MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

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COURT OF APPEALS

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KATHLEEN JANSEN	2013
E. THOMAS FITZGERALD	2015
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PETER D. O'CONNELL	2013
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CYNTHIA DIANE STEPHENS	2017
MICHAEL J. KELLY	2015
DOUGLAS B. SHAPIRO	2013
AMY RONAYNE KRAUSE	2013

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	Term Expires January 1 of
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Justices	
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MARILYN KELLY	2013
STEPHEN J. MARKMAN	2013
DIANE M. HATHAWAY	2017
MARY BETH KELLY	2019
BRIAN K. ZAHRA	2013

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TABLE OF CASES REPORTED

(Lines set in small type refer to orders appearing in the Special Orders section beginning at page 801.)

PAGE

PAGE

COURT OF APPEALS CASES

AFSCME COUNCIL 25 v STATE EMPLOYEES' RETIREMENT SYSTEM

MICHIGAN STATE EMPLOYEES ASSOCIATION v STATE EMPLOYEES' RETIREMENT SYSTEM

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 517M v STATE EMPLOYEES' RETIREMENT SYSTEM

McNEILL v PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

Docket Nos. 302959, 302960, 302961, and 302962. Submitted July 12, 2011, at Lansing. Decided August 25, 2011, at 9:00 a.m. Leave to appeal denied, 490 Mich 935.

AFSCME Council 25, the Michigan State Employees Association, Service Employees International Union, Local 517M and Local 526M, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America and its Local 6000, and various members of the plaintiff unions brought four separate actions in the Court of Claims against the State Employees' Retirement System and its board, the Public Employee Retirement Health Care Funding Trust, the Department of Technology Management and Budget and its director, the director of the Office of Retirement Services, the state of Michigan, the Public School Employees' Retirement Board, and the Treasurer of the state of Michigan, alleging that 2010 PA 185, MCL 38.35, the statute requiring a three percent employee compensation contribution to finance the Public Employee Retirement Health Care Funding Act, 2010 PA 77, MCL 38.2731 to 38.2747, is unconstitutional and seeking a declaratory judgment to that effect. The actions were consolidated in the Court of Claims. The Court of Claims, William E. Collette, J., granted plaintiffs' motion for summary disposition on the basis that MCL 38.35 violated Const 1963, art 11, § 5 and denied defendants' motion for summary disposition. Defendants brought four separate appeals. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. The Court of Claims had jurisdiction to hear the dispute because plaintiffs alleged a current confiscation of their compensation without adherence to the provisions of Const 1963, art 11, § 5 and in violation of the relevant collective-bargaining agree-

ment and plaintiffs' contractual rights. Plaintiffs did not base their action on a hypothetical situation.

2. The Civil Service Commission has absolute power in its field. The commission's power and authority is derived from the constitution, therefore, its valid exercise of that power cannot be taken away by the Legislature. The commission regulates the terms and conditions of employment of classified civil service employees and has plenary and absolute authority in that respect. Although the commission had plenary authority over the rates of compensation, a system of checks and balances with the Legislature is established in Const 1963, art 11, § 5 whereby an increase in the rate of compensation authorized by the commission may be rejected or reduced by the Legislature by a 2/3 vote of the members elected to and serving in each house provided the vote occurs within 60 calendar days of the transmitted increase. By enacting 2010 PA 185 and adding the current version of MCL 38.35, the Legislature acted to reduce the compensation of classified civil servants without an accompanying agreement with the unions or the Civil Service Commission. Pursuant to Const 1963, art 3, § 2, and art 11, § 5, the Legislature did not have the authority to eliminate the wage increase agreed to in the collective bargaining agreement by enacting MCL 38.35. The Legislature failed to successfully invoke the process for overriding the commission set forth in the constitution.

3. The fact that prior versions of MCL 38.35 were not the subject of a constitutional challenge does not render them constitutional.

4. MCL 38.35 contravenes the provisions of the constitution and is unconstitutional and void.

Affirmed.

CONSTITUTIONAL LAW — CIVIL SERVICE COMMISSION — PUBLIC EMPLOYEES — HEALTH-CARE FUNDING.

The statute enacted by 2010 PA 185 to require a three percent employee compensation contribution to finance the Public Employee Retirement Health Care Funding Act, MCL 38.2731 *et seq*., violates the grant of authority to the Civil Service Commission to regulate the rates of compensation of classified civil service employees in Const 1963, art 11, § 5 (MCL 38.35).

Miller Cohen, P.L.C. (by *Bruce A. Miller* and *Keith D. Flynn*), for AFSCME Council 25, Sylvester Austin, Mark Smith, David Baker, Myrtel Brown, and Lenore Davis.

Fraser Trebilcock Davis & Dunlap, P.C. (by *Brandon W. Zuk*), for the Michigan State Employees Association, Kenneth Moore, Tim Schutt, Donna Spencer, and Russell Waters.

Sachs Waldman (by *Mary Ellen Gurewitz* and *Marshall Widick*) for Service Employees International Union, Locals 517M and 526M.

William A. Wertheimer for Anthony McNeill, Rachael Siemen, Rick Hankinson, and Ray Holman.

William A. Wertheimer, *Michael B. Nicholson*, and *Ava R. Barbour* for International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America and its Local 6000.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Council, and *Frank J. Monticello*, *Thomas Quasarano*, and *Larry F. Brya*, Assistant Attorneys General, for the State Employees' Retirement System and others.

Amicus Curiae:

Miller, Canfield, Paddock and Stone, P.L.C. (by *Michael J. Hodge* and *Scott R. Eldridge*), for the Civil Service Commission.

Before: BECKERING, P.J., and FORT HOOD and STEPHENS, JJ.

FORT HOOD, J. Defendants, the entities and individuals charged with the administration, collection, and distribution of the State Employees' Retirement System,

appeal as of right the Court of Claims' decision holding that MCL 38.35, the statute requiring a three percent employee compensation contribution to finance the Public Employee Retirement Health Care Funding Act, 2010 PA 77, MCL 38.2731 to 38.2747, is unconstitutional. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiffs[1] addressed wage provisions during collective-bargaining negotiations with the state. Ultimately, the parties agreed to a collective-bargaining agreement (CBA) that provided that hourly wages would be frozen for the fiscal year 2008-2009, increased by one percent for fiscal year 2009-2010, and increased by three percent for fiscal year 2010-2011. The CBA was approved by the Civil Service Commission (CSC or the commission) and transmitted to then Governor Jennifer Granholm for incorporation into the state budget.

An attempt to reject the three percent wage increase included in the 2010-2011 budget failed in the Legislature. On February 23, 2010, House Concurrent Resolution (HCR) 42 was introduced that proposed rejection of an increase in rates of compensation as recommended by the CSC. There is no indication that the resolution was voted on by house members of the Legislature. On March 3, 2010, an attempt to reject the three percent wage increase was made in the Senate when Senate Concurrent Resolution (SCR) 35 was introduced. This SCR contained an acknowledgment of the constitutional authority of the CSC and the requirement that a vote of two-thirds of the members serving in each house was required to reject the commission's approval of the

[1] Plaintiffs are unions that are parties to a collective-bargaining agreement with the state and individual members of the unions.

wage increase. Despite the introduction of SCR 35 and numerous attempts to pass the resolution throughout March 2010, it did not garner a sufficient number of votes for passage. On March 24, 2010, HCR 48 was introduced. This HCR also contained an acknowledgment of the constitutional authority of the CSC and the requirement that a two-thirds vote of the members serving in each house was required to reject the increase. There is no indication that action was taken on this resolution.

Unable to obtain the two-thirds vote in each house to override the three percent compensation increase negotiated in the CBA and approved by the CSC, the Legislature enacted 2010 PA 185, MCL 38.35, and 2010 PA 77, MCL 38.2731 *et seq*. MCL 38.35 required a mandatory three percent contribution from the compensation of active employee members from November 1, 2010, through September 30, 2013, into the Public Employee Retirement Health Care Funding Act, MCL 38.2731 *et seq*. Plaintiffs filed suit in the Court of Claims to challenge the reduction from compensation by the enactment of MCL 38.35.[2] Plaintiffs alleged that the reduction in compensation was in violation of both the Michigan Constitution and the United States Constitution and of contractual rights. Defendants countered that the regulation of the retirement system was within the province of the Legislature and that the Court of Claims lacked jurisdiction because the availability of the benefits at a later date presented a hypothetical question. The Court of Claims held that MCL 38.35 violated art 11, § 5 of the Michigan Consti-

[2] There were four separate actions filed in the Court of Claims, and the actions were consolidated in the lower court, although the order stated that each case would keep its separate identity and the parties in one action would not become parties in the other actions. The Court of Appeals consolidated the appeals.

tution, rejected the jurisdictional challenge, and did not address the remaining claims. Defendants appeal as of right.

II. JURISDICTION

A challenge to the jurisdiction of the Court of Claims presents a statutory question that is reviewed de novo as a question of law. *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 767; 664 NW2d 185 (2003). The Court of Claims has exclusive jurisdiction to hear and determine "all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms, or agencies." MCL 600.6419(1)(a); *Parkwood*, 468 Mich at 767. The Court of Claims also has concurrent jurisdiction over "any demand for equitable relief and any demand for a declaratory judgment when ancillary to a claim filed" pursuant to MCL 600.6419. MCL 600.6419a. The determination whether the Court of Claims possesses jurisdiction is governed by the actual nature of the claim, not how the parties phrase the request for relief or the characterization of the nature of the relief. *Parkwood*, 468 Mich at 770. "[T]he Court of Claims has exclusive jurisdiction over complaints based on contract or tort that seek solely declaratory relief against the state or any state agency." *Parkwood*, 468 Mich at 775.

In the present case, defendants contend that the Court of Claims lacked jurisdiction to issue a declaratory judgment because the issue regarding the availability of benefits for current employees upon their retirement presents a *hypothetical* injury premised on a future contingent event. The power of state courts to pass upon the constitutionality of state statutes arises only when interested litigants require the use of judicial

authority for protection against actual interference, not hypothetical threats. *Golden v Zwickler*, 394 US 103, 110; 89 S Ct 956; 22 L Ed 2d 113 (1969). Here, although defendants' statement of the issue alleges a jurisdictional challenge, in fact, defendants effectively assert that there is no justiciable controversy because the availability of health benefits upon retirement for current employees is contingent on a future event. We disagree.

A condition precedent to invoke declaratory relief is the requirement that an actual controversy exist. *Detroit v Michigan*, 262 Mich App 542, 550; 686 NW2d 514 (2004). An actual controversy is present when a declaratory judgment is necessary to direct a plaintiff's future conduct in order to preserve his or her legal rights. *Shavers v Attorney General*, 402 Mich 554, 588; 267 NW2d 72 (1978). Although the actual-controversy requirement prevents a court from ruling on hypothetical questions, a court is not precluded from addressing issues before actual injuries or losses have developed. *Id*. at 589. Furthermore, "declaratory relief is designed to resolve questions . . . before the parties change their positions or expend money futilely." *Detroit*, 262 Mich App at 551.

Although defendants characterize plaintiffs' claims as seeking relief from a hypothetical event, plaintiffs allege a current confiscation of their compensation without adherence to the provisions of Const 1963, art 11, § 5 and in violation of their CBA and contractual rights. Specifically, irrespective of the future availability of retiree health benefits to current employees, plaintiffs challenge the reduction in wages from November 1, 2010, through September 30, 2013. In light of the present reduction in compensation, defendants' jurisdictional challenge claiming that plaintiffs are raising a

hypothetical scenario regarding events that may occur upon their retirement fails.

III. STANDARD OF REVIEW

The trial court's decision regarding a motion for summary disposition is reviewed de novo with the evidence examined in the light most favorable to the nonmoving party. *In re Egbert R Smith Trust*, 480 Mich 19, 23-24; 745 NW2d 754 (2008). Issues involving statutory interpretation present questions of law that are reviewed de novo. *Klooster v Charlevoix*, 488 Mich 289, 295-296; 795 NW2d 578 (2011). "The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 76; 780 NW2d 753 (2010). To determine the legislative intent, the court must first examine the statute's plain language. *Klooster*, 488 Mich at 296. If the language of the statute is clear and unambiguous, it is presumed that the Legislature intended the meaning plainly expressed in the statute. *Briggs*, 485 Mich at 76.

Cases involving questions of constitutional interpretation are reviewed de novo. *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83, 89; 803 NW2d 674 (2011). When interpreting a constitutional provision, the primary goal is to determine the initial meaning of the provision to the ratifiers, the people, at the time of ratification. *Nat'l Pride at Work, Inc v Governor*, 481 Mich 56, 67; 748 NW2d 524 (2008). "[T]he primary objective of constitutional interpretation, not dissimilar to any other exercise in judicial interpretation, is to faithfully give meaning to the intent of those who enacted the law." *Id*. To effectuate this intent, the appellate courts apply the plain meaning of the terms used in the constitution. *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 11; 743 NW2d 902 (2008). When technical terms are employed,

the meaning understood by those sophisticated in the law at the time of enactment will be given unless it is clear that some other meaning was intended. *Id*. To clarify the meaning of the constitutional provision, the court may examine the circumstances surrounding the adoption of the provision and the purpose sought to be achieved. *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971). An interpretation resulting in a holding that the provision is constitutionally valid is preferred to one that finds the provision constitutionally invalid, and a construction that renders a clause inoperative should be rejected. *Id*. at 406. Constitutional convention debates are relevant, albeit not controlling. *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW2d 452 (2003). Every provision in our constitution must be interpreted in light of the document as a whole, and "no provision should be construed to nullify or impair another." *Id*. "Statutes are presumed constitutional unless the unconstitutionality is clearly apparent." *Toll Northville Ltd*, 480 Mich at 11. The court's power to declare a law unconstitutional is exercised with extreme caution and is not exercised where serious doubt exists regarding the conflict. *Dep't of Transp v Tomkins*, 481 Mich 184, 191; 749 NW2d 716 (2008).

IV. THE CREATION OF THE CIVIL SERVICE COMMISSION

In October 1935, the Civil Service Study Commission, appointed by Governor Frank D. Fitzgerald, initiated a year-long study of state personnel practices to determine " 'the most important evils from which the state [was] suffering.' " *Council No 11, AFSCME v Civil Serv Comm*, 408 Mich 385, 397; 292 NW2d 442 (1980) (citation omitted). The result was a condemnation of the longstanding "spoils system" or "patronage system" where government jobs were filled with loyal party

workers who were counted on, not to perform the work of the state, but rather to perform party or candidate work during election season. *Id*. at 397 n 10. As a result of the spoils system, state office buildings were nearly empty during political conventions. *Id*. Consequently, the regular work of the state was interrupted, and services and funds were at the disposal of political parties. *Id*. To remedy the spoils system, it was recommended that legislation establish a state civil service system. *Id*. at 397.

In response to the commission's findings and recommendations and heightened public interest, the Legislature created 1937 PA 346, which was designed to eliminate the spoils system and prohibit participation in political activities during the hours of employment. *Council No 11*, 408 Mich at 398. In its next regular session, the Legislature adopted a group of bills designed to destroy the recently established Civil Service Commission. It created legislation that sharply curtailed the state classified civil service, diminished the authority of the director of the commission by repealing a provision vesting executive and administrative functions in the director, made the director an appointee of the commission to serve at its pleasure, reduced the CSC's appropriation to require serious staff reductions and limited services, and provided increased employment preferences for veterans and former state employees. *Id*. at 399. The Legislature succeeded in "badly crippling" the newly created Civil Service Commission. *Id*. Specifically, in a two-year period, the number of "exempt" civil service positions climbed. The percentage of state employees serving in classified positions fell from 90.7 percent in January 1939 to 51.1 percent in March 1940. *Id*. at 400. Additionally, only the lowest-paying jobs were retained as classified positions. *Id*. In 1940, apparently unsatisfied with the political maneuvering and the dismantling of the Civil Service

Commission, the people of Michigan "adopted a constitutional amendment establishing a constitutional state civil service system, superseding the 1939 legislation." *Id*. at 401.

Before changes to the 1963 Constitution, the Civil Service Commission had "absolute authority to set compensation at any time during the course of a fiscal year without legislative oversight." *Mich Ass'n of Governmental Employees v Civil Serv Comm*, 125 Mich App 180, 187; 336 NW2d 463 (1983). However, at the 1961 Constitutional Convention, delegates proposed a change to allow legislative oversight, commenting as follows:

> "[T]his amendment would . . . only affect[] increases in rates of compensation for classified personnel. Presently, the civil service commission has the absolute power to fix rates of compensation in any amount and at any time it desires, free from legislative control or accountability.
>
> "This amendment would require several things. First of all, it would require that any proposed increases made by the civil service commission be submitted with the governor's budget. Now, this has been the practice for the past 2 or 3 years. However, we are dealing primarily here in what I would consider statutory language. There is nothing in the present constitution to require the commission to continue the practice that they followed in the past few years, or to prevent them from reverting to the practice of declaring a pay raise at any time. This would make it crystal clear that any proposed increases in rates of compensation must be submitted with the governor's budget.
>
> "Then these rates or increased rates would take effect only at the beginning of the next fiscal year. In other words, if a proposed increase were submitted with the governor's budget in January, it would not take effect until July 1 of that year. Also, the rates would take effect, upon the failure of the legislature, within 60 days after submission of this

recommendation, to either reject, modify or reduce the amount recommended by the commission.

"The amendment gives the legislature this power to reject, modify or reduce increases in rates of compensation where there is a 2/3 vote of the members elected, if you will, in each house. In other words, in order to defeat a recommendation of the civil service commission as to pay raises, 2/3 of the senate would have to reject it, 2/3 of the house would have to reject, modify or reduce it.

"Additionally, the amendment would prohibit the legislature from reducing rates of compensation in effect at the time of the submission of the commission's recommendations to the legislature. In other words, the legislature would not be given the authority, even with a 2/3 vote, of going below those rates of compensation which are in effect at the time of a proposed increase.

"Now, it is sincerely believed that this proposed amendment is not a drastic one; it is not a radical one, but it is offered for the following reasons:

"It is believed that no governmental unit should be free from the time tested and proven checks and balances inherent in our constitutional form of government. Since the civil service commissioners are appointed for 8 year terms, they truly are not accountable to the governor, particularly a governor of short duration. Although the legislature presently has the power to fix the total appropriation within a given agency, it has no method of controlling abuses in a salary classification which could occur in the future. In recognition of the fact that commissioners are but mere human beings and, as such, subject to error, it is felt that they should be accountable to the people for their actions, and this . . . is accomplished through giving the legislature a veto power. Now, for those who favor retention of this power by the civil service commission—in other words, the right to fix compensation—it should be pointed out that civil service retains the initiating power to raise rates under the proposed language. Also, as a practical proposition, the requirement of a 2/3 vote of both houses to reject, modify or reduce the commission's recommendation means that the veto power

> could not be exercised readily, and would undoubtedly be exercised only in the event of a real abuse by the commission." 1 Record of the Constitutional Convention of 1961, p 652. [*Mich Ass'n of Governmental Employees*, 125 Mich App at 187-189.]

Consequently, although the prior version of the constitutional article creating the Civil Service Commission contained no provision regarding legislative oversight, Const 1908, art 6, § 22 (adopted in 1940), the amendment expressly allowed legislative action over CSC determinations by a two-thirds vote of the members serving in each house. Const 1963, art 11, § 5.

Currently, the Civil Service Commission is authorized by Const 1963, art 11, § 5, which provides, in relevant part:

> The classified state civil service shall consist of all positions in the state service except those filled by popular election, heads of principal departments, members of boards and commissions, the principal executive officer of boards and commissions heading principal departments, employees of courts of record, employees of the [L]egislature, employees of the state institutions of higher education, all persons in the armed forces of the state, eight exempt positions in the office of the governor, and within each principal department, when requested by the department head, two other exempt positions, one of which shall be policy-making. The civil service commission may exempt three additional positions of a policy-making nature within each principal department.
>
> The civil service commission shall be non-salaried and shall consist of four persons, not more than two of whom shall be members of the same political party, appointed by the governor for terms of eight years, no two of which shall expire in the same year.
>
> The administration of the commission's powers shall be vested in a state personnel director who shall be a member of

the classified service and who shall be responsible to and selected by the commission after open competitive examination.

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

* * *

No person shall be appointed to or promoted in the classified service who has not been certified by the commission as qualified for such appointment or promotion. No appointments, promotions, demotions or removals in the classified service shall be made for religious, racial or partisan considerations.

Increases in rates of compensation authorized by the commission may be effective only at the start of a fiscal year and shall require prior notice to the governor, who shall transmit such increases to the [L]egislature as part of his budget. The [L]egislature may, by a majority vote of the members elected to and serving in each house, waive the notice and permit increases in rates of compensation to be effective at a time other than the start of a fiscal year. Within 60 calendar days following such transmission, the [L]egislature may, by a two-thirds vote of the members elected to and serving in each house, reject or reduce increases in rates of compensation authorized by the commission. Any reduction ordered by the [L]egislature shall apply uniformly to all classes of employees affected by the increases and shall not adjust pay differentials already established by the civil service commission. The [L]egislature may not reduce rates of compensation below those in

> effect at the time of the transmission of increases authorized by the commission.
>
> * * *
>
> The civil service commission shall recommend to the governor and to the [L]egislature rates of compensation for all appointed positions within the executive department not a part of the classified service.

The Civil Service Commission is an administrative agency established by the Michigan Constitution. Const 1963, art 11, § 5; *Viculin v Dep't of Civil Serv*, 386 Mich 375, 385; 192 NW2d 449 (1971); *Womack-Scott v Dep't of Corrections*, 246 Mich App 70, 79; 630 NW2d 650 (2001). Pursuant to the constitutional amendment, the Civil Service Commission is vested with plenary powers in its "sphere of authority." *Plec v Liquor Control Comm*, 322 Mich 691, 694; 34 NW2d 524 (1948). That is, the Civil Service Commission has absolute power in its field. *Hanlon v Civil Serv Comm*, 253 Mich App 710, 718; 660 NW2d 74 (2002). "Because the CSC's power and authority is derived from the constitution, its valid exercise of that power cannot be taken away by the Legislature." *Id*. at 717. "The CSC regulates the terms and conditions of employment in the classified service and has plenary and absolute authority in that respect." *Womack-Scott*, 246 Mich App at 79. The Legislature and the appellate courts have no right to amend or change a provision contained in the state constitution. *Pillon v Attorney General*, 345 Mich 536, 547; 77 NW2d 257 (1956). Consequently, when a statute contravenes the provisions of the state constitution it is unconstitutional and void. *Id*.

V. THE CIVIL SERVICE COMMISSION'S EXERCISE OF ITS AUTHORITY

The extent of the Civil Service Commission's authority has been addressed by the courts of this state. In

Council No 11, 408 Mich at 392, one of the individual plaintiffs, an employee in the state classified civil service, filed nominating petitions to become a candidate for political office. As a result of the filing, he was discharged for violating the commission rule ordering a flat ban on off-duty as well as on-duty political activity by all state classified civil service employees. *Id*. at 392-393. However, the Legislature "is empowered to enact laws to promote and regulate political campaigns and candidacies." *Id*. at 395. Consequently, the Legislature took the unusual step of enacting 1976 PA 169, which gave employees in the state's classified civil service the "right to engage in partisan political activity, serve as convention delegates and run for elective office while on mandatory leave of absence." *Id*. at 395. The Civil Service Commission asserted that the statute permitting certain types of political activity was unconstitutional because it conflicted with the commission's rulemaking authority and the commission's exclusive jurisdiction over civil service employees as derived from Const 1963, art 11, § 5. *Id*. at 395-396.

The Supreme Court rejected the commission's challenge to the constitutionality of 1976 PA 169, and allowed off-duty political activity by civil service employees. The Court held that the plain language of the provision creating the Civil Service Commission contained no such language forbidding off-duty political activity that did not interfere with job performance. *Id*. at 405-407. The Court held that the Civil Service Commission's sphere of authority did not extend to off-duty behavior unrelated to job performance. *Id*. at 408-409. Therefore, a valid exercise of legislative authority applicable to state classified civil service employees was permissible provided that it did not interfere with the constitutional authority of the Civil Service Commission. *Id*. at 409. Consequently, legislation must

be examined within the context of the authority delegated to the CSC in the Michigan Constitution.

The Michigan Constitution empowers the Civil Service Commission to exercise authority over the compensation of classified civil service employees. In *Crider v Michigan*, 110 Mich App 702, 707; 313 NW2d 367 (1981), the state initiated a voluntary-layoff program to address severe financial circumstances. When the voluntary-layoff program failed to sufficiently reduce payroll costs, a task force formed by the Governor recommended six one-day layoffs for certain state employees that would not result in the reduction of their hourly pay rate or fringe benefits. *Id*. To facilitate this proposal, one of the defendants, the Civil Service Commission, temporarily modified its rules regarding notice to allow for emergency situations that required immediate action. *Id*. at 707-709. The plaintiffs challenged the layoffs, asserting that the layoffs violated Const 1963, art 11, § 5, because the layoffs impermissibly reduced the salary of state officers. *Crider*, 110 Mich App at 722. This Court disagreed, holding:

> Defendants concede that the Governor did not receive the approval of the appropriating committees of the House and the Senate for the salary reductions apparent in the layoff program. They further admit that the Governor does not have the authority to either personally order the layoff of state classified employees or to reduce appropriations for their salaries. Defendants contend, however, that the CSC does have authority to order or request departments to lay off classified state employees under Const 1963, art 11, § 5.
>
> This latter constitutional provision confers upon the CSC plenary power to "fix rates of compensation for all classes of positions * * * and regulate all conditions of employment in the classified service". The CSC's constitutional authority to regulate the conditions of employment in classified civil service is independent from and not limited by the provisions of Const 1963, art 5, § 20. Accord-

> ingly, if the CSC's implementation of the layoff plan was permissible under art 11, § 5, it is not necessary for us to consider the effect of the failure of the Governor to comply with the conditions of art 5, § 20 of the Michigan Constitution. This follows by virtue of the fact that it is the Civil Service Commission, and not the Legislature, that is given "supreme power" over civil service employees under art 11, § 5. *Welfare Employees Union v Civil Service Comm*, 28 Mich App 343; 184 NW2d 247 (1970).
>
> Our review of the record convinces us that the one-day layoff program instituted by the CSC was within the authority delegated to that agency under art 11, § 5. The effect of the layoff program is to reduce the actual number of hours worked in certain pay periods by classified state employees. The number of hours in a pay period is a condition of employment that is subject to the constitutional supremacy of the CSC. *Welfare Employees Union v Civil Service Comm, supra*. Nothing in the Michigan Constitution or in the rules and regulations of the CSC requires classified state employees to work any particular number of hours in a pay period or requires that they receive compensation for a specified number of hours during any fiscal year.
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> * * *
>
> Because Const 1963, art 11, § 5 vests in the CSC exclusive authority to establish the conditions of employment for public employees and because neither plaintiffs nor the amicus curiae have cited any other constitutional provisions that the CSC may have violated in reducing the number of hours worked by plaintiffs, there is no merit to the contention that the one-day layoff program violates the constitution of this state. [*Crider*, 110 Mich App at 723-725.]

Additionally, in *Mich Ass'n of Governmental Employees*, 125 Mich App at 183-185, the commission ratified two collective-bargaining agreements that included a five-percent wage increase and vision-care benefits for

certain employees. The agreements for the wage increase and the vision-care benefits were transmitted to the Legislature. The Legislature passed a resolution rejecting the wage increase, but the resolution was contingent on the employees' unions' agreeing to modify the collective-bargaining agreements to eliminate the provisions for the wage increase. When the Office of the State Employer was unable to negotiate the concessions with the unions, the resolution became null and void. Consequently, the State Employer, at the behest of the Governor, asked the CSC to rescind the five-percent wage increase. The commission acted to rescind the wage increase and vision benefits applicable to two-thirds of the state classified civil service employees. *Id*. at 185.

The plaintiffs challenged the CSC's authority to rescind the authorized wage increase after it had been considered by the Legislature. *Id*. at 186. On appeal, the commission's rejection of the wage increase and vision benefits was upheld. "It is this Court's opinion that the commission had the authority to rescind and defer the proposed increase even after it was considered by the Legislature." *Id*. at 187. Const 1963, art 11, § 5, ¶ 7 allows the Legislature to have narrowly drawn veto power over increases in state wages. *Mich Ass'n of Governmental Employees*, 125 Mich App at 189. This provision of the Michigan Constitution does not foreclose "later action by the commission to rescind an authorized increase which has not been vetoed by the Legislature." *Id*. The Legislature's inability to veto an increase by a two-thirds vote of the members serving in each house does not mandate that salaries be maintained at that level in light of the authority over compensation that is granted to the Commission. *Id*. Consequently, the CSC exercised its sphere of authority to reduce compensation to classified civil service em-

ployees when the Legislature failed to act or was unable to garner sufficient support of its members to act within the parameters for adjustments to compensation in accordance with the Michigan Constitution.

VI. MCL 38.35

In 1943, the Legislature established a savings fund for employees that required deductions for contribution to the fund. The statute, MCL 38.35, provided, in relevant part:

> Beginning July 1, 1943, each state employe who is a member of the retirement system shall contribute 5 per centum of that part of his compensation earnable, not in excess of $3,600.00 per annum, to the employes' savings fund; compensation earnable, as herein used, shall mean salary or wages received during a payroll period for personal services plus such allowance for maintenance as may be recognized by the maintenance compensation schedules of the civil service commission. [1943 PA 240.]

The statutory provision following MCL 38.35 in 1943 PA 240, MCL 38.36, expressly stated that the deduction was agreed to between the Legislature and the members. MCL 38.36 provided:

> Members agree to deductions. The deductions from the compensation of members, provided for in section 37 [sic] of this act, shall be made notwithstanding that the minimum compensation provided for by law for any member shall be reduced thereby. Every member shall be deemed to consent and agree to the deductions made and provided for in this act and shall receipt in full for his salary or compensation, and payment less said deductions shall be a full and complete discharge and acquittance of all claims and demands whatsoever for the services rendered by such person during the period covered by such payment, except as to benefits provided for under this act. [1943 PA 240.]

MCL 38.35 was amended in 1955 (1955 PA 237) to require, in relevant part, as follows:

> Each member shall, to the date the members of the retirement system become covered under the federal social security old-age and survivors' insurance program on account of their state employment, contribute 5% of the first $4,800.00 of his annual compensation to the employees' savings fund. From and after the said date upon which members of the retirement system become covered under the said old-age and survivors' insurance program, each member shall contribute to the employees' savings fund 3% of the first $4,200.00 of his annual compensation plus 5% of his annual compensation in excess of $4,200.00.

MCL 38.36 was modified by 1955 PA 237 to provide that the payroll deduction to the employees' savings fund was presumably consented to by the members:

> The deductions from the compensation of members, provided for in section 35 of this act, shall be made notwithstanding that the minimum compensation provided for by law for any member shall be reduced thereby. Every member shall be deemed to consent and agree to the deductions made and provided for in this act, and payment less said deductions shall be a full and complete discharge and acquittance of all claims and demands whatsoever for the services rendered by such person during the period covered by such payment, except as to benefits provided for under this act. [1955 PA 237.]

MCL 38.35 and MCL 38.36 were repealed by 1974 PA 216. However, effective September 30, 2010, the Legislature enacted 2010 PA 185, which added a new MCL 38.35, the statute at issue in this case, to implement member and participant contribution to health-care-financing accounts, stating in subsection (1) of § 35:

> Except as otherwise provided in this section, beginning with the first pay date after November 1, 2010 and ending September 30, 2013, each member and each qualified

> participant shall contribute an amount equal to 3.0% of the member's or qualified participant's compensation to the appropriate funding account established under the public employee retirement health care funding act, 2010 PA 77, MCL 38.2731 to 38.2747. The member and qualified participant contributions shall be deducted by the employer and remitted as employer contributions to the funding account in a manner that the state budget office and the retirement system shall determine. The state budget office and the retirement system shall determine a method of deducting the contributions provided for in this section from the compensation of each member and qualified participant for each payroll and each payroll period. [MCL 38.35(1).]

Notably absent from this legislation is MCL 38.36, now repealed, the companion provision to prior versions of MCL 38.35 that expressly stated that the deduction was the subject of an agreement among members to consent to the deduction and to preclude litigation premised on the deduction.

With regard to the present version of MCL 38.35, plaintiffs contend that the enactment of 2010 PA 185 violates Const 1963, art 11, § 5. We agree and hold that MCL 38.35 contravenes the provisions of Const 1963, art 11, § 5 and, therefore, it is unconstitutional and void. *Pillon*, 345 Mich at 547.

A review of the record reveals that plaintiffs, unions and their members, negotiated a CBA wage provision that culminated in a three percent wage increase for fiscal year 2010-2011. The commission's sphere of authority, *Plec*, 322 Mich at 694, includes determinations of rates of compensation for all positions in the classified service:

> The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal

> services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service. [Const 1963, art 11, § 5, ¶ 4.]

Although the commission has plenary authority over the rates of compensation, a system of checks and balances was established with the Legislature in the Michigan Constitution of 1963. *Mich Ass'n of Governmental Employees*, 125 Mich App at 187-189. Specifically, an increase in the rate of compensation authorized by the commission may be rejected or reduced by the Legislature "by a two-thirds vote of the members elected to and serving in each house" provided the vote occurs within 60 calendar days of the transmitted increase. Const 1963, art 11, § 5, ¶ 7; *Mich Ass'n of Governmental Employees*, 125 Mich App at 187. "The [L]egislature may not reduce rates of compensation below those in effect at the time of the transmission of increases authorized by the commission." Const 1963, art 11, § 5, ¶ 7. The Civil Service Commission has the sole authority to fix rates of compensation. Const 1963, art 11, § 5, ¶ 4. The term "compensation" is defined as "something given or received for services, debt, loss, injury, etc." *Random House Webster's College Dictionary* (2001), p 271. By enacting 2010 PA 185 and adding the current version of MCL 38.35, the Legislature acted to reduce the compensation of classified civil servants by three percent without an accompanying agreement with the unions or the CSC. The sole authority to fix rates of compensation of classified civil servants is vested with the CSC. *Womack-Scott*, 246 Mich App at 79.

When interpreting a constitutional provision, the primary objective is to determine the initial meaning of the provision to the ratifiers, or the people, at the time of ratification. *Nat'l Pride*, 481 Mich at 67. To effectuate this intent, the plain meaning of the terms used in the constitution are examined and applied. *Toll Northville Ltd*, 480 Mich at 11. To clarify the meaning of this provision, we may examine the circumstances surrounding its adoption and its purpose. *Traverse City Sch Dist*, 384 Mich at 405. Every provision of the constitution must be interpreted in light of the document as a whole, and no provision should be construed to nullify or impair another. *Lapeer Co Clerk*, 469 Mich at 156.

The Separation of Powers Clause of the Michigan Constitution states:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution. [Const 1963, art 3, § 2.]

"The Constitution of the State of Michigan is not a grant of power to the [L]egislature, but is a limitation upon its powers." *In re Brewster Street Housing Site*, 291 Mich 313, 333; 289 NW 493 (1939). The plain language of Const 1963, art 11, § 5, ¶ 7 shows the intent that the rate of compensation is established by the CSC. Although the Legislature may exercise oversight over the CSC, it must act within 60 days of the commission's action and must do so by a two-thirds vote of the members serving in each house. Const 1963, art 11, § 5, ¶ 7.

In the present case, the Legislature attempted to eliminate the three percent wage increase for the fiscal year 2010-2011 but did not succeed. However, the

Legislature faced a budget deficit and determined that it would balance the budget by reducing the "compensation" of state employees, as defendants readily admitted in their brief on appeal:

> In the fall of 2010, the Legislature was faced with the acute problem of balancing the State's budget for the fiscal year beginning October 1, 2010. As a result the Legislature enacted MCL 38.35, which requires members and qualified participants in MSERS to contribute 3% of their compensation to the Trust created by MCL 38.2731, *et seq* in return for receiving health care for retirees, former qualified recipients, and their respective dependants. It was anticipated that MCL 38.35 would generate about $75 million annually to help balance the budget, though the total cost of health care for recipients for the year beginning October 1, 2010 will be approximately $500 million. [Defendants' Brief on Appeal, p 6.]

Pursuant to Const 1963, art 3, § 2 and Const 1963, art 11, § 5 the Legislature did not have the authority to act to eliminate the three percent wage rate increase by enacting MCL 38.35 to remedy a budget deficit. The process for overriding the commission is expressly set forth in the Michigan Constitution, and when the Legislature failed to successfully invoke that process, it enacted MCL 38.35 to exercise authority over compensation, which is within the sphere of authority of the commission. *Plec*, 322 Mich at 694.

Moreover, caselaw reflects a record of cooperation between the branches of government to abide by the separation of powers as set forth in the Michigan Constitution. Specifically, when a voluntary layoff program failed to achieve the costs savings necessary to correct an increasing budget deficit, the commission, at the request of another branch of government, temporarily suspended its rules to allow for a program of six one-day layoffs. *Crider*, 110 Mich App at 723-725. This

Court upheld the commission's actions, determining that the commission had the exclusive authority to establish the conditions of employment for public employees. *Id*. at 725. Additionally, in *Mich Ass'n of Governmental Employees*, 125 Mich App at 183-185, the commission, at the behest of the State Employer, rescinded a five-percent wage increase and the addition of vision benefits for some state classified employees. This Court ruled that the commission had the authority to rescind and defer the proposed increase even after it was considered by the Legislature. *Id*. at 187. In the present case, there is no evidence that a process of negotiation was even attempted between the commission and the Legislature to achieve cost savings.[3]

Defendants contend that the Legislature acted appropriately because MCL 38.35 merely represents a deduction similar to deductions for health insurance and taxes. However, deductions for health insurance are, to some extent, controlled by the civil service employee. That is, the employee decides whether to accept this benefit of employment and the type of plan from those available, thereby controlling the amount of the deduction. Taxes imposed by the federal government and the state government are standard rates that apply on the basis of income levels. In the present case, civil service employees were not given the option of participating in the retiree health care funding act.

[3] At oral argument, defendants asserted that the Legislature enacted the retirement system and has maintained authority over the system for the last 40 years. Therefore, defendants alleged that plaintiffs seek to invalidate the retirement system as a whole. On the contrary, any decision regarding MCL 38.35 is not an assault on the collective retirement system. Rather, the litigation is limited to addressing the validity of the *process* of removing three percent of employee compensation and directing it to retiree health care without regard to Const 1963, art 11, § 5.

Moreover, there is no correlation between the three percent reduction in compensation for individual civil service employees and the contribution into the system. That is, there is no escrow of the individual's contribution into a fund for that individual. Plaintiffs contend, and defendants do not dispute, that the vast majority of the three percent compensation reduction is being utilized to fund benefits for current retirees, and is not being reserved for current employees. Curiously, unlike the prior statutory versions of MCL 38.35 that set aside the reduction in compensation into a savings fund in perpetuity, the present version of MCL 38.35 has a sunset provision of nearly three years. Defendants do not dispute plaintiffs' assertion that the nearly three-year period of the deduction from compensation of MCL 38.35 will raise $225 million or the amount necessary to fill a budgetary gap. Indeed, defendants present no explanation for the sunset provision.

Defendants also submit that the prior versions of the retirement act, repealed in 1974, existed without constitutional challenge. However, the fact that a constitutional challenge did not occur is not dispositive. As noted in the context of taxation issues, "[i]t is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it." *Walz v City of New York Tax Comm*, 397 US 664, 678; 90 S Ct 1409; 25 L Ed 2d 697 (1970). The fact that the prior versions of MCL 38.35 were not the subject of a constitutional challenge does not render them constitutional. *Walz*, 397 US at 678. Furthermore, the prior versions of the savings fund retirement deduction contained an express provision holding that employees had agreed to the reduction in wages, see MCL 38.36 repealed in 1974. The current version of the retirement act, MCL 38.35, contains no

similar provision, and there was no negotiated agreement with classified civil service employees.[4]

Defendants also contend that the will of the people must be examined with regard to the passage of MCL 38.35 and that the people would approve of state workers' being responsible for retirement costs. The people did not vote on and ratify the terms and conditions of MCL 38.35. Rather, the will of the people was expressed in Const 1963, art 11, § 5. There, the people ratified a system of checks and balances where the CSC has plenary authority over classified civil servants with a process in place for legislative override. The people expect that that the system of checks and balances will be respected, and a review of Michigan caselaw reveals that the CSC and the executive branch have dealt cooperatively to address employee compensation in times of economic hardship. The people can and should expect shared sacrifice; however, it cannot come at the expense of constitutional nullification, and the Legislature cannot expect to balance the budget on the backs of state workers.

Const 1963, art 11, § 5 provides that the rates of compensation for all employees in the classified service are fixed by the commission. It further sets forth the process for a legislative override of any wage increase submitted to the Governor by legislative vote of two-thirds of the members serving in each house. In the present case, the Legislature did not achieve its goal of preventing the wage increase in accordance with the constitutional provisions. Therefore, it enacted MCL

[4] Defendants also rely on the fact that the three percent deduction applies to all employees. We only decide actual controversies, *Shavers*, 402 Mich at 589, and the application of MCL 38.35 to other employees is not at issue in this appeal. Defendants' argument that the Legislature was acting for the benefit of the public health and welfare does not excuse the failure to comply with the Michigan Constitution.

38.35 to fill a budget deficit. When a statute contravenes the provisions of the Michigan Constitution, it is unconstitutional and void. *Pillon*, 345 Mich at 547. Accordingly, the trial court did not err by granting plaintiffs' motion for summary disposition and denying defendants' motion for summary disposition.

Affirmed.

BECKERING, P.J., and STEPHENS, J., concurred with FORT HOOD, J.

In re ELLIS

Docket Nos. 301884 and 301887. Submitted June 8, 2011, at Detroit. Decided August 25, 2011, at 9:05 a.m.

The Department of Human Services petitioned the Wayne Circuit Court, Family Division, to terminate the parental rights of the mother and father of A. Ellis. The court, Frank S. Szymanski, J., entered an order terminating their parental rights pursuant to MCL 712A.19b(3)(b)(*i*) (parent abused child), (b)(*ii*) (parent failed to prevent abuse), (j) (child likely to be harmed if returned to parent), and (k)(*iii*) (battery, torture, or other serious abuse). Respondents appealed, contending that the court erred because it was impossible to determine which parent physically abused the child.

The Court of Appeals *held*:

To terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met by clear and convincing evidence. Only one statutory ground need be established, even if the court erred by finding sufficient evidence under other statutory grounds. Under MCL 712A.19b(5), if a statutory ground for termination is established and the court finds that termination of parental rights is in the child's interests, the court must order termination of the respondent's parental rights and order that additional efforts for reunification of the child with the parent not be made. The trial court did not clearly err by terminating respondents' parental rights to the child under MCL 712A.19b(3)(b)(*i*) and (*ii*), (j), and (k)(*iii*) because he suffered numerous severe nonaccidental injuries highly indicative of child abuse that most likely occurred over an extended period of time and the parents lived together, shared childcare responsibilities, and were the child's sole caregivers. Definitive evidence regarding the actual abuser's identity was not necessary to terminate parental rights under the grounds for termination alleged because the evidence demonstrated that at least one of the respondents must have caused the child's injuries and at least one of them failed to prevent them and it did not matter which did which.

Affirmed.

PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — GROUNDS FOR TERMINATION — IDENTITY OF CHILD ABUSER UNKNOWN.

Termination of parental rights under MCL 712A.19b(3)(b)(*i*), (b)(*ii*), (j), and (k)(*iii*) is permissible in the absence of definitive evidence regarding the identity of the perpetrator of child abuse when the evidence demonstrates that the respondent parent or parents must have either caused or failed to prevent the child's injuries.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Stephanie Achenbach*, Assistant Attorney General, for the Department of Human Services.

Helm, Miller & Miller (by *Beth Anne Miller*) for A. Jones.

Susan K. Rock for T. Ellis.

Before: FORT HOOD, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ.

PER CURIAM. In these consolidated appeals, respondents appeal as of right the trial court's order terminating their parental rights to A. Ellis. We affirm.

Respondents are the child's parents. When A. Ellis was less than two months of age, Children's Protective Services (CPS) received a complaint that the child had been brought to the hospital with, to understate the situation, injuries from physical abuse. In fact, skull x-rays and skeletal surveys revealed that the child had swelling and multiple skull fractures on the upper-rear right side of his head. He had internal bleeding inside the skull, over the coating of the brain, in the area of the fractures as well as on the left side of his head. In the area of the fractures, he had reduced blood supply to his brain. A. Ellis had 13 broken bones, including 7 partially healed fractures to his posterior ribs, with 3

breaks on his right side and 4 on his left. He also had fractures to bones in an arm and in his legs.

Neither respondent was able to provide an explanation for these severe injuries, and they agreed that they were A. Ellis's only caretakers. They explained that the child had been particularly fussy and crying more than usual. A physician qualified as an expert in child abuse and neglect, however, was able to explain the injuries. The rib fractures had resulted from physical abuse and very forceful squeezing of his rib cage, especially the posterior injuries. The fractures to A. Ellis's arm and leg bones were in the metaphysis portion of the bones,[1] which was significant because fractures in that area are highly indicative of child abuse and typically occur when babies are shaken very forcefully. Finally, none of the child's injuries appeared to be accidental, related to any genetic problems, or the result of a difficult childbirth. Injuries caused by, say, being dropped or hitting his head against a faucet would have looked different. The physician expert concluded that A. Ellis had suffered "abuse head trauma and physical abuse."

To terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been proved by clear and convincing evidence. *In re Trejo Minors*, 462 Mich 341, 355; 612 NW2d 407 (2000). Only one statutory ground need be established by clear and convincing evidence to terminate a respondent's parental rights, even if the court erroneously found sufficient evidence under other statutory grounds. *In re Powers Minors*, 244 Mich App 111, 118; 624 NW2d 472 (2000). If a statutory ground for termination is established and the trial court finds "that termination of parental rights is

[1] The metaphysis is a transitional section of long bones between the long tubular shaft (the diaphysis) and the expanded ends (the epiphyses).

in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5).

This Court reviews the trial court's findings under the clearly-erroneous standard. MCR 3.977(K); *Trejo*, 462 Mich at 356-357. A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). To be clearly erroneous, a decision must be more than maybe or probably wrong. *In re Sours Minors*, 459 Mich 624, 633; 593 NW2d 520 (1999). Further, regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); MCR 3.902(A); *Miller*, 433 Mich at 337.

Respondents' parental rights were terminated pursuant to MCL 712A.19b(3)(b)(*i*) (parent abused child), (b)(*ii*) (parent failed to prevent abuse), (j) (child would likely be harmed if returned to the parent), and (k)(*iii*) (abuse included battery, torture, or other serious abuse). Respondents argue that the trial court erred by terminating their rights. We disagree.

The most significant and interesting argument respondents raise is that it is impossible to determine which of them committed this heinous abuse of the minor child. That would be an extremely relevant, and possibly dispositive, concern in a criminal proceeding against either or both of them, but it is irrelevant in a termination proceeding. When there is severe injury to an infant, it does not matter whether respondents committed the abuse at all, because under these circumstances there was clear and convincing evidence that they did not provide proper care. *In re Edwards*, un-

published opinion per curiam of the Court of Appeals, issued February 21, 2006 (Docket No. 264477), p 3. While *Edwards* is unpublished and therefore not binding, MCR 7.215(C)(1), we find its reasoning sound and persuasive. See *People v Jamison*, 292 Mich App 440, 445; 807 NW2d 427 (2011).

This Court has reached similar conclusions in other unpublished opinions with similar facts. We find those cases persuasive as well.

In *In re Armstrong*, unpublished opinion per curiam of the Court of Appeals, issued August 15, 2006 (Docket No. 266856), a three-month-old child was treated for multiple nonaccidental fractures. They were determined to be the result of abuse, but because the child had several caregivers, it was not possible to determine the actual perpetrator. This Court nevertheless found that termination of the respondents' parental rights was appropriate, reasoning that the multitude of injuries over an extended period showed that the parents could have prevented the abuse but failed to do so and that the child would likely be injured again if returned to the care of either. In *In re Rangel*, unpublished opinion per curiam of the Court of Appeals, issued August 10, 2006 (Docket No. 268172), the parents were the sole caretakers of a 20-month-old child who suffered severe, nonaccidental wounds. This Court affirmed the order terminating the mother's parental rights, concluding that at least one of them must have caused the injuries and that their joint denial of knowledge of the source of the injuries showed a reasonable likelihood that the child would suffer further injury in the mother's care. In *In re Turner*, unpublished opinion per curiam of the Court of Appeals, issued January 20, 2009 (Docket No. 286133), p 2, this Court reasoned that because the respondents were the sole caregivers of a

nonaccidentally injured child, the trial court had "little choice but to conclude that one or both parents abused [the child] and that the other parent failed to protect him."[2]

As noted, we find the reasoning in these cases persuasive and applicable here. The trial court's decision to terminate respondents' parental rights was supported by the law and by the facts apparent from the record. Respondents lived together in a small apartment. Both testified that they were the only two individuals who took care of the child. The child suffered numerous nonaccidental injuries, and the explanations provided were inconsistent with the extent and nature of the child's injuries. The injuries were numerous, highly indicative of child abuse, using a very high force of impact, and inconsistent with any sort of accident. The fact that many of them were in various stages of healing showed that A. Ellis had suffered multiple instances of abuse over a prolonged time. The physician testified that while the child may not have been crying constantly, he would have shown signs of distress at least periodically through lack of appetite, sleeping more, and increased fussiness. Respondents could not offer any plausible alternative explanation for A. Ellis's injuries. We conclude that the trial court properly determined that at least one of them had perpetrated the abuse and at least one of them had failed to prevent it; consequently, it did not matter which did which.

We hold that termination of parental rights under MCL 712A.19b(3)(b)(*i*), (b)(*ii*), (j), and (k)(*iii*) is permissible even in the absence of definitive evidence regarding the identity of the perpetrator when the evidence

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[2] Although published before this case, in *In re VanDalen*, 293 Mich App 120; 809 NW2d 412 (2011), this panel arrived at the same conclusion as a basis for terminating parental rights under MCL 712A.19b(3)(g) and (j).

does show that the respondent or respondents must have either caused or failed to prevent the child's injuries. The evidence in this case clearly shows that A. Ellis suffered numerous nonaccidental injuries that likely occurred on more than one occasion and that the parents lived together, shared childcare responsibilities, and were the child's sole caregivers. The trial court did not clearly err by finding that the statutory grounds for termination of respondents' parental rights were established by clear and convincing evidence and that termination of respondents' parental rights was in the child's best interests.

Affirmed.

FORT HOOD, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ., concurred.

RICHARD v SCHNEIDERMAN & SHERMAN, PC

Docket No. 297353. Submitted July 7, 2011, at Detroit. Decided August 25, 2011, at 9:10 a.m. Vacated and remanded, 490 Mich 1001.

Aaron Richard brought an action in the Wayne Circuit Court against Schneiderman & Sherman, P.C., GMAC Mortgage, and Mortgage Electronic Registration Systems, Inc. (MERS). Richard had purchased real property, obtaining financing in part through a $50,000 loan from Homecomings Financial Network, Inc. The loan was simultaneously secured by a mortgage with MERS as the nominee of Homecomings. Schneiderman acting as GMAC's agent, notified Richard that his mortgage was in default and informed him of his rights. MERS subsequently began nonjudicial foreclosure by advertisement under MCL 600.3201 *et seq.* and purchased the property at the subsequent sheriff's sale. Richard's suit was brought during the redemption period and challenged the sheriff's sale on numerous grounds. Schneiderman, GMAC, and MERS moved for summary disposition, which the court, Michael F. Sapala, J., granted. Richard appealed.

The Court of Appeals *held*:

Residential Funding Co, LLC v Saurman, 292 Mich App 321 (2011), held that a mortgagee may not use nonjudicial foreclosure by advertisement when it does not own the underlying note on the real property. Generally, judicial decisions are given complete retroactive effect. Complete prospective application is limited to decisions which overrule clear and uncontradicted caselaw. The threshold question is whether the decision clearly established a new principle of law. *Saurman* must be given full retroactive effect because it did not overrule any law or reconstrue a statute. Given the unique nature of foreclosure by advertisement, *Saurman* would not apply in an action if the mortgagor failed to challenge the foreclosure during the redemption period or any proceedings seeking an eviction order or if the property had been sold to a bona fide purchaser. Richard timely filed his claim during the redemption period, however, and there was no evidence of a bonafide purchaser, so *Saurman* applied and the foreclosure proceedings were void *ab initio*.

Reversed, foreclosure proceeding vacated, and case remanded for further proceedings.

Aaron Richard *in propria persona*.

Schneiderman & Sherman, P.C. (by *Andrew J. Hubbs* and *Erin R. Katz*), for defendants.

Before: BORRELLO, P.J., and METER and SHAPIRO, JJ.

PER CURIAM. Plaintiff, Aaron Richard, appeals as of right an order granting summary disposition in favor of defendants, Schneiderman & Sherman, P.C., GMAC Mortgage, and Mortgage Electronic Registration Systems, Inc. (MERS). We reverse the trial court's grant of summary disposition, vacate the foreclosure proceeding, and remand for further proceedings consistent with this opinion.

This case arises from plaintiff's attempts to challenge the foreclosure and sale of property he owned located at 19952 Hubbell in Detroit. Plaintiff purchased the property in part through a $50,000 loan, executed on May 4, 2006, from Homecomings Financial Network, Inc. The loan was secured by a May 4, 2006, mortgage with MERS, as the nominee of Homecomings.

It is not clear from the record when plaintiff fell behind on his mortgage payments. However, on October 9, 2009, Schneiderman, acting as GMAC's agent, mailed plaintiff a notice stating that his mortgage was in default and informing him of his rights, including the right to request mediation. The outstanding debt owed to GMAC was listed as $50,267.78. Ultimately, MERS began nonjudicial foreclosure by advertisement under MCL 600.3201 *et seq*. and purchased the property at the subsequent sheriff's sale.

Plaintiff filed suit, *in propria persona*, during the redemption period, alleging that the sheriff's sale was "flawed" on numerous grounds and asserting that MERS held no rights to the debt. Defendants moved for summary disposition, asserting, among other things,

that the sheriff's sale was "not only legal, but also valid, as all required procedures were followed." The trial court granted summary disposition in favor of defendants and dismissed plaintiff's claim.

Although many of plaintiff's claims are without merit, it is clear that the sheriff's sale was invalid because MERS foreclosed on plaintiff's property using nonjudicial foreclosure by advertisement even though MERS was only a mortgagee. This Court has held that MERS is not entitled to use foreclosure by advertisement when it does not own the underlying note. *Residential Funding Co, LLC v Saurman*, 292 Mich App 321, 331-333; 807 NW2d 412 (2011).* Under such circumstances, "MERS' inability to comply with the statutory requirements rendered the foreclosure proceedings . . . void *ab initio*." *Id.* at 342. Because the application of *Saurman* is dispositive, we must determine whether *Saurman* is retroactive and, if so, whether to assign it full or limited retroactivity.

"[T]he general rule is that judicial decisions are to be given complete retroactive effect." *Hyde v Univ of Mich Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986). "Complete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law." *Id.*

> Rules determined in opinions that apply retroactively apply to all cases "still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule[s]." *Harper v Virginia Dep't of Taxation*, 509 US 86, 97; 113 S Ct 2510; 125 L Ed 2d 74 (1993). Rules determined in opinions that apply prospectively only, on the other hand, not only do not apply to cases still open on direct review, but do not even apply to the parties in the cases in which the rules are declared. See

* Reversed, 490 Mich 909 (2011)—REPORTER.

> *Pohutski v City of Allen Park*, 465 Mich 675, 699; 641 NW2d 219 (2002). [*McNeel v Farm Bureau Gen Ins Co of Mich*, 289 Mich App 76, 94; 795 NW2d 205 (2010).]

Given that the *Saurman* Court applied its holding to the cases under review in that appeal, it is clear that the holding in *Saurman* has been afforded at least limited retroactivity.[1] However, cases given limited retroactivity apply "in pending cases where the issue had been raised and preserved," *Stein v Southeastern Mich Family Planning Project, Inc*, 432 Mich 198, 201; 438 NW2d 76 (1989), while cases with full retroactivity apply to all cases then pending. This distinction makes a difference because, although plaintiff contested the foreclosure, he did not specifically raise and preserve the issue of whether MERS has the authority to foreclose by advertisement. Thus, *Saurman* is only applicable to this case if it is granted full retroactivity.

"The threshold question is whether 'the decision clearly established a new principle of law.' " *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 220; 731 NW2d 41 (2007) (citation omitted). Our Supreme Court has held that cases that properly interpret statutes, even if prior caselaw had held differently, "restore[] legitimacy to the law" and, thus, are "not a declaration of a new rule, but . . . a vindication of controlling legal authority[.]" *Id.* at 222 (quotation marks and citation omitted). In *Saurman*, this Court interpreted MCL 600.3204(1)(d). There was no existing caselaw and, therefore, it did not overrule any law or reconstrue a statute. See *Hyde*, 426 Mich at 240. Consequently, this

[1] In addition, " 'there is a serious question as to whether it is constitutionally legitimate for this Court to render purely prospective opinions, as such ruling are, in essence, advisory opinions.' " *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 221; 731 NW2d 41 (2007), quoting *Wayne Co v Hathcock*, 471 Mich 445, 485 n 98; 684 NW2d 765 (2004).

Court's decision in *Saurman* was not "tantamount to a new rule of law," see *Rowland*, 477 Mich at 222 n 17, and, therefore should be given full retroactive effect. Hence, *Saurman* is applicable to the instant case, rendering the foreclosure proceedings void *ab initio*. *Saurman*, 292 Mich App at 342.

However, given the unique nature of foreclosure by advertisement, there is longstanding caselaw that limits the application of *Saurman*. First, our Supreme Court has held that a mortgagor must challenge the validity of a foreclosure by advertisement promptly and without delay. See *White v Burkhardt*, 338 Mich 235, 239; 60 NW2d 925 (1953) (concluding that a claim was too late when the redemption period had expired before the filing of the complaint); *Fox v Jacobs*, 289 Mich 619, 625; 286 NW 854 (1939) (concluding that a challenge 20 months after foreclosure sale was too late). In addition, our Supreme Court has held that the validity of a foreclosure by advertisement may not be challenged after the property is sold to a bona fide purchaser. See *Hogan v Hester Investment Co*, 257 Mich 627; 241 NW 881 (1932). Thus, *Saurman* does not apply in an action to recover title or possession of property if the mortgagor failed to challenge the foreclosure by advertisement during the redemption period or any proceedings seeking an order of eviction, or if the foreclosed property has been sold to a bona fide purchaser.

Because plaintiff filed his claim during the redemption period and there is no evidence of a bona fide purchaser, he is entitled to relief under *Saurman*. Accordingly, we reverse the trial court's grant of summary disposition, vacate the foreclosure proceeding, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

BORRELLO, P.J., and METER and SHAPIRO, JJ., concurred.

PRICE v HIGH POINTE OIL COMPANY, INC

Docket No. 298460. Submitted July 12, 2011, at Lansing. Decided August 25, 2011, at 9:15 a.m. Leave to appeal granted, 491 Mich 870.

Beckie Price brought an action in the Clinton Circuit Court against High Pointe Oil Company, Inc., claiming, among other things, noneconomic damages for the mental anguish, emotional distress, and psychological injuries sustained when High Pointe negligently pumped 400 gallons of fuel oil into the basement of her house. The incident created an environmental hazard that required Price's home to be razed. Before the jury trial, High Pointe moved for summary disposition, in part on the issue of noneconomic damages, arguing that noneconomic damages resulting from real property damage were not compensable. The court, Randy L. Tahvonen, J., denied that part of High Pointe's motion, concluding that such damages could be recovered in a negligence action. The jury awarded Price $100,000 for noneconomic damages, after which High Pointe filed a motion for judgment notwithstanding the verdict (JNOV) and remittitur. The court denied the motion, and High Pointe appealed.

The Court of Appeals *held*:

1. As a general rule, noneconomic damages are recoverable in tort claims, and emotional damages include both emotional distress and mental anguish. A tortfeasor is liable for all injuries resulting directly from the wrongful act, whether foreseeable or not, provided the damages are the legal and natural consequences of the wrongful act. Because personal property is replaceable chattel, damages for emotional distress and mental anguish for injuries to personal property are not recoverable in a tort action. Real property, however, has a unique and peculiar value, and mental anguish damages naturally flowing from the damage to or destruction of real property may be recovered in a negligence action. Moreover, the plaintiff need not suffer the emotional distress as a result of a fear of physical impact. Unlike a claim for emotional distress, a party need not demonstrate a physically manifested injury to recover for mental anguish.

2. The trial court properly denied High Pointe's motion for summary disposition on the issue of noneconomic damages. Men-

tal anguish includes shame, mortification, mental pain and anxiety, discomfiture, and humiliation. Because Price presented evidence that she cried and became upset when talking about the destruction of her home, that her decision-making was affected at home and work, that she had difficulty sleeping and focusing her thoughts, and that she was prescribed and took an antidepressant for four months, a genuine issue of material fact existed regarding her claim for noneconomic damages.

3. The trial court also properly denied defendant's motion for JNOV. The jury verdict must stand if reasonable jurors could have reasonably reached different conclusions regarding the evidence. Price's testimony that she felt a great sense of personal loss following the destruction of her home; that she was embarrassed to move into her parents' home as an adult; that she suffered from anxiety, sleeplessness, and an inability to concentrate because of the stress; and that she took an antidepressant for four months was sufficient to submit the issue of noneconomic damages to the jury.

4. If the only error in the trial was the inadequacy or excessiveness of the verdict, under MCR 2.611(E)(1) the trial court may deny a motion for new trial on the condition that the nonmoving party consent to the entry of a judgment in the amount that the court finds to be the lowest (if the verdict was inadequate) or the highest (if the verdict was excessive) amount the evidence will support. The court must view the evidence in the light most favorable to the nonmoving party when deciding whether the jury award is supported by the evidence. The court must consider objective criteria relating to the actual conduct of the trial or the evidence presented, including whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact; whether it was within the limits of what reasonable minds would deem to be just compensation for the injury inflicted; and whether the amount actually awarded is comparable to other awards in similar cases. The court's decision is given deference because it is in the best position to evaluate the credibility of the witnesses and is in the best position to make an informed decision on the issue of remittitur. High Pointe failed to support its claim that the jury was influenced by sympathy following Price's testimony regarding how she suffered mentally and emotionally from the loss of her home. Given the evidence Price presented, the court did not abuse its discretion by denying High Pointe's motion for remittitur. The jury's $100,000 award for noneconomic damages was within the limits of what reasonable minds would deem to be just compensation for Price's mental anguish.

Affirmed.

1. DAMAGES — NONECONOMIC DAMAGES — NEGLIGENCE — REAL PROPERTY — MENTAL ANGUISH.

As a general rule, noneconomic damages are recoverable in tort claims, and emotional damages include both emotional distress and mental anguish; a tortfeasor is liable for all injuries resulting directly from the wrongful act, whether foreseeable or not, provided the damages are the legal and natural consequences of the wrongful act; real property has a unique and peculiar value, and mental anguish damages naturally flowing from the damage to or destruction of real property may be recovered in a negligence action; the plaintiff need not suffer the emotional distress as a result of a fear of physical impact; unlike a claim for emotional distress, a party need not demonstrate a physically manifested injury to recover for mental anguish; mental anguish includes shame, mortification, mental pain and anxiety, discomfiture, and humiliation.

2. JUDGMENTS — EXCESSIVE JUDGMENTS — REMITTITUR — OBJECTIVE CRITERIA.

If the only error in the trial was the inadequacy or excessiveness of the verdict, the trial court may deny a motion for new trial on the condition that the nonmoving party consent to the entry of a judgment in the amount that the court finds to be the lowest (if the verdict was inadequate) or the highest (if the verdict was excessive) amount the evidence will support; a trial court must view the evidence in the light most favorable to the nonmoving party when deciding whether the jury award is supported by the evidence; the court must consider objective criteria relating to the actual conduct of the trial or the evidence presented, including (1) whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact, (2) whether it was within the limits of what reasonable minds would deem to be just compensation for the injury inflicted, and (3) whether the amount actually awarded is comparable to other awards in similar cases; the court's decision is given deference because the court is in the best position to evaluate the credibility of the witnesses and is in the best position to make an informed decision on the issue of remittitur (MCR 2.611[E][1]).

Sinas, Dramis, Brake, Boughton & McIntyre, P.C. (by *James F. Graves* and *Stephen H. Sinas*), for plaintiff.

Garan Lucow Miller, P.C. (by *Megan K. Cavanagh*), for defendant.

Before: BECKERING, P.J., and FORT HOOD and STEPHENS, JJ.

BECKERING, P.J. In this negligence action, defendant, High Pointe Oil Company, Inc., appeals as of right following a jury trial in which plaintiff, Beckie Price, was awarded $100,000 in noneconomic damages after defendant filled the basement of her home with nearly 400 gallons of fuel oil. The incident created an environmental hazard that required plaintiff's home to be razed from the site and left her displaced from a permanent home for almost two years. Defendant appeals the trial court's orders denying its motion for summary disposition on the issue of noneconomic damages and it's motion for judgment notwithstanding the verdict (JNOV) and remittitur. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff owned a home located in DeWitt, Michigan. She and her former husband helped to build the house, which was completed in 1975. The house was heated by an oil furnace, and the oil tank was kept in the basement. Beginning in 1995, the tank was serviced by Mooney Oil, which was later purchased by defendant. Plaintiff was on defendant's "keep full" list. In 2006, plaintiff replaced her oil furnace with a propane furnace. She then sold the oil furnace and oil tank to a neighbor, who removed both from plaintiff's basement. Before switching to the propane furnace, plaintiff telephoned defendant and canceled its services. There were no fuel oil deliveries made to plaintiff's house between October 2006 and November 2007.

On November 17, 2007, while plaintiff was at work, defendant attempted to deliver fuel oil to her house because her name was inadvertently placed on defen-

dant's "keep full" list. Although the oil furnace and oil tank had been removed from plaintiff's basement, the fill pipe located outside of the house had remained unchanged. Defendant's oil truck driver took the hose from his truck, hooked the hose up to the fill pipe, and pumped fuel oil into plaintiff's basement. After four or five minutes, the driver stopped pumping because he felt it had gone too long and that there might be a problem. The driver then looked into the basement and saw fuel oil on the floor. He called 911, and emergency crews responded shortly thereafter. In total, the driver pumped 396 gallons of fuel oil into plaintiff's basement.

An environmental consulting company assessed the damage. Many of plaintiff's personal items located on the main floor of the home were able to be salvaged; however, most of the items in the basement were too heavily contaminated to be salvaged. Additionally, more porous items, such as mattresses and pillows, could not be salvaged because they had absorbed oil fumes. The items that could be salvaged were placed in storage, and the rest were put in a pole barn on plaintiff's property. Eventually, it was determined that the oil had leaked into the soil and that as a result of the contamination, the entire house had to be demolished. The Department of Environmental Quality notified plaintiff on April 18, 2008, that the excavation and cleanup of the soil had been completed and that no further action was required.

From November 17, 2007, to March 1, 2008, plaintiff stayed in the extra bedroom of her parents' house, which was also being used to store a number of large antiques, although she often slept on the couch. Her parents were in Texas for all but one week of the time she lived there. From March 1, 2008, until late September 2009, plaintiff stayed in a duplex. Thereafter, she moved into a new house that she had helped to build.

Plaintiff built the new house on the same property as the old one, but the new house had to be built in a different location on the property because the soil was unstable where the site had been excavated.

Plaintiff filed suit in August 2008, alleging counts of negligence, gross negligence, negligent infliction of emotional distress, nuisance, trespass, and a private citizen's claim under the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*. She requested general and compensatory damages for the economic harm caused by defendant's conduct, as well as noneconomic damages for annoyance, inconvenience, pain, suffering, mental anguish, emotional distress, and psychological injuries caused by the destruction of her house.

Plaintiff moved for partial summary disposition under MCR 2.116(C)(9) and (10), requesting that the trial court grant summary disposition on her claims of negligence, negligent infliction of emotional distress, trespass, and nuisance. Plaintiff also argued that under the court rules she was entitled to seek noneconomic damages for emotional distress and mental anguish and exemplary damages. Defendant filed a countermotion for summary disposition under MCR 2.116(C)(8) and (10). In regard to plaintiff's request for noneconomic damages, defendant argued that noneconomic damages resulting from property damage are not compensable.

The trial court granted plaintiff summary disposition on her negligence claim and granted defendant summary disposition on plaintiff's claims of gross negligence and negligent infliction of emotional distress. The court denied both parties' motions for summary disposition on the trespass, nuisance, and private citizen's claims. With regard to noneconomic damages, the court stated:

> [*The Court*]: Relating to the damages, in essence, by dismissing the claim of negligent infliction of emotional

> distress, I have deprived the Plaintiff of the opportunity to seek mental anguish damages secondary to property damage, and I think that's the law . . . .
>
> So, it seems to me that the request for economic losses adequate to put the Plaintiff in the position she would have occupied had the torts not been committed, is, of course, for the jury, and I'm satisfied that she can seek to recover non-economic damages as typically allowed in connection with the claim for negligence.
>
> * * *
>
> [*Defense Counsel*]: Just for clarification for me, you are allowing mental anguish damages for the negligence claim resulting to the property damage?
>
> *The Court*: Yes, and that's why I took out, in part, the claim for negligent infliction of emotional distress, because the idea of inflicting emotional distress is that the foreseeable outcome of the actor's conduct would be to cause emotional distress, and I don't think that a negligent defendant has to foreseeably see that as an outcome of their conduct if, in fact, it results naturally and probably from that conduct.

The parties agree that during the time plaintiff was displaced from her home, all of her economic losses, including the costs of demolition, excavation, and remediation expenses, were paid by her insurer, defendant, or defendant's insurer. Plaintiff received $175,000 from her insurance company, which represented the fair market value of her house, approximately $10,000 for lost personal property, and $1,000 a month for rent while she lived in the duplex. Plaintiff testified at her deposition that she had not incurred any out-of-pocket costs associated with the incident.

In January 2010, the case proceeded to a jury trial on plaintiff's trespass, nuisance, and private citizen's claims, as well as the issue of damages related to her

negligence claim. Before presenting any proofs, plaintiff withdrew her claim for economic damages, as well as her trespass and nuisance claims. She requested that the court handle her private citizen's claim posttrial.[1] Over defendant's objection, the court ruled that plaintiff was entitled to seek noneconomic damages for mental anguish, fright, shock, denial of social pleasures or enjoyments, and any embarrassment she suffered as a result of defendant's negligence.

Plaintiff testified that she felt a great sense of loss over the destruction of her house, which held special memories for her; she was embarrassed to move into her parents' house as an adult; she suffered from sleeplessness and an inability to concentrate because of the stress of the situation; and she took an antidepressant over the course of several months. At the close of proofs, the court instructed the jury, over defendant's objection, that it could award plaintiff "non-economic damages, for things such as mental anguish and fright and shock, and denial of social pleasures and enjoyment in the use of the former home and embarrassment or humiliation" suffered as a result of the property damage negligently caused by defendant. The jury returned a verdict in favor of plaintiff in the amount of $100,000 for past damages and zero dollars for future damages. The court entered a judgment in plaintiff's favor. Thereafter, defendant filed a motion for a new trial, JNOV, and remittitur, arguing that plaintiff had failed to present sufficient proofs to support the verdict. The court denied the motion.

Defendant now appeals as of right the trial court's orders regarding plaintiff's recovery of noneconomic damages.

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[1] At trial, defendant moved for a directed verdict on plaintiff's private citizen's claim. The trial court took the matter under advisement and later granted defendant's motion.

II. STANDARDS OF REVIEW

Whether a plaintiff is entitled to seek noneconomic damages for damage to or destruction of real property presents a question of law, which we review de novo. See *2000 Baum Family Trust v Babel*, 488 Mich 136, 143; 793 NW2d 633 (2010).

Plaintiff moved for partial summary disposition under MCR 2.116(C)(9) and (10), and defendant moved for summary disposition under MCR 2.116(C)(8) and (10). The trial court did not specify which subrules it relied on in deciding the parties' motions.

> A grant or denial of summary disposition is reviewed de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. [*Id*.] at 119. The motion should be granted only when the claim is so legally deficient that recovery would be impossible even if all well-pleaded factual allegations were true and viewed in the light most favorable to the nonmoving party. *Id*. Likewise, a motion under MCR 2.116(C)(9) tests the legal sufficiency of a defense by the pleadings alone. *Slater v Ann Arbor Pub Schools Bd of Ed*, 250 Mich App 419, 425; 648 NW2d 205 (2002). All well-pleaded factual allegations are accepted as true, and summary disposition is appropriate only "when the defendant's pleadings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery." *Id*. at 425-426. A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Maiden*, [461 Mich] at 119-120. All admissible evidence submitted by the parties is reviewed in the light most favorable to the nonmoving party and summary disposition is appropriate only when the evidence fails to establish a genuine issue regarding any material fact. *Id*.; MCR 2.116(G)(6). [*USA Cash #1, Inc v City of Saginaw*, 285 Mich App 262, 265-266; 776 NW2d 346 (2009).]

A trial court's decision on a motion for JNOV is also reviewed de novo. *Prime Financial Servs LLC v Vinton*, 279 Mich App 245, 255; 761 NW2d 694 (2008). We view the evidence and all legitimate inferences from it in the light most favorable to the nonmoving party to determine whether a question of fact existed. *Livonia Bldg Materials Co v Harrison Constr Co*, 276 Mich App 514, 517-518; 742 NW2d 140 (2007). If reasonable jurors could have honestly reached different conclusions regarding the evidence, the jury verdict must stand. *Genna v Jackson*, 286 Mich App 413, 417; 781 NW2d 124 (2009).

We review for an abuse of discretion a trial court's decision regarding remittitur. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 462; 750 NW2d 615 (2008). An abuse of discretion occurs when the result is outside the range of principled outcomes. *Heaton v Benton Constr Co*, 286 Mich App 528, 538; 780 NW2d 618 (2009). The trial court, having witnessed the testimony and the evidence as well as the jury's reactions, is in the best position to evaluate the credibility of the witnesses and make an informed decision. *Unibar Maintenance Servs, Inc v Saigh*, 283 Mich App 609, 629-630; 769 NW2d 911 (2009). Therefore, we must give due deference to the trial court's decision. *Id*.

III. NONECONOMIC DAMAGES FOR THE DESTRUCTION OF REAL PROPERTY

Defendant argues on appeal that under current Michigan law, plaintiff is not entitled to seek noneconomic damages for mental anguish caused by the destruction of her home. Defendant first raised this argument in response to plaintiff's motion for summary disposition, and the argument presents an issue of first impression in this state. We agree with the trial court

that it was legally permissible for plaintiff to seek mental anguish damages in this case.

As a general rule, noneconomic damages are recoverable in tort claims, and emotional damages include both emotional distress and mental anguish. See *Phillips v Butterball Farms Co, Inc* (*After Second Remand*), 448 Mich 239, 251 n 32; 531 NW2d 144 (1995); *McClain v Univ of Mich Bd of Regents*, 256 Mich App 492, 498-500; 665 NW2d 484 (2003). In *Sutter v Biggs*, 377 Mich 80, 86; 139 NW2d 684 (1966), our Supreme Court explained:

> The general rule, expressed in terms of damages, and long followed in this State, is that in a tort action, the tort-feasor is liable for all injuries resulting directly from his wrongful act, whether foreseeable or not, provided the damages are the legal and natural consequences of the wrongful act, and are such as, according to common experience and the usual course of events, might reasonably have been anticipated.

According to defendant, plaintiff is limited in her recovery to the difference between the market value of her house before and after the damage. Because plaintiff was paid the difference in market value, defendant argues that she has been fully compensated. Defendant relies on *Strzelecki v Blaser's Lakeside Indus of Rice Lake, Inc*, 133 Mich App 191; 348 NW2d 311 (1984), and *Baranowski v Strating*, 72 Mich App 548; 250 NW2d 744 (1976), to support its argument. In *Strzelecki*, this Court stated:

> "It is the settled law of this state that the measure of damages to real property, if permanently irreparable, is the difference between its market value before and after the damage. However, if the injury is reparable, and the expense of repairs is less than the market value, the measure of damage is the cost of the repairs." [*Strzelecki*, 133 Mich App at 194 (citation omitted).]

In both *Strzelecki* and *Baranowski*, however, this Court addressed the measure of damages for *economic* loss suffered as a result of the destruction of real property. Neither case included a discussion of noneconomic damages. Therefore, defendant's reliance on *Strzelecki* and *Baranowski* is misplaced.

Defendant further argues that recovery for emotional distress or mental anguish caused by damage to or the destruction of real property is not permitted under common law. In support of its argument, defendant cites *Koester v VCA Animal Hosp*, 244 Mich App 173; 624 NW2d 209 (2000), and *Bernhardt v Ingham Regional Med Ctr*, 249 Mich App 274; 641 NW2d 868 (2002). In *Koester*, a negligence action, this Court considered whether a dog owner could recover "damages of emotional distress and loss of companionship" of his pet dog, which is considered personal property under Michigan jurisprudence. *Koester*, 244 Mich App at 176. Declining to permit such recovery, the Court stated:

> There is no Michigan precedent that permits the recovery of damages for emotional injuries allegedly suffered as a consequence of property damage. Plaintiff requests that we allow such recovery when a pet is the property that is damaged, arguing that pets have evolved in our modern society to a status that is not consistent with their characterization as "chattel." In essence, plaintiff requests that we create for pet owners an independent cause of action for loss of companionship when a pet is negligently injured by a veterinarian. Although this Court is sympathetic to plaintiff's position, we defer to the Legislature to create such a remedy. [*Id.*]

In *Bernhardt*, the plaintiff's claims arose out of the loss of two pieces of jewelry that were of great sentimental value to her. *Bernhardt*, 249 Mich App at 276-277. The plaintiff filed suit against the defendant hospital, which

she alleged was responsible for the loss, claiming conversion, breach of bailment, and intentional infliction of emotional distress and, in the alternative, negligence and replevin. *Id*. at 277. This Court held that the plaintiff's "claims of emotional distress in connection with her tort claims of conversion and negligence" were insufficient to bring the "case within the jurisdiction of the circuit court," noting that the plaintiff had not specifically alleged emotional distress damages in connection with her conversion and negligence claims, as well as the *Koester* Court's statement that "there is no Michigan precedent that permits the recovery of damages for emotional injuries allegedly suffered as a consequence of property damage." *Id*. at 279 & n 1.

Defendant acknowledges that both *Koester* and *Bernhardt* involved the loss or destruction of personal property, whereas, this case involves the destruction of real property. Nonetheless, defendant asserts that those holdings should be applied in this case. We disagree. As indicated, the general rule in Michigan is that noneconomic damages are recoverable in tort claims, *Phillips*, 448 Mich at 251 n 32, and "in a tort action, the tort-feasor is liable for *all* injuries resulting directly from [the] wrongful act, whether foreseeable or not, provided the damages are the legal and natural consequences of the wrongful act, and . . . might reasonably have been anticipated," *Sutter*, 377 Mich at 86. While this Court has carved out an exception to that general rule in regard to emotional damages for the loss or destruction of personal property (which is considered to be a replaceable chattel despite any emotional attachment)[2], we decline to extend

[2] *Random House Webster's College Dictionary* (2001) defines "chattel" as "a movable article of personal property" and "any tangible property other than land and buildings." *Merriam-Webster's Collegiate Dictionary*

that exception to real property. Defendant has failed to cite any authority requiring such a holding.

Furthermore, contrary to defendant's assertion, the law has historically distinguished between personal property and real property. For example, liability for trespass to land does not require any actual showing of damage. " 'Any intentional and unprivileged entry on land is a trespass without a showing of damage, since those who own land have an exclusive right to its use[.]' " *Adkins v Thomas Solvent Co*, 440 Mich 293, 304; 487 NW2d 715 (1992), quoting Prosser & Keeton, Torts (5th ed), § 87, p 623. Liability for a trespass to chattel, however, generally requires some showing of damage. Section 218 of the Restatement Second of Torts provides:

> One who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if,
>
> (a) he dispossesses the other of the chattel, or
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> (b) the chattel is impaired as to its condition, quality, or value, or
>
> (c) the possessor is deprived of the use of the chattel for a substantial time, or
>
> (d) bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest. [1 Restatement Torts, 2d, § 218, p 420.]

Comment (e) to that section clarifies the distinction between real and personal property in tort law:

> The interest of a possessor of a chattel in its inviolability, unlike the similar interest of a possessor of land, is not given legal protection by an action for nominal damages for

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(11th ed) defines "chattel" as "an item of tangible movable or immovable property except real estate and things (as buildings) connected with real property[.]"

> harmless intermeddlings with the chattel. In order that an actor who interferes with another's chattel may be liable, his conduct must affect some other and more important interest of the possessor. Therefore, one who intentionally intermeddles with another's chattel is subject to liability only if his intermeddling is harmful to the possessor's materially valuable interest in the physical condition, quality, or value of the chattel, or if the possessor is deprived of the use of the chattel for a substantial time, or some other legally protected interest of the possessor is affected as stated in Clause (c). Sufficient legal protection of the possessor's interest in the mere inviolability of his chattel is afforded by his privilege to use reasonable force to protect his possession against even harmless interference. [Id. at 421-422.]

Similarly, our Supreme Court has held that breach of contract for the sale of real property necessarily includes the right to specific performance because land is presumed to have "a unique and peculiar value . . . ." *In re Egbert R Smith Trust*, 480 Mich 19, 26; 745 NW2d 754 (2008); see also *Kent v Bell*, 374 Mich 646, 651; 132 NW2d 601 (1965) (ADAMS, J.). Moreover, in holding that the plaintiff in *Kent* could require specific performance of a contract involving the upkeep of a house in exchange for a later sale or devise of the house to the plaintiff, see *Kent*, 374 Mich at 648-649 (KELLY, J., dissenting), the Court specifically noted that, with respect to the home, "[t]here is also involved a house having a particular value to [the plaintiff]. Conceivably, it could not be duplicated by an award of money." *Id*. at 651 (ADAMS, J.).

Authors and poets alike wax philosophical about the unique value of a home, which often provides as much, if not more, in the way of feelings of emotion and memories as it does shelter. A home's unique and particular value has been acknowledged by our Supreme Court, and damage to or destruction of one's

home or land would, in most cases, produce emotional suffering. Additionally, such a loss causes the stress and upheaval of displacement and the need to seek alternative shelter, which does not result from the loss or destruction of personal property. Dealing with the consequences caused by the loss of or severe damage to one's home and relocating or rebuilding also often involves considerable time and energy in addition to stress. Put simply, there are numerous and substantial differences between real and personal property. As such, we decline to extend the noneconomic damages carveout that this Court has applied to personal property.

Defendant also argues that plaintiff's claim for noneconomic damages is barred because she did not suffer fear of physical harm and was not present when the fuel oil was pumped into her house. Defendant relies on our Supreme Court's holding in *Daley v LaCroix*, 384 Mich 4; 179 NW2d 390 (1970), to support this claim. In *Daley*, the defendant's reckless driving caused his car to strike a utility pole, cutting electric lines connected to the plaintiffs' home and causing an explosion that resulted in property damage. *Id*. at 6-7. The plaintiffs "claimed, in addition to property damage, that Estelle Daley suffered traumatic neurosis, emotional disturbance and nervous upset, and that Timothy Daley suffered emotional disturbance and nervousness as a result of the explosion and the attendant circumstances." *Id*. at 7. The Supreme Court allowed the plaintiffs to recover not only for their property damage, but also for any physical injury produced as a result of emotional distress proximately caused by the defendant's negligent conduct. *Id*. at 15-17. In so holding, the Court overruled the common-law "impact rule," which required that a plaintiff suffer

a physical impact in order to recover damages for negligently caused emotional distress. *Id*. at 11-12. The Court explained:

> We hold that where a definite and objective physical injury is produced as a result of emotional distress proximately caused by defendant's negligent conduct, the plaintiff in a properly pleaded and proved action may recover in damages for such physical consequences to himself notwithstanding the absence of any physical impact upon plaintiff at the time of the mental shock.
>
> * * *
>
> Further, plaintiff has the burden of proof that the physical harm or illness is the *natural result* of the fright proximately caused by defendant's conduct. In other words, men of ordinary experience and judgment must be able to conclude, after sufficient testimony has been given to enable them to form an intelligent opinion, that the physical harm complained of is a natural consequence of the alleged emotional disturbance which in turn is proximately caused by defendant's conduct. [*Id*. at 12-14 (citations omitted).]

Contrary to defendant's argument, the *Daley* Court's holding does not require that a plaintiff suffer emotional distress as a result of fear of physical impact. Nor did the Court hold that a plaintiff must witness or contemporaneously experience the underlying wrong. Rather, all that is required under *Daley* is that a plaintiff's physical injury be a natural result of emotional distress proximately caused by the defendant's negligence.

Defendant argues that even if plaintiff could recover noneconomic damages stemming from the destruction of her real property, she would be required, under *Daley*, to show that her mental anguish manifested itself physically. Defendant's reasoning blurs the line

between damages for emotional distress and mental anguish. Although emotional distress and mental anguish are related, they are distinct and separate measures of damages. *McClain*, 256 Mich App at 498, 500. Emotional distress requires a manifestation of physical injury as a result of mental distress. *Id*. at 498; *Ledbetter v Brown City Savings Bank*, 141 Mich App 692, 703; 368 NW2d 257 (1985). "Mental anguish damages, however, are not so circumscribed. A plaintiff is not limited to recovery for physical pain and anguish, but, rather, is entitled to damages for mental pain and anxiety which naturally flow from the injury, i.e., for shame, mortification, and humiliation." *Ledbetter*, 141 Mich App at 703; see also *McClain*, 256 Mich App at 497-499 (discussing at length our Supreme Court's holding in *Daley* and the difference between recovery for emotional distress without accompanying physical injury or any other independent basis for tort liability and recovery for mental anguish and other damages flowing from an underlying injury). As stated by this Court in *McClain*,

> recovery for emotional distress differs from recovery for mental anguish, and various specific nonpecuniary, personal damages beyond the ambit of emotional distress are available to a plaintiff who can establish proof of such damages. Patek, McLain, Granzotto & Stockmeyer, 1 Michigan Law of Damages and Other Remedies (ICLE), § 2.15, p 2-15 and § 2.17, p 2-16. These include: physical pain and suffering; mental anguish; fright and shock; denial of social pleasure and enjoyment; embarrassment, humiliation, or mortification; or other appropriate damages. *Id*.; see also SJI2d 50.02 and comment. [*McClain*, 256 Mich App at 498-499.]

Therefore, to the extent that plaintiff sought recovery for mental anguish, she was not required to show that it manifested itself physically.

Noneconomic damages are generally recoverable in tort claims, and we are not convinced that noneconomic damages stemming from damage to or destruction of real property must or should be excepted from that general rule.[3] We conclude that in negligence actions, a plaintiff may recover mental anguish damages naturally flowing from the damage to or destruction of real property.[4]

IV. PLAINTIFF'S EVIDENCE OF NONECONOMIC DAMAGES

Defendant next argues that even if it was permissible for plaintiff to seek mental anguish damages in this case, she failed to present sufficient evidence of her claim for damages; thus, the trial court erred by denying defendant's motions for summary disposition and JNOV.[5] We disagree.

Defendant asserts that it was entitled to summary disposition on the issue of noneconomic damages and JNOV because plaintiff "failed to sustain her burden of proving . . . that a definite and objective physical injury [was] produced as a result of emotional distress proximately caused by defendant's negligent conduct." As indicated, however, it is unnecessary to demonstrate a

[3] See, as persuasive authority, *Stevens v City of Flint*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2007 (Docket No. 272329), and *Bielat v South Macomb Disposal Auth*, unpublished opinion per curiam of the Court of Appeals, issued November 9, 2004 (Docket No. 249147).

[4] Defendant argues that it was entitled to summary disposition of plaintiff's claim for noneconomic damages under the alternative theories of trespass and nuisance. We need not address this argument, however, as plaintiff withdrew her trespass and nuisance claims before trial.

[5] Defendant cursorily stated in its brief on appeal that the trial court also erred by denying its motion for a new trial. Because defendant failed to present any legal analysis in support of its statement, we decline to address the issue.

physically manifested injury in order to recover mental anguish damages and various other "nonpecuniary, personal damages beyond the ambit of emotional distress," including "physical pain and suffering; . . . fright and shock; denial of social pleasure and enjoyment; embarrassment, humiliation, or mortification; or other appropriate damages." *McClain*, 256 Mich App at 498-499; see also *Ledbetter*, 141 Mich App at 703. In order for a plaintiff to recover mental anguish damages, those damages must "naturally flow from the injury," *Ledbetter*, 141 Mich App at 703, in this case, the destruction of plaintiff's real property. Mental anguish encompasses, among other things, "shame, mortification, mental pain and anxiety, annoyance, discomfiture, and humiliation." *McClain*, 256 Mich App at 503.

In its denial of defendant's motion for summary disposition on the issue of noneconomic damages, the trial court specifically stated that plaintiff was permitted to seek damages for mental anguish. The court also made the general statement that plaintiff could "seek to recover non-economic damages as typically allowed in connection with [a] claim for negligence." Our review of a trial court's decision on a motion for summary disposition is limited to the evidence that had been presented to the court at the time the motion was decided. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475-476; 776 NW2d 398 (2009). At the time of her motion, plaintiff presented the court with deposition testimony in which she testified that she was emotionally attached to her home and the land on which it was built; she had intended to live in the home indefinitely; and she sought treatment from her doctor after her basement was filled with fuel oil. Plaintiff initially visited her doctor because whenever she talked about the incident, she cried and became upset; her decision-making was affected both at home and at work;

she had difficulty sleeping; and she had trouble focusing. Plaintiff's doctor prescribed an antidepressant medication, which plaintiff took for approximately four months. At her deposition, plaintiff presented the records from her doctor's visit, which stated: "The patient is anxious, fearful, [and] in depressed moods . . . ." Considering this evidence, the trial court did not err by determining that a genuine issue of material fact existed in regard to plaintiff's claim for noneconomic damages. See *USA Cash #1*, 285 Mich App at 266 (stating that summary disposition under MCR 2.116(C)(10) is appropriate "only when the evidence fails to establish a genuine issue regarding any material fact"). Plaintiff presented evidence that as a result of the destruction of her home, she suffered mental anguish, specifically mental pain and anxiety, and discomfiture, i.e., disconcertion, frustration of hopes or plans. See *McClain*, 256 Mich App at 503; *Random House Webster's College Dictionary* (2005), p 352 (defining "discomfiture"). She also presented evidence of fright, shock, and denial of the enjoyment of her property. See *McClain*, 256 Mich App at 498-499.

Additionally, we find that the trial court did not err by denying defendant's motion for JNOV. Viewing the evidence presented at trial in the light most favorable to plaintiff, there was sufficient evidence of noneconomic damages to present the issue to the jury. See *Heaton v Benton Constr Co*, 286 Mich App 528, 532; 780 NW2d 618 (2009) (stating that JNOV should be granted only when there is insufficient evidence to create an issue for the jury); *Livonia Bldg Materials*, 276 Mich App at 517-518 (stating that in reviewing a trial court's decision on a motion for JNOV, this Court must review the evidence in the light most favorable to the nonmoving party to determine whether a question of fact existed). Before the presentation of proofs at trial, the trial court

ruled that plaintiff was entitled to seek noneconomic damages for mental anguish, fright, shock, denial of social pleasures or enjoyments, and any embarrassment she suffered as a result of defendant's negligence. During direct examination of plaintiff, the following exchange occurred:

> *Q.* Becky, when you witnessed this happening at the time, what were you feeling emotionally?
>
> *A.* I think mostly it was the fact that it was gone, that there just wasn't any coming back at this point, you know, to your house. The home I brought my kids to is gone; all of the hard work was for naught, and I really just didn't know what I was going to do at that point.
>
> *Q.* Were you still living at your parents' home?
>
> *A.* Yes; yes, I was.
>
> *Q.* Did it become necessary for you to seek the help of your doctor?
>
> *A.* I did; I did, yes.
>
> *Q.* Tell us about that, please.
>
> *A.* Fairly shortly after it happened, I--obviously, you are very upset and everything, but it was--it was just hard to sleep. I was having trouble focusing on, you know, at work and at home, and I knew I needed to focus as much as I could, because I knew I was going to have decisions to make and I was just having a hard time with all of it.
>
> *Q.* Who did you see?
>
> *A.* I went to my doctor.
>
> * * *
>
> *Q.* Okay. And when you met with her, did you share with her the troubles you were having?
>
> *A.* I did, I did.
>
> *Q.* And did she counsel you?

A. Well, she--yes, she did. She recommended--and she recommended a medication that might help me kind of--an anti-depressant to help maybe get through the rough times.

Q. She put you on Paxil, did she not?

A. She did.

Q. And did you have refills for that, as well?

A. I did, I did. There was I think two; there was two initially, and then when I went back with her, maybe two months later, I had a regular physical, and we talked about it again, and I was given a couple of more refills.

* * *

Q. How did that work out?

A. Well, first of all, it's rather embarrassing to be 50-some years old and have to move back in with Mom and Dad.

My parents are collectors of certain antiques, and it's very crowded; it's very crowded. The extra bedroom had--the extra bedroom I was using had like six china cabinets, a dresser, and I don't know, a couple of sewing machines in it and it was just--it was too close; it wasn't mine; it wasn't my home. I had been on my own for 30-some years. It just wasn't mine.

* * *

Q. The new house, if you will, is it the same as the old home you had?

A. No.

Q. Why not?

A. I guess it just doesn't have the personality to it. It doesn't have your kids' memories to it. It doesn't have the appreciation of what you go through and do. So much of it seems to have a different type of a quality, characteristics, value to it. It's just more of a home when you do it all yourself. It just was home.

Plaintiff also presented the same medical records she had presented at her deposition, which indicated that she had been anxious, fearful, and sufferied depressed moods. At the close of proofs, the court instructed the jury, in accordance with SJI2d 50.02, that it could award plaintiff "non-economic damages, for things such as mental anguish and fright and shock, and denial of social pleasures and enjoyment in the use of the former home and embarrassment or humiliation." After the jury returned its verdict in favor of plaintiff, defendant moved for JNOV, which the court denied. The evidence plaintiff presented at trial—specifically her testimony that she felt a great sense of personal loss after the destruction of her home; that she was embarrassed about being forced to move into her parents' house as an adult; that she suffered from anxiety, sleeplessness, and inability to concentrate because of the stress of the situation; and that she took an antidepressant over the course of several months—was sufficient to submit the issue of noneconomic damages to the jury.

V. DEFENDANT'S MOTION FOR REMITTITUR

Defendant finally argues that the trial court abused its discretion by denying its motion for remittitur. Again, we disagree.

Remittitur is provided for under MCR 2.611(E)(1), which states:

> If the court finds that the only error in the trial is the inadequacy or excessiveness of the verdict, it may deny a motion for new trial on condition that within 14 days the nonmoving party consent in writing to the entry of judgment in an amount found by the court to be the lowest (if the verdict was inadequate) or highest (if the verdict was excessive) amount the evidence will support.

In determining whether remittitur is appropriate, a trial court must view the evidence in the light most favorable to the nonmoving party and decide whether the jury award was supported by the evidence. *Taylor v Kent Radiology, PC*, 286 Mich App 490, 522; 780 NW2d 900 (2009). The trial court's determination must be based on objective criteria relating to the actual conduct of the trial or the evidence presented. *Palenkas v Beaumont Hosp*, 432 Mich 527, 532; 443 NW2d 354 (1989). Such objective criteria include (1) whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact, (2) whether it was within the limits of what reasonable minds would deem to be just compensation for the injury inflicted, and (3) whether the amount actually awarded is comparable to other awards in similar cases. *Diamond v Witherspoon*, 265 Mich App 673, 694; 696 NW2d 770 (2005). As noted, the trial court is in the best position to evaluate the credibility of the witnesses and make an informed decision on the issue of remittitur, having witnessed the testimony, evidence, and the jury's reactions. *Unibar Maintenance Serv*, 283 Mich App at 629-630. Therefore, we must give the trial court's decision deference. *Id*.

Defendant argues that the amount of noneconomic damages awarded plaintiff did not fall within the limits of what reasonable minds would deem just compensation for the mental anguish she suffered and, therefore, that the verdict must have been the product of sympathy. But defendant has not alleged that there was misconduct at trial, that the jury was improperly instructed, or that the jury allowed sympathy to sway its decision. The trial court instructed the jury that economic damages were not at issue and that in considering the issue of noneconomic damages, its decision must not be influenced by sympathy, bias, or prejudice. Juries

are presumed to understand and follow their instructions. *Dep't of Transp v Haggerty Corridor Partners Ltd Partnership*, 473 Mich 124, 178-179; 700 NW2d 380 (2005) (MARKMAN, J., dissenting). Further, the trial court was in the best position to observe the jury's reaction to plaintiff's testimony and the other evidence presented. See *Unibar Maintenance Serv*, 283 Mich App at 629-630.

Defendant attempts to minimize the emotional damage suffered by plaintiff, stating that the only evidence she presented in support of her claim for noneconomic damages was her own "testimony, without elaboration, that she was 'upset' and 'embarrassed' as a result of the destruction of her home and that her family doctor prescribed an antidepressant for 'possible' depression that had apparently resolved a month later." Contrary to defendant's assertion, however, plaintiff described in detail how she suffered emotionally and mentally after losing her home. She lost the home that she had helped to build, where she made memories with her children, and where she intended to continue living indefinitely. As a result of that loss and the stress of relocating, she suffered embarrassment while living in her parents' house, sleeplessness, and inability to focus, as well as fear, anxiety, and depressed moods, for which she took an antidepressant medication over the course of several months.

It is difficult to determine what amount of damages would justly compensate plaintiff for her suffering. In *Paulitch v Detroit Edison Co*, 208 Mich App 656, 657, 659; 528 NW2d 200 (1995), this Court affirmed a $359,000 jury verdict in an age-discrimination case. "Because evidence of emotional damage was presented at trial, and the award was comparable to awards in similar cases, the trial court properly deferred to the

jury and denied defendant's motions" for remittitur or a new trial. *Id*. at 659. The evidence of the "plaintiff's emotional damages, include[ed] his testimony that his relationships with his wife and friends suffered" as a result of the discrimination. *Id*. In *Howard v Canteen Corp*, 192 Mich App 427, 429, 435-436; 481 NW2d 718 (1991), overruled on other grounds by *Rafferty v Markovitz*, 461 Mich 265; 602 NW2d 367 (1999), this Court affirmed the trial court's denial of remittitur of a $200,000 award for mental anguish, emotional distress, and humiliation in a gender-based-discrimination case. In affirming the trial court, this Court explained:

> The testimony indicated that defendants' actions left plaintiff sad and depressed and that she is still dealing with her problems today. She is behind in paying her bills and suffers from a medical problem that she believes stems from her work situation. The evidence to support these results is found in the harassment and discrimination inflicted upon her for a lengthy period of time, despite her complaints to [a manager]. Under these circumstances, we do not believe the award was excessive, nor do we believe, giving deference to the trial court that personally observed the witnesses and heard the testimony, that the trial court abused its discretion in denying defendants' motion for remittitur. [*Id.* at 436 (citations omitted).]

Admittedly, both *Howard* and *Paulitch* involved discrimination actions and are not completely analogous to this case, which is a negligence action involving property damage. Defendant points to a Louisiana Supreme Court case, *Williams v City of Baton Rouge*, 731 So 2d 240, 252 (La, 1999), in which the court "reviewed cases awarding damages for mental anguish when property has been damaged" and found that the awards ranged "from $35,000 to $100." The highest amount of damages the court awarded to an individual plaintiff in that case was $35,000. *Id*. We note, however, that in *Will-*

iams, none of the plaintiffs' homes had been damaged or destroyed as is the case here. See *id*. at 243, 251-252. Moreover, the disparity between $35,000 and $100 only demonstrates that determining a just amount of mental anguish damages is a fact-intensive analysis, which inevitably varies from case to case.

Although it may be difficult to determine what amount of noneconomic damages would justly compensate plaintiff, and an award of $100,000 may seem high in comparison to some other awards in cases involving property damage, "[t]he law does not provide any exact standard or yardstick for measuring damages of this type." *Howard v Burton*, 338 Mich 178, 186; 61 NW2d 77 (1953). Therefore, the "determination must necessarily be left to the good sense and sound judgment of the jury in their view of the evidence." *Sebring v Mawby*, 251 Mich 628, 629; 232 NW 194 (1930). Given the evidence presented by plaintiff and the lack of support for defendant's claim that the jury was improperly influenced by sympathy, we cannot conclude that the trial court abused its discretion by denying defendant's motion for remittitur. We give deference to the trial court's decision.

Affirmed.

FORT HOOD and STEPHENS, JJ., concurred with BECKERING, P.J.

PEOPLE v COHEN

Docket No. 298076. Submitted July 12, 2011, at Detroit. Decided July 19, 2011. Approved for publication August 30, 2011, at 9:00 a.m.

Clarence H. Cohen, charged with possession with intent to deliver less than 50 grams of cocaine, moved to quash the information in the Oakland Circuit Court. Officers from the Pontiac Police Department had arrested Cohen after they observed cocaine paraphernalia sitting between him and another man in a vehicle in which Cohen was a passenger. When Cohen was subsequently placed into a jail holding cell, he unsuccessfully attempted to discard a small plastic bag containing crack cocaine. Cohen was initially charged with possession with intent to deliver less than 50 grams of cocaine in connection with the cocaine that he had attempted to discard, and with possession of less than 25 grams of cocaine in connection with cocaine residue found on the drug paraphernalia. Following the preliminary examination, the 50th District Court, Ronda M. Fowlkes Gross, J., dismissed the simple possession charge, concluding that there was insufficient evidence that the drug paraphernalia belonged to Cohen. Cohen then moved in the circuit court to quash the information, arguing in light of the district court's decision to dismiss the simple possession charge, that the police had lacked probable cause to arrest him and, therefore, the evidence discovered as a result of that arrest—the small bag containing crack cocaine—had to be suppressed. The circuit court, Daniel P. O'Brien, J., agreed that given the absence of probable cause to bind Cohen over on the simple possession charge, the police had lacked probable cause for his arrest and that the evidence discovered as a result of the arrest had to be suppressed. Accordingly, the circuit court dismissed the charge of possession with intent to deliver cocaine. The prosecution appealed.

The Court of Appeals *held*:

1. The probable cause required to bind over a defendant at a preliminary examination is different from the probable cause required to arrest a defendant. Probable cause to arrest exists when the facts and circumstances within an officer's knowledge and of which he or she has reasonably trustworthy information are

sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been or is being committed; this is a practical, nontechnical conception judged from the totality of the circumstances before the arresting officers. The purpose of a preliminary examination is to determine whether there is probable cause to believe that a crime was committed and that the defendant committed it. To meet his or her burden of proof at the preliminary examination, the prosecutor must present enough evidence on each element of the charged offense to lead a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt. The arrest standard considers only the probability that the person committed the crime as established at the time of the arrest, while the preliminary hearing considers both the probability at the time of the preliminary hearing that the person committed the crime and the probability that the government will be able to establish guilt at trial.

2. Possession of a controlled substance is dominion or right of control over the drug with knowledge of its presence and character. In this case, the drug paraphernalia was in clear view and reach of both occupants of the vehicle, and thus the arresting officers had probable cause to believe that the occupants jointly possessed the drug paraphernalia, justifying Cohen's arrest and rendering admissible the evidence that was discovered after Cohen's arrest. The circuit court erred by suppressing evidence gathered following a constitutionally valid arrest solely because the district court concluded that it lacked probable cause to bind Cohen over for trial on the charge for which he was originally arrested.

Reversed and remanded.

CRIMINAL LAW — PROBABLE CAUSE TO ARREST — PROBABLE CAUSE TO BIND OVER.

The probable cause required to bind over a defendant at a preliminary examination is different from the probable cause required to arrest a defendant; the arrest standard considers only the probability that the person committed the crime as established at the time of the arrest, while the preliminary hearing considers both that probability at the time of the preliminary hearing and the probability that the government will be able to establish guilt at trial.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, and *John S. Pallas* and *Matthew A. Fillmore*, Assistant Prosecuting Attorneys, for the people.

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

PER CURIAM. The police arrested defendant after observing cocaine paraphernalia resting near him on the center console of a vehicle in which he was a passenger. At the police station, defendant unsuccessfully attempted to discard a small plastic bag containing a large rock of crack cocaine. The prosecutor charged defendant with possession of both the cocaine residue coating the drug paraphernalia and the later-discovered rock cocaine. At the preliminary examination, the district court dismissed the residue-related charge, finding insufficient evidence linking defendant to the paraphernalia. In light of that ruling, the circuit court invalidated defendant's arrest, concluding that the police lacked probable cause to take defendant into custody. Invoking the "fruit of the poisonous tree" doctrine, the circuit court then suppressed the evidence that defendant possessed the rock cocaine. Because distinctly different probable-cause standards distinguish the arrest and bind-over decisions, we reverse and remand.

I. FACTS AND PROCEDURAL HISTORY

On the night in question, defendant rode as a passenger in a vehicle driven by a man named Lee Pondexter. The police stopped the vehicle because the license plate was registered to a different vehicle. In plain sight, an officer observed a clear plastic measuring cup on the center console between defendant and Pondexter containing a digital scale and a brown bag. White residue on the cup and scale field-tested positive for cocaine. Defendant and Pondexter were arrested for joint constructive possession of the drug paraphernalia and residue and were transported to the police station.

At the station, an officer placed defendant in a holding cell. As defendant stepped into the cell, he removed a small plastic bag containing a rock of suspected cocaine from his person and threw it into the toilet. The officer stopped defendant from flushing the toilet and recovered the bag. The rock weighed just over 25 grams and field-tested positive for cocaine.

The prosecutor charged defendant with possession with intent to deliver less than 50 grams of cocaine in connection with the rock he threw into the jail-cell toilet, MCL 333.7401(2)(a)(*iv*), and possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(*v*), in connection with the cocaine residue on the scale. At the preliminary examination, the district court bound defendant over for trial on the possession with intent to deliver charge. The district court dismissed the simple possession charge because it was not convinced that the measuring cup and its contents belonged to defendant, and thought it was more likely that they belonged to Pondexter.

Once in circuit court, defendant filed a motion to quash. Defendant did not challenge the district court's decision to bind him over on the charge of possession with intent to deliver. Rather, he contended that the district court's reason for dismissing the simple possession charge established that the police lacked probable cause to arrest him. Defendant argued that because the arrest was illegal, the evidence discovered as a result of that arrest had to be suppressed. The circuit court agreed that given the absence of probable cause to bind defendant over on the simple possession charge, the police had lacked probable cause for his arrest. Accordingly, the circuit court dismissed the remaining charge of possession with intent to deliver cocaine.

II. ANALYSIS OF THE ISSUE

In relation to a circuit court motion to quash the information, we generally review for an abuse of discretion the district court's initial decision to bind the defendant over for trial. *People v Perkins*, 468 Mich 448, 452; 662 NW2d 727 (2003). In this case, however, defendant actually sought the suppression of evidence. This Court reviews a trial court's factual findings at a suppression hearing for clear error, and the court's ultimate ruling de novo. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002). The application of the exclusionary rule is a question of law that is reviewed de novo. *People v Custer*, 465 Mich 319, 326; 630 NW2d 870 (2001) (opinion by MARKMAN, J.).

We disagree with the circuit court's conclusion that probable cause to support an arrest is equivalent to probable cause to bind a defendant over for trial. "The purpose of a preliminary examination is to determine whether there is probable cause to believe that a crime was committed and whether there is probable cause to believe that the defendant committed it." *Perkins*, 468 Mich at 452, citing MCR 6.110. To meet its burden of proof at the preliminary examination, the prosecution must present "enough evidence on each element of the charged offense to lead a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of [the defendant's] guilt." *Perkins*, 468 Mich at 452 (quotation marks and citations omitted) (alteration in original).

Probable cause to effectuate an arrest is gauged differently. A police officer may arrest a person without a warrant if he or she has reasonable cause to believe that a felony has been committed and that the particular person committed it. MCL 764.15(1)(d). "In order to lawfully arrest a person without a warrant, a police

officer must possess information demonstrating probable cause to believe that an offense has occurred and that the defendant committed it." *People v Reese*, 281 Mich App 290, 294-295; 761 NW2d 405 (2008) (quotation marks and citation omitted). "Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). This probable cause standard "is a practical, nontechnical conception" judged from the totality of the circumstances before the arresting officers. *Maryland v Pringle*, 540 US 366, 370; 124 S Ct 795; 157 L Ed 2d 769 (2003) (quotation marks and citations omitted).

Professors Wayne LaFave and Jerold Israel have explained the difference between probable cause for an arrest and a bindover as follows:

> The use of the Fourth Amendment arrest standard in describing probable cause at a preliminary hearing indicates only the requisite degree of probability. . . . The arrest standard, directed primarily at police, is expressed in terms of "the factual and practical distinctions of everyday life in which reasonable and prudent men, not legal technicians act," while the charging decision being reviewed . . . is . . . the responsibility of "legal technicians," the attorneys in the prosecutor's office. Under the arrest standard, considerable uncertainty must be tolerated on occasion because of the need to allow the police to take affirmative action in ambiguous circumstances, but no comparable exigencies are presented as the charging decision is made. Thus, a police officer may make an arrest where the circumstances suggest that the property possessed by the suspect may have been stolen, but the prosecutor ordinarily has no justification for proceeding to charge without first determining that a theft actually did occur.

> . . . [I]t has been stated both that the probable cause required for a bindover is "greater" than that required for an arrest and that it imposes a different standard of proof. . . . [T]he arrest standard looks only to the probability that the person committed the crime as established at the time of the arrest, while the preliminary hearing looks both to that probability at the time of the preliminary hearing *and* to the probability that the government will be able to establish guilt at trial. [LaFave & Israel, Criminal Procedure (2d ed, 1992), § 14.3, pp 668-669 (citations omitted).]

As stated by the Seventh Circuit Court of Appeals, "[B]ecause the probable cause determination after a preliminary hearing is made during a legal proceeding incorporating all the safeguards of evidentiary rulings as in a trial, it is an entirely separate legal proceeding distinct from the probable cause judgment to arrest made by the police officer in the field[.]" *Williams v Kobel*, 789 F2d 463, 468 (CA 7, 1986).

In this case, probable cause supported the officers' decision to arrest defendant in light of the discovery of the digital scale and cocaine residue inside the vehicle. Generally, possession of any amount of cocaine is a felony. MCL 333.7403(2)(a). "Possession is a term that signifies dominion or right of control over the drug with knowledge of its presence and character." *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000) (quotation marks and citation omitted). The defendant need not own or have actual physical possession of the substance to be found guilty of possession; constructive possession is sufficient. *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992). Constructive possession, which may be sole or joint, is the right to exercise control over the drug coupled with knowledge of its presence. *Id*. at 520. "Constructive possession exists when the totality of the

circumstances indicates a sufficient nexus between the defendant and the controlled substance." *People v Meshell*, 265 Mich App 616, 622; 696 NW2d 754 (2005). Close proximity to contraband in plain view is evidence of possession. *Wolfe*, 440 Mich at 521.

The arresting officers found trace amounts of cocaine on drug paraphernalia in a vehicle occupied only by defendant and Pondexter. The paraphernalia lay on the center console between defendant and Pondexter, in clear view and reach of both. From a practical standpoint, this evidence gave the arresting officers probable cause to believe that defendant and Pondexter jointly possessed the paraphernalia. Thus, sufficient information justified defendant's arrest, rendering admissible the evidence discovered thereafter. We express no opinion regarding whether the district court correctly dismissed the simple possession charge for lack of probable cause to proceed to trial. In any event, the circuit court erred by suppressing evidence gathered following a constitutionally valid arrest solely because the district court concluded that it lacked probable cause to bind defendant over for trial on the charge for which he was originally arrested.

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

TALBOT, P.J., and HOEKSTRA and GLEICHER, JJ., concurred.

PEOPLE v REED

Docket No. 296686. Submitted May 12, 2011, at Lansing. Decided August 30, 2011, at 9:05 a.m.

Brian B. Reed was charged in the Montmorency Circuit Court with manufacturing less than 5 kilograms or less than 20 plants of marijuana, MCL 333.7401(d)(*iii*). Reed unsuccessfully approached two separate physicians at his regular health clinic about registering to use marijuana to reduce his chronic back pain as allowed by the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. However, marijuana was discovered growing at Reed's residence on August 25, 2009, by the Huron Undercover Narcotics Team, after which he obtained a physician's statement certifying his marijuana use for a medical purpose on September 16, 2009, and his registry identification card from the Department of Community Health on October 6, 2009. Reed was arrested on October 16, 2009. He moved for dismissal of the charge, asserting the affirmative defense provided by § 8(a) of the MMMA, MCL 333.26428(a), and arguing that under § 4(a) of the act, MCL 333.26424(a), he was immune from prosecution. After a hearing, the court, Michael G. Mack, J., denied the motion. Reed appealed by leave granted.

The Court of Appeals *held*:

1. A person facing prosecution for violating Michigan's controlled substances laws may assert an affirmative defense under MCL 333.26428(a) if a physician has stated that, in the physician's professional opinion, the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition. The physician's statement must have been made before the person's arrest and before the purportedly illegal conduct. Reed was barred from asserting the § 8(a) affirmative defense at trial because it was undisputed that he did not obtain the required physician's statement until after the police discovered his marijuana.

2. MCL 333.26424(a) provides that certain persons are immune from prosecution for violating Michigan's controlled substances laws if using marijuana for medical purposes. The person must have been issued and possess a registry identification card

before the purportedly illegal conduct is committed in order for the person to be immune from arrest, prosecution, or penalty under § 4(a). Reed did not have a registry identification card at the time the alleged crime occurred and could therefore not rely on MCL 333.26424 to claim immunity from prosecution.

Affirmed and remanded for further proceedings.

1. CONTROLLED SUBSTANCES — MARIJUANA — MEDICAL MARIJUANA — CRIMINAL DEFENSES — AFFIRMATIVE DEFENSE.

A person facing prosecution for violating Michigan's controlled substances laws may assert an affirmative defense under MCL 333.26428(a) of the Michigan Medical Marihuana Act if a physician has stated that, in the physician's professional opinion, the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; to successfully assert this affirmative defense, the physician's statement must have been made before the person's arrest and before the illegal conduct.

2. CONTROLLED SUBSTANCES — MARIJUANA — MEDICAL MARIJUANA — CRIMINAL DEFENSES — IMMUNITY FROM PROSECUTION.

A person facing prosecution for violating Michigan's controlled substances laws for using marijuana for medical purposes may assert immunity from prosecution under MCL 333.26424 of the Michigan Medical Marihuana Act, but the person must have been issued and possess a registry identification card before the illegal conduct is committed to be immune from arrest, prosecution, or penalty.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Terrie J. Case*, Prosecuting Attorney, and *Melissa M. Goodrich*, Assistant Prosecuting Attorney, for the people.

Bolser and Kundinger, PLC (by *Benjamin T. Bolser*), for defendant.

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

METER, J. Defendant appeals by leave granted the denial of his motion to dismiss a charge of manufactur-

ing less than 5 kilograms or less than 20 plants of marijuana,[1] MCL 333.7401(2)(d)(*iii*). We affirm.

This case requires us, to consider in part, the applicability of the affirmative-defense portion of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. See MCL 333.26428(a). Defendant's marijuana plants were discovered by the police before he received physician authorization to possess them, but he was not arrested until after he had obtained the physician authorization, as well as a registry identification card from the Michigan Department of Community Health (MDCH). See MCL 333.26424. We held in *People v Kolanek*, 291 Mich App 227, 235-236; 804 NW2d 870 (2011), that a physician's statement must be obtained before the defendant's arrest in order to establish the affirmative defense set forth in § 8 of the MMMA, MCL 333.26428. We now extend that ruling and hold that, the physician's statement must also occur before the commission of the purported offense in order to establish the affirmative defense. We further hold that defendant has no immunity from prosecution under MCL 333.26424 because defendant did not possess a registry identification card at the time of the purported offense.

The facts in this case are undisputed. Defendant suffers from chronic back pain due to a degenerative disk disease for which he underwent surgery more than a decade ago. After the enactment of the MMMA, defendant began to inquire about the possibility of becoming registered to use marijuana to help relieve his pain. He began at Thunder Bay Community Health Service, the clinic that he generally attended for treatment of his condition. However, two separate doctors

[1] Although the statutory provisions at issue refer to "marihuana," this Court uses the more common spelling "marijuana" in its opinions except in quotations.

there told him that they would not be issuing certifications for medical use of marijuana because they received federal funding. Defendant then searched for another place to receive certification but had not formally consulted with another doctor before his marijuana was discovered.

On August 25, 2009, the Huron Undercover Narcotics Team (HUNT), during an aerial surveillance, spotted six marijuana plants growing at defendant's residence. At that time, defendant had not received a physician's statement certifying his marijuana use for a medical purpose. See MCL 333.26428(a)(1). On September 16, 2009, defendant received a doctor's certification to use marijuana medically, and he received his registry certification card from MDCH on October 6, 2009. Ten days later, on October 16, he was arrested and charged with the manufacture of marijuana.

Defendant filed a motion to dismiss the charge under MCL 333.26428(b), arguing that the trial court was obligated to dismiss the case because defendant satisfied all three elements of the affirmative defense. Additionally, defendant argued that he should have been immune from arrest under MCL 333.26424(a). The trial court denied the motion and we granted defendant's application for leave to appeal.

This case involves statutory interpretation, which we review de novo. *People v Redden*, 290 Mich App 65, 76; 799 NW2d 184 (2010). "Generally, the primary objective in construing a statute is to ascertain and give effect to the Legislature's intent." *Id*. The MMMA was enacted by an initiative adopted by the voters. "The words of an initiative law are given their ordinary and customary meaning as would have been understood by the voters." *Welch Foods, Inc v Attorney General*, 213 Mich App 459, 461; 540 NW2d 693 (1995). Moreover, "[t]his Court

must avoid a construction that would render any part of a statute surplusage or nugatory, and '[w]e must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme.' " *Redden*, 290 Mich App at 76-77, quoting *People v Williams*, 268 Mich App 416, 425; 707 NW2d 624 (2005).

Defendant first argues that he may use MCL 333.26428(a) as an affirmative defense to the charge of manufacturing marijuana. MCL 333.26428(a) states:

> Except as provided in [MCL 333.26427], a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana, and this defense shall be presumed valid where the evidence shows that:
>
> (1) A physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition;
>
> (2) The patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; and
>
> (3) The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana to treat or alleviate the patient's serious or

> debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.[2]

Defendant argues that under our recent decision in *Kolanek*, he could satisfy the requirement that "[a] physician *has stated* that . . . the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana," see MCL 333.26428(a)(1), by obtaining this statement at any time before arrest. (Emphasis added.)

In *Kolanek*, 291 Mich App at 229, the defendant was arrested after a search of his vehicle revealed eight marijuana cigarettes. He filed a motion to dismiss under MCL 333.26428(b), claiming the § 8 affirmative defense because he used the marijuana to treat the pain associated with his Lyme disease. *Id.* at 231-232. The defendant's doctor had authorized the defendant's marijuana use after his arrest and testified at trial that the amount the defendant had in his possession was reasonable. *Id*. at 230. In affirming the trial court's denial of the defendant's motion to dismiss, this Court held that "the language in MCL 333.26428(a)(1), '[a] physician has stated,' requires that a physician's statement of the medical benefit of marijuana be made prior to arrest." *Id.* at 230. Defendant argues that this language validates, for purposes of the § 8 affirmative defense, his doctor's approval, which occurred on September 16, 2009, one month before his arrest. We disagree.

In *Kolanek*, the defendant was charged the day after his marijuana was seized. *Id*. at 229. It appears that the seizure and the arrest were simultaneous; indeed, the *Kolanek* Court gave no indication that it was considering a situation in which the crime and arrest were not

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[2] Defendant's compliance with MCL 333.26428(a)(2) and (3) are not at issue here.

contemporaneous. Accordingly, we cannot place substantial emphasis on the *Kolanek* Court's use of the term "arrest" in describing its holding. Moreover, the *Kolanek* Court stated: "[I]t is reasonable to assume that the affirmative defense created in § 8 was intended to protect those who actually had a medical basis for marijuana use recognized by a physician *before the use began* and was not intended to afford defendants an *after-the-fact exemption for otherwise illegal activities*." *Id*. at 238 (emphasis added). The Court, in making this statement, was clearly focusing on a defendant's purportedly illegal *conduct*, not on the defendant's arrest. We note that statutes should be construed so as to avoid absurd results. *McAuley v Gen Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998), abrogated in part on other grounds by *Rafferty v Markovitz*, 461 Mich 265, 273 n 6; 602 NW2d 367 (1999). It would be absurd if it were possible to assert the § 8 affirmative defense by obtaining a physician's statement after the crime had been committed but before an arrest has been made.[3] The law would provide less incentive to obtain a qualifying physician's statement if it were construed in the manner defendant suggests. This interpretation would also place too much emphasis on the police decision to arrest a suspect rather than the illegal conduct undertaken by that suspect.

The Oregon Court of Appeals, interpreting that state's affirmative defense contained in Or Rev Stat 475.319(1), agrees. That court stated: "[W]e conclude that, in order for defendant to have availed himself of the 'medical marijuana' affirmative defense in [Or Rev

[3] In effect, defendant's argument would have us apply the law in a "reverse ex post facto" manner, allowing one who has committed a crime to avoid punishment by taking action to obtain a physician's statement after the illegality of his actions has been discovered.

Stat] 475.319(1), his attending physician's advice regarding the use of medical marijuana had to occur *before the incident for which he was arrested*." *Oregon v Root*, 202 Or App 491, 497; 123 P3d 281, 284 (2005) (emphasis added). We note that *Kolanek* also relied on *Root*. See *Kolanek*, 291 Mich App at 238.

In light of these considerations, we hold that for a § 8 affirmative defense to apply, the physician's statement must occur before the purportedly illegal conduct.

Generally, a defendant is not barred from asserting a § 8 defense at trial simply because his pretrial motion to dismiss was denied. See the concurring opinion of Judge M. J. KELLY in *People v Anderson*, 293 Mich App 33, 63; 809 NW2d 176 (2011).[4] See also *Kolanek*, 291 Mich App at 241-242 ("Because the statute does not provide that the failure to bring, or to win, a pretrial motion to dismiss deprives the defendant of the statutory defense before the fact-finder, defendant's failure to provide sufficient proofs pursuant to his motion to dismiss does not bar him from asserting the § 8 defense at trial nor from submitting additional proofs in support of the defense at that time."). However, the *Anderson* Court also held that, when there is no issue of fact to present to a jury that might establish a § 8 defense, "a trial court might be warranted in barring a defendant from presenting evidence or arguing at trial that he or she is entitled to the defense stated in § 8(a)." *Anderson*, 293 Mich App at 64-65. The relevant standard is whether, "given the undisputed evidence, no reasonable jury could find that the elements of the § 8 defense had been met." *Id*. at 65.

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[4] The majority opinion in *Anderson* stated that it adopted part II(C)(3) of Judge KELLY's concurring opinion, the portion at issue here. *Anderson*, 293 Mich App at 35.

In *Anderson*, it was undisputed that the defendant possessed more than 12 marijuana plants and that some of them were not kept in an enclosed, locked facility. *Id*. No reasonable jury could have found, given this fact and the applicable law, that the defendant was entitled to assert the § 8 defense. *Id*. Thus, the Court held that "[t]he trial court did not err when it precluded Anderson from presenting a § 8 defense at trial." *Id*. Here, it is undisputed that defendant did not obtain the required physician's statement until after his marijuana had been discovered by HUNT. No reasonable jury could find that defendant is entitled to the § 8 defense, and thus defendant is barred from asserting it at trial.

Defendant relies on § 4 of the MMMA, MCL 333.26424, to support his additional argument that he should have been immune from prosecution. The statute states, in relevant part:

> A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount. [MCL 333.26424(a).]

Defendant's argument fails because at the time of the offense he did not possess a registry identification card. The statute states that "[a] qualifying patient *who has*

been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty . . . for the medical use of marihuana in accordance with this act . . . ." MCL 333.26424(a) (emphasis added). The statute ties the *prior issuance* and possession of a registry identification card to the medical use[5] of marijuana, and much of the same reasoning that applies to the timing under § 8 applies equally to the timing regarding registry identification cards. See, e.g., *Kolanek*, 291 Mich App at 238-239; see also the prior analysis in this opinion. Defendant did not have the card at the applicable time and therefore is not immune from arrest, prosecution, or penalty.

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

OWENS, P.J., and O'CONNELL, J., concurred with METER, J.

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[5] We note that the definition of "medical use" under the MMMA includes "cultivation." MCL 333.26423(e).

HALL v STARK REAGAN, PC

Docket No. 294647. Submitted January 4, 2011, at Detroit. Decided September 13, 2011, at 9:00 a.m. Reversed in part and vacated in part, 493 Mich 903.

Patrick C. Hall and Ava Ortner brought an action in the Oakland Circuit Court against Stark Reagan, P.C., and several present and former shareholders in the law firm, alleging age discrimination. Plaintiffs served as shareholders in the firm from 2004 until their termination in 2009. Defendants moved for summary disposition, contending that the arbitration provision in the firm's shareholders' agreement barred the action and challenging plaintiffs' capacity to sue under the Civil Rights Act (CRA), MCL 37.2101 *et seq*. The court, John James McDonald, J., agreed that arbitration was required and granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(7). Plaintiffs appealed.

The Court of Appeals *held*:

1. An issue is arbitrable when (1) there is an arbitration agreement in a contract between the parties, (2) the disputed issue is on its face or arguably within the contract's arbitration clause, and (3) the dispute is not expressly exempted from arbitration by the terms of the contract. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, but the presumption of arbitrability cannot compel the arbitration of issues beyond those identified in the parties' contract. The arbitration clause at issue in this case stated that it applied to any "dispute regarding interpretation or enforcement of any of the parties' rights or obligations" under the shareholders' agreement. The agreement embodied the parties' intentions concerning the transfer, purchase, and sale of Stark Reagan stock. Thus, the arbitration language evinced an intent to commit to arbitration those claims stemming from the interpretation or enforcement of matters related to the management of corporate stock. Plaintiffs' age-discrimination claims fell outside the arbitration provision because they bore no significant relationship to the agreement, the agreement did not refer to any issues even tangentially related to the age-discrimination claims, and the agreement provided no evidence pertinent to the age-discrimination claims. Contrary to the circuit court's conclusion, Stark Reagan's law office staff

manual, which prohibited discrimination on the basis of age, did not become part of the shareholders' agreement in light of the fact that the agreement, which was entered after the office manual was created, made no mention of the office manual and contained a clause stating that the shareholders' agreement constituted the entire agreement between the parties.

2. Under MCL 37.2202(1)(a), an employer shall not discriminate against an individual with respect to employment because of age or other protected status. An employer can be held liable under the CRA for discriminatory acts against a nonemployee if it can be demonstrated that the employer affected or controlled a term, condition, or privilege of employment. Defendants indisputably fell within the CRA's definition of "employer." And plaintiffs asserted an adverse employment action and presented evidence that defendants' actions affected or controlled a term, condition, or privilege of their employment. Accordingly, contrary to defendants' assertion, even if plaintiffs could not be characterized as Stark Reagan employees, their pleadings stated a claim under the CRA.

Reversed and remanded.

K. F. KELLY, P.J., dissenting, disputed the majority's application of the relevant law to the facts of the case. The shareholders' agreement specified the procedures and requirements for the involuntary termination of a shareholder's interest in the firm and the process by which the shares could be redeemed. The agreement also stated that it was subject to and governed by Michigan law, which prohibits discrimination on the basis of age, MCL 37.2202(1)(a). Plaintiffs contested the involuntary redemption of their shares in the law firm, an act that was allegedly the result of unlawful discrimination. Plaintiffs' claims could not be maintained without reference to the shareholders' agreement and were inextricably linked with that agreement. Therefore, plaintiffs' claims were within the agreement's arbitration clause and subject to arbitration.

1. ARBITRATION — ARBITRABILITY — PRESUMPTION OF ARBITRABILITY — LIMITATION OF THE PRESUMPTION OF ARBITRABILITY.

An issue is arbitrable when (1) there is an arbitration agreement in a contract between the parties, (2) the disputed issue is on its face or arguably within the contract's arbitration clause, and (3) the dispute is not expressly exempted from arbitration by the terms of the contract; any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, but the presumption of

arbitrability cannot compel the arbitration of issues beyond those identified in the parties' contract.

2. CIVIL RIGHTS — CIVIL RIGHTS ACT — DISCRIMINATION — LIABILITY FOR DISCRIMINATION AGAINST NONEMPLOYEES.

Under the Civil Rights Act (CRA), an employer shall not discriminate against an individual with respect to employment because of age or other protected status; an employer can be held liable under the CRA for discriminatory acts against a nonemployee if it can be demonstrated that the employer affected or controlled a term, condition, or privilege of employment (MCL 37.2202[1][a]).

Law Offices of Kathleen L. Bogas, PLC (by *Kathleen L. Bogas* and *Charlotte Croson*), for Patrick C. Hall.

Pitt, McGehee, Palmer, Rivers & Golden (by *Robert W. Palmer* and *Beth Rivers*) for Ava Ortner.

Kienbaum Opperwall Hardy & Pelton, P.L.C. (by *Thomas G. Kienbaum* and *Jay C. Boger*), for Stark Reagan, P.C., Peter L. Arvant, Kenneth M. Boyer, William D. Girardot, Christopher E. LeVasseur, R. Keith Stark, and Michael H. Whiting.

Ahern Fleury (by *Joseph A. Ahern*) for Joseph A. Ahern and Jeffrey J. Fleury.

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

GLEICHER, J. The individual parties to this appeal are present and former shareholders in a law firm, defendant Stark Reagan, P.C. Plaintiffs Patrick C. Hall and Ava Ortner filed a complaint against Stark Reagan and the individual defendants, asserting that age discrimination motivated defendants' decision to terminate Hall's and Ortner's shareholder status. The circuit court granted defendants summary disposition pursuant to MCR 2.116(C)(7) and ordered the case to proceed to arbitration. We reverse and remand for further proceedings.

I. UNDERLYING FACTS AND PROCEEDINGS

In 2003, Stark Reagan hired Hall and Ortner as associate attorneys. On January 1, 2004, they became shareholders in the firm, joining seven of the eight attorneys named as individual defendants in this case.[1] Upon their election as shareholders in the firm, Hall and Ortner signed a shareholders' agreement that included an arbitration clause.

At a January 8, 2009 shareholders' meeting, defendant R. Keith Stark proposed the termination of Hall's and Ortner's interests in Stark Reagan. According to affidavits submitted by Hall and Ortner, Stark explained that their terminations were needed "to change the 'demographics' of the firm." The affidavits attested that defendant Joseph Ahern expressed that "the demographics of the firm was [sic] a problem because older attorneys lose their client bases," and that two younger attorneys " 'had more potential' and their practices would be going up while ours would be going down." At the request of Hall and Ortner, the meeting adjourned until the next week. During the continued meeting on January 12, 2009, Ortner and Hall announced that the termination of their employment "constituted illegal age discrimination," and advised the other shareholders that they had retained legal counsel. On February 13, 2009, defendants Ahern and Jeffrey Fleury resigned as shareholders of Stark Reagan, effective immediately. The remaining shareholders voted to redeem the stock held by Hall and Ortner, terminating their employment effective March 1, 2009.

[1] In 2005, attorney Daniel E. Chapman was also a shareholder in Stark Reagan. He is not a defendant in this action. Defendant Jeffrey J. Fleury became a shareholder at some point after 2005.

In April 2009, Hall and Ortner filed a three-count complaint in the Oakland Circuit Court alleging that defendants violated the Civil Rights Act (CRA), MCL 37.2101 *et seq*., by discriminating against them on the basis of their ages, unlawfully retaliating against them when they retained counsel, and conspiring to violate the CRA. Defendants filed a motion for summary disposition under MCR 2.116(C)(7), contending that a binding arbitration agreement barred the lawsuit. Defendants also moved for summary disposition under MCR 2.116(C)(5), challenging the capacity of Hall and Ortner to sue under the CRA. The circuit court entered an opinion and order granting defendants' subrule (C)(7) motion, reasoning as follows:

> The Court finds that the arbitration [sic] is applicable to the case here in all respects. Michigan public policy favors arbitration to resolve disputes. *Rembert v. Ryan's Family Steak Houses, Inc*, 235 Mich.App. 118, 127-128 [596 NW2d 208] (1999). Further, the Shareholder Agreement governs disputes for the shareholders; additionally the Law Office Staff Manual can be said to have become part of the Shareholder Agreement for those who executed that Agreement.[1]
>
> As to the issue of whether Plaintiffs are eligible to bring claims under the Elliott Larsen Civil Rights Act as employees of the law firm, the Court finds that issue is also subject to the arbitration clause. . . .
>
> Accordingly, Defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) is granted and this case is ordered to arbitration. In light of this decision, the Court finds that the other issues raised by defendants are moot here and can be raised before the Arbitrator.

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[1] Although not binding on this Court, the holding in *Panepucci v Honigman Miller Schwartz & Cohen* [sic] *LLP*[,] 281 Fed App[x] 482 . . . (C.A. 6 . . . [2008]) is informative.

II. ANALYSIS

A. GOVERNING PRINCIPLES

Hall and Ortner maintain that the arbitration clause in the shareholder agreement does not apply to this dispute arising under the CRA. We review de novo a circuit court's determination that an issue is subject to arbitration. *In re Nestorovski Estate*, 283 Mich App 177, 184; 769 NW2d 720 (2009).

> A three-part test applies for ascertaining the arbitrability of a particular issue: 1) is there an arbitration agreement in a contract between the parties; 2) is the disputed issue on its face or arguably within the contract's arbitration clause; and 3) is the dispute expressly exempted from arbitration by the terms of the contract. [*Id.* at 202 (quotation marks and citation omitted).]

"Arbitration is a matter of contract . . . ." *City of Ferndale v Florence Cement Co*, 269 Mich App 452, 460; 712 NW2d 522 (2006). Under the federal arbitration act (FAA), 9 USC 1 *et seq*., courts considering whether the parties agreed to arbitrate a certain matter "should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc v Kaplan*, 514 US 938, 944; 115 S Ct 1920; 131 L Ed 2d 985 (1995).[2] The United States Supreme Court recently emphasized that although federal policy favors arbitration, "we have never held that this policy overrides the principle that a court may submit to arbitration only those disputes . . . that the parties have agreed to submit. Nor have we held that courts may use policy considerations as a substitute for party agreement." *Granite Rock Co v Int'l Brotherhood of Teamsters*, 561 US ___, ___; 130 S Ct 2847, 2859; 177 L Ed 2d 567 (2010)

[2] The parties agree that the FAA applies in this case because Stark Reagan attorneys practice law outside Michigan.

(quotation marks and citations omitted). "[W]hen parties have freely established their mutual rights and obligations through the formation of unambiguous contracts, the law requires this Court to enforce the terms and conditions contained in such contracts, if the contract is not contrary to public policy." *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 213; 737 NW2d 670 (2007) (quotation marks and citation omitted). " 'The cardinal rule in the interpretation of contracts is *to ascertain the intention of the parties*.' " *Goodwin, Inc v Orson E Coe Pontiac, Inc*, 392 Mich 195, 209; 220 NW2d 664 (1974), quoting *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924). "Where the language of a contract is clear and unambiguous, the intent of the parties will be ascertained according to its plain sense and meaning." *Haywood v Fowler*, 190 Mich App 253, 258; 475 NW2d 458 (1991).

B. ARBITRABILITY OF HALL'S AND ORTNER'S CLAIMS

We first consider whether the arbitration clause language of the shareholders' agreement governs this action brought under the CRA. Article 14 of the shareholders' agreement, entitled "Miscellaneous Provisions," sets forth, in relevant part, the following with respect to arbitration:

> Any dispute regarding interpretation or enforcement of any of the parties' rights or obligations hereunder shall be resolved by binding arbitration according to the rules of the American Arbitration Association in the County of Oakland, State of Michigan. The parties hereby irrevocably submit to personal jurisdiction of any State court in the County of Oakland or the Federal court in the County of Wayne, State of Michigan, in any action or other legal proceeding to enforce any award made by the arbitrators. . . .

> . . . Proceeding to arbitration and obtaining an award thereunder shall be a condition precedent to the bringing or maintaining of any action in any court with respect to any dispute arising under this Agreement, except for the institution of a civil action of a summary nature where the relief sought is predicated on there being no dispute with respect to any fact.

The arbitration clause clearly and unambiguously declares that it applies to "[a]ny dispute regarding interpretation or enforcement of any of the parties' rights or obligations hereunder . . . ." By these terms, the arbitration clause limits its scope to disputes relating to the "interpretation or enforcement" of the "rights or obligations" described within the shareholders' agreement.

The shareholders' agreement embodies the parties' intentions concerning the transfer, purchase, and sale of Stark Reagan stock. The 14 articles contained in the shareholders' agreement address: (1) general restrictions on the disposition of stock, (2) the manner in which shareholders may gain admission to the corporation through a vote of other shareholders, (3) the necessary conditions precedent to the sale, transfer, or other disposition of stock, (4) the purchase and sale of stock in the event of a shareholder's inability to practice law because of a disability, (5) the purchase of stock in the event of the death of a shareholder, (6) the redemption of stock in the event of a shareholder's retirement or "Of Counsel" status, (7) involuntary transfers of stock, including but not limited to "transfers pursuant to operation of law, a divorce proceeding, to judicial process and to proceedings in bankruptcy or receivership," (8) the sale of stock on termination of employment, (9) additional events triggering a stock redemption or purchase, (10) the procedural requirements applicable to the purchase of the stock of a selling

shareholder, (11) stock prices and other terms, including the repayment of loans and capital contributions, (12) stock redemption or purchase payment terms, and (13) shareholder guaranties. Article 14 consists of the arbitration terms and other general, standard contractual clauses.

The shareholders' agreement makes no mention of any relationships between the parties other than those created or impacted by the disposition of stock. The "rights or obligations" addressed in the shareholders' agreement involve only various forms of entitlement to stock ownership and restrictions attending stock transfer. The parties' chosen arbitration language clearly and unambiguously evinces an intent to commit to an arbitral forum only those claims stemming from the "interpretation or enforcement" of matters directly related to the management of corporate stock.

Our review of Hall's and Ortner's complaint reveals no allegation that defendants violated a term of the shareholders' agreement or disregarded the procedures for stock redemptions. Hall and Ortner have set forth no assertions touching on the price of their stock, payment terms, the manner of stock disposition, or any other right or obligation described in the shareholders' agreement. Simply put, Hall and Ortner have not advanced any claim or argument germane to the subject matter of the shareholders' agreement, or having its genesis in that agreement. To include an age-discrimination action within the scope of an arbitration provision expressly limited to the "interpretation or enforcement" of "rights or obligations" concerning corporate stock would expand the clause's reach beyond that intended by the parties. Consequently, Hall's and Ortner's age-discrimination claims fall outside the ambit of the arbitration provision.

Defendants insist that the following "Introductory Statements" of the shareholders' agreement compel arbitration of Hall's and Ortner's CRA claims:

> B. The parties hereto believe it is desirable and in their mutual best interest to control the ownership of the Stock of the Corporation and to also insure the continuous, harmonious and effective management of the affairs, policies, and operations of the Corporation; as such, this Agreement is also intended to be construed as an agreement entered into pursuant to §488 of the Michigan Business Corporations Act (as may be amended from time to time) and shall supercede and control any and all provisions of the Corporation's By Laws and Articles of Incorporation that may now or hereafter be in conflict herewith.
>
> C. The parties desire to enter into this Agreement in order, among other things, to establish and implement a structure for the orderly management and operation of the Corporation, to restrict the transfer of all shares of the Stock of the Corporation so that the Stock will not pass into the control of persons whose interests, might be incompatible with the interests of the Corporation and the Shareholders, and to provide a market for the sale of shares upon death or disability of a Shareholder and upon the occurrence of certain other events; all as hereinafter provided.

Despite the references to "the continuous, harmonious and effective management of the affairs, policies, and operations of the Corporation" and "the orderly management and operation of the Corporation," we find nothing in the contract that addresses corporate management or operations beyond the realm of stock-related issues. Moreover, the subsequent arbitration clause specifically confines its reach to the resolution of disputes "regarding interpretation or enforcement of any of the parties' rights or obligations hereunder . . . ."

The "rights or obligations" delineated in the contract bear no relationship to Hall's and Ortner's age-discrimination claims.[3]

In reaching this result, we have remained mindful that under both Michigan and federal law, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ." *Moses H Cone Mem Hosp v Mercury Constr Corp*, 460 US 1, 24-25; 103 S Ct 927; 74 L Ed 2d 765 (1983); see also *Amtower v William C Roney & Co (On Remand)*, 232 Mich App 226, 234-235; 590 NW2d 580 (1998). But the presumption of arbitrability cannot compel the arbitration of issues beyond those identified in the parties' written contract. *Amtower*, 232 Mich App at 235. Our construction of the contractual language employed by the instant parties is consistent with the decisions of other courts that have interpreted similar contractual language. In *Seifert v US Home Corp*, 750 So 2d 633, 636-638 (Fla, 1999), the Florida Supreme Court sur-

[3] We respectfully disagree with the dissent's contention that because Michigan law governs the shareholders' agreement, we must read into the contract the statutory prohibition of age discrimination, MCL 37.2202(1)(a). We decline to extend by implication the issues the parties unambiguously agreed to arbitrate. To do so would sweep away the bedrock principle that by their chosen words, the contracting parties determined the scope of their arbitration agreement. That the drafters and signers of the shareholders' agreement are lawyers buttresses our conclusion. We further observe that these parties are not ordinary lawyers, but specialists in employment law. They must have known that in *Rembert* a conflict panel of this Court held that arbitration of statutory discrimination claims required "[c]lear notice to the employee that he is waiving the right to adjudicate discrimination claims in a judicial forum and opting instead to arbitrate these claims." *Rembert*, 235 Mich App at 161, citing *Renny v Port Huron Hosp*, 427 Mich 415, 437; 398 NW2d 327 (1986). By its terms, the arbitration clause in the shareholders' agreement confines its reach to "[a]ny dispute regarding interpretation or enforcement of any of the parties' rights or obligations hereunder . . . ." The dissent's interpretation of this clause eliminates the word "hereunder," a judicial amendment we are unwilling to endorse.

veyed state and federal caselaw interpreting arbitration provisions calling for the arbitration of disputes "arising out of" and "relating to" the contract. The parties in *Seifert* entered into a contract for the construction of a house that called for the arbitration of "[a]ny controversy or claim arising under or related to this Agreement or to the Property . . . ." *Id*. at 635. After the plaintiffs moved in, the air conditioning system "picked up the carbon monoxide emissions" from a car running in the garage, "and distributed them into the house, killing Mr. Seifert." *Id*. The plaintiffs sued the defendant for wrongful death, asserting tort claims for strict liability and negligence. *Id*.

The Florida Supreme Court observed that although some courts have characterized arbitration clauses referring to disputes arising "out of" or "under" the contract as restrictive, the phrase "arising out of or relating to" the contract is often construed as broadening the scope of an arbitration clause. *Id.* at 637. Nevertheless, the court explained that "even in contracts containing broad arbitration provisions, the determination of whether a particular claim must be submitted to arbitration necessarily depends on the existence of some nexus between the dispute and the contract containing the arbitration clause." *Id*. at 638. Citing *American Recovery Corp v Computerized Thermal Imaging, Inc*, 96 F3d 88, 93-94 (CA 4, 1996), the court in *Seifert* announced that "the test for determining arbitrability of a particular claim under a broad arbitration provision is whether a 'significant relationship' exists between the claim and the agreement containing the arbitration clause, regardless of the legal label attached to the dispute (i.e., tort or breach of contract)." *Id.* at 637-638. In *Seifert*, the court found that the facts and allegations pleaded in the complaint asserted negligence in the home's construction, rather

than the violation of any duty set forth in the contract. *Id*. at 640. The court held that the plaintiffs' tort averments did not bear a "significant relationship to the contract," and discerned no intent on the part of the contracting parties to arbitrate tort claims that emerged after the completion of construction. *Id*. at 641-642.

If *Seifert*'s "significant relationship" test represents an approach less deferential to a presumption of arbitrability, the standard adopted in *Fazio v Lehman Bros, Inc*, 340 F3d 386 (CA 6, 2003), exemplifies the other end of the spectrum. In *Fazio*, the plaintiffs' broker misappropriated millions of dollars from his clients. *Id*. at 391. The plaintiffs sued the brokerage firms that had employed the broker, and the defendants moved to compel arbitration on the basis of a contract term calling for arbitration of " '[a]ny controversy arising out of or relating to any of my accounts, to transactions with you for me, or to this or any other agreement or the construction, performance or breach thereof . . . .' " *Id*. at 391-392. The United States Court of Appeals for the Sixth Circuit held that the plaintiffs' fraud claims fell within the scope of the arbitration agreement because "[t]he lawsuit by necessity must describe why [the broker] was in control of the plaintiffs' money . . . . The plaintiffs therefore cannot maintain their action without reference to the account agreements, and accordingly, this action is covered by the arbitration clauses." *Id*. at 395. In a subsequent case, the Sixth Circuit described the *Fazio* standard as "whether an action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the scope of the arbitration agreement." *NCR Corp v Korala Assoc, Ltd*, 512 F3d 807, 813 (CA 6, 2008) (quotation marks and citation omitted).

Other federal circuit courts of appeal have more directly addressed the language employed in the instant parties' shareholders' agreement. For example, in *Mediterranean Enterprises, Inc v Ssangyong Corp*, 708 F2d 1458, 1464 (CA 9, 1983), the United States Court of Appeals for the Ninth Circuit distinguished the phrase "arising hereunder" from contractual provisions calling for the arbitration of disputes "arising out of and relating to" the contract. "We have no difficulty finding that 'arising hereunder' is intended to cover a much narrower scope of disputes, *i.e*., only those relating to the interpretation and performance of the contract itself." *Id*. Professor Martin Domke adopted the Ninth Circuit's reasoning in his treatise on Commercial Arbitration, noting that "a clause providing for the arbitration of 'any dispute arising hereunder' means arising under the contract itself and does not cover matters or claims independent of the contract or collateral to it." 1 Domke, Commercial Arbitration (3d ed), § 8:14.[4]

Irrespective which interpretive approach we apply to the shareholders' agreement's clause mandating the arbitration of "[a]ny dispute regarding interpretation or enforcement of any of the parties' rights or obligations hereunder," we cannot "arguably" construe this language to cover a dispute regarding workplace discrimination. *In re Nestorovski*, 283 Mich App at 202. The shareholders' agreement neither bears a significant relationship to Hall's and Ortner's CRA assertions, nor refers to any issue even tangentially relevant to

[4] Although some federal circuit courts of appeal have criticized the analysis advanced in *Mediterranean Enterprises*, at least one court has acknowledged "that 'arising under' may denote a dispute somehow limited to the interpretation and performance of the contract itself." *Sweet Dreams Unlimited, Inc v Dial-A-Mattress Int'l, Ltd*, 1 F3d 639, 642 (CA 7, 1993).

Hall's and Ortner's age-discrimination claims. Bearing in mind the presumption in favor of arbitrability, we decline to stretch the contracual language so far as to encompass statutory civil rights claims. Because the unambiguous language of the arbitration clause plainly limits its application to actions flowing from the entitlements, privileges, duties, and responsibilities attending stock ownership, we discern no factual support for defendants' contention that the parties intended to arbitrate age-discrimination claims.

Pursuant to similar logic, we reject the circuit court's finding that Stark Reagan's Law Office Staff Manual "bec[a]me part of the Shareholder Agreement for those who executed that Agreement." The staff manual commences with the following relevant "INTRODUCTION":

> This Handbook has been prepared and will be kept up-to-date to provide each employee of Stark Reagan, P.C. with information about the Firm's policies and procedures. It is intended to inform you of the Firm's responsibilities to you and to inform you of your responsibilities to the Firm, its clients and your fellow employees of the Firm.
>
> * * *
>
> All should understand that the policy statements described herein are not conditions of employment and are subject to change at the discretion of the Firm. These policies are not intended to create, nor are they to be construed to constitute, a contract between this Firm and any of its employees for either employment or the providing of any benefit described in the Handbook. The Board of Directors, from time to time, makes decisions regarding increases or decreases in the staff. Every present and future employee of the Firm has and will continue to have the right, with or without cause, to resign at any time, and the Firm will continue to have the right, with or without cause, to terminate the employment of any employee at any time. . . .

> The provisions of this manual apply to all attorneys, law clerks, legal assistants, the bookkeeper, the office administrator, the secretarial staff, the receptionists and couriers. Some of the provisions of this booklet do not apply to all employees of the Firm, and in those cases we have tried to state clearly to whom the provisions do apply.

The staff manual describes in several paragraphs the "ORGANIZATION AND MANAGEMENT OF THE FIRM," and explains the functions of the executive, personnel, and technology committees. Most of the staff manual content sets forth garden-variety terms and conditions of employment, including "GENERAL OFFICE POLICIES" concerning attendance, outside employment, computers and e-mail, and a host of other similar topics. The staff manual details Stark Reagan's compensation and benefit plans, and contains admonitions against sexual harassment and other "unwelcome conduct" "based upon a person's legally protected status, such as color, race, ancestry, religion, national origin, age, weight, physical handicap, medical condition, disability, marital status, veteran status, or other protected group status in addition to sex." The staff manual does not contain an arbitration clause.

The shareholders' agreement makes no mention of the staff manual. Rather, it includes the following clause under the heading "Entire Agreement":

> This agreement constitutes the entire agreement between the parties regarding its subject matter and supersedes any and all other agreements, negotiations and discussions, either written or oral, of the parties hereto regarding the subject matter of this Agreement. Any such prior written or oral agreements, negotiations and discussions are hereby revoked, cancelled and rescinded.

Given that the parties contemplated that the shareholders' agreement would serve as "the entire agreement between the parties," no record evidence supports the

circuit court's finding that the shareholders' agreement implicitly incorporated within its terms the law office staff manual.

Nor do we accept, as did the circuit court, that the Sixth Circuit's decision in *Panepucci*, 281 Fed Appx at 488, compels us to view the shareholders' agreement "as an umbrella or master agreement in relation to, and thus covering, the Staff Manual."[5] We find *Panepucci* distinguishable from the instant case in several important respects. First, the arbitration term at issue in *Panepucci* commanded a somewhat broader reach than does the arbitration clause in the shareholders' agreement. Panepucci's partnership agreement contained an arbitration clause stating, "In the event of a controversy or claim *arising under or related to* this Agreement or its interpretation, or, in the event of an alleged breach of this Agreement which the partnership or any Partner disputes, the parties shall submit such controversy, claim or dispute to a binding arbitration . . . ." *Id*. at 484 (emphasis altered). Second, Panepucci's complaint alleged that she had been inequitably compensated on a discriminatory basis. Because the partnership agreement set forth the method for compensating partners, the Sixth Circuit held that the dispute fell within the scope of the arbitration clause: "Panepucci's complaint alleges that she was entitled to more compensation than was distributed. That claim clearly requires reference to, and interpretation of, the Partnership Agreement." *Id*. at 487. In contrast with the facts of the instant case, the Sixth Circuit concluded that

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[5] We note that the Sixth Circuit did not designate *Panepucci* for publication, and generally considers unpublished decisions as having "little precedential value." *Taxpayers United for Assessment Cuts v Austin*, 994 F2d 291, 295 n 3 (CA 6, 1993).

> Panepucci's action simply cannot be maintained without reference to the Partnership Agreement. Even if the agreement deals only with the bare mechanics of compensation, the question of whether the other partners followed those mechanics could be a key factor in deciding whether or not they illegally discriminated against her. The key issue in Panepucci's suit is whether she was paid less and denied work because of illegal discrimination. To determine whether she was paid less will require determining a baseline of how much she should be paid, and that will require reference to the Partnership Agreement. [*Id*. at 487-488.]

In this case, the shareholders' agreement supplies no evidence pertinent to Hall's and Ortner's age-discrimination claims.

Finally, we find entirely unpersuasive defendants' argument that *Panepucci* supports the circuit court's conclusion that the Stark Reagan staff manual should be considered part of the shareholders' agreement. In *Panepucci*, the Sixth Circuit determined that even if the defendants' attorney manual "were a contract, it would still be governed by the arbitration clause." *Id*. at 488. The Sixth Circuit premised this conclusion on language found in *Nestle Waters North America, Inc v Bollman*, 505 F3d 498 (CA 6, 2007). In *Nestle Waters*, the parties "entered into multiple contracts as part of one overall transaction or ongoing relationship." *Id*. at 503. The first contract in the series incorporated an arbitration clause stating that " 'any controversy or claim . . . arising out of this Agreement . . . shall be settled by arbitration . . . .' " *Id*. at 501. A subsequent agreement (the Deed) did not mention arbitration. *Id*. Nestlé Waters North America Inc. filed a declaratory-judgment action in the federal district court after receiving the defendants' petition for arbitration, which relied on language found only in the Deed. *Id*. The Sixth Circuit framed the dispositive question as whether an arbitration clause placed in an earlier contract could

apply "to a dispute arising out of a later agreement, whose execution was required by the first contract." *Id*. at 504. Although Nestlé Waters's complaint lacked any reference to the signed agreements, the Sixth Circuit ruled that because "the proper interpretation of the Deed could not be determined without reference to" the earlier agreement and the parties' ongoing relationship, the dispute fell within the scope of the arbitration clause. *Id*. at 505. The Sixth Circuit emphasized that "the arbitration clause in this case was written into the contract that was executed first and pursuant to which all of the subsequent agreements and documents were executed." *Id*. at 505-506. Notably, the Sixth Circuit acknowledged in *Nestle Waters*, "[W]e have held that an arbitration clause in a later agreement should not be read backward into an earlier agreement merely because the later agreement had a boilerplate 'merger' clause." *Id*. at 504.

The instant arbitration clause appears in a later agreement that both lacks a merger clause and expressly prohibited the incorporation of any "other agreements" within its subject matter. Given the substantial factual differences between this case and *Nestle Waters*, we derive no guidance from the latter. Furthermore, defendants have brought forth no evidence that the Stark Reagan shareholders intended that the contents of the staff manual would be integrated into the shareholders' agreement. In summary, we detect in defendants' cited federal authority no reason to alter our conclusion that the parties' arbitration agreement does not cover Hall's and Ortner's age-discrimination claims.

C. HALL'S AND ORTNER'S STANDING TO BRING CRA CLAIMS

Lastly, defendants contend that we should affirm summary disposition on an alternate ground, that Hall

and Ortner lack standing to sue under the CRA. According to defendants, only "employees" may sue under the CRA, and as shareholders of the firm, Hall and Ortner instead qualify as employers. In considering whether the statutory language of the CRA reflects a legislative intent that partners or shareholders in a law firm are entitled to the protections of the CRA, we bear in mind "[w]ell-established principles [that] guide this Court's statutory construction efforts. We begin our analysis by consulting the specific statutory language at issue." *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 10; 654 NW2d 610 (2002).

> When reviewing matters of statutory construction, this Court's primary purpose is to discern and give effect to the Legislature's intent. The first criterion in determining intent is the specific language of the statute. The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written. Additionally, it is important to ensure that words in a statute not be ignored, treated as surplusage, or rendered nugatory. Unless defined in the statute, every word or phrase of a statute will be ascribed its plain and ordinary meaning. [*Robertson v Daimler-Chrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002) (citations omitted).]

The relevant portion of the CRA sets forth the following:

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status. [MCL 37.2202(1)(a).]

The CRA defines an "employer" as "a person who has 1 or more employees, and includes an agent of that person." MCL 37.2201(a). A "person" includes "an individual, agent, association, corporation, . . . partnership, . . . or any other legal or commercial entity." MCL 37.2103(g).

Indisputably, defendants fall within the CRA's definition of "employer." Stark Reagan, a corporation and a "person" for purposes of the CRA, has more than one employee. MCL 37.2201(a); MCL 37.2103(g). As Stark Reagan's agents, the individual defendants are also "persons" who employ others. MCL 37.2201(a); MCL 37.2103(g). As employers, defendants face liability under the CRA if they "discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . age . . . ." MCL 37.2202(1)(a). Although the CRA does not define the term "individual," "unless a contract or statute provides a different definition, this Court has recognized that the term 'an individual' designates a natural person or a single human being." *People v Haynes*, 281 Mich App 27, 31; 760 NW2d 283 (2008).

When we apply the plain meaning of the word "individual" to the relevant portion of MCL 37.2202(1)(a), we conclude that the statute prohibits employers from discriminating against persons on the basis of age, with respect to "a term, condition, or privilege of employment . . . ." Defendants have not challenged that Hall's and Ortner's age-discrimination claims assert an adverse *employment* action. Alternatively phrased, defendants have not denied that the February 13, 2009 vote of the shareholders concerned "a term, condition, or privilege of" Hall's and Ortner's employment. And even assuming that Hall and Ortner

cannot be characterized as Stark Reagan "employees," we nevertheless find that their pleadings state a claim under the CRA.

In *McClements v Ford Motor Co*, 473 Mich 373, 376; 702 NW2d 166 (2005), amended 474 Mich 1201 (2005), our Supreme Court considered whether a cashier working for AVI Food Systems, which operated three cafeterias at a Ford assembly plant, could maintain a sexual-harassment action against a Ford Motor Company employee. The Supreme Court held that "a worker is entitled to bring an action against a nonemployer defendant if the worker can establish that the defendant affected or controlled a term, condition, or privilege of the worker's employment." *Id*. at 389. Notably, the Supreme Court recognized that "MCL 37.2202 does not state that an employer is only forbidden from engaging in [prohibited] acts against its own employees. . . . [T]o limit the availability of relief under the CRA to those suits brought by an employee against his or her employer is not consistent with the statute." *Id*. at 386. Instead, to merit protection under the CRA, a plaintiff must show "some form of nexus or connection between the employer and the status of the nonemployee." *Id*. The Supreme Court continued:

> [T]he key to liability under the CRA is not simply the status of an individual as an "employee"; rather, liability is contingent upon the employer's affecting or controlling that individual's work status. Accordingly, an employer can be held liable under the CRA for discriminatory acts against a nonemployee if the nonemployee can demonstrate that the employer affected or controlled a term, condition, or privilege of the nonemployee's employment. [*Id*. at 386-387.]

Therefore, even were we to conclude that Hall and Ortner were not employees of Stark Reagan, we interpret the CRA as permitting their age-discrimination

claim against defendants in light of the record evidence that defendants' actions "affected or controlled a term, condition, or privilege" of Hall's and Ortner's employment.

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

STEPHENS, J., concurred with GLEICHER, J.

K. F. KELLY, P.J. (*dissenting*). I respectfully dissent. The circuit court properly granted defendants summary disposition pursuant to MCR 2.116(C)(7) and properly ordered the case to proceed to arbitration. I would affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

As noted by the majority, the individual parties to this appeal are present and former shareholders in the law firm of defendant Stark Reagan, P.C. (the firm). Plaintiffs Patrick C. Hall and Ava Ortner first became "of counsel" to the firm in 2003 for a one year trial period to determine if they would become full partners[1] in the firm. At the time, any future participation in the firm was contingent on them becoming full partners. The firm only had full partners, and each partner had equal shares of stock, along with a seat on the Board of Directors.

Plaintiffs became full partners of the firm in 2004, each paying $10,000 in a capital contribution to the firm and signing the 1991 Shareholders' Agreement. In 2005, a new Shareholders' Agreement was executed. A particular purpose of the agreement was to ensure effective management of the firm:

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[1] The shareholders in Stark Reagan referred to each other as "partners" and I use the term here.

> B. The parties hereto believe it is desirable and in their mutual best interest to control the ownership of the Stock of the Corporation and to also *insure the continuous, harmonious and effective management of the affairs, policies, and operations* of the Corporation . . . .
>
> C. The parties desire to enter into this Agreement in order, among other things, to *establish and implement a structure for the orderly management and operation of the Corporation*, to restrict the transfer of all shares of the Stock of the Corporation so that the Stock will not pass into the control of persons whose interests might be incompatible with the interests of the Corporation and the Shareholders, and to provide a market for the sale of shares upon death or disability of a Shareholder and upon the occurrence of certain other events; all as hereinafter provided. [Emphasis added.]

Stock ownership of the firm was divided equally among the partners. All shares were common shares and retained the same voting rights. Each partner served as an officer of the firm; during their five-year tenure with the firm, plaintiffs both held the position of vice president. The managing partner of the firm was elected each year by a vote of the partners. The agreement specifically stated that it was subject to and governed by the laws of the state of Michigan.

In addition to providing for management of the firm by its shareholders, the agreement specified the procedures and requirements for the involuntary termination of a partner's interest in the firm as well as the process by which the shares could be redeemed. And any dispute was to be submitted to arbitration:

> 14.1 *Arbitration*
>
> Any dispute regarding interpretation or enforcement of any of the parties' rights or obligations hereunder shall be resolved by binding arbitration according to the rules of the American Arbitration Association in the County of Oak-

> land, State of Michigan. The parties hereby irrevocably submit to personal jurisdiction of any State court in the County of Oakland or the Federal court in the County of Wayne, State of Michigan, in any action or other legal proceeding to enforce any award made by the arbitrators. The arbitrators may award attorneys fees to the prevailing party in any arbitration proceeding.
>
> * * *
>
> . . . Proceeding to arbitration and obtaining an award thereunder shall be a condition precedent to the bringing or maintaining of any action in any court with respect to any dispute arising under this Agreement, except for the institution of a civil action of a summary nature where the relief sought is predicated on there being no dispute with respect to any fact.

In 2008, allegedly because of declining business and revenues, the partners began discussing restructuring of the firm, although they were unable to reach an agreement on how to accomplish the restructuring. On January 8, 2009, the Managing Partner, Keith Stark, proposed downsizing the firm by three attorneys, including partners. As noted by the majority:

> According to affidavits submitted by Hall and Ortner, Stark explained that their terminations were needed "to change the 'demographics' of the firm." The affidavits attested that defendant Joseph Ahern expressed that "the demographics of the firm was [sic] a problem because older attorneys lose their client bases," and that two younger attorneys " 'had more potential' and their practices would be going up while ours would be going down." At the request of Hall and Ortner, the meeting adjourned until the next week. During the continued meeting on January 12, 2009, Ortner and Hall announced that the termination of their employment "constituted illegal age discrimination," and advised the other shareholders that they had retained legal counsel. On February 13, 2009, defendants Ahern and Jeffrey Fleury resigned as shareholders of Stark Reagan,

> effective immediately. The remaining shareholders voted to redeem the stock held by Hall and Ortner, terminating their employment effective March 1, 2009. [*Ante* at 91 (alteration in original).]

Plaintiffs commenced the instant action alleging violations of the Civil Rights Act (CRA), MCL 37.2101 *et seq*. Defendants moved for summary disposition under MCR 2.116(C)(7), contending that the arbitration provision of the Shareholders' Agreement barred the lawsuit. Defendants also argued that plaintiffs, as shareholders, could not proceed on a claim under the CRA. The circuit court agreed with defendants that summary disposition was required under MCR 2.116(C)(7) and ordered the case to arbitration.

II. STANDARD OF REVIEW AND APPLICABLE LAW

The existence and enforceability of an arbitration agreement are questions of law that we review de novo. *Michelson v Voison*, 254 Mich App 691, 693-694; 658 NW2d 188 (2003). "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he had not agreed to so submit." *Amtower v William C Roney & Co (On Remand)*, 232 Mich App 226, 234; 590 NW2d 580 (1998), quoting *AT&T Technologies, Inc v Communications Workers of America*, 475 US 643, 648; 106 S Ct 1415; 89 L Ed 2d 648 (1986) (quotation marks omitted) (alteration in original). When the language of an arbitration clause is clear and unambiguous, the intent of the parties will be determined according to the plain meaning of the language. However, any ambiguity in the language of an arbitration clause is to be resolved in favor of arbitration:

> [C]onsistent with the strong federal policy promoting arbitration, any ambiguity concerning whether a specific

> issue falls within the scope of arbitration, such as whether a claim is timely, must be resolved in favor of submitting the question to the arbitrator for resolution. See *AT & T Technologies*, [475 US at 650.] In other words, there is a presumption of arbitrability " 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.' " *Id*., quoting *United Steelworkers of America v Warrior & Gulf Navigation Co*, 363 US 574, 582-583; 80 S Ct 1347; 4 L Ed 2d 1409 (1960). In [*First Options of Chicago, Inc v Kaplan*, 514 US 938, 945; 115 S Ct 1920; 131 L Ed 2d 985 (1995)], the Court explained that when the parties have a contract that provides for arbitration of some issues, "the parties likely gave at least some thought to the scope of arbitration." Therefore, the law "insist[s] upon clarity before concluding that the parties did not want to arbitrate a related matter." *Id*. [*Amtower*, 232 Mich App at 234-235 (third alteration in original).]

In order to determine whether a contested issue is subject to arbitration, we apply a three-part test: "1) is there an arbitration agreement in a contract between the parties; 2) is the disputed issue on its face or arguably within the contract's arbitration clause; and 3) is the dispute expressly exempted from arbitration by the terms of the contract." *Detroit Auto Inter-Ins Exch v Reck*, 90 Mich App 286, 290; 282 NW2d 292 (1979). "Any doubts about the arbitrability of an issue should be resolved in favor of arbitration." *Huntington Woods v Ajax Paving Indus, Inc (After Remand)*, 196 Mich App 71, 75; 492 NW2d 463 (1992). And finally, "Segregating disputed issues 'into categories of "arbitrable sheep and judicially-triable goats" ' " is generally disapproved. *In re Nestorovski Estate*, 283 Mich App 177, 202-203; 769 NW2d 720 (2009), quoting *Detroit Auto*, 90 Mich App at 289.

III. ANALYSIS

Plaintiffs maintain that the arbitration clause in the Shareholders' Agreement does not apply to their complaint arising under the CRA. I disagree. Pursuant to the three-part test previously set forth, the first and third elements are met: the agreement clearly has an arbitration clause and plaintiffs' claims are not expressly exempted by the terms of the agreement. The relevant question is whether plaintiffs' CRA claims are on their face or arguably within the Agreement's arbitration clause. I would conclude that they are.

The arbitration clause clearly and unambiguously declares that it applies to "[*a*]*ny* dispute regarding interpretation or enforcement of any of the parties' rights or obligations hereunder . . . ." (Emphasis added.) The word "any" is defined as " 'every; all.' " *Dep't of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 8; 779 NW2d 237 (2010), quoting *Random House Webster's College Dictionary* (1997). By its very terms, the agreement is also "subject to" and "governed by" Michigan laws.[2] Plaintiffs allege in their complaint that they were involuntarily terminated because of age discrimination. Because Michigan law prohibits discrimination against an employee on the basis of age, MCL 37.2202(1)(a), the arbitration clause in the agreement clearly applies. Moreover, engaging in illegal discrimination can hardly be said to be conducive to "the continuous, harmonious and effective management" of the firm which is a key purpose of the agreement.

Another issue addressed by the parties in the circuit court and on appeal is the status of the respective

[2] "Subject" to means "[u]nder the power of authority of another; owing obedience or allegiance to another." *The American Heritage Dictionary of the English Language, New College Edition* (1981), p 1282. "Governed" by means controlled by the actions and behavior of another. *Id*. at 569.

parties within the firm. Plaintiffs allege that they were employees and that defendants——the firm as well as its individual shareholders—were their employers. Without addressing the merits of plaintiffs' claims, it is clear that this argument will necessitate an examination of the agreement and operation of the firm in order to ascertain the status and rights of the individual shareholders. Plaintiffs' complaint is replete with references to "non-controlling" and "controlling" shareholders. Plaintiffs allege that the individual defendants had the "decisionmaking power" over "non-controlling shareholders" like plaintiffs. Plaintiffs effectively allege that there were "super partners" who made decisions that were "rubber stamped," while plaintiffs and others were relegated to an inferior position within the firm. These facts cannot be determined without reference to how the firm operated and the partners' relationships. The proceedings will necessarily include an examination of plaintiffs' status as shareholders and will, therefore, require a reading and application of the Shareholders' Agreement. The claim that plaintiffs were marginalized as shareholders directly affects their rights and responsibilities under the agreement. The agreement is critically important to the case—not just tangential to it; it is directly intertwined with plaintiffs' claims that they held a lesser interest in the corporation.

Plaintiffs take the position that, because they were fully indemnified of their capital contribution under the agreement and do not raise any claim regarding the *mechanics* of the stock divestiture, the agreement does not apply to what they believe is their separate and distinct claim of age discrimination. I disagree. Though the mechanics of divestiture may have been proper, plaintiffs are challenging the very process and motive that led to the determination to buy out their shares

and divest them of their interest in the corporation. The majority opinion concedes as much by stating that plaintiffs have "filed a complaint against Stark Reagan and the individual defendants, asserting that age discrimination motivated defendants' decision to terminate [their] *shareholder status*." *Ante* at 90 (emphasis added).

There are two divesture provisions in the agreement applicable to this case. The first, § 8.1(A), concerns termination of employment:

> If a Shareholder who is employed by the Corporation ceases to be employed by the Corporation due to voluntary termination of employment, termination of employment by the mutual consent of the Shareholder and the Corporation, or termination by the unilateral act of the Corporation, such Shareholder shall be deemed to have offered to sell all of his Stock to the Corporation.

And the second, § 9.1, concerns shareholders who are forced out:

> Provided no other Triggering Event is then effective to cause a redemption or purchase hereunder, upon the vote or written consent of seventy-five percent (75%) of the voting power of the then total issued and outstanding Stock of the Corporation and delivery of written notice to such effect to all Shareholders, the Stock of a Shareholder which such vote or consent demands to be sold shall be subject to redemption by the Corporation . . . .

The agreement then sets out the procedural requirements for exercising a buyout, including price and terms. It is, as the majority notes, procedural in nature; however, that does not mean that it is inapplicable to plaintiffs' allegation of age discrimination. If found to be valid, their claim will undoubtedly include relief in the form of lost profits and stock ownership. Ultimately,

plaintiffs are disputing whether defendants had the right to re-claim the shares.

Finally, because the arbitration clause was included in the agreement, the parties obviously gave some thought to the scope of any arbitration. It must be noted that the parties are not unsophisticated lay people; they are highly talented attorneys well versed in employment and contract law. As such, they were fully cognizant of all legal ramifications of the arbitration clause. The arbitration clause specifically refers to "any" dispute and does not exempt actions under the CRA as it does "civil action[s] of a summary nature where the relief sought is predicated on there being no dispute with respect to any fact." The law "insist[s] upon clarity before concluding that the parties did not want to arbitrate a related matter" and applying the presumption of arbitrability, it cannot be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers plaintiffs' complaint. *Amtower*, 232 Mich App at 235 (quotation marks and citation omitted) (alteration in original).

I do not take issue with the law cited by the majority; instead, I merely dispute the majority's application of these particular facts to the relevant law. Distilled to its essence, plaintiffs are contesting the involuntary redemption of shares, which was allegedly the result of unlawful discrimination. The Shareholders' Agreement is inextricably linked to plaintiffs' claims, which cannot be maintained without reference to the agreement. Plaintiffs' claims are, therefore, subject to arbitration. I would affirm the circuit court's order.

In re MICHIGAN CONSOLIDATED GAS COMPANY'S COMPLIANCE WITH 2008 PA 286 AND 295

Docket No. 292683. Submitted May 11, 2011, at Lansing. Decided September 13, 2011, at 9:05 a.m.

The Public Service Commission (PSC) opened dockets for all rate-regulated natural gas distribution companies to ensure the timely implementation of the Clean, Renewable, and Efficient Energy Act (the Act), MCL 460.1001 *et seq*., which requires regulated utilities to adopt energy-optimization plans to reduce the demand for energy. Michigan Consolidated Gas Company (MichCon) applied for approval of its energy-optimization plan as the Act required. The Association of Businesses Advocating Tariff Equity (ABATE) intervened to argue, among other things, that customers who purchase only gas transportation services and not the commodity itself should not be subject to surcharges to recover the cost of implementing energy-optimization plans. The PSC approved MichCon's energy-optimization plan, and ABATE appealed.

The Court of Appeals *held*:

1. The PSC's conclusion that natural gas transportation customers are "natural gas customers" under MCL 460.1089(2) was not unlawful or unreasonable given that it comported with the language of the Act and its purpose. Under MCL 460.1089(1), a natural-gas provider whose rates are regulated, such as MichCon, is entitled to recover the actual costs of implementing its approved energy-optimization plan, and MCL 460.1089(2) requires that these costs be recovered from all natural gas customers.

2. The PSC correctly decided that former MCL 460.1093(1) only allowed exemption for eligible electric customers from the energy-optimization-plan charges of their electric providers, not those of their gas providers. Former MCL 460.1093(1) provided that eligible electric customers were exempt from charges that they would have otherwise incurred under MCL 460.1089 and MCL 460.1091 if they filed a self-directed energy-optimization plan with their electric providers and implemented the plan. The PSC correctly determined that the charges referred to in former MCL 460.1093(1) were limited to the charges for electric service that would otherwise be applicable and did not include the charges

for the gas providers' optimization plans, given that the self-directed plan effectively replaces participation in the electric providers' optimization plan and that the PSC's interpretation otherwise comported with the language of the Act and the Legislature's subsequent amendment of MCL 460.1093(1).

3. ABATE failed to establish that the Act's requirement that the PSC approve MichCon's energy-optimization plan within 90 days after the utility filed its application violated ABATE's constitutional right to due process or the statutory right to a reasonable opportunity for a full and complete hearing. ABATE failed to offer any evidence that the time limit prejudiced it or its members.

Affirmed.

1. PUBLIC UTILITIES — ENERGY-OPTIMIZATION PLANS — COST RECOVERY — NATURAL GAS CUSTOMERS.

Under the Clean, Renewable, and Efficient Energy Act, a provider whose rates are regulated is entitled to recover the actual costs of implementing its approved energy-optimization plan from all natural gas customers, including those customers who only purchase gas transportation services from the provider (MCL 460.1089).

2. PUBLIC UTILITIES — ENERGY-OPTIMIZATION PLANS — COST RECOVERY — EXEMPTION FOR ELIGIBLE ELECTRIC CUSTOMERS.

Eligible electric customers are exempt from charges that the customer would otherwise incur under the cost-recovery provisions of the Clean, Renewable, and Efficient Energy Act if the customer files a self-directed energy-optimization plan with its electric provider and implements the plan; the charges the customer would otherwise incur as part of the cost-recovery plan refers to the customer's electric-optimization plan costs (Former MCL 460.1093[1], as added by 2008 PA 295).

Clark Hill PLC (by *Thomas E. Maier* and *Robert A. W. Strong*) for the Association of Businesses Advocating Tariff Equity.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Steven D. Hughey* and *Patricia S. Barone*, Assistant Attorneys General, for the Public Service Commission.

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

MARKEY, P.J. Appellant Association of Businesses Advocating Tariff Equity (ABATE)[1] appeals by right a June 2, 2009, order of the Michigan Public Service Commission (PSC), approving the energy optimization plan submitted by Michigan Consolidated Gas Company (MichCon) pursuant to Michigan's Clean, Renewable, and Efficient Energy Act, 2008 PA 295, MCL 460.1001 *et seq*. (the Act).[2] We affirm.

I. BACKGROUND

The Act became effective on October 6, 2008. MCL 460.1191 provides that the PSC was to issue a temporary order implementing the Act within 60 days of its passage. As discussed more fully in this Court's related case, *In re Review of Consumers Energy Co Renewable Energy Plan*, 293 Mich App 254; 820 NW2d 170 (2011), subpart A requires regulated electric utilities to adopt "renewable energy plan[s]" in which the electric companies are required to demonstrate how they would achieve compliance with the Act's requirements for obtaining electric capacity and energy production from "renewable energy resource[s]" as defined in part 1 of

[1] ABATE describes itself as "a voluntary association of large industrial businesses which are located in and doing business in the State of Michigan." According to its petition to intervene, its members "consume substantial quantities of electricity and natural gas and in Michigan alone their combined gas and electric bills exceed $1.2 billion annually." ABATE's filing further indicates that some of its members are customers of Michigan Consolidated Gas Company among other providers.

[2] The underlying petition in this case also addressed MichCon's compliance with 2008 PA 286, which, among other things, prevents a gas utility from increasing the cost of its services to customers without PSC approval. See MCL 460.6a(1). That act is not directly at issue in this appeal.

the Act. See MCL 460.1011 and MCL 460.1021 through MCL 460.1053. Subpart B of the Act requires, among other things, that regulated electric and natural gas providers adopt "energy optimization plan[s]." See MCL 460.1071 through MCL 460.1097. Broadly speaking, an energy optimization plan is designed to reduce the demand for energy and provide for load management, and thus reduce the future costs of providing service to customers. Specifically, these plans are meant "to delay the need for constructing new electric generating facilities and thereby protect consumers from incurring the costs of such construction." MCL 460.1071(2). See also MCL 460.1001(2) (stating the Act's purpose). Combination utilities are to adopt both electric and natural gas energy optimization plans. The Act provides companies with the option of enacting their own energy optimization plans with PSC approval, see MCL 460.1071 through MCL 460.1089, or of turning to an "independent energy optimization program administrator," a nonprofit organization selected by the PSC through a competitive bid process, MCL 460.1091. Certain electric customers may also opt to enact a self-directed energy optimization plan. MCL 460.1093. Also, gas or electric companies are permitted to recover certain costs for the energy optimization plans from their customers, see MCL 460.1089 and MCL 460.1091(3), while electrical customers who have a self-directed plan would be exempt from some of the utilities' plan costs, MCL 460.1093(1), as we will discuss further.

The PSC conducted meetings and discussions on a proposed order and released its temporary order on December 4, 2008, followed by amendatory orders on December 23, 2008, and January 13, 2009. *In re Temporary Order to Implement 2008 PA 295* (PSC Case No.

U-15800).[3] At the same time, to comply with the strict time limits placed on the PSC to complete the initial phases of the implementation process by MCL 460.1021 and MCL 460.1073, the PSC opened dockets for all rate-regulated natural gas distribution companies, including MichCon. MichCon then filed a notice of intent to file an application to seek review approval of its energy optimization plan for 2009, 2010, and 2011. On March 4, 2009, MichCon filed its application with supporting testimony and exhibits for approval of its energy optimization plan. Among other surcharges it sought to impose on its customers for implementation of the plan was a surcharge of $0.0009/Ccf[4] on MichCon's "End Use Transportation" customers,[5] some of which are ABATE members. A hearing was held on the proposed plan on April 20, 2009, and briefs were subsequently submitted on May 5, 2009. With respect to the surcharge at issue here, ABATE, which had moved to intervene and was granted permission to do so,[6] continued its arguments, first raised in *In re Rules*

[3] The temporary order, by its own terms, was to last only for a year while the PSC promulgated administrative rules to administer the Act in *In re Rules Governing Renewable Energy Plans* (PSC Case No. U-15900). However, to date, the PSC has only proposed a number of rules to administer the Act and is in the process of seeking public comment. *In re Rules Governing Renewable Energy Plans*, order entered April 27, 2010 (PSC Case No. U-15900).

[4] "Ccf" refers to "centum cubic feet" or 100 cubic feet of natural gas.

[5] "End use transportation customers" are individuals and entities who purchase only transportation services from the gas utility, as opposed to customers who purchase both gas commodity and transportation (known as "direct" customers) from MichCon. On appeal, ABATE refers to end use transportation customers as "gas transportation only customers." No party uses the Act's nomenclature of "distribution customers" from MCL 460.1089(5), but we find these terms synonymous and treat them as such.

[6] Given this fact, we reject the challenge to ABATE's standing to dispute the rights of customers who choose to establish self-directed energy optimization plans. The PSC had discretion to allow intervention,

Governing Renewable Energy Plans (PSC Case No. U-15800), that natural gas transportation customers cannot be subject to energy optimization plan surcharges of their transportation providers. It also challenged MichCon's proposed gas surcharge for these customers. ABATE also argued, again consistently with its argument in U-15800, that electric customers who file self-directed electric energy optimization plans with their electric providers should be exempt under MCL 460.1093(1) not only for their electric providers' energy optimization plan surcharges, but from their gas providers' energy optimization plan surcharges as well. However, consistently with its holding in the initial case, the PSC again rejected these arguments and approved MichCon's energy optimization plan, including the surcharges on the gas transportation customers.

II. GAS TRANSPORTATION CUSTOMERS' INCLUSION IN MICHCON'S ENERGY OPTIMIZATION PLANS

ABATE argues that the PSC erroneously interpreted the language of MCL 460.1089(2) to rule that gas transportation only customers were "natural gas customers" subject to a $0.0009/Ccf surcharge to fund MichCon's energy optimization plan.

As explained in *In re Application of Detroit Edison Co*, 276 Mich App 216, 224-225; 740 NW2d 685 (2007):

> 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

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Mich Admin Code, R 460.17201, and permitted ABATE's intervention without limitation, Mich Admin Code, R 460.17205.

> 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).

"An agency's interpretation of a statute, while entitled to 'respectful consideration,' 'is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue.' " *In re Application of Consumers Energy Co*, 281 Mich App 352, 357; 761 NW2d 346 (2008), quoting *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 93, 103; 754 NW2d 259 (2008) (quotation marks omitted).

With respect to this Court's review of the PSC's factual determinations:

> Judicial review of administrative agency decisions must "not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views." *Employment Relations Comm v Detroit Symphony Orchestra*, 393 Mich 116, 124 [223 NW2d 283] (1974); see also *In re Payne*, 444 Mich 679, 692-693 [514 NW2d 121] (1994) ("When reviewing the decision of an administrative agency for substantial evidence, a court should accept the agency's findings of fact, if they are supported by that quantum of evidence. A court will not set aside findings merely because alternative findings also could have been supported by substantial

evidence on the record."). [*In re Application of Detroit Edison Co*, 483 Mich 993 (2009).]

With regard to the question of whether natural gas transportation customers should not be subject to a $0.0009/Ccf surcharge to fund MichCon's energy optimization plan, we find ABATE's arguments unpersuasive. Gas transportation customers are "natural gas customers" under MCL 460.1089(2). In resolving this issue we find persuasive and adopt this Court's previous analysis in *In re Temporary Order to Implement 2008 PA 295*, unpublished opinion per curiam of the Court of Appeals, issued October 14, 2010 (Docket No. 290640), pp 4-7:

> When interpreting statutory language, this Court's primary goal is to give effect to the intent of the Legislature. "The first step is to review the language of the statute. If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute." *Briggs Tax Serv, LLC v Detroit Pub Schools*, 485 Mich 69, 76; 780 NW2d 753 (2010) . . . . This Court accords 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. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999); *Stocker v Tri-Mount/Bay Harbor Bldg Co, Inc*, 268 Mich App 194, 199; 706 NW2d 878 (2005). See also MCL 8.3a; *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 189-190; 740 NW2d 678 (2007). Furthermore, statutory language is to be read in context, and "statutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole." *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010) . . . .
>
> Under MCL 460.1089(1), a provider whose rates are regulated by the PSC is entitled to recover "the actual costs of implementing its approved energy optimization plan."[4] Pursuant to MCL 460.1089(2), the utility is entitled to recover those costs from customers:

> "Under subsection (1), costs shall be recovered from *all natural gas customers* and from residential electric customers by volumetric charges, from all other metered electric customers by per-meter charges, and from unmetered electric customers by an appropriate charge, applied to utility bills as an itemized charge." [Emphasis added.]

In the instant case, ABATE argues that individuals and entities who purchase only "transportation services" from the gas utility, i.e. natural gas transportation customers, are not "natural gas customers" of the utility and thus cannot be assessed the surcharge to fund the gas distribution utilities' energy optimization plans which ABATE maintains the "transportation only customers" cannot use.

The phrase "natural gas customers" is not specifically defined in the Act. The PSC noted this, but found that the Legislature intended the definition to include transportation customers. It based its decision on the fact that gas transportation customers were not explicitly excluded or distinguished in MCL 460.1089(1), that the transportation customers would receive benefits from inclusion in the providers' energy optimization plans, that the additional provisions of the Act include the revenues generated by sales to transportation customers, and that inclusion of these customers was consistent with the stated goals of the energy optimization provisions of the Act, as well as the stated goals of the Act itself.

Reading MCL 460.1089(2) in context with the other subsections of that statute, and in connection with the remaining provisions of the Act and the stated purpose of the Act in MCL 460.1001(2), *Robinson*, 486 Mich at 15, we hold that the PSC correctly found that a portion of the natural gas providers' energy optimization plan costs could be charged back to the providers' gas transportation customers. Gas transportation customers take their service from the providers pursuant to PSC-approved terms and rate schedules. The services they are provided by the regulated utility are "natural gas" services. And in the absence of even an assertion to the contrary, we find no error in the PSC's finding that all of ABATE's members do purchase natural gas commodity, albeit from another pro-

vider. Thus, in light of the specific language that costs shall be recovered from "*all* natural gas customers" (emphasis added), the PSC's interpretation does not "conflict with the Legislature's intent as expressed in the language of the statute at issue." *In re Application of Consumers Energy Co*, 281 Mich App at 357.

The language of MCL 460.1089(6), MCL 460.1089(7) and MCL 460.1091(1) provides further support for the PSC's decision. In pertinent part, MCL 460.1089(6) provides:

"The commission shall authorize a natural gas provider that spends a minimum of 0.5% of *total natural gas retail sales revenues, including natural gas commodity costs*, in a year on commission-approved energy optimization programs to implement a symmetrical revenue decoupling true-up mechanism that adjusts for sales volumes that are above or below the projected levels that were used to determine the revenue requirement authorized in the natural gas provider's most recent rate case." [Emphasis added.][7]

MCL 460.1089(7) provides in pertinent part:

"A natural gas provider or an electric provider shall not spend more than the following percentage of *total utility retail sales revenues, including electricity or natural gas commodity costs*, in any year to comply with the energy optimization performance standard without specific approval from the commission. . . . " [Emphasis added.]

Similarly, MCL 460.1091(1) provides that, except for MCL 460.1089(6), the requirements under MCL 460.1071 through MCL 460.1089 do not apply "to a provider that pays the following percentage of *total utility sales revenues, including electricity or natural gas commodity costs*, each year to an independent energy optimization program administrator selected by the commission[.]" (emphasis added).

We agree with the PSC's determination that these provisions support a finding that the Legislature intended

[7] We recognize the parties' agreement that "natural gas commodity costs" represents sales of the physical natural gas itself.

to include natural gas transportation customers in the providers' energy optimization plans (either administered internally or run by the PSC's program administrator) and to count the transportation revenues for purposes of determining the size of the plans and the ability to implement the true-up mechanism. ABATE argues that Consumers' reading of the statutes improperly renders "including natural gas commodity costs" or "including electricity or natural gas commodity costs" surplusage. However, it ignores the contrary argument that, if the Legislature intended the inclusion of only commodity costs, it would not have added the language concerning total sales, or total retail sales, revenue and that ABATE's interpretation would thus in turn improperly render this language surplusage. We do not find ABATE's argument persuasive. The language used in these sections indicates an intention by the Legislature that the provider is to include all of its utility sales revenues in its calculations.[5] Thus, the provider is to include the costs of the gas to direct customers, transportation sales to direct (or bundled) customers, and transportation sales to unbundled customers. While ABATE states that the question of what sales are to be included is not directly related to the question of which customers have to pay for the optimization plan costs, we disagree. The provider's costs are passed on to the customers under MCL 460.1089(2). And as ABATE repeatedly points out on appeal, an energy optimization plan is supposed to "[e]nsure, to the extent feasible, that charges collected from a particular customer rate class are spent on energy optimization programs for that rate class." MCL 460.1071(3)(d). Thus, when the provisions of the Act are viewed as a whole, the scope of an energy optimization plan is related to the Legislature's intention concerning which customers should be responsible for the costs of implementing the plan.[6]

MCL 460.1089(5) further supports a finding that the Legislature intended to include gas transportation customers in the phrase "all natural gas customers." That statute provides:

"The established funding level for low income residential programs shall be provided from each customer rate class in proportion to that customer rate class's funding of the provider's total energy optimization programs. Charges shall be applied to distribution customers regardless of the source of their electricity or natural gas supply."

The inclusion of "distribution customers" in this subsection provides support for the PSC's conclusion that the Legislature was aware of the existence of gas transportation customers and intended them to be included in "all natural gas customers" in MCL 460.1089(2). In addition, this subsection further supports the PSC's interpretation because it ties the customers' funding of the low income residential programs in "proportion to that customer rate class's funding of the provider's total energy optimization programs." In other words, the distribution customers' funding responsibilities for low income residential programs are to be proportionate to the distribution customers' funding of the total energy optimization program. This indicates an intent by the Legislature that the distribution customers, or gas transportation customers, share funding responsibility for the provider's total energy optimization program, and are thus included as "all natural gas customers" for recovery of energy optimization plan surcharges.[7]

In addition, the PSC reasonably found that the inclusion of gas transportation customers in the energy optimization programs of their transportation providers would have results consistent with the intentions of the Act as stated in MCL 460.1001(2). While MCL 460.1071(2) describes the goals of the energy optimization portion of the Act primarily in terms of reduction of electric usage, and of reducing the need to build more electric generating facilities, ultimately the Act is designed to promote electrical and natural gas energy efficiency. See e.g. MCL 460.1071(3)(f) and (4)(a). While reducing the gas transportation customer's gas usage does not directly result in increased future service capacity for the transportation provider, it could have the effect of increasing the future service capacity of the provider who sells the transportation customer its natural gas. These presumably could include municipal

providers, who are not subject to regulation by the PSC. See MCL 460.6. A demand reduction in one of ABATE's member companies results in an increased ability for such a utility to meet customer's [sic] future demands without investment in costly infrastructure. This is at least consistent with the goal of MCL 460.1001(2)(b) to provide greater energy security through the use of indigenous energy resources. This finding refutes ABATE's implicit argument that the natural gas transportation customers' gas usage is not relevant to the goals of the Act or of the creation of energy optimization plans.

For the above reasons, we hold that ABATE has not shown that the PSC's decision that natural gas transportation customers are responsible for energy optimization plan costs under MCL 460.1089(2) is unlawful or unreasonable.

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[4] Some caveats apply for costs that exceed the overall funding levels specified in the plan, and "costs for load management" are not recoverable under this section.

[5] While the Act does not define "retail" sale, ABATE does not argue that a sale of transportation services does not constitute a retail sale, nor does it explain what such a sale would otherwise be. In addition, because the language of MCL 460.1091 does not use the phrase "retail" but includes the same percentages of revenue as those included in MCL 460.1089(7), and the sales of transportation services are to end user customers, we conclude that these services are intended to be viewed as retail sales.

[6] A similar conclusion could be made regarding the savings targets outlined in MCL 460.1077. The PSC's December 23, 2008 order clarified that these targets include sales volumes that include both choice and transportation sales volumes.

[7] With regard to ABATE's argument that it will not be able to participate in any of the benefit programs, Consumers correctly notes that ABATE acknowledges that gas transportation customers will be eligible to participate in and receive benefits from the energy optimization pro-

> grams developed by the utilities, a fact that the PSC recognized in its order. ABATE's assertion as to the amount of the benefits its members will receive, and whether these benefits would run afoul of the requirements in MCL 460.1071(3)(d), is speculative.

ABATE has raised nothing new in the instant appeal to challenge this analysis. Most pertinently, while ABATE continues to complain that the gas transportation customers will not benefit from participation in the energy optimization plans, and in particular from MichCon's plan, it has still failed to provide any underlying testimony or evidence to support this assertion. According to MichCon's trial brief, as well as the testimony of its manager for business development, Gregory Woloszczuk, and its director of market development, Kevin McCrackin, MichCon's commercial and industrial customers, including gas transportation customers, would be offered two different programs: "prescriptive," with a fixed incentive for each measure the customer takes, and "non-prescriptive," in which the level of incentive is determined from the amount of savings the plan produces. According to MichCon's witnesses, the goal of the prescriptive program is to offer fixed incentives on "proven technologies" to install energy-efficient systems, such as heating and cooling systems, food service equipment, commercial laundry equipment, and energy-management systems in existing and new facilities. The non-prescriptive program—broken down into three subprograms: "custom," "request for proposal" (RFP), and "new construction"—involves incentives for energy-efficient equipment and controls that are considered nonstandard, either because they are unique applications or new technologies, in existing or new facilities. Woloszczuk testified that these programs would comprehensively

cover all of MichCon's consumer and industrial customers, that the programs would work in concert with each other, and that MichCon would provide engineering reviews of custom applications. McCrackin testified that he thought the "RFP offerings" were "broad enough to be available to all customers, and scalable enough that [MichCon] can meet the aggressive savings requirements." Given this testimony, it appears that MichCon planned that gas transportation customers would benefit from its energy optimization plan and take part in its incentives programs, even though the transportation customers receive gas commodity from a different source. Especially given ABATE's acknowledgement that its members will receive some benefit from participating, we find ABATE's argument unpersuasive.

Accordingly, we agree with this Court's decision in *In re Temporary Order to Implement 2008 PA 295* and conclude that the Legislature intended gas transportation customers to participate in MichCon's energy optimization plan.

III. EXEMPTION UNDER MCL 460.1093(1)

ABATE next argues that the PSC erroneously construed former MCL 460.1093(1), which provided that "an eligible primary or secondary electric customer" is exempt from charges that the customer would otherwise incur under MCL 460.1089 and MCL 460.1091 if the customer files a self-directed energy optimization plan with its electric provider and implements the plan.[8] ABATE contends that the PSC improperly ruled that this exemption only applies to surcharges from

[8] As discussed further later in this opinion, this provision was amended by 2010 PA 269, effective December 14, 2010.

electric providers, despite the fact that MCL 460.1089 and MCL 460.1091 provide for electric and gas utilities to collect gas and energy optimization program costs.

Because we agree with this Court's previous analysis of this issue in *In re Temporary Order to Implement 2008 PA 295*, unpub op at 7-9, we adopt it:

> ABATE next argues that the PSC erroneously construed the language of MCL 460.1093(1), when it determined that an "eligible electric customer" could still be responsible for surcharges relating to the customer's natural gas provider's energy optimization plan, even if it filed a self-directed electrical energy optimization plan with its electric provider. We disagree.
>
> As a counterpart to MCL 460.1089 and MCL 460.1091, MCL 460.1093 provides an opportunity for certain electric customers to file a self-directed electric optimization plan. MCL 460.1093(2) defines eligibility based on the peak demand of the customer's facility or facilities. MCL 460.1093(1), the subject of the instant dispute, provides for exemption of the requirements and responsibilities the customer would otherwise have under the energy optimization plan of its provider, or as ABATE argues providers, under MCL 460.1089, or the provider or providers' "independent energy optimization program administrator" under MCL 460.1091. [Former] MCL 460.1093(1) provide[d]:
>
> "An eligible primary or secondary electric customer is exempt from charges the customer would otherwise incur under section 89 or 91 if the customer files with its electric provider and implements a self-directed energy optimization plan as provided in this section."
>
> At issue is whether an eligible electric customer, who files a self-directed energy optimization plan with its electric provider[,] is exempt from the surcharges of only its electric provider under MCL 460.1089 or MCL 460.1091 or from both its gas and electric providers under those subsections.
>
> The PSC found that the Legislature did not have this intent, holding that it was highly unlikely that the Legis-

lature would have, in a section of the Act dealing explicitly with electric customers who file self-directed electric energy optimization plans, provided a loophole by which an electric sales customer who elects to do a self-directed electric program can avoid not only the electric surcharge, but also any gas surcharges assessed to gas sales customers. In holding that a customer is an electric customer only when purchasing electric service, the PSC determined that the charges referenced in MCL 460.1093(1) are therefore limited to charges for electric service that would otherwise be applicable.

We find the PSC's rationale persuasive. The phrase "is exempt from charges the customer would otherwise incur under section 89 or 91" is to be read in context with the remaining portions of MCL 460.1093, as well as the remaining portions of the Act. *Robinson*, 486 Mich at 15. The purpose of MCL 460.1089 and MCL 460.1091 is to provide alternative forms of provider-based energy optimization plans, and provide coverage for the cost of funding the plans. A self-directed energy plan obviates the need for the customer to participate in its electric provider's optimization plan, and effectively replaces it. See MCL 460.1093(7). [8] Thus, the "charges the customer would otherwise incur under [MCL 460.1089 or MCL 460.1091]" in this situation refers to the customer's electric optimization plan costs. Or, as stated by the PSC, a customer is an electric customer with respect to electric charges, and a gas customer with respect to gas charges.

The PSC's decision that the Legislature did not intend MCL 460.1093(1) to exempt the customers who file a self-directed energy optimization plan from all surcharges, whether gas or electric-related, they would otherwise incur under MCL 460.1089 or MCL 460.1091 is further supported by the language of [former] MCL 460.1093(4)(c).[9] This provision, which also pertains to customers who file a self-directed energy optimization plan, requires the PSC to "[p]rovide a mechanism to cover the costs of the low income energy optimization program under [MCL

[9] This language is now contained in MCL 460.1093(5)(c).

460.1089].” This program is found in MCL 460.1089(5), discussed above. Thus, reading MCL 460.1093(1) in conjunction with [former] MCL 460.1093(4)(c), we conclude that the Legislature did not intend for the filing of an electric self-directed energy optimization plan to serve as a blanket exemption from all of the other surcharges in MCL 460.1089 or MCL 460.1091. Notably, ABATE does not challenge on appeal the PSC’s imposition of the “cost associated with the allocated portion for the provider’s low income residential energy optimization program” on self-directed optimization plan customers. Accordingly, reading the language of MCL 460.1093(1) as a whole in conjunction with the remainder of MCL 460.1093, and the other provisions of the Act, we hold that ABATE has failed to show that the PSC’s decision was unlawful or unreasonable.

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[8] This section[10] provides:

“Once a customer begins to implement a self-directed plan at a site covered by the self-directed plan, that site is exempt from energy optimization program charges under section 89 or 91 and is not eligible to participate in the relevant electric provider’s energy optimization programs.”

Moreover, we also note that, in addition to other amendments of MCL 460.1093, the Legislature has since amended MCL 460.1093(1), which now provides in pertinent part: “An eligible electric customer is exempt from charges the customer would otherwise incur *as an electric customer* under section 89 or 91 if the customer files with its electric provider and implements a self-directed energy optimization plan as provided in this section.” (Emphasis added.) This amendment supports the above analysis concerning the Legislature’s intent.

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[10] This language is now contained in MCL 460.1093(8).

Accordingly, the PSC correctly decided that former MCL 460.1093(1) only allowed exemption for eligible electric customers from their electric providers' energy optimization plan charges, not their gas providers' optimization plan charges.

IV. NINETY-DAY REVIEW PERIOD

The Act requires that the PSC approve energy optimization plans, and renewable energy plans, within 90 days after the utility/provider files its application. As it argued in *In re Temporary Order to Implement 2008 PA 295*, ABATE maintains that this tight time frame and the orders of the PSC setting the schedules for this and other cases violated customers' rights under the Michigan Administrative Procedures Act (APA) and the Michigan Constitution. While we note that ABATE failed to raise this issue below, we will address it. We again find the analysis this Court used in *In re Temporary Order to Implement 2008 PA 295*, unpub op at 10-12, persuasive and adopt it:

> MCL 460.1021(5) provides:
>
> "The commission shall conduct a contested case hearing on the proposed plan filed under subsection (2),[11] pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328. If a renewable energy generator files a petition to intervene in the contested case in the manner prescribed by the commission's rules for interventions generally, the commission shall grant the petition. Subject to [MCL 460.1021(6) and 420.1021(10)] after the hearing and within 90 days after the proposed plan is filed

[11] MCL 460.1021(2) requires each electric provider to file a proposed renewable energy plan within 90 days after the PSC issued its temporary order implementing the Act. MCL 460.1073(1) in turn provides, "A provider's energy optimization plan shall be filed, reviewed, and approved or rejected by the [PSC] and enforced subject to the same procedures that apply to a renewable energy plan."

with the commission, the commission shall approve, with any changes consented to by the electric provider, or reject the plan."

As noted by ABATE, MCL 460.6a(1) provides in pertinent part that, in certain proceedings before the PSC, "the effect of which will be to increase the cost of services to [the gas or electric utility] customers," interested parties are entitled to notice and a [sic] "a reasonable opportunity for a full and complete hearing." Pursuant to MCL 460.6a(2)(a), a " '[f]ull and complete hearing' means a hearing that provides interested parties a reasonable opportunity to present and cross-examine evidence and present arguments relevant to the specific element or elements of the request that are the subject of the hearing."

Here, even to the extent that ABATE is correct in its assertion that it, or other customers, are entitled to this procedure, it cannot show that the PSC's actions were improper. ABATE notes that our Supreme Court has held that the PSC should provide for a "full and complete hearing" to even procedures for interim rate relief, see *ABATE v Mich Public Service Comm*, 430 Mich 33, 36, 42-43; 420 NW2d 81 (1988), and argues that parties are entitled to these procedures in energy optimization plan proceedings. However, it ignores the Supreme Court's concurrent holding that, even in such a case, "[t]he PSC also retains discretion to define the standards upon which it bases a grant of interim relief, to define what issues and factors, in a given case, are relevant to those standards as opposed to the standards for final relief, and to limit evidence to the written form." *Id*. at 36. See also *id*. at 43-44. Thus, the PSC retains the ability to narrow the issues in rate optimization plan proceedings, and the relevant evidence, accordingly.

In its denial of ABATE's motion for rehearing or reconsideration, the PSC stated the Legislature intended to expedite energy optimization plan cases and thus only issues that are germane to the questions before the PSC should be entertained at the hearing. It further found that following the procedures set forth in the orders would not violate any party's rights because they provide for notice,

opportunity for intervention, offering evidence, cross-examining evidence presented by others, and presenting arguments.

ABATE has not offered evidence to show that the PSC's decision was unreasonable or unlawful, or that it has failed to provide a reasonable opportunity for a full hearing in energy optimization plan cases. ABATE's argument minimizes the fact that the Legislature, not the PSC, set forth the ninety-day plan review timeframe here. Essentially, through the language of MCL 460.1021(5), the Legislature has determined that, as to the review of energy optimization or renewable energy plans, ninety days presents a "reasonable opportunity to present and cross examine evidence and present arguments relevant to the specific element or elements of the requests that are subject to the hearing" under MCL 460.6a(2). And while ABATE argues that the PSC improperly informed the Legislature that such a timeframe was feasible, or at least did not inform the Legislature that the timeframe would present a problem, it does not provide support for this assertion.

As to ABATE's claims that the ninety-day window violates customers' due process rights under the Michigan Constitution, ABATE cites solely to Const 1963, art 6, § 28. It provides no analysis of its claims that the Legislature's actions violated its members' constitutional rights and no case law to support its assertions. "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.' " *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). "Failure to brief a question on appeal is tantamount to abandoning it." *Mitcham*, 355 Mich at 203.

In addition, ABATE essentially seeks declaratory relief concerning an alleged due process violation that has not yet occurred. ABATE asserts that the ninety-day window is insufficient to present and cross-examine evidence, but has not demonstrated this to be the case by providing particulars concerning what, if any, evidence, testimony, argument

> or other matter it was not permitted to introduce or cross-examine in optimization plan cases as a result of the ninety-day period.
>
> . . . We thus hold that ABATE has failed to demonstrate that the PSC's decision to adopt procedures consistent with the time frame set forth in MCL 460.1021(5) was unreasonable or unlawful.

ABATE's arguments in this case are essentially the same as those raised in its appeal from the initial temporary order. It again cites Const 1963, art 6, § 28, without any further discussion. And while it now has at least participated in a number of energy optimization cases, it provides nothing to show that the time limits imposed by MCL 460.1021(5) have actually caused it or its members to be prejudiced. ABATE has not, for example, cited any expert witness testimony it could not procure in time or any discovery that it tried to engage in and could not. As the PSC notes, ABATE did participate in this case and filed both an initial brief and a reply brief. In addition to the claims raised in this appeal, ABATE specifically challenged MichCon's actual proposed energy efficiency incentive on the grounds that it was unnecessary, poorly constructed, not cost-effective, and inconsistent with the proposed purpose of the incentive. ABATE has not yet produced anything concrete to show that it or its members lost protections under the APA or the Constitution.

Accordingly, we adopt the rationale in *In re Temporary Order to Implement 2008 PA 295* and conclude that ABATE has not met its burden of showing that the PSC's adoption of the time frame set out in MCL 460.1021(5) was unlawful or unreasonable.

We affirm.

FITZGERALD and SHAPIRO, JJ., concurred with MARKEY, P.J.

YOUNG v INDEPENDENT BANK

Docket No. 299192. Submitted September 8, 2011, at Detroit. Decided September 20, 2011, at 9:00 a.m. Leave to appeal denied, 491 Mich 908.

Independent Bank and Independent Mortgage Company initiated mortgage foreclosure proceedings against Alicia Young with regard to her primary residence. Young thereafter filed for Chapter 7 bankruptcy and, although Young's bankruptcy attorney and the bankruptcy trustee were aware of the foreclosure dispute and no lawsuit regarding the dispute had yet been filed, Young did not list a cause of action regarding the foreclosure dispute on her schedule of assets for purposes of the bankruptcy proceedings. The trustee eventually filed a report in the bankruptcy proceedings that did not list the potential lawsuit. The bankruptcy court thereafter entered a discharge in bankruptcy. Young then brought an action in the Oakland Circuit Court against Independent Bank and Independent Mortgage Company, seeking to quiet title to her residence. Defendants filed a motion for summary disposition, alleging that Young did not have standing to bring the action because the interest in the cause of action belonged to the bankruptcy estate and not to Young. The court, Shalina Kumar, J., agreed with defendants and granted their motion. Young appealed the order dismissing her action.

The Court of Appeals *held*:

1. A party filing for bankruptcy must list all his or her assets on the bankruptcy schedule, including all legal or equitable interests of the debtor in property as of the commencement of the case. The interests of the debtor in property include causes of action. The debtor loses all rights to his or her property when he or she files for bankruptcy. The right to pursue causes of action formally belonging to the debtor then vests in the trustee for the benefit of the estate and the debtor has no standing to pursue such causes of action on a vested asset unless the trustee abandons it or the court gives permission.

2. The trial court properly considered the foreclosure dispute an asset of the bankruptcy estate because Young clearly was aware that she was in the dispute with defendants when she filed for bankruptcy.

3. It is not disputed that Young did not receive permission from the bankruptcy court to bring her suit to quiet title. An unscheduled asset cannot be abandoned. A trustee's knowledge of an unscheduled asset does not create an exception to the rule that an unscheduled asset cannot be abandoned. The trial court properly held that plaintiff lacked standing to bring this suit regarding an asset belonging to the bankruptcy estate.

Affirmed.

1. BANKRUPTCY — SCHEDULE OF ASSETS — INTERESTS OF DEBTOR — CAUSES OF ACTION.

A party filing for bankruptcy must list all his or her assets on the bankruptcy schedule, including all legal and equitable interests of the debtor in property as of the commencement of the proceedings; the interests of the debtor in property include causes of action; a debtor loses all rights to his or her property when the debtor files for bankruptcy and a right to pursue a cause of action formerly belonging to the debtor then vests in the trustee for the benefit of the bankruptcy estate; the debtor has no standing to pursue such a cause of action unless the trustee abandons it or the court gives permission (11 USC 521[a][1], 11 USC 541[a][1]).

2. BANKRUPTCY — SCHEDULE OF ASSETS — UNSCHEDULED ASSETS — ABANDONMENT OF ASSETS BY BANKRUPTCY TRUSTEE.

An unscheduled asset cannot be abandoned by a bankruptcy trustee even if the trustee knows of the existence of the unscheduled asset.

Alicia Young *in propria persona.*

Weltman, Weinberg & Reis Co., L.P.A. (by *Stuart A. Best*), for Independent Bank and Independent Mortgage Company.

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

PER CURIAM. Plaintiff appeals as of right the trial court's order of dismissal based on the conclusion that plaintiff did not have standing to bring the action. We affirm.

This action was brought to quiet title to plaintiff's primary residence. In December 2009 plaintiff filed for

Chapter 7 bankruptcy. Before that, defendants had initiated foreclosure proceedings against plaintiff regarding the residence. Defendants filed the requisite motions to proceed with the foreclosure outside the bankruptcy court.

Plaintiff disputed the foreclosure with the bank before and during the bankruptcy proceedings, though no lawsuit had yet been filed. Plaintiff did not list this cause of action on her schedule of assets for purposes of the bankruptcy proceedings. However, both plaintiff's bankruptcy attorney and the trustee were aware of the dispute with the bank.

The bankruptcy court entered a discharge in bankruptcy in March 2010, and plaintiff instituted this lawsuit within a month. Defendants filed a motion to dismiss on the ground that plaintiff did not have standing to bring the claim because the interest in this cause of action belongs to the bankruptcy estate and not to plaintiff. The trial court granted this motion.

Plaintiff argues that the trial court erred by concluding that she did not have standing. She asserts that the trustee knew about the potential lawsuit with the bank and abandoned the asset when the trustee filed his report that did not list the potential lawsuit. As a result, she asserts that the interest in the abandoned asset reverted back to her and therefore she has standing to bring this claim to quiet title. We disagree.

The question whether a party has standing to bring a claim is reviewed de novo because it is a question of law. *In re KH*, 469 Mich 621, 627-628; 677 NW2d 800 (2004).

A debtor loses all rights to his or her property when he or she files for bankruptcy. 11 USC 541(a). A party filing for bankruptcy must list all of his or her assets on the bankruptcy schedule, 11 USC 521(a)(1), in-

cluding "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 USC 541(a)(1). "[I]t is well established that the interests of the debtor in property include causes of action." *Bauer v Commerce Union Bank*, 859 F2d 438, 441 (CA 6, 1988) (quotation marks and citations omitted). Moreover, "the right to pursue causes of action formerly belonging to the debtor . . . vests in the trustee for the benefit of the estate. The debtor has no standing to pursue such causes of action." *Id*. (quotation marks and citation omitted). The debtor can only bring suit on a vested asset if the trustee abandons it or the court gives permission. *Kuriakuz v Community Nat'l Bank of Pontiac*, 107 Mich App 72, 75; 308 NW2d 658 (1981).

A cause of action that is known about and filed before the filing of bankruptcy is an asset and properly belongs to the bankruptcy estate whether or not it was listed on the schedule. *Id.* at 74-75. A cause of action is also an asset that properly belongs to the estate where a party has reason to know of the potential for the cause of action before the filing of bankruptcy and the suit is filed during the bankruptcy proceedings. See *Miller v Chapman Contracting*, 477 Mich 102, 104; 730 NW2d 462 (2007).

Here, plaintiff was aware of the dispute she had with the bank before the bankruptcy filing. Letters were exchanged between plaintiff and the bank and plaintiff's attorney both before and during the bankruptcy proceedings. However, plaintiff filed for bankruptcy and the bankruptcy was discharged before she filed the present lawsuit.

While no Michigan cases have considered this exact situation, other jurisdictions agree that any potential causes of action must be listed on the schedule. The

United States Court of Appeals for the Sixth Circuit held that where the party clearly knew the factual basis for the allegations of a sexual harassment claim but did not disclose that information to the bankruptcy court, that claim was an asset properly belonging to the bankruptcy estate. *White v Wyndham Vacation Ownership, Inc*, 617 F3d 472, 484 (CA 6, 2010).[1] The United States Court of Appeals for the Fifth Circuit is even more explicit, describing the debtor's "duty to disclose all assets, *including contingent and unliquidated claims*." *In re Coastal Plains, Inc*, 179 F3d 197, 208 (CA 5, 1999).

> The debtor need not know all the facts or even the legal basis for the cause of action; rather, if the debtor has enough information . . . prior to confirmation to suggest that it may have a possible cause of action, then that is a "known" cause of action such that it must be disclosed. [*Id.* (citations and some quotation marks omitted).]

Plaintiff cites *Eubanks v CBSK Fin Group, Inc*, 385 F3d 894 (CA 6, 2004), for the proposition that an inadvertent omission of a claim in prior bankruptcy proceedings should not be judicially estopped. *Id*. at 899. Employing *Eubanks*, the *White* court noted:

> [T]o support a finding of judicial estoppel, we must find that: (1) White assumed a position that was contrary to the one that she asserted under oath in the bankruptcy proceedings; (2) the bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition; and (3) White's omission did not result from mistake or inadvertence. In determining whether White's conduct resulted from mistake or inadvertence, this court considers whether: (1) she lacked knowledge of the factual basis of the undisclosed claims; (2) she had a motive for concealment; and (3) the evidence indicates an absence of

[1] Federal caselaw is not binding precedent, but may be persuasive. *Sharp v City of Lansing*, 464 Mich 792, 803; 629 NW2d 873 (2001).

> bad faith. In determining whether there was an absence of bad faith, we will look, in particular, at White's "attempts" to advise the bankruptcy court of her omitted claim. [*White*, 617 F3d at 478.]

In *Eubanks*, the bankrupt party made multiple attempts to amend the schedule and provide documentation of the potential dispute and repeatedly contacted the trustee to clarify the position of the suit. In contrast, the bankrupt party in *White* made what the court characterized as "limited and ineffective attempts to correct her initial misfiling . . . ." *White*, 617 F3d at 480. The *White* court noted that these attempts included an application to employ counsel, an affidavit, and eventually an amendment to her " 'Statement of Financial Affairs.' " *Id*.

Here, the efforts made by plaintiff to correct the record were weak in comparison to the examples in *Eubanks* and even in *White*. Plaintiff's only attempt to correct the record was during one hearing, where plaintiff mentioned to the trustee that she was in a fight with the bank, which was confirmed by her bankruptcy attorney. However, according to plaintiff's brief on appeal, later in that same meeting, plaintiff responded "No" when asked if she had any lawsuits or claims. There is no record of any follow-up effort made by either plaintiff or her attorney. There is no indication that documentation was provided to the trustee or that any effort was made by plaintiff to amend her schedule. Plaintiff's failure to inform the bankruptcy court, and thus to correct her misfiled schedule, distinguishes this case from *Eubanks*.

Because plaintiff clearly was aware that she was in a dispute with the bank regarding the foreclosure when she filed for bankruptcy, the trial court properly considered it an asset of the bankruptcy estate.

Plaintiff can only bring suit on an asset that is part of the bankruptcy estate if that asset has been abandoned or she is given permission by the bankruptcy court. *Kuriakuz*, 107 Mich App at 75. It is undisputed that plaintiff did not receive permission from the bankruptcy court.

Plaintiff claims that the trustee abandoned the claim when the trustee filed his report that did not list the potential lawsuit. However, an unscheduled asset cannot be abandoned. *Id.* at 75-77. Plaintiff claims that because the trustee knew of the claim, he abandoned it by not administering it elsewhere before filing his report. Certainly, in order to abandon an asset, the trustee must know about it. Still, a trustee's knowledge of an asset does not create an exception to the rule that an unscheduled asset cannot be abandoned. The United States Court of Appeals for the First Circuit stated that whether the trustee was aware of the asset was irrelevant because "the burden is on the debtors to list the asset . . . ." *Jeffrey v Desmond*, 70 F3d 183, 186 (CA 1, 1995). The court went on to state:

> What matters here is not what the appellants or their counsel said, it is what they did or, rather, failed to do. The state court action was not scheduled as an asset at any time during the bankruptcy proceedings. There is simply no such concept of "assumed abandonment," which is essentially what appellants ask us to find. [*Id.*]

In sum, the lawsuit in issue here is an asset of the bankruptcy estate because plaintiff knew of this dispute with the bank at the time she filed for bankruptcy even though no suit had yet been filed. Because it is an asset of the bankruptcy estate, plaintiff does not have standing to bring suit unless this claim was abandoned. An unscheduled asset cannot be abandoned even if the

trustee knows of its existence. Therefore, the trial court did not err by dismissing this case on the basis that plaintiff lacks standing.

Affirmed.

M. J. KELLY, P.J., and OWENS and BORRELLO, JJ., concurred.

MACOMB COUNTY v AFSCME COUNCIL 25 LOCALS 411 AND 893

Docket No. 296416. Submitted May 10, 2011, at Lansing. Decided September 20, 2011, at 9:05 a.m. Leave to appeal granted, 491 Mich 915.

AFSCME Council 25 Locals 411 and 893, the International Union UAW Locals 412 and 889, and the Michigan Nurses Association filed an unfair labor practice with the Michigan Employment Relations Commission (MERC) against Macomb County, the Macomb County Road Commission, and the Macomb Circuit Court, alleging that respondents had lowered their pension benefits without bargaining on the issue as required by the public employment relations act (PERA), MCL 423.201 *et seq*. The parties' respective collective-bargaining agreements (CBAs) provided employees with various pension plan options, including one in which payments terminated at the death of the employee (straight-life pension) and another in which pension benefits continued until the death of both the employee and his or her spouse (joint-and-survivor pension). A Macomb County retirement ordinance mandated that the optional joint-and-survivor benefit be the actuarial equivalent of the standard straight-life benefit. A 100 percent female/zero percent male blended mortality table was used to calculate the joint-and-survivor monthly pension benefits from 1982 through 2006, when respondents adopted a different mortality table for calculating those benefits after determining that use of the 100 percent female table resulted in higher pension benefits for those employees who chose the joint-and-survivor pension option. The monthly joint-and-survivor pension benefit was reduced under the new mortality table. The hearing referee determined that under PERA, respondents had a duty to bargain over the method by which the joint-and-survivor pension benefits were determined even though the pension plan was administered by an independent board. She further concluded that respondents' duty to bargain had been satisfied because the CBAs fully covered the issue of retirement benefit calculations and that although the meaning of the term "actuarially equivalent" in the CBAs and the ordinance was ambiguous, respondents' unilateral change in the benefits paid under the joint-and-survivor pension plan did not constitute an unfair labor practice. The MERC reversed, concluding that the term "actuarially equivalent" in the CBAs was

ambiguous and as such did not contain the parties' entire agreement with respect to pension benefits. It found that the use of the 100 percent female mortality table over a 24-year period constituted a tacit agreement that the practice would continue and that respondents' unilateral change in the mortality table used to calculate pension benefits constituted an unfair labor practice. Respondents appealed.

The Court of Appeals *held*:

1. A public employer has a duty to bargain in good faith over the wages, hours, and other terms and conditions of employment, MCL 423.215(1). Under MCL 423.210(1)(e), a public employer commits an unfair labor practice when it refuses to bargain in good faith regarding a mandatory subject of collective bargaining or takes unilateral action on the subject absent an impasse in negotiations. A public employer also commits an unfair labor practice if, before bargaining, it unilaterally alters or modifies a term or condition of employment unless the employer has fulfilled its statutory obligation or been freed from it. An employer may not remove a subject of mandatory bargaining from PERA's requirements by assigning its management to a body not controlled by PERA. Retirement or pension benefits and the methods of calculating them are mandatory subjects of collective bargaining. The MERC correctly determined that even though the retirement ordinance granted the Macomb County Retirement Commission the authority to adopt the actuarial assumptions used to calculate retirement benefits, the actuarial assumptions used to calculate the optional forms of pension-benefit payments under the terms of the CBAs were subject to mandatory bargaining under PERA.

2. When a term in a CBA is unambiguous, a past practice may constitute a term or condition of employment only if it is so widely acknowledged and mutually accepted that it amends the contract, that is, if the parties had a meeting of the minds with respect to the new terms or conditions so that there was an agreement to modify the contract. If the term is ambiguous, then a tacit agreement that a past practice will continue renders that practice a term or condition of employment that cannot be unilaterally altered. The phrase "actuarial equivalence" was not defined in the CBAs, and MERC properly determined it was ambiguous. Expert testimony established that "actuarial equivalence" did not unequivocally mean "equal in value." The past practice of accepting the specific mortality table for calculation of joint-and-survivor pensions constituted a tacit agreement with respect to the application of the term "actuarial equivalence" as used in the CBAs that could not be unilaterally altered. The MERC's findings were supported by

competent, material, and substantial evidence on the whole record. Moreover, the retirement commission adopted the use of the 100 percent female mortality table with knowledge that its use would increase costs. Even if "actuarial equivalence" unambiguously meant "equal in value," the parties' practices over a 24-year period modified the contract and could not be unilaterally altered.

Affirmed.

MARKEY, P.J., dissenting, would have held that the retirement commission did not commit an unfair labor practice when it adopted a new mortality table for calculating pension benefits that resulted in a reduction in monthly benefits to those employees who had chosen the joint-and-survivor pension plan. The matter was not subject to mandatory bargaining under PERA. Judge MARKEY concluded that even though not defined in the statute, retirement ordinance, or the CBAs, the term "actuarial equivalent" was not ambiguous. Rather, the term could be defined by looking at dictionary terms and meant that the optional joint-and-survivor pension benefits must be equal in value to the straight-life benefit on the basis of mortality statistical data. Using the 100 percent female mortality table from 1982 through 2006 erroneously resulted in the optional joint-and-survivor pension monthly benefit being more valuable than the straight-life benefit, which was contrary to the plain terms of the CBAs and the retirement ordinance and resulted in more benefits being paid for by the retirement system than provided in the CBAs. This discrepancy in value violated MCL 46.12a(1)(b), which relates to county pension plans and requires uniformity in pension benefits for all persons in the same general class or classification. Accordingly, Judge MARKEY would have held that respondents did not violate MCL 423.210(1)(e) and that the unfair labor practice charges should have been dismissed. Judge MARKEY further concluded that respondents satisfied their duty to bargain in good faith because the retirement benefits and the methods used to calculate them were covered by the parties' CBAs. She disagreed that there was sufficient evidence to find that the parties amended their CBAs by the past practice of using the 100 percent female mortality table to calculate the straight-life and optional joint-and-survivor pension benefits. Respondents' longtime overpayment of optional joint-and-survivor monthly pension benefits that were not the actuarial equivalent of straight-life pensions did not overcome the express language of the CBAs, and the retirement ordinance vested authority in the commission to adopt mortality tables and rates of interest necessary on an actuarial basis.

1. LABOR RELATIONS — PUBLIC EMPLOYEES — COLLECTIVE BARGAINING — MANDATORY SUBJECTS OF BARGAINING — UNFAIR LABOR PRACTICES.

A public employer has a duty under the public employment relations act (PERA) to bargain in good faith over the wages, hours, and other terms and conditions of employment; a public employer commits an unfair labor practice when it refuses to bargain in good faith regarding a mandatory subject of collective bargaining, takes unilateral action on the subject absent an impasse in negotiations, or before bargaining unilaterally alters or modifies a term or condition of employment unless the employer has fulfilled its statutory obligation or been freed from it; an employer may not remove a subject of mandatory bargaining from the requirements of PERA by assigning its management to a body not controlled by PERA (MCL 423.10[1][e], 423.215[1]).

2. LABOR RELATIONS — COLLECTIVE BARGAINING — MANDATORY SUBJECTS OF BARGAINING — RETIREMENT AND PENSION BENEFITS.

Retirement or pension benefits and the methods of calculating them are mandatory subjects of collective bargaining.

3. LABOR RELATIONS — COLLECTIVE BARGAINING — PAST PRACTICES — AMENDMENTS OF CONTRACT.

When a term in a collective-bargaining agreement is unambiguous, a past practice may constitute a term or condition of employment only if it is so widely acknowledged and mutually accepted that it amends the contract, that is, that the parties had a meeting of the minds with respect to the new term or condition so that there was an agreement to modify the contract; if the term is unambiguous, a tacit agreement that a past practice will continue renders that practice a term or condition of employment that cannot be unilaterally altered.

McConaghy & Nyovich, P.L.L.C. (by *Timothy K. McConaghy*), for Macomb County, the Macomb County Road Commission, and the Macomb Circuit Court.

Miller Cohen, P.L.C. (by *Bruce A. Miller* and *Richard G. Mack, Jr.*), for AFSCME Council 25 Locals 411 and 893.

Georgi-Ann Bargamian for International Union UAW Locals 412 and 889.

Anita Szczepanski and *Lisa Harrison* for the Michigan Nurses Association.

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

SHAPIRO, J. Respondents-appellants employ members of the charging party-appellee labor unions. Pursuant to their respective collective-bargaining agreements (CBAs), respondents provide pension benefits to their employees. The CBAs provide the employees with various pension plan options, including one in which payments terminate at the death of the employee (straight-life pension) and another in which pension benefits continue until the death of both the employee and his or her spouse (joint-and-survivor pension or optional benefits plan). Since 1982, a particular mortality table was used to calculate the joint-and-survivor-pension monthly benefit. In 2006, respondents adopted a different mortality table for calculating those benefits, thereby reducing the monthly pension benefit paid under the joint-and-survivor plan. The charging parties filed a claim with the Michigan Employment Relations Commission (MERC), asserting that respondents committed an unfair labor practice (ULP) by lowering pension benefits without bargaining on the issue as required by the public employment relations act (PERA), MCL 423.201 *et seq*. The MERC agreed that respondents' unilateral actions constituted a ULP, ordered respondents to bargain on the issue, and held that until an agreement is reached, the joint-and-survivor pension benefits must be calculated under the mortality table adopted in 1982. We affirm.

I. UNDERLYING FACTS

The Macomb County Employees' Retirement System Ordinance (the retirement ordinance) provides pension

benefits for employees who are members of the system.[1] Before 1982, calculation of optional joint-and-survivor pension benefits included consideration of the gender of the retiree because the average lifespans of women and men differed. In 1978, the United States Supreme Court held that the usage of separate tables constituted unlawful gender discrimination. *Los Angeles Dept of Water & Power v Manhart*, 435 US 702; 98 S Ct 1370; 55 L Ed 2d 657 (1978). The Michigan Attorney General then issued an opinion that public pension systems must adopt gender-neutral mortality tables. OAG, 1981-1982, No 5846, p 29 (January 22, 1981) ("[A]doption of a sexually-neutral retirement table by the [county] would comport with federal and state law.").[2]

In 1982, in response to this change in the law, the Macomb County Retirement Commission asked its actuary, Gabriel, Roeder and Smith (GRS), to study the effect on the retirement system if it adopted a single mortality table for all future retirees based on a blending of male and female mortality tables into one gender-neutral, or unisex, table. GRS's report explained that doing so would result in a range of outcomes. To the degree that the blend was weighted toward male mortality rates, the result would be "substantially lower benefits than at present for women electing a joint and survivor benefit[.]"[3] To the degree that the blend was weighted toward female rates, it would result in an increase in costs because it would increase benefits to male retirees greater than the reduction in benefits to female retirees. The report went on to note that the

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[1] This includes employees who are not represented by the unions.

[2] The opinion also included a discussion of "actuarially equivalent," although in a different context than at issue here, but noted that the term was undefined.

[3] This would also result in slightly higher benefits being paid to men than had been paid to that date.

only way to "make sure that no participant will receive a lesser benefit than under present procedures" was to adopt a gender-neutral table with a 100% female/0% male blend of mortality rates. The report outlined the specific additional costs to the system using this and several other blends of the male and female mortality tables and offered them as options to the retirement commission. Though cognizant of the increase in overall costs to the retirement system, the retirement commission adopted the 100% female/0% male mortality blend as its gender-neutral mortality table.

The 1982 GRS report also noted that the retirement ordinance required that the optional joint-and-survivor benefit be "the actuarial equivalent" of the standard straight-life benefit. Accordingly, the report recommended adopting a specific rule to govern the meaning of actuarial equivalence in the context of optional benefits. The report recommended adoption of a rule stating that "for purposes of determining amounts of optional benefits, the actuarial equivalent will be based upon a stipulated interest rate and unisex mortality table." Section 15 of the retirement ordinance was thereafter amended to read:

> The Retirement Commission shall from time to time adopt such mortality and other tables of experience, and a rate or rates of regular interest, as are necessary in the Retirement System on an actuarial basis. *For purposes of determining actuarial equivalent Retirement Allowances*, the Retirement Commission is currently using a $7^1/_2$% interest rate and a blending of male and female rates based on the 1971 group annuity mortality table projected to 1984 with ages set back 2 years . . . . [Emphasis added.]

The retirement commission continued to use the same mortality table for 24 years. However, in 2006, in response to another study conducted by GRS, the retirement commission adopted a new gender-neutral

mortality table, effective July 1, 2007, which, among other things, changed the assumed ratio of retirees selecting the joint-and-survivor plan from 100% female/0% male to 60% male/40% female. This had the result of lowering the monthly retirement benefit for those under the joint-and-survivor pension. The charging parties demanded bargaining over the change. Respondents rejected the demand, and the charging parties filed ULP charges with the MERC asserting a violation of respondents' duty under § 10(1)(e) of PERA, MCL 423.210(1)(e), to bargain over benefits.

Although the hearing referee and the MERC reached different rulings, they agreed on two preliminary questions. First, that under PERA, respondents have a duty to bargain over the method by which the joint-and-survivor pension benefits are determined. Second, they agreed that this duty to bargain was not eliminated by the fact that the pension plan is administered by an independent board.

The hearing referee and the MERC disagreed about whether the CBAs fully covered the issue of retirement-benefit calculations so as to satisfy the respondents' duty to bargain. The hearing referee found that this did because the CBAs incorporated § 26 of the ordinance, which describes the optional joint-and-survivor benefits as "actuarially equivalent" to the straight-life benefits. The hearing referee found that the term "actuarially equivalent" represented a bargained benefit and that, although the meaning of the term "actuarially equivalent" as used by the parties was ambiguous, respondents' unilateral change in the benefits paid under the optional joint-and-survivor plan did not give rise to a ULP.[4]

[4] The hearing referee apparently concluded that this ambiguity in contract language could be resolved through grievance arbitration and

The MERC concluded that because the term "actuarially equivalent," as used in the CBAs, was ambiguous, the CBAs did not "contain the entirety of the parties' agreements with respect to pension benefits." It went on to conclude that the 24-year practice of using the 100 percent female mortality table constituted a "tacit agreement that the practice would continue."[5] It found, therefore, that the unilateral change in the mortality tables used to calculate benefits constituted a ULP.

II. STANDARD OF REVIEW

The MERC's findings of fact are conclusive if supported by competent, material, and substantial evidence on the record considered as a whole. MCL 423.216(e); Const 1963, art 6, § 28; *Amalgamated Transit Union, Local 1564, AFL-CIO v Southeastern Mich Transp Auth*, 437 Mich 441, 450; 473 NW2d 249 (1991). Indeed, appellate review of those findings must be undertaken with sensitivity because of the administrative expertise of the MERC. *Amalgamated Transit*, 437 Mich at 450; *Gogebic Community College Mich Ed Support Personnel Ass'n v Gogebic Community College*, 246 Mich App 342; 348-349; 632 NW2d 517 (2001). The

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that, therefore, a unilateral change in optional retirement benefits did not give rise to a ULP. However, even if the hearing referee was correct that the matter could give rise to a grievance, this would not eliminate the presence of a ULP under PERA. In *Bay City Sch Dist v Bay City Ed Ass'n, Inc*, 425 Mich 426, 436-437; 390 NW2d 159 (1986), our Supreme Court held that "[w]here a controversy gives rise to both contractual and statutory claims . . . , grievants have been allowed to pursue different avenues of relief in different fora." If contractual and statutory claims arise out of the same controversy, parallel proceedings are permitted. *Id.* at 437-440.

[5] The hearing referee did not address whether the use of a particular mortality table for 24 years represented a past practice rising to the level of a term or condition of employment.

MERC's legal rulings, however, are not accorded the same deference as its factual findings. "Legal rulings of an administrative agency are set aside if they are in violation of the constitution or a statute, or affected by a substantial and material error of law." *Amalgamated Transit Union*, 437 Mich at 450. Of course, whether an error of law has occurred and, if so, whether it is substantial and material are legal questions subject to review de novo. *Mich Ed Ass'n v Christian Bros Institute of Mich*, 267 Mich App 660, 663; 706 NW2d 423 (2005). Also subject to review de novo are issues of statutory interpretation, *Kent Co Deputy Sheriffs Ass'n v Kent Co Sheriff*, 463 Mich 353, 357 n 8; 616 NW2d 677 (2000), as well as whether contract language is ambiguous and the meaning of unambiguous contract language, *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996).

III. ANALYSIS

In this appeal, we must determine whether respondents violated their duty to bargain when they adopted new mortality tables to calculate joint-and-survivor benefits under the CBAs that had the result of reducing the monthly benefits paid under the joint-and-survivor plan. A public employer commits an unfair labor practice if it refuses to bargain in good faith regarding a mandatory subject of collective bargaining or takes unilateral action on the subject absent an impasse in the negotiations. MCL 423.210(1)(e); *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-55; 214 NW2d 803 (1974). A public employer also "commits an unfair labor practice if, before bargaining, it unilaterally alters or modifies a term or condition of employment, unless the employer has fulfilled its statutory obligation or has been freed from it." *Port Huron*, 452 Mich at 317.

A. MANDATORY BARGAINING

Under § 15 of PERA, MCL 423.215(1), a public employer has a duty to bargain in good faith over subjects found within the scope of the phrase "wages, hours, and other terms and conditions of employment." See *Detroit Police Officers Ass'n*, 391 Mich at 54. The duty to bargain in good faith also extends to officers and agents of public employers. MCL 423.210(1).

Respondents assert that they have no duty to bargain over actuarial assumptions because actuarial assumptions are the sole fiduciary responsibility of the retirement commission. Although actuarial assumptions used to determine whether the retirement system is receiving sufficient contributions to maintain adequate funding may not be a subject of bargaining, *Bd of Trustees of the Policemen and Firemen Retirement Sys of Detroit v Detroit*, 270 Mich App 74, 82-85; 714 NW2d 658 (2006), the purpose of those assumptions is wholly different from those used to calculate joint-and-survivor pension benefits, which, as the hearing referee concluded, are subject to mandatory bargaining:

> [T]he mortality table at issue here, although an "actuarial assumption," is used to calculate the benefits received by retirees from the system. While Respondents' contributions are affected by the choice of the mortality table used for this purpose, they are also affected by the methods used to calculate final average compensation. In general, if benefits rise, so must Respondents' contributions. I find that like the methods used to calculate final average compensation, the mortality table used to calculate joint and survivor pension benefits is a matter properly within Respondents' control and is a mandatory subject of bargaining under PERA.

It is well settled that " '[a]n employer is responsible for its bargaining obligations regardless of whatever

actions are taken by an independent pension board.' " *Detroit Police Officers Ass'n v Detroit*, 212 Mich App 383, 390; 538 NW2d 37 (1995), aff'd 452 Mich 339 (1996) (citation omitted). Moreover, "[i]t is improper for an employer to remove a subject of mandatory bargaining from the scope of PERA by assigning its management to a body insulated from PERA." *Detroit Police Officers Ass'n*, 212 Mich App at 389. Our Supreme Court explained that the basis for this principle originates from the supremacy of state law over local ordinances:

> The enactment of an ordinance, however, despite its validity and compelling purpose, cannot remove the duty to bargain under PERA if the subject of the ordinance concerns the "wages, hours or other terms and conditions of employment" of public employees. If the [relevant] ordinance were to be read to remove a mandatory subject of bargaining from the scope of collective bargaining negotiations, the ordinance would be in direct conflict with state law and consequently invalid. Therefore, if . . . [the subject of the ordinance] is a mandatory subject of bargaining, a city ordinance cannot foreclose collective bargaining on the subject. [*Detroit Police Officers Ass'n*, 391 Mich at 58 (citations omitted).]

Retirement or pension benefits and methods of calculating them are mandatory subjects of collective bargaining. *Id.* at 63-64; *Lieutenants & Sergeants Ass'n v City of Riverview*, 111 Mich App 158, 161; 314 NW2d 463 (1981). Accordingly, the existence of an ordinance that grants the retirement commission the authority to adopt the actuarial assumptions used to calculate retirement benefits does not foreclose collective bargaining on the issue, and respondents' lack of control over the retirement commission cannot excuse avoiding mandatory bargaining under PERA. Moreover, respondent Macomb County has the authority to amend the

ordinance to comply with any term of a bargained agreement and, as just noted, whatever the ordinance may provide, it cannot foreclose statutorily mandated collective bargaining.[6] With regard to the other respondents, we note the ordinance already provides that union members' retirement benefits are controlled by the terms of the members' pertinent CBA. Macomb County Employees' Retirement System Ordinance, § 53b.

Accordingly, we hold, as did the hearing referee and the MERC, that the actuarial assumptions used to calculate the optional forms of benefit payments under the terms of the CBAs are subject to mandatory bargaining under PERA.

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[6] The dissent agrees with us that employers cannot avoid their duty to bargain over actuarial assumptions that govern pension-benefit amounts and that the assumptions in this case must therefore be subject to bargaining. Curiously, despite its explicit rejection of respondent's view that the duty to bargain does not apply, the dissent also observes that respondent's position "has merit." However, other than a brief discussion of the terms "trustee" and "agent," the dissent fails to explain what it finds meritorious in the argument. Indeed, the distinction between the terms "trustee" and "agent" is fully consistent with the notion that the retirement commission, as a trustee, may act to secure and manage reserves in order to ensure the county's ability to pay the benefits, the amount of which is exclusively a matter for bargaining between the county and its employees.

As for the dissent's concern regarding MCL 46.12a(1)(b), we note that the language cited by the dissent requires that pension or retirement benefits be granted "according to a *uniform scale* for all persons in the same general class or classification." It is clear that a uniform scale is being used here. Each retiree is receiving benefits under the same 100% female/0% male table. The dissent is concerned that the amounts of benefits ultimately received are equal, but that is entirely different from whether a *uniform scale* is used to calculate the benefits. A nonuniform scale would, for example, require that the benefits received by men be calculated using a different mortality table than for those received by women. It was precisely to adopt a uniform scale that the 100% female/0% male table was adopted for all employees, even though separate scales for male and female retirees likely resulted in greater consistency in the actual dollar amount of benefits received by each retiree.

B. WHETHER THE CBAs ARE AMBIGUOUS IN THE USE OF THE TERM "ACTUARIAL EQUIVALENCE"

Whether the term "actuarial equivalence" is ambiguous or unambiguous determines the standard by which the past actions of the parties may be seen to establish a term or condition of employment. If the term is ambiguous, then a "tacit agreement" that "past practice will continue" renders that practice a term or condition of employment that cannot be unilaterally altered. If the term is unambiguous, then a past practice may constitute a term or condition of employment only if it "is so widely acknowledged and mutually accepted that it amends the contract," i.e., that "the parties had a meeting of the minds with respect to the new terms or conditions so that there was an agreement to modify the contract." *Port Huron*, 452 Mich at 312.

The MERC found that because the retirement ordinance does not provide a definition of "actuarial equivalence," the term is ambiguous. It further found that the past practice of the use of the 100% female/0% male table had become a term or condition of employment under *Port Huron* and therefore could not be unilaterally altered. We agree with the MERC's conclusion that the term "actuarial equivalence" is ambiguous. We also conclude that its findings regarding the past practice were supported by competent, material and substantial evidence. *Amalgamated Transit Union*, 437 Mich at 450.

The only expert testimony in the record regarding actuarial equivalence was provided by a witness for the charging parties. The expert testified that as long as the same assumptions are used for everyone, they are actuarially equivalent, irrespective of whether the benefits themselves are equal in value:

Q. So that if I'm 62 and I retire and [someone else] is 65 and he retires, if we live to our life expectancy, we should get the exact or close as can be calculated the same amount of pension benefits from the social security system, right?

A. That's the goal, correct.

Q. And that goal is known as actuarial equivalence, isn't it?

A. I'm not sure. I don't think so.

* * *

Q. . . . Is it your understanding that [the GRS report is] saying, look, if you want the surviving spouse options to be the actuarial equivalent of the single life, here's what we do.

A. Well, I'm not entirely sure what they mean by actuarially equivalent *because they are by plan definition actuarially equivalent*.

Q. But the value--

A. The value is different than--I'm sorry. Go ahead.

Q. Correct. We talked about that social security example. The value of the benefits were different, right?

A. Yes.

Q. Those were actuarially equivalent?

A. Right.

* * *

A. Well, by plan definition actuarial equivalence is using a set of factors, they are equivalent. The plan, when they value these particular benefits, there's a greater value to somebody who elects a life option--I'm sorry, a joint and survivor option than a life benefit.

* * *

A. . . . Individually they're using factors that are neutral and by definition they're actuarially equivalent because that's what they have to be.

* * *

A. Well, in terms of valuating a life benefit and a joint and survivorship, you can have a stipulated set of factors that you use in a mortality interest rate and to equate one form to another using those assumptions, they will be equal, in other words, they will be actuarially equivalent based on those assumptions. Like for example, they use the 71 female with a two-year set back. *Every option using those tables is equivalent to every other option*.

Q. And even though they're not going to end up being equal?

A. Well, now we're talking about how do we value these benefits.

Q. Yes.

A. The value of those benefits will not be equal because you're using a different set of assumptions to value these benefits.

Q. That's what I'm getting at. *There's a difference between being of equal value and being actuarially equivalent?*

A. Right. I mean actuarially equivalent is usually a term used in a plan document to set the optional forms to another optional form. The valuation of those optional forms is a different matter, whole different assumption set. They don't have to be different. In most cases they are not the same. They're always different.

Q. In most cases the actual valuation is going to be different than what you came up with to be actuarially equivalent to start with?

A. Right.

* * *

Q. To be actuarially equivalent is really a matter of choosing what factors that you decide will make it actuarially equivalent, is that right?

A. Right.

Q. Valuation would be I wait and see how long you live. I see how many dollars. I pay it off. I multiply the years times the dollars or times the month and that's a value and they may not be the same for the same people at all?

A. They may not be the same.

Q. They may be different for male and female?

A. Right.

* * *

Q. So let me guess. *You could end up having benefits having different values and still be perfectly actuarially equivalent* and plans run that way every day and have for the last 25 years of your experience?

A. Yes. [Emphasis added.]

It is abundantly clear from this expert testimony that the MERC had substantial evidence from which to conclude that the term "actuarial equivalence" as used in this case did not unambiguously mean "equal in value."[7]

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[7] The dissent ignores the testimony and documentary evidence of the parties' use of the term "actuarial equivalence" and instead elects to impose its own definition using a dictionary to define the term despite the fact that the term "actuarial equivalence" cannot be found in the cited dictionary. Although undefined contract terms are generally interpreted in accordance with their "commonly used meaning," *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 113-114; 595 NW2d 832 (1999), courts are not to resort to a lay dictionary for specialized terms of art, particularly in technical fields in which professionals obtain advanced degrees, see *People v Thompson*, 477 Mich 146, 151-152; 730 NW2d 708 (2007). For example, we give tax terms their specialized meanings. *Prod Credit Ass'n of Lansing v Dep't of Treasury*, 404 Mich 301, 312; 273 NW2d 10 (1978) (stating that "terms of art" should be interpreted "in

C. PAST PRACTICE

The MERC concluded that the parties had engaged in a past practice of accepting a 100% female/0% male mortality table for calculation of the optional joint-and-survivor pension and that this practice constituted a "tacit agreement" with respect to the application of the term "actuarial equivalence" as used in the contract that cannot be unilaterally altered. We agree with this conclusion.[8]

We further conclude that, even if "actuarial equivalence" had the unambiguous meaning of "equal in value," the parties' practices over the subsequent 24 years would have constituted a modification of the contract that could not be unilaterally altered.

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accordance with the experience and understanding of those who would be expected to use and interpret the act"). Similarly, we routinely accept testimony about the meaning of medical and engineering terms of art.

Ignoring this rule, the dissent attempts to craft a definition by breaking the term into component parts, finding definitions for each word, and then rejoining them. The absurdity of attempting this with a technical term is evident when one considers medical terms such as "gall bladder." The dictionary defines "gall" as "[b]itterness of feeling; rancor" and "[o]utrageous insolence," and defines "bladder" as "[a]ny of various distensible membranous sacs . . . found in most animals and that serve as receptacles for fluid or gas." *The American Heritage Dictionary of the English Language* (2001). Adopting the dissent's approach to defining terms of art, the legally binding definition of "gall bladder" would be "a distensible membranous sac found in animals that serves as a receptacle for bitterness of feeling, rancor, and outrageous insolence."

[8] The dissent concludes that the MERC's decision is not supported by competent, material and substantial evidence. However, we reiterate that this Court must be extremely deferential when reviewing the MERC's factual findings. " 'Review of factual findings of the commission must be undertaken with sensitivity, and due deference must be accorded to administrative expertise. Reviewing courts should not invade the exclusive fact-finding province of administrative agencies by displacing an agency's choice between two reasonably differing views of the evidence.' " *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n/MEA*, 458 Mich 540, 553; 581 NW2d 707 (1998) (citation omitted).

> [T]he unambiguous contract language controls unless the past practice is so widely acknowledged and mutually accepted that it amends the contract. The party seeking to supplant the contract language must show the parties had a meeting of the minds with respect to the new terms or conditions so that there was an agreement to modify the contract. [*Port Huron*, 452 Mich at 312.]

The record contains the GRS report entitled "Study Regarding Unisex Mortality Tables," which was presented to the retirement commission on July 26, 1982. The report included discussions regarding the effect of various actions the commission might take and included sample male-female blended morality tables labeled U1 (90% male/10% female), U2 (75% male/25% female), U3 (50% male/50% female), and U4 (0% male/100% female). The added costs of these options to the retirement system as a percentage of payroll were estimated as follows: U1 (0.01 percent); U2 (0.19 percent); U3 (0.47 percent); U4 (1.01 percent). The retirement commission adopted the U4 (100 percent female) mortality table for determining optional joint-and-survivor benefits under the retirement ordinance. The retirement commission continued using the 100 percent female mortality table until 2006.

Respondents claim that the adoption of the 100 percent female table "unknowingly" created unequal payments and that "it took a team of actuaries to discover the overpayments in 2006." However, this is not borne out by the record. The initial GRS study that resulted in the adoption of the 100 percent female table specifically indicated that there would be an increased cost to the system. In fact, the 100 percent female table created the *highest* effect on costs of the four options. In spite of that, the retirement commission elected to adopt that table. Further, as conceded by Macomb County's finance director, whatever "inequality" was occurring in 2006 had been

occurring over the past 24 years. Moreover, the record indicates that GRS performed an experience study in 1993 to review the actuarial assumptions the system was using to calculate benefits and did not recommend any changes to the system.[9]

In any event, § 15 of the retirement ordinance was amended shortly after the adoption of the 100 percent female mortality table to read: "For purposes of determining actuarial equivalent Retirement Allowances, the Retirement Commission is currently using a 7½% interest rate and a blending of male and female rates based on the 1971 group annuity mortality table projected to 1984 with ages set back two years." This amendment was clearly adopted to set the optional joint-and-survivor benefits at values that were not strictly "equal in value" to those provided in the straight-life benefit. The original GRS plan expressly stated:

> COMMENT C: The Retirement System Ordinance provides that an optional benefit will be "the actuarial equivalent" of the standard benefit. The Retirement Commission could adopt a rule stating that for purposes of determining

[9] The report stated that it would be reasonable to expect that using a merged gender table would result in "substantially lower benefits than at present for women electing a joint and survivor benefit, and slightly higher benefits than at present for men." On the other hand, the report stated that using all female factors for future retirees would "make sure that no participant will receive a lesser benefit than under present procedures." However, this option "would necessarily entail a cost for the plan since men electing optional forms of payment would be subject to a smaller reduction in benefits than required on an actuarial basis." Thus, the record evidence is that the retirement commission selected the 100 percent female table, even though it resulted in the highest costs to the system, because it left the female benefits the same and increased the male benefits, as opposed to adopting some other merged table, which would have left male benefits the same or better, but reduced female benefits. This suggests that the selection was made without regard to cost or whether the options were equal in value, but was instead based on how the adopted table would affect those receiving the benefits.

> amounts of optional benefits, the actuarial equivalent will be based upon a stipulated interest rate and unisex mortality table. This could eliminate the need for an ordinance change.

Indeed, GRS's 1982 report went on to provide: "[A] unisex approach subsidizes optional elections for men. If, in recognition of this, more men elect joint and survivor benefits than in the past, cost to the system will be greater than is shown." Thus, the initial GRS study both recognized and explicitly informed the county that adoption of any of the unisex tables could result in optional joint-and-survivor benefits that were not equal in value to those of the straight-life benefits. Rather, every unisex table would, to some degree, create an approach that resulted in greater benefits for men making one of the optional elections. The report went further, suggesting that the retirement commission adopt language designed to circumvent the equivalence requirement by providing an open-ended formulaic definition for "actuarial equivalent" that would be based on an interest rate and unisex mortality table.

Consequently, assuming respondents' definition of "actuarially equivalent" is correct and unambiguous, the retirement commission's selection of the 100 percent female table, in conjunction with respondents' adoption of the suggested language and the continued use of the 100 percent female table for 24 years, even after actuarial review in 1993, represented a "definite, certain, and intentional" modification of the actuarial equivalent requirement that was "unequivocal."[10] See

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[10] The dissent contends that the parties' knowledge that the benefits were unequal was insufficient to amend the parties' agreement, citing *Port Huron*, 452 Mich at 332. We agree. That is why we have relied not simply on their knowledge, but their actions to find evidence of an unequivocal modification. We also note that in *Port Huron*, the Court held that there was no evidence that the district had *intentionally* taken

Port Huron, 452 Mich at 329. The acceptance of this provision is clear from the language in the controlling CBAs, which provide that retirement benefits are to be continued "*as presently constituted*," i.e., in accordance with the 100% female/0% male mortality table.

The evidence presented showed that, despite respondents' claim that the clear terms of the CBAs required that the joint-and-survivor pension be "equal in value" to the straight-life pension, for 24 years—from adoption until 2006—the parties continuously used the 100 percent female mortality table without regard to whether it would create equal-in-value pensions. Accordingly, even were respondents correct that the term "actuarial equivalence" as used by the parties was unambiguous, we would still find for the charging parties because the usage of the 100 percent female mortality table was "so widely acknowledged and mutually accepted that it creat[ed] an amendment to the contract."[11] *Port Huron*, 452 Mich at 329.

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actions contrary to the agreements; rather, they happened by *happenstances or oversight*. *Id.* at 332 n 22. Such is clearly not the case here, where there is no happenstance or oversight, but deliberate acceptance based on a clear understanding of the implications. We reject the dissent's conclusion that the GRS reports cannot establish respondents' intent because it was respondents that incorporated language identical to that from the GRS report in the ordinance establishing the adoption of the 100 percent female table. Ironically, the dissent asserts that the 1982 GRS report cannot establish respondents' intent in the same footnote that it acknowledges respondents' amendment of the retirement ordinance in accordance with the report's recommendation. The amendment is necessarily tied to the report. Accordingly, it is appropriate to use it in determining their intent. In any event, the dissent fails to provide or cite any facts in the record that are inconsistent with the MERC's findings.

[11] The dissent alludes to the fact that not permitting the retirement commission to change the actuarial tables used to calculate the retirement benefits could potentially destabilize the retirement funds. However, there is no evidence in the record to support such an assertion, nor has the commission concluded that additional funding is either necessary or unavailable. Thus, the dissent's expression of concern about the financial stability of the retirement system appears to be intended to inflame rather than clarify. Moreover, our conclusion that the parties had

IV. CONCLUSION

In sum, we agree with the MERC that the term "actuarial equivalence" is ambiguous and that a past practice of accepting a 100% female/0% male mortality table constituted a tacit agreement by the parties that that table would continue to be used. We further conclude that, even if "actuarial equivalence" had the unambiguous meaning of "equal in value," there was sufficient evidence of a meeting of the minds that the 100% female/0% male table was accepted for calculating pension benefits in lieu of any "equal in value" requirement that the table could not be unilaterally changed. Accordingly, we agree with the MERC that "[r]espondents violated their duty to bargain when, without bargaining, they changed the method used to calculate joint and survivor benefits under the parties' collective bargaining agreements."[12]

Affirmed.

FITZGERALD, J., concurred with SHAPIRO, J.

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a past practice of using the 100 percent female table does not prevent the parties from selecting a new table. It merely requires that they do so at the bargaining table rather than by a unilateral change.

Finally, the dissent's claim that the use of a gender-neutral table based on a 100 percent female assumption results in inequities constitutes a criticism of using a gender-neutral table at all. Any gender-neutral table will invariably result in some difference in payments given that women in fact do generally live longer than men and that this reality cannot, by definition, be reflected in a gender-neutral table. Moreover, the dissent's assertion that the commission "did not accept a sex-blended mortality table until 2006" is simply wrong. A 100 percent female table is still a sex-blended mortality table; the blending just assumes zero percent men. What makes it a sex-blended table is that the same assumptions are used for everyone, as opposed to having different tables to calculate benefits for men and women.

[12] In light of our conclusion, we do not address the charging parties' claim that respondents had a separate duty to bargain over the effects of implementing the new mortality table.

MARKEY, P.J. (*dissenting*). I respectfully dissent. I conclude that respondents did not commit an unfair labor practice (ULP) when the Macomb County Retirement Commission adopted new mortality tables to ensure that optional retirement benefits that include payment to a surviving beneficiary are the actuarial equivalent of the negotiated defined-benefit straight-life pension. I would hold that the retirement commission is vested with the authority to determine mortality tables and actuarial assumptions necessary to ensure "actuarial equivalence" of optional retirement benefits, and that the matter is not subject to mandatory bargaining under the public employment relations act (PERA), MCL 423.201 *et seq*. But even if it is, the matter was "covered by" the parties' collective bargaining agreements (CBAs); consequently, respondents satisfied their duty to bargain in good faith. I would also hold that the Michigan Employment Relations Commission (MERC) erred by ruling that the parties had tacitly amended the clear and unambiguous language of the parties' contracts. The MERC's finding is not supported by competent, material, and substantial evidence on the whole record. I conclude that it is a substantial and material error of law. Because this Court cannot cure these errors by conducting its own fact-finding under the higher standard required to overcome the clear and unambiguous terms of the parties' CBAs, I would reverse and remand for dismissal of the ULP charges.

I. ANALYSIS

Respondents assert three arguments on appeal. First, respondents argue that the hearing referee correctly determined that respondents had satisfied their duty to bargain in good faith because the matters the charging parties wished to negotiate were already "cov-

ered by" the CBAs. Second, respondents contend that the MERC's decision is unsupported by evidence or legal authority and that the mistaken overpayment of optional benefits with rights of survivorship greater than the "actuarial equivalent" of a straight-life benefit cannot tacitly amend the unambiguous language of the CBAs or the Macomb County Employees' Retirement System Ordinance (the retirement ordinance or the ordinance). Respondents assert that, at best, the charging parties have alleged a breach of a disputed term of the CBAs for which the contract remedy of arbitration is available. Finally, respondents argue that they have no duty to bargain over actuarial assumptions that are within the sole discretion of the commission and that such bargaining might threaten the financial integrity of the pension system. The commission, respondents assert, must be able to determine actuarial assumptions to fulfill its statutory fiduciary duty to maintain the financial integrity of the pension system. Respondents argue that actuarial equivalence cannot have varying bargained definitions and that the determination of actuarial assumptions to ensure that optional benefits are the actuarial equivalent of bargained defined benefits is a fiduciary responsibility vested in the commission by both the ordinance and the CBAs. I agree.

A. MANDATORY BARGAINING

The primary question presented in this appeal is whether the actuarial assumptions made to ensure that optional forms of benefit payments are the actuarial equivalent of straight-life retirement benefits determined under the terms of the CBAs are subject to mandatory bargaining under PERA. The hearing referee, the MERC, and the majority reject respondents' contention that they have no duty to bargain over

actuarial assumptions because they lacked control over the issue, citing *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44; 214 NW2d 803 (1974), and *Detroit Police Officers Ass'n v Detroit*, 212 Mich App 383; 538 NW2d 37 (1995), aff'd 452 Mich 339 (1996). I agree that respondents cannot, on the basis of lack of control over the retirement commission, avoid *their* duty to bargain in good faith *if* the actuarial assumptions at issue are mandatory subjects of collective bargaining under PERA. See *Detroit Police Officers Ass'n*, 391 Mich at 58; *Detroit Police Officers Ass'n*, 212 Mich App at 389-390. However, I agree with respondents and conclude that the actuarial assumptions the commission uses to ensure that optional forms of benefit payments are the actuarial equivalent of the bargained primary straight-life retirement benefit are *not* mandatory topics of bargaining within the meaning of "wages, hours, and other terms and conditions of employment" under MCL 423.215(1).

PERA extends its duty to bargain in good faith over "wages, hours, and other terms and conditions of employment," MCL 423.215(1), to public employers "or an officer or agent of a public employer," MCL 423.210(1). PERA does not define "public employer," but it may be inferred from the definition of "public employee," MCL 423.201(e), that "public employer" includes the government of this state, the government of one of its political subdivisions, or boards, commissions, public school districts or any other branch of the public service that appoints or employs persons. The general characteristics of employers are "(1) that they select and engage the employee; (2) that they pay the wages; (3) that they have the power of dismissal; and (4) that they have power and control over the employee's conduct." *Saginaw Stage Employees, Local 35, IATSE v City of Saginaw*, 150 Mich App 132, 134-135; 387 NW2d 859 (1986).

Consequently, the retirement commission is not the public employer of the charging parties' members, so the commission has no duty to bargain with the charging parties regarding terms and conditions of employment unless the commission acts as the agent of respondents.

An "agent" is " 'a person having express or implied authority to represent or act on behalf of another person, who is called his principal.' " *Stephenson v Golden*, 279 Mich 710, 734; 276 NW 849 (1937), quoting Bowstead, Agency (4th ed), p 1. Similarly, Black's Law Dictionary (8th ed) defines "agent" as "[o]ne who is authorized to act for or in place of another[.]" On the other hand, a trustee is not an agent. " 'An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined generally as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another.' " *Bankers Trust Co of Detroit v Russell*, 263 Mich 677, 682; 249 NW 27 (1933), quoting *Taylor v Davis' Administratrix*, 110 US 330, 334-335; 4 S Ct 147; 28 L Ed 163 (1884).

The facts and law in this case establish that the retirement commission is a trustee, not an agent. "If a county establishes a plan for the payment of pension and retirement benefits to its employees pursuant to this section, the county board of commissioners may provide for a board of trustees to administer the plan and for the manner of election or appointment of the members of the board of trustees." MCL 46.12a(12). The retirement ordinance creates and vests the retirement commission with "the general administration, management and responsibility for the proper operation of the Retirement System, and for construing and making effective the provisions of this Ordinance."

Macomb County Employees' Retirement System Ordinance, § 3. It is undisputed that the commission has never represented respondents in its bargaining with the charging parties; respondents have not authorized the commission to bargain on their behalf with representatives of their employees. Thus, as respondents argue, they cannot directly control decisions made by the commission. But neither may respondents avoid *their* duty to bargain in good faith on this basis *if* the actuarial assumptions at issue are mandatory subjects of bargaining under PERA.

I also conclude that the hearing referee properly rejected respondents' policy argument on the basis of MCL 46.12a(11), which requires that if the county establishes a pension plan, it "shall establish and maintain reserves on an actuarial basis in the manner provided in this subsection sufficient to finance the pension and retirement and death benefit liabilities under the plan and sufficient to pay the pension and retirement and death benefits as they become due." The hearing referee distinguished actuarial assumptions used to determine whether the retirement system is adequately funded, which are not the subject of bargaining, *Bd of Trustees of the Policemen and Firemen Retirement Sys of Detroit v Detroit*, 270 Mich App 74; 714 NW2d 658 (2006), from those used to calculate pension benefits with survivorship rights.

Even though I reject respondents' arguments regarding their lack of control and based on MCL 46.12a(11), I conclude that other reasons support a finding that actuarial assumptions necessary to ensure that optional forms of pension benefits are the "actuarial equivalent" of bargained straight-life retirement benefits are not mandatory subjects of bargaining under PERA. I believe these reasons justify finding that the retirement

commission has the responsibility under state law, as well as the retirement ordinance and the CBAs, to ensure that optional forms of pension benefits payable to similarly situated retirees are actuarially equivalent. I disagree with the MERC and the majority that the term "actuarial equivalent" might be ambiguous because it is not defined in either the retirement ordinance or state law. A term in a statute or contract is not rendered ambiguous because it is undefined. Rather, words are construed according to their plain and ordinary meaning, with consultation of a dictionary if necessary, unless it is clear a term is a legal term of art having peculiar meaning. *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008); *Terrien v Zwit*, 467 Mich 56, 76; 648 NW2d 602 (2002).

The *Random House Webster's College Dictionary* (1997) defines the root word "actuary" as "a person who computes insurance premium rates, dividends, risks, etc., based on statistical data." It also defines "equivalence" as "the state or fact of being equivalent; equality in value, force, significance, etc." In the context of the CBAs and the retirement ordinance, which plainly require that optional retirement benefits payable over the life of a retiree and a surviving beneficiary be the "actuarial equivalent" of the retiree's straight-life retirement allowance, these definitions require that "actuarial equivalent" mean that optional benefits that include payments to a survivor be equal in value to the straight-life benefit on the basis of statistical data regarding mortality and other factors such as the rate of interest. This meaning of "actuarial equivalent" is consistent with the evidence presented at the hearing before the hearing referee, who concluded, despite some obfuscating testimony by the charging parties' expert, that "[b]oth [Gabriel, Roeder and Smith (GRS), the commission's actuary], from the evidence of its reports,

and the UAW's expert witness appear to agree that the precise definition of 'actuarially equivalent' is 'equal based on the same set of actuarial assumptions.' " The retirement system's December 2003 annual actuarial valuation, which was admitted at the MERC hearing below, also defined "actuarial equivalent" as "[a] single amount or series of amounts of equal value to another single amount or series of amounts, computed on the basis of the rate(s) of interest and mortality tables used by the plan." Similarly, the Attorney General opined that the meaning of "actuarial equivalent" in MCL 46.12a(1)(b) requires "receipt of benefits of equal value, and not approximate value, with reference to those benefits enjoyed by other retirants . . . ." OAG, 1981-1982, No 5846, p 32 (January 22, 1981). So, requiring that optional retirement benefits payable over the life of a retiree and a surviving beneficiary be the "actuarial equivalent" of the retiree's straight-life retirement allowance means that optional retirement benefits be equivalent or equal in value on the basis of actuarial assumptions.

It is undisputed that using 100 percent female mortality tables to calculate "actuarial equivalent" optional retirement benefits payable over the life of a retiree and a surviving beneficiary results in the optional benefits being more valuable than the straight-life benefit. This inequality is contrary to the plain terms of the CBAs and the retirement ordinance. It also results in the retirement system's paying more benefits than are provided for in the CBAs and the retirement ordinance and, in turn, makes it more difficult for respondents to satisfy their obligation to maintain the financial stability of the retirement system. Moreover, rather than achieving sex neutrality in pension benefits and obligations, using 100 percent female mortality tables disproportionately favors male retirees.

The retirement commission in 2006, pursuant to § 15 of the ordinance,[1] selected a true sex-blended mortality table that reflected the actual experience of the retirement system. The 2006 GRS experience study determined that using 60 percent male and 40 percent female blended mortality tables would provide actuarial equivalence between a straight-life benefit and optional benefits with rights to a surviving beneficiary. The 60% male/40% female ratio reflected the actual experience of county retirees selecting the more valuable optional benefits despite the fact that the county work force is 74 percent female and 24 percent male. These ratios may reflect that when ready to retire, females are less likely to have someone in whom they have an insurable interest who may be nominated as a survivor or they may reflect the fact that females are less likely to need or desire to provide benefits to a survivor. If bargaining regarding mortality tables and other assumptions used to calculate equality of value is allowed, it would permit continued disparity of value between optional retirement and straight-life benefits. Indeed, bargaining increases the likelihood that optional benefits will continue to differ in value from the defined straight-life benefit.

I read state legislation enabling county retirement systems such as the one at issue here as implicitly, if not explicitly, requiring that optional forms of retirement benefits available to similarly situated retirees be "actuarially equivalent" and that the determination of actuarial assumptions on the basis of the statistical experience of the retirement system is vested in the

[1] "The Retirement Commission shall from time to time adopt such mortality and other tables of experience, and a rate or rates of regular interest, as are necessary in the Retirement System on an actuarial basis." Macomb County Retirement Ordinance, § 15.

system's board of trustees, here the retirement commission. MCL 46.12a(1)(b) provides in pertinent part: "A plan adopted for the payment of retirement benefits or a pension shall grant benefits to an employee eligible for pension or retirement benefits according to *a uniform scale for all persons in the same general class or classification*." (Emphasis added). I conclude that permitting an optional retirement benefit with rights of survivorship that is more valuable than a straight-life benefit violates the rule of uniformity "for all persons in the same general class or classification."

In addition, MCL 46.12a(12) provides that a county retirement plan "may provide for a board of trustees to administer the plan and . . . may grant authority to the board of trustees to fully administer and operate the plan . . . within the limitations . . . in the plan." This subsection also provides that the county retirement plan

> may provide for financing, funding, and the payment of benefits in the same manner and to the same extent as is provided for in the state employees' retirement act, 1943 PA 240, MCL 38.1 to 38.69, and the municipal employees retirement act of 1984, 1984 PA 427, MCL 38.1501 to 38.1555 . . . . [*Id.*]

The State Employees' Retirement Act (SERA) vests the state retirement board with the obligation and authority to conduct an actuarial investigation at least once every five years:

> At least once in each 5 year period, the retirement board shall cause an actuarial investigation to be made into the mortality, service, compensation, and other experience of the members and beneficiaries of the retirement system. Upon the basis of such actuarial investigation the retirement board shall adopt such tables as are deemed necessary for the proper operation of the retirement system and for making effective the provisions of this act. [MCL 38.7.]

SERA, like the retirement ordinance here, offers optional retirement benefits that include survivorship rights to a beneficiary provided they are the "actuarial equivalent" of the straight-life benefit. MCL 38.31(1). Although MCL 38.49(8) specifies an assumed interest rate and use of "the 1983 group annuity and mortality table" for the purpose of determining actuarial equivalence for certain optional retirement benefits, SERA does not suggest that the authority vested in the state retirement board to ensure that optional benefits are the actuarial equivalent of the regular straight-life retirement allowance is subject to collective bargaining under PERA. Reading MCL 46.12a(1)(b) and MCL 46.12a(12) in light of SERA, I believe that the Legislature intended that county retirement plans require optional benefits with rights of survivorship be the actuarial equivalent of straight-life benefits determined by bargained factors and that the determination of mortality tables and other actuarial assumptions to maintain actuarial equivalence be vested with the retirement commission.

This conclusion is consistent with caselaw holding "that pension and retirement provisions are mandatory subjects of bargaining" under PERA. *Detroit Police Officers Ass'n*, 391 Mich at 63-64. The parties have bargained and will continue to bargain over formulas for determining eligibility for retirement and for calculating pension benefits on the basis of age, years of service, final average compensation, and other factors. The parties have bargained and will continue to bargain over the availability of optional forms of benefit payments that may include payments to a surviving beneficiary. The only matter within the discretion of the retirement commission is the determination of mortality tables and actuarial assumptions, on the basis of the actual experience of the retirement system's members

and beneficiaries, so that optional benefits remain the "actuarial equivalent" of each other. This will also ensure that regardless of which pension benefit similarly situated retirees select, retirement benefits will be paid "according to a uniform scale for all persons in the same general class or classification." MCL 46.12a(1)(b).

B. MORTALITY TABLES ARE "COVERED BY" THE PARTIES' AGREEMENTS

To the extent that the mortality tables and the actuarial assumptions the retirement commission uses to determine actuarial equivalence of optional pension benefits are mandatory topics of collective bargaining, the matter is "covered by" the parties' CBAs. Consequently, respondents satisfied their duty of good-faith bargaining.

Under § 15 of PERA, MCL 423.215(1), a public employer has a duty to bargain in good faith over subjects found within the scope of the phrase "wages, hours, and other terms and conditions of employment." See *Detroit Police Officers Ass'n*, 391 Mich at 54. I agree that, generally, retirement or pension benefits and methods of calculating them are mandatory subjects of collective bargaining. *Id*. at 63-64; *Lieutenants & Sergeants Ass'n v City of Riverview*, 111 Mich App 158, 161; 314 NW2d 463 (1981). A public employer commits an unfair labor practice if it refuses to bargain in good faith regarding a mandatory subject of collective bargaining or takes unilateral action on the subject absent an impasse in the negotiations. MCL 423.210(1)(e); *Detroit Police Officers Ass'n*, 391 Mich at 54-55. A public employer also "commits an unfair labor practice if, before bargaining, it unilaterally alters or modifies a term or condition of employment, unless the employer has fulfilled its statutory obligation or has been freed from it." *Port Huron*

Ed Ass'n v Port Huron Area Sch Dist, 452 Mich 309, 317; 550 NW2d 228 (1996). An employer satisfies its duty by bargaining about a subject and "memorializing resolution of that subject in the collective bargaining agreement" or by establishing that "the union has waived its right to demand bargaining." *Id*. at 318.

Assuming that mortality tables and other actuarial assumptions are subject to mandatory bargaining, and because respondents do not assert that the charging parties waived their right to bargain, the question presented is whether the matter the charging parties assert should be negotiated is "covered by" or is "contained in" the CBAs. *Port Huron Ed Ass'n*, 452 Mich at 318, citing *Dep't of Navy v Fed Labor Relations Auth*, 295 US App DC 239, 247; 962 F2d 48 (1992). When a matter is "covered by" a CBA, whether the union has waived its rights is irrelevant. *Port Huron Ed Ass'n*, 452 Mich at 319; *Dep't of Navy*, 295 US App DC at 248. Thus, when analyzing an ULP charge, the first step is to determine if the parties' CBA "covers" the matter in dispute. *Port Huron Ed Ass'n*, 452 Mich at 321. If the disputed matter is "covered" by the CBA, "the details and enforceability of the provision are left to arbitration." *Id*. A matter can be "covered by" by a CBA without the matter being explicitly mentioned. *Id*. at 322 n 16.

In this case, all the CBAs provide formulas for determining eligibility for retirement and for calculating pension benefits on the basis of age, years of service, final average compensation, and other factors. All except the AFSCME Local 893 CBA recognize that the retirement benefit an employee may earn is a defined benefit for the life of the retiree but that an actuarially equivalent reduced benefit payable over the joint lives of the retiree and a beneficiary is available under the

county retirement ordinance. Further, the parties' agreements incorporate the retirement ordinance by providing that the employer "shall continue the benefits as provided by the presently constituted . . . Ordinance, and the Employer and the employee shall abide by the terms and conditions thereof . . . ." Apparently then, the parties have agreed that the retirement benefit employees may earn is a straight-life benefit under § 22 of the ordinance or an actuarially equivalent reduced benefit payable over the joint lives of the retiree and a beneficiary under § 26. Moreover, by agreeing to be bound by the retirement ordinance, the parties have also agreed that the retirement commission "shall from time to time adopt such mortality and other tables of experience, and a rate or rates of regular interest, as are necessary in the Retirement System on an actuarial basis." Macomb County Retirement Ordinance, § 15. Consequently, retirement benefits and the methods used to calculate them—including mortality tables and actuarial assumptions—are "covered by" the parties' CBAs. Respondents have therefore satisfied their duty of bargaining in good faith over retirement benefits. *Port Huron Ed Ass'n*, 452 Mich at 322; *Detroit Police Officers Ass'n*, 391 Mich at 55.

This analysis also applies to the CBA between the Macomb County Road Commission and Local 893. That agreement refers to the retirement ordinance and benefit options for spouses. Because a subject is not comprehensively addressed in the CBA does not mean it is not "covered by" it. *Gogebic Community College Mich Ed Support Personnel Ass'n v Gogebic Community College*, 246 Mich App 342, 350; 632 NW2d 517 (2001).

This analysis is also unaffected by the fact that the term "actuarial equivalent" is not defined in either the retirement ordinance or the CBAs. As previously dis-

cussed, the term is not ambiguous in the context of pension benefits. Moreover, to the extent the charging parties believe anything in the CBAs or the retirement ordinance requires the continued use of mortality tables and actuarial assumptions adopted in 1982, they have a readily available contract remedy. "If the term or condition in dispute is 'covered' by the agreement, the details and enforceability of the provision are left to arbitration." *Port Huron Ed Ass'n*, 452 Mich at 321.

Consequently, even assuming that mandatory bargaining applies, I conclude that respondents have satisfied their duty to do so in good faith because retirement benefits and methods of calculating them are "covered by" the parties' CBAs. Respondents are not guilty of violating MCL 423.210(1)(e), and the ULP charges should have been dismissed.

C. THE PARTIES DID NOT TACITLY AMEND THE CBAS

I respectfully disagree with the majority that there was sufficient evidence to find that the parties by past practice have amended their CBAs to remove from the retirement commission the discretion to adopt "from time to time . . . such mortality and other tables of experience, and a rate or rates of regular interest, as are necessary in the Retirement System on an actuarial basis." Macomb County Retirement Ordinance, § 15. I would reverse the decision of the MERC and vacate its order because its findings are not supported by competent, material, and substantial evidence on the whole record and its holding that the clear and unambiguous language of the parties' contracts was tacitly amended constitutes a substantial and material error of law. First, the MERC erred by finding that the parties' CBAs were ambiguous. Second, the MERC erred by applying the wrong legal standard to determine that the parties

tacitly amended their CBAs by lengthy acquiescence to the retirement commission's use of 100 percent female mortality tables for the purpose of determining that optional retirement benefits were the actuarial equivalent of a straight-life benefit.

By finding that the parties tacitly amended their CBAs, the MERC must necessarily have found an ambiguity in the parties' CBAs because a past practice of the parties cannot tacitly amend unambiguous terms of the parties' agreement to the contrary. *Port Huron Ed Ass'n*, 452 Mich at 325-326; *Gogebic Community College*, 246 Mich App 352. The MERC erroneously applied the tacit amendment standard of *Amalgamated Transit Union*, 437 Mich at 454-455. As later explained in *Port Huron Ed Ass'n*, 452 Mich at 325, this standard only applies "[w]here the collective bargaining agreement is ambiguous or silent on the subject for which the past practice has developed . . . ." A higher standard must be employed with respect to the unambiguous terms of a CBA in order to facilitate the primary purpose of PERA: promotion of "collective bargaining to reduce labor-management strife." *Id*. at 326. To require a party to return to the bargaining table about a matter clearly set forth in a contract requires proof that the parties "knowingly, voluntarily, and mutually agreed to new obligations." *Id*. at 327. The proof necessary to meet this higher standard must be " 'clear and unmistakable' " and " 'substantially stronger evidence than when utilized to interpret ambiguous language or to fill in areas where the contract is silent.' " *Port Huron Ed Ass'n*, 452 Mich at 327-328 (citations omitted). The " 'highest quantum of proof will ordinarily be required in order to show that the parties intended by their conduct to amend or modify clear and unambiguous contractual language . . . .' " *Id*. at 329 (citation omitted). Under this higher standard, that "a

party 'knew or should have known' it was acting contrary to the agreement is insufficient to overcome express language of the agreement." *Port Huron Ed Ass'n*, 452 Mich at 332.

Although an ambiguity or the failure of a CBA to "cover" a topic is necessary to apply the tacit amendment standard, *id*. at 327-330, the MERC did not clearly state what parts of the CBAs are ambiguous. The MERC suggested that the term "actuarial equivalent" is ambiguous by noting the term is not defined in the retirement ordinance. This term appears in both the CBAs and the retirement ordinance and, as discussed already, is not ambiguous. In the context of the CBAs and the retirement ordinance, the term means that the optional benefits be equal in value to the straight-life benefit on the basis of statistical data regarding mortality. Moreover, the issue in this case is not the meaning of "actuarial equivalent," but how or who determines the mortality tables and other actuarial assumptions by which actuarial equivalence is established. On this pertinent question there is no ambiguity in either the CBAs or the retirement ordinance. The parties in all but one of the CBAs explicitly agreed to be bound by the terms of the retirement ordinance. The one exception, the agreement between the road commission and AFSCME Local 893, implicitly, if not explicitly, deferred to the retirement ordinance as governing optional retirement benefits, and hence the meaning of "actuarial equivalent." The retirement ordinance clearly and unambiguously declares that the retirement commission "is vested [with] the general administration, management and responsibility for the proper operation of the Retirement System, and for construing and making effective the provisions of this Ordinance." Macomb County Retirement Ordinance, § 3. Moreover, the retirement ordinance unambiguously

provides that the retirement commission "shall from time to time adopt such mortality and other tables of experience, and a rate or rates of regular interest, as are necessary in the Retirement System on an actuarial basis." Macomb County Retirement Ordinance, § 15.

The retirement commission's long use of a 100 percent female mortality table to determine that optional retirement benefits were the actuarial equivalent of a straight-life benefit is not the clear and unmistakable evidence necessary to overcome the clear and unambiguous terms of the parties' CBAs and the retirement ordinance. On the contrary, it is evidence confirming the plain terms of the CBAs and the retirement ordinance that vests the authority in the commission to from "time to time adopt such mortality and other tables of experience, and a rate or rates of regular interest, as are necessary . . . ." It also does not evidence that the "parties knowingly, voluntarily, and mutually agreed" to amend the CBAs. Similarly, the longtime overpayment of optional benefits that were not "the 'actuarial equivalent' of straight life pensions" cannot overcome the express language of the CBAs and the retirement ordinance that vests the authority in the commission to adopt mortality tables and rates of interest as necessary on an actuarial basis. Even if the parties knew or should have known that the use of 100 percent female mortality tables resulted in optional benefits being more valuable than straight-life benefits, that knowledge was not enough to amend the parties' agreements.[2] "Simply because a party 'knew or should

[2] Because the retirement commission is not an agent of respondents, the commission's 1982 action cannot be evidence of respondents' intent to "knowingly, voluntarily, and mutually" amend the CBAs. Likewise, the 1982 GRS report cannot establish respondents' intent. Moreover, adding the language "[f]or purposes of determining actuarial equivalent Retirement Allowances, the Retirement Commission is currently using a 7½%

have known' it was acting contrary to the agreement is insufficient to overcome express language of the agreement." *Port Huron Ed Ass'n*, 452 Mich at 332.

II. CONCLUSION

I would hold that the retirement commission is vested with the authority to determine mortality tables and actuarial assumptions necessary to ensure "actuarial equivalence" of optional and straight-life retirement benefits and that this matter is not a mandatory subject of bargaining under PERA. But even if mortality tables and actuarial assumptions were mandatory subjects of bargaining, I would conclude for the reasons discussed in part I(B) that respondents satisfied their duty of good-faith bargaining because retirement benefits and methods of calculating them were "covered by" the parties' CBAs.

Finally, for the reasons discussed in part I(C), I would also reverse the MERC's decision and order because it is not supported by competent, material, and substantial evidence on the whole record and its holding that the clear and unambiguous language of the parties' contracts was tacitly amended constitutes a substantial and material error of law. I would, therefore, reverse the MERC's decision, vacate its order, and remand this

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interest rate and a blending of male and female rates based on the 1971 group annuity mortality table projected to 1984 with ages set back two years" to § 15 of the ordinance does not limit the preceding sentence of that section. Further, the retirement commission did not adopt a sex-blended mortality table until 2006. At best, the evidence the majority relies on would only support a finding that respondents knew or should have known that using the 100 percent female mortality tables would result in optional retirement benefits that were not the actuarial equivalent of a straight-life benefit. That knowledge is insufficient to amend the clear and unambiguous language of the parties' agreements. *Port Huron Ed Ass'n*, 452 Mich at 332.

matter for entry of an order dismissing the charging parties' unfair labor practice charges under MCL 423.210(1)(e).

PEOPLE v BENTON

Docket No. 296721. Submitted September 15, 2011, at Detroit. Decided September 22, 2011, at 9:00 a.m. Leave to appeal denied, 491 Mich 917.

Allanah T. Benton, a former school teacher, was convicted in the Genesee Circuit Court, Geoffrey L. Neithercut, J., of two counts of first-degree criminal sexual conduct for engaging in sexual intercourse with a 12-year-old former student. Benton appealed.

The Court of Appeals *held*:

1. Under Michigan's rape-shield statute, MCL 750.520j, evidence of specific instances of a victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct may not be admitted unless and only to the extent that the judge finds that the proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value. The evidence may only be of the victim's past sexual conduct with the actor or of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. However, evidence that is not admissible under one of the statutory exceptions to the rape-shield statute may nevertheless be relevant and admissible to preserve a defendant's Sixth Amendment right of confrontation. In determining whether to admit the evidence, a court must consider the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct when its exclusion would not unconstitutionally abridge the defendant's right to confront the witnesses against him or her. In this case, Benton sought to introduce evidence that the victim had previously engaged in sexual relations with two other girls, but the trial court excluded the evidence under the rape-shield statute. Benton argued that the exclusion of the evidence had deprived her of her right of confrontation because it allowed the prosecution to portray the victim as sexually innocent. However, the evidence was not legally relevant because sexual penetration with a person under 13 years of age constitutes first-degree criminal sexual conduct irrespective of the victim's sexual history. Further, because the victim never asserted that Benton had been his first sexual partner, the evidence was not necessary to

impeach the victim's testimony. Accordingly, the trial court did not abuse its discretion by excluding the evidence.

2. Generally, all relevant evidence is admissible, but relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. In this case, Benton was terminated from her teaching position and the termination was upheld by the tenure commission. The prosecutor referred to the tenure proceeding while cross-examining Benton. Benton argued that the reference was irrelevant and unfairly prejudicial. However, Benton had referred to the tenure proceeding during direct examination, and the cross-examination was responsive. Accordingly, the trial court did not abuse its discretion by allowing cross-examination regarding the tenure proceeding, and to the extent that the questioning improperly suggested that there had already been an official determination that Benton was guilty, any error was harmless in light of the trial court's instruction that the attorneys' questions and statements were not evidence.

3. Under MCL 750.520b(2)(b), a conviction for first-degree criminal sexual conduct is punishable by imprisonment for life or any term of years, but not less than 25 years if the offense is committed by a person who is 17 years of age or older against an individual less than 13 years of age. Benton was, accordingly, sentenced to 25 to 38 years' imprisonment. In determining whether a penalty constitutes cruel or unusual punishment, a court must consider (1) the severity of the sentence imposed and the gravity of the offense, (2) a comparison of the penalty to penalties for other crimes under Michigan law, and (3) a comparison between Michigan's penalty and penalties imposed for the same offense in other states. Benton engaged in a prolonged course of action to isolate the victim and render him susceptible to her approach, and the victim's alleged acquiescence cannot be considered a mitigating factor given his age. Further, the 25-year minimum sentence was not disproportionate in light of the social consequences of sexual offenses against children, and several other states impose similar penalties. Thus, the statutory mandatory-minimum sentence of 25 years in prison was not cruel or unusual, and Benton was not unconstitutionally sentenced.

Affirmed.

1. RAPE — CRIMINAL SEXUAL CONDUCT — EVIDENCE OF PRIOR SEXUAL CONDUCT — RIGHT OF CONFRONTATION.

Under Michigan's rape-shield statute, evidence of specific instances of a victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct

may not be admitted unless and only to the extent that the judge finds that the proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value; the evidence may only be of the victim's past sexual conduct with the actor or of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease; however, evidence that is not admissible under one of the statutory exceptions to the rape-shield statute may nevertheless be relevant and admissible to preserve a defendant's Sixth Amendment right of confrontation; in determining whether to admit the evidence, a court must consider the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct when its exclusion would not unconstitutionally abridge the defendant's right to confront the witnesses against him or her (MCL 750.520j).

2. CONSTITUTIONAL LAW — SENTENCES — CRUEL OR UNUSUAL PUNISHMENT — FIRST-DEGREE CRIMINAL SEXUAL CONDUCT.

In determining whether a penalty constitutes cruel or unusual punishment, a court must consider (1) the severity of the sentence imposed and the gravity of the offense, (2) a comparison of the penalty to penalties for other crimes under Michigan law, and (3) a comparison between Michigan's penalty and penalties imposed for the same offense in other states; a conviction for first-degree criminal sexual conduct is punishable by imprisonment for life or any term of years, but not less than 25 years if the offense is committed by a person who is 17 years of age or older against an individual less than 13 years of age; a 25-year minimum sentence for first-degree criminal sexual conduct committed by a person who is 17 years of age or older against an individual less than 13 years of age is not cruel or unusual in light of the social consequences of sexual offenses against children and given that the 25-year mandatory minimum sentence is similar to the penalty imposed for the same offense in several other states (US Const, Am VI; Const 1963, art 1, § 16; MCL 750.520b[2][b]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *David S. Leyton*, Prosecuting Attorney, and *Vikki Bayeh Haley*, Assistant Prosecuting Attorney, for the people.

Michael A. Faraone, P.C. (by *Michael A. Faraone*), for defendant.

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

MARKEY, J. Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(a)(1), for which she was sentenced to concurrent prison terms of 25 to 38 years. She appeals by right. We affirm.

Defendant, a former elementary school teacher, was convicted of engaging in sexual intercourse with a 12-year-old former student from her sixth grade class. The victim had academic and behavioral problems and was suspended from school for fighting with another student at the beginning of the 2007-2008 school year. Defendant intervened on the victim's behalf and persuaded the school principal not to expel the victim from school. After the victim returned to school, defendant invited him to religious activities at her masjid (mosque) and to her home, purportedly to offer him guidance and help him with his anger and academic problems. The victim was subsequently expelled from school after a second fighting incident. After his expulsion, he spent more time with defendant at her home, with his mother's permission.

According to the victim, he and defendant progressed from hugging, to holding hands, to kissing, before eventually engaging in sexual intercourse. The victim testified that he and defendant had sexual intercourse on two different evenings in October 2007. After the second incident, the victim called defendant from his home and inadvertently recorded the call. During the recorded call, the victim referred to defendant as his girlfriend and stated that he was proud to be involved with a grown woman. The victim's mother heard the recording and reported it to the school. The school

board later terminated defendant from her teaching position and that decision was upheld by the tenure commission.

I. RAPE-SHIELD STATUTE

Defendant argues that the trial court erred by denying her request to cross-examine the victim concerning statements he previously made during a forensic interview in which he related prior sexual experiences with a 13-year-old girl and a 14-year-old girl. The trial court ruled that the evidence was barred by the rape-shield statute, MCL 750.520j. Defendant contends that the exclusion of the evidence violated her constitutional right of confrontation.

This Court reviews a trial court's evidentiary ruling for an abuse of discretion. *People v Orr*, 275 Mich App 587, 588; 739 NW2d 385 (2007). An abuse of discretion occurs when the trial court reaches a result that is outside the range of principled outcomes. *Id.* at 588-589. Preliminary issues of law, including the interpretation of the rules of evidence and the effect of constitutional provisions, are reviewed de novo. *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007). The constitutional question whether defendant was denied her constitutional right to confront the witnesses against her is reviewed de novo. *People v Breeding*, 284 Mich App 471, 479; 772 NW2d 810 (2009).

At trial, when describing the two acts of intercourse with defendant, the victim testified that defendant placed a condom on his penis and put his penis into her vagina because he did not know how. The trial court denied defendant's request to cross-examine the victim concerning statements he previously made during a forensic interview in which he related prior sexual experiences with a 13-year-old girl and a 14-year-old girl.

Michigan's rape-shield statute, MCL 750.520j, provides:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted . . . unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.
>
> (2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

MRE 404(a) similarly provides, in pertinent part:

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> * * *
>
> (3) In a prosecution for criminal sexual conduct, evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease[.]

In this case, the evidence of the victim's prior sexual experiences that defendant sought to introduce did not fit within the categories of evidence specified in MCL 750.520j(1)(a) or (b). Defendant contends, however, that the evidence was necessary to protect her constitutional right of confrontation.

In certain limited situations, evidence that is not admissible under one of the statutory exceptions may nevertheless be relevant and admissible to preserve a criminal defendant's Sixth Amendment right of confrontation. *People v Hackett*, 421 Mich 338, 344, 348; 365 NW2d 120 (1984). In *Hackett*, 421 Mich at 348-349, our Supreme Court explained:

> The fact that the Legislature has determined that evidence of sexual conduct is not admissible as character evidence to prove consensual conduct or for general impeachment purposes is not however a declaration that evidence of sexual conduct is never admissible. We recognize that in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted. Moreover in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge. Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past. [Citations omitted.]

When a trial court exercises its discretion to determine whether evidence of a complainant's sexual conduct not within the statutory exceptions should be admitted, the court "should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's

sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation." *Id.* at 349. When applying the rape-shield statute, trial courts must balance the rights of the victim and the defendant in each case. *People v Morse*, 231 Mich App 424, 433; 586 NW2d 555 (1998).

Defendant argues that she should have been permitted to cross-examine the victim concerning his prior sexual experiences because his trial testimony falsely portrayed him as a sexually innocent, inexperienced virgin, thereby appealing to the jury's sympathy for a sexually uninitiated victim. We conclude that the trial court did not err by excluding this evidence. The first flaw in defendant's argument is that the victim never stated, directly or indirectly, that his sexual contact with defendant was his first sexual experience. Indeed, when the prosecutor asked the victim why he needed defendant's assistance with the condom and with penetration the second time, the victim stated, "Cause *every time* I did . . . the *girl* put my penis in her vagina for me." (Emphasis added.) We disagree with defendant's contention that this statement could only be understood as referring to the victim's first sexual encounter with defendant. The phrase "every time" refers to more than one occasion, not a single prior incident. Further, the victim's reference to "the girl" suggested someone other than defendant, considering that defendant was a grown woman and that the victim referred to defendant as "Miss Allanah" throughout his testimony. Accordingly, defendant failed to show that the proffered evidence was necessary to impeach the victim's trial testimony.

Furthermore, the evidence was not otherwise relevant. "Evidence is relevant when it has a tendency to make a material fact more or less probable." *People v*

McGhee, 268 Mich App 600, 610; 709 NW2d 595 (2005). "Relevance involves two elements, materiality and probative value. Materiality refers to whether the fact was truly at issue." *Id.* The premise of defendant's argument is that a jury would view sexual relations with a 12-year-old virgin as being more egregious than sexual relations with a 12-year-old victim who has already had sexual relations, so it was necessary to place the victim's prior sexual experiences before the jury to defuse the prejudicial inference that defendant was the victim's first sexual partner. But the victim's sexual experience or history was not legally relevant to any issue in the case. Sexual penetration with a person under 13 years of age constitutes CSC-I irrespective of the victim's consent or experience. MCL 750.520b(1)(a).

Accordingly, the trial court did not abuse its discretion by excluding the proffered evidence.

II. TENURE COMMISSION EVIDENCE

Defendant next argues that the trial court erred when it permitted the prosecutor to cross-examine her concerning the results of her teacher tenure proceeding. We review this evidentiary issue for an abuse of discretion. *Dobek*, 274 Mich App at 93. Evidentiary error does not require reversal unless after an examination of the entire cause, it appears more probable than not that the error affected the outcome of the trial in light of the weight and strength of the properly admitted evidence. MCL 769.26; *People v Whittaker*, 465 Mich 422, 426-427; 635 NW2d 687 (2001).

"Generally, all relevant evidence is admissible, and irrelevant evidence is not." *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003), citing MRE 402. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to

the determination of the action more probable or less probable than it would be without the evidence." MRE 401. However, MRE 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Defendant argues that the prosecutor's question regarding the tenure hearing was unfairly prejudicial because it suggested that there had already been a judicial finding of her guilt. She argues that the outcome of the tenure hearing was not relevant because it involved different allegations, such as improper communications with a student, and was decided by a different standard of proof. Plaintiff argues that the question was not improper because defendant opened the door by testifying about the tenure hearing on direct examination.

The record discloses that on direct examination defendant testified that the victim's mother brought the recording of the telephone call between the victim and defendant to defendant's school for school authorities to listen to, but that no one associated with the school or the school board ever gave defendant the opportunity to listen to the recording. According to defendant, she heard the recording for the first time in April 2009, when her attorney for the tenure proceeding allowed her to listen to it. Defendant also testified on direct examination that the school district terminated her employment "[a]s a result of the allegations[.]" On cross-examination, the prosecutor questioned defendant as follows:

> *Q.* Ms. Benton, you—you have lost your job, that's true, isn't it?
>
> *A.* Correct.

Q. They had a tenure hearing about that, didn't they?

A. Yes.

Q. So, you had a hearing before you lost your job, didn't you?

A. Yes.

Q. Wasn't just the allegation. There was actually some process—

* * *

A. Correct.

Defendant's direct examination testimony suggested that the school board had treated her unfairly by denying her the opportunity to hear the recording and explain her statements until the tenure commission hearing. Defendant's direct examination testimony opened the door for the prosecution to further question defendant on this subject. The prosecutor's questioning did not expand on the matters raised in direct examination except to elicit defendant's acknowledgement that she was not terminated merely because of "allegations," but rather was afforded a hearing before she lost her job. Accordingly, the trial court did not abuse its discretion in allowing cross-examination on this subject.

To the extent that the prosecutor's last question improperly suggested that there had already been an official determination of defendant's guilt, we conclude any error arising from the question was harmless. The jury had already learned from defendant's direct examination testimony that the school board had terminated defendant's employment following a tenure commission hearing. The potential prejudice arose not from defendant's answer to the question, but rather from the prosecutor's wording of the question. Nonetheless, the

jurors were instructed that the attorney's questions and statements were not evidence, and jurors are presumed to have followed their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998); *Dobek*, 274 Mich App at 66 n 3 (potential prejudice from prosecutor's statement cured by instruction that statements and arguments by counsel are not evidence). Accordingly, it is not more probable than not that any error affected the outcome. *Whittaker*, 465 Mich at 426-427.

Defendant also argues that the question regarding the outcome of the hearing was improper hearsay, and that it violated the Confrontation Clause. Defendant did not object below to the prosecutor's questioning on hearsay or Confrontation Clause grounds, so these claims are not preserved. Unpreserved claims of evidentiary error are reviewed for plain error affecting the defendant's substantial rights. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). Defendant's hearsay and Confrontation Clause arguments are based on her attempt to equate the testimony revealing the outcome of the tenure hearing with an out-of-court statement of the referee who presided at that hearing; however, no statement by the hearing referee was introduced at trial. Rather, defendant merely offered her own knowledge of the outcome of that proceeding. Accordingly, defendant has not established a plain error based on hearsay grounds or the Confrontation Clause.

Defendant further argues that to the extent defense counsel opened the door to this line of questioning, counsel was ineffective. Pertinent here, to establish ineffective assistance of counsel, defendant must establish (1) that her attorney's performance was objectively unreasonable in the light of prevailing professional norms, and (2) that but for counsel's error, it is reasonably probable that a different outcome would have

resulted. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Defense counsel's direct examination questioning was intended to show that defendant was treated unfairly by the school board, which did not give her the opportunity to explain her statements on the recording. This line of questioning was a matter of strategy, and this Court will not second-guess defense counsel's judgment on matters of trial strategy. *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008).

III. MANDATORY 25-YEAR MINIMUM SENTENCE

Defendant lastly argues that her mandatory 25-year minimum sentences for her first-degree CSC convictions are cruel and/or unusual punishments that violate the federal and state constitutions. US Const, Am VIII; Const 1963, art 1, § 16. We review issues of constitutional law de novo. *People v Swint*, 225 Mich App 353, 364; 572 NW2d 666 (1997). "Statutes are presumed to be constitutional, and the courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *People v Dipiazza*, 286 Mich App 137, 144; 778 NW2d 264 (2009) (quotation marks and citation omitted).

As amended by 2006 PA 169, effective August 28, 2006, MCL 750.520b(2)(b) provides that a conviction for CSC-I is punishable by "imprisonment for life or any term of years, but not less than 25 years" if the offense is committed by a person who is 17 years of age or older against an individual less than 13 years of age. Defendant argues that the mandatory 25-year minimum sentence constitutes cruel or unusual punishment because it imposes an excessively long term of imprisonment and precludes judicial discretion to consider mitigating factors or other particular circumstances of the offense and the offender.

The Michigan Constitution prohibits cruel *or* unusual punishment, Const 1963, art 1, § 16, whereas the United States Constitution prohibits cruel *and* unusual punishment, US Const, Am VIII. If a punishment "passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *People v Nunez*, 242 Mich App 610, 618-619 n 2; 619 NW2d 550 (2000).

In *People v Bullock*, 440 Mich 15; 485 NW2d 866 (1992), our Supreme Court considered whether a statutory mandatory penalty of life in prison without the possibility of parole for possession of 650 or more grams of cocaine was cruel or unusual punishment under the Michigan Constitution. The Court explained that whether a penalty may be considered cruel or unusual is to be determined by a three-pronged test that considers (1) the severity of the sentence imposed and the gravity of the offense, (2) a comparison of the penalty to penalties for other crimes under Michigan law, and (3) a comparison between Michigan's penalty and penalties imposed for the same offense in other states. *Id.* at 33-34. The Court stated that under the Michigan Constitution, the prohibition against cruel or unusual punishment included a prohibition on grossly disproportionate sentences. *Id.* at 32. But, the Court noted that "the *constitutional* concept of 'proportionality' under Const 1963, art 1, § 16 is distinct from the nonconstitutional 'principle of proportionality' discussed in *People v Milbourn*, 435 Mich 630, 650; 461 NW2d 1 (1990), although the concepts share common roots." *Id.* at 34 n 17.

With respect to the first factor, gravity of the offense and the severity of the sentence imposed, defendant argues that her sentences are disproportionate because, considering her own characteristics and the character-

istics of the sentencing offense, she ranks among the least dangerous of offenders in the class of offenders subject to a 25-year minimum sentence under MCL 750.520b(2)(b). She asserts that the offenses did not involve any force, violence, coercion, or trickery, and that the victim did not sustain physical or psychological injury. Further, she has no prior criminal record of any kind, and she contends that "by all accounts she had otherwise led an exemplary life." She maintains that her sentences are unduly harsh in view of the particular offense, which she characterizes as a comparatively benign type of child assault.

We are not persuaded that defendant should be considered a less culpable offender than most persons convicted of CSC-I against a child victim. In *In re Hildebrant*, 216 Mich App 384, 386-387; 548 NW2d 715 (1996), this Court observed:

> Statutory rape, a strict-liability offense, has been upheld as a matter of public policy because of the need to protect children below a specific age from sexual intercourse. The public policy has its basis in the presumption that the children's immaturity and innocence prevents them from appreciating the full magnitude and consequences of their conduct. *People v Cash*, 419 Mich 230, 242; 351 NW2d 822 (1984). Because this policy focuses on the exploitation of the victim, we find that the Legislature did not intend to withdraw the law's protection of the victim in order to protect the offender.

This statement of Michigan public policy conflicts with defendant's attempt to minimize the gravity and severity of her offense. Further, contrary to defendant's assertion that she did not resort to trickery, isolation, or surprise to accomplish the abuse, the evidence showed that defendant offered herself as a mentor and tutor to a particularly vulnerable victim, invited the victim to participate in activities that allowed her to isolate him

in her home, and then gradually introduced physical and emotional intimacy to the relationship that culminated in sexual intercourse. The victim's alleged acquiescence to defendant's conduct cannot be considered a mitigating factor given that "his immaturity and innocence prevent[ed] [him] from appreciating the full magnitude and consequences of [his] conduct." *In re Hildebrant*, 216 Mich App at 386.

Defendant also argues that the mandatory 25-year minimum sentence is unduly harsh compared to penalties for other offenses under Michigan law, including many violent offenses. We are not persuaded that these comparisons render the 25-year minimum sentence disproportionate to the offense. The perpetration of sexual activity by an adult with a preteen victim is an offense that violates deeply ingrained social values of protecting children from sexual exploitation. Even when there is no palpable physical injury or overtly coercive act, sexual abuse of children causes substantial long-term psychological effects, with implications of far-reaching social consequences. The unique ramifications of sexual offenses against a child preclude a purely qualitative comparison of sentences for other offenses to assess whether the mandatory 25-year minimum sentence is unduly harsh.

Finally, defendant invites a comparison of Michigan's mandatory 25-year minimum sentence with the sentencing schemes for like offenses in other states. But our research reveals that several other states have laws that also impose a mandatory 25-year minimum sentence for an adult offender's sexual offense against a preteen victim, regardless of the presence of aggravating factors such as force or violence.[1] Thus, a compari-

[1] Ark Code Ann 5-14-103(a)(3)(A) and (c)(2); Cal Penal Code 288.7(a); Del Code Ann tit 11, § 4205A(a)(2); Fla Stat 775.082(3)(a)(4) and

son of Michigan's penalty and penalties imposed for the same offense in other states fails to support defendant's attack on the constitutionality of Michigan's sentencing statute.

For these reasons, we reject defendant's argument that her mandatory 25-year minimum sentences are unconstitutionally cruel or unusual.

We affirm.

SERVITTO, P.J., and K. F. KELLY, J., concurred with MARKEY, J.

800.04(5)(b); Ga Code Ann 16-6-4(d); Kan Stat Ann 21-6627(a)(1)(B) and 21-5503(a)(3); La Rev Stat Ann 14:43.1(C)(2); Mont Code Ann 45-5-501(1)(a)(ii)(D), 45-5-503(4), and 45-5-507(5); Nev Rev Stat 200.366(3)(b) and (c); NC Gen Stat 14-27.2A and 14-27.4A; Or Rev Stat 137.700(2)(b)(D) and 163.375(1)(b); RI Gen Laws 11-37-8.1 and 11-37-8.2; SC Code Ann 16-3-651(h) and 16-3-655; Tenn Code Ann 39-13-522 and 40-35-112(b)(1); Utah Code Ann 76-5-402.1; Wash Rev Code 9.94A.507; W Va Code 61-8B-3(c); Wis Stat 939.616(1r) and 948.02(1)(b).

PEOPLE v MAHONE

Docket No. 299056. Submitted September 14, 2011, at Detroit. Decided September 27, 2011, at 9:00 a.m. Leave to appeal denied, 491 Mich 908.

Lance C. Mahone was convicted by a jury in the Oakland Circuit Court of two counts of first-degree criminal sexual conduct and one count of unarmed robbery. The charges resulted from an attack on the victim after an attempt by defendant and his codefendant (not a party to this appeal) to solicit the sexual services she advertised online. The victim refused to see two clients at the same time, and defendant and his codefendant initially left, but then later returned to rob and sexually assault her. Because defendant's theory was that the victim invented the sexual assault as vengeance for the theft and refusal to pay for services, credibility was an essential component of the case. The jury's composition was changed after jury deliberations had begun when the court, Martha D. Anderson, J., excused a juror from service and replaced her with an alternate. Defendant appealed.

The Court of Appeals *held*:

1. A police officer testified that the victim indicated that she screamed during the assault. The officer then testified that she confirmed with unidentified inhabitants of an adjacent hotel room that they heard a disturbance and screams during that time frame. The error was cured when the inadmissible hearsay was struck from the record and the jury was instructed to disregard it. Jurors are presumed to follow instructions, and it is presumed the instructions cure most errors. The prosecutor's comment during closing argument that the officer confirmed the disturbance was a fair response to defendant's explicit testimony that there was no screaming and, by implication, no disturbance.

2. Under MRE 801(d)(1)(B), a prior consistent statement of a witness is admissible hearsay if (1) the declarant testifies at trial and is subject to cross-examination, (2) there was an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony, (3) the proponent offers a prior statement that is consistent with the declarant's challenged in-court testimony, and (4) the prior consistent statement was made before the supposed motive to falsify arose.

3. The testimony of the victim's coworker that the victim told the coworker before the assault (but after she refused to see the codefendants) that she had not been expecting two customers to arrive and would call the coworker back was consistent with the victim's testimony and properly admitted under MRE 801(d)(1)(B). Defendant's testimony that the victim admitted him and his codefendant without complaint implied that the victim had fabricated her testimony about the phone call. The telephone conversation occurred before the victim would have had a motive to falsify her testimony (that is, retaliation for the codefendants' refusal to pay and subsequent theft of the victim's cell phone and computer).

4. The police officer's hearsay testimony that the victim stated that a vodka bottle had been used in a threatening manner against her was not admissible under MRE 801(d)(1)(B), however, because the victim's motive to falsify would have occurred before the victim talked to the officer, not after. While a witness's nonresponsive answer to a question may work some mischief with a jury, it is not prejudicial unless it is egregious or not amenable to a curative instruction. The inadmissible hearsay was not prejudicial because the testimony was not egregious and could have been cured by an instruction had defense counsel requested one.

5. Statements made for the purpose of medical treatment are admissible under MRE 803(4) if they were reasonably necessary for diagnosis and treatment and the declarant had a self-interested motivation to be truthful in order to receive proper medical care, irrespective of whether the declarant sustained any immediately apparent physical injury. In cases of sexual assault, the injuries might be latent, such as contracting sexually transmitted diseases, or psychological in nature and thus not necessarily physically manifested at all. In these cases, a victim's complete history and a recitation of the totality of the circumstances of the assault are properly considered to be statements made for medical treatment. The victim's statements made to a nurse during the rape examination were properly admitted under MRE 803(4).

6. If an alternate juror replaces a juror after deliberations begin, the court must instruct the jury to begin its deliberations anew. MCR 6.411. Defendant was not prejudiced by the substitution of an alternate juror because the alternate juror was properly instructed before his initial release from jury deliberations not to discuss the case or review media concerning it, the alternate complied with that instruction, and the jury was instructed to begin deliberations anew.

Affirmed.

1. EVIDENCE — HEARSAY — PRIOR CONSISTENT STATEMENTS — RULES OF EVIDENCE.

A prior consistent statement is admissible if (1) the declarant testifies at trial and is subject to cross-examination, (2) there was an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony, (3) the proponent offers a prior statement that is consistent with the declarant's challenged in-court testimony, and (4) the prior consistent statement was made before the supposed motive to falsify arose (MRE 801[d][1][B]).

2. EVIDENCE — HEARSAY — STATEMENTS FOR MEDICAL TREATMENT — SEXUAL ASSAULT VICTIMS.

Statements made for the purpose of medical treatment are admissible hearsay if they were reasonably necessary for diagnosis and treatment and the declarant had a self-interested motivation to be truthful in order to receive proper medical care, irrespective of whether the declarant sustained any immediately apparent physical injury; in cases of sexual assault, the injuries might be latent, such as contracting a sexually transmitted disease, or psychological in nature and thus not necessarily physically manifested at all, and a sexual assault victim's complete history and a recitation of the totality of the circumstances of the assault are properly considered to be statements made for medical treatment (MRE 803[4]).

3. CRIMINAL LAW — JURY TRIALS — SUBSTITUTION OF JURORS AFTER COMMENCEMENT OF DELIBERATIONS.

If an alternate juror replaces a juror after deliberations begin, the court must instruct the jury to begin its deliberations anew (MCR 6.411).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Matthew A. Fillmore*, Assistant Prosecuting Attorney, for the people.

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

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and JANSEN, JJ.

RONAYNE KRAUSE, P.J. Defendant was convicted by a jury, after a joint trial with his codefendant, Evan Jerome Burney,[1] of two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b, and one count of unarmed robbery, MCL 750.530. Trial was, for the most part, a credibility contest between defendant and the victim. The jury apparently found the victim more credible. Defendant appeals his convictions by right, and we affirm.

The victim was working as a prostitute at the time of the offense, a fact that was fully explored before the jury by both the prosecution and the defense. The codefendants initially sought to procure her services after finding an online advertisement that had been placed by the victim's working partner. The victim testified that she refused to see two customers at once, whereupon the codefendants initially left. They then returned, tricked her into opening the door, robbed her of her cell phone and computer, and sexually assaulted her; they were interrupted by the arrival of another customer. Defendant testified that the interaction had been completely consensual until interrupted by the other customer's arrival. However, he and Burney took their money back after the acts in question and, unbeknownst to defendant until they returned to their car, Burney also took the victim's cell phone and computer. The defense theory was essentially that the victim

[1] This Court affirmed Burney's convictions but remanded for resentencing in his separate appeal. *People v Burney*, unpublished opinion per curiam of the Court of Appeals, issued August 25, 2011 (Docket No. 298620). *Burney* is not binding, and we have not considered it in deciding the instant appeal, but we note that the *Burney* panel resolved the alternate-juror issue, the only issue these appeals have in common, in accord with our own resolution in this case. Although we will refer to both Burney and Mahone as "codefendants," Mahone will be referred to only as defendant.

invented the claimed sexual assault as vengeance for the theft and the refusal to pay.

Defendant argues that the trial court erred by admitting several instances of inadmissible hearsay evidence, thereby requiring a new trial. We review preserved evidentiary issues for an abuse of discretion. *People v Smith*, 456 Mich 543, 549; 581 NW2d 654 (1998). An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). We agree that in a case that turns entirely on the jury's credibility determinations, it would be very difficult to deem any error harmless. However, to the minimal extent there may be any evidentiary errors in this matter, they were, or could have been, corrected by curative instructions. Accordingly, we find no basis for reversal.

Defendant first argues that inadmissible and prejudicial hearsay was admitted through the testimony of a police officer, who testified that she confirmed with unidentified inhabitants of an adjacent hotel room that they had heard a disturbance. The officer initially testified that the victim had stated that she screamed and that the neighbors had said they heard screaming, but the inadmissible statements were struck and the jury was instructed to disregard them. Jurors are presumed to follow their instructions, and it is presumed that instructions cure most errors. See *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). The prosecutor discussed the officer's confirmation of "a disturbance" during closing argument, but did not state that the officer had confirmed the screaming. This was a fair response to defendant's explicit testimony that there was no screaming and, by implication, no disturbance.

Defendant also argues that further inadmissible hearsay was admitted through the same officer's testimony that the victim said she had been threatened with a large vodka bottle. This is a closer question because the officer did, in fact, testify that the victim "said that it had been used, um, in a threatening manner." Defense counsel immediately objected, but the trial court did not rule on the objection; instead, the prosecutor immediately rephrased the question. Significantly, the officer's testimony was not responsive. She was asked only whether her attention had been directed to a bottle at the crime scene, not why. In any event, unresponsive answers may " 'work a certain amount of mischief with the jury,' " but they are generally not considered prejudicial errors unless egregious or not amenable to a curative instruction. *People v Barker*, 161 Mich App 296, 305-307; 409 NW2d 813 (1987), quoting 2 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 600, pp 203-204; see also *People v Waclawski*, 286 Mich App 634, 709-710; 780 NW2d 321 (2009). We do not find this testimony egregious, and although the statement could easily have been struck, defense counsel did not make a request to strike, possibly because at that point, it would simply have drawn more attention to the statement. The officer's testimony was not a prejudicial error.

However, we disagree with the prosecutor's argument that it was admissible pursuant to MRE 801(d)(1)(B) (prior consistent statement). Under that rule, a statement is admissible if four elements are satisfied:

> "(1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent

> with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose." [*People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000) (citations omitted).]

The fourth element is not met here, because the "supposed motive to falsify" was the codefendants' claimed refusal to pay and subsequent theft of the victim's cell phone and computer when they left the hotel room after being interrupted. Consequently, the alleged motive to falsify would have arisen before the victim talked to the officer.

In contrast, defendant's next assertion of inadmissible hearsay was properly admitted pursuant to MRE 801(d)(1)(B). The victim's coworker, who was responsible for receiving contacts from customers and directing them to the victim, testified that the victim called her shortly after the coworker had directed defendant to the victim's hotel room. The coworker testified, consistently with the victim's own testimony, that the victim told the coworker that she had not been expecting two customers to arrive and would call the coworker back. Significantly, defendant's testimony was that the victim admitted him and Burney without any complication, thereby impliedly charging that the victim had fabricated her testimony about the telephone call. And critically, this telephone call would have occurred *before* the victim would have had any motive to falsify, no matter which version of events is correct. The coworker's testimony about the victim's telephone call was properly admitted.

Defendant also argues that statements the victim made to the nurse who conducted a rape examination should not have been admitted. Statements made for the purpose of medical treatment are admissible pursu-

ant to MRE 803(4) if they were reasonably necessary for diagnosis and treatment and if the declarant had a self-interested motivation to be truthful in order to receive proper medical care. This is true irrespective of whether the declarant sustained any immediately apparent physical injury. *People v Garland*, 286 Mich App 1, 8-10; 777 NW2d 732 (2009). Particularly in cases of sexual assault, in which the injuries might be latent, such as contracting sexually transmitted diseases or psychological in nature, and thus not necessarily physically manifested at all, a victim's complete history and a recitation of the totality of the circumstances of the assault are properly considered to be statements made for medical treatment. *Id*. at 9-10; *People v McElhaney*, 215 Mich App 269, 282-283; 545 NW2d 18 (1996). Thus, statements the victim made to the nurse were all properly admissible pursuant to MRE 803(4).

Finally, defendant argues that he was denied his right to a fair trial when the trial court removed a juror after the jury had begun deliberations and replaced that juror with the alternate juror instead of granting a mistrial. Although we would have preferred a better record, we do not conclude that the trial court abused its discretion or denied defendant a fair trial. The trial court's decision whether to remove a juror is reviewed for an abuse of discretion. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). Constitutional issues, such as the right to a fair trial, are reviewed de novo. *People v Idziak*, 484 Mich 549, 554; 773 NW2d 616 (2009).

During voir dire, the juror explained that she had friends who were victims of sexual assault and who had been accused of sexual assault. She indicated, however, that she could be fair and impartial, although she was pregnant and would have a hard time paying her bills if

she missed many days of work. After the jury was charged, it requested that the victim's telephone call to 911 be replayed twice. The jury also requested that defendant's testimony be replayed, but changed its mind after again reviewing CJI2d 8.1 (intentional assistance) and CJI2d 18.2 (unarmed robbery). The juror then sent a note that stated in relevant part:

> I need to be dismissed/removed from the Jury at this time. Mentally I am really unable to proceed in this case. I feel myself about to have another mental breakdown and it's not good for me and my unborn child. (Stress). I cried over the break and can't really stop crying and talking to one of the other Jurors it all came out and my true feelings and personal biases is really taking an infact [sic] and I don't think its fair. I am stressing myself out + my stomach is feeling pain. So I am scared that I am going to go into early labor because the case is taking a toll on me. I am unable to put behind me my personal + past experiences in coming to a lodgical [sic] conclusion. Please can you please remove me + because of this I am putting our delibeattion [sic] at a stand by.

The juror was brought back to the courtroom by herself and explicitly told not to discuss how the voting stood but was also informed that she had to explain why she felt she could not deliberate.

Unfortunately, neither the court nor any of the attorneys asked whether she was experiencing stress because she held a minority viewpoint in the jury vote, irrespective of what that viewpoint might have been. However, contrary to defendant's pure speculation, the record that was made strongly suggests otherwise, particularly given her direct and explicit denial that she was being maltreated by the other jurors. In fact, the more rational interpretation of the juror's statements would be that she may not have held a view at all. It is abundantly clear from the record that the juror was

experiencing more than sufficient physical and emotional strain to warrant her removal from the jury, even absent her unambiguous explanation that she simply could not continue deliberating. The record shows that the juror grossly underestimated the extent to which she would become emotionally entangled when trying to reach an actual conclusion about the evidence, and she tried to do the right thing. The trial court did not abuse its discretion by removing the juror.

Defendant relies on *Tate*, 244 Mich App at 564, to support his argument that there was a danger of the alternate juror being coerced by the other jurors or that coercion actually occurred. At the time *Tate* was decided, MCR 6.411 did not permit an alternate juror, once discharged, to be recalled, although subsequent reversal of a conviction would only be required if the procedure actually prejudiced the defendant. *Id*. However, MCR 6.411 was amended a few months later and now explicitly permits the trial court to retain the alternate juror, and it merely requires that if the alternate juror replaces a juror after deliberations have begun, the trial court must instruct the jury to begin its deliberations anew. This is consistent with then recently modified FR Crim P 24(c)(3). *Id*. at 563 n 1, 565.

The portion of the transcript at which the alternate juror was selected was not transmitted to us, and it appears that the trial court's instruction to begin deliberations anew was not transcribed at all. However, it is clear from the record we do have that the alternate juror was properly instructed before his initial release from jury deliberations to not discuss the case or review any media concerning the case, the alternate juror complied with that instruction, and the jury was, in fact, properly instructed to begin deliberations anew. Defendant does not argue that the jury or the juror was

not properly instructed, and the jury is presumed to have followed its instructions. *Abraham*, 256 Mich App at 279.

We find no indication in the record that the jury could not or did not follow that instruction. Because it is again pure speculation that the alternate juror was coerced, we conclude that defendant was not prejudiced by the substitution of the alternate juror.

Affirmed.

CAVANAGH and JANSEN, JJ., concurred with RONAYNE KRAUSE, P.J.

PEOPLE v BYLSMA

Docket No. 302762. Submitted September 7, 2011, at Grand Rapids. Decided September 27, 2011, at 9:05 a.m. Affirmed in part, reversed in part, and remanded, 493 Mich 17.

Ryan M. Bylsma, a registered primary caregiver under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., was charged in the Kent Circuit Court with manufacturing marijuana in violation of MCL 333.7401(2)(d)(*iii*). Defendant moved to dismiss the charge, asserting that as the registered primary caregiver of two registered qualifying patients, he was allowed to possess 24 marijuana plants and that the remainder of the 88 plants seized by the police from the defendant's leased unit in a building belonged to other registered primary caregivers and registered qualifying patients whom defendant had offered to assist in growing and cultivating the plants. The court, George S. Buth, J., denied the motion, holding that the MMMA contains the strict requirement "that each set of 12 plants permitted under the MMMA to meet the medical needs of a specific qualifying patient must be kept in an enclosed, locked facility that can only be accessed by one individual," that defendant had failed to comply with that requirement, and that defendant was therefore not entitled to invoke either the immunity provided by § 4(b) of the MMMA, MCL 333.26424(b), or the affirmative defense contained in § 8 of the MMMA, MCL 333.26428. Defendant appealed by leave granted.

The Court of Appeals *held*:

1. The MMMA provides that a registered qualifying patient may have no more than one registered primary caregiver and a registered primary caregiver may assist no more than five registered qualifying patients. MCL 333.26426(d). There is a presumption that a registered qualifying patient or a registered primary caregiver is engaged in the medical use of marijuana in accordance with the provisions of the MMMA if the patient or the primary caregiver possesses a registry identification card and possesses an amount of marijuana that does not exceed the amount allowed under the MMMA. MCL 333.26424(d). Defendant, the registered primary caregiver for two qualifying patients, was immune from arrest, prosecution, or penalty in any manner provided, in part, that he did not possess more than 24 marijuana plants. MCL

333.26424(b). Defendant does not dispute that, under the facts of this case, he was in possession of all the 88 plants seized.

2. The plain language of MCL 333.26424(a) and (b) provides that only one person may possess 12 marijuana plants for each specific registered qualifying patient's medical use of marijuana. That person is either the registered qualifying patient himself or herself, if the patient has not specified that a primary caregiver be allowed to cultivate his or her marijuana plants, or the patient's primary caregiver, if the patient has specified that the caregiver be allowed to cultivate his or her marijuana plants. Under the plain language of § 6 of the MMMA, MCL 333.26426, the registered qualifying patient or the qualifying patient's registered primary caregiver, but not both, may possess marijuana plants for the patient's medical use of marijuana.

3. Because the MMMA did not repeal any of the provisions of the Public Health Code making it illegal for a person to possess, use, manufacture, create, or deliver marijuana, any possession of marijuana that does not fall within the narrowly tailored protections of the MMMA remains illegal under the Public Health Code.

4. Defendant was not authorized to possess the marijuana plants that were being grown and cultivated for registered qualifying patients that he was not connected to through the Michigan Department of Community Health's registration process. Those plants could only be possessed by the registered qualifying patient for whose treatment they were grown or the qualifying patient's registered primary caregiver. Defendant was not entitled to the presumption that he was engaged in the medical use of marijuana provided in § 4(d) of the MMMA or the immunity granted in § 4(b) of the MMMA with regard to those plants. The trial court's determination that defendant is not entitled to invoke the immunity provided in § 4(b) must be affirmed, albeit for a different reason than that relied on by the trial court. The trial court properly held that, having failed to comply with the requirements of § 4(b) of the MMMA, defendant was not entitled to the affirmative defense provided in § 8 of the MMMA.

Affirmed.

1. CONTROLLED SUBSTANCES — MEDICAL MARIJUANA — PRESUMPTIONS.

There is presumption that a person who is either a registered qualifying patient or a registered primary caregiver under the Michigan Medical Marihuana Act is engaged in the medical use of marijuana in accordance with the provisions of the act if the

person possesses a registry identification card and an amount of marijuana that does not exceed the amount allowed under the act (MCL 333.26424[d]).

2. CONTROLLED SUBSTANCES — MEDICAL MARIJUANA — POSSESSION OF MARIJUANA FOR MEDICAL USE.

Only one person may possess 12 marijuana plants for each specific registered qualifying patient's medical use of marijuana under the Michigan Medical Marihuana Act; that person is either the patient, if the patient has not specified that a registered primary caregiver be allowed to cultivate his or her marijuana plants, or the patient's primary caregiver, if the patient has specified that the caregiver be allowed to cultivate the patient's marijuana plants; either the registered qualifying patient or the qualifying patient's registered primary caregiver, but not both, may possess the plants for the patient's medical use of marijuana (MCL 333.26426).

3. CONTROLLED SUBSTANCES — MEDICAL MARIJUANA — POSSESSION OF MARIJUANA FOR MEDICAL USE — PRESUMPTIONS — IMMUNITY — AFFIRMATIVE DEFENSES.

A registered primary caregiver under the Michigan Medical Marihuana Act may not possess marijuana plants that were not grown and cultivated for registered qualifying patients to whom the caregiver is connected to through the Michigan Department of Community Health's registration process; a primary caregiver who violates this provision is not entitled to the presumption in § 4(d) of the act that he or she was engaged in the medical use of marijuana, the immunity provided by § 4(b) of the act, or the affirmative defense provided in § 8 of the act (MCL 333.26424[b] and [d]; MCL 333.26428).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, and *Timothy K. McMorrow* and *Gary A. Moore*, Assistant Prosecuting Attorneys, for the people.

Bruce Alan Block and *Joel T. Brusk* for defendant.

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

HOEKSTRA, J. In this case involving the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et*

seq., defendant appeals by leave granted the trial court's order denying his motion to dismiss a charge of manufacturing marijuana,[1] MCL 333.7401(2)(d)(*iii*). Under the MMMA, a registered primary caregiver is allowed to possess 12 marijuana plants for each registered qualifying patient the primary caregiver is connected to through the Michigan Department of Community Health's (MDCH) registration process. Because defendant possessed marijuana plants that were being grown and cultivated for registered qualifying patients that were not connected to him through the MDCH's registration process, defendant was not entitled to immunity under § 4(b) of the MMMA, MCL 333.26424(b). In addition, because defendant did not comply with the requirements of § 4(b), defendant is not entitled to assert the § 8 affirmative defense of medical purpose, MCL 333.26428. For these reasons, we affirm the trial court's order denying defendant's motion to dismiss.

I. FACTS AND PROCEDURAL HISTORY

On September 15, 2010, the Grand Rapids police, acting under a search warrant, seized 88 marijuana plants that were in three grow booths in Unit 15E of the building at 470 Market Avenue. Unit 15E was leased to defendant. The police also discovered five ounces of usable marijuana, fertilizer, soil, a water-osmosis system, grow lights, and security cameras. In addition, the police found photocopies of defendant's primary caregiver cards for two patients, letters from the MDCH approving defendant's status as a primary caregiver, and an expired card for a third patient who had desig-

[1] Although the statutory provisions at issue refer to "marihuana," by convention this Court uses the more common spelling "marijuana" in its opinions.

nated defendant as his primary caregiver. The police also found MDCH paperwork showing that defendant's brother, Eric Bylsma, was a registered primary caregiver.

Defendant was charged with manufacturing marijuana, MCL 333.7401(2)(d)(*iii*), subject to an enhanced sentence under MCL 333.7413(2). Defendant moved to dismiss the charge under § 4 of the MMMA. He asserted that, as the registered primary caregiver of two qualifying patients, he was allowed to possess 24 marijuana plants, and he claimed that the remainder of the 88 plants seized by the police belonged to other primary caregivers and qualifying patients. Defendant argued that the MMMA permits primary caregivers and qualifying patients to share a common grow area for their marijuana plants, as long as the plants are grown in a secured area. In addition, defendant "reserve[d] his right to raise the Affirmative Defense under Section 8 of the MMMA" at trial. The trial court held a two-day evidentiary hearing on defendant's motion to dismiss.

Defendant testified that, on September 15, 2010, he was the registered primary caregiver for two qualifying patients. He had leased Unit 15E to grow marijuana. According to defendant, Unit 15E was "exactly what [he] needed"; it had a large steel door and a lock on the front of the building, so that Unit 15E was "double locked." It was a "secured, safe location." Defendant built three grow booths, each with a latch, in Unit 15E to grow marijuana plants. Defendant testified that 24 of the 88 marijuana plants seized on September 15, 2010, belonged to him and were being grown for his two qualifying patients. The remaining plants belonged to other primary caregivers or qualifying patients, most of whom defendant had offered to assist in growing and cultivating the plants. According to defendant, it was

"pretty obvious" which plants belonged to which caregivers and patients because the plants were of different strains and each plant had a tag.

The other primary caregivers and qualifying patients that had marijuana plants growing in Unit 15E also testified at the evidentiary hearing. Each presented a registry identification card from the MDCH.

James Wagner testified that he was a registered qualifying patient, who was serving as his own caregiver. However, defendant had agreed to assist Wagner by providing him with 12 "start-up plants." After the 12 marijuana plants had roots, defendant would give them to Wagner and Wagner would continue to grow them for his medication. The 12 plants were being kept in Unit 15E. Wagner had never been to Unit 15E.

Nathaniel Dixon testified that he was a registered primary caregiver for one qualifying patient. He was in the process of building his own grow room, but until the room was completed, he was growing 12 marijuana plants for his patient in Unit 15E. Because Dixon knew little about how to grow marijuana plants, defendant was training him. Dixon had been to Unit 15E four or five times to care for his plants. Dixon did not know which grow booth contained his plants, but he would be able to recognize his pots.

Shannon VanderZee testified that he was a registered primary caregiver for three patients. He attempted to grow marijuana plants in his basement. When his attempts were unsuccessful, he consulted with defendant. Defendant took 12 "cuttings and clones," as well as some fresh cuttings, from VanderZee, with the intent to fix the plants. Once the marijuana plants were rooted, defendant was to return them to VanderZee. VanderZee had never been to Unit 15E, but he believed that the 12 plants defendant had taken from his basement belonged to him.

Lawrence Huck testified that he was a registered qualifying patient and a registered primary caregiver. Defendant was serving as Huck's primary caregiver. Huck had attempted to grow marijuana plants, but was unsuccessful. Huck took four plants to defendant for assistance. He left the plants with defendant at Unit 15E, where defendant cared for the plants while teaching Huck how to do so. Huck visited Unit 15E three or four times.

Eric Bylsma testified that he was a registered qualifying patient and a registered primary caregiver for one qualifying patient. Twenty-four of the seized plants belonged to him; 12 were for him as a patient, and 12 were for the patient for whom he served as primary caregiver. Eric did not know which grow booth contained his marijuana plants because he had not been to Unit 15E for a couple of days and the plants got moved around depending on which light they needed to be under. He testified that he could identify his plants by looking at them.

The trial court denied defendant's motion to dismiss. According to the trial court, the MMMA contains the strict requirement "that each set of 12 plants permitted under the MMMA to meet the medical needs of a specific individual be kept in an enclosed, locked facility that can only be accessed by one person." Because the evidence demonstrated that Unit 15E was secured by a single lock, that several primary caregivers and qualifying patients used Unit 15E to grow marijuana plants, and that defendant had access to marijuana plants designated for qualifying patients to whom he was not linked through the MDCH's registration system, the trial court held that defendant had failed to comply with the strict requirements of the MMMA. Thus, the trial court held that defendant was not entitled to invoke the

immunity provided by § 4 of the MMMA or to assert the affirmative defense contained in § 8.

II. ANALYSIS

On appeal, defendant argues that the trial court read into the MMMA a requirement not contained within the plain language of the MMMA when it held that each set of 12 marijuana plants permitted under the MMMA for the medical needs of a specific qualifying patient must be kept in a separate enclosed, locked facility that can only be accessed by one individual. According to defendant, nothing in the language of the MMMA prohibits primary caregivers and qualifying patients from utilizing the same enclosed, locked facility to grow and cultivate marijuana plants.

A. STANDARDS OF REVIEW

We review a trial court's decision on a motion to dismiss charges for an abuse of discretion. *People v Kevorkian*, 248 Mich App 373, 383; 639 NW2d 291 (2001). However, we review de novo the trial court's interpretation of the MMMA. *Michigan v McQueen*, 293 Mich App 644, 653; 811 NW2d 513 (2011). The MMMA was enacted as a result of an initiative adopted by the voters in the November 2008 election. *Id.* at 658.

> "The words of an initiative law are given their ordinary and customary meaning as would have been understood by the voters." *Welch Foods, Inc v Attorney General*, 213 Mich App 459, 461; 540 NW2d 693 (1995). We presume that the meaning as plainly expressed in the statute is what was intended. *Id.* This Court must avoid a construction that would render any part of a statute surplusage or nugatory, and "we must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme." *People v Williams*, 268

> Mich App 416, 425; 707 NW2d 624 (2005). [*People v Redden*, 290 Mich App 65, 76-77; 799 NW2d 184 (2010) (alteration omitted).]

B. THE MMMA

Under the Public Health Code (PHC), MCL 333.1101 *et seq.*, it is illegal for a person to possess, use, manufacture, create, or deliver marijuana. *McQueen*, 293 Mich App at 658; see also MCL 333.7401(2)(d); MCL 333.7403(2)(d); MCL 333.7404(2)(d). Pursuant to § 7(a) of the MMMA, the "medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions" of the MMMA.[2] MCL 333.26427(a). Nonetheless, the MMMA operates under the framework established by the PHC, *McQueen*, 293 Mich App at 658, because the MMMA did not repeal any drug laws, *Redden*, 290 Mich App at 92 (O'CONNELL, P.J., concurring). Rather, the MMMA sets forth very limited circumstances under which those involved with the use of marijuana may avoid criminal liability. *People v King*, 291 Mich App 503, 509; 804 NW2d 911 (2011).

1. SECTION 4 IMMUNITY

The MMMA provides a registration system for "qualifying patients" and "primary caregivers."[3] See MCL 333.26426. When applying for a "registry identi-

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[2] The "medical use" of marijuana is defined as "the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition." MCL 333.26423(e).

[3] A "qualifying patient" is "a person who has been diagnosed by a physician as having a debilitating medical condition." MCL 333.26423(h). A "primary caregiver" is "a person who is at least 21 years old and who

fication card" with the MDCH,[4] a qualifying patient must indicate whether the patient will have a primary caregiver and, if so, must designate "whether the qualifying patient or primary caregiver will be allowed under state law to possess marihuana plants for the qualifying patient's medical use." MCL 333.26426(a)(5) and (6). If the MDCH approves the qualifying patient's application, it must issue a registry identification card to the patient and, if the patient has designated a primary caregiver, it must also issue a registry identification card to the primary caregiver. MCL 333.26426(a) and (d). However, a qualifying patient may have no more than one primary caregiver, and a primary caregiver may assist no more than five qualifying patients. MCL 333.26426(d).

Section 4 of the MMMA provides immunity from arrest and prosecution to qualifying patients and primary caregivers who have been issued and possess a registry identification card. MCL 333.26424(a) and (b); *McQueen*, 293 Mich App at 660-661. Specifically, § 4 provides, in pertinent part:

> (a) A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and,

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has agreed to assist with a patient's medical use of marihuana and who has never been convicted of a felony involving illegal drugs." MCL 333.26423(g).

[4] A "registry identification card" is "a document issued by the [MDCH] that identifies a person as a registered qualifying patient or registered primary caregiver." MCL 333.26423(i).

> if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount.
>
> (b) A primary caregiver who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for assisting a qualifying patient to whom he or she is connected through the [MDCH's] registration process with the medical use of marihuana in accordance with this act, provided that the primary caregiver possesses an amount of marihuana that does not exceed:
>
> (1) 2.5 ounces of usable marihuana for each qualifying patient to whom he or she is connected through the [MDCH's] registration process; and
>
> (2) for each registered qualifying patient who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility; and
>
> (3) any incidental amount of seeds, stalks, and unusable roots.

In addition, there is a presumption that a qualifying patient or a primary caregiver is engaged in the medical use of marijuana in accordance with the provisions of the MMMA if the qualifying patient or the primary caregiver (1) possesses a registry identification card and (2) possesses an amount of marijuana that does not exceed the amount allowed under the MMMA. MCL 333.26424(d).

Here, on September 15, 2010, defendant was the registered primary caregiver for two qualifying patients. Therefore, defendant was immune from "arrest,

prosecution, or penalty in any manner," provided, in part, that he did not possess more than 24 marijuana plants. MCL 333.26424(b). The Court in *McQueen*, 293 Mich App at 654, explained the concept of possession:

> The term "possession," when used in regard to controlled substances, "signifies dominion or right of control over the drug with knowledge of its presence and character." *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000) (quotation marks and citation omitted). Possession may be actual or constructive, and may be joint or exclusive. *People v McKinney*, 258 Mich App 157, 166; 670 NW2d 254 (2003). "The essential issue is whether the defendant exercised dominion or control over the substance." *Id.* A person can possess a controlled substance and not be the owner of the substance. *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992).

In this case, the police seized 88 marijuana plants from Unit 15E. Defendant does not dispute that he was in possession of all these plants. Indeed, the evidence produced at the evidentiary hearing established that defendant did, in fact, posses the marijuana plants. Defendant admitted that he leased Unit 15E for the purpose of growing marijuana plants, and he was at Unit 15E five to seven days a week. The 88 plants were distributed among three grow booths, and although the grow booths were latched, defendant testified that they were not locked. There was no evidence that defendant was denied access to any of the marijuana plants. Under the circumstances, defendant clearly possessed all 88 marijuana plants. He knew of the presence and character of the plants and he exercised dominion and control over them.

But, despite being in possession of more marijuana plants than permitted under the MMMA, defendant claims that he is entitled to immunity under § 4(b) because only 24 of the 88 plants were for his qualifying

patients and nothing in the MMMA prohibited him from letting other registered primary caregivers and registered qualifying patients utilize Unit 15E to grow and cultivate marijuana plants. We disagree.

The MMMA permits the possession and cultivation of 12 marijuana plants by a registered qualifying patient for whose treatment of a debilitating medical condition the marijuana plants are grown and cultivated *or* by the patient's registered primary caregiver.[5] Under § 4(a), a qualifying patient, who has been issued and possesses a registry identification card, is immune from arrest and prosecution for the medical use of marijuana provided, in part, that the qualifying patient does not possess more than 12 marijuana plants and "has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient[.]" MCL 333.26424(a). Similarly, under § 4(b), a primary caregiver, who has been issued and possesses a registry identification card, is immune from arrest and prosecution "for assisting a qualifying patient to whom he or she is connected through the [MDCH's] registration process with the medical use of marihuana" provided, in part, that the primary caregiver does not possess more than 12 marijuana plants "for each registered qualifying patient who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient[.]" MCL 333.26424(b)(2).

Because §§ 4(a) and 4(b) only allow either the registered qualifying patient or the qualifying patient's

[5] The MMMA requires that marijuana plants be grown in an "enclosed, locked facility," MCL 333.26424(a) and (b)(2), defined as "a closet, room, or other enclosed area equipped with locks or other security devices that permit access only by a registered primary caregiver or registered qualifying patient," MCL 333.26423(c). The prosecutor does not dispute that Unit 15E was an "enclosed, locked facility."

registered primary caregiver to possess 12 marijuana plants, we conclude that the plain language of §§ 4(a) and 4(b) unambiguously provides that only one person may possess 12 marijuana plants for the registered qualifying patient's medical use of marijuana. That person is either the registered qualifying patient himself or herself, if the qualifying patient has not specified that a primary caregiver be allowed to cultivate his or her marijuana plants, or the qualifying patient's registered primary caregiver, if the qualifying patient has specified that a primary caregiver be allowed to cultivate his or her marijuana plants.

That only one person—either the registered qualifying patient or the qualifying patient's registered primary caregiver—is allowed to possess marijuana plants for the patient's medical use of marijuana is also reflected in § 6 of the MMMA, MCL 333.26426, which governs registry identification cards. In an application for a registry identification card, a qualifying patient must submit the "[n]ame, address, and date of birth of the qualifying patient's primary caregiver, if any[.]" MCL 333.26426(a)(5). If the qualifying patient has designated a primary caregiver, the patient must also designate on the application "whether the qualifying patient *or* primary caregiver will be allowed under state law to possess marihuana plants for the qualifying patient's medical use." MCL 333.26426(a)(6) (emphasis added). See also MCL 333.26426(e)(6), which states that registry identification cards shall contain "[a] clear designation showing whether the primary caregiver *or* the qualifying patient will be allowed under state law to possess the marihuana plants for the qualifying patient's medical use, which shall be determined based solely on the qualifying patient's preference" (emphasis added). "The word 'or' is a disjunctive term. It indicates a choice between two alternatives." *McQueen*, 293 Mich

App at 671 (citations omitted). Accordingly, under the plain language of § 6, the registered qualifying patient or the qualifying patient's registered primary caregiver, but not both, may possess marijuana plants for the patient's medical use of marijuana.

Further, we reject defendant's reliance on the fact that the MMMA is silent regarding whether registered qualifying patients and registered primary caregivers may utilize the same enclosed, locked facility to grow and cultivate marijuana plants. Because the MMMA did not repeal any drug laws, *Redden*, 290 Mich App at 92 (O'CONNELL, P.J., concurring), any possession of marijuana that does not fall within the "narrowly tailored protections" of the MMMA, *King*, 291 Mich App at 509, remains illegal under the PHC. Here, defendant was in possession of the 88 marijuana plants that were seized from Unit 15E. But, the MMMA only authorized him to possess 12 marijuana plants for each registered qualifying patient that he was connected to through the MDCH's registration process, provided that the qualifying patient designated him to be allowed to cultivate the plants. Defendant was not authorized to possess the marijuana plants that were being grown and cultivated for registered qualifying patients that he was not connected to through the MDCH's registration process; those marijuana plants could only be possessed by the registered qualifying patient for whose treatment they were grown or the qualifying patient's registered primary caregiver.

Consequently, defendant's possession of all 88 marijuana plants seized from Unit 15E was not permitted by the MMMA. Defendant, therefore, is not entitled to the presumption of § 4(d) that he was engaged in the medical use of marijuana or to the immunity granted in § 4(b) to primary caregivers who have been issued and

possess a registry identification card. We do not address the trial court's holding that the MMMA requires a registered primary caregiver to keep each of his or her qualifying patients' 12 marijuana plants in a separate enclosed, locked facility. That issue is not before us on the facts of the present case, and we express no opinion on that issue. Nonetheless, because we agree with the trial court that defendant did not comply with the provisions of the MMMA, albeit for a different reason, we affirm the trial court's holding that defendant is not entitled to invoke the immunity of § 4(b). *People v Lyon*, 227 Mich App 599, 612-613; 577 NW2d 124 (1998).

2. SECTION 8 AFFIRMATIVE DEFENSE

Section 8 of the MMMA provides an affirmative defense of "medical purpose" that a patient and a patient's primary caregiver may assert in any prosecution involving marijuana. MCL 333.26428. MCL 333.26428(a) provides:

> *Except as provided in section 7*, a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana, and this defense shall be presumed valid where the evidence shows that:
>
> (1) A physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition;
>
> (2) The patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than was reasonably necessary to

> ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; and
>
> (3) The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition. [Emphasis added.]

In *King*, 291 Mich App at 505-506, the defendant, who was a registered qualifying patient, was growing marijuana plants in a chain-link dog kennel and an unlocked living room closet. He was charged with two counts of manufacturing marihuana. The defendant asserted the § 8 affirmative defense and moved to dismiss the charges. On appeal, this Court held that neither the dog kennel nor the unlocked closet was an enclosed, locked facility. *Id.* at 512-514. The Court further held that because the defendant had not complied with the growing requirements of § 4, the defendant was not entitled to assert the § 8 affirmative defense. *Id.* at 510. It stated:

> In *Redden*, this Court held that the statute permits an unregistered patient to assert the affirmative defense under § 8 if he or she meets the requirements of § 8. *Redden*, 290 Mich App at 81, 85. We hold that § 8 permits a "registered qualifying patient" to raise an affirmative defense under § 8, just as an unregistered defendant may under *Redden*. *We further hold that the express reference to § 7 and the statement in § 7(a) that medical use of marijuana must be carried out in accordance with the provisions of the MMMA require defendant to comply with the provisions of § 4 concerning growing marijuana.* And in any case, § 4 applies to defendant because he grew marijuana

> under a claim that he is a qualifying patient in possession of a registry identification card. We hold that because defendant did not comply with § 4, he also failed to meet the requirements of § 8 and, therefore, he is not entitled to the affirmative defense in § 8 and is not entitled to dismissal of the charges. [*Id.* at 509-510 (emphasis added).]

Because defendant possessed more than 12 marijuana plants for each qualifying patient that he was connected to through the MDCH's registration process, defendant failed to comply with the requirements of § 4(b). Having failed to comply with the requirements of § 4(b), defendant is not entitled to the § 8 affirmative defense. *King*, 291 Mich App at 510. Because we agree with the trial court that defendant did not comply with the requirements of § 4(b), albeit for a different reason, we affirm the trial court's holding that defendant is not entitled to assert the § 8 affirmative defense. *Lyon*, 227 Mich App at 612-613.

III. CONCLUSION

We affirm the trial court's order denying defendant's motion to dismiss the charge of manufacturing marijuana. Because defendant possessed marijuana that was being grown for the treatment of debilitating conditions of qualifying patients that were not connected to him through the MDCH's registration process, defendant is not entitled to immunity under § 4(b) of the MMMA. In addition, because defendant failed to comply with the requirements of § 4(b), he is not entitled to assert the § 8 affirmative defense.

Affirmed.

GLEICHER, P.J., and STEPHENS, J., concurred with HOEKSTRA, J.

PEOPLE v HARTUNIEWICZ

Docket No. 298163. Submitted September 8, 2011, at Grand Rapids. Decided September 29, 2011, at 9:00 a.m.

A jury convicted Benjamin A. Hartuniewicz in the Kent Circuit Court of possessing ketamine in violation of MCL 333.7403(2)(b)(*ii*) of the controlled substances act (CSA), MCL 333.7101 *et seq*., and he was sentenced to 48 months of probation. At trial, defendant moved for a directed verdict on the ground that the prosecution had failed to establish that the ketamine was not "in a proportion or concentration to vitiate the potential for abuse" and therefore excluded from the schedule of controlled substances under MCL 333.7227(1). The court, James R. Redford, J., denied the motion, and also denied defendant's request for a special jury instruction based on MCL 333.7227(1). Defendant appealed.

The Court of Appeals *held*:

1. The prosecution was not required to disprove that the ketamine defendant possessed was excluded from the schedule of controlled substances under MCL 333.7227(1) for being in a proportion or concentration that vitiated the potential for abuse. Exceptions, exemptions, or exclusions from the legal definition of a controlled substance are not elements of controlled-substance offenses; rather, they are affirmative defenses that a defendant may present to rebut the state's evidence.

2. To prove possession of ketamine, the prosecution was required to establish (1) that the substance in question was ketamine, (2) that defendant possessed some amount of ketamine, (3) that defendant was not authorized to possess ketamine, and (4) that defendant knowingly possessed the ketamine. Because the evidence, when viewed in the light most favorable to the prosecution, was sufficient to support a finding of guilt with respect to each element of the offense, the trial court properly denied defendant's motion for a directed verdict.

3. The trial court properly denied defendant's request for a special jury instruction based on MCL 333.7227(1) because defendant presented no evidence that the ketamine found inside his

residence was mixed with any other substance, much less that it was in a proportion or concentration that vitiated its potential for abuse.

Affirmed.

CRIMINAL LAW — CONTROLLED SUBSTANCES — ELEMENTS OF POSSESSION — EXCLUSIONS FROM SCHEDULES OF CONTROLLED SUBSTANCES.

To prove possession of ketamine, the prosecution was required to establish (1) that the substance in question was ketamine, (2) that defendant possessed some amount of ketamine, (3) that defendant was not authorized to possess ketamine, and (4) that defendant knowingly possessed the ketamine; the prosecution was not required to establish that the ketamine was not excluded from the schedules of controlled substances by MCL 333.7216(1)(h) for being in a proportion or concentration that vitiated the potential for abuse (MCL 333.7401 *et seq*.).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, and *Timothy K. McMorrow*, Assistant Prosecuting Attorney, for the people.

Charles B. Covello for defendant.

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

GLEICHER, P.J. A jury convicted defendant Benjamin Alan Hartuniewicz of possession of ketamine, a schedule 3 controlled substance,[1] in violation of MCL 333.7403(2)(b)(*ii*) of the controlled substances act (CSA), MCL 333.7101 *et seq*.[2] Defendant argues that the prosecution failed to establish, as an element of the

[1] "Any material, compound, mixture, or preparation containing any quantity of ketamine" is included within the definition of a schedule 3 controlled substance by MCL 333.7216(1)(h). Ketamine is also federally classified as a schedule III controlled substance. See 21 CFR 1308.13(c)(7).

[2] The jury acquitted defendant of maintaining a drug house in violation of MCL 333.7405(d).

charged offense, that the ketamine was not "in a proportion or concentration to vitiate the potential for abuse," because such diluted substances are "excluded" from the CSA by MCL 333.7227(1). We hold that the exclusion in MCL 333.7227(1) is not an element of a possession offense, but an affirmative defense for which a defendant bears the burden of proof. Because defendant presented no evidence demonstrating that the ketamine was mixed with other substances or was "in a proportion or concentration to vitiate the potential for abuse," we affirm the trial court's denial of defendant's motion for a directed verdict and rejection of defendant's proposed jury instruction.

I. FACTUAL AND PROCEDURAL HISTORY

On June 24, 2009, defendant's probation officer and the local probation supervisor went to defendant's home for an unscheduled residence visit. When defendant came to the door, his pupils were dilated, his face was flushed, and he acted confused and disoriented. The officers secured defendant's consent to search the residence. They found a plate under defendant's bed that held a white powdery substance, an assortment of pills and tablets, a straw, defendant's driver's license, and a small plastic bag containing a white powdery substance. The officers also found an empty bag coated with a white powdery residue. Defendant admitted to the probation officers that certain items were prescription medications that he had received from friends. Defendant claimed that he purchased the other substances over the Internet. Defendant further stated that he used the substances to "get high."

Subsequent forensic testing negated the presence of any controlled substances in the pills, tablets, and powder on the plate and in the full bag. However, the white

powdery residue found on the otherwise empty bag was analyzed and found to contain less than one milligram of ketamine.[3] During cross-examination of the forensic analyst, defense counsel inquired about the proportion of ketamine to other substances found within the residue. The witness testified that he had not identified any other substances within the residue or analyzed the ratio of ketamine to other substances. The witness further testified that such quantitative analysis would have been difficult to conduct on such a small sample.

At the close of the prosecution's case in chief, defense counsel moved for a directed verdict. Defense counsel argued that the prosecution had the burden to establish that a substance is proscribed by the CSA and is not excluded from the definition of "controlled substance" under MCL 333.7227(1) for not being "in a proportion or concentration to vitiate the potential for abuse . . . ." In other words, according to defendant, to establish the elements of the charged possession offense, the prosecution was required to establish that the ketamine residue was not so diluted by other substances as to vitiate its potential for abuse. Because the prosecution presented no evidence in that regard, defense counsel argued that it failed to prove the elements of the crime as a matter of law. In the alternative, defense counsel requested the court to read the exclusion of MCL 333.7227(1) into the jury instructions.

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[3] Ketamine is "a legitimate intravenous anesthetic" used for both veterinary and human purposes, but it is also used "as a hallucinogen by recreational drug users," 9 Attorneys' Textbook of Medicine (3d ed), ¶ 64.72, and as a "date rape drug," see 21 USC 841(g)(2)(A)(ii); *Date Rape Drugs: XTC, Rohypnol, Ketamine*, University of Notre Dame Office of Alcohol & Drug Education <http://oade.nd.edu/educate-yourself-drugs/rohypnol-flunitrazepam/> (accessed September 13, 2011); see also *Ketamine*, Center for Substance Abuse Research <http://www.cesar.umd.edu/cesar/drugs/ketamine.asp> (accessed September 13, 2011).

The trial court denied defendant's motion for directed verdict and his request for a special jury instruction. In relation to the motion for directed verdict, the court noted that the evidence, taken in the light most favorable to the prosecution, was sufficient to support a guilty verdict for possession. Specifically, the evidence tended to prove that defendant knowingly possessed ketamine. In relation to the jury instructions, the court avoided answering the legal question defendant raised regarding the interpretation of the statutes. Instead, the court decided the issue on the evidence:

> I believe as a matter of law that there was just not any evidence to suggest that it was in a proportion or concentration to vitiate the potential for abuse that's before the Court. And I know the defense does not have the burden to do anything, of course, but there's just no evidence of it, in the Court's estimation, that it's been somehow diluted to such a level that it can't have any potential, and for that reason I'm respectfully readopting my decision not to give a special instruction . . . .

The jury then convicted defendant of possession of ketamine, and the court sentenced him to 48 months of probation.

II. STANDARD OF REVIEW

At issue in this appeal is the interpretation and coordination of various provisions of the CSA. We review issues of statutory interpretation de novo. *People v Kowalski*, 489 Mich 488, 497; 803 NW2d 200 (2011).

> The primary goal in interpreting the meaning of a statute is "to ascertain and give effect to the intent of the Legislature . . . ." The first step in determining legislative intent is consideration of the statutory language itself. Statutory language must be read in the context of the act as a whole, giving every word its plain and ordinary meaning. When

> the language is clear and unambiguous, we enforce the statute as written. [*Id.* at 497-498, quoting *People v Lown*, 488 Mich 242, 254; 794 NW2d 9 (2011).]

Once we discern the intent of the Legislature regarding the elements of the underlying criminal offense, we can analyze the trial court's denial of defendant's motion for directed verdict and rejection of defendant's proposed special jury instruction.

> In reviewing the denial of a motion for a directed verdict of acquittal, this Court reviews the evidence in a light most favorable to the prosecution in order to "determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." [*People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006), quoting *People v Riley (After Remand)*, 468 Mich 135, 139-140; 659 NW2d 611 (2003).]

We generally review claims of instructional error de novo. *Kowalski*, 489 Mich at 501. However, we review for an abuse of discretion a trial court's determination that a specific instruction is inapplicable given the facts of the case. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010). We consider the jury instructions as a whole to determine whether the court omitted an element of the offense, misinformed the jury on the law, or otherwise presented erroneous instructions. See *Kowalski*, 489 Mich at 501.

III. DEFENDANT HAS THE BURDEN OF ESTABLISHING AN EXCEPTION TO THE CSA AS AN AFFIRMATIVE DEFENSE

MCL 333.7403(1) proscribes the knowing or intentional possession of a controlled substance unless obtained directly through a valid prescription or valid doctor's order. A person illegally possessing a schedule 3 controlled substance is guilty of a two-year felony. MCL

333.7403(2)(b)(*ii*). Defendant was convicted of possession of a schedule 3 controlled substance as defined in MCL 333.7216(1)(h):

> (1) The following controlled substances are included in schedule 3:
>
> * * *
>
> (h) Any material, compound, mixture, or preparation containing any quantity of ketamine, a salt of ketamine, an isomer of ketamine, or a salt of an isomer of ketamine.[4]

The CSA enumerates various exclusions, exceptions, and exemptions from the schedules of controlled substances. MCL 333.7227(1) excludes "[a] nonnarcotic substance that under the federal food, drug and cosmetic act may be lawfully dispensed without a prescription" and "[a] substance that contains 1 or more controlled substances in a proportion or concentration to vitiate the potential for abuse . . . ." MCL 333.7227(3) provides: "An excluded substance is a deleterious drug and may be manufactured, distributed, or dispensed only by a person who is registered to manufacture, distribute, or dispense a controlled substance under [MCL 333.7208(2)]." MCL 333.7229 integrates various exclusions, exceptions, and exemptions from federal law:

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[4] MCL 333.7216(2) allows the Department of Community Health to "promulgate rules to except" a substance from the CSA "if the compound, mixture, or preparation contains 1 or more active medicinal ingredients not having a stimulant or depressant effect on the central nervous system" and are combined in a way to "vitiate the potential for abuse . . . ." There is no exception in this state's administrative code for any ketamine compound, mixture, or preparation. See Mich Admin Code, R 338.3120 through 338.3122. There is also no exception for ketamine compounds, mixtures, or preparations in the federal code. See 21 USC 801 *et seq*.

> A compound, mixture, or preparation containing a depressant or stimulant substance or of similar quantitative composition shown in federal regulations as an excepted compound or which is the same except that it contains a lesser quantity of a controlled substance or other substances which do not have a stimulant, depressant, or hallucinogenic effect, and which is restricted by law to dispensing on prescription is excepted from [MCL 333.7212, 333.7214, 333.7216, 333.7218, and 333.7220]. Compliance with federal law respecting an excepted compound is considered compliance with this section.

Defendant asserts that the MCL 333.7227(1) exclusion of "[a] substance that contains 1 or more controlled substances in a proportion or concentration to vitiate the potential for abuse" from the CSA's schedules amounts to an element of a controlled substance offense. Accordingly, defendant contends that the prosecution has the burden of proving, in its case in chief, that the subject substance does not fall within this exclusion.

Contrary to defendant's argument, the CSA expressly places the burden of proving "an exemption or exception" on the defendant:

> It is not necessary for this state to negate any exemption or exception in this article in a complaint, information, indictment, or other pleading or in a trial, hearing, or other proceeding under this article. The burden of proof of an exemption or exception is upon the person claiming it. [MCL 333.7531(1).]

In *People v Pegenau*, 447 Mich 278, 292; 523 NW2d 325 (1994), our Supreme Court interpreted the burden described in MCL 333.7531(2)[5] as an exemption to the

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[5] MCL 333.7531(2) provides:

> In the absence of proof that a person is the authorized holder of an appropriate license or order form issued under this article, the

CSA "rather than an element of the crime." The *Pegenau* Court analogized possession of a controlled substance proscribed under MCL 333.7403(1) to other statutory offenses that can be disproved with evidence of a valid license or authorization, such as carrying a concealed weapon. *Id.* at 289-292. Consistently with precedent interpreting those statutes, the *Pegenau* Court held that the elements of possession under MCL 333.7403(1) are limited to knowing or intentional possession of a controlled substance. Once the prosecution presents a prima facie case of those elements, the defendant bears the burden of affirmatively defending the action with proof of a valid prescription. *Id.* at 292-293.

Before *Pegenau*, this Court repeatedly considered the burden of proof in relation to exceptions to the CSA. And, having done so, this Court consistently ruled that these exceptions are affirmative defenses, not elements of the underlying offense. See *People v Bates*, 91 Mich App 506, 513-516; 283 NW2d 785 (1979) (the defendant has the burden to prove the exemption now located in MCL 333.7531[2] because the lack of authorization to deliver a controlled substance is not an element of a delivery charge); *People v Bailey*, 85 Mich App 594, 596; 272 NW2d 147 (1978) (same); *People v Beatty*, 78 Mich App 510, 513-515; 259 NW2d 892 (1977) (the CSA creates a general prohibition on the delivery of controlled substances and the defendant has the burden to establish a specific exception); *People v Dean*, 74 Mich App 19, 21-28; 253 NW2d 344 (1977), mod in part on other grounds 401 Mich 841 (1977) (the Legislature did not unconstitutionally shift the burden of proof onto defendants under the CSA; defendants merely have the

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person is presumed not to be the holder of the license or order form. The burden of proof is upon the person to rebut the presumption.

burden of establishing statutory exceptions as an affirmative defense). The common theme of these opinions is that exceptions, exemptions, and exclusions from the legal definition of "controlled substance" are not elements of a controlled substance offense. Rather, they are affirmative defenses that a defendant may present to rebut the state's evidence. Just as our Supreme Court held in *Pegenau* and this Court stated in *Dean*, "once the people show a prima facie violation" of the CSA, the defendant then has "the burden of going forward, *i.e.*, of injecting some competent evidence of the exempt status, of the drug." *Dean*, 74 Mich App at 27 (citation and quotation marks omitted); see also *Pegenau*, 447 Mich at 292-293.

Relevant to this appeal, MCL 333.7403(1) proscribes the knowing or intentional possession of a controlled substance without authorization. MCL 333.7216(1)(h), in turn, includes within the definition of "controlled substance" "[a]ny material, compound, mixture, or preparation containing any quantity of ketamine . . . ." These are the elements of the charged offense. The prosecution was therefore required to prove only that defendant knowingly or intentionally possessed ketamine without authorization.

MCL 333.7227(1), on the other hand, is an exception or exemption. Once the prosecution presented a prima facie case that defendant knowingly or intentionally possessed ketamine, defendant had the burden to affirmatively defend his innocence by presenting competent evidence that the ketamine discovered within the subject residue was "in a proportion or concentration to vitiate the potential for abuse . . . ."

Yet defendant presented no evidence that the ketamine within the powder residue was part of a compound or mixture including other ingredients that

could have vitiated the ketamine's potential for abuse. In this regard, defendant merely asked the forensic analyst whether he had measured the proportion of ketamine to any other substances that might have been mixed with the ketamine. Defendant never sought to perform an independent analysis of the sample or requested the prosecution to submit the sample for quantitative testing. In short, no evidence indicated that the white powder that tested as ketamine fell outside the definition of a controlled substance.

We further note that defendant is apparently attempting to employ the exclusion of MCL 333.7227(1) to eliminate from the definition of "controlled substance" any drug with the potential for abuse if it is sufficiently diluted with a cutting agent. Under defendant's suggested interpretation of this exclusion, the prosecution would be required to analyze every substance seized in a criminal investigation to determine the concentration of controlled substances and the effect of the particular level of a controlled substance. For example, when officers seize a quantity of crack cocaine, the officers would be required to analyze the sample to determine the concentration of cocaine in relation to other substances, regardless of the undeniable fact that cocaine processed into crack cocaine has no legitimate use. This clearly was not the intention of our Legislature.

Rather, we believe that *Barnett v Indiana*, 579 NE2d 84, 87 (Ind App, 1991), provides a helpful example of how MCL 333.7227(1) is intended to function. Analyzing nearly identical statutory language, the Indiana Court of Appeals held that any particular sample of "acetaminophen with codeine," a combination of a controlled substance with a noncontrolled substance into a legitimate prescription pain reliever, could be

classified as a schedule 3 controlled substance *if* the proportion of codeine were significant enough to cause the potential for abuse. MCL 333.7227(1) functions in the same manner: to decriminalize legitimate, medically sanctioned heterogeneous substances that contain some level of a controlled substance. Defendant has never attempted to establish that ketamine can be or ever is combined with other "ingredients" into a legitimate, medically sanctioned substance in which the ketamine is "in a proportion or concentration to vitiate the potential for abuse." Because defendant completely misunderstood the meaning and application of the statutes, he failed to present any evidence tending to support this affirmative defense.

IV. THE TRIAL COURT PROPERLY DENIED A DIRECTED VERDICT

Given our conclusion that the MCL 333.7227(1) exclusion from the definition of a "controlled substance" is not an element of a controlled substance offense, we affirm the trial court's denial of defendant's motion for a directed verdict. To prove possession of ketamine, the prosecution must establish (1) that the substance in question was ketamine, (2) that defendant possessed some amount of ketamine, (3) that defendant was not authorized to possess ketamine, and (4) that defendant knowingly possessed the ketamine. See *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). The prosecution presented evidence that the substance was, in fact, ketamine. There was no evidence to indicate that defendant was authorized to possess ketamine. And the prosecution presented sufficient evidence from which the jury could determine that defendant knowingly possessed ketamine. The residue was found on a small plastic bag in defendant's residence. Defendant admit-

ted that the bag belonged to him. Defendant indicated that he used the substances found along with the bag "to get high" and that he had illegally secured the substances from friends and over the Internet. This evidence, when viewed in the light most favorable to the prosecution, was sufficient to support a finding of guilt with respect to each element of the charged offense. See *Gillis*, 474 Mich at 113.

V. THE TRIAL COURT PROPERLY REJECTED DEFENDANT'S PROPOSED SPECIAL JURY INSTRUCTION

Defendant was not entitled to a special jury instruction regarding the MCL 333.7227(1) exclusion from the definition of a "controlled substance." As this exception is not an element of the charged possession offense, defendant was not constitutionally entitled to have the instruction presented to the jury. *Kowalski*, 489 Mich at 501 (holding that protection of a defendant's constitutional right to be convicted only after a jury's "consideration of every essential element of the charged offense" demands that the jury be given proper instructions regarding all elements of the crime). Although not a constitutional mandate, our Supreme Court has held that a trial court must also "instruct the jury . . . , upon request, on material issues, defenses, and theories that are *supported by the evidence*." *People v Anstey*, 476 Mich 436, 453; 719 NW2d 579 (2006) (emphasis added), citing *People v Rodriguez*, 463 Mich 466, 472-473; 620 NW2d 13 (2000), and *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975). Defendant presented no evidence that the ketamine found inside his residence was mixed with any other substance, let alone any evidence that the ketamine was "in a proportion or concentration to vitiate the potential for abuse[.]" Accordingly, defendant's proffered instruction

based on MCL 333.7227(1) was not supported by the evidence, and the trial court properly denied defendant's request.

Affirmed.

HOEKSTRA and STEPHENS, JJ., concurred with GLEICHER, P.J.

ELDENBRADY v CITY OF ALBION

Docket No. 297735. Submitted July 6, 2011, at Lansing. Decided October 4, 2011, at 9:00 a.m.

Joshua and Anna EldenBrady filed a petition in the Michigan Tax Tribunal (MTT), challenging the denial of their request for a principal residence exemption on a 10-acre parcel of land that was contiguous to the property on which their residence was located. The parcel contained an abandoned school building that petitioners did not use. A hearing referee had issued a proposed opinion recommending that petitioners be granted the expanded principal residence exemption, but the MTT disagreed and denied petitioners' request, concluding that petitioners had failed to establish by a preponderance of the evidence that the property was unoccupied or being used in conjunction with their principal residence. Petitioners appealed.

The Court of Appeals *held*:

An exemption from the taxing power of the state must be clear and unambiguous and is strictly construed against the property owner and in favor of the public. Under MCL 211.7cc(1), a principal residence is exempt from the tax levied by a local school district for school operating purposes. MCL 211.7dd(c) provides that the term "principal residence" includes all of an owner's property that is classified as residential, is adjoining or contiguous to his or her dwelling, and is unoccupied. It was undisputed that petitioners' 10-acre parcel was zoned residential and that the parcel was adjoining or contiguous to petitioners' dwelling. The MTT erred by concluding that the parcel did not qualify for the principal residence exemption because it was not "vacant." The statute mandated that the property need only be "unoccupied," not vacant. While these words are frequently used interchangeably and sometimes considered synonyms, for purposes of MCL 211.7dd(c) the term "unoccupied" has a meaning separate and distinct from that of the word "vacant." The statute merely requires that the contiguous property be without human occupants. The abandoned school building on the petitioners' 10-acre parcel was not used as a residence or dwelling,

had no tenants or residents, and was unoccupied within the meaning of MCL 211.7dd(c). Petitioners were entitled to the principal residence exemption.

Reversed and remanded for further proceedings.

TAXATION — GENERAL PROPERTY TAX ACT — PRINCIPAL RESIDENCE EXEMPTION — DEFINITION OF PRINCIPAL RESIDENCE.

A principal residence is exempt from the tax levied by a local school district for school operating purposes; the term "principal residence" includes all of an owner's property that is classified as residential, is adjoining or contiguous to his or her dwelling, and is unoccupied; as used in the statute, "unoccupied" means without human occupants (MCL 211.7cc[1], 211.7dd[c]).

Joshua S. EldenBrady for petitioners.

Robison Law Office (by *Mark J. Robison*) for respondent.

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

PER CURIAM. Petitioners appeal by right the final opinion and judgment of the Michigan Tax Tribunal (MTT) denying their request for a principal residence exemption. We reverse and remand to the MTT with instructions to grant petitioners' request for a principal residence exemption on their 10-acre parcel for tax years 2008 and 2009.

I

Petitioners purchased a 10-acre parcel that is contiguous to the property on which their home is located. There is an abandoned school building on the 10-acre parcel. It is undisputed that the 10-acre parcel is zoned residential. Petitioners sought and obtained permission from the local zoning authority to plant a garden on the parcel and construct a fence around it. Petitioners plan to convert the

abandoned school building into an art center in the future, but do not currently use the building.

Petitioners filed an affidavit with respondent, the city of Albion, seeking to extend the scope of their principal residence exemption to include the 10-acre parcel for tax years 2008 and 2009. Respondent denied petitioners' request, finding that the 10-acre parcel did not qualify for the principal residence exemption because there was a building on it and it was therefore not vacant. Petitioners appealed to the Small Claims Division of the MTT. An MTT hearing referee issued a proposed opinion recommending that petitioners be granted the expanded principal residence exemption they were seeking. The referee determined that the 10-acre parcel was being "used as an extension of the petitioners' home" and that the parcel was qualified to receive the exemption under MCL 211.7cc because it was unoccupied, zoned residential, and contiguous to petitioners' dwelling.

The MTT disagreed with the hearing referee's recommendation and issued a final opinion and judgment denying petitioners' request for a principal residence exemption on the 10-acre parcel. The MTT determined that the hearing referee's recommendation was "not supported by the record" and that petitioners had "failed to establish by a preponderance of the evidence that the subject property is unoccupied or being used in conjunction with their principal residence." Citing certain guidelines prepared by the Department of Treasury,[1] the MTT observed that "an adjacent parcel is eligible for a principal residence exemption only if [it] is vacant (unoccupied land) or has a garage or other

[1] Michigan Department of Treasury, *Guidelines for the Michigan Principal Residence Exemption Program* (2010) <http://www.michigan.gov/documents/2856_11014_7.pdf>.

structures that are part of [p]etitioners' home." The MTT ruled that petitioners' 10-acre parcel was not vacant because it "contain[ed] an abandoned, unimproved, and unused school building," and further noted that petitioners were not using the school building "in conjunction with their principal residence, such as for storage." Accordingly, the MTT denied petitioners' request for a principal residence exemption on the parcel for tax years 2008 and 2009.

II

"In the absence of fraud, we review the Tax Tribunal's decision 'for misapplication of the law or adoption of a wrong principle.' " *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 163; 744 NW2d 184 (2007), quoting *Wexford Med Group v Cadillac*, 474 Mich 192, 201; 713 NW2d 734 (2006). The MTT's factual findings are conclusive "if they are supported by 'competent, material, and substantial evidence on the whole record.' " *Id*., quoting *Mich Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 476; 518 NW2d 808 (1994). "However, because statutory interpretation is involved in this matter, we review the tribunal's decision de novo." *Kinder Morgan*, 277 Mich App at 163; see also *Wexford Med Group*, 474 Mich at 202.

"This Court's primary task in construing a statute is to discern and give effect to the intent of the Legislature." *Shinholster v Annapolis Hosp*, 471 Mich 540, 548-549; 685 NW2d 275 (2004). "To do so, we begin with the language of the statute, ascertaining the intent that may reasonably be inferred from its language." *Lash v Traverse City*, 479 Mich 180, 187; 735 NW2d 628 (2007). "The words contained in the statute provide us with the most reliable evidence of the Legislature's intent." *Kinder Morgan*, 277 Mich App at 163. "Terms

used in a statute must be given their plain and ordinary meaning, and it is appropriate to consult a dictionary for definitions." *Id.*; see also MCL 8.3a; *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004).

There are certain special rules of construction that apply to the interpretation of statutory tax exemptions:

> " 'An intention on the part of the legislature to grant an exemption from the taxing power of the State will never be implied from language which will admit of any other reasonable construction. Such an intention must be expressed in clear and unmistakable terms, or must appear by necessary implication from the language used, for it is a well-settled principle that, when a specific privilege or exemption is claimed under a statute, charter or act of incorporation, it is to be construed strictly against the property owner and in favor of the public. This principle applies with peculiar force to a claim of exemption from taxation. Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed and cannot be made out by inference or implication but must be beyond reasonable doubt. In other words, since taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain; and the burden of establishing it is upon him who claims it. Moreover, if an exemption is found to exist, it must not be enlarged by construction, since the reasonable presumption is that the State has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute the favor would be extended beyond what was meant.' " [*Guardian Indus Corp v Dep't of Treasury*, 243 Mich App 244, 249-250; 621 NW2d 450 (2000), quoting *Detroit v Detroit Commercial College*, 322 Mich 142, 148-149; 33 NW2d 737 (1948), in turn quoting 2 Cooley, Taxation (4th ed), § 672, p 1403.]

However, these special rules "do not permit a strained construction that is adverse to the intent of the Legislature." *VanderWerp v Plainfield Charter Twp*, 278 Mich App 624, 628; 752 NW2d 479 (2008).

III

We conclude that the MTT misinterpreted MCL 211.7dd(c) and committed an error of law when it determined that petitioners were not entitled to a principal residence exemption on their 10-acre parcel for tax years 2008 and 2009.

Michigan's principal residence exemption, also known as the "homestead exemption," is governed by §§ 7cc and 7dd of the General Property Tax Act, MCL 211.7cc and MCL 211.7dd. See *Inter Coop Council v Dep't of Treasury*, 257 Mich App 219, 222; 668 NW2d 181 (2003). The Legislature has declared that "[a] *principal residence* is exempt from the tax levied by a local school district for school operating purposes to the extent provided under . . . the revised school code . . . if an owner of that principal residence claims an exemption as provided in this section." MCL 211.7cc(1) (emphasis added); see also *Inter Coop Council*, 257 Mich App at 223. MCL 211.7dd(c) provides in relevant part:

> "Principal residence" means the 1 place where an owner of the property has his or her true, fixed, and permanent home to which, whenever absent, he or she intends to return and that shall continue as a principal residence until another principal residence is established. Except as otherwise provided in this subdivision, principal residence includes only that portion of a dwelling or unit in a multiple-unit dwelling that is subject to ad valorem taxes and that is owned and occupied by an owner of the dwelling or unit. *Principal residence also includes all of an owner's unoccupied property classified as residential that is adjoining or contiguous to the dwelling subject to ad valorem taxes*

> *and that is owned and occupied by the owner*. . . . Contiguity is not broken by a road, a right-of-way, or property purchased or taken under condemnation proceedings by a public utility for power transmission lines if the 2 parcels separated by the purchased or condemned property were a single parcel prior to the sale or condemnation. [Emphasis added.]

In other words, to receive the exemption that they were seeking, petitioners were required to prove by a preponderance of the evidence that their 10-acre parcel (1) was classified as residential, (2) was adjoining or contiguous to their dwelling, and (3) was "unoccupied." MCL 211.7dd(c).

As noted previously, it is undisputed that petitioners' 10-acre parcel was zoned residential at the time. It is also undisputed that the parcel is adjoining or contiguous to petitioners' dwelling. Thus, the sole issue for respondent and the MTT was whether petitioners' parcel was "unoccupied" within the meaning of the third sentence of MCL 211.7dd(c).

Respondent argued, and the MTT concluded, that the 10-acre parcel did not qualify for the principal residence exemption under MCL 211.7dd(c) because it was not *vacant*. The MTT's final opinion and judgment, and the Department of Treasury's guidelines concerning the principal residence exemption program, both make clear that the MTT considers the terms *vacant* and *unoccupied* to be synonymous. However, we conclude that these two terms are not synonymous for purposes of the present case.

In order to qualify for a principal residence exemption under the third sentence of MCL 211.7dd(c), property need only be "unoccupied"—not "vacant." Indeed, the word *vacant* does not appear in the text of MCL 211.7dd(c). We acknowledge that the terms vacant and

unoccupied are frequently used interchangeably and are considered synonyms in many instances. *Hill v Warrell*, 87 Mich 135, 138; 49 NW 479 (1891); *Stupetski v Transatlantic Fire Ins Co*, 43 Mich 373, 374; 5 NW 401 (1880); *Random House Webster's College Dictionary* (1997). But these words are not always synonymous; in some contexts each term has a meaning independent of the other. See *McNeel v Farm Bureau Gen Ins Co*, 289 Mich App 76, 92; 795 NW2d 205 (2010); see also *Mich Twp Participating Plan v Federal Ins Co*, 233 Mich App 422, 435; 592 NW2d 760 (1999). The principal definition of the word "vacant" is "having no contents; empty; void." *Random House Webster's College Dictionary* (1997). While it is true that the dictionary goes on to define "vacant" as "having no occupant; unoccupied," *id*., we are convinced that the term *unoccupied* has a meaning separate and distinct from that of the word *vacant* for purposes of MCL 211.7dd(c).

" '[C]ourts have sometimes distinguished *vacant* from *unoccupied*, holding that *vacant* means completely empty while *unoccupied* means not routinely characterized by the presence of human beings.' " *Vushaj v Farm Bureau Gen Ins Co*, 284 Mich App 513, 515-516; 773 NW2d 758 (2009), quoting Black's Law Dictionary (8th ed). Similarly, one dictionary "defines 'unoccupied' as 'without occupants' and 'occupant' as 'a tenant of a house, estate, office, etc.; resident.' " *Vushaj*, 284 Mich App at 516, quoting *Random House Webster's College Dictionary* (1995). Another dictionary observes that " '*vacant* means without inanimate objects, while *unoccupied* means without human occupants.' " *McNeel*, 289 Mich App at 92, quoting Garner, *A Dictionary of Modern Legal Usage* (2d ed). When read in context, it is clear that the Legislature intended the term "unoccupied" in the third sentence of MCL 211.7dd(c) to mean "without human occupants" rather than "completely

empty," "without inanimate objects," or "having no contents; empty; void." Indeed, if the word "unoccupied" in MCL 211.7dd(c) were to be interpreted as meaning "vacant" (and by extension "completely empty," "without inanimate objects," or "having no contents; empty; void"), then any property with a garage or shed would be ineligible for the principal residence exemption under the third sentence of MCL 211.7dd(c). Even the MTT implicitly admits that this cannot be what the Legislature intended.[2]

In sum, the third sentence of MCL 211.7dd(c) does not require that contiguous property be *vacant* or completely devoid of any inanimate objects, contents, or structures to qualify for the principal residence exemption. Instead, the statutory language merely requires that the contiguous property be *unoccupied*, i.e., without human occupants. See *McNeel*, 289 Mich App at 92. As explained earlier, an occupant is a tenant or a resident. See *Vushaj*, 284 Mich App at 516.

No part of petitioners' 10-acre parcel or abandoned school building was used as a residence or dwelling, and no part of the parcel or school building had tenants or residents. Accordingly, we conclude that the 10-acre parcel was "unoccupied" within the meaning of MCL 211.7dd(c). Because the parcel was zoned residential, was adjoining or contiguous to petitioners' dwelling, and was "unoccupied" within the meaning of MCL 211.7dd(c), petitioners were entitled to a principal residence exemption on the property. For these reasons, we reverse the final opinion and judgment of the MTT and

[2] The Department of Treasury's guidelines, on which the MTT relied, provide that contiguous property containing a garage qualifies for the principal residence exemption under the third sentence of MCL 211.7dd(c) as long as the property is zoned residential and the garage is not inhabited or used as a dwelling.

remand this case to the tribunal with instructions to grant petitioners' request for a principal residence exemption on their 10-acre parcel for tax years 2008 and 2009.[3]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, a public question having been involved.

SAAD, P.J., and JANSEN and DONOFRIO, JJ., concurred.

[3] Nor does MCL 211.7dd(c) contain any requirement that the owner use the contiguous, unoccupied property in conjunction with, or as an extension of, his or her dwelling. Accordingly, the MTT erred to the extent that it ruled that petitioners' 10-acre parcel was ineligible for the principal residence exemption because it was not being used "in conjunction with [petitioners'] principal residence, such as for storage."

In re HUDSON

Docket No. 302214. Submitted September 16, 2011, at Detroit. Decided October 11, 2011, at 9:00 a.m. Leave to appeal denied, 490 Mich 918.

The Department of Human Services (DHS) filed a petition in the Family Division of the Oakland Circuit Court to terminate the parental rights of A. Sword-Pope to her minor children. DHS became involved because of deplorable housing conditions and alleged sexual abuse by respondent against her 14-year-old biological son, A., with whom she had recently reconnected after giving him up for adoption at birth. A. had revealed that he had sexual intercourse with respondent on numerous occasions after she located him. Respondent pleaded no contest to an amended termination petition, which included the sexual abuse allegations. In a separate criminal proceeding, respondent pleaded guilty of first-degree criminal sexual conduct (CSC-I), MCL 750.520b, arising out of her sexual activity with A. and was sentenced to a term of nine to 30 years in prison. The court, Lisa Ortlieb Gorcyca, J., terminated respondent's parental rights after finding that grounds for termination under MCL 712A.19b(3)(b)(*i*), (h), (j), and (k)(*ii*) existed. Respondent appealed.

The Court of Appeals *held*:

1. Under MCL 712A.19b(3)(k)(*ii*), termination is appropriate if the parent abused the child or a sibling of the child and the abuse included criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate. Because respondent pleaded guilty of CSC-I in relation to her sexual abuse of A., there was clear and convincing evidence to support termination of her parental rights. "Sibling" is defined as one or more individuals having one or both parents in common or a brother or sister. Respondent was the biological mother of A. and all the minor children, who shared some genetic makeup and thus were siblings. There was no rational basis for a distinction between a legal sibling and a biological sibling in this case.

2. The same holds true under MCL 712A.19b(3)(b)(*i*), which provides that termination is appropriate if the child or a sibling of the child suffered sexual abuse, a parent's act caused the physical

injury or physical or sexual abuse, and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the forseeable future if placed in the parent's home. Evidence of how a parent treats one child is evidence of how he or she may treat her other children. Even though no legal relationship existed between respondent and A., her behavior was so egregious as to defy comprehension.

3. There was clear and convincing evidence to support termination of respondent's parental rights under MCL 712A.19b(3)(h), which provides for termination if the parent is imprisoned for more than two years and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time. A present inability to care for one's minor children due to incarceration is not, by itself, grounds for termination. Respondent, however, had failed to provide proper care and custody for the minor children and there was no reasonable expectation that she would be able to do so within a reasonable time. Only the youngest child would still be a minor if respondent were to be released from prison at her earliest release date, and she subjected the children to emotional damage by breaching their trust and confidence in her, placing them in a situation where they no longer resided together as a family unit, and depriving them of her daily presence.

4. There was clear and convincing evidence to support termination of respondent's parental rights under MCL 712A.19b(3)(j), which provides for termination if there is a reasonable likelihood, based on the parent's conduct or capacity, that the child will be harmed if he or she is returned to the home of the parent. Harm to the child under this basis may be emotional, not just physical. Respondent's sexual abuse of A. deprived the minor children of a normal home with her, her denial turned the minor children against A., and she violated their trust when they discovered she was guilty of CSC-I.

4. The trial court did not clearly err by determining that termination of respondent's parental rights was in the best interests of the minor children.

Affirmed.

PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — ABUSE OF SIBLINGS — DEFINITION OF SIBLING.

A petitioner must establish at least one statutory ground for termination of parental rights by clear and convincing evidence; a biological child who is put up for adoption by a parent is a sibling of that parent's other biological children when determining

whether statutory grounds for termination of parental rights have been established under MCL 712A.19b(3)(b)(*i*) and (k)(*ii*); there is no distinction between a legal sibling and a biological sibling under those subsections.

Jessica R. Cooper, Prosecuting Attorney, and *Thomas R. Grden* and *Tanya L. Nava*, Assistant Prosecuting Attorneys, for the Department of Human Services.

William Lansat for A. Sword-Pope.

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

PER CURIAM. Respondent appeals as of right the order terminating her parental rights to her minor children pursuant to MCL 712A.19b(3)(b)(*i*), (h), (j), and (k)(*ii*). Because the trial court did not clearly err by finding that a statutory ground for termination was established by clear and convincing evidence or that termination was in the minor children's best interests, we affirm.

The minor children came to the attention of the Department of Human Services (DHS) because of deplorable housing conditions and allegations of sexual abuse by respondent against her 14-year-old biological son, whom she had given up for adoption at birth but with whom she had recently reconnected. The child, A., revealed that he and respondent had engaged in sexual intercourse on numerous occasions after she located him through MySpace. The trial court asserted jurisdiction over the minor children, and the matter proceeded to hearing. Respondent ultimately pleaded guilty to one count of first-degree criminal sexual conduct, MCL 750.520b, relating to her sexual activity with A. and was sentenced to a term of nine years to 30 years in prison. The trial court thereafter terminated respondent's parental rights to her minor children.

A petitioner must establish by clear and convincing evidence at least one statutory ground for termination of parental rights. *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003). This Court reviews for clear error the trial court's ruling that a statutory ground for termination has been established and its ruling that termination is in the children's best interests. MCR 3.977(K); *In re Archer*, 277 Mich App 71, 73; 744 NW2d 1 (2007). A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

On appeal, respondent contends that the trial court erred by finding that any of the four cited statutory bases for termination were established by clear and convincing evidence. We disagree.

First and foremost, respondent pleaded no contest to an amended petition, which included allegations that she had sexually abused A. Though the trial court declined to terminate respondent's parental rights following the first best-interest hearing, child protective proceedings are viewed as one continuous proceeding. *In re LaFlure*, 48 Mich App 377, 391; 210 NW2d 482 (1973). Respondent's plea, therefore, became evidence in the case, and she claims no irregularity pertaining to her 2009 plea. She now argues that the evidence to support termination was not clear and convincing, which is directly contrary to her plea of no contest. Respondent may not assign as error on appeal something that she deemed proper in the lower court because allowing her to do so would permit respondent to harbor error as an appellate parachute. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). In any event, we find that clear and convincing evidence supported the trial court's termination decision. *Archer*, 277 Mich App at 73.

Termination is appropriate pursuant to MCL 712A.19b(3)(b)(*i*) if the child or a sibling of the child has suffered sexual abuse and "[t]he parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home." MCL 712A.19b(3)(k)(*ii*) allows for termination of parental rights if "the parent abused the child or a sibling of the child and the abuse included . . . [c]riminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate."

Respondent admits that she pleaded guilty to a charge of first-degree criminal sexual conduct involving her biological son, but avers that because she gave the child up for adoption at birth, he was not her legal child. Respondent argues that it legally follows that as A. was not the sibling of her other children, termination on the basis of her sexually assaulting him was not appropriate under MCL 712A.19b(3)(b)(*i*) or (k)(*ii*). Aside from the fact that respondent has provided no authority for such position and we may thus deem this issue abandoned, see, e.g., *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999), we disagree with respondent's position.

"Sibling" is not specifically defined in the Juvenile Code. Nor is there any caselaw in Michigan on this particular issue. That being the case, we may consult a dictionary for the proper definition of "sibling." See, e.g., *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004) (stating that when terms are not defined in a statute, those terms are to be "given their plain and ordinary meanings, and it is proper to consult a dictionary for definitions"). The *American Heritage Dictionary of the English Language* (3d ed), p 1675, defines "sibling"

as "[o]ne of two or more individuals having one or both parents in common; a brother or sister." Respondent is the biological mother of A. and all the minor children at issue; the children share the same mother and thus some of the same genetic makeup. A. and the minor children are thus siblings and there is no rational basis for forging a distinction between a legal sibling and biological sibling under the present factual situation. Clear and convincing evidence thus supported termination pursuant to MCL 712A.19b(3)(k)(*ii*).

The same holds true for termination under MCL 712A.19b(3)(b)(*i*). Respondent contends that no evidence was presented that any of the children would suffer from injury or abuse if placed with her, considering that she will be incarcerated until at least 2019. However, the reason for respondent's incarceration was her sexual abuse of her 14-year-old biological son. Evidence of how a parent treats one child is evidence of how he or she may treat the other children. *In re AH*, 245 Mich App 77, 84; 627 NW2d 33 (2001). It is thus appropriate for a trial court to evaluate a respondent's potential risk to the other siblings by analyzing how the respondent treated another one of his or her children, albeit a child the respondent gave up for adoption. Though no legal relationship exists in such a situation, the reality is that respondent is still the biological mother of the child who was given up for adoption and that child is the biological half-sibling of the respondent's other children. Were respondent's other children at less risk because A. was merely their *biological* and not their *legal* sibling? Respondent's behavior with A. was so egregious as to defy comprehension. It demonstrated more than a mere lack of insight and poor judgment.

Respondent can argue that she perceived A. in a different way than she perceived the rest of her children because she did not raise him. If that is the case, then

her now toddler son would be at the same risk of harm. Assuming that respondent serves only the minimum sentence, she will be released when the child is 15 years old—nearly the same age that A. was when he was reunited with respondent and she sexually abused him.

Clear and convincing evidence also supported termination under MCL 712A.19b(3)(h), which provides for termination if

> [t]he parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, 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.

Respondent does not dispute that she will be in prison for a minimum of nine years. And as a result of her imprisonment and the circumstances leading up to it, the minor children have undoubtedly been emotionally damaged. They have been split up and no longer reside together in the same home. By the time of respondent's earliest release date, only the youngest child will still be a minor. While one's present inability to care for one's minor children due to incarceration is not alone grounds for termination, *In re Mason*, 486 Mich 142, 160; 782 NW2d 747 (2010), incarceration was not the sole reason for termination in this case. By subjecting the children to emotional damage, breaching their trust and confidence in her, placing them in a situation where they no longer reside together as a family unit, and depriving them of her daily presence, respondent has not provided proper care and custody of the children. She will be imprisoned for a sufficient period that they will be deprived of a normal home for more than two years, and there is no reasonable expec-

tation that respondent will be able to provide the children with proper care and custody within a reasonable time.

Finally, termination was proper pursuant to MCL 712A.19b(3)(j) because "[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent." Respondent focuses only on the potential of *physical* harm or abuse and ignores the fact that the children had been, and continued to be, at risk of *emotional* harm. Respondent's behavior had already deprived the children of several years of a normal home with her. Her ongoing denial not only turned the children against A. because they believed he was a liar, but also violated the children's trust in respondent when they came to learn more of the allegations against her. Respondent's behavior will have lifelong and profound effects on her children as they come to grips with the fact that she was guilty of first-degree criminal sexual conduct with her own 14-year-old biological child.

For the foregoing reasons, the trial court did not clearly err by finding that the statutory grounds for termination of respondent's parental rights set forth in MCL 712A.19b(3)(b)(*i*), (h), (j), and (k)(*ii*) were established.

The trial court also did not clearly err by determining that termination was in the children's best interests. As indicated by the trial court, all the children were indirectly made victims of respondent's sexual abuse of A. Respondent's criminal behavior and failure to fully appreciate her conduct set a poor example for the children, who looked to her for guidance. Respondent's teenage daughter had difficulty processing what respondent had done and for a long time believed that

respondent was innocent. Respondent played into her daughter's beliefs. At the first best-interest hearing, respondent testified that "I have not, would not ever abuse any of my children. I never did." Later, however, respondent admitted engaging in sexual intercourse with her teenage biological son and pleaded guilty to criminal charges concerning her actions. All the children will have a lifelong struggle dealing with what happened to their family as the result of respondent's reprehensible behavior. Termination of respondent's parental rights was in their best interest and was a necessary step in allowing the children to have the safety, permanence, and stability to which they are entitled.

Affirmed.

SERVITTO, P.J., and MARKEY and K. F. KELLY, JJ., concurred.

In re PLUMP

Docket No. 302995. Submitted October 5, 2011, at Grand Rapids. Decided October 11, 2011, at 9:05 a.m.

The Department of Human Services petitioned in the Berrien Circuit Court, Family Division, to terminate the parental rights of respondent, the mother of SO and EW, on the basis that respondent had provided marijuana to a teenage friend of one of her teenage children and then smoked the marijuana in the presence of the teenagers and SO and EW. Respondent had pleaded guilty to criminal charges concerning the event. Respondent's children had previously been removed from her care because, in addition to her substance abuse, she had failed to protect her two oldest children from physical and sexual abuse by her violent partner. At that time, she received numerous services from petitioner, and the children were eventually returned to her care. After her children were again removed because of the marijuana incident, respondent was again provided with numerous services, including counseling for victims of domestic violence. By the time of the termination proceeding, respondent had stopped participating in that counseling, had repeatedly tested positive for marijuana use, and had been arrested for violating the terms of her probation for the marijuana conviction by associating with the person who had abused her two oldest children. The court, Thomas E. Nelson, J., eventually entered an order terminating respondent's parental rights to the two minors under MCL 712A.19b(3)(c)(*ii*) (failure to rectify conditions), (g) (failure to provide proper care or custody), and (j) (likelihood of harm if child returned to home), holding that respondent's own behaviors were directly harming the children or exposing them to harm and that petitioner had expended reasonable efforts toward reuniting respondent with the children. Respondent appealed, alleging that petitioner failed to provide her with adequate services regarding her being a victim of domestic violence.

The Court of Appeals *held*:

1. When a child is removed from a parent's custody, the agency charged with the care of the child must report to the trial court the efforts made to rectify the conditions that led to the removal of the

child. The trial court, before entering an order of disposition, must state whether reasonable efforts have been made to prevent the child's removal from the home or rectify the conditions that caused the removal of the child. Services are not mandated in all situations, but the agency must justify any decision not to provide services.

2. The termination in this case was properly based on the fact that respondent's own behaviors were directly harming the children or exposing them to harm. The trial court did not err by determining that reasonable efforts had been exerted by petitioner toward reunifying respondent with the children.

Affirmed.

Gregory H. Feldman for C. Plump.

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

RONAYNE KRAUSE, J. Respondent appeals as of right the order terminating her parental rights to her two minor children, SO and EW, pursuant to MCL 712A.19b(3)(c)(*ii*), (g), and (j). Respondent contends that petitioner failed to recognize that domestic violence is an issue in this case and therefore failed to provide her with adequate services regarding her being the victim of domestic violence. We disagree and affirm.

The children in this case were removed from respondent's care after respondent provided marijuana to a teenage friend of one of her older children, MG. She then smoked the marijuana in front of the teenagers and SO and EW, who were then ages six and four, respectively. Respondent later pleaded guilty to criminal charges in connection with that event.

Respondent's children had previously been removed from her care because, in addition to her substance abuse, she had failed to protect her two oldest children from physical and sexual abuse by her violent partner.

At the time of that earlier removal, respondent was provided with numerous services and the children thereafter were returned to her care.

After the children were again removed from her care, this time as a result of the marijuana incident, respondent was again provided with numerous services. Those services included counseling for victims of domestic violence. She participated in the services for several months, but she did not, in the end, persist. She stopped participating in the domestic-violence-victims' counseling, repeatedly tested positive for marijuana use, quit one of her jobs, had no heat at her residence and was facing eviction, and was arrested for violating her probation by associating with the person who had physically and sexually abused the two oldest children. At the termination hearing, a foster-care worker testified that domestic violence was one of the concerns both times the children were removed and that both times respondent received numerous services, including counseling for victims of domestic violence, but she had failed to benefit from those services.

When a child is removed from a parent's custody, the agency charged with the care of the child is required to report to the trial court the efforts made to rectify the conditions that led to the removal of the child. See *In re Fried*, 266 Mich App 535, 542; 702 NW2d 192 (2005). Before the trial court enters an order of disposition, it is required to state whether reasonable efforts have been made to prevent the child's removal from the home or to rectify the conditions that caused the child to be removed from the home. MCL 712A.18f(4). Services are not mandated in all situations, but the statute requires the agency to justify the decision not to provide services. *In re Terry*, 240 Mich App 14, 25 n 4; 610 NW2d 563 (2000).

The evidence shows that petitioner and respondent were both aware of the numerous barriers to reunification in this case, among them respondent's relationship with an abusive partner. Petitioner provided respondent numerous services each time the children were removed from her care, including counseling for victims of domestic violence, yet respondent failed to benefit from the services and persisted in her relationship with the abuser of her children. To be clear, it would be impermissible for a parent's parental rights to be terminated solely because he or she was a victim of domestic violence. However, this termination was properly based on the fact that respondent's own behaviors were directly harming the children or exposing them to harm. We conclude that the trial court did not err by determining that reasonable efforts had been exerted by the agency toward reuniting respondent with the children.

Affirmed.

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

PEOPLE v NUNLEY

Docket No. 302181. Submitted July 7, 2011, at Lansing. Decided October 13, 2011, at 9:00 a.m. Precedential effect stayed, 490 Mich 922. Reversed, 491 Mich 686. Certiorari denied, 568 US ___.

Terry Nunley was charged in the 15th District Court with driving while his license was suspended (DWLS), second offense, MCL 257.904(1) and (3)(b). The prosecution filed a motion in limine, seeking a ruling that the document certifying that the Secretary of State had mailed defendant notice that his license was suspended, which is an element of DWLS, would be admissible at trial. The district court, Chris Easthope, J., denied the motion, and the prosecution appealed. The Washtenaw Circuit Court, Melinda Morris, J., reversed the district court's ruling that the certificate of mailing was inadmissible because it lacked a signature, but affirmed its ruling that admitting the document without the testimony of its author would violate defendant's constitutional right to be confronted with the witnesses against him. The Court of Appeals granted the prosecution's application for interlocutory appeal.

The Court of Appeals *held*:

The circuit court did not err by ruling that the certificate of notice was testimonial in nature. Under the Confrontation Clause of the Sixth Amendment of the United States Constitution, a person facing criminal prosecution has the right to be confronted with the witnesses against him or her, and § 20 of article 1 of the Michigan Constitution provides the same right. These provisions allow the admission of testimonial statements of witnesses absent from trial only when the original declarant is unavailable and the defendant has had a prior opportunity to cross-examine that declarant. Statements are testimonial if their primary purpose is to establish or prove past events potentially relevant to later criminal prosecution. A document need not have been prepared solely in anticipation of trial in order to be classified as testimonial; rather, it is subject to Confrontation Clause requirements if it was made under circumstances that would lead an objective witness reasonably to believe that it would be available for use at a later trial. In light of the fact that the prosecution was required

to prove that defendant had received notice that his license was suspended as an element of DWLS, the certificate of mailing satisfies this condition.

Affirmed.

SAAD, P.J., dissenting, would have held that the certificate of mailing was nontestimonial because it was created independently of any investigatory or prosecutorial purpose given that no crime had yet been committed and because cross-examination of its author would elicit little or nothing to ensure its reliability.

1. CONSTITUTIONAL LAW — EVIDENCE — RIGHT OF CONFRONTATION — TESTIMONIAL STATEMENTS.

Testimonial statements of witnesses absent from trial are admissible only when the original declarant is unavailable and the defendant has had a prior opportunity to cross-examine that declarant; a statement is considered testimonial if its primary purpose is to establish or prove past events potentially relevant to later criminal prosecution; a statement satisfies this condition if it was made under circumstances that would lead an objective witness reasonably to believe that it would be available for use at a later trial (US Const, Am VI; Const 1963, art 1, § 20).

2. CONSTITUTIONAL LAW — EVIDENCE — RIGHT OF CONFRONTATION — TESTIMONIAL STATEMENTS — NOTICE OF SUSPENSION OF DRIVER'S LICENSES — CERTIFICATES OF MAILING.

The document certifying that the Secretary of State mailed a person notice that his or her driver's license was suspended is testimonial in nature; it may only be admitted to prove a charge of driving with a suspended license without the testimony of its preparer if the preparer is unavailable and the defendant had a prior opportunity to cross-examine him or her (US Const, Am VI; Const 1963, art 1, § 20; MCL 257.212; MCL 257.904[1]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Brian L. Mackie*, Prosecuting Attorney, and *David A. King*, Assistant Prosecuting Attorney, for the people.

James E. R. Fifelski for defendant.

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

DONOFRIO, J. The prosecution appeals by leave granted the circuit court's order affirming in part the district court's order denying the prosecution's motion in limine to admit certain documentary evidence on the ground that it violated defendant's right to confront witnesses against him.[1] The prosecution contends that the circuit court erred by affirming in part the district court's denial of its motion in limine because the admission of the Secretary of State's certificate of mailing would not have violated the Confrontation Clause. Because the circuit court did not abuse its discretion when it affirmed the denial of the prosecution's motion in limine for the reason that the certificate of mailing is testimonial in nature and would violate the Confrontation Clause if admitted without witness testimony, we affirm.

I

On September 9, 2009, a police officer pulled defendant over for failing to properly secure the load in his truck and for improper identification of a commercial vehicle. The police officer cited defendant for driving while license suspended (DWLS), and then released defendant from the scene.[2] The prosecutor charged defendant with DWLS-second offense, MCL 257.904(1)

[1] US Const, Am VI; Const 1963, art 1, § 20. The prosecution applied in this Court for leave to appeal pursuant to MCR 7.205(E)(1), and this Court granted leave to appeal. *People v Nunley*, unpublished order of the Court of Appeals, entered March 1, 2011 (Docket No. 302181).

[2] The prosecutor, in his applications for leave to appeal in the circuit court and in this Court, asserts that defendant admitted to the charging officer that he did not have a valid license. There is no record evidence or supporting documentation in the lower court record for this assertion. Further, the record is silent regarding defendant's receipt of the notification that his driving privileges had been suspended.

and (3)(b).[3] The prosecutor obtained defendant's certified driving record from the Secretary of State's office. Included as part of defendant's driving record is a "Certificate of Mailing of Orders and Rest Lics." The certificate provides in relevant part:

> I CERTIFY THAT I AM EIGHTEEN YEARS OF AGE OR OLDER AND THAT ON THIS DATE NOTICE OF THE ORIGINAL ORDER OF SUSPENSION OR RESTRICTED LICENSE WAS GIVEN TO EACH OF THE PERSONS NAMED BELOW BY FIRST-CLASS UNITED STATES MAIL AT LANSING, MICHIGAN AS PROVIDED IN SECTION 212 OF MICHIGAN VEHICLE CODE (MCL 257.212).
>
> DATE 6-22-09 OFFICER OR EMPLOYEE F. Bueter
> [handwritten]

On the certificate of mailing, the date is handwritten, and "F. Bueter" is typed on the "Officer or Employee" signature line. Defendant's name and driver's license number are listed below the above-quoted language.[4]

On June 3, 2010, the prosecutor brought a motion in limine before the district court, seeking a ruling that the certificate of mailing was admissible without both the signature of the person giving the notice and without calling a representative of the Secretary of State as a witness. Defendant objected to the motion in

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[3] The prosecutor enhanced defendant's DWLS charge to DWLS-second offense pursuant to MCL 257.904(3)(b) because of defendant's prior driving record. MCL 257.904(3)(b) provides that if a violation occurs after a prior conviction, the sentence is enhanced to "imprisonment for not more than 1 year or a fine of not more than $1,000, or both." The fact that defendant is facing a charge of DWLS-second offense rather than DWLS is of no consequence to our analysis of the issues in this case.

[4] Defendant's certified driving record shows that defendant had obtained a temporary license or permit pursuant to MCL 257.625g on February 7, 2009, and was not made aware of its revocation through means other than the notice sent on June 22, 2009. The record also establishes an earlier DWLS conviction.

limine and asserted his right to cross-examine the issuer of the certificate of mailing.[5] On July 27, 2010, the district court held a hearing on the prosecutor's motion in limine. The district court held that by its nature, a "certificate" requires a signature and that because the court did not "find any other reason why this document would be used except in litigation," the Confrontation Clause in the Sixth Amendment of the United States Constitution required that, in order for the certificate to be admitted in defendant's trial, the person who prepared the certificate appear and be subject to cross-examination. In sum, the district court denied the prosecution's motion in limine, ruling that a signature was required on the certificate in order for it to be effective as a basis for a DWLS charge and that admission of the certificate without the testimony of its author would violate defendant's Confrontation Clause rights. On September 2, 2010, the prosecutor applied in the circuit court for leave to appeal pursuant to MCR 7.103.

On December 3, 2010, the circuit court held a hearing on the prosecutor's application for leave to appeal. On January 3, 2011, the circuit court issued an order granting interlocutory appeal and reversing in part and affirming in part the district court's order. First, the circuit court concluded that "the issues [were] important and not otherwise susceptible of review." Next, it reversed the district court and held that a signature was not required for the certificate to be effective as a basis for a DWLS charge because the court "cannot imply a requirement for a handwritten signature in the absence of any express or specific reference to a signature in MCL 257.212" and because the "[t]he definitions of

[5] From the briefing and argument it is inferred that defendant challenges receipt of the Order of Action containing the notice of suspension.

'certify' and 'certification' are not so clear as to make it obvious from the use of 'certification' that a signature is required."[6] Finally, the circuit court affirmed the district court's ruling regarding the Confrontation Clause, specifically holding that without the testimony of its author, admission of the certificate would violate defendant's constitutional right to confront the witnesses against him.

In reaching its decision regarding the Confrontation Clause, the circuit court observed that there was no evidence in the record that the certificate of mailing was used for anything other than proof of the notice element for DWLS. The circuit court did not find persuasive the caselaw that the prosecution cited—*People v Hislope*, 13 Mich App 63; 163 NW2d 675 (1968) (holding that a certified driving record was admissible for proving facts documentary in nature), and *People v Khoshaba*, unpublished opinion per curiam of the Court of Appeals, issued April 11, 2006 (Docket No. 257484) (holding that the "face sheet" of a driving record, which contained the seal of the state of Michigan, was a business record that was not testimonial in nature)—because the certificate in the instant case was not simply a multipurpose record or a record kept by the Secretary of State's office for its own purposes. The circuit court distinguished the certificate from a certificate authenticating a document as an accurate copy of a public record. The circuit court concluded that the certificate was a document certifying that the author "took an action, namely, mailing a legal document to a particular person and place, on a particular date — facts that [were] essential elements of the criminal offense with which the defendant [was] charged."

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[6] Apparently because the circuit court ruled in its favor regarding whether a signature was required, the sole issue the prosecutor raises on appeal is with regard to the Confrontation Clause challenge.

The prosecutor now appeals by leave granted.

II

Generally, this Court reviews a circuit court's decision regarding the admission of evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). Accordingly, there is an "abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law." *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). Also, "whether the admission of evidence would violate a defendant's constitutional right of confrontation is a question of law that we review de novo." *People v Dinardo*, 290 Mich App 280, 287; 801 NW2d 73 (2010).

III

The Confrontation Clause of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." US Const, Am VI. The Michigan Constitution provides the same guarantee for criminal defendants. Const 1963, art 1, § 20; *Dinardo*, 290 Mich App at 288. Testimonial statements of witnesses absent from trial are therefore admissible only when the original declarant is unavailable and the defendant has had a prior opportunity to cross-examine that declarant. *Michigan v Bryant*, 562 US ___; 131 S Ct 1143, 1153; 179 L Ed 2d 93 (2011); *Crawford v Washington*, 541 US 36, 54, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Ordinarily, whether a statement is testimo-

nial in nature depends on whether it constitutes a " 'declaration or affirmation made for the purpose of establishing or proving some fact.' " *Crawford*, 541 US at 51 (citation omitted). This Court has explained that "[s]tatements are testimonial where the 'primary purpose' of the statements or the questioning that elicits them 'is to establish or prove past events potentially relevant to later criminal prosecution.' " *Dinardo*, 290 Mich App at 288, quoting *People v Lewis (On Remand)*, 287 Mich App 356, 360; 788 NW2d 461 (2010), quoting *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). If a statement is nontestimonial, then "the Confrontation Clause does not restrict state law from determining admissibility." *People v Garland*, 286 Mich App 1, 10; 777 NW2d 732 (2009), citing *Crawford*, 541 US at 68.

A. *CRAWFORD* AND *MELENDEZ-DIAZ*

This Confrontation Clause case is governed by the United States Supreme Court's recent decision in *Melendez-Diaz v Massachusetts*, 557 US 305; 129 S Ct 2527; 174 L Ed 2d 314 (2009). The pertinent facts of the case are as follows:

> Melendez-Diaz was charged with distributing cocaine and with trafficking in cocaine in an amount between 14 and 28 grams. At trial, the prosecution placed into evidence the bags seized from [the arrest scene]. It also submitted three "certificates of analysis" showing the results of the forensic analysis performed on the seized substances. The certificates reported the weight of the seized bags and stated that the bags "[h]a[ve] been examined with the following results: The substance was found to contain: Cocaine." The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health, as required under Massachusetts law.

> Petitioner objected to the admission of the certificates, asserting that our Confrontation Clause decision in *Crawford* v. *Washington*, 541 U. S. 36 [124 S Ct 1354; 158 L Ed 2d 177] (2004), required the analysts to testify in person. The objection was overruled, and the certificates were admitted pursuant to state law as "prima facie evidence of the composition, quality, and the net weight of the narcotic . . . analyzed." [*Melendez-Diaz*, 557 US at 308-309 (citations omitted).]

The Court described its previous ruling in *Crawford* as follows:

> In *Crawford*, after reviewing the Clause's historical underpinnings, we held that it guarantees a defendant's right to confront those "who 'bear testimony' " against him. A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.
>
> Our opinion described the class of testimonial statements covered by the Confrontation Clause as follows:
>
> "Various formulations of this core class of testimonial statements exist: *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." [*Id*. at 309-310, quoting *Crawford*, 541 US at 51-52 (citation omitted.)]

The *Melendez-Diaz* Court concluded that the "certificates of analysis" were actually affidavits, explaining:

> The documents at issue here, while denominated by Massachusetts law "certificates," are quite plainly affidavits: "declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths." They are incontrovertibly a " 'solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " The fact in question is that the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine—the precise testimony the analysts would be expected to provide if called at trial. The "certificates" are functionally identical to live, in-court testimony, doing "precisely what a witness does on direct examination." [*Melendez-Diaz*, 557 US at 310-311 (citations omitted.)]

The *Melendez-Diaz* Court summed up:

> In short, under our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were "witnesses" for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to " 'be confronted with' " the analysts at trial. [*Id*. at 311.]

Ultimately, the United States Supreme Court held that the "certificates of analysis," which showed the forensic analysis results for the seized controlled substances, constituted testimonial statements barred from admission by the Confrontation Clause. *Id*. at 308-311. The *Melendez-Diaz* Court observed that the "certificates" were made under circumstances that would lead an objective person to reasonably believe that they would be available for use at trial and that under Massachusetts law their sole purpose was to provide prima facie evidence regarding the analyzed substance. *Id*. at 311, citing *Crawford*, 541 US at 52, and Mass Gen Laws ch 111, § 13. The Court

concluded that the analysts who created the "certificates" were witnesses for purposes of the Confrontation Clause and that the defendants had the right to be "confronted" by them at trial, absent a showing that the analyst were unavailable to testify and defendant had a prior opportunity for cross-examination. *Melendez-Diaz*, 557 US at 311.

B. MCL 257.904(1) AND MCL 257.212

MCL 257.904(1) governs the elements of driving with a suspended or revoked license and is the provision defendant was charged with violating. It provides:

> A person whose operator's or chauffeur's license or registration certificate has been suspended or revoked and who has been notified as provided in [MCL 257.212] of that suspension or revocation, whose application for license has been denied, or who has never applied for a license, shall not operate a motor vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of motor vehicles, within this state. [MCL 257.904(1).]

MCL 257.212 specifically states:

> If the secretary of state is authorized or required to give notice under this act or other law regulating the operation of a vehicle, unless a different method of giving notice is otherwise expressly prescribed, notice shall be given either by personal delivery to the person to be notified or by first-class United States mail addressed to the person at the address shown by the record of the secretary of state. The giving of notice by mail is complete upon the expiration of 5 days after mailing the notice. *Proof of the giving of notice in either manner may be made by the certificate of a person 18 years of age or older, naming the person to whom notice was given and specifying the time, place, and manner of the giving of notice.* [Emphasis added.]

C. APPLICATION

The prosecution argues that in determining that the admission of the certificate of mailing would violate the Confrontation Clause, both lower courts erroneously relied on an expansive and inaccurate interpretation of *Melendez-Diaz*. The certificate of mailing states that defendant had been sent notice of his driver's license suspension. As the circuit court stated in its written opinion, "The parties agree that the proof of giving notice mandated by MCL 257.212 is a necessary element for a charge of DWLS." The parties are correct. Again, MCL 257.904(1) states: "A person whose operator's . . . license . . . has been suspended or revoked and who has been notified as provided in [MCL 257.212] of that suspension or revocation . . . shall not operate a motor vehicle . . . ." So, in order to convict defendant of DWLS, the prosecutor must prove that defendant's license had been suspended and that defendant had been notified of the suspension as provided in MCL 257.212. That defendant was notified of the suspension as provided in MCL 257.212 is precisely what the certificate of mailing that the prosecutor seeks to have admitted states. Like the lab analyst report at issue in *Melendez-Diaz*, the certificate of mailing in this case is being offered to prove a fact in question. *Melendez-Diaz*, 557 US at 310, citing *Crawford*, 541 US at 51. Indeed, the certificate of mailing here is being offered to prove an element of the offense: the notification required by the plain language of MCL 257.904(1). Furthermore, in light of the fact that notification is an element of the offense, certainly the certificate of mailing was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . . ." *Melendez-Diaz*, 557 US at 311,

quoting *Crawford*, 541 US at 52 (quotation marks omitted). The lower courts did not misinterpret *Melendez-Diaz*; to the contrary, the district court and circuit court properly applied the holding of the case.

The prosecutor also argues that the certificate of mailing at issue is analogous to a docketing statement or a clerk's certification authenticating an official record and is therefore nontestimonial and admissible. In support of his argument, the prosecutor relies on the following passage in *Melendez-Diaz*:

> The dissent identifies a single class of evidence which, though prepared for use at trial, was traditionally admissible: a clerk's certificate authenticating an official record—or a copy thereof—for use as evidence. But a clerk's authority in that regard was narrowly circumscribed. He was permitted "to certify to the correctness of a copy of a record kept in his office," but had "no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect." [*Melendez-Diaz*, 557 US at 322 (citations omitted).]

The prosecutor asserts that the situation in the present case is identical, arguing that Secretary of State records are similar to a clerk's certification. The prosecutor has missed a crucial distinction. If the document at issue were merely a copy of defendant's driving record sent along with the certificate of mailing and "F. Bueter" had merely been certifying the authenticity of that record, the prosecutor would have an excellent point. But the copy of the record is not at issue, and Bueter was not certifying its authenticity. Bueter was certifying that the notice of suspension had been sent, the very fact that must be proved to convict defendant of DWLS. The critical distinction is that the author of the certificate of mailing, here F. Bueter, is providing

more than mere authentication of documents; he is actually attesting to a required element of the charge. Unlike a docketing statement or clerk's certification, the certificate of mailing will be used against defendant to prove an element of DWLS and is necessary for establishing an essential fact at trial. MCL 257.904(1).

The prosecutor also argues that the certificate of mailing is admissible because the Secretary of State's records are not prepared "solely" for trial. MCL 257.204a(1) states:

> The secretary of state shall create and maintain a computerized central file that provides an individual historical driving record for a person with respect to all of the following:
>
> (a) A license issued to the person under chapter 3 [of the Michigan Vehicle Code, MCL 257.301 *et seq*.].
>
> (b) A conviction, civil infraction determination, or other licensing action that is entered against the person for a violation of this act or a local ordinance substantially corresponding to a provision of this act, or that is reported to the secretary of state by another jurisdiction.
>
> (c) A failure of the person, including a nonresident, to comply with a suspension issued pursuant to [MCL 257.321a].
>
> (d) A cancellation, denial, revocation, suspension, or restriction of the person's operating privilege, a failure to pay a department of state driver responsibility fee, or other licensing action regarding that person, under this act or that is reported to the secretary of state by another jurisdiction. This subdivision also applies to nonresidents.
>
> (e) An accident in which the person is involved.
>
> (f) A conviction of the person for an offense described in [MCL 257.319e].
>
> (g) Any driving record requested and received by the secretary of state under [MCL 257.307].

> (h) Any notice given by the secretary of state and the information provided in that notice under [MCL 257.317(3) or (4)].
>
> (i) Any other information received by the secretary of state regarding the person that is required to be maintained as part of the person's driving record as provided by law.

Careful review of MCL 257.204a reveals that it does not require creation of the certificates or maintenance of the certificates in the Secretary of State's records. Although MCL 257.204a(1)(h) requires the maintenance of "notices," it does not require records to be kept of the certificates verifying the fact that a notice has been sent. Our review of the record in this case shows that the certificate of mailing does not appear in defendant's certified driving record. The Secretary of State created the certificate of mailing independently of MCL 257.204a.

The prosecutor asserts that the certificate of mailing cannot be subject to Confrontation Clause requirements because it was not prepared solely for litigation. The prosecutor's argument is based on the following passage from *Melendez-Diaz*:

> Here, moreover, not only were the affidavits " 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,' " but under Massachusetts law the *sole purpose* of the affidavits was to provide "prima facie evidence of the composition, quality, and the net weight" of the analyzed substance. [*Melendez-Diaz*, 557 US at 311 (citations omitted).]

As can be seen, however, the last clause addressing the Massachusetts law was not the main point. Under the *Melendez-Diaz* test, the affidavits are subject to Confrontation Clause requirements if "made under circum-

stances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id*. (citation and quotation marks omitted). When noting that the sole purpose of the affidavits under Massachusetts law was to provide prima facie evidence of the nature and weight of the substance, the Supreme Court was not narrowing the rule or augmenting the test. Instead, when read in context, the *Melendez-Diaz* Court was just pointing out that not only do the affidavits meet that test, they meet it without equivocation. That is, the Court was referring to a specific fact about the affidavits at issue in that case; it was not incorporating the notion of "sole purpose" into the rule. In this case, the sole purpose of the preparation of the certificate of mailing was to provide proof of notice as required by MCL 257.212, which is necessary for a conviction under MCL 257.904(1). The primary purpose of the certificate "is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 US at 822; *Dinardo*, 290 Mich App at 288 (quoting *Davis*). Under these circumstances, an objective witness could reasonably believe that the statement would be available for use at a later trial. *Melendez-Diaz*, 557 US at 311.

The prosecutor also argues that "the purpose of this Secretary of State document is not to create a brand new record, as would a lab report analyzing controlled substances." This argument is made with reference to the following language from *Melendez-Diaz*: "A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant." *Melendez-Diaz*, 557 US at 322-323. The record belies this claim. F. Bueter certainly created an original

record, namely the certificate of mailing the notice of suspension, for the purpose of providing evidence of notice as required under MCL 257.904(1).

The prosecutor also argues that because the Secretary of State is required by statute to maintain the records, the records are not testimonial. The *Melendez-Diaz* Court opined:

> Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here—prepared specifically for use at petitioner's trial—were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment. [*Melendez-Diaz*, 557 US at 324.]

Furthermore, in *Melendez-Diaz*, the Supreme Court addressed the respondent's argument that the analysts' affidavits were admissible without confrontation because they are " 'akin to the types of official and business records admissible at common law.' " *Id*. at 321 (citation omitted). The Supreme Court stated that the affidavits do not qualify as such records, but "even if they did, their authors would be subject to confrontation nonetheless." *Id*. The Supreme Court continued: "Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. See Fed. Rule Evid. 803(6). But that is not the case if the regularly conducted business activity is the production of evidence for use at trial." *Id*.

So, regardless of the fact that the certificate of mailing here could be considered a public record in the sense that it is a record setting forth "matters observed pursuant to duty imposed by law as to which matters there was a duty to report," MRE 803(8), it is testimony against defendant. And the prosecutor concedes that one purpose of the certificate of mailing is "the production of evidence for use at trial," *Melendez-Diaz*, 557 US at 321, because the certificate of mailing will be used to establish that notice was provided by the Secretary of State to defendant, an element of DWLS. MCL 257.904(1). Indeed, the certificate of mailing is the only evidence of proof of notice and is created solely for that purpose. In other words, even if the certificate of mailing was prepared in the regular course of the Secretary of State's business, the certificate of mailing is testimonial because it will be used for the purpose of proving or establishing some fact at trial. Therefore, it is subject to Confrontation Clause requirements.

The prosecutor also relies on this Court's conclusion in *Lewis (On Remand)*, 287 Mich App at 363, that an autopsy report prepared pursuant to a statutorily imposed duty was not testimonial in nature. At issue in that case was whether an autopsy report prepared by two nontestifying medical examiners, but admitted through the testimony of a third medical examiner, violated defendant's right to confront witnesses against him. This Court had originally analyzed the issue under *Crawford* and two Michigan cases, but our Supreme Court directed this Court on remand to reconsider the issue in light of *Melendez-Diaz*. This Court stated:

> In our previous opinion, we thoroughly discussed this Court's applications of *Crawford* in *People v Jambor (On Remand)*, 273 Mich App 477; 729 NW2d 569 (2007), and *People v Lonsby*, 268 Mich App 375; 707 NW2d 610 (2005).

> On the basis of these decisions, we concluded that the autopsy report was nontestimonial because it "was 'not prepared in anticipation of litigation against defendant,' but pursuant to a 'duty imposed by law,' MRE 803(8)." [*People v*] *Lewis*, [unpublished opinion of the Court of Appeals, issued April 15, 2008 (Docket No. 274508)], citing *Jambor*. We also noted that a medical examiner is required by statute to investigate the cause and manner of death of an individual under certain circumstances, including death by violence, MCL 52.202(1)(a), and thus further concluded that the admission of the autopsy report through [a different medical examiner's] testimony did not violate defendant's Sixth Amendment rights under *Crawford* and *Davis*. [*Id*. at 360.]

On remand, this Court arrived at the same result, reasoning:

> The Supreme Court's determination that the forensic analysts' certificates in *Melendez-Diaz* were testimonial was based on characteristics that are not present here. Unlike the certificates, which were prepared for the "sole purpose" of providing "prima facie evidence" against the defendant at trial, *Melendez-Diaz*, 557 US at [311], the autopsy report was prepared pursuant to a duty imposed by statute. *Lewis*, unpub op at 4-5; MRE 803(8); MCL 52.202(1)(a). As we stated in our previous opinion:
>
> "[W]hile it was conceivable that the autopsy report would become part of [a] criminal prosecution, investigations by medical examiners are required by Michigan statute under certain circumstances regardless of whether criminal prosecution is contemplated." [*Lewis*, unpub op at 4.]
>
> Furthermore, unlike the way the certificates in *Melendez-Diaz* were used, [the testifying medical examiner] formed independent opinions based on objective information in the autopsy report and his opinions were subject to cross-examination. See *Lewis*, unpub op at 5; cf., *Jambor*, 273 Mich App at 488, and *Lonsby*, 268 Mich App at 392. Because the autopsy report was not prepared prima-

> rily for use in a later criminal prosecution and defendant cross-examined [the testifying medical examiner] regarding his independent opinions based on the autopsy report, the report is not testimonial evidence and defendant was not denied the right to be confronted by the two nontestifying medical examiners who prepared it. *Davis*, 547 US at 822; *Lonsby*, 268 Mich App at 392. [*Id*. at 362-363.]

Thus, under *Lewis*, the facts that the autopsy report was prepared pursuant to a statutorily imposed duty and that the report had to be prepared regardless of whether criminal prosecution was contemplated were important factors.[7] And as the prosecutor argues here, that is also true of driving records. Indeed, under MCL 257.204a, driving records must be compiled and put into the Secretary of State's centralized computer file completely independently of any contemplation of criminal prosecution.

It is important to keep in mind just what the prosecutor wants to have admitted and what the lower courts refused to admit. It was not defendant's driving record. Nor was it the notice of suspension. It was the certificate of mailing that the notice of suspension was in fact mailed to defendant. The key factor in this case is that the certificate of mailing is proof of notice by virtue of the plain language of MCL 257.212, which will indisputably be used to establish an element of the offense charged. MCL 257.904(1). In this case, unlike in *Lewis*, the certificate of mailing is the only proof of notice, and it is necessary to establish the notice element of the DWLS. MCL 257.904(1).

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[7] It is of further moment that the independent opinions provided the proof of elements of the crime and that the author of those opinions was subject to cross-examination. We also note that the continued viability of *Lewis* may be in question given the recent decision of the Supreme Court in *Bullcoming v New Mexico*, 564 US ___; 131 S Ct 2705; 180 L Ed 2d 610 (2011), as discussed later in this opinion.

The certified driving record cannot stand in for the certificate of mailing because the certified driving record says nothing about the certification. There is no entry in defendant's certified driving record regarding the June 22, 2009, certification of mailing. In fact, the certified driving record shows that notification occurred on June 11, 2009. And the June 11, 2009, notice itself provides that defendant's driving privileges and license were to be revoked from June 27, 2009, through at least June 26, 2010. The effective date within the notice coincides with the provision of MCL 257.212 that the giving of notice by mail is complete upon the expiration of five days after mailing the notice. The certificate of mailing shows that it was sent on June 22, 2009, and five days later constitutes the effective date of June 27, 2009. We cannot ascertain the effective date of the revocation from the certified copy of the driving record—the record that the Secretary of State is required to maintain pursuant to MCL 257.204a(1). It is only the permissive record—the certificate of mailing—that rounds out the salient dates required under MCL 257.212. Thus, we conclude that the certificate of mailing is "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.' " *Melendez-Diaz*, 557 US at 310-311 (citations omitted).

Finally, the prosecutor directs our attention to this Court's decisions in *Hislope* and *Khoshaba*. In *Hislope*, this Court held that the right of confrontation does not apply to the defendant's driving record compiled by the Secretary of State. This Court explained:

> In view of the fact that defendant's driving record certified by the secretary of State is essentially an abstract of documents concerning accidents in which defendant was involved, moving violations of which he was convicted, and revocations and suspensions of his operating privileges, it

> would be proving facts documentary in nature and so would be admissible for proving the fact that defendant's driver's license was revoked. [*Hislope*, 13 Mich App at 67.]

Hislope is completely irrelevant to the present case because, once again, it is not defendant's driving record that is at issue, it is the certificate of mailing that the notice of suspension was in fact mailed. That defendant was notified of the suspension in a specific manner is an essential element of the offense. The certificate of mailing attests to the personal capacity, knowledge, and actions of its author. More specifically, the certificate of mailing contains testimony of F. Bueter that he is of sufficient age and that the original order of suspension was mailed. The certificate does not certify the record of the Secretary of State, but that the Secretary of State behaved in a certain way. The certificate of mailing is not a computer-generated record, but instead is a typed certificate with the operative date handwritten by the author. Whether the order of suspension was given by personal delivery or by mail, the certificate of mailing is offered as a substitute for the testimony of the person or persons making the delivery to the defendant or mailing to the address of record for the defendant as required by MCL 257.212. The proffered certificate of mailing cannot be confronted about when, where, or how the statutory obligation to provide notice of suspension of driving privileges was accomplished.

In *Khoshaba*, unpub op at 5-6, this Court held that the "face sheet" of a driving record, which contained the seal of the state of Michigan, was a business record that was not testimonial in nature. Unlike the certificate of mailing in the instant case, the "face sheet" was created independent of a prosecutorial purpose, and it did not contain declarations or affirmations made for the purpose of proving a fact at trial. With respect to the

prosecutor's reliance on *Hislope* and *Khoshaba*, cases with which we do not quarrel, they are not germane to the issues presented in this appeal.

IV

We conclude that the certificate of mailing at issue in this case is a testimonial statement under the Confrontation Clause. We point out that contrary to the prosecution's contention that the lower courts improperly relied on and interpreted *Melendez-Diaz*, 557 US 305, another recent Supreme Court decision supports the conclusion that the certificate of mailing is testimonial, *Bullcoming v New Mexico*, 564 US ___; 131 S Ct 2705; 180 L Ed 2d 610 (2011). In *Bullcoming*, the defendant was arrested for driving while intoxicated. The prosecutor presented evidence that the defendant's blood alcohol level was well above the legal limit through a certified forensic laboratory report recording the results of a gas chromatograph machine that determined the blood alcohol level. *Id*. at ___; 131 S Ct at 2709. The prosecution did not call as a witness the analyst who actually completed and signed the certification. Instead, the prosecution called another analyst who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on the defendant's blood sample. *Id*. at ___; 131 S Ct at 2709. The Supreme Court was presented with the question "whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." *Id*. at ___; 131 S Ct at 2710.

The Supreme Court held "that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." *Id*. at ___; 131 S Ct at 2710. The Supreme Court also stated that its answer to the question presented was "in line with controlling precedent," namely, *Crawford* and *Melendez-Diaz*. *Id*. at ___; 131 S Ct at 2713. The Supreme Court again articulated the rule we must follow: "As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness." *Id*. at ___; 131 S Ct at 2713. The Supreme Court also rejected the argument that "unbending application of the Confrontation Clause . . . would impose an undue burden on the prosecution." *Id*. at ___; 131 S Ct at 2717. The Supreme Court reiterated the notion set out in *Melendez-Diaz* that the constitutional requirement at issue "may not be disregarded at our convenience." *Id*. at ___; 131 S Ct at 2718 (citation, quotations marks, and alterations omitted).

The dissent in *Bullcoming* believed that "requiring the State to call the technician who filled out a form and recorded the results of a test is a hollow formality." *Id*. at ___; 131 S Ct at 2724 (Kennedy, J., dissenting). Likewise, in the instant case, it has crossed our minds that calling F. Bueter to testify that he is of suitable age and actually mailed the order of suspension in this case is a "hollow formality" and could cause a burden on both the prosecutor and the Secretary of State. Whether a burden is experienced is yet to be seen. Obviously, a stipulation that the required

notice of suspension, a predicate element of the crime of DWLS, is uncontested may be a routine experience and the burden of presenting the author of the certificate of mailing a rare occurrence in a select few cases, such as when a defendant contests the receipt of the notice. Nevertheless, we are bound by *Crawford* and its progeny and so hold that the circuit court did not err by affirming the district court's denial of the motion in limine to admit the certificate of mailing without testimony because the certificate is a testimonial statement under the Confrontation Clause.

Affirmed.

JANSEN J., concurred with DONOFRIO, J.

SAAD, P.J. (*dissenting*).

I. INTRODUCTION

I respectfully dissent because the certificate of mailing is nontestimonial. Accordingly, I would reverse the circuit court's order.

The majority incorrectly holds that because proof of notice is an element of driving while license suspended (DWLS), the certificate of mailing produced by the Secretary of State is testimonial. This analysis is flawed because it does not address the context in which the certificate was created, and it reasons backwards to conclude that a statement must be testimonial if it relates to an element of the crime. In *Davis v Washington*, 547 US 813; 126 S Ct 2266; 165 L Ed 2d 224 (2006), the United States Supreme Court held that consideration of context is critical in determining whether evidence is testimonial. See *id*. at 822. In this case, the context in which the certificate of mailing was created demonstrates that it was made before the commission

of a crime, and thus independently from any investigatory or prosecutorial purpose. Further, it is not the rule as articulated in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), and its progeny that evidence is testimonial merely because it constitutes proof of an element of a crime. Moreover, to hold that the certificate of mailing here is testimonial runs contrary to the purpose of the Confrontation Clause—to ensure the reliability of evidence through vigorous cross-examination—because cross-examination here would elicit little or nothing of value to ensure that reliability.

II. ANALYSIS

A. TESTIMONIAL EVIDENCE UNDER *DAVIS*

I disagree with the majority's conclusion that because proof of notice is an element of DWLS, the disputed certificate of mailing is testimonial. The simple fact that a piece of evidence proves an element of a crime does not automatically render it testimonial. As our Supreme Court explained in *Davis*, it is the context surrounding the creation of evidence that determines whether that evidence is testimonial—not whether it proves an element of the crime charged.

Davis involved a domestic dispute between defendant Davis and his former girlfriend, Michelle McCottry. *Davis*, 547 US at 817. Davis violated a no-contact order and assaulted McCottry. *Id*. at 818. McCottry called 911 while the incident was still in progress and, at the prompting of the 911 operator, gave Davis's name and a description of the assault over the telephone. *Id.* at 817-818. The prosecutor used a recording of the 911 call at trial. *Id.* at 819. It was presumably an important piece of evidence in leading to Davis's conviction because the state's only witnesses in the case were the two

police officers who responded to the 911 call and McCottry did not testify at trial. *Id.* at 818-819. Davis took the position that the prosecution's use of the recorded 911 call violated his constitutional rights because the recording was testimonial and he did not cross-examine McCottry. See *id.* at 819.

The Supreme Court rejected Davis's argument and held that the 911 recording was nontestimonial. *Id.* at 822. In explaining its decision, the Court stressed the context in which the 911 call was made and contrasted its provenance with that of a truly testimonial statement:

> The question before us in *Davis*, then, is whether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements. When we said in *Crawford* that "interrogations by law enforcement officers fall squarely within [the] class" of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial. It is, in the terms of the 1828 American dictionary quoted in *Crawford*, " '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " A 911 call, on the other hand, and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to "establis[h] or prov[e]" some past fact, but to describe current circumstances requiring police assistance. [*Id.* at 826-27 (citations omitted).]

In other words, in the 911 recording, McCottry was "speaking about events *as they were actually happening*, rather than describ[ing] past events." *Id.* at 827 (citations and quotation marks omitted). Such a situa-

tion, the Court ruled, is entirely different from the police interrogation at issue in *Crawford*, which "took place hours after the events [the speaker] described had occurred." *Id.* The Court was careful to note that McCottry faced "an ongoing emergency" and that the "circumstances of [her] interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness*; she was not *testifying*." *Id.* at 828. Thus—despite its critical importance in securing Davis's conviction—the 911 call was not testimonial.

Davis, then, stands for two propositions regarding the classification of evidence as testimonial or nontestimonial. First, the context in which the evidence is created is crucial in determining whether that evidence is testimonial or nontestimonial. Second, it is inconsequential for the purposes of this determination whether the evidence in question is essential to proving that defendant committed the charged crime. Accordingly, we must examine the context of the evidence at issue here—the context in which the certificate of mailing was created—to accurately determine whether or not that certificate is testimonial or nontestimonial.

B. THE CERTIFICATE OF MAILING

As the majority observes, the certificate of mailing at issue here was created pursuant to MCL 257.212, which outlines the procedures used in mailing notices of license status to their recipients. MCL 257.212 fits in the wider statutory framework created by MCL 257.204a(1), which governs the maintenance of driving records in Michigan.[1] And, as the majority points out, a

[1] Note the primarily administrative—not criminal or prosecutorial—nature of MCL 257.204a(1). Among other things, this provision requires the Secretary of State to "create and maintain a computerized central file

notice sent in compliance with MCL 257.212 is a necessary element of DWLS under MCL 257.904(1).

The majority makes much of this link between the certificate of mailing and MCL 257.904(1), asserting that the former's presence in the latter's elements automatically makes the former testimonial. The "primary purpose of the certificate," the Court states, " 'is to establish or prove past events potentially relevant to later criminal prosecution.' " *Ante* at 289. The quoted passage is from *Davis*, but it is used out of context. The sentence the majority quotes applies only to statements made during police interrogations—not documents produced by the Secretary of State, or evidence in general. The full quotation reads:

> Without attempting to produce an exhaustive classification of all conceivable statements . . . as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: *Statements are nontestimonial when made in the course of police interrogation* under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Davis*, 547 US at 822 (emphasis added).

While the majority is certainly correct that the certificate of mailing is an essential piece of evidence in proving defendant's guilt, it does not follow that this renders the certificate testimonial. As noted, the majority's analysis also ignores the context in which the evidence is made. At the time the certificate of mailing

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that provides an individual historical driving record for a person"—a central file, hence, that includes every driver (criminal and noncriminal alike) in the state of Michigan.

was created, no crime had taken place, nor was there an ongoing criminal investigation involving the defendant. Therefore, it was impossible for F. Bueter, or an "objective witness," "reasonably to believe" that the certificate of mailing, at the time of its creation, "would be available for use at a later trial." *Crawford*, 541 US at 52 (citation and quotation marks omitted).

The Secretary of State suspended Nunley's license effective June 11, 2009. The corresponding certificate of mailing is dated June 22, 2009. Nunley was cited for DWLS on September 9, 2009. Thus, Nunley's "driving record was created *prior* to the events leading up to his criminal prosecution." *State v Shipley*, 757 NW2d 228, 237 (Iowa, 2008).[2] The certificate of mailing "would exist even if there had been no subsequent criminal prosecution." *Id.* Indeed, it predated the event that led to Nunley's citation by more than two months. It strains credulity to suggest that the certificate was "made under circumstances which would lead an objec-

[2] Courts in other states have been careful to note this temporal distinction in deciding whether evidence is testimonial. In addition to *Shipley*, see *State v Vonderharr*, 733 NW2d 847, 852 (Minn App, 2007) (contrasting certificates of laboratory analysis prepared exclusively for prosecutorial use with state-created driving records: "Unlike the laboratory report, Vonderharr's [Department of Public Safety] records were not prepared for the purpose of prosecuting Vonderharr. The records were produced before Vonderharr was charged and even before the incident that lead [sic] to him being charged occurred."); *People v Espinoza*, 195 P3d 1122, 1127 (Colo App, 2008) (holding a proof of notice of license revocation nontestimonial: "Although an objective person who prepared such a proof of service might reasonably believe it would be available in the event of a later traffic violation, we conclude that this possibility does not make the document testimonial where, as here, the document served a routine administrative function and was created before the charged crime occurred."); and *State v Dukes*, 38 Kan App 2d 958, 963; 174 P3d 914 (2008) (ruling that a driving record is nontestimonial because the state is statutorily required to create and maintain driving records regardless of whether they become relevant to a later criminal investigation).

tive witness reasonably to believe that the statement would be available for use at a later trial" because Nunley had not committed a crime and F. Bueter, when he certified the mailing, had no reason to expect that Nunley would commit a crime. See *Crawford*, 541 US at 52. Bueter, or any other state employees who create certificates of mailing, "cannot be considered witnesses" against Nunley "when no prosecution existed at the time of data entry." *Shipley*, 757 NW2d at 237. Bueter would likely have suspected that the certificate of mailing was just that: a certificate of notice, certifying a warning to encourage defendant to comply with the law, not a piece of evidence for use in a hypothetical trial.[3] As such, the certificate of mailing was "created under conditions far removed from the inquisitorial investigative function—the primary evil that *Crawford* was designed to avoid." *Id.* at 238. Therefore, on the basis of the context in which it was created, the certificate of mailing is nontestimonial.

C. COMPARISON TO OTHER CONFRONTATION CLAUSE CASES

In *Crawford*, *Davis*, *People v Lonsby*, 268 Mich App 375; 707 NW2d 610 (2005), and *Melendez-Diaz v Massachusetts*, 557 US 305; 129 S Ct 2527; 174 L Ed 2d 314 (2009), the statements, affidavits, and laboratory certificates at issue were made *after* the alleged commis-

[3] Indeed, the notice itself (which defendant admits receiving) contains a large header stating "WARNING — DO NOT DRIVE," suggesting that the purpose of the notice (and its accompanying certification) is to help the suspended license-holder comply with the law and *avoid* any ensuing consequences, not to serve as a piece of evidence should the suspended license-holder disregard the notice and break the law. The hundreds (or thousands) of such certificates of mailing the Secretary of State produces each month are certainly not all used in criminal trials—in fact, it is more probable that the vast majority of certificates are never used as evidence at all, as the recipients of the suspended-license notices comply with the law and do not drive-unlike defendant here.

sion of a crime, as part of ongoing criminal investigations of the defendants.[4] The "statements" in each case were held to be testimonial because they were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 US at 52 (citation and quotation marks omitted). In other words, at the time the evidence in question was created, the defendants in *Crawford*, *Davis*, *Lonsby*, and *Melendez-Diaz* were already identified as suspects by the criminal justice system. For that reason, that evidence—created after the commission of the crime, with an express prosecutorial purpose—was testimonial. And, accordingly, the defendants in those cases had the right to confront and cross-examine the individuals who produced the very evidence used to prove the crime.

Crawford and its progeny robustly defended the right of confrontation for good reason: the "crucible of cross-examination" is essential to assessing the reliability of evidence. *Crawford*, 541 US at 61. "The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined." *Id.* The Confrontation Clause, then, is not a mere formality that serves "symbolic goals"—instead, " '[t]he right to confront and to cross-examine witnesses is primarily a functional right that promotes

[4] See *Crawford*, 541 US at 38-40 (involving a witness's response to a police interrogation regarding a stabbing); *Davis*, 547 US at 822 (holding that statements made to law-enforcement personnel during a 911 call immediately after the commission of a crime were nontestimonial); *Lonsby*, 268 Mich App at 380-381 (concerning a lab report conducted after defendant allegedly committed sexual assault); and *Melendez-Diaz*, 557 US at 308-309 (addressing a forensic analysis of substance in the defendant's possession suspected to be cocaine).

reliability in criminal trials.' " *People v Fackelman*, 489 Mich 515, 528; 802 NW2d 552 (2011), quoting *Lee v Illinois*, 476 US 530, 540; 106 S Ct 2056; 90 L Ed 2d 514 (1986).

Melendez-Diaz explains why confrontation ensures the reliability of evidence at trial, in the context of forensic analysts responsible for testing and assessing evidence against criminal defendants. First, "neutral scientific testing" is not necessarily neutral or reliable: "Forensic evidence is not uniquely immune from the risk of manipulation." *Melendez-Diaz*, 557 US at 318. "A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution." *Id*.[5] Confrontation, through rigorous cross-examination, can help expose such fraud if it exists. Second, "[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." *Id.* at 319.[6] Like all expert witnesses, "an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination." *Id.* at 320. Third, confrontation provides the defendant a chance to question the technician's methodology. *Id.* at 320-321.[7]

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[5] See also *Lonsby*, 268 Mich App at 391 ("[T]he State Police crime lab is an arm of law enforcement and the scientists' written analyses are regularly prepared for and introduced in court.").

[6] See also *Lonsby*, 268 Mich App at 392 ("Moreover, the evidence at issue was based on [the analyst's] subjective observations and analytic standards that established a fact critical to proving the alleged offense.").

[7] See also *Lonsby*, 268 Mich App at 392 ("Because the evidence was introduced through the testimony of [the analyst's superior], who had no firsthand knowledge about [the analyst's] observations or analysis of the physical evidence, defendant was unable, through the crucible of cross-

None of these concerns is present here. The risks of inexperience or incompetence inherent in the forensic analyst's laboratory are not found at the desk of a driving-record administrator. See *State v Murphy*, 991 A2d 35, 42 (Me, 2010) ("The certificates of the Secretary of State, at issue here . . . , do not involve expert analysis or opinion."). The certificates are not made by highly trained experts, who must constantly retrain and refresh their methodologies. If "[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well," *Melendez-Diaz*, 557 US at 319, cross-examination will do no such weeding here, as there is little, if any, room for fraud or incompetence in creating certificates of mailing.

Further, there is no risk of bias in the certification and dissemination of hundreds of thousands of state administrative documents, because the state employee charged with that task reports "neutral information"—namely, the fact that a notice of suspended license was sent to a suspended-license holder. *Murphy*, 991 A2d at 42. In this case, that information was all the more neutral because the certificate of mailing was made long before the commission of a crime—and with no advance knowledge that such a crime would take place. At the time F. Bueter created the so-called "testimonial" statement, defendant was simply a record—he was not in the criminal-justice system, as he had committed no crime and thus could not be charged with one. Accordingly, Bueter, and the work product that he certified, cannot be considered a witness against Nunley. See *Shipley*, 757 NW2d at 237.

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examination, to challenge the objectivity of [the analyst] and the accuracy of her observations and methodology.").

For these reasons, the cross-examination of F. Bueter or his colleagues does not serve the fundamental purpose of the Confrontation Clause: to serve as a vehicle to advance the truth and promote reliability at criminal trials. *Fackelman*, 489 Mich at 528.

D. PRACTICAL EFFECTS OF MAJORITY OPINION

If called to testify, it is highly unlikely that an administrative employee such as F. Bueter would be able to identify a specific recipient of his mailing. Yet the majority's holding—classifying an administrative document from the Secretary of State as testimonial—will compel the prosecutor to produce such administrative employees from Lansing at every suspended-license trial in the state. Considering the volume of notices and other documents produced by the Secretary of State's office, a state employee cannot conceivably remember signing and certifying a particular notice. The Secretary of State presumably creates identical certificates for any other driver whose license is suspended for any number of reasons, which likely amounts to hundreds of thousands of certificates a year. And, as discussed, there is almost no room for bias or fraud on the employee's part—when a certificate of mailing is created, the hypothetical defendant has not yet committed any crime. If the hypothetical defendant becomes real, the state employee's testimony at trial will reveal nothing, much less offer a substantial benefit to the defendant. Calling such a witness for cross-examination would truly be a "hollow formality" and a waste of judicial resources. *Bullcoming v New Mexico*, 564 US ___; 131 S Ct 2705, 2724; 180 L Ed 2d 610 (2011) (Kennedy, J., dissenting).

III. CONCLUSION

For the foregoing reasons, I would reverse the ruling of the circuit court, hold that the Secretary of State's certificate of mailing is nontestimonial, and remand the case for further proceedings.

ELBA TOWNSHIP v GRATIOT COUNTY DRAIN COMMISSIONER

Docket No. 303211. Submitted October 11, 2011, at Lansing. Decided October 18, 2011, at 9:00 a.m. Leave to appeal granted, 491 Mich 924.

Elba Township brought an action in the Gratiot Circuit Court against the Gratiot County Drain Commissioner seeking to enjoin the drain commission from consolidating the #181-0 Drain Drainage District's established tributary drains. Elba Township argued that the consolidation had violated the Drain Code, MCL 280.1 *et seq*. because the #181-0 Drain petition for consolidation lacked the statutorily required number of freeholder signatures and the notice of the board of determination hearing had been deficient. David Osborn, Mark Crumbaugh, Cloyd Cordray, and Rita Cordray (the Osborn plaintiffs) intervened in the action, seeking declaratory relief and claiming that the notice had violated the Drain Code and their due process rights. The drain commissioner moved for summary disposition, arguing that the appropriate number of signatures had been gathered and that the notice given appropriately informed those affected by the proposed drain consolidation of the date, time, and place of the board of determination meeting. Elba Township and the Osborn plaintiffs filed a cross-motion for summary disposition. The court, Randy L. Tahvonen, J., granted the drain commissioner's motion finding that under MCL 280.191 only 5 freeholder signatures were required on the petition rather than the 50 signatures the township claimed were required under MCL 280.441. Elba Township and the intervening Osborn plaintiffs appealed.

The Court of Appeals *held*:

1. A petition seeking to consolidate two or more drainage districts must be signed by at least 50 property owners within the proposed consolidated drainage district, MCL 280.441, but a petition to clean out, relocate, widen, or straighten a drain need be signed by only 5 freeholders whose land would be subject to assessment for the improvements, MCL 280.191. Under MCL 280.194, property owners subject to a proposed assessment need file only one petition for one proceeding when maintenance, improvements, and consolidation of drainage districts are being requested. Reading the three provisions together to avoid a

construction that would render any part of the statutes surplusage or nugatory, the more onerous signature requirement of MCL 280.441 indicated the Legislature's intent that it should be harder to initiate a consolidation proceeding than one for maintenance because of the potential for consolidation to affect a much larger segment of the population than maintenance and improvements to existing drains. The 50-signature requirement of MCL 280.441 applied to the combined petition and the #181-0 Drain petition was invalid because it requested consolidation of the drainage district's established tributary drains but was signed by only five freeholders within the drainage district. The circuit court erred by concluding that the drain commissioner had authority to act on the petition.

2. Under MCL 280.441(2), the drain commissioner must give notice of the time, date, and place of the meeting scheduled to determine whether consolidation of two or more drainage districts would be conducive to public health, convenience, or welfare. The notice must not be misleading or make any untrue statement or fail to explain or omit any fact that would be important to an affected person when making his or her decision regarding the consolidation. The notice sent to the Osborn plaintiffs provided the date, time, and place of the board of determination hearing and that evidence would be taken regarding the improvements, maintenance, and consolidation proposed as well as a specific description of the area where the work would be done. The notice was misleading because all the districts of the drainage district were included within the proposed project, but only certain sections within various townships were listed in the notice as being included within the consolidation. A person living outside those sections of the townships listed would not have readily understood that his or her property would be liable for an assessment if the consolidation was allowed.

3. Under MCL 280.161, an affected party must challenge minor errors and irregularities under the Drain Code by filing for a writ of certiorari in the circuit court within 10 days after the final order of determination is issued. However, certiorari is not the exclusive remedy under the Drain Code; equity will provide a remedy when the drain commissioner acts without jurisdiction and there is no adequate remedy at law. The circuit court properly exercised equitable jurisdiction because the Osborn plaintiffs had challenged the drain commissioner's authority to act on the #181-0 Drain petition absent the signatures of 50 property owners required by MCL 280.441(1). This was not a minor error or

irregularity under the Drain Code and the type of error that the Drain Commissioner could correct.

Reversed in part and affirmed in part.

1. DRAINS — CONSOLIDATION OF DRAIN DISTRICTS — PETITIONS — SIGNATURE REQUIREMENTS.

A petition seeking to consolidate two or more drainage districts must be signed by at least 50 property owners within the proposed consolidated drainage district under MCL 280.441, but a petition to clean out, relocate, widen, or straighten a drain need be signed only by 5 freeholders whose land would be subject to assessment for the improvements under MCL 280.191; under MCL 280.194, property owners subject to a proposed assessment need file only one petition for one proceeding when maintenance, improvements, and consolidation of drainage districts are being requested, but the signatures of 50 property owners are required for combined petitions that include a request for consolidation.

2. DRAINS — CONSOLIDATION OF DRAIN DISTRICTS — BOARD OF DETERMINATION HEARING — NOTICE REQUIREMENT.

The drain commissioner must give notice of the time, date, and place of the meeting scheduled to determine whether consolidation of two or more drainage districts would be conducive to the public health, convenience, or welfare; the notice must not be misleading or make any untrue statement or fail to explain or omit any fact that would be important to an affected person when making his or her decision regarding the consolidation (MCL 280.441[2]).

3. DRAINS — DRAIN CODE — VIOLATIONS — EQUITABLE REMEDIES.

An affected party must challenge minor errors and irregularities under the Drain Code by filing for a writ of certiorari in the circuit court within 10 days after the final order of determination is issued; however, certiorari is not the exclusive remedy under the Drain Code; equity will provide a remedy when the drain commissioner acts without jurisdiction and there is no adequate remedy at law (MCL 280.161).

Smith Bovill, P.C. (by *David B. Meyer* and *Elian E. H. Fichtner*), for Elba Township, David Osborn, Mark Crumbaugh, and Cloyd and Rita Cordray.

Fahey Schultz Burzych Rhodes, PLC (by *Stacy L. Hissong*), and *Clark Hill PLC* (by *Douglas R. Kelly* and *Kristin B. Bellar*) for the Gratiot County Drain Commissioner.

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

WHITBECK, J. Plaintiff, Elba Township, and intervening plaintiffs, David Osborn, Mark Crumbaugh, Cloyd Cordray, and Rita Cordray (the Osborn plaintiffs), appeal as of right the March 8, 2011, order granting summary disposition in favor of defendant, the Gratiot County Drain Commissioner. Elba Township filed a complaint against the Drain Commissioner, seeking to enjoin the consolidation of 47 drainage districts within Gratiot County because the petition for consolidation lacked the requisite number of signatures. Elba Township, the Osborn plaintiffs, and the Drain Commissioner moved for summary disposition. The circuit court denied plaintiffs' motion and granted summary disposition in the Drain Commissioner's favor. We reverse in part and affirm in part.

I. BASIC FACTS

A. PROJECT SCOPE

This appeal involves the consolidation of 47 drain districts located in Gratiot County. On May 4, 2010, a board of determination approved a project for the consolidation and maintenance of the #181-0 Drain and all the established tributary drains of the #181-0 Drain located in Gratiot County. The drainage district boundaries for each of the established tributaries proposed to be consolidated are located wholly within the #181-0 Drain Drainage District. The consolidation and maintenance project covers more than 30,000 acres of land and more than 80 miles of drain, and spans six townships and one village. The consolidated drain system is known as the No. 181 Consolidated Drain.

B. THE PETITIONS

In March 2009, Dennis Kellog filed with the Gratiot County Drain Commission a petition that five freeholders[1] from North Star Township signed. The petition sought the consolidation, cleaning out, relocating, widening, deepening, straightening, tiling, extending, or relocating along a highway for the "181-0 Drain and all established tributary drains, located and established in the Township of Northstar, Washington & Elba, in the County of Gratiot, State of Michigan." The #181-0 Drain petition further stated that the consolidation and maintenance was needed "for the reason that flooding and erosion problems are occurring" and that the consolidation and maintenance "of the drains is necessary and conducive to the public health and welfare of the North Star, Washington & Elba Townships."

Before receiving the #181-0 Drain petition, the Drain Commissioner had received petitions for consolidation and maintenance of two other drains, both of which are established #181-0 Drain tributaries. Specifically, the Drain Commissioner received petitions for the consolidation, cleaning out, relocating, widening, deepening, straightening, tiling, extending, or relocating along a highway of the #135-0 Drain and the #156-0 Drain and all established tributary drains. Also, after receiving the #181-0 Drain petition, the Drain Commissioner received a petition for the consolidation, cleaning out, relocating, widening, deepening, straightening, tiling, extending, or relocating along a highway of the #192-0 Drain and all established tributary drains. The #192-0 Drain is also an established #181-0 Drain tributary.

[1] A freeholder is defined as, "[o]ne having title to realty; either of inheritance or for life; either legal or equitable title." Black's Law Dictionary (6th ed).

C. THE SPICER STUDY

In response to the various petitions, the Drain Commissioner retained Spicer Group, Inc., to survey, inspect, and evaluate the drainage issues. The survey and inspection revealed that the drains within the #181-0 Drain Drainage District had generally not been maintained for 30 years and had degraded to the point that the drainage systems within the #181-0 Drain Drainage District required repairs. The Spicer Group concluded that maintenance of and improvements to the #181-0 Drain without additional maintenance and improvements on the established tributary drains would not provide an adequate solution to the drainage problems that had been identified within the drainage district. Therefore, it proposed a consolidation of the established tributary drains within the #181-0 Drain Drainage District. According to Spicer Group, consolidation of the established tributary drains within the #181-0 Drain Drainage District was the most cost- effective way to address problems that had been identified within the #181-0 Drain Drainage District.

D. THE BOARD OF DETERMINATION HEARING

On the basis of the Spicer Group's recommendations, the Drain Commissioner determined that the best and most cost-effective way to address the issues raised in the petitions was to design a project within the #181-0 Drain Drainage District, which necessarily included consolidation of its tributary drains. The Drain Commissioner then appointed a board of determination to hear evidence and determine whether the actions requested in the #181-0 Drain petition were necessary and conducive to the public health, convenience, or welfare. The board of determination convened and held a hearing on May 4, 2010.

Before the May 4, 2010 hearing, all the municipalities located within the #181-0 Drain Drainage District—the townships of Elba, Fulton, Hamilton, Newark, North Star, and Washington, and the village of Ashley—were notified of the date and place of the board of determination meeting. Additionally, notice of the meeting was sent to the individual property owners and published in the *Gratiot County Herald*. The notice stated:

> *Notice Is Hereby Given* to you as a person liable for an assessment that the Board of Determination . . . will meet on Tuesday, May 4, 2010 at 10:00 A.M., o'clock in the forenoon, North Star Township Hall located at 2840 E. Buchanan Road, North Star Township, Michigan to hear all interested persons and evidence and to determine whether the drain in *Drainage District No. 181-10 Wolf & Bear known as the #181-10 Wolf & Bear Drain*, as prayed for in the Petition for consolidating, cleaning out, relocating, widening, deepening, straightening, tiling, extending or relocating along a highway, *and all established tributary drains, located and established in the Township(s) of Elba, Sections 18 & 19, North Star Sections 25, 26, 27, 28, 29, 32 and 36, Washington, Sections 1, 12, 23 and 24, County of Gratiot, State of Michigan*. Petition further shows that . . . said consolidating, clearing out, relocating, widening, deepening, straightening, tiling, extending or relocating along a highway of the drains is necessary and conducive to the public health and welfare of Elba, North Star and Washington Township(s). Dated March 23, 2009 . . . for the protection of the public health of the following: Elba, North Star and Washington Township(s).
>
> * * *
>
> *You Are Further Notified*, that persons aggrieved by the decisions of the Board of Determination may seek judicial review in the Circuit Court for the County of Gratiot within ten (10) days of the determination.[2]

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[2] Emphasis added.

During the board of determination hearing, the Spicer Group provided the board and all attendees with maps, diagrams, and plans that described the current condition of the drains and the proposed consolidation project. The board of determination approved the project by a 2-1 margin. Following the meeting, an order of necessity was prepared and filed in the Drain Commissioner's office. The order provided that the board had determined that the work set forth in the #181-0 Drain petition was necessary and conducive to the public health, convenience, and welfare. The order listed the "#181-10 drain and all established tributaries located and established in the Township(s) of Elba, Sections 18 & 19, North Star Sections 25, 26, 27, 28, 29, 32 and 36, Washington, Sections 1, 12, 23 and 24, County of Gratiot, State of Michigan."

E. THE ASSESSMENTS

In September 2010, the Drain Commissioner sent out notifications of at-large assessments to the townships of Elba, Fulton, Hamilton, Newark, North Star, and Washington, and the village of Ashley. According to the Drain Commissioner, after the notices of assessments were mailed, the Drain Commissioner determined that adding more land to the drainage district might be necessary, and, accordingly, in November 2010, the Drain Commissioner issued a notice of reconvened board of determination. Included in the notice was a list of the 47 drains consolidated at the May 4, 2010 hearing "known as the No. 181 Consolidated Drain in the Townships of Elba, Fulton, Hamilton, Newark, North Star and Washington . . . ." The notice provided that the reconvened hearing would be held on November 11, 2010, to determine the necessity of adding lands to the No. 181 Consolidated Drain. The Drain Commissioner

sent the notice of the reconvened hearing to all the municipalities and individual property owners within the drainage district.

F. THE SECOND BOARD OF DETERMINATION HEARING

At the November 11, 2010, hearing, the attendees were told that the purpose of the hearing was to add an additional 700 acres of land to the No. 181 Consolidated Drain project. The reconvened board of determination approved the addition and a revised order of necessity was issued that same day. The revised order identified the 47 drains previously consolidated at the May 4, 2010, hearing. The revised order further stated that it had been determined that "it is necessary and conductive to the public health [and] convenience or welfare to add lands to the Consolidated Drain No. 181 as specified by the Board of Determination."

G. THE FINAL ORDER OF DETERMINATION

On December 22, 2010, the Drain Commissioner issued a final order of determination. The order of determination listed and described all the drains to be consolidated into the No. 181 Consolidated Drain.

H. COURT PROCEEDINGS

On November 8, 2010 (before the reconvened board of determination hearing), Elba Township filed a complaint against the Drain Commissioner. Elba Township alleged that the Drain Commissioner's actions—consolidating the #181-0 Drain Drainage District's established tributary drains—violated the Drain Code.[3] Specifically, Elba Township alleged that the Drain Commissioner was

[3] MCL 280.1 *et seq*.

required to reject the #181-0 Drain petition because it did not have enough signatures. According to Elba Township, MCL 280.441 requires that at least 50 freeholders sign a petition for consolidation, but only five freeholders actually signed the #181-0 Drain petition. Additionally, Elba Township stated that the notice of the May 4, 2010, board of determination hearing was deficient because it failed to refer properly to the districts affected by the proposed consolidation. Elba Township requested that the circuit court enjoin the Drain Commissioner from proceeding with the proposed consolidation and requested a preliminary injunction until the court could hold a full trial on the merits.

The circuit court held a hearing on Elba Township's motion for a preliminary injunction in mid-December 2010. At the hearing, the circuit court declined to grant Elba Township's motion for a preliminary injunction concluding that as the dispute involved only legal issues, it could be resolved through a motion for summary disposition. The circuit court signed a written order denying Elba Township's motion for a preliminary injunction in early January 2011.

Thereafter, the Drain Commissioner filed a motion for summary disposition, arguing that MCL 280.441 did not apply. Rather, the Drain Commissioner argued, MCL 280.191 and MCL 280.194 applied and, when reading those sections together, only five signatures were required. With respect to notice, the Drain Commissioner argued that MCL 280.72 only requires that notice be given to the public of the date, time, and place of the board of determination meeting and that such notice was provided.

In mid-January 2011, the Osborn plaintiffs moved to intervene as of right. The Osborn plaintiffs also filed a complaint alleging that by not giving them notice that

their property was subject to the No. 181 Consolidated Drain project, the Drain Commissioner had violated the Drain Code and their due process rights. In early February 2011, the circuit court granted the Osborn plaintiffs' motion to intervene.

The Drain Commissioner then moved for summary disposition of the Osborn plaintiffs' claims. The Drain Commissioner argued that the circuit court must dismiss the Osborn plaintiffs' claims because the Drain Commissioner had complied with the Drain Code. Additionally, the Drain Commissioner argued that the May 4, 2010, notice of the No. 181 Consolidated Drain project did not violate the Drain Code or the Osborn plaintiffs' due process rights.

Elba Township and the Osborn plaintiffs opposed the Drain Commissioner's motions for summary disposition and filed a cross-motion for summary disposition in their favor. The circuit court held a hearing on the motions for summary disposition in early March 2011. After hearing the parties' arguments, the circuit court granted the Drain Commissioner's motions for summary disposition. Elba Township and the Osborn plaintiffs now appeal.

II. THE DRAIN PETITIONS

A. STANDARD OF REVIEW

We review de novo a trial court's decision to grant or deny a motion for summary disposition.[4] We also review de novo as a question of law the interpretation of a statute.[5]

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[4] *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

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

" 'Proceedings under the [D]rain [C]ode, other than condemnation proceedings, are administrative proceedings.' "[6] The circuit court reviews " '[a]n administrative agency decision . . . to determine whether the decision was authorized by law and supported by competent, material, and substantial evidence on the whole record.' "[7] Additionally, the Michigan Supreme Court has explained that it is "not inclined to reverse proceedings taken under the general drain law absent showing of very substantial faults."[8]

B. OVERVIEW

The circuit court erred when it determined only five signatures were required for the #181-0 Drain petition. As we noted above, that petition provided: "Petitioners hereby petition for consolidation, cleaning out, relocating, widening, deepening, straightening, tiling, extending or relocating along a highway of the following drains: #181-0 Drain and all established tributary drains, located and established in the Township of North Star, Washington & Elba, in the County of Gratiot, State of Michigan." The circuit court concluded that the petition was governed under MCL 280.191 and MCL 280.194 and that MCL 280.441 was inapplicable. This conclusion was erroneous.

C. STATUTORY PROVISIONS

1. MCL 280.191

Contained within chapter 8 of the Drain Code is MCL

[6] *Barak v Oakland Co Drain Comm'r*, 246 Mich App 591, 597; 633 NW2d 489 (2001) (citation omitted).

[7] *Id.*, quoting *Mich Ed Ass'n Political Action Comm*, 241 Mich App 432, 443-444; 616 NW2d 234 (2000), citing Const 1963, art 6, § 28 and *Ansell v Dep't of Commerce* (*On Remand*), 222 Mich App 347, 354; 564 NW2d 519 (1997).

[8] *In re Fitch Drain No 129*, 346 Mich 639, 647; 78 NW2d 600 (1956).

280.191, which addresses maintenance and improvement of county drains. It provides in relevant part:

> When a drain or portion thereof, which traverses lands wholly in 1 county, and lands only in 1 county which is subject to assessment, needs cleaning out, relocating, widening, deepening, straightening, tiling, extending, or relocating along a highway, . . . any 5 or at least 50% of the freeholders if there are less than 5 freeholders whose lands shall be liable to an assessment for benefits of such work, may make petition in writing to the commissioner setting forth the necessity of the proposed work . . . .[9]

Notably absent from MCL 280.191 is the word "consolidation."

2. MCL 280.441

Chapter 19 of the Drain Code addresses consolidation of drainage districts under MCL 280.441, which provides in relevant part:

> Two or more drainage districts located in the same county and in the same drainage basin or in adjoining basins, may consolidate and organize as a single drainage district upon the filing of a petition for consolidation with the drain commissioner of the county setting forth the reason for the proposed consolidation. The consolidation may include land not within an existing drainage district if requested in the petition. The petition shall be signed by at least 50 property owners within the proposed consolidated drainage district.[10]

3. MCL 280.194

MCL 280.194, however, is the section of the Drain Code that has caused the confusion in this case. Section

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[9] MCL 280.191.

[10] MCL 280.441(1).

194 deals with the petitions and proceedings for maintenance, improvements, and consolidation and provides:

> In any petition filed under this chapter it shall not be necessary for the petitioners to describe said drain other than by its name or to describe its commencement, general route and terminus. For any work necessary to be done in cleaning out, widening, deepening, straightening, *consolidating*, extending, relocating, tiling or relocating along a highway, . . . and for any and all such proceedings, only 1 petition and proceeding shall be necessary.[11]

D. INTERPRETING THE PROVISIONS OF THE DRAIN CODE

The Drain Commissioner argues that MCL 280.194 allows the use of only one petition when petitioning for maintenance, improvements, and consolidations of existing drains. Therefore, he contends, the petition requirements of MCL 280.191 apply to the #181-0 Drain and only five signatures were needed. This argument, however, ignores the basic principles of statutory interpretation. When construing a statute, courts must read the provisions in the context of the entire statute, and the courts should avoid any construction that would render any part of a statute surplusage or nugatory.[12]

MCL 280.194 does not act to negate the signature requirements of MCL 280.441. Instead, MCL 280.194 recognizes that improvement and maintenance of drains is often ancillary to consolidation projects. Therefore, MCL 280.194 authorizes the use of one petition and one proceeding when maintenance, improvements, and consolidation are being requested. Otherwise, at least two petitions and two board of determination proceedings would be required.

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[11] MCL 280.194 (emphasis added).

[12] *Robinson v City of Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010).

However, the use of a single petition does not change the end result, which is both consolidation and improvements. And if two separate petitions had in fact been made—one for improvements and one for consolidation—no one would have questioned the need for 50 signatures on the petition for consolidation. Therefore, the requirements of MCL 280.191 and MCL 280.441 *each* apply. Otherwise, the signature requirements of MCL 280.441 would have no effect whenever a person petitions for both maintenance and consolidation of a drain. Given that MCL 280.441 contains a significantly more onerous signature requirement, thus indicating the Legislature's intention that it should be harder to initiate a consolidation proceeding than a proceeding for maintenance, such a result is incongruous. Had the Legislature intended this result under MCL 280.441, it could have easily referred to the signature requirements in MCL 280.191. Manifestly, however, it did not.

Further, the Drain Commissioner's argument would essentially read the word "consolidation" into MCL 280.191. However, we must presume that the omission of the word "consolidation" in MCL 280.191, and its inclusion in MCL 280.441, was intentional.[13] It was also logical to omit the word "consolidation" in MCL 280.191 because consolidation of drainage districts has the potential to affect a much larger segment of the population than maintenance and improvements to existing drains.

In determining that MCL 280.191 applied, the circuit court relied, in part, on its mistaken conclusion that MCL 280.191 and MCL 280.441 cannot be applied together consistently. The circuit court stated in relevant part:

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[13] See *People v Monaco*, 474 Mich 48, 58; 710 NW2d 46 (2006).

> What kind of proceeding is necessary under section 194, is it a section 191 proceeding or is it a section 441 proceeding? The answer to that question has got to be, it's a section 191 proceeding.
>
> And what's the important difference? Two of them. First, how many signatures do we have to have on the petition—191 says five signatures, 441 says 50 signatures to consolidate. But just as importantly, who sits on the board of determination depends upon whether you're working under section 191 to improve a drain, or under section 441 to consolidate drains. Because if we're working to improve a drain under section 191, then the people who sit on the board have to be subject to an assessment for the improvements. We have to have five people who are going to have to share in paying the bill, petition to improve a drain. But under section 441, the people on the board of determination of necessity of consolidating drains can't live in the consolidated districts, they have to live in the county, but not in the districts, therefore, they have no direct interest in the outcome of the request to consolidate and to create a consolidated district.
>
> You can't have one proceeding under section 194 involving consolidation and improvements, unless you make a decision as to whether or not that proceeding is governed by section 191 with five signators in the district, or section 441 with 50 signators, and a board comprised of individuals outside the district. And 194, it seems to me, resolves that question in a way that, to me at least, is clear. There's only one petition needed, that petition has to be in accordance with the requirements of 191. And there's only one proceeding required, and that proceeding is governed by the requirements of section 191.

Thus, the circuit court's decision was based, in part, on its understanding that the board of determination's composition would be different under MCL 280.191 and 280.441. The circuit court, however, misstated the law. MCL 280.441(1) provides in part that "[a]s soon as practicable after the filing of a petition, the drain

commissioner . . . may appoint a board of determination composed of 3 disinterested property owners to determine the necessity of the consolidation." MCL 280.441(1) further provides that "[m]embers of a board of determination shall be residents of the county but not of the proposed consolidated drainage district or of a drainage district a part of which is to be included in the proposed consolidation."

MCL 280.191 does not specifically refer to the composition of the board of determination. However, it does cross-reference MCL 280.72, which provides in relevant part: "As soon as practicable after the filing of a petition, the commissioner authorized to act on the petition . . . may appoint a board of determination composed of 3 disinterested property owners." MCL 280.72(1) goes on to state that "[m]embers of boards of determination shall be residents of the county but not of a township, city, or village affected by the drain, and may not be members of the county board of commissioners of the county."

Therefore, the circuit court erred when it determined that the composition of the board members was different under each section. Rather, the two sections are entirely consistent. In fact, MCL 280.441 and MCL 280.72 are consistent in almost every aspect. The only inconsistency in applying MCL 280.441 and MCL 280.191 is the signature requirement.

The Drain Commissioner contends that this Court's decision in *Kramer v Dearborn Hts* supports his position.[14] *Kramer*, however, dealt with chapters 19 and 20 of the Drain Code, not chapter 8. In *Kramer*, the plaintiffs challenged the consolidation of several drainage districts, arguing that consolidation

[14] *Kramer v Dearborn Hts*, 197 Mich App 723; 496 NW2d 301 (1992).

should have been sought under chapter 19 of the Drain Code not chapter 20.[15] This Court found no merit in the plaintiffs' claim because chapter 20 provided a basis for the consolidation. This Court recognized that MCL 280.486 provides that a petition for consolidation is sufficient if only the city signed it.[16] Further, MCL 280.484 specifically provides that "[i]n operating under the terms of [chapter 20], the several boards and officials shall not be limited by the provisions contained in other chapters of this act. . . ." Chapter 8, however, contains no provisions allowing the Drain Commissioner to disregard the signature requirements contained in MCL 280.441. Therefore, *Kramer* is simply inapplicable to this case.

The Drain Commissioner's reliance on a Michigan Attorney General opinion[17] to support his argument is also unpersuasive. In his opinion, the Attorney General addressed whether it was "legally permissible under the present drain law to consolidate into one petition a petition for consolidation of drains and also a petition for the cleaning out, relocating, widening, etc. of said drains."[18] The Attorney General concluded "that the procedure for consolidation and improvement work on the drain are the same in relation to both county and inter-county drains."[19] The Attorney General stated that "[i]t seems to follow that a petition to consolidate and to clean out, widen, deepen, straighten or extend may be combined . . . ."[20]

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[15] *Id.* at 727.

[16] *Id.*

[17] 1 OAG, 1955, No 2314, p 600 (November 3, 1955).

[18] *Id.*

[19] *Id.* at 601.

[20] *Id.*

Relying on this opinion, the Drain Commissioner asserts that a single petition may implement all the actions contemplated in MCL 280.194, including consolidation. The Attorney General opinion, however, interpreted a prior version of the Drain Code. In 1955, at the time of the opinion, MCL 265.16 as amended by 1955 PA 44, provided that

> [a]ny 2 or more drainage districts . . . may be consolidated and organized as a single drainage district upon the filing of a petition therefor, which petition and proceedings . . . shall be subject to the same provisions relating to petitions contained in [MCL 267.1] . . . .

Former MCL 267.1 (now MCL 280.191) provided that only five freeholders were required to sign a petition for maintenance and improvements. Therefore, at the time of the Attorney General opinion, the signature requirements were the same for maintenance, improvements, *and* consolidation. That is no longer the case. Since the Attorney General opinion was written in 1955, former MCL 265.16 has been amended six times into its current version, MCL 280.441, which now requires 50 signatures. Therefore, the Attorney General Opinion does not apply to this case.

In sum, the Drain Code requires 50 signatures for the #181-0 Drain petition. MCL 280.194 allows the use of a single petition and proceeding "[f]or any work necessary to be done in cleaning out, widening, deepening, straightening, consolidating, extending, relocating, tiling or relocating along a highway . . . ." However, the 50-signature requirement of MCL 280.441 still applies to a combined petition. Therefore, the #181-0 Drain petition was invalid, and the Drain Commissioner was without authority to act upon it.[21]

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[21] See *Grand Rapids & I R Co v Round*, 220 Mich 475, 478-479; 190 NW 248 (1922).

III. NOTICE

A. STANDARD OF REVIEW

We review de novo a trial court's decision to grant or deny a motion for summary disposition.[22] We also review de novo as a question of law the determination whether a party has been afforded due process.[23]

B. LEGAL REQUIREMENTS

Generally, due process requires notice of the nature of the proceedings and an opportunity to be heard in a meaningful time and manner.[24] Notice must be reasonably calculated to apprise interested parties of the pendency of the action and must afford them an opportunity to present objections.[25] "The kind of notice required depends on the circumstances of the case . . . ."[26]

C. DEFECTIVE NOTICE

The Osborn plaintiffs do not argue that they did not receive notice. Rather, they argue that the notice they received was defective. We have found no caselaw directly on point, but *Alan v Wayne Co* has some persuasive value.[27] *Alan* dealt with the validity of stadium bonds issued by Wayne County to finance a new

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[22] *Latham*, 480 Mich at 111.

[23] *Reed v Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005).

[24] *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 606; 683 NW2d 759 (2004).

[25] *Dusenbery v United States*, 534 US 161, 168, 170; 122 S Ct 694; 151 L Ed 2d 597 (2002); *In re Petition by Wayne Co Treasurer*, 478 Mich 1, 9; 732 NW2d 458 (2007).

[26] *Alan v Wayne Co*, 388 Mich 210, 351; 200 NW2d 628 (1972).

[27] *Id*.

stadium, which would eventually cost the county $371 million.[28] Among the many arguments heard by the Michigan Supreme Court was the issue of notice and whether the notice of intent to issue the bonds complied with due process.[29]

The Supreme Court determined that the notice was "defective in substance because it fail[ed] to inform the reader of its purpose and because it [was] misleading."[30] The Court stated that "[t]he purpose of the notice is to create and determine a method of objecting to a bond issue by petitioning for a vote."[31] The Court further explained:

> To comport with due process any notice respecting petition rights on bonds supported by any pledge of tax power must state to whom the notice is issued and for what purpose: (a) it must tell, in this case, the electors and taxpayers of Wayne County that it is issued for their benefit; (b) it must contain enough information so that it can be told from its face in plain and understandable language that the notice concerns some particular right or obligation respecting the subject matter of the notice; (c) the notice must explain the nature of the right (or obligation) and what is required to exercise it and the consequence of not exercising it; (d) regarding the subject matter of the notice there must be enough information so that a meaningfully informed decision respecting the right can reasonably be made from information supplied in plain language on the face of the notice.[32]

After review of the notice, the Court noted that the notice of intent failed to tell the taxpayer (1) what a revenue bond was, (2) how much the stadium would

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[28] *Id.* at 233.

[29] *Id.* at 344.

[30] *Id.* at 351.

[31] *Id.*

[32] *Id.* at 352.

cost, (3) how the bonds would be paid, especially if the stadium stood empty, and (4) why the notice was given.[33] The Court in *Alan* concluded that the notice was defective because the method used was not reasonable under the circumstances.[34] The notice was also defective because it failed to inform the reader of the bond's purpose in order to allow the taxpayers a method of objecting to a bond issue by petitioning for a vote. The Court further determined that it was misleading because it failed to inform taxpayers that the bonds could result in higher taxes.[35] Therefore, the Court concluded, the bonds were invalid because there was no valid notice.[36]

Although *Alan* does not deal with drain assessments, we can apply its general principles to this case. The notice here was not as vague or defective as that in *Alan*. The notice here provided the date, time, and place of the board of determination hearing as MCL 280.72(2) and MCL 280.441(2) require. It also explained that the purpose of the board of determination hearing was to hear all interested parties and take evidence regarding improvements, maintenance, and consolidation of the "#181-10 Wolf & Bear Drain." The notice further provided that persons feeling aggrieved by the decision could seek judicial review within 10 days of the determination.

However, the notice was misleading. In *Alan*, the Supreme Court stated that "there must be enough information so that a meaningfully informed decision respecting the right can reasonably be made from information supplied in plain language on the face of

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[33] *Id.* at 341-342.

[34] *Id*. at 350-351.

[35] *Id*. at 352.

[36] *Id.* at 354.

the notice."[37] "As phrased it must not make any misleading or untrue statement; or fail to explain, or omit any fact which would be important to the taxpayer or elector in deciding to exercise his right. In short, the notice may not be misleading under all the circumstances."[38] While, the notice provided only a very general description of the activities sought to be conducted, it provided a specific description of the area where the work would be done. The notice stated that the hearing would be to determine the necessity of

> consolidating, cleaning out, relocating, widening, deepening, straightening, tiling, extending or relocating along a highway, and all established tributary drains, *located and established in the Township(s) of Elba, Sections 18 & 19, North Star Sections 25, 26, 27, 28, 29, 32 and 36, Washington, Sections 1, 12, 23 and 24 . . . .*"[39]

This description was inaccurate because the project actually involved all the districts contained within the "#181-10 Wolf & Bear Drain" Drainage District. A person not living within the specific sections of the townships mentioned in the notice would not readily understand that the project would affect his or her property as well. Therefore, that person would be unable to make a meaningful and informed decision regarding his or her rights. Thus, we conclude, the notice was misleading.

The Drain Commissioner, however, argues that the intervening plaintiffs had a duty to inquire whether their land would be affected. Specifically, the Drain Commissioner argues that "[r]ecipients of notice have an affirmative duty to inquire when the notice is 'worded in a manner which would not mislead a tax-

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[37] *Id.* at 352.

[38] *Id.* at 353.

[39] Emphasis added.

payer or voter in deciding how to respond to the notice given.' " But the Drain Commissioner has failed to provide any authority to support his argument that the Osborn plaintiffs had an affirmative duty to inquire whether their land was affected. Although the Drain Commissioner quotes *Trussell v Decker*,[40] the quotation is taken out of context.

In *Trussell*,[41] this Court held that a notice was misleading. The notice stated that all objections and comments to a proposed water project would be heard at a public hearing. However, the notice failed to inform the plaintiff that her objections had to be presented in writing at or before the hearing in order to preserve her rights. In holding that the notice was misleading, this Court cited *Alan*, noting that "the *Alan* Court stressed that a notice must be worded in a manner which would not mislead a taxpayer or voter in deciding how to respond to the notice given[.]"[42] Nowhere in the opinion, however, did this Court state that a taxpayer has an affirmative duty to inquire. Further, the Drain Commissioner's argument is a contradiction in and of itself. If a notice is "worded in a manner which would not mislead a taxpayer," there would be no reason for the taxpayer to inquire whether he or she was affected.

The Drain Commissioner's reliance on *Muskegon Twp v Muskegon Co Drain Comm'r*[43] is similarly unpersuasive. The Drain Commissioner cites *Muskegon Twp* for the proposition that the Osborn plaintiffs had a duty to inquire into the details of the #181-0 Drain project if they did not believe the notice was clear. But *Muskegon*

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[40] *Trussell v Decker*, 147 Mich App 312, 323; 382 NW2d 778 (1985).

[41] *Id.* at 324-325.

[42] *Id.* at 323.

[43] *Muskegon Twp v Muskegon Co Drain Comm'r*, 76 Mich App 714; 257 NW2d 224 (1977).

Twp did not discuss or address the issue of a notice of a determination of necessity. Nor did it address the issue of whether a notice was misleading. Instead, the issue in *Muskegon Twp* was whether the Drain Code was "unconstitutional in that it fails to require that notice be given upon the filing of the board of review's report."[44] The appellants had notice of the board of review meeting, and "[n]o claim [was] made that they were denied an opportunity to participate."[45] Rather, they complained that they "did not officially receive a notice of when the [board of review] report was filed."[46] This Court stated that "[a]lthough it would be better for the statute to provide a specific time limit for the filing of the report so that one would know exactly when to check for the report, we do not find that the burden of checking with the drain commissioner is fatal."[47]

We do note that this case is somewhat analogous to *Thayer Lumber Co v City of Muskegon*.[48] In *Thayer Lumber Co*, the city of Muskegon adopted a resolution creating and constructing a sewer district, which was to be funded through a special assessment.[49] Notice of the improvement was published in the newspaper. However, the notice failed to describe the boundaries of the sewer district or the land that would be affected.[50] The Supreme Court held that the notice was invalid and stated:

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[44] *Id.* at 719.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 720.

[48] *Thayer Lumber Co v City of Muskegon*, 152 Mich 59; 115 NW 957 (1908).

[49] *Id.* at 61-62.

[50] *Id.* at 62.

> Where notice is required to be given, it is imperative that such notice, when brought to the attention of any person interested, shall apprise him at least of the approximate location of the proposed improvement and of the property to be assessed therefor. This notice contained no such information. From reading it no person could ascertain in what part of the city the proposed sewers were to be built, and much less whether or not his property was liable to be assessed therefor.[51]

This case presents the inverse of *Thayer Lumber Co*. The Drain Commissioner sent notice to the individual property owners. And the notice apprised the individual property owners of the location of the proposed drain project. However, the location of the project was erroneous. From reading the notice, no person living outside the sections specifically mentioned could have ascertained whether his or her property was liable to be assessed. Therefore, we conclude, the notice was misleading.

IV. EQUITABLE JURISDICTION

A. STANDARD OF REVIEW

The Drain Commissioner raised the issue of jurisdiction below, and the circuit court determined that it had equitable jurisdiction to hear the claim. "Lack of jurisdiction of the subject matter may be raised at any time and the parties to an action cannot confer jurisdiction by their conduct or action nor can they waive the defense by not raising it."[52] We review de novo the determination of whether a circuit court possesses subject-matter jurisdiction.[53] To the extent this issue

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[51] *Id.* at 66-67.

[52] *Paulson v Secretary of State*, 154 Mich App 626, 630-631; 398 NW2d 477 (1986).

[53] *People v Glass*, 288 Mich App 399, 400; 794 NW2d 49 (2010).

involves interpretation of the Drain Code, we also review de novo legal issues concerning statutory interpretation.[54]

B. MCL 280.161

The Drain Commissioner argues that this suit was barred because of Elba Township's and the Osborn plaintiffs' failure to comply with the Drain Code's review procedures. The Drain Code provides several limited avenues for judicial review, and the Drain Commissioner cites three provisions of the Drain Code that provide review procedures and limitations periods for drain challenges: MCL 280.72, MCL 280.72a, and MCL 280.161. MCL 280.72 and MCL 280.72a do not apply because both sections deal with challenges to the order of determination. Elba Township and the Osborn plaintiffs, however, are not challenging the finding of necessity or the order of determination. Rather, they are challenging the validity of the proceedings themselves. Therefore, MCL 280.161 is applicable to this case and provides as follows:

> The proceedings in establishing any drain and levying taxes therefor shall be subject to review on certiorari as herein provided. A writ of certiorari for any error occurring before or in the final order of determination shall be issued within 10 days after a copy of such final order is filed in the office of the drain commissioner . . . . If no certiorari be brought within the time herein prescribed, the drain shall be deemed to have been legally established, and the taxes therefor legally levied, and the legality of said drain and the taxes therefor shall not thereafter be questioned in any suit at law or equity . . . . And if any error be found in the proceedings, the court shall direct the commissioner to correct such error or errors and then proceed the same as though no error had been made.

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[54] *Id.*

C. INTERPRETING THE STATUTE

Relying on MCL 280.161, the Drain Commissioner argues that the circuit court lacked jurisdiction to hear Elba Township's and the Osborn plaintiffs' claims. We find the Drain Commissioner's argument unpersuasive. Early Supreme Court precedent recognized that certiorari is not the exclusive remedy under the Drain Code. In *Pere Marquette R Co v Auditor General*,[55] the Supreme Court stated:

> We are unable to accept the proposition that certiorari is an exclusive remedy under the drain law, for this court has held under certain circumstances that equity proceedings to restrain the enforcement of a drain assessment may run collaterally in aid of certiorari to review a drain commissioner's action (*Drain Commissioner* v. *Baxter*, 57 Mich [127, 129; 23 NW 711 (1885)]), and that in a proper case equity has jurisdiction to restrain the return of lands as delinquent for drain taxes where the proceedings are illegal and void.[56]

Later, in *Clinton v Spencer*,[57] the Supreme Court held that when irregularities rendered drain proceedings void from their inception, so that they could not be corrected on certiorari, the plaintiffs would not be limited to certiorari.

Shortly thereafter, the Supreme Court decided *Fuller v Cockerill*.[58] In *Fuller*, the plaintiffs had filed a suit in equity to enjoin the Muskegon County Superintendent of Drains from proceeding with the construction of a sewer drain entirely within the village of Whitehall.[59]

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[55] *Pere Marquette R Co v Auditor General*, 226 Mich 491, 494; 198 NW 199 (1924).

[56] *Id*.

[57] *Clinton v Spencer*, 250 Mich 135, 155-156; 229 NW 609 (1930).

[58] *Fuller v Cockerill*, 257 Mich 35; 239 NW 293 (1932).

[59] *Id.* at 35-36.

The superintendent argued that the plaintiffs' remedy was in certiorari and that a court of equity lacked jurisdiction.[60] The Supreme Court rejected this argument[61] and determined that defendants were without authority to construct the sewer drain because the drain was to be located completely within the village limits.[62] Therefore, the superintendent was "wholly without jurisdiction or authority to act, the proceeding [was] void, and equity [had] power to restrain."[63] The Court stated that if the superintendent was "wholly without authority to lay this drain, the ultimate result of assessment of benefits and the collection from plaintiffs of the drain tax would be to deprive them of their property without due process of any sort."[64]

In *Lake Twp v Millar*,[65] the Supreme Court reaffirmed its prior holdings that certiorari is not the exclusive remedy under the Drain Code. The Court explained that

> a drain commissioner may not, by mere assumption of authority, legally do that which he has no authority to do. If, upon a petition to do what he has a right to do, he may do what he has no right to do, the extent of his authority is measured by his own acts and conduct and not by law. The extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority. The rule is that errors and irregularities in drain proceedings must be taken advantage of by certiorari, but an entire want of jurisdiction may be taken advantage of at any time. The drain commissioner had no jurisdiction to

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[60] *Id.*

[61] *Id.* at 38-39.

[62] *Id.* at 37-38.

[63] *Id.* at 39.

[64] *Id.*

[65] *Lake Twp v Millar*, 257 Mich 135, 141-142; 241 NW 237 (1932).

> construct a sewer any more than to construct a Covert road. No one will contend that if the drain commissioner, when the petition for a drain was filed with him, had laid out an assessment district, established and constructed a Covert road, the plaintiffs would have been without remedy. The same legal question is here presented. The proceedings are void for want of jurisdiction. The decree of the trial court is reversed, and decree will be entered for plaintiffs.[66]

Twenty years later, the Supreme Court in *Patrick v Shiawassee Co Drain Comm'r*[67] again reaffirmed this precedent. The Court addressed the issue of whether the drain commissioner was allowed to enlarge a drain "beyond the determination of the board of determination[.]"[68] The Court stated:

> In the case at bar [the drain commissioner's] authority was limited to cleaning out the drain to its original depth as authorized by the board of determination. He had no legal right to deepen or widen the drain or use plaintiffs' lands without condemnation of the same. Under the circumstances of this case it clearly appears that certiorari was not an adequate remedy. It follows that plaintiffs had a right to resort to chancery to restrain defendant from enlarging the drain or taking plaintiffs' lands without condemnation thereof.[69]

Thus, certiorari is not the exclusive remedy under the Drain Code. Although minor errors and irregularities must be challenged by means of certiorari, equity will still provide a remedy when the drain commissioner acts without jurisdiction and there is no adequate remedy at law. A plain reading of MCL 280.161 supports

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[66] *Id.* at 141-142.

[67] *Patrick v Shiawassee Co Drain Comm'r*, 342 Mich 257; 69 NW2d 727 (1955).

[68] *Id.* at 263.

[69] *Id.* at 264.

such a conclusion. Section 161 provides in relevant part: "And if any error be found in the proceedings, *the court shall direct the commissioner to correct such error* or errors and then proceed the same as though no error had been made."[70] When an error is so substantial that a drain commissioner cannot correct it, certiorari is an inadequate remedy. Therefore, equity must provide relief.

We note that, although these cases dealt with prior versions of the Drain Code, the procedures and limitations periods for certiorari were the same as they are now.[71] Further, this Court reaffirmed these principles in *Emerick v Saginaw Twp* and *Blakely Drain Improvements Drainage Dist v City of Woodhaven*.[72] In *Emerick*, this Court interpreted a different provision of the Drain Code, MCL 280.483, which provides as follows:

> Neither the final order of determination nor the final order of apportionment shall be subject to attack in any court, except by proceedings in certiorari brought within 20 days after the filing of such order in the office of the chairman of the board issuing the same. If no such proceeding shall be brought within the time above prescribed, the drain shall be deemed to have been legally established and the legality of the drain and the assessments therefor shall not thereafter be questioned in any suit at law or in equity, either on jurisdictional or nonjurisdictional grounds.

This Court noted that "mere irregularities in the proceedings were to be settled under the statute."[73] However, it stated that there are two exceptions to the Drain

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[70] MCL 280.161 (emphasis added).

[71] See 1923 PA 316; 1929 CL 4902; 1931 PA 318, and 1948 CL 266.11.

[72] *Emerick v Saginaw Twp*, 104 Mich App 243, 247; 304 NW2d 536 (1981), and *Blakely Drain Improvements Drainage Dist v City of Woodhaven*, 112 Mich App 675; 317 NW2d 220 (1982).

[73] *Emerick*, 104 Mich App at 247, citing *Patrick*, 342 Mich 257, and *Kinner v Spencer*, 257 Mich 142; 241 NW 240 (1932).

Code's plain language: fraud and lack of jurisdiction. If either fraud or an entire lack of jurisdiction are properly pleaded, then equity will allow a plaintiff to bring suit.[74]

In *Woodhaven*, this Court again recognized that certiorari is not the exclusive remedy under the Drain Code. This Court relied on *Emerick* and stated: " 'An exception to the plain language of the Drain Code has grown up in Michigan under prior statutory language for cases where fraud is alleged and properly pled. An entire lack of jurisdiction could be challenged in a similar fashion.' "[75]

From this precedent, we conclude that the circuit court properly exercised equitable jurisdiction. Although the Drain Commissioner argues that Elba Township and the Osborn plaintiffs complained of mere technical defects in the proceedings, this argument is unpersuasive. Elba Township and the Osborn plaintiffs are not alleging mere technicalities. Rather, they are challenging the Drain Commissioner's authority to act on the #181-0 Drain petition. As discussed, a petition for consolidation requires 50 signatures.[76] The #181-0 Drain petition only contained five signatures. This is not the type of error that the Drain Commissioner can correct. Without the requisite number of signatures attached to the #181-0 Drain petition, the Drain Commissioner had no authority or jurisdiction to act, and the proceedings establishing the No. 181 Consolidated Drainage District were void.[77] Certiorari was not the only remedy under the

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[74] *Emerick*, 104 Mich App at 247.

[75] *Woodhaven*, 112 Mich App at 684, quoting *Emerick*, 104 Mich App at 247.

[76] MCL 280.441(1).

[77] See *Grand Rapids & I R Co*, 220 Mich at 479 (holding that an application for the cleaning out of a drain was insufficient on its face to confer jurisdiction on the drain commissioner because it failed to show that the signers were freeholders liable for the assessment for benefits).

Drain Code, and the circuit court properly exercised equitable jurisdiction.

We reverse in part and affirm in part. No costs, a public question being involved and no party having prevailed in full.

M. J. KELLY, P.J., and FITZGERALD, J., concurred with WHITBECK, J.

SNEAD v JOHN CARLO, INC

SNEAD v DEPARTMENT OF TRANSPORTATION

Docket No. 298575. Submitted September 14, 2011, at Detroit. Decided October 18, 2011, at 9:10 a.m.

Tracy Snead brought an action in the Macomb Circuit Court against John Carlo, Inc., seeking damages for personal injuries and property damage sustained when she drove her vehicle into a large construction hole located in the roadbed of a highway exit lane. She claimed that Carlo negligently maintained the construction site. Snead amended her complaint to add a claim for personal protection insurance benefits against State Farm Insurance Company, the insurer of her vehicle. Snead also initiated a separate suit in the Court of Claims against the Michigan Department of Transportation (MDOT), alleging, in part, negligence for having barricaded the construction hole in a defective, unsafe, and confusing manner. A stipulated order for joinder was entered pursuant to which the Court of Claims ordered the joinder of the two actions and assigned the joined cases to the Macomb Circuit Court, with the circuit court having concurrent jurisdiction and sitting as the Court of Claims. The Court of Claims, Richard L. Caretti, J., determined that, under the totality of the circumstances, it was not clear that the area had been in fact closed to traffic and, therefore, it was not clear that MDOT's duty to maintain the highway under MCL 691.1402(1) had been suspended during the construction activities. The court held that Snead could pursue her claim under the highway exception to governmental immunity contained in the statute. The court then denied MDOT's motion for summary disposition and granted partial summary disposition in favor of Snead with regard to the applicability of the highway exception to governmental immunity. MDOT appealed.

The Court of Appeals *held*:

1. The statutory duty to maintain a highway creates a duty with respect to the traveled portion, paved or unpaved, of the roadbed actually designed for vehicular travel by the public. If the condition is not located in the actual roadbed designed for vehicular travel, the narrowly drawn highway exception is inapplicable and liability does not attach. Allegations concerning a lack of

warning and traffic-control devices, or allegations of design defects, do not by themselves implicate the highway exception and the government's duty to repair and maintain a highway.

2. The condition or hazard that must be examined in this case is the construction hole in the exit lane, which proximately caused the accident and any resulting damages. The roadbed of the exit lane is indisputably part of the improved portion of the highway designed for vehicular travel. Therefore, if the exit lane was effectively open for public travel and not closed as reflected by traffic-control devices, MDOT's duty to keep the exit lane reasonably safe for public travel would be implicated.

3. The construction activities, in and of themselves, do not support a conclusion that the exit lane was closed. The appropriate test for determining whether a road is open for public travel is whether a reasonable motorist, under all the circumstances, would believe that the road was open for travel. It would be nonsensical to conclude that a road was closed for public travel in circumstances in which a motorist had no notice that construction activities precluded the safe use of the road, making evasive action difficult or impossible.

4. The issue concerning traffic-control devices cannot be considered in isolation; rather, it affects the questions whether the exit lane was open for public travel and whether MDOT was negligent, both of which questions relate to the construction hole in the roadbed that was the direct proximate cause of the accident.

5. The duty to keep a highway in reasonable repair is suspended when the highway is effectively closed by authorities, while the duty is still owed if the highway, despite undergoing construction, is not properly closed to the public.

6. A genuine issue of material fact exists with respect to whether the exit lane was effectively open for public travel at the time of the accident, as based on the observations of a reasonable motorist driving down the highway at the time. The trial court erred by granting partial summary disposition in favor of Snead on the basis that the highway exception applied as a matter of law. The applicability of the highway exception on remand will be dependent on the trier of fact's finding regarding whether the exit lane was closed or open for public travel. The part of the trial court's order that denied MDOT's motion for summary disposition is affirmed, the part of the order granting partial summary disposition in favor of Snead with respect to the applicability of the highway exception to governmental immunity is reversed, and the matter is remanded to the trial court for further proceedings consistent with the opinion of the Court of Appeals.

Affirmed in part, reversed in part, and remanded.

TALBOT, J., concurring, wrote separately to state that, while he concurs in the majority's ultimate ruling, it is unnecessary to suggest the existence of a new rule of law or test to reach this correct result. The trial court correctly identified that the primary issue is whether MDOT had closed the subject area of the highway. This determination simply comprises a question of fact and does not necessitate the construction or imposition of a reasonable-person test. The question whether the roadway was open or closed comprised a factual determination for the trier of fact.

1. GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — TRAFFIC-CONTROL DEVICES — DESIGN DEFECTS.

Allegations concerning a lack of warning and traffic-control devices or allegations of design defects do not by themselves implicate the highway exception to governmental immunity and the government's duty to repair and maintain a highway within its jurisdiction (MCL 691.1402[1]).

2. GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — OPEN FOR PUBLIC TRAVEL.

The appropriate test for determining whether a highway is open for public travel for purposes of the highway exception to governmental immunity is whether under all the circumstances a reasonable motorist traveling along the pertinent section of highway would believe that the highway was open for travel (MCL 691.1402[1]).

3. GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — HIGHWAY IMPROVEMENT AND REPAIR.

A governmental agency's duty to keep a highway under its jurisdiction in reasonable repair is suspended when the highway is effectively closed by authorities; the duty is still owed if the highway, despite undergoing construction, is not properly closed to the public (MCL 691.1402[1]).

Daniel J. Flaggman and *Eric D. Geller* for Tracy Snead.

Ogne, Alberts & Stuart, P.C. (by *Dennis D. Alberts*, Special Assistant Attorney General), for the Department of Transportation.

Before: MURPHY, C.J., and FITZGERALD and TALBOT, JJ.

MURPHY, C.J. Defendant Michigan Department of Transportation (MDOT) appeals the Court of Claims' order that denied its motion for summary disposition while granting partial summary disposition in favor of plaintiff with respect to the applicability of the highway exception to governmental immunity. This case arose out of a motor vehicle accident in which plaintiff drove her car into a large construction hole located in the roadbed of a highway exit lane, allegedly as a result of confusing and inadequate traffic-control devices. We conclude that the relevant condition or hazard for purposes of determining the applicability of the highway exception was the construction hole itself, which proximately caused the accident and any resulting damages. Furthermore, we find, as a matter of law, that the exit lane's roadbed where the construction hole was located constituted an improved portion of the highway and that the exit lane had been designed for vehicular traffic. We also conclude that a genuine issue of material fact exists regarding whether the exit lane was closed or effectively remained open for public travel at the time of the accident, as gleaned by a reasonable motorist traveling along the pertinent section of highway. Accordingly, we affirm the trial court's ruling that denied MDOT's motion for summary disposition but we reverse the court's determination that plaintiff was entitled to partial summary disposition with respect to the applicability of the highway exception to governmental immunity.

I. FACTUAL AND PROCEDURAL HISTORY

In the early morning hours of April 21, 2007, plaintiff was operating her motor vehicle on eastbound I-94 when she entered the exit lane for westbound M-59/Hall Road and soon struck a large, unprotected construction

hole in the roadbed of the exit lane.[1] In January 2009, plaintiff initially filed suit in the Macomb Circuit Court solely against defendant John Carlo, Inc. (hereafter Carlo). Plaintiff alleged that Carlo was hired and delegated the task of construction and that Carlo was responsible for maintaining safe conditions at the construction site and for keeping the site reasonably safe and convenient for public travel. She contended that Carlo was negligent because it failed to properly and adequately maintain the construction site, failed to adequately design the site to allow for safe use of the exit lane, failed to adequately warn the public of the hazardous condition, failed to use reasonable care to make the site reasonably safe for foreseeable use by motorists attempting to exit the highway, erected unsafe and inadequate barricades, and failed to properly barricade the exit lane, thereby allowing traffic to enter what should have been a closed exit. Plaintiff maintained that she suffered a litany of injuries and incurred damages as a proximate result of Carlo's negligence.

A couple of weeks after filing the complaint, plaintiff filed a first amended complaint in the Macomb Circuit Court that retained the negligence claim against Carlo and added a first-party claim for personal protection insurance (PIP) benefits against defendant State Farm Insurance Company (hereafter State Farm), which was plaintiff's auto insurer.[2]

In February 2009, plaintiff initiated a separate suit against MDOT in the Court of Claims, alleging negli-

[1] The exit was actually comprised of three lanes of travel, at times referred to as "flare" lanes by the parties and the police, which transported motorists off the main highway. To avoid confusion and simplify matters, we shall refer to the roadway where the hole was located as the "exit lane" in the singular.

[2] The claims against Carlo and State Farm are not at issue in this appeal.

gence by MDOT for having barricaded the construction hole in a defective, unsafe, and confusing manner. Plaintiff claimed that the construction site was improperly and negligently constructed and maintained by MDOT, creating a point of hazard or special danger that uniquely affected vehicular traffic on the improved portion of the roadway to the extent that travel was rendered unsafe. Plaintiff additionally set forth allegations of negligence similar to those made against Carlo, along with a claim that MDOT negligently hired and failed to properly supervise Carlo.

In April 2009, a stipulated order for joinder was entered pursuant to which the Court of Claims, under MCL 600.6421,[3] ordered the joinder of the two actions and assigned the joined cases to the Macomb Circuit Court, with the circuit court "having concurrent jurisdiction and sitting as the Court of Claims."

In March 2010, MDOT filed a motion for summary disposition, arguing that plaintiff drove on the wrong side of orange construction barrels and into a portion of the road under construction. MDOT maintained that the construction activities clearly and undeniably entailed the exercise and discharge of a governmental function; therefore, it was immune from tort liability under the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, and more specifically MCL 691.1407(1). MDOT contended that the highway exception to governmental immunity, MCL 691.1402, did not apply for the following two reasons: "(1) the accident

[3] MCL 600.6421 provides:

> Cases in the court of claims may be joined for trial with cases arising out of the same transaction or series of transactions which are pending in any of the various trial courts of the state. A case in the court of claims shall be tried and determined by the judge even though the trial court action with which it may be joined is tried to a jury under the supervision of the same trial judge.

occurred on a closed portion of the road that was not intended for vehicular travel at the time as a result of the ongoing construction activities; and (2) Plaintiff's claims for negligent placement of barricades and other traffic control devices does not fit within the highway exception as a matter of law."

Plaintiff filed a response to the motion, arguing that she did not drive on the wrong side of the barrels and that the barrels were set up in such a manner so as to not clearly indicate a right or wrong side for vehicular travel. Plaintiff maintained that she and several other drivers drove where they were directed by the barrels, leading them into a construction hole dug across two of the three exit or flare lanes in the improved portion of the roadway.[4] Plaintiff argued that the highway exception to governmental immunity was thus fully applicable. Documentary evidence submitted by plaintiff showed that four vehicles, including plaintiff's car, took the exit lane that was under construction and struck the hole. Four separate crash reports indicated that the accidents occurred around the same time.[5] The crash reports further indicated that the vehicles struck or drove into the large hole in the roadway because of a confusing road-closure set up. In two of the reports, it was noted, "Investigation found barrels for construction confusing." A couple of the crash reports also stated that the county road commission was contacted

[4] It was a bit unclear from the record whether plaintiff wanted to take that particular exit to arrive at her desired destination, whether she had no such intent but felt that the barrels and barriers forced or directed her to leave the highway and enter the exit lane, or whether she wished to take the exit and thought that she was also compelled to exit the highway. There were several miles of highway in the area that were undergoing construction.

[5] The reports reflected that one car crashed into the hole at 5:14 a.m., that another vehicle also hit the hole at 5:14 a.m., that plaintiff struck the hole at 5:28 a.m., and that a fourth car drove into the hole at 5:29 a.m.

because of the confusing closure set up, that road commission personnel arrived, and that the personnel "made adjustments."

Plaintiff testified in her deposition that she was driving slower because of the construction in the general area, that she took the exit at issue, and that the next thing she knew was that the front of her car was at the bottom of a hole. She did not see the hole before impact and did not have the opportunity to take any evasive action. Plaintiff could not recall the placement of any barrels or barricades near the exit, and she did not see any exit-closed signs. Plaintiff testified that she observed a regular exit sign for westbound M-59; she did not see a sign for a "temporary" M-59 westbound exit. She stated that she did not see any construction vehicles or construction equipment in the area around the hole. Plaintiff observed two other cars in different parts of the same hole when she crashed. As she scurried to get out of her car out of fear that other cars might run into her vehicle before she got out, the fourth car plowed into another section of the hole.

Officer Gary Venet, who was one of the responding police officers, testified in his deposition that "it wasn't clear that . . . the road was - - that that lane was closed." Venet further testified that, to the best of his memory, "the barrels were spaced a little too far apart, and that there wasn't a sign specifically indicating that the exit was closed." Sergeant Philip Abdoo, who also responded to the accident scene, testified that the hole was about the width of one lane and probably six to seven feet deep. Abdoo also indicated that "[t]he road was marked with barrels. However, it was somewhat confusing where the barrels meant to direct traffic." Documents from the road construction company, we presume Carlo, contained a foreman's diary, which provided:

> Note that even after we put type III barricades up at the EB off ramp for WB Hall two cars still managed to drive into the open hole where we pulled the concrete for the pipe crossing at sta. 997+00. Leo from MDOT called to tell me and we had to re-adjust the barricades again to try and keep traffic out!! Note that Leo himself drove into the corner of this proposed pipe crossing and he ended up in the ditch, and he knew it was there but wasn't watching where he was going[.]

Another document from the company included an entry by a different company foreman, who stated as follows:

> U/G crews working on EB storm sewer X-ings . . . from north of RR to 23 Mi. Rd. There was confusion with traffic overnight after [workers] removed pavement for these X-ings. Traffic was used to using the long deceleration lane from EB I-94 to WB M-59 and 4 cars came through the closure into the pavement removal area. Removals finish up at 4:00 AM with U/G crews starting at 6:30 AM.

It thus appears that the construction hole at issue was cut or excavated at or before 4:00 a.m., with the accidents occurring a little more than an hour later.

Gordon Wall, a safety manager who worked for Carlo, testified that the police contacted MDOT after the accidents and that an MDOT inspector contacted Carlo regarding the need for more barrels. Arnold Beller, an MDOT employee, made the following comments in a daily report: "Accident at 5:00 am on EB I94 @ M59 WB off Ramp. 4 cars came behind the lane closure into the closed lane and ran off into the open pavement patching area." Plaintiff also submitted an affidavit from Thomas Maleck, Ph.D., who averred and opined that the "accident occurred in the active roadbed designed for vehicular traffic," that the hole "constituted a defect," that the defect "was within the active roadbed designed

for vehicular travel," and that "the defect . . . falls within the highway exception to governmental immunity."

At oral argument on the motion for summary disposition, MDOT's counsel, on questioning by the trial court, conceded that there was no sign indicating that the exit taken by plaintiff and the other drivers was closed to traffic. We note that the parties agree that there was a temporary exit sign for westbound M-59 *located further down eastbound I-94 and past the exit at issue* that was intended to direct motorists to an alternate exit that could be taken to access westbound M-59 for those drivers who would have ordinarily used the earlier "closed" exit. The trial court took the motion for summary disposition under advisement and subsequently issued a written opinion and order. The court denied defendant's motion for summary disposition and granted, under MCR 2.116(I)(2), partial summary disposition in favor of plaintiff with respect to the issue of governmental immunity. The trial court reasoned:

> It is true that a dispute over the mere placement of traffic signs will not be sufficient for plaintiff to invoke the "highway exception" to MDOT's immunity from tort liability because such signs are not typically in the roadbed itself. . . . Contrary to MDOT's position, however, this is not a situation in which mere sign placement is involved. Instead, the instant controversy involves the overall sufficiency of warnings in the roadbed itself.
>
> The primary issue is whether MDOT had closed the subject area of the highway. If MDOT had done so, then its duty under MCL 691.1402(1) to keep the highways in reasonably good repair and fit for public travel would have been suspended [under *Grounds v Washtenaw Co Rd Comm*, 204 Mich App 453; 516 NW2d 87 (1994)], which, in turn, means that MDOT would not be subject to tort liability under the "highway exception," but instead would be immune from such liability under MCL 691.1407(1). As

> addressed above, the evidence shows that there was a great deal of confusion as to whether the area containing the hole was actually closed. Unlike the situation in *Grounds, supra*, there is no evidence of a sign that clearly and specifically marked the area as closed to traffic. Neither were there any flashing arrows or detour signs. Significantly, the area was confusing to several other drivers, including an MDOT employee, all of whom also drove into the hole. Even law enforcement personnel express[ed] confusion as to whether the area was closed. Contrary to MDOT's assertion, this dispute does not merely involve the proper spacing of the orange cones, but also involves the lack of other warning devices. Under the totality of [the] circumstances, it was not clear that the area was in fact closed to traffic. Therefore, it cannot be concluded that MDOT's duty under MCL 691.1402(1) was suspended. In turn, this means that plaintiff may pursue her tort claim against MDOT under the "highway exception" to governmental immunity.
>
> Accordingly, MDOT is not entitled to summary disposition pursuant to MCR 2.116(C)(7). . . . Moreover, plaintiff's motion for partial summary disposition should be granted pursuant to MCR 2.116(I)(2) as to the issue of governmental immunity since MDOT is not immune from tort liability.[6]

Defendant MDOT appeals as of right the trial court's ruling.

II. ANALYSIS

A. STANDARD OF REVIEW AND SUMMARY DISPOSITION TESTS

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

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[6] We note that plaintiff did not actually file a motion for partial summary disposition. However, under MCR 2.116(I)(2), "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

Ceiling & Partition Co, LLC, 489 Mich 157, 162; 809 NW2d 553 (2011); *In re Egbert R Smith Trust*, 480 Mich 19, 23; 745 NW2d 754 (2008). Further, the determination regarding the applicability of governmental immunity and a statutory exception to governmental immunity is a question of law that is also subject to review de novo. *Co Rd Ass'n of Mich v Governor*, 287 Mich App 95, 117-118; 782 NW2d 784 (2010); *Robinson v City of Lansing*, 282 Mich App 610, 613; 765 NW2d 25 (2009), rev'd on other grounds 486 Mich 1 (2010). Indeed, we review de novo questions of law in general, including matters of statutory construction. *Loweke*, 489 Mich at 162; *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006); *Byker v Mannes*, 465 Mich 637, 643; 641 NW2d 210 (2002).

Under MCR 2.116(C)(7), an order granting a motion for summary disposition in favor of a defendant is proper when the plaintiff's claim is "barred because of . . . immunity granted by law . . . ." See *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). The moving party may submit affidavits, depositions, admissions, or other documentary evidence in support of the motion if substantively admissible. *Id.* The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. *Id.* This Court must consider the documentary evidence submitted for purposes of a motion brought under MCR 2.116(C)(7) relative to governmental immunity in a light most favorable to the nonmoving party. *Herman v Detroit*, 261 Mich App 141, 143-144; 680 NW2d 71 (2004). If there is no relevant factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. *Huron Tool & Engineering Co v Precision Consulting Servs, Inc*, 209 Mich App 365, 377; 532 NW2d 541 (1995). If, however, a pertinent factual dispute exists, summary disposition is not appropriate. *Id.*

B. GENERAL PRINCIPLES—STATUTORY INTERPRETATION

This appeal entails, in part, an issue of statutory construction. In *McCormick v Carrier*, 487 Mich 180, 191-192; 795 NW2d 517 (2010), the Michigan Supreme Court recited the familiar principles that guide our interpretation of a statute:

> The primary goal of statutory construction is to give effect to the Legislature's intent. This Court begins by reviewing the language of the statute, and, if the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute. Judicial construction of an unambiguous statute is neither required nor permitted. When reviewing a statute, all non-technical words and phrases shall be construed and understood according to the common and approved usage of the language, MCL 8.3a, and, if a term is not defined in the statute, a court may consult a dictionary to aid it in this goal. A court should consider the plain meaning of a statute's words and their placement and purpose in the statutory scheme. Where the language used has been subject to judicial interpretation, the legislature is presumed to have used particular words in the sense in which they have been interpreted. [Citations and quotation marks omitted.]

This Court must avoid a construction that would render any part of a statute surplusage or nugatory. *Zwiers v Growney*, 286 Mich App 38, 44; 778 NW2d 81 (2009). We may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Id.*

C. GENERAL PRINCIPLES—GOVERNMENTAL IMMUNITY

Except as otherwise provided, the GTLA broadly shields and grants immunity to governmental agencies from tort liability when an agency is engaged in the exercise or discharge of a governmental function. MCL

691.1407(1); *Duffy v Dep't of Natural Resources*, 490 Mich 198, 204; 805 NW2d 399 (2011); *Grimes v Dep't of Transp*, 475 Mich 72, 76-77; 715 NW2d 275 (2006). "The existence and scope of governmental immunity was solely a creation of the courts until the Legislature enacted the GTLA in 1964, which codified several exceptions to governmental immunity that permit a plaintiff to pursue a claim against a governmental agency." *Duffy*, 490 Mich at 204. A governmental agency[7] is potentially liable under the GTLA only if the case against it falls into one of these enumerated statutory exceptions to governmental immunity. *Grimes*, 475 Mich at 77; *Stanton v Battle Creek*, 466 Mich 611, 614-615; 647 NW2d 508 (2002). An activity that is expressly or impliedly authorized or mandated by constitution, statute, local charter, ordinance, or other law constitutes a governmental function. *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 613-614; 664 NW2d 165 (2003). This Court gives the term "governmental function" a broad interpretation, but the statutory exceptions must be narrowly construed. *Id.* at 614. "A plaintiff filing suit against a governmental agency must initially plead his claims in avoidance of governmental immunity." *Odom*, 482 Mich at 478-479.

The highway exception to governmental immunity, MCL 691.1402, provides, in pertinent part:

> (1) Except as otherwise provided in section 2a, each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair

[7] The state of Michigan is a governmental agency for purposes of the GTLA, MCL 691.1401(d), and this includes its departments such as MDOT, MCL 691.1401(c). See *Duffy*, 490 Mich at 204 n 2.

> and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. . . . *The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel*. [Emphasis added.]

A "highway" is statutorily defined as "a public highway, road, or street that is *open for public travel* and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway." MCL 691.1401(e) (emphasis added). MCL 691.1402(1) and MCL 691.1401(e) must be read together as a single law, and when they "are read *in pari materia*, it is clear that all governmental agencies have a duty to maintain highways within their jurisdiction in reasonable repair, but that this duty only extends to 'highways' that fall within the definition of 'highway' in MCL 691.1401(e)." *Duffy*, 490 Mich at 207.

In regard to the state and county road commissions under the highway exception, the statutory language creates a duty to maintain a highway solely with respect to the traveled portion, paved or unpaved, of the roadbed actually designed for vehicular travel by the public. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 180; 615 NW2d 702 (2000); *Grimes*, 475 Mich at 79. "[I]f the condition is not located in the actual roadbed designed for vehicular travel, the narrowly drawn highway exception is inapplicable and liability does not attach." *Nawrocki*, 463 Mich at 162; see also *Grimes*, 475 Mich at 79. Our Supreme Court has clearly stated that allegations concerning a lack of warning and traffic-control devices, or allegations of design defects, do not implicate the highway exception and the government's duty to repair and maintain a highway. *Hanson v*

Mecosta Co Rd Comm'rs, 465 Mich 492, 499; 638 NW2d 396 (2002); *Nawrocki*, 463 Mich at 183-184.

D. MDOT'S APPELLATE ARGUMENTS

MDOT first argues that the trial court erroneously ruled that governmental immunity was inapplicable under the highway exception, because there was no dispute that plaintiff's claims solely involved the alleged inadequacy of traffic-control devices and barricades, which do not in any way involve the improved portion of a highway designed for vehicular travel. In addition, according to MDOT, the trial court's ruling was in error because there was no dispute that the area where the hole was located was neither designed nor intended for vehicular traffic, given that it was closed during ongoing construction activities. Finally, as an alternative argument, MDOT maintains that the trial court erroneously granted partial summary disposition in favor of plaintiff on the issue of governmental immunity, because there were, at the very least, genuine issues of material fact concerning whether the exit lane was closed at the time of the accident.

E. HOLDING AND DISCUSSION

We hold that the trial court properly denied MDOT's motion for summary disposition, albeit for reasons slightly different from those expressed by the court. We initially note that there is no dispute that MDOT was engaged in the exercise or discharge of a governmental function; therefore, immunity would shield MDOT absent application of the highway exception. With respect to the highway exception and its limitation that the state's duty, and the liability for that duty, extends only to the "improved portion of a highway," MCL 691.1402(1), we conclude that the condition or hazard

that must be examined is the construction hole in the exit lane for purposes of determining whether this case concerned an improved portion of a highway. The excavated hole was the direct proximate cause of the accident; but for the construction hole, there would be no crash or resulting damages. And the roadbed of the exit lane wherein the hole was located is indisputably part of "the improved portion of the highway" and not an "installation outside of the improved portion of the highway . . . ." MCL 691.1402(1).[8] Furthermore, it cannot reasonably be disputed that the exit lane had been "designed for vehicular travel," MCL 691.1402(1). Indeed, the very purpose of designing and constructing the exit lane was to provide an avenue by which vehicles could travel off the main highway and head toward a different destination. Accordingly, and generally speaking, MDOT had a duty under MCL 691.1402(1) to maintain the exit lane "in reasonable repair so that it [was] reasonably safe and convenient for public travel." However, we must also contemplate the impact of construction activities on MDOT's duty, and this issue necessarily entails consideration of whether the exit lane could properly be deemed a "highway" at the time of the accident under the statutory definition of "highway" in MCL 691.1401(e), which required the exit lane to be "open for public travel . . . ." This is the part of the analysis where the traffic-control devices, i.e., orange barrels, signs, markers, and barricades, become relevant.

Traffic-control devices generally indicate whether or not a road is "open for public travel." Matters concern-

[8] At this juncture in our analysis, we are proceeding on the assumption that the exit lane fits the definition of a "highway" under MCL 691.1401(e). That issue, however, will be explored in detail later in this opinion.

ing the traffic-control devices here cannot be viewed or examined in a vacuum and must necessarily be considered in conjunction with, and not independent of, the construction hole in the exit lane. If the exit lane was effectively open for public travel and not closed as reflected by traffic-control devices, MDOT's duty to keep the exit lane reasonably safe for public travel would be implicated.[9] MDOT argues that it is beyond rational dispute that the exit lane was in fact closed for public travel given the construction activities and the placement of orange barrels. We shall later discuss the issue concerning whether the exit lane was open or closed for public travel as indicated by the barrels and

[9] We note that, assuming the existence of a duty, the placement of traffic-control devices would also be relevant to the issue whether the excavation and presence of the construction hole constituted a breach of the duty to maintain the exit lane in reasonable repair, or, stated otherwise, whether MDOT was negligent. "[T]ort actions against governmental agencies generally raise two separate issues: 1) whether the plaintiff has pleaded a cause of action in avoidance of governmental immunity, and 2) whether the plaintiff can establish the elements of a negligence action." *Glancy v City of Roseville*, 457 Mich 580, 588; 577 NW2d 897 (1998) (noting that actionable negligence relates to a failure to keep a highway in reasonable repair). There is some natural overlap in this case between the issue of negligence and the applicability of the highway exception in relationship to the traffic-control devices. MCL 691.1402(1) and MCL 691.1401(e) make it relevant in determining the applicability of the highway exception whether a highway was open for public travel, thereby requiring consideration of traffic-control devices, and, if indeed the highway was open, resolution of MDOT's negligence would turn, in part, on any negligent conduct in placing the traffic-control devices in such a manner that they effectively allowed the exit lane to remain open, thereby making the construction hole a true defect in the roadbed. It is possible that presumed inadequate traffic-control devices may have existed because of circumstances beyond MDOT's blameworthiness in tort, e.g., perhaps other vehicles recently knocked down some barrels or vandals removed an "exit closed" sign. And it is also possible that a jury could allocate fault, in whole or in part, to contractor Carlo or others. The question of negligence is outside the scope of this appeal.

other traffic-control devices. Setting aside for the moment consideration of the barrels with regard to the determination whether the exit lane was open for public travel, we do not find that the construction activities, in and of themselves, support a conclusion that the exit lane was closed. Assuming a motorist could observe from a distance that construction was ongoing on part of a highway that he or she wished to use, the motorist could still reasonably proceed to drive through the construction zone if there were no signs or traffic-control devices indicating a closure, given that roadways through construction zones often remain open, although there might be some limitations, e.g., only one lane available. A road is not necessarily closed for public travel simply because construction work is being performed in the area. We acknowledge that there are situations in which a construction project so blatantly blocks any potential use of a roadway that a reasonable motorist would certainly understand and appreciate that the roadway was fully closed, even in the absence of any signage or traffic-control devices. For purposes of analyzing the applicability of the highway exception to governmental immunity, we conclude that the appropriate test for determining whether a road is open for public travel is whether a reasonable motorist, under all the circumstances, would believe that the road was open for travel.[10] It would be nonsensical to conclude that a road was closed for public travel in circumstances in which a motorist had no notice that construction

[10] On the possibility that plaintiff had not planned to use the exit but did so only because she believed that the orange barrels were temporarily directing her off the main highway because of construction, the test would be framed in terms of determining whether a reasonable motorist would have believed that he or she was required to exit the highway, which would indicate to the motorist that the exit lane had to be open for use.

activities precluded the safe use of the road, making evasive action difficult or impossible.

With its focus placed chiefly on the traffic-control devices, MDOT's position in this appeal essentially ignores the fact that a construction hole existed in the roadbed of the exit lane. Again, the issue concerning the traffic-control devices cannot be considered in isolation; rather, it affects the questions whether the exit lane was open for public travel and whether MDOT was negligent, both of which questions relate to the construction hole. The traffic-control devices would be entirely irrelevant if the exit lane had no construction hole. It is true that plaintiff's allegations in her complaint focused heavily on MDOT's management and handling of the traffic-control devices. But plaintiff also alleged that her "injuries were the direct and proximate result of the negligence of . . . MDOT and the defective, unsafe and confusing barricading of the *construction hole dug in and at this highway exit lane, which was not obvious to approaching traffic and created a point of special danger.*" (Emphasis added.) MDOT argues that "[e]ven assuming the road was not properly barricaded, this has nothing whatsoever to do with governmental immunity." This argument fails to take into consideration the presence of the construction hole. If there were absolutely no barricades blocking access to the exit lane and a complete absence of signage indicating a closure, one would simply have a case where a motorist struck a major defect in the exit lane and the case would easily fit within the parameters of the highway exception.

We observe that almost any defective condition in a roadbed could be viewed as creating some type of duty to warn the public of the condition through signage, markers, barrels, or other traffic-control devices. For example, if part of the roadbed of a bridge or overpass

had become dilapidated to the point that a motor vehicle could not safely traverse the bridge without the danger of crashing to the ground below, and a vehicle did in fact so crash where there was a complete absence of any warnings about the roadbed defect, it might be argued that governmental immunity applied without implicating the highway exception. In that scenario, although the improved portion of the highway, or roadbed, would indisputably be defective, a subsequent suit would likely entail, to some degree or in some fashion, allegations of a negligent failure to employ traffic-control devices. The same could be said for a case that simply involved a large, dangerous pothole that caused an accident, with a defendant arguing that the strategic placement of a barrel would have mitigated the danger and thus the resulting lawsuit would in essence be an action concerning traffic-control devices. We, however, do not find that these hypothetical situations would justify granting immunity, where the fact remained that the cases ultimately concerned a roadbed condition that proximately caused damages. The case sub judice is *not* a case where we are merely talking about, for example, negligence in failing to repair a malfunctioning stoplight that leads to a crash in an intersection; we have the added element and involvement of a roadbed condition that was ultimately the cause of the crash.

We shall now turn our attention to the cases cited and relied on by the parties, which we find are entirely consistent with our approach, reasoning, and analysis. In *Nawrocki*, the plaintiff was injured in a motor vehicle accident at an intersection when his car and another vehicle collided. The plaintiff sued the defendant, alleging that the defendant "owed him a duty to install additional stop signs or traffic signals at the intersec-

tion." *Nawrocki*, 463 Mich at 154.[11] The issue addressed by the Court was whether, under the highway exception to governmental immunity, "the state or a county road commission ha[d] a duty to install, maintain, repair, or improve traffic control devices, including traffic signs." *Id.* at 173. The Court held that the highway exception did not contemplate conditions arising from points of hazard, areas of special danger, or integral parts of a highway that were outside the actual roadbed, whether paved or unpaved, designed for vehicular travel. *Id.* at 176-177. Further, our Supreme Court elaborated and ruled:

> The state and county road commissions' duty, under the highway exception, is only implicated upon their failure to repair or maintain the actual physical structure of the roadbed surface, paved or unpaved, designed for vehicular travel, which in turn proximately causes injury or damage. A plaintiff making a claim of inadequate signage, like a plaintiff making a claim of inadequate street lighting or vegetation obstruction, fails to plead in avoidance of governmental immunity because signs are not within the paved or unpaved portion of the roadbed designed for vehicular travel. Traffic device claims, such as inadequacy of traffic signs, simply do not involve a dangerous or defective condition in the improved portion of the highway designed for vehicular travel.
>
> [The plaintiff] argues that the [defendant] failed to install additional traffic signs or signals that might conceivably have made the intersection safer. Because the highway exception imposes no such duty on the state or county road commissions, we reverse the decision of the

[11] We note that the *Nawrocki* opinion involved two consolidated appeals of separate cases with distinct factual backgrounds. *Nawrocki*'s companion case was *Evens v Shiawassee Co Rd Comm'rs*. Our discussion here pertains to the Michigan Supreme Court's review of the facts, its analysis, and the Court's holding with respect to *Evens*, but for reasons of clarity and to avoid confusion, we shall simply make reference to *Nawrocki* for citation purposes.

> Court of Appeals and reinstate the trial court's grant of summary disposition to the [defendant]. [*Id.* at 183-184 (citation omitted).]

Here, there can be no reasonable dispute that, ultimately, the point of hazard or area of special danger was the construction hole in the actual roadbed of the exit lane. While this case involves in part a claim of inadequate traffic signage and control devices, it *also* involves an allegedly dangerous or defective condition in the improved portion of the highway that proximately caused injury or damage, which condition must be examined in the context of and in relationship to the adequacy of traffic-control devices.

In its discussion, the *Nawrocki* Court overruled *Pick v Szymczak*, 451 Mich 607; 548 NW2d 603 (1996), on the basis that *Pick* would have plausibly and improperly allowed a plaintiff to argue the following:

> — there should have been yield signs along a highway instead of no signs;
> — there should have been stop signs along a highway instead of yield signs;
> — there should have been a flashing yellow/red traffic light along a highway instead of stop signs;
> — there should have been a fully functional red/yellow/green traffic signal along a highway instead of a flashing yellow/red light;
> — there should have been an overpass above a highway, thus eliminating the need for traffic signals altogether;
> — there should have been a 25 MPH sign, instead of a 30 MPH sign, nearing an approach to an intersection; or
> — there should have been a left turn lane where none existed. [*Nawrocki*, 463 Mich at 178.]

Under *Nawrocki*, these hypothetical scenarios do not implicate the highway exception because they do not

concern a condition relative to the improved portion of a highway designed for vehicular travel. None of them, however, can be analogized to the factual situation here, because they do not entail the added element of a roadbed condition or hazard that proximately caused injuries. *Nawrocki* is entirely consistent with our proffered analysis above and does not demand a contrary result, since the case at bar encompasses a condition concerning the improved portion of a highway—the construction hole.

In *Grimes*, 475 Mich at 73, the Michigan Supreme Court framed the issue there as whether, for purposes of the highway exception to governmental immunity, the shoulder of a highway was part of the improved portion of the highway designed for vehicular travel. The Court held:

> We believe that, taken as a whole, the language of the highway exception supports the view that a shoulder, unlike a travel lane, is not designed for vehicular travel. Consequently, we adopt a view of "travel" that excludes the shoulder from the scope of the highway exception. Thus, we hold that only the travel lanes of a highway are subject to the duty of repair and maintenance specified in MCL 691.1402(1).
>
> Also, our decision is consistent with *Nawrocki*. . . . [O]ur determination that the shoulder is not designed for vehicular travel reinforces *Nawrocki's* reading of the highway exception that it encompassed only the " 'traveled portion, paved or unpaved, of the roadbed actually designed for public vehicular travel.' " [*Grimes*, 475 Mich at 91.]

Other than reiterating the principles from *Nawrocki*, the opinion in *Grimes* does not play a significant relevant role in deciding our case. It does support our earlier proposition that the exit lane had been designed for vehicular travel.

This Court's decision in *Grounds*, 204 Mich App 453, addressed the issue of a closed roadway and its effect on the duty to maintain the roadway in a safe condition. It is a rather short opinion; therefore, we shall quote it in full, omitting some of the general principles on governmental immunity and statutory language that we have already alluded to above:

> These consolidated actions arise from an automobile accident that occurred at the intersection of Stoney Creek Road and Platt Road in Washtenaw County on November 10, 1987. Cynthia Kimble was traveling east and Calvin Grounds was traveling west on Stoney Creek Road. At that time Stoney Creek was undergoing repairs. There were eight-foot-wide barricades in the middle of Stoney Creek on both sides of the intersection with signs warning motorists that the road was closed to through traffic. Both Cynthia Kimble and Nancy Grounds, the personal representative of the estate of Calvin Grounds, brought suit against defendant, alleging that defendant's negligent placement of the barricades caused the accident.
>
> Defendant filed a motion for summary disposition with respect to each plaintiff under MCR 2.116(C)(8) and (C)(10), alleging that it had no statutory duty to plaintiffs because Stoney Creek Road was not open to public travel. Following a hearing on the motion, the court granted summary disposition in favor of defendant. Plaintiffs now appeal as of right. We affirm.
>
> * * *
>
> The key issue here is whether the highway exception to governmental immunity applies when the road is undergoing repairs or reconstruction and has been marked as "closed to through traffic." We find that it does not.
>
> Our Supreme Court has held that a governmental agency may suspend its duty to keep the streets in good repair and fit for public travel while the street is being improved or repaired by closing to public traffic that portion of the street. *Southwell v Detroit*, 74 Mich 438; 42

> NW 118 (1889), *Beattie v Detroit*, 137 Mich 319; 100 NW 574 (1904), and *Speck v Bruce Twp*, 166 Mich 550; 132 NW 114 (1911). Here, the road was marked by eight-foot barricades as being closed to through traffic while repairs and improvements were being made. We find this was sufficient to suspend the statutory exception to governmental immunity.
>
> In their briefs on appeal, plaintiffs discuss at great length whether plaintiff Kimble had a right to use the road; we find that question to be irrelevant to our holding. [*Grounds*, 204 Mich App at 454-456.]

It is abundantly clear that Stoney Creek Road was, in general, closed because of construction and that traffic-control devices adequately indicated the closure, since the road was expressly marked closed to through traffic and huge barriers were in place. More importantly, the *Grounds* panel specifically ruled that the highway exception to governmental immunity was suspended because "the road *was marked by eight-foot barricades as being closed* to through traffic while repairs and improvements were being made." *Id*. at 456 (emphasis added). In that same vein, the Court also indicated that a governmental agency may suspend its duty to keep a street in good repair and fit for travel by the public while the street is under construction "*by closing* to public traffic that portion of the street." *Id*. (emphasis added). Accordingly, a highway is not open for public travel when the government "closes" the highway and "marks" it as being closed, which would typically entail the use of adequate traffic-control devices. Therefore, *Grounds* is consistent with our analysis, and it negates any stance that, for purposes of analyzing the highway exception, a road is not open for public travel simply because it is under construction and regardless of whether it is sufficiently marked as being closed by the governmental agency.

A case relied on by MDOT is *Pusakulich v City of Ironwood*, 247 Mich App 80; 635 NW2d 323 (2001), wherein the plaintiff sustained injuries when she fell on an allegedly defective city sidewalk that was adjacent to a street that was temporarily closed for repairs to a water line running underneath the street. The plaintiff alleged that "a slab of the sidewalk was missing, the area filled with water, and the area was unmarked and unlit." *Id.* at 81. She fell while attempting to jump over the hole that she believed was simply a puddle on the sidewalk. *Id.* The *Pusakulich* panel affirmed the grant of summary disposition in favor of the defendant city, but only because it believed that it was required to do so under prior precedent. *Id.* This Court stated:

> We recognize that the status of a sidewalk for purposes of governmental immunity depends on whether the adjacent highway is covered by the exception. MCL 691.1401(e). The highway in this case was temporarily closed. Because this Court previously determined . . . that temporary closure removed a street itself from the highway exception, those decisions necessarily also require us to conclude that any sidewalk connected with the temporarily closed highway is also removed from the highway exception along with the highway. In this case, Aurora Street was temporarily closed and, under the broad holding of *Grounds*, *supra*, that closure removed it from the highway exception to governmental immunity. Because the sidewalk on which plaintiff alleged that she sustained injuries was adjacent to this temporarily closed street, we are compelled . . . to conclude that it too was removed from the exception. Although we disagree with that conclusion, we reluctantly acknowledge that, under existing case law, the trial court properly granted summary disposition. [*Pusakulich*, 247 Mich App at 87 (citations omitted).]

We note that a special panel was not convened. *Pusakulich v City of Ironwood*, 247 Mich App 801 (2001).

As in *Grounds*, the panel in *Pusakulich* was addressing a situation in which there was no dispute that the road, and therefore its adjacent sidewalk, was temporarily closed. There is such a dispute in the case at bar. Neither *Grounds* nor *Pusakulich* contravene our analysis and instead they provide support for our holding, because they indicate that the duty to keep a highway in reasonable repair is suspended when the highway is effectively closed by authorities, with the necessary corollary being that the duty is still owed if the highway, despite undergoing construction, is not properly closed to the public.

Finally, it must be determined whether the trial court properly granted partial summary disposition in favor of plaintiff on the issue of governmental immunity. The trial court essentially found that the exit lane was open for public travel as a matter of law because it was not adequately marked as being closed; therefore, the highway exception applied and MDOT was not shielded by governmental immunity. MDOT argues that, minimally, there was a genuine issue of material fact regarding whether the exit lane was open for public travel. MDOT contends that it "submitted abundant documentary evidence in support of its position that the area was, in fact, closed and therefore governmental immunity applied." MDOT relies on the police crash reports that referenced "closed lanes" and "lane closures."

As indicated already, the applicability of governmental immunity and the highway exception turns on whether the exit lane, at the time of the accident, was open for public travel, which is determined on the basis of the observations of a reasonable motorist driving down I-94 at the time of the accident. Plaintiff did not recall seeing any barriers or traffic-control devices that directed her not to use the exit lane, and there is no

dispute that there were no signs indicating that the exit lane was closed. Three other drivers made the same "mistake" as plaintiff, and a couple of the police crash reports noted that, upon investigation, the placement of the construction barrels was confusing. And two of the reports also indicated that road commission personnel made adjustments to the traffic-control devices after the multiple accidents. Deposition testimony by responding police officers reflected that it was not clear that the exit lane was closed. The police officers' testimony further indicated that the orange barrels were spaced too far apart and that it was somewhat confusing with respect to what direction the barrels were directing I-94 traffic. Although it is somewhat unclear from the record of all the surrounding circumstances, even an inspector from MDOT drove into the hole.

MDOT relies on references to "closed lanes" and "lane closures" in the crash reports. Although we believe that little weight should be given to these descriptive references, there is evidence that orange barrels were indeed utilized and there were road construction documents indicating that type III barricades were put in place when the hole was cut in the exit lane. Additionally, heavy road construction activities throughout the exit lane area may have provided a reasonable motorist visual notice that the exit lane was closed to traffic regardless of the absence or adequacy of traffic-control devices. And the testimony and reports of the police officers did not declare that the exit lane definitively appeared open for travel. While a close call, we conclude that a genuine issue of material fact exists with respect to whether the exit lane was effectively open for public travel at the time of the accident, as based on the observations of a reasonable motorist driving down I-94. Accordingly, the trial court erred by granting partial summary disposition in favor of plain-

tiff on the basis that the highway exception applied as a matter of law. The applicability of the highway exception will be dependent on the trier of fact's finding regarding whether the exit lane was closed or open to public travel.

III. CONCLUSION

We conclude that the relevant condition or hazard for purposes of determining the applicability of the highway exception was the construction hole itself, which proximately caused the accident and any resulting damages. Furthermore, we find, as a matter of law, that the exit lane's roadbed where the construction hole was located constituted an improved portion of the highway and that the exit lane had been designed for vehicular travel. We also hold that a genuine issue of material fact exists regarding whether the exit lane was closed or effectively remained open for public travel at the time of the accident, as gleaned by a reasonable motorist traveling along the pertinent section of highway. Accordingly, we affirm the trial court's ruling that denied MDOT's motion for summary disposition but we reverse the court's determination that plaintiff was entitled to partial summary disposition with respect to the applicability of the highway exception to governmental immunity.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Neither party having prevailed in full on appeal, we decline to award taxable costs under MCR 7.219.

FITZGERALD, J., concurred with MURPHY, C.J.

TALBOT, J. (*concurring*). Although I concur with the majority's ultimate ruling, I write separately because I

believe it unnecessary to suggest the existence of a new rule of law or test to reach this correct outcome.

Tracy Snead was driving her vehicle on eastbound I-94 near Hall Road, which was under construction. Snead drove onto an exit ramp where she encountered a large hole where the concrete had been removed in part of the exit lane. Snead's automobile was one of four vehicles that were involved in accidents at this location within a very short time. Her allegations against the Michigan Department of Transportation (MDOT) are that her injuries are the direct result of the defective, unsafe, and confusing manner in which the construction area was barricaded. MDOT contends that Snead's claims are barred by governmental immunity and it is entitled to summary disposition because the highway exception does not require signage to be placed in a construction area and the exception is inapplicable because the roadway was closed to traffic.

The highway exception to governmental immunity is statutory and provides:

> [E]ach governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. . . . The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel.[1]

[1] MCL 691.1402(1).

The Legislature has defined a highway as "a public highway, road, or street that is open for public travel . . . ."[2] Because neither party disputes that MDOT is a governmental agency[3] that was engaged in a governmental function[4] at the time of the events comprising this matter, the focus of the analysis is on MDOT's duty to maintain the highway "in reasonable repair and in a condition reasonably safe and fit for travel . . . ."[5]

In asserting its entitlement to summary disposition, MDOT contends that Snead cannot demonstrate that it had a duty to provide warning signs or barriers since the duty owed to travelers is recognized by law to be very limited in scope.[6] Specifically MDOT notes:

> The first sentence of the statutory clause, crucial in determining the scope of the highway exception, describes the basic duty imposed on all governmental agencies, including the state, having jurisdiction over any highway: "[to] maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." This sentence establishes the duty to keep the highway in reasonable repair. The phrase "so that it is reasonably safe and convenient for public travel" refers to the duty to maintain and repair. The plain language of this phrase thus states the desired outcome of reasonably repairing and maintaining the highway; it does not establish a second duty to keep the highway "reasonably safe."[7]

To the extent that Snead implies that MDOT had a duty to place warnings signs or barricades for safety pur-

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[2] MCL 691.1401(e).

[3] MCL 691.1401(d).

[4] MCL 691.1401(f).

[5] MCL 691.1402(1).

[6] See *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000).

[7] *Id.* at 160 (citation omitted).

poses on the highway, her allegations cannot be sustained. Yet, while there is no affirmative duty to place barricades to designate a hazardous condition, the use and placement of barricades can serve as evidence of whether MDOT's duty to keep the highway in reasonable repair was suspended through the closure of the relevant portion of the highway. This Court has recognized decisions by our Supreme Court "that a governmental agency may suspend its duty to keep the streets in good repair and fit for public travel while the street is being improved or repaired by closing to public traffic that portion of the street."[8] As such, the trial court correctly identified that "[t]he primary issue is whether MDOT had closed the subject area of the highway." Contrary to the majority's opinion, this determination simply comprises a question of fact and does not necessitate the construction or imposition of a reasonable-person test.

As discussed by the trial court, in this case

> "there is no evidence of a sign that clearly and specifically marked the area as closed to traffic. Neither were there any flashing arrows or detour signs. Significantly, the area was confusing to several other drivers, including an MDOT employee, all of whom also drove into the hole. Even law enforcement personnel expression [sic] confusion as to whether the area was closed. Contrary to MDOT's assertion, this dispute does not merely involve the proper spacing of the orange cones, but also involves the lack of other warning devices. Under the totality of [the] circumstances, it was not clear that the area was in fact closed to traffic.

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[8] *Grounds v Washtenaw Co Rd Comm*, 204 Mich App 453, 456; 516 NW2d 87 (1994), citing *Southwell v Detroit*, 74 Mich 438; 42 NW 118 (1889), *Beattie v Detroit*, 137 Mich 319; 100 NW 574 (1904), and *Speck v Bruce Twp*, 166 Mich 550; 132 NW 114 (1911). See also *Pusakulich v Ironwood*, 247 Mich App 80, 85-86; 635 NW2d 323 (2001).

Because of the existence of this question of fact regarding whether the roadway was closed or open to traffic, the trial court correctly ruled that MDOT was not entitled to summary disposition based on governmental immunity. The error committed by the trial court was the granting of partial summary disposition in favor of Snead on the issue of governmental immunity because the overriding question of whether the roadway was open or closed comprised a factual determination for the trier of fact.

PEOPLE v BROWN

Docket No. 297728. Submitted October 11, 2011, at Detroit. Decided October 20, 2011, at 9:00 a.m. Leave to appeal denied, 492 Mich 852.

Bryan Brown was convicted following a jury trial in the Macomb Circuit Court of first-degree criminal sexual conduct (CSC-I) involving a victim under 13 years of age. The court, James M. Biernat, Sr., J., sentenced defendant to life in prison. Defendant appealed by leave granted.

The Court of Appeals *held*:

1. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. However, a prosecutor's good-faith effort to admit evidence does not constitute misconduct. In this case, defendant failed to show that the prosecution acted in bad faith when it introduced evidence that defendant was the subject of a federal child-pornography investigation and that he had been arrested for possession of marijuana. Thus, defendant failed to establish prosecutorial misconduct, but even if the prosecutor had engaged in misconduct, defendant would not have been entitled to relief because of the strong evidence supporting his conviction.

2. Under MRE 404(b)(1), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with that character. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. Under MCL 768.27a, in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. A defendant's propensity to commit criminal sexual behavior can be relevant and admissible to demonstrate the likelihood of the defendant committing criminal sexual behavior toward another minor, but the evidence must also be assessed for whether its probative value is outweighed by its prejudicial effect. In

this case, the trial court did not abuse its discretion by admitting evidence that defendant had improperly touched another girl, who at the time was the same age as the victim in this case. Contrary to defendant's assertion, the court recognized its duty to weigh the probative value of the evidence of other acts against the potential for unfair prejudice and concluded that the evidence was admissible. And the length of time between defendant's conduct toward the other-acts witness and the charged offense only affected the weight of the evidence, not its admissibility.

3. To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable. Defendant failed to establish that he received ineffective assistance of counsel based on counsel's failure to object to the alleged instances of prosecutorial misconduct given that he failed to show the existence of prosecutorial misconduct, but regardless, the claim of ineffective counsel failed in light of the overwhelming evidence supporting the conviction.

4. A sentencing court cannot base its sentence on a defendant's decision to exercise his or her constitutional right to a jury trial. However, it is not per se unconstitutional for a defendant to receive a higher sentence following a jury trial than he or she would have received in exchange for pleading guilty. In this case, defendant was sentenced to life in prison following his trial, but the trial court was required by statute to impose that sentence and, thus, the sentence could not be viewed as punishment for defendant's decision to proceed to trial.

5. In deciding if punishment is cruel or unusual, a court considers the gravity of the offense and the harshness of the penalty, comparing the punishment to the penalty imposed for other crimes in Michigan and the penalty imposed for the same crime in other states. Under 750.520b(2)(c), a defendant over the age of 17 who commits CSC-I involving a victim less than 13 years of age when the defendant was previously convicted of a similar sex crime with a victim less than 13 years of age must be sentenced to life in prison without the possibility of parole. The penalty of life in prison for a repeat offender convicted of CSC-I involving a victim under the age of 13 reflects the gravity of the offense and is similar to the penalties imposed in other states. The penalty is not unconstitutionally cruel or unusual. Further, the sentencing guidelines range does not apply to crimes for which there is a

mandatory sentence, and the imposition of a mandated sentence does not constitute a departure from the guidelines.

Affirmed.

CONSTITUTIONAL LAW — SENTENCES — CRUEL OR UNUSUAL PUNISHMENT — FIRST-DEGREE CRIMINAL SEXUAL CONDUCT — REPEAT OFFENDERS — LIFE IMPRISONMENT.

In deciding if punishment is cruel or unusual, a court considers the gravity of the offense and the harshness of the penalty, comparing the punishment to the penalty imposed for other crimes in Michigan and the penalty imposed for the same crime in other states; a defendant over the age of 17 who commits first-degree criminal sexual conduct (CSC-I) involving a victim less than 13 years of age when the defendant was previously convicted of a similar sex crime with a victim less than 13 years of age must be sentenced to life in prison without the possibility of parole; the penalty of life in prison for a repeat offender convicted of CSC-I involving a victim under the age of 13 reflects the gravity of the offense and is similar to the penalties imposed in other states; the penalty is not unconstitutionally cruel or unusual (US Const, Am VIII; Const 1963, art 1, § 16; MCL 750.520b[2][c]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, and *Joshua D. Abbott*, Assistant Prosecuting Attorney, for the people.

Linda D. Ashford, P.C. (by *Linda D. Ashford*), and Bryan Brown, *in propria persona*, for defendant.

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

PER CURIAM. Following a jury trial, defendant was convicted of one count of criminal sexual conduct in the first degree (CSC-I), MCL 750.520b(1)(a) (victim under 13 years old). The trial court sentenced defendant to life in prison. Defendant appeals by leave granted.[1] We affirm.

[1] *People v Brown*, unpublished order of the Court of Appeals, entered September 30, 2010 (Docket No. 297728).

The complainant in this matter, MO, was born on September 23, 2002. MO's mother was in a dating relationship with defendant and moved in with him in May 2007, bringing MO with her. Defendant and MO were often left alone together. On April 16, 2008, MO, then five years old, was playing with CL, a boy who lived in her neighborhood. CL went to his brother's car to get a toy from the trunk; CL's little brother and MO accompanied him. The children found DVDs depicting naked people on the cover engaging in sex acts. MO picked up one of the DVDs, and CL indicated that she should not be looking at it. According to CL, MO said that her dad made her "suck his wiener every night" and that he "videotapes them, like, doing it." CL understood that MO was referring to defendant as her dad. MO also told CL that defendant called what they did together the humping game. Shortly after, defendant arrived to take MO home.

Right after defendant took MO home, CL told his mother what MO had reported to him. She called the police. Brent Chisolm and William Ross, officers with the Warren Police Department, went to defendant's residence to investigate the complaint they had received. When the officers arrived, MO was sleeping in defendant's bed wearing only underpants. According to Ross, he detected the odor of burnt marijuana in defendant's bedroom and saw drug paraphernalia in an open drawer. Consequently, defendant was arrested for possession of narcotics and paraphernalia.

Robert Krist, a detective with the Warren Police Department, was assigned as the co-officer-in-charge and investigated defendant's background. He learned that defendant had been convicted in Illinois of charges relating to other sexual conduct involving minors. Subsequently, a search warrant for defendant's home was

obtained and executed, resulting in the seizure of a laptop, a video camera, five Hi8 tapes for the video camera, and nudist videotapes.

As part of this investigation, Krist worked with Donald Raymo, a federal agent with the Department of Homeland Security in the cybercrimes division, which typically investigates child-pornography allegations. Raymo had been investigating a person named Bryan Brown. When he learned defendant was the subject of a criminal sexual behavior investigation, Raymo agreed to engage in a joint investigation, offering to process the electronic evidence related to this case. According to Raymo, one of the videos seized from defendant's home included a 10-minute segment that constituted child pornography; that section of the video was located midway through the tape and was preceded by a black screen, indicating that it had been taped over. It was followed by footage of a wedding. This tape was played for the jury at trial.

At trial, MO testified that defendant put his "private parts" in hers and that it felt bad when he did. MO indicated this happened in her mother's bed. However, MO could not recall ever seeing defendant with a camera and denied making a movie with defendant.

During the trial, defendant's Illinois convictions for sexual misconduct involving minors were introduced without objection. In addition, the prosecution introduced the testimony of KD, who had been coached by defendant as a gymnastics student in 1997 when she was approximately five years old. KD testified that defendant would grab her and pull her close and then put his hand underneath her leotard and touch her vaginal area on the outside.

Defendant testified on his own behalf. He described his relationship with MO's mother and MO as a "[v]ery

loving family" and said that MO was the "daughter [he] always wished [he] had." Defendant testified he never thought about MO sexually. He denied putting his "privates" in MO's and further denied ever having MO perform fellatio on him. Defendant acknowledged that he had previously been a gymnastics teacher in Illinois and had pleaded guilty with respect to the convictions introduced earlier. He denied being sexually attracted to five-year-old girls or children in general. Defendant stated that it was a coincidence that MO was close in age to the girls involved in his prior convictions.

II. PROSECUTORIAL MISCONDUCT

First, defendant claims that the prosecution engaged in prosecutorial misconduct. We disagree.

In order to preserve a claim of prosecutorial misconduct for appellate review, a defendant must have timely and specifically objected below, unless objection could not have cured the error. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). Defendant did not object at trial to Krist's or Raymo's testimony related to the federal investigation of defendant. Nor did defendant object to any of the testimony related to defendant's arrest for possession of child pornography. Finally, defendant did not object to the prosecutor's questions and statements that defendant characterizes on appeal as arguing that defendant is a pedophile. Thus, this issue was not preserved. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

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). Prosecutorial misconduct issues are decided on a case-

by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *Thomas*, 260 Mich App at 454.

Defendant first argues that he was denied a fair trial when the prosecutor elicited testimony from Krist and Raymo indicating he was the subject of a federal child-pornography investigation. Defendant specifically argues that this evidence was irrelevant and served only to paint defendant as a bad man by implying that he was the target of a federal investigation into child pornography.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. This is a broad definition, allowing the admission of evidence that is helpful in throwing light on any material point. *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). Despite this broad definition, that Raymo may have been investigating defendant relative to child-pornography activity should have no bearing on a determination whether defendant committed the charged offense. Thus, this evidence could be characterized as irrelevant. However, a prosecutor's good-faith effort to admit evidence does not constitute misconduct. *Dobek*, 274 Mich App at 70. Even if the evidence could be characterized as irrelevant, defendant has not established bad faith.

Defendant next argues that the prosecutor engaged in misconduct by injecting other acts evidence for the purpose of showing that defendant had the propensity to commit crimes. He takes issue with references to his arrest for possession of marijuana and drug paraphernalia. Defendant specifically argues that the subject of drugs tends to inflame the passions of a jury and thus was unfairly prejudicial. Evidence is unfairly prejudicial when

it presents a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). In light of the nature of the charge defendant faced at trial and evidence of previous instances of child-sexual abuse, the argument that there was a danger the jury would give undue weight to defendant's involvement in drug use is unpersuasive. Regardless, defendant has not shown that the prosecutor was motivated by bad faith. See *Dobek*, 274 Mich App at 70.

Defendant finally argues that he was a denied a fair trial when the prosecutor argued he must have committed the charged offense because he was a pedophile. This argument is without merit. A review of the record demonstrates that the prosecutor never referred to defendant as a "pedophile." Thus, defendant's discussion of the diagnostic criteria necessary for such a diagnosis is superfluous.

In any event, even if this Court were to conclude that the prosecutor engaged in misconduct, defendant would not be entitled to a reversal of his conviction. Defendant cannot show that "the plain, forfeited error resulted in the conviction of an actually innocent defendant or . . . seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999) (quotation marks and citation omitted) (alteration in *Carines*). The testimony provided at trial by MO, coupled with the footage shown to the jury, which defendant conceded depicted himself and MO, strongly supports the verdict.

III. ADMISSION OF EVIDENCE

Next, defendant claims that the trial court denied him a fair trial by failing to exercise its duty to ensure

that the challenged evidence was not more prejudicial than probative. We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Aldrich*, 246 Mich App at 113. An abuse of discretion occurs when the trial court chooses an outcome that falls outside the permissible range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

At trial, the jury heard testimony from defendant's former gymnastics student that he had improperly touched her when she was five years old. The jury was also informed that defendant had pleaded guilty to four counts of sexually abusive activity involving minors. This evidence was introduced pursuant to both MRE 404(b) and MCL 768.27a.

MRE 404(b)(1) provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

MRE 404(b) is a rule of inclusion rather than a rule of exclusion. *People v Katt*, 248 Mich App 282, 303; 639 NW2d 815 (2001). As such, evidence of other crimes, wrongs, or acts is admissible under MRE 404(b)(1) if such evidence is (1) offered for a proper purpose, (2) relevant under MRE 402 to a fact of consequence at trial, and (3) the danger of unfair prejudice does not substantially outweigh the probative value of the evidence. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

MCL 768.27a provides in pertinent part that, "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." MCL 768.27a(1). "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." *People v Petri*, 279 Mich App 407, 411; 760 NW2d 882 (2008). However, the court must still employ the balancing test of MRE 403. See *People v Mann*, 288 Mich App 114, 118 n 12; 792 NW2d 53 (2010).

Defendant primarily argues that the challenged evidence should have been excluded because the trial court "[a]bdicated" its duty to evaluate and balance the probative value of the proposed evidence against its prejudicial effect in deciding whether to admit it. A review of the record demonstrates that this claim cannot succeed.

The trial court specifically recognized its duty to weigh the probative value of defendant's past convictions against the potential for unfair prejudice, and it determined that the record before it provided no reason to exclude the evidence. Defendant's argument that the trial court failed to appropriately analyze the proffered evidence is without merit.

Defendant also argues that KD's testimony describing defendant's conduct toward her was not sufficiently similar to the charged conduct. A showing of similarity might be required if the evidence had simply been admitted pursuant to MRE 404(b). However, this argument fails to recognize that the evidence was also

admitted under MCL 768.27a. Moreover, the testimony indicated that defendant targeted girls of MO's specific age and accordingly, was arguably more probative than prejudicial.

Likewise, defendant's intimation that the length of time between his conduct toward KD and the charged offense should have been a factor in determining its admissibility is not persuasive. MCL 768.27a does not contain a temporal limitation. The remoteness of the other act affects the weight of the evidence rather than its admissibility. *People v McGhee*, 268 Mich App 600, 611–612; 709 NW2d 595 (2005).

IV. EFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant claims that he was denied the effective assistance of counsel when trial counsel failed to object to misconduct on the part of the prosecution. We disagree.

A claim of ineffective assistance of counsel presents a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews a trial court's findings of fact, if any, for clear error, and reviews de novo the ultimate constitutional issue arising from an ineffective assistance of counsel claim. *Id*. However, this Court's review of unpreserved claims of ineffective assistance of counsel is limited to mistakes apparent on the record. *People Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

To prevail on a claim of ineffective assistance of counsel, defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) the resultant proceedings were fundamentally un-

fair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant must also overcome a strong presumption that counsel's actions were the product of sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant's claim that he was denied the effective assistance of counsel is premised on his assertion that the prosecution engaged in misconduct to which counsel posed no objection. The alleged misconduct centered on the admission of evidence pertaining to the federal investigation of child pornography and evidence of drug and drug paraphernalia possession. It is noteworthy that defendant's ineffective assistance claim is not premised on the failure to object to this evidence, but on the failure to assert that its elicitation constituted prosecutorial misconduct. Defendant has not established that the prosecutor engaged in misconduct. Accordingly, it is doubtful that an objection on this ground would have been fruitful. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (stating that defense counsel is not required to advocate a meritless position).

However, even if this Court were to agree that trial counsel should have objected to any of the alleged instances of misconduct, defendant is not entitled to a new trial when he cannot demonstrate that the allegedly deficient performance affected the outcome of trial. In light of the overwhelming evidence establishing defendant's guilt of the charged offense, notably MO's testimony and the video footage that defendant concedes depicts him and MO, defendant's claim cannot succeed.

V. RIGHT TO TRIAL

Next defendant argues that he was punished by the trial court for exercising his right to trial. We disagree.

A sentencing court cannot base its sentence on a defendant's decision to exercise his constitutional right to a jury trial. *People v Earegood*, 383 Mich 82, 85; 173 NW2d 205 (1970). However, it is not per se unconstitutional for a defendant to receive a higher sentence following a jury trial than he would have received had he pleaded guilty. *People v Rivers*, 147 Mich App 56, 60-61; 382 NW2d 731 (1985). In this case, the trial court was required by statute to impose the sentence defendant received. Accordingly, the sentence cannot be viewed as punishment for defendant's decision to proceed to trial, but rather, must be viewed as the risk he faced by not accepting a plea deal.

VI. LIFE IMPRISONMENT FOR CSC-I

Finally, defendant claims that his sentence of life imprisonment without the possibility of parole constitutes cruel and unusual punishment or that, in the alternative, his sentence constitutes an impermissible departure from the sentencing guidelines. We disagree with both arguments.

Defendant failed to challenge the constitutionality of MCL 750.520b(2)(c) below. Thus, this claim is not preserved for appellate review. *People v Eccles*, 260 Mich App 379, 385; 677 NW2d 76 (2004). This Court generally reviews constitutional questions de novo. *People v Conat*, 238 Mich App 134, 144; 605 NW2d 49 (1999). However, because this issue is unpreserved it will be reviewed for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764. Questions of statutory interpretation are reviewed de novo. *People v Schaub*, 254 Mich App 110, 114-115; 656 NW2d 824 (2002).

Defendant's sentence was imposed pursuant to MCL 750.520b(2)(c), which mandates the penalty of life im-

prisonment without the possibility of parole for a defendant over the age of 17 who commits CSC-I involving a victim less than 13 years of age when the defendant was previously convicted of a similar sex crime with a victim less than 13 years of age. Legislatively mandated sentences are presumptively proportional and presumptively valid. *People v Williams*, 189 Mich App 400, 404; 473 NW2d 727 (1991). In deciding if punishment is cruel or unusual, this Court looks to the gravity of the offense and the harshness of the penalty, comparing the punishment to the penalty imposed for other crimes in this state, as well as the penalty imposed for the same crime in other states. *People v Poole*, 218 Mich App 702, 715; 555 NW2d 485 (1996).

In *People v Hall*, 396 Mich 650, 657-658; 242 NW2d 377 (1976), the Supreme Court held that life without the possibility of parole is not cruel and unusual punishment. However, this ruling was made with respect to the crime of felony murder. *Id*.; see also *People v Launsburry*, 217 Mich App 358, 364; 551 NW2d 460 (1996) (concluding that it was not a cruel or unusual punishment to sentence a juvenile to prison for life without parole for first-degree murder); *People v Fernandez*, 427 Mich 321, 335; 398 NW2d 311 (1986) (concluding that life imprisonment without parole is not cruel and unusual punishment for conspiracy to commit first-degree murder). These cases are, however, distinguishable from the issue before this Court because murder and criminal sexual conduct are distinctly different types of crimes.

Our Supreme Court has held that the graduated system of punishment adopted by the Legislature demonstrates a careful consideration and balancing of the age of the victim and the nature of the sexual conduct. *People v Cash*, 419 Mich 230, 242-243; 351 NW2d 822

(1984). The fact that the Legislature adopted harsher punishment for those crimes involving penetration of a victim under the age of 13, even for a first-time offense,[2] indicates that such crimes are indeed grave.

In addition, a number of states authorize or mandate life in prison without parole for similar offenses. Texas requires a mandatory life sentence without the possibility of parole for repeat sexual offenders involving a victim who is a minor. See Tex Penal Code Ann 12.42(c)(4). Similarly, Louisiana mandates life in prison at hard labor without the possibility for parole for aggravated rape, which includes penetration of a minor, even for a first time offense. See La Rev Stat Ann 14:42(D)(1).[3] Montana also requires mandatory life imprisonment without parole for a repeat sexual offender if a serious bodily injury is inflicted. Mont Code Ann 45-5-503(3)(c)(ii). Oklahoma requires punishment by life in prison without parole for a repeat offender who commits "forcible anal or oral sodomy, rape, rape by instrumentation, or lewd molestation of a child under fourteen (14) years of age . . . ." Okla Stat tit 21, § 843.5(K). South Carolina requires life in prison if the criminal sexual conduct involves a statutory aggravating circumstance. SC Code Ann 16-3-655(D). Florida requires life in prison without parole for a recidivist child sexual offender. Fla Stat 775.082(3)(a)(4)(b). Georgia authorizes life in prison without parole for rape. Ga Code Ann 16-6-1. Notably, in *Norris v Morgan*, 622 F3d 1276, 1295-1296 (CA 9, 2010), the court concluded that

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[2] Such crimes are punishable by imprisonment for life or any term of years, but not less than 25 years. MCL 750.520b(2)(b).

[3] In *Kennedy v Louisiana*, 554 US 407; 128 S Ct 2641; 171 L Ed 2d 525 (2008), the United States Supreme Court held that the Eighth Amendment bars Louisiana from imposing the death penalty, as authorized by La Rev Stat Ann 14:42(D)(2), for the rape of a child when the crime did not result, and was not intended to result, in the victim's death.

a sentence of life in prison without parole for a recidivist child sex offender was not a violation of the Eight Amendment protection against cruel and unusual punishment. See also *Adaway v Florida*, 902 So 2d 746 (Fla, 2005) (concluding that a sentence of life without parole for a sex offender that victimized a child did not violate Florida's constitutional ban on cruel and unusual punishment).

In light of the foregoing, defendant has failed to overcome the presumption that his legislatively mandated sentence was proportional and valid in this case. *Williams*, 189 Mich App at 404.

Defendant's claim that his sentence constituted a departure from the sentencing guidelines without being supported by substantial and compelling reasons is without merit. Although the sentencing information report related to this case included a recommendation for a minimum sentence range of 126 to 210 months in prison, defendant's argument fails to recognize that the sentencing guidelines range does not apply to crimes for which there is a mandatory sentence. MCL 769.34(5). Moreover, imposition of a mandated sentence does not constitute a departure from the guidelines. See *People v Izarraras-Placante*, 246 Mich App 490, 497; 633 NW2d 18 (2001). Thus, it is not necessary to address defendant's argument that the trial court failed to provide substantial and compelling reasons to justify a departure in this case.

Affirmed.

OWENS, P.J., and JANSEN and O'CONNELL, JJ., concurred.

PUGH v ZEFI

Docket No. 299034. Submitted October 12, 2011, at Detroit. Decided October 20, 2011, at 9:05 a.m.

Johnetta Pugh brought an action in the Oakland Circuit Court against Fran Zefi and Farmers Insurance Exchange, seeking to recover underinsured-motorist benefits from Farmers. Pugh had suffered injuries in a car accident while a passenger in a car owned by a third party and insured by Farmers. The underinsured-motorist provision of the policy excluded coverage for bodily injuries sustained by a person while occupying the car when it was being used to carry persons or property for a charge; the exclusion did not apply to shared-expense carpools, however. The owner of the car drove Pugh and a colleague to work in exchange for a weekly payment of $20. The owner of the car maintained that the arrangement was a carpool and that the money had been used to help pay for gas. Pugh did not have a driver's license and did not take a turn driving the group to work. Farmers moved for partial summary disposition, arguing that because Pugh had hired the car's owner to drive her around, the carry-for-charge exclusion in the policy barred Pugh's recovery of underinsured-motorist benefits. The court, Daniel Patrick O'Brien, J., denied Farmer's motion, concluding that the driving arrangement could fit the definition of a carpool. Farmers appealed.

The Court of Appeals *held*:

For purposes of interpreting the term when not defined by the insurance policy, the phrases "shared-expense carpool" and "carpool" are defined as requiring only that the associated driving costs be shared, not cars. There is no need for members of the carpool to know each other socially and no requirement that the members of the carpool work at the same exact location. Because Pugh's weekly payment was used by the car's owner to help defray the cost of gasoline, and not to generate a profit, Pugh was not being carried for a charge within the meaning of the policy's exclusion. The exclusion for bodily injury sustained while carrying persons or property for a charge had accordingly not applied, and the trial court properly denied Farmers' motion for partial summary disposition.

Affirmed.

INSURANCE — UNDERINSURED-MOTORIST BENEFITS — EXCLUSIONS — SHARED-EXPENSE CARPOOLS.

For purposes of interpreting the term when not defined by the automobile insurance policy, the phrases "carpool" or "shared-expense carpool" describe an arrangement wherein the associated driving costs are shared, but not necessarily the cars; there is no need for members of the carpool to know each other socially and no requirement that the members of the carpool work at the same exact location.

Liss & Shapero (by *Anthony D. Shapero* and *Scott M. Mitnick*) for Johnetta Pugh.

Cory & Associates (by *Andrew R. Biscoglia*) for Farmers Insurance Exchange.

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

PER CURIAM. Defendant Farmers Insurance Exchange (defendant) appeals by right, challenging the circuit court's denial of its motion for partial summary disposition on the issue of underinsured-motorist coverage.[1] We affirm.

Defendant insures a vehicle owned by Orlander Meadows, Jr., which was involved in an accident while

[1] Plaintiff argues that this Court lacks jurisdiction over the present appeal because the parties "have stipulated to place this matter into binding arbitration." We agree with plaintiff's assertion that the parties stipulated that the underinsured motorist claim "will be placed into Binding Arbitration." But plaintiff fails to mention that the parties' stipulation also provided that "[t]his does not preclude [defendant] from pursuing its appellate rights." As plaintiff acknowledges in her brief on appeal, the circuit court's order of dismissal, from which defendant has appealed, was a final order appealable by right. Moreover, as noted, the stipulation specifically reserved defendant's right to appeal on the issue of underinsured-motorist coverage. Pursuant to MCR 7.203(A)(1), this Court has jurisdiction over an appeal of right filed by an aggrieved party from a final order of the circuit court. Defendant was clearly aggrieved by the circuit court's denial of its partial motion for summary disposition, and plaintiff's jurisdictional challenge is therefore without merit.

plaintiff was a passenger. Plaintiff suffered injuries and sought underinsured-motorist benefits from defendant. The underinsured-motorist provision of the insurance policy included an exception providing: "This coverage does not apply to **bodily injury** sustained by a person . . . [**w**]**hile occupying your insured car** when used to carry persons or property for a charge. This exclusion does not apply to shared-expense car pools."

Meadows drove plaintiff and a colleague to work in his vehicle, in exchange for which plaintiff gave Meadows approximately $20 a week. Meadows maintained that he was not hired and that he had never entered into a contract by which money would be exchanged for his driving services. Instead, Meadows maintained, he was involved in a carpool. Meadows argued that he never charged or billed plaintiff for his driving services, but that plaintiff would occasionally "chip in" money to help pay for gasoline. Meadows stated that any money he collected "was used primarily for gas and was not earned income." Plaintiff had no driver's license and thus never took turns driving.

Defendant argued before the circuit court that plaintiff had "hired . . . Meadows . . . to drive her around" and that she was accordingly not entitled to underinsured-motorist benefits. Defendant maintained that this was unequivocally a "carry for charge situation," and not a carpool situation. The circuit court ruled that the arrangement could fit into the definition of a carpool and therefore denied defendant's motion for partial summary disposition.

We review de novo the circuit court's grant or denial of a motion for summary disposition. *Woodman v Kera LLC*, 486 Mich 228, 236; 785 NW2d 1 (2010). Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue of material fact except as to

the amount of damages and the moving party is entitled to full or partial judgment as a matter of law. The court must consider the pleadings, affidavits, depositions, admissions, and other evidence in a light most favorable to the nonmoving party. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993).

Viewing the documentary evidence in a light most favorable to plaintiff, the circuit court correctly concluded that the arrangement at issue in this case qualified as a "shared-expense car pool[]" within the meaning of the insurance policy.

Preliminarily, we note that this case involves the interpretation of Meadows's insurance policy only. It does not concern the no-fault act because underinsured-motorist coverage is optional and thus solely contractual. *Rory v Continental Ins Co*, 473 Mich 457, 465-466; 703 NW2d 23 (2005). Insurance contracts are interpreted like any other contract, and their construction and interpretation are questions of law for the court. *Farm Bureau Mut Ins Co v Buckallew*, 246 Mich App 607, 611; 633 NW2d 473 (2001). The court will read the contract as a whole and enforce the written terms according to their plain and ordinary meaning. *Id*. "Clear and specific exclusionary clauses must be given effect, but are strictly construed in favor of the insured." *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 333; 632 NW2d 525, 528 (2001).

The insurance policy at issue in the present case does not define "car pools" or "shared-expense car pools." Therefore, it is appropriate to consult a dictionary to determine the ordinary or commonly used meaning of these terms. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 262; 617 NW2d 777 (2000).

The parties disagree concerning the definition of "car pool" and whether plaintiff was being "carr[ied] . . . for

a charge" in this case. Defendant argues that in order for a given arrangement to qualify as a "car pool," all the parties involved must take turns driving. Defendant further argues that plaintiff was being carried for a charge because she paid Meadows approximately $20 a week to drive her to work. In contrast, plaintiff argues that a given arrangement can qualify as a car pool even if the parties do not share driving responsibility. Plaintiff also contends that Meadows, plaintiff, and the other passenger in this case were merely "shar[ing] in the expenses." For the reasons that follow, we agree with plaintiff.

It is true that *Random House Webster's College Dictionary* (1997) defines a "carpool" as "an arrangement among automobile owners by which each in turn drives the others to and from a designated place." However, Ballentine's Law Dictionary (3d ed) clarifies that a "car pool" can also be "[a]n arrangement whereby two or more persons ride to work . . . on a share-the-expense agreement if only the car of one is used." Courts in other jurisdictions that have interpreted analogous insurance policy language have found no requirement that carpool participants take turns driving. For instance, in *Aetna Cas & Surety Co v Mevorah*, 149 Misc 2d 1011, 1013-1015; 566 NYS2d 842 (1991), the court considered a situation in which a driver regularly drove several individuals to work, always in the driver's own van. The *Mevorah* court explained that

> a fair and reasonable definition of the term 'share-the-expense' car pool extends to the situation herein, wherein [the driver] traveled to work on a daily basis and transported a small group of approximately eight regular riders, friends and nonfriends, over a period of time, charging them a sufficient amount to cover the expenses incurred

> for gas, tolls, insurance and other expenses incident to their use of the van. [*Id*. at 1015.]

The court further noted that the driver "did not solicit the general public as passengers on her van, and her uncontroverted testimony indicated that her use of the van was not a profit-making or motivated enterprise." *Id*. at 1015-1016. Similarly, in *Gen Accident Ins Co of America v Gonzales*, 86 F3d 673, 674 (CA 7, 1996), the United States Court of Appeals for the Seventh Circuit considered an arrangement in which one man drove four of his coworkers to work each day, always in his own car, for a daily fee of $5 per passenger. The *Gonzales* court observed that even though the driver charged his passengers for the trip, this charge "did not exceed [the driver's] actual expenses" and was not even enough to "cover the expenses borne by [the driver]." *Id*. at 678-679. The *Gonzales* court ultimately concluded that the arrangement in question was "a 'share-the-expense car pool' type of arrangement" and "thus an exception to the policy exclusion against carrying persons for a fee." *Id*. at 679.

The passengers in *Mevorah* and *Gonzales* rode in the same driver's vehicle each day and did not take turns driving their own cars. Moreover, although the passengers in *Mevorah* and *Gonzales* paid a regular fee to the driver, both the *Mevorah* court and the *Gonzales* court ultimately concluded that the arrangement at issue qualified as a "share-the-expense car pool." *Mevorah*, 149 Misc 2d at 1016; *Gonzales*, 86 F3d at 679. Like the courts in *Mevorah* and *Gonzales*, we conclude that "shared-expense car pools" require only the sharing of costs—not the sharing of cars. We also conclude that, because plaintiff's weekly payment of $20 was used merely to help defray the cost of gasoline, and not to

generate a profit for Meadows, plaintiff was not being "carr[ied] . . . for a charge" within the meaning of the insurance policy.

Nor are we persuaded by defendant's argument that a different result is compelled by our Supreme Court's decision in *Burgess v Holder*, 362 Mich 53; 106 NW2d 379 (1960). The insurance policy at issue in *Burgess* contained an exclusion providing that " '[t]he company shall not be liable for any loss or claim arising while the automobile shall be rented or used for the transportation of passengers for a specific charge.' " *Id*. at 54-55. Turning back to the present case, the fact that plaintiff "chip[ped] in" the same amount of money each week to help defray the cost of gasoline does not in any way establish that Meadows charged plaintiff a fixed amount for his services, especially given Meadows's explicit testimony to the contrary. Indeed, as this Court has explained, "evidence of payment by a passenger to a driver, in and of itself, is not sufficient to characterize the passenger as a matter of law as a passenger for hire." *Perlmutter v Whitney*, 60 Mich App 268, 275; 230 NW2d 390 (1975).[2]

We also reject defendant's argument that a given arrangement does not qualify as a "car pool" unless the persons involved are "friends" or "coworkers." For example, the *Mevorah* court classified the arrangement at issue in that case as a carpool even though some of the passengers were the driver's "nonfriends." *Mevorah*, 149 Misc 2d at 1012, 1015. Despite defendant's assertion to the contrary, there is simply no requirement that members of a carpool know one another

[2] We further note that participants in a "share-the-expense" carpool need not share costs with absolute, mathematical certainty. Shared-expense carpools can encompass other, less formal arrangements. *Mevorah*, 149 Misc 2d at 1015.

socially. See *Dutcher v Rees*, 331 Mich 215, 219; 49 NW2d 146 (1951) (concluding that "[t]he fact that [the parties] had not met each other until the evening in question does not in itself make the tender of a ride a commercial transaction").[3]

Lastly, defendant takes issue with the fact that plaintiff and Meadows were not going to the same exact destination. Many carpool arrangements involve persons who work at different locations in the same city or general geographic area. While the general location is likely the same, the precise destination for each member of a carpool need not be identical. This argument lacks merit.

In sum, we conclude that plaintiff and Meadows were participants in a shared-expense carpool. Accordingly, the insurance policy's exclusion for "bodily injury sustained . . . [w]hile . . . carry[ing] persons or property for a charge" did not apply in this case. The circuit court properly denied defendant's motion for partial summary disposition with respect to the issue of underinsured-motorist coverage.

In light of this conclusion, we need not address the remaining arguments raised by the parties on appeal.

Affirmed. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219.

OWENS, P.J., and JANSEN and O'CONNELL, JJ., concurred.

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[3] Although not specifically called upon to define the term carpool, this Court has previously characterized an arrangement in which two college students paid $25 for a ride home from a third student with whom they were "previously unacquainted" as a "carpooling" arrangement. *Thomas v Tomczyk*, 142 Mich App 237, 239, 241; 369 NW2d 219 (1985).

HOPKINS v DUNCAN TOWNSHIP

Docket No. 300170. Submitted October 11, 2011, at Marquette. Decided October 20, 2011, at 9:10 a.m. Leave to appeal denied, 491 Mich 908.

Douglas Hopkins brought an action in the Houghton Circuit Court, alleging that Duncan Township violated Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq*., when defendant failed to produce handwritten notes taken during meetings of the Duncan Township Board of Trustees by a board member for his personal use in response to plaintiff's FOIA request. The court, Charles R. Goodman, J., granted summary disposition in favor of defendant, holding that the notes were not part of the public record and, thus, the notes were not subject to disclosure under FOIA. Plaintiff appealed.

The Court of Appeals *held*:

Under FOIA, a public body must disclose all public records which are not specifically exempt under the act. A writing can become a public record after its creation if used by a public body in the performance of an official function, regardless of who prepared it. In this case, a member of the township's board of trustees habitually took notes in a personal journal to enhance his memory of events, including notes regarding township board meetings. The notes had not been read by other officials, had not been consulted by the member in the course of the board's decision-making, had not been used by the board, and had been retained at the member's sole discretion. Accordingly, the notes had not been used by a public body in the performance of an official function and had not become a public record subject to disclosure. Instead, the notes were personal in nature. The trial court properly granted summary disposition.

Affirmed.

RECORDS — FREEDOM OF INFORMATION ACT — WORDS AND PHRASES — PUBLIC RECORDS — PERSONAL NOTES.

Under the Freedom of Information Act, a public body must disclose all public records which are not specifically exempt under the act; a writing can become a public record after its creation if used by a public body in the performance of an official function, regardless of

> who prepared it; handwritten notes taken by a member of a township board of trustees for his or her personal use, not circulated among other board members, not used in the creation of the minutes of any meetings, and retained or destroyed at the member's sole discretion are not public records subject to disclosure under the act (MCL 15.232[e]).

Hahner Law Offices, P.C. (by *Mikael G. Hahner*), for Douglas Hopkins.

Vairo, Mechlin & Tomasi, PLLC (by *David R. Mechlin*), for Duncan Township.

Before: STEPHENS, P.J., and SAWYER and K. F. KELLY, JJ.

PER CURIAM. Plaintiff appeals as of right an order granting summary disposition in favor of defendant on plaintiff's claim that defendant violated Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq*. We affirm, holding that handwritten notes of a township board member taken for his personal use, not circulated among other board members, not used in the creation of the minutes of any of the meetings, and retained or destroyed at his sole discretion, are not public records subject to disclosure under FOIA.

I. THE PARTIES' PLEADINGS

On March 18, 2010, plaintiff filed a complaint alleging a FOIA violation. Plaintiff, a Duncan Township resident, claimed that defendant had failed to produce records plaintiff had requested on September 9, 2009, specifically "Copies of any notes taken by any elected official during any Duncan Township Board or Zoning Board meetings over the past 12 months[.]" Although defendant claimed that no zoning board meetings had been held, it did not address meetings held by the

Duncan Township Board of Trustees. Plaintiff alleged that a videotape revealed board members taking notes during the meetings.

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant provided the affidavits of the township board members, which revealed that only one individual—Frank Pentti—took notes at the meeting. Because the notes were strictly for his personal use, kept in his personal journal, not shared with other members of the board, and never placed in defendant's files, defendant argued that Pentti's notes did not constitute "public records." MCL 15.232(e). Pentti specifically averred that "[a]ny notes that I may have taken during Township Meetings were written in my personal diary, which also includes notes of meetings that [I] had with other groups such a [sic] local historical society."

Plaintiff filed a response to defendant's motion, arguing that Pentti's notes were, in fact, public records. Pentti acknowledged that he took notes at the meetings, and video footage from such meetings confirmed that he went back into his notes to advise the board of his recollection of what they had discussed at earlier meetings. Additionally, plaintiff argued, defendant never claimed that the notes were exempt and never specifically denied plaintiff's FOIA request, as was required. Plaintiff asserted that defendant had failed to prove that defendant's refusal to disclose the notes was correct. Included in plaintiff's response were DVDs of defendant's meetings for August, September, and October 2009.

At his deposition, Pentti testified that he was a trustee on the Duncan Township Board of Trustees. Pentti was also secretary of the Kenton Historical Society. The township board had two trustees, a super-

visor, a clerk and a treasurer. The clerk conducted her business from her residence and from a store that she owned. The town's records were held jointly with the clerk and in the treasurer's office, which consisted of a desk and a chair in the Sidnaw town hall. There was also a building next door to the town hall where other "ancient" records were found, but "certainly, all active township records would be either with the clerk or the treasurer." Pentti brought his notebook to the deposition, which he referred to as his personal diary. The notebook contained a "mishmash of everything." Pentti did not use the notes in the performance of his duties as a trustee; rather, "it's something I started doing in college; and I found out that if I write things down, they stick—things stick with me better." Pentti did not refer to the notes in the course of participating in township board meetings. He did not believe that he used the notes for any purpose other than the "mnemonic thing. I—seems that if I write it down, it goes in up here." Pentti saw other members jot down notes on copies of budgets and similar memoranda, but had no idea what the other board members did with their notes. Pentti deposited copies of the budget, agenda, and other notes in the garbage. Pentti did not believe that he ever referred to his notes during a township meeting with other board members, nor had he ever referred to his notes in discussing matters with any citizen. He had never been asked to refer to his notes by the clerk in preparation of the minutes. During direct examination by plaintiff's attorney, Pentti testified:

> *Q.* Okay. The notes that you make at the meetings, you're making those notes while you're participating as a trustee for Duncan Township, correct?
>
> *A.* I would not say they're an inherent part of my participation; it's just the way I have existed since college.

Q. Okay.

A. I jot things down.

Q. But when you do that, you're acting as a trustee of the township?

A. At the board meeting, yes.

During cross-examination by defense counsel, Pentti testified:

Q. Mr. Pentti, the preparation of your personal notes that were made during these township board meetings, were they prepared in any way in connection with either your role or responsibilities as a member of the township board.

A. No, I think they're just personal notes.

At her deposition, Shirley Wittingen testified that she was the township clerk. Wittingen also owned a convenience store. She was responsible for bookkeeping, recordkeeping, taking minutes of the meetings, and running elections. All of the board's files were kept in Wittingen's store. Some were in storage in a building next to the town hall. When Wittingen got plaintiff's request for documents, she went into her files to see if anything was there. She also asked the board members whether they had any notes. Pentti "was the only one that said that he had some notes. But they were his personal notes; they were not in the files." Wittingen had never reviewed Pentti's notes. Wittingen had not received official training about FOIA, but had a reference book that she consulted. She admitted that she never told plaintiff about Pentti's notes because she believed that they were not subject to disclosure.

David Johnson provided an affidavit, averring that he had attended several township board meetings, including those that took place in September and Octo-

ber 2009. Johnson witnessed Pentti "making notes in a spiral bound notebook." Additionally:

> 5. During one of the meetings I attended Skye Johnson inquired of the Board whether her home was in compliance and to what agencies she had been referred to.
>
> 6. At that meeting, I observed Frank Pentti refer to his notebook and turn pages back and he told her the agencies she was referred to.

II. HEARING ON DEFENDANT'S MOTION

At the motion hearing, defense counsel relied on *Howell Ed Ass'n MEA/NEA v Howell Bd of Ed*, 287 Mich App 228; 789 NW2d 495 (2010), arguing that Pentti's notes were not public documents because they were not stored or retained by the township in the performance of an official function. Instead, plaintiff sought disclosure of Pentti's personal journal. Defendant did not argue that the documents were exempt from disclosure, but that they were not public in the first place.

In response, plaintiff claimed there was never a proper denial given; rather, defendant had made it appear as if no notes existed. Plaintiff asked the court to conduct an in camera review of Pentti's notebook. Plaintiff contended that because there was no centralized filing and recordkeeping system, defendant could not argue that the documents needed to be under the control of the township and that the heart of the matter was that Pentti had taken notes in his official capacity and the clerk was under an obligation to search for them. Citing *Walloon Lake Water Sys, Inc v Melrose Twp*, 163 Mich App 726; 415 NW2d 292 (1987), plaintiff argued that an otherwise personal item may become a public record.

Defendant argued that an in camera review would only be appropriate if the trial court first determined that the notes were public records.

The trial court declined to review the notes in camera. It ruled:

> Here's what I'm thinking; Your motion is a (C)(10) motion. Um, I'm wondering if (C)(8)—I don't think that personal notes are public records. All right. Um, I think personal notes are just that. Personal notes. They're not intended to be a public record. They're intended to aid the maker of the note for whatever reason, maybe doesn't feel like he's got a good memory, or she's got a good memory; just a note taker. Some people are note takers, they're writing all the time.
>
> * * *
>
> And I don't think that that person's, um, the way they function means that everything that they write down is all of a sudden part of the public record. Um, the notes of meetings that become a part of the record are the clerk's. That's within the official duty of the clerk, so obviously those minutes are public record. But someone who's a member of the board or whatever, and who's saying–writes down a note, ah, Mr. Smith from the audience indicated he's not for this ordinance, or whatever, just to keep track so when he wants to talk about it later he can reference Mr. Smith out there. I don't think that becomes a public record. That's a record of an individual member for the individual's own personal use. I don't think it's in furtherance, really, of the official business. And I think the *Howell* case used that language. Um, where was that, in talking about the emails they said, "However, the school district does not assert that its backup system was purposely designed to retain and restore personal emails, or that those emails have some official function." So I got the impression there has to be some official function. And I don't see an official function to an individual member's notes. It's to assist that individual member.

The trial court entered judgment in defendant's favor. Plaintiff now appeals as of right.

III. STANDARD OF REVIEW

Although the trial court made some indication that it would entertain an MCR 2.116(C)(8) motion, it is clear from the record that, in fact, the motion was granted pursuant to MCR 2.116(C)(10) because the court had to go beyond the mere pleadings in order to conclude that the notes at issue were not subject to disclosure. See *Capitol Props Group, LLC v 1247 Center Street, LLC*, 283 Mich App 422, 425; 770 NW2d 105 (2009). This Court reviews de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition under MCR 2.116(C)(10) is appropriate only when the moving party can demonstrate there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Rose v Nat'l Auction Group*, 466 Mich 453, 461; 646 NW2d 455 (2002). This Court also reviews de novo a trial court's legal determination in a FOIA case. *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 470-472; 719 NW2d 19 (2006).

IV. STATUTORY LAW AND CASELAW

MCL 15.231(2) provides that

> [i]t is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

Under FOIA, a public body must disclose all public records that are not specifically exempt under the act. MCL 15.233(1); *Coblentz v City of Novi*, 475 Mich 558, 571, 573; 719 NW2d 73 (2006). The exemptions are specifically enumerated in MCL 15.243, but are inapplicable to this case because defendant does not claim that the information sought was exempt from disclosure; rather, defendant maintains that the information was not a public record subject to disclosure, obviating the need to address whether the information was protected by any of the enumerated exemptions.

MCL 15.232(e) defines "public record" as follows:

> "Public record" means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created. Public record does not include computer software. This act separates public records into the following 2 classes:
>
> (*i*) Those that are exempt from disclosure under [MCL 15.243].
>
> (*ii*) All public records that are not exempt from disclosure under [MCL 15.243] and which are subject to disclosure under this act.

A "writing" includes all means of recording or retaining meaningful content, including handwriting. MCL 15.232(h); *Patterson v Allegan Co Sheriff*, 199 Mich App 638, 639-640; 502 NW2d 368 (1993). A writing can become a public record after its creation if possessed by a public body in the performance of an official function, or if used by a public body, regardless of who prepared it. *MacKenzie v Wales Twp*, 247 Mich App 124, 129; 635 NW2d 335 (2001); *Detroit News, Inc v Detroit*, 204 Mich App 720, 723-724; 516 NW2d 151 (1994). Mere possession of a record by a public body does not, however, render it a public record; a record must be

used in the performance of an official function to be a public record. *Howell Ed Ass'n*, 287 Mich App at 236.

At the heart of this case is whether Pentti's notes were taken in the performance of an official function. If so, then the notes are subject to disclosure under FOIA. The goal in interpreting a statute is to ascertain the Legislature's intent. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548–549; 685 NW2d 275 (2004). The first step in doing so is looking to the language used. *Id.* at 549. Effect must be given to each word, reading provisions as a whole, and in the context of the entire statute. *Green v Ziegelman*, 282 Mich App 292, 301–302; 767 NW2d 660 (2009). If the language is clear and unambiguous, the statute must be applied as written. *Id*. at 302. In such instances, judicial construction is neither necessary nor permitted. *People v Shakur*, 280 Mich App 203, 209; 760 NW2d 272 (2008). Further, because FOIA is a prodisclosure statute, it must be broadly interpreted to allow public access. *Practical Political Consulting, Inc v Secretary of State*, 287 Mich App 434, 465; 789 NW2d 178 (2010).

Plaintiff relies on *Walloon Lake*, 163 Mich App 726, as well as this Court's unpublished opinion *WDG Investment Co, LLC v Mich Dep't of Mgt & Budget*, unpublished opinion per curiam of the Michigan Court of Appeals, issued October 25, 2002 (Docket No. 229950), in support of his position that Pentti's personal notes were transformed into public documents.

In *Walloon Lake*, the plaintiff sought disclosure of a personal letter that had been read into the record at a township meeting. This Court concluded that because the letter was read into the record at a public meeting and its contents were considered by the township board, it became a public record subject to disclosure under FOIA. *Walloon Lake*, 163 Mich App at 729.

> Without opining as to what extent an outside communication to an agency constitutes a public record, we believe that here, once the letter was read aloud and incorporated into the minutes of the meeting where the township conducted its business, it became a public record "used . . . in the performance of an official function." [*Id.* at 730.]

In deciding that the letter had been "used" for purposes of the FOIA, this Court explained:

> To be fully aware of the affairs of government, interested citizens are entitled to know not only the basis for various decisions to act, but also for decisions not to act. To further this purpose, we must construe the FOIA in such a manner as to require disclosure of records of public bodies used or possessed in their decisions to act, as well as of similar records pertaining to decisions of the body not to act. Under this holding, not every communication received by a public body will be subject to disclosure. But where, as here, the content of a document is made part of the minutes of the body's meeting where it conducts its official affairs and the content of the document served as the basis for a decision to refrain from taking official affirmative action, that document must be considered a "public record," as defined by the FOIA. [*Id.* at 730-731.]

Thus, a private letter became public because it was read into the record of the township meeting and used by the township board to resolve a specific issue. In this case, Pentti's notes were never read into the record, nor is there any evidence that the notes were used in the township's decisions. The notes were kept for Pentti's personal use and were not provided to any of the other board members.

In *WDG*, the plaintiffs sought "all notes or other writings" of those individuals who participated in evaluating submitted proposals in connection with the construction of a public facility, regardless of whether individuals were employed by the agency. *WDG*, unpub

op at 7. The defendants argued that there was no duty to disclose such "personal" notes. In a footnote, this Court stated, "It is not at all clear from the record what defendants mean by 'personal' notes. We therefore decline to address this argument at this time." *Id*. at 7 n 4. This Court went on to hold that the defendants had failed to meet their burden to justify the nondisclosure given that the defendants only argued that the notes were located in other departments. *Id*. at 8. "[E]ven if the requested records were not retained by the DMB, the DMB was still under a duty to conduct a reasonable search to request and locate the records." *Id*. at 7. Again, the case is not helpful to plaintiff. This Court specifically declined to decide whether personal notes could be considered public documents; instead, the focus was on the duty of the defendants to conduct a reasonable search to request and locate documents, which they clearly did not do. In contrast, the township clerk asked the individual township board members if they had any notes from the year's meetings. Only Pentti had notes, which he claimed were in his personal diary.

During the motion hearing, the parties and the trial court referred to the *Howell Ed Ass'n* case, but the trial court hesitated in relying too heavily on the case, as the matter had been appealed to the Michigan Supreme Court. Since that time, however, the Michigan Supreme Court has denied leave to review.[1] Though not directly on point, *Howell Ed Ass'n* is instructive. It involved a "reverse" FOIA issue, in which a teacher's union objected to the release of e-mails between the union and its members, arguing, among other things, that personal e-mails were not "public records." *Howell Ed*

[1] *Howell Ed Ass'n MEA/NEA v Howell Bd of Ed*, 488 Mich 1010 (2010), recon den 489 Mich 976 (2011).

Ass'n, 287 Mich App at 232. The plaintiffs' appeal was limited to whether the trial court properly concluded that the e-mails generated through the school district's e-mail system, retained and stored by the district, were public records subject to disclosure. *Id.* at 235. This Court found that the e-mails at issue had nothing to do with the essential operations of the schools and declined to find that they were equivalent to student information. *Id.* at 236-237. Further, this Court noted that

> "unofficial private writings belonging solely to an individual should not be subject to public disclosure merely because that individual is a state employee." We believe the same is true for all public body employees. Absent specific legislative direction to do so, we are unwilling to judicially convert every e-mail ever sent or received by public body employees into a public record subject to FOIA. [*Id.* at 237, quoting *Kestenbaum v Mich State Univ*, 414 Mich 510, 539; 327 NW2d 783 (1982).]

The fact that the district maintained and saved the e-mails did not render e-mails sent by its employees while at work subject to release under FOIA. *Howell Ed Ass'n*, 287 Mich App at 237. This Court easily reconciled its finding with *Walloon Lake*, finding that it is possible that a personal document can become public, but only because "[the document's] subsequent use or retention 'in the performance of an official function . . . rendered [it] so." *Id.* at 243. This Court also referred to *WDG*, and noted that while the case declined to define the word "personal," it nevertheless offered "limited guidance." *Id.* at 244. "[T]o the degree [*WDG*] is helpful, it indicates that individual notes taken by a decisionmaker on a governmental issue are still public records when they were taken in furtherance of an official function." *Id.*

Defendant also cites *Porter Co Chapter of the Izaak Walton League of America, Inc v United States Atomic*

Energy Commission, 380 F Supp 630 (D Ind, 1974), in support of its position. Federal court decisions regarding whether an item is an "agency record" under the federal freedom of information act, 5 USC 552, are persuasive in determining whether a record is a "public record" under the Michigan FOIA. *MacKenzie*, 247 Mich App at 129, n 1. In *Porter*, the plaintiffs requested "[a]ssorted generally untitled, undated and uncirculated handwritten personal notes of [Atomic Energy Commission (AEC)] and Argonne National Laboratory personnel[.]" *Porter*, 380 F Supp at 632. In granting the defendant's motion for summary judgment, the district court noted that uncirculated handwritten personal notes were not subject to disclosure:

> In executing their responsibilities relating to the AEC's health and safety and environmental reviews, individual AEC staff members frequently prepare assorted handwritten materials for their own use. Such materials are not circulated to nor used by anyone other than the authors, and are discarded or retained at the author's sole discretion for their own individual purposes in their own personal files. The AEC does not in any way consider such documents to be 'agency records,' nor is there any indication in the record that anyone other than the author exercises any control over such documents. [*Id.* at 633.]

V. APPLICATION OF LAW TO THE FACTS

Plaintiff argues that Pentti took his notes while acting in his official capacity as an elected official at a public meeting. Defendant does not dispute that Pentti's handwritten notes are a "writing" for purposes of FOIA. MCL 15.232(h). Nor does defendant argue that a writing that is otherwise private may become a public record subject to disclosure if the writing is possessed by the public body in the performance of an official function or if it is used by the public body. Defendant's

argument is simply that Pentti's handwritten notes were not in furtherance of an *official function*; rather, Pentti's notes, taken voluntarily, not circulated among other board members, not used in the preparation of meeting minutes, and retained at his sole discretion were private writings not subject to disclosure under FOIA. We agree.

The town's records were held jointly with the clerk and in the treasurer's office, which consisted of a desk and a chair in the Sidnaw town hall. There was also a building next door to the town hall where other "ancient" records were found, but "certainly, all active township records would be either with the clerk or the treasurer." The clerk conducted her business from her residence and from a store that she owned. When plaintiff's FOIA request was made, the clerk immediately went to those records. Finding nothing there, she then asked each board member whether they had notes of the meetings. Pentti reported that he had kept notes in his personal diary, where he also kept notes of his other affairs, including as secretary of the Kenton Historical Society and a "mishmash of everything." Pentti took notes in hopes that in so doing, he would better retain information. Pentti did not refer to the notes in the course of participating in township board meetings. Plaintiff claims otherwise, pointing to the sworn affidavit of David Johnson, who specifically averred that during one of the meetings he saw Pentti refer to his prior notes in answer to an inquiry from a citizen who asked to whom she had been previously referred for bringing her home into compliance with local building ordinances. Even accepting the averment as true, it appears that Pentti did little other than offer the citizen contact information. Such information had nothing to do with substantive decision-making.

Pentti saw other township board members jot down notes, but had no idea what the other board members did with their notes. For his part, Pentti often deposited copies of the budget, agenda, and other notes in the garbage. None of the board members shared notes with one another. The clerk never asked Pentti to refer to his notes in her preparation of the minutes, nor were the notes circulated among other board members. When asked if the notes were prepared in connection with his responsibilities as a member of the board, Pentti testified, "No, I think they're just personal notes."

The foregoing facts demonstrate that Pentti's notes were never in the township's possession, nor were they used in the performance of an official function. Regardless of plaintiff's opinion regarding the township's loose recordkeeping, the fact remains that all of the public records relative to the township board meetings were kept and retained by the township clerk, either at her home or the convenience store she owned. The clerk was responsible for preparing the minutes of the meetings and admitted that she never saw nor read any of Pentti's notes. The fact that Pentti's notes were not for substantive decision-making or recordkeeping is supported by the fact that Pentti, alone, retained the records at his sole discretion. Unlike *Walloon Lake*, in which a private letter was read into the record and incorporated into the board's substantive decision-making, there is absolutely no support that anyone other than Pentti read the notes. *Howell Ed Ass'n* presented the opposite situation, in which the documents (e-mails) at issue were retained by the agency. This Court found that the mere possession of the material sought did not convert an otherwise private writing into a public document subject to disclosure. Quite the opposite:

> "[U]nofficial private writings belonging solely to an individual should not be subject to public disclosure merely because that individual is a state employee." We believe the same is true for all public body employees. Absent specific legislative direction to do so, we are unwilling to judicially convert every e-mail ever sent or received by public body employees into a public record subject to FOIA. [*Howell Ed Ass'n*, 287 Mich App at 237, quoting *Kestenbaum*, 414 Mich at 539 (citation omitted).]

Just as not every e-mail prepared and sent by a teacher on school-owned computer equipment was subject to disclosure, not every handwritten note prepared by a member of a public body, not otherwise used by the body's remaining members, should be subject to disclosure. Instead, individual notes taken by a decision-maker on a governmental issue are only a public record when the notes are taken in furtherance of an official function. *Howell Ed Ass'n*, 287 Mich App at 244.

We believe that the case most on point is *Porter*, which concluded that untitled, undated and uncirculated handwritten personal notes were not subject to disclosure under the federal freedom of information act. *Porter*, 380 F Supp at 633. Notes not considered by other members of the board and retained or disposed of at the discretion of the writer cannot be anything other than personal in nature. *Porter* also states:

> Disclosure of such personal documents would invade the privacy of and impede the working habits of individual staff members; it would preclude employees from ever committing any thoughts to writing which the author is unprepared, for whatever reason, to disseminate publicly. Even if the records were 'agency records,' their disclosure would be akin to revealing the opinions, advice, recommendations and detailed mental processes of government officials. Such notes would not be available by discovery in ordinary litigation. [*Id.*]

Finally, given that Pentti's notes were not public records subject to disclosure under FOIA, plaintiff's claims that defendant failed to properly respond to the FOIA inquiry pursuant to MCL 15.235(2) and (3) are without merit. Plaintiff's claim that the trial court should have conducted an in camera review of the notes under MCL 15.240(4) is also without merit because the statute specifically provides that a "court, on its own motion, may view the public record in controversy in private before reaching a decision." Because Pentti's notes are not public records kept in the furtherance of a governmental function, an in camera review was unnecessary.

VI. CONCLUSION

Handwritten notes of a township board member taken for his personal use, not circulated among other board members, not used in the creation of the minutes of any of the meetings, and retained or destroyed at his sole discretion are not public records subject to disclosure under FOIA.

The trial court did not err in granting defendant summary disposition.

Affirmed.

STEPHENS, P.J., and SAWYER and K. F. KELLY, JJ., concurred.

PETIPREN v JASKOWSKI

JASKOWSKI v PETIPREN

Docket Nos. 298088 and 301125. Submitted July 6, 2011, at Detroit. Decided October 20, 2011, at 9:15 a.m. Leave to appeal granted, 491 Mich 913.

Thomas J. Petipren brought an action in the Sanilac Circuit Court against Rodney Jaskowski, who was the police chief for the village of Port Sanilac, and the village of Port Sanilac, alleging that Jaskowski had assaulted and wrongfully arrested him for resisting and obstructing and disorderly conduct (Docket No. 298088). Jaskowski filed a separate suit against Petipren, alleging assault and negligent and intentional infliction of emotional distress, and Petipren filed a counterclaim in the separate lawsuit, alleging claims of negligence, negligent infliction of emotional distress and intentional infliction of emotional distress against Jaskowski (Docket No. 301125). Petipren's band had been scheduled to perform at a fundraiser hosted by the village of Port Sanilac. Attendees complained about the style of music performed before Petipren's arrival and performance. Jaskowski was called to the event, which was cancelled at some point. Jaskowski arrested Petipren while he was warming up on his drum set, but the parties' respective versions of the circumstances surrounding the arrest were completely different. Petipren alleged that he did not resist arrest, but Jaskowski barged through the drum set and pushed him several times. Jaskowski alleged that Petipren refused to stop playing, swore at him, struck him in the jaw, and repeatedly resisted the arrest. Jaskowski filed motions for summary disposition pursuant to MCR 2.116(C)(7) in both cases on the basis that under MCL 691.1407(5), Petipren's claims were barred by governmental immunity. The court, Donald A. Teeple, J., denied Jaskowski's motions. Jaskowski appealed both orders, and this Court consolidated the appeals.

The Court of Appeals *held*:

Under MCL 691.1407(5), judges, legislators, and the elective or highest appointive executive officials of all levels of government are immune from tort liability for injuries to persons or damage to property if they are acting within the scope of their judicial, legislative, or executive authority. While a police chief is recognized as the highest appointive official in the police department, he or she would

not be immune from tort liability unless the challenged acts fell within the scope of his or her executive authority. Whether the highest executive official of a local government was acting within his or her authority depends on (1) the nature of the acts, (2) the position held by the official, (3) the local law defining the official's authority, and (4) the structure and allocation of powers at that particular level of government. The official's motive is irrelevant. The trial court properly denied Jaskowski's motions for summary disposition. Jaskowski's duties as chief of police generally involved policy, procedure, administration, and personnel matters and were distinct from the nature of the duties of an ordinary police officer. Jaskowski was not acting within the scope of his executive duties when he performed the ordinary police act of arresting Petipren and was thus not entitled to absolute immunity. The fact that Jaskowski occasionally performed the duties of an ordinary police officer did not place those functions within the scope of the executive duty of the police chief; rather, they remained within the scope of the functional responsibilities of the police department generally.

Affirmed.

MURRAY, P.J., dissenting, would have reversed and remanded for entry of an order granting Jaskowski's summary disposition motions on the basis that as the chief of police, Jaskowski was the highest executive official of a level of government and had acted within the scope of his employment when arresting Petipren. Jaskowski averred in his affidavit that arresting offenders was one of the functional responsibilities of his position as chief of police and Petipren failed submit any evidence to dispute this fact. On these facts, Judge MURRAY would have held that Jaskowski was entitled to absolute immunity under MCL 691.1407(5).

1. GOVERNMENTAL IMMUNITY — EXECUTIVE OFFICIALS — CHIEFS OF POLICE.

Judges, legislators, and the elective or highest appointive executive officials of all levels of government are immune from tort liability for injuries to persons or damage to property if they are acting within the scope of their judicial, legislative, or executive authority; a chief of police is generally recognized as the highest appointive official in a police department; if the duties of an ordinary police officer—such as effecting arrests—are outside the scope of the police chief's executive authority, a police chief acting as an ordinary police officer is not entitled to absolute immunity simply because he or she is also the police chief, even if he or she occasionally performs those ordinary duties, but would be entitled to the immunity provided to governmental employees if all the

statutory requirements for that immunity are satisfied (MCL 691.1407[2], [5].)

2. GOVERNMENTAL IMMUNITY — EXECUTIVE OFFICIALS — EXECUTIVE AUTHORITY.

Whether an elective or highest executive official of a level of local government was acting within his or her authority and therefore immune from tort liability depends on (1) the nature of the acts, (2) the position held by the official, (3) the local law defining his or her authority, and (4) the structure and allocation of powers at that particular level of government; the official's motive is irrelevant.

Cutler & Associates, P.C. (by *Michael H. Cutler*), for Thomas J. Petipren.

McGraw Morris, P.C. (by *G. Gus Morris* and *D. Randall Gilmer*), and *Stephens & Moore* (by *Phoebe J. Moore*) for Rodney Jaskowski.

Before: MURRAY, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

FITZGERALD, J. In Docket No. 298088, plaintiff, Thomas Petipren, alleged that defendant Rodney Jaskowski, the police chief for the village of Port Sanilac, assaulted him without provocation and wrongfully arrested him for resisting and obstructing and disorderly conduct. In Docket No. 301125, Petipren filed a counterclaim in a separate lawsuit brought by Jaskowski, alleging that Jaskowski negligently and intentionally inflicted emotional distress upon Petipren and acted negligently. Jaskowski appeals as of right the orders denying his motions for summary disposition that were brought pursuant to MCR 2.116(C)(7) on the basis of governmental immunity. We affirm.

I. FACTS AND PROCEDURAL HISTORY

On July 19, 2008, the village of Port Sanilac hosted a fundraising event in a park that included a number of

musical acts and a beer tent; Petipren and his band were scheduled to perform at the event. Complaints regarding the style of music being played at the event had been voiced to volunteers working at the beer tent before Petipren's band played. Words were exchanged between individuals listening to the prior band and those patronizing the beer tent. Brown City Police Chief Ron Smith reported to the park after receiving a "call from individuals" requesting that he stop by the park "because the band that was performing was playing offensive music." The organizer of the event also returned to the event after being contacted by a volunteer at the beer tent. Upon his arrival, Smith was approached by several citizens who found the music "offensive, disturbing, and not appropriate for the crowd." Smith then contacted Village of Port Sanilac Police Chief Ronald Jaskowski and requested that Jaskowski come to the park because trouble appeared to be brewing between those who wanted the band to play and those who did not. By the time Jaskowski arrived, the organizer of the event was resolving the situation. At some point, a decision was made that the bands would no longer play.

From here, the parties' portrayals of the facts sharply diverge. Petipren testified that he had been busy assembling his drum set on stage and did not know that the concert had been canceled. Petipren was in the midst of playing his usual warmup routine when he observed Jaskowski for the first time. Jaskowski appeared to be very angry, so Petipren stopped playing to determine what Jaskowski wanted. Petipren asserted that he held his drumsticks in his lap and did not say anything. According to Petipren, Jaskowski barged through Petipren's drum set, knocked over a cymbal, grabbed Petipren's drumsticks, and flung them away. Jaskowski then grabbed Petipren by the collar and pushed him backward off of his seat and into a pole.

Petipren testified that no words were exchanged and that he put his arms straight up in the air to be completely clear that he was not resisting. Petipren stated that he began asking, "What did I do?" and Jaskowski then pushed him off the stage and shoved him down onto the grass. Jaskowski yelled at Petipren to stop resisting, and Petipren again responded that he was not resisting. When a bass player from another band asked Jaskowski why Petipren was being arrested, Jaskowski had him arrested as well. The prosecutor declined to press any charges against Petipren.

Testimony from the organizer of the event and the statements of other witnesses generally corroborated Petipren's account of the incident. Jaskowski, on the other hand, reported that when he told Petipren to stop playing, Petipren refused, swore at him, and punched him in the jaw when he tried to take Petipren's drumsticks. Jaskowski stated that Petipren continued to resist while Jaskowski attempted to handcuff him.

Petipren filed suit against Jaskowski individually and as the police chief for assault and battery and false arrest.[1] Jaskowski filed his own suit against Petipren, alleging assault, intentional infliction of emotional distress, negligence, and negligent infliction of emotional distress. Petipren filed a countercomplaint in that case alleging intentional and negligent infliction of emotional distress and negligence against Jaskowski. Jaskowski moved for summary disposition of the claims against him in each case. The trial court denied both motions.

II. STANDARD OF REVIEW

We review de novo a trial court's determination regarding a motion for summary disposition. *Odom v*

[1] Petipren also filed suit against the village of Port Sanilac. The trial court dismissed the claims against the village.

Wayne Co, 482 Mich 459, 466; 760 NW2d 217 (2008). A trial court properly grants summary disposition under MCR 2.116(C)(7) when a claim is barred because of immunity granted by law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them." *Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211 (2010). If any documentary evidence is submitted, we must view it in the light most favorable to the nonmoving party to determine whether there is a genuine issue of material fact. *Zwiers v Growney*, 286 Mich App 38, 42; 778 NW2d 81 (2009). "If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred is an issue of law for the court." *Dextrom*, 287 Mich App at 431. Conversely, if a factual dispute exists regarding whether immunity applies, summary disposition is not appropriate. *Id*.

III. STATUTORY INTERPRETATION

This appeal involves, in part, an issue of statutory construction. The primary goal of statutory interpretation is to "ascertain the legislative intent that may reasonably be inferred from the statutory language itself." *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 526; 697 NW2d 895 (2005), citing *Sotelo v Grant Twp*, 470 Mich 95, 100; 680 NW2d 381 (2004). "The first step in that determination is to review the language of the statute itself." *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999), citing *House Speaker v State Admin Bd*, 441 Mich 547, 567; 495 NW2d 539 (1993). Unless statutorily defined, every

word or phrase of a statute should be accorded its plain and ordinary meaning, MCL 8.3a; *Robertson v Daimler-Chrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002), taking into account the context in which the words are used, *2000 Baum Family Trust v Babel*, 488 Mich 136, 175; 793 NW2d 633 (2010). We may consult dictionary definitions to give words their common and ordinary meaning. *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004). When given their common and ordinary meaning, *Veenstra v Washtenaw Country Club*, 466 Mich 155, 160; 645 NW2d 643 (2002), citing MCL 8.3a, "[t]he words of a statute provide 'the most reliable evidence of its intent,' " *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999), quoting *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981).

IV. GOVERNMENTAL IMMUNITY

The governmental tort liability act (GTLA), MCL 691.1401 *et seq*., shields a governmental agency from tort liability "if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). "The existence and scope of governmental immunity was solely a creation of the courts until the Legislature enacted the GTLA in 1964, which codified several exceptions to governmental immunity that permit a plaintiff to pursue a claim against a governmental agency." *Duffy v Dep't of Natural Resources*, 490 Mich 198, 204; 805 NW2d 399 (2011). The statutory exceptions must be narrowly construed. *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 614; 664 NW2d 165 (2003). A plaintiff bringing suit against the government must plead in avoidance of governmental immunity. *Odom*, 482 Mich at 478-479. However, the immunity of an individual governmental

employee is an affirmative defense that the employee must raise and prove. *Id*. at 479.

V. MCL 691.1407(5)

Jaskowski argues that he is absolutely immune from plaintiff's claims because he holds the highest appointive office at the pertinent level of government and his actions were taken within the scope of his authority. Governmental immunity from tort liability is governed by MCL 691.1407. Of particular relevance in this case, MCL 691.1407(5) provides:

> A judge, legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.

A police chief is generally recognized as the highest appointive official in the police department. See *Payton v Detroit*, 211 Mich App 375, 394; 536 NW2d 233 (1995). However, under MCL 691.1407(5), the highest appointive executive officials of a level of government are not immune from tort liability unless their acts fall within the scope of their executive authority. *American Transmissions, Inc v Attorney General*, 454 Mich 135, 144; 560 NW2d 50 (1997); *Marrocco v Randlett*, 431 Mich 700, 710-711; 433 NW2d 68 (1988). Whether the highest executive official of a local government was acting within his or her authority depends on a number of factors, including the nature of the acts, the position held by the official, the local law defining the authority, and the structure and allocation of powers at that particular level of government. *American Transmissions*, 454 Mich at 141; *Bennett v Detroit Police Chief*, 274 Mich App 307, 312; 732 NW2d 164 (2006). The

official's motive is irrelevant.[2] *American Transmissions*, 454 Mich at 143-144; *Brown v Detroit Mayor*, 271 Mich App 692, 722; 723 NW2d 464 (2006), aff'd in part and vacated in part on other grounds 478 Mich 589 (2007).

The Port Sanilac Village Council set forth the "Essential Duties and Responsibilities" of the police chief in the job description for the position:

> • Recruit, train, and monitor officers[']performance.
>
> • Coordinates activities by scheduling work assignments, setting priorities, and directing the work of subordinate employees.
>
> • Plan, develop, and monitor work schedules to ensure efficient use of personnel.

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[2] In *American Transmissions*, 454 Mich at 140 n 5, the Supreme Court quoted from this Court's opinion in *American Transmissions, Inc v Attorney General*, 216 Mich App 119, 125 n 3; 548 NW2d 665 (1996):

> "When the Legislature was considering amendments of the governmental immunity statute in 1985 and 1986, it always provided for immunity for judges, legislators, elective officials, and the highest appointive executive officials when they are acting within the scope of their judicial, legislative, or executive authority. See House Legislative Analysis, HB 5163 Substitute H-2, November 19, 1985; Senate Analysis, HB 5163 (S-3), March 20, 1986; House Legislative Analysis, HB 5163, July 23, 1986. This is in direct contrast to the treatment of lower level governmental employees. With respect to lower level governmental employees, the Legislature considered various intent-based standards, such as 'acting in good faith' and 'not acting in bad faith.' See House Legislative Analysis, HB 5163 Substitute H-2, November 19, 1985; House Legislative Analysis, HB 5163, January 16, 1986. The proposed intent requirements were in addition to other prerequisites to immunity in lower level employees; the employee's 'reasonable belief' that he was acting within the scope of his authority and the 'gross negligence' standard. *Id.* Ultimately, however, the specific intent requirement for lower level governmental employees was omitted from the bill as passed. See MCL 691.1407(2); MSA 3.996(107)(2). Thus, although the Legislature considered various intent-based factors for lower level governmental employees, such an intent factor was never considered or included with respect to high level governmental employees."

• Makes decisions and takes necessary actions. Identifies and solves administrative problems.

• Communicates effectively with others.

• Identify staff development and training needs and ensures that training is obtained.

• Oversees communication and public relations practices, and directs the dissemination of requested information and/or materials to requestors.

• Maintains records, prepares reports, and composes correspondence relative to the work to include but not limited to; [Michigan Incident Crime Reporting] state report, death and custody reports, officers killed report, [1982 PA 302 criminal justice training] fund expenditures report.

• Prepares and presents a monthly report to council at regular council meetings and attends monthly finance committee meeting.

• Reviews request for service, determines feasibility of requests according to resource capabilities; then proceeds to either execute the request or suggest other means to secure the requested service.

• Provides input into the development of long-range budget and planning information.

• Issues various licenses and permits handled by the police department (ie., Liquor licenses)[.]

• Prepares time sheets and presents to bookkeeper in a timely manner in accordance with pay dates for all officers.

• Maintains and updates policies and procedures within the police department.

• Maintains complete inventory and requisitions of materials and supplies.

• Vehicle fleet maintenance.

• Maintains records of all vehicles to establish repair/replacement.

• Maintains inventory of department of vehicles.

• Provide leadership and mentoring to subordinate employees while carrying out police activities.

• Record and secure all evidence.[3]

A review of the duties assigned to the chief of police reveals that the chief's duties generally involve policy, procedure, administration, and personnel matters. Generally, opinions interpreting MCL 691.1407(5) have involved either defamation lawsuits that arose from public comments made by the highest executive official of a level of government or lawsuits that arose from personnel or employment decisions made by the highest executive official of a level of government. Those cases have concluded that acts such as commenting on an official governmental matter and making personnel or employment decisions clearly fall within the scope of the executive authority of the highest executive officials of local government. For example, in *Bennett*, a suspended police officer brought an action for wrongful discharge against the chief of police and the mayor. This Court concluded that the chief had express legal authority to suspend police officers from duty and, therefore, was entitled to governmental immunity for suspending the police officer for operating an Internet website in violation of police department rules and regulations. *Bennett*, 274 Mich App at 313-315. This Court also concluded that the mayor, who had authority to terminate or suspend employees, was immune from the plaintiff's tort allegations. *Id*. at 319.

In *Washington v Starke*, 173 Mich App 230; 433 NW2d 834 (1988), the personal representative of a fleeing burglar shot by a Benton Harbor police officer brought a wrongful death action against the city's public safety director, who is the highest executive

[3] The specific job duties of the police chief do not refer to making arrests.

official in Benton Harbor's police department. The plaintiff alleged that the public safety director had failed to properly supervise the officer who used deadly force in shooting the burglar. This Court concluded that the public safety director's "supervision of departmental employees is conduct within his executive authority, and therefore immune from suit." *Id*. at 241.

In *Meadows v Detroit*, 164 Mich App 418; 418 NW2d 100 (1987), a police officer brought suit against the police chief[4] for the chief's participation in a board hearing that resulted in the suspension of the police officer and for allegedly defamatory comments the chief wrote in a letter to the effect that the officer's failure to report that his partner had accepted a bribe amounted to "criminal misconduct." This Court noted that the city charter gave the police chief the authority to suspend and discharge employees of the department. Thus, the Court concluded that the chief was acting within the scope of his executive authority when he discharged the plaintiff without pay and was therefore absolutely immune for his action. *Id*. at 427. The Court also concluded that the police chief was entitled to absolute immunity for the allegedly defamatory comments he made in the letter written in response to a citizen complaint concerning the officer's discharge. The Court found that "as a part of his duties as chief of police, [the chief] was implicitly authorized [by the city charter] to respond to and, if possible, to resolve complaints concerning the police department, even complaints regarding the discharge of a police officer." *Id*. at 428.

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[4] We note that in Meadows two different defendants functioned as chief police during the relevant time period. Although one defendant was responsible for the police officer's suspension and another for the allegedly defamatory remarks, it was irrelevant with respect to the governmental immunity analysis as both were acting as chief of police during the complained about actions.

None of the published decisions in this state have considered a situation involving conduct by a police chief that occurred when the chief was acting as an ordinary police officer rather than within his or her capacity as the highest executive official of a level of government. Jaskowski relies on an unpublished and thus nonbinding decision in which a panel of this Court concluded "that a police chief's 'executive authority' includes his duties as a high ranking executive as well as his ordinary duties as a police officer." *Lewkowicz v Poe*, unpublished opinion per curiam of the Court of Appeals, issued May 15, 2001 (Docket No. 216307), p 2. After specifically noting that the police chief was directed to attend a city council meeting *in his official capacity as police chief*, this Court found that the police chief "acted within the authority granted him by law as a police officer when he arrested and detained plaintiff, and was entitled to absolute immunity under MCL 691.1407(5) . . . by virtue of his status as the highest law enforcement official for the city of Romulus." *Id*. at 2-3 (emphasis added). However, in *Scozzari v City of Clare*, 723 F Supp 2d 945, 967 (ED Mich, 2010), the federal district court concluded that a police chief was not entitled to absolute immunity under MCL 691.1407(5) from an assault-and-battery claim brought by the estate of a deceased victim of a police shooting because the chief "appears to have been acting in his capacity as an officer on patrol, rather than performing any tasks particular to his position as the 'highest appointive official.' "

We find that the *Scozzari* reasoning best reflects the legislative intent expressed in the words of MCL 691.1407(5). *Scozzari* was more faithful in construing the plain language of the statute and recognized that it refers to immunity for acts taken by the highest executive official of a level of government when the official is

acting within the scope of his or her *executive* authority. When a police chief acts as an ordinary police officer—that is, when the nature of the act is outside the scope of his or her executive duties—the chief is not entitled to absolute immunity simply because he or she is also the police chief. Indeed, the essential duties of the police chief as set forth in the job description for the police chief of the village of Port Sanilac are administrative in nature and are clearly distinct from the nature of the duties of an ordinary police officer.[5] Although a police chief may occasionally perform the duties of an ordinary police officer, the police chief is not acting within the scope of his or her *executive* authority as the highest executive official in the police department when doing so.[6] Rather, the nature of the act is that of an ordinary police officer. As an ordinary police officer, he would be entitled to the immunity provided to governmental employees under MCL 691.1407(2) if all the statutory

[5] The duties of an ordinary police officer can be gleaned from the responsibilities of the police department generally as set forth by the Port Sanilac Village Council:

> Patrol the streets of the Village of Port Sanilac, . . . observe and investigate persons, situations or things which require attention and which affect enforcement of laws or prevention of crime. Preserve the peace and protect life and property, control public gatherings and perform miscellaneous services relative to public health and safety including property checks of private residences (upon request) and commercial establishments. Receive and process complaints by citizens, arrest offenders, prepare reports and testify in court. Traffic duties shall consist of enforcing the traffic ordinances of the Village of Port Sanilac and the State of Michigan. . . . Investigate traffic accidents and prepare proper reports.

[6] We acknowledge that Jaskowski submitted an affidavit in which he averred that he did at times perform those functions that are within the scope of the duties of employees of the police department generally. This fact is not in dispute. However, the fact that Jaskowski performed those functions does not place the functions within the scope of the *executive* duty of the police chief; rather, they remain within the scope of the functional responsibilities of the police department generally.

requirements were satisfied.[7] Indeed, it would lead to an illogical result to limit a plaintiff's intentional-tort claims arising from the conduct of a police officer in those cases in which the police officer was also the police chief who was acting as an ordinary police officer at the time he or she allegedly committed the tortious act.

Affirmed.

RONAYNE KRAUSE, J., concurred with FITZGERALD, J.

MURRAY, P.J. (*dissenting*). The trial court held that defendant Rodney Jaskowski was not entitled to absolute governmental immunity under MCL 691.1407(5) because (1) Jaskowski acted outside the scope of his executive authority as chief of police and (2) Jaskowski was motivated by a "personal vendetta" against plaintiff. Because Michigan law provides no support for such a conclusion under the undisputed material facts presented to the trial court, I respectfully dissent from the majority's decision to affirm the trial court's order denying Jaskowski's motion for summary disposition.

As acknowledged by the majority, MCL 691.1407(5) provides that judges, legislators, "and the elective or highest appointive executive official of all levels of

[7] Under MCL 691.1407(2) employees of a governmental unit are immune from state tort claims if all the following conditions are met:

> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority." *Bennett v Detroit Police Chief*, 274 Mich App 307, 311; 732 NW2d 164 (2006). Thus, the test for whether a chief of police is entitled to absolute immunity is whether the official (1) is "the highest appointed or elected executive *of a level of government*," *Grahovac v Munising Twp*, 263 Mich App 589, 596; 689 NW2d 498 (2004), and if he is, (2) whether the chief's acts at issue in this case were within his executive authority, *Payton v Detroit*, 211 Mich App 375, 394; 536 NW2d 233 (1995). As the majority correctly recognizes, Jaskowski, as the Chief of Police for the village of Port Sanilac, is the highest executive official of a level of government. See *Payton*, 211 Mich App at 394 (MCL 691.1407(5) applies to a municipal police chief because he is the highest level official within a political subdivision).[1]

However, the majority errs in its conclusion that Jaskowski acted outside the scope of his authority when he arrested plaintiff. Whether the highest official acted within the scope of his authority depends on the nature of the specific acts alleged, the position held by the official, the laws defining the official's authority, and the structure and allocation of powers in that level of

[1] Contrary to plaintiff's arguments, the conclusion that the police department is a level of government emanates from the definitions contained within the governmental tort liability act, MCL 691.1401 *et seq*. A police department is a level of government because a "department" of a municipal corporation is a "political subdivision," MCL 691.1401(b), and a "political subdivision" is a "governmental agency" for purposes of governmental immunity, MCL 691.1401(d). *Mack v Detroit*, 467 Mich 186, 204; 649 NW2d 47 (2002); *Grahovac*, 263 Mich App at 599 (GRIFFIN, J., dissenting). Hence, although it may seem strange from a common-sense perspective to consider a police department a "level of government," the statute and caselaw support this conclusion.

government. *American Transmissions, Inc v Attorney General*, 454 Mich 135, 141; 560 NW2d 50 (1997), quoting *Marrocco v Randlett*, 431 Mich 700, 710-711; 433 NW2d 68 (1988).

Jaskowski submitted an affidavit in which he attested that his executive authority as the chief of police included, amongst many other things, the duty to "arrest offenders." This testimony was based in part on the job description for the chief of police (which was also submitted to the trial court), which sets forth both the "functional responsibilities of the Police Department" as well as the "essential duties and responsibilities" of the position. The majority has quoted the "essential duties" but ignores the "functional responsibilities," which, according to the chief's affidavit, included the general aspects of the job he actually performed while serving as chief. And as noted, Jaskowski testified that some of the tasks he was expected to, and did perform, were to "control public gatherings and perform miscellaneous services relative to public health and safety including . . . [t]o arrest offenders." Importantly, plaintiff failed to submit *any* evidence to contradict Jaskowski's affidavit and documentary evidence, so the material facts about what Jaskowski was expected to do (and actually did) as chief of police were undisputed before the trial court.[2]

Furthermore, the Legislature has given *all* police officers the authority to pursue, arrest, and detain persons suspected of committing a crime. See *Payton*, 211 Mich App at 392, citing MCL 117.34 ("The author-

[2] The majority has effectively ignored Jaskowski's affidavit, preferring instead to rely on its own reading of the job description. However, because Jaskowski's affidavit is undisputed and it reveals that his actual duties extended to those matters listed under the "functional responsibilities" of the department, we must accept as true the factual statements of his actual job duties.

ity of the city's police officers to 'pursue, arrest and detain' those suspected of violating the laws of Michigan is expressly granted."); see also MCL 70.16 (granting village police officers power to preserve quiet and good order). Because Jaskowski was the highest executive official within the police department and the authority granted to that executive position included the ability to arrest offenders, he acted within the scope of his executive authority when he arrested plaintiff.[3]

Plaintiff spends a significant amount of time arguing that Jaskowski was not entitled to absolute immunity because he was motivated by a "personal vendetta" against plaintiff and because Jaskowski "was acting upon his personal biases against individuals who looked different from him and played music that was unacceptable to him." And as noted earlier, the trial court's decision was in part based on Jaskowski being motivated by this perceived "personal vendetta." However, whether any of these allegations are true is of no moment, and any facts pertaining to these allegations are certainly not material, for they have no bearing on the legal issue presented. A unanimous Supreme Court held more than a decade ago that there is no "malevolent heart" exception to absolute immunity, *American Transmissions*, 454 Mich at 143-144, and we have more recently held that in light of *American Transmissions*, whether a defendant acted with "an improper motive

[3] While the majority finds that the reasoning of *Scozzari v City of Clare*, 723 F Supp 2d 945 (ED Mich, 2010), "best reflects the legislative intent expressed in the words of MCL 691.1407(5)," *ante* at 431, *Scozzari* is not persuasive. *Lee v Nat'l Union Fire Ins Co*, 207 Mich App 323, 328; 523 NW2d 900 (1994). The pivotal basis of the court's holding was that the defendant *failed to address* whether his authority extended to those also exercised by a patrol officer. *Scozzari*, 723 F Supp 2d at 967. To the contrary, Jaskowski *has* provided undisputed evidence of his authority to arrest, both as a matter of fact and law.

and purpose in" committing the acts at issue was "meaningless," *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 594; 640 NW2d 321 (2001). Consequently, to the extent the trial court's decision rested on a perceived "personal vendetta" against plaintiff, that ruling had no legal support under Michigan law.

Based on the foregoing, Jaskowski was entitled to absolute immunity under MCL 691.1407(5), and I would reverse and remand for entry of an order granting Jaskowski's motion for summary disposition.

PEOPLE v MEISSNER

Docket No. 298780. Submitted October 11, 2011, at Detroit. Decided October 25, 2011, at 9:00 a.m. Leave to appeal denied, 491 Mich 938.

A jury in the Oakland Circuit Court convicted Christopher M. Meissner of domestic violence, second offense, MCL 750.81(3); first-degree home invasion, MCL 750.110a(2); and obstruction of justice, MCL 750.505, for breaking into the complainant's home, assaulting her, and sending her threatening text messages when he learned that she was in the process of reporting his conduct to the police. The court, Nanci J. Grant, J., admitted into evidence pursuant to MCL 768.27c the complainant's verbal description to the police of the incident that gave rise to the charges, as well as a written description she had prepared at the police station that included additional incidents from months earlier. Defendant appealed.

The Court of Appeals *held*:

1. The trial court properly admitted the complainant's statements to the police under MCL 768.27c. MCL 768.27c allows trial courts to admit a hearsay statement into evidence if (1) the statement purports to narrate, describe, or explain the infliction or threat of physical injury on the declarant, (2) the action in which the evidence is offered is an offense involving domestic violence, (3) the statement was made at or near the time of the infliction or threat of physical injury and not more than five years before the current action or proceeding was filed, (4) the statement was made under circumstances that would indicate its trustworthiness, and (5) the statement was made to a law enforcement officer. The complainant's statements met the factual requirements of MCL 768.27c(1)(a) because they described text messages that threatened physical injury and previous incidents in which defendant had choked her and pushed her down the stairs, and met the temporal requirements of MCL 768.27c(1)(c) because she made the statements at or very near the time she received one or more of the threatening text messages. The trial court was not required to calculate or consider the number of hours that elapsed between the time of the charged offense and the time the complainant gave the statements to the police.

2. MCL 768.27c(2) provides that circumstances relevant to the issue of trustworthiness include, but are not limited to, whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested, whether and to what extent the declarant has a bias or motive for fabricating the statement, and whether the statement is corroborated by evidence other than statements that are admissible only under MCL 768.27c. Given that these circumstances are not the sole means by which to establish trustworthiness, a trial court is not required to make factual findings regarding them or to exclude a statement because they have not been established. In this case, the complainant's statements were corroborated in part by the police officer who had responded to the choking incident and observed red marks on both sides of complainant's neck. The trial court also asked about the complainant's demeanor when she made the statements and about whether she contemporaneously indicated any fear of defendant. The trial court then made a valid determination that the complainant's statements were trustworthy. When the declarant is an alleged domestic violence victim, the statutory reference to statements in contemplation of litigation does not pertain to the victim's report of the charged offense; it pertains to litigation in which the declarant could gain a property, financial, or similar advantage, such as divorce, child custody, or tort litigation. In this case, there was no evidence that the complainant's statements could give her an advantage in any related litigation.

3. The trial court did not err by admitting evidence of defendant's prior acts despite the fact that those acts differed from the charged offense. MCL 768.27b(1) provides that in a criminal domestic violence action, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant if it is not otherwise excluded under MRE 403. Evidence may be excluded under MRE 403 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Because evidence offered against a criminal defendant is prejudicial by its very nature, exclusion of evidence otherwise admissible under MCL 768.27b is appropriate only when there is a danger that the evidence will be given undue or preemptive weight by the jury or if admitting it would be inequitable. Prior acts of domestic violence may be admissible under MCL 768.27b regardless of whether the acts were identical to the charged offense. The trial court was within its discretion in concluding that any potential unfair prejudice to defendant was substantially out-

weighed by the probative value of the evidence, which illustrated the nature of defendant's relationship with complainant and assisted the jury in assessing her credibility.

4. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that defendant assaulted complainant, which is an essential element of both home invasion and domestic violence. An assault is generally defined as either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. A battery is an intentional, nonconsensual, and harmful or offensive touching of another person. In this case, the prosecution presented sufficient evidence to prove that defendant threw coins at complainant and pushed her, which constituted an offensive touching.

5. Obstruction of justice is a common-law charge that can be prosecuted under MCL 750.505 and is generally understood as an interference with the orderly administration of justice. Obstruction of justice is considered a category of offenses; a common example is witness coercion. Coercion involves an attempt to dissuade a witness from testifying, and words alone may be sufficient to constitute the crime. The prosecutor presented evidence that defendant sent several harassing text messages to the complainant shortly after breaking into her apartment and assaulting her, and the messages indicated that he would harm her if she made a statement to the police. A reasonable jury could find that by sending these messages defendant willfully and corruptly hampered, obstructed, and interfered with a proper and legitimate criminal investigation.

6. The prosecutor did not unduly appeal to the jury's sympathy by reading complainant's written statement to the police during his opening statement. The prosecutor was stating facts that he intended to prove at trial, which is permissible in opening statements, and the statement was not so inflammatory that reading it prejudiced defendant. Further, the prosecutor did not use the prestige of his office to bolster a police witness's credibility; his comments merely summarized testimony elicited by defense counsel during cross-examination. To the extent the prosecutor may have improperly denigrated defense counsel by stating that he could tell the defense was in trouble and arguably introduced facts that were not in evidence by stating that domestic violence victims recant or explain their initial accusations of abuse, reversal is not required because the trial court instructed the jury that the lawyers' statements are not evidence and jurors are presumed to follow instructions.

7. Defendant has not established that his counsel's performance was ineffective. To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that he was prejudiced by the deficiency. Although defense counsel failed to object to the prosecutor's comments during opening statements and closing argument, any resulting prejudice was cured by the jury instructions. Further, defense counsel adequately presented defendant's position that defendant had permission to be in complainant's apartment because he lived there, notwithstanding counsel's decision not to subpoena evidence, call additional witnesses, or request a special jury instruction on that point.

Affirmed.

1. EVIDENCE — HEARSAY — DOMESTIC VIOLENCE — TEMPORAL REQUIREMENTS.

A hearsay statement is admissible if (1) the statement purports to narrate, describe, or explain the infliction or threat of physical injury on the declarant, (2) the action in which the evidence is offered is an offense involving domestic violence, (3) the statement was made at or near the time of the infliction or threat of physical injury and not more than five years before the current action or proceeding was filed, (4) the statement was made under circumstances that would indicate its trustworthiness, and (5) the statement was made to a law enforcement officer; a court is not required to calculate or consider the number of hours that elapsed between the time of the charged offense and the time the complainant gave the statements to the police (MCL 768.27c[1]).

2. EVIDENCE — HEARSAY — DOMESTIC VIOLENCE — TRUSTWORTHINESS.

A hearsay statement in which a declarant describes to a law enforcement officer a threat or incident of domestic violence inflicted on him or her is admissible if it meets certain temporal requirements and is trustworthy; circumstances relevant to determining trustworthiness include but are not limited to whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested, whether and to what extent the declarant has a bias or motive for fabricating the statement, and whether the statement is corroborated by evidence other than statements that are admissible only under MCL 768.27c; a court is not required to make factual findings regarding these circumstances or to exclude a statement because they have not been established; the statutory reference to statements in contemplation of litigation does not pertain to a domestic violence victim's report of the charged offense but rather to litigation in

which the declarant could gain a property, financial, or similar advantage (MCL 768.27c[1], [2]).

3. EVIDENCE — DOMESTIC VIOLENCE — PRIOR ACTS — PREJUDICE.

Evidence of a defendant's commission of other acts of domestic violence is admissible in a criminal domestic violence action for any purpose for which it is relevant if it is not otherwise excluded under MRE 403 because its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; because evidence offered against a criminal defendant is prejudicial by its very nature, exclusion of the evidence is appropriate only when there is a danger that the evidence will be given undue or preemptive weight by the jury or if admitting it would be inequitable; prior acts of domestic violence may be admissible regardless of whether the acts were identical to the charged offense (MCL 768.27b).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden* and *Tanya L. Nava*, Assistant Prosecuting Attorneys, for the people.

State Appellate Defender (by *Chari K. Grove*) and Christopher Meissner, *in propria persona*, for defendant.

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

O'CONNELL, J. Following a jury trial, defendant appeals by right his convictions of second-offense domestic violence, MCL 750.81(3); first-degree home invasion, MCL 750.110a(2); and obstruction of justice, MCL 750.505. We affirm.

I. FACTS AND PROCEDURAL HISTORY

On November 28, 2009, Candace Worthington appeared at the Waterford police station, visibly shaken

and upset. She reported that defendant, with whom she had a relationship, had broken her door and had sent her threatening text messages. She showed a police officer the text messages, which included "You trying to die?" and "now you will reap the repercussions," as well as defendant's pointed message in response to Worthington's telling him that she had gone to the police: " . . . I am going to beat the shit out of you." Worthington described to the police several experiences she had with defendant over the prior months, including one in which defendant had destroyed her phone, another in which he pushed her down the stairs, and another in which he put her in a chokehold. Worthington wrote a statement recounting the threatening text messages, the prior physical injuries, and the other information she had given to the police.

Worthington's statement also described an incident that had occurred just that morning, when Worthington had been awakened by a crashing noise and saw defendant in her bedroom. Defendant pushed her shoulder, asked for a cigarette, tossed coins at her, and then left. The prosecutor subsequently charged defendant with home invasion, obstruction of justice, and domestic violence.

Before trial, the prosecutor filed a notice of intent to use verbal and written statements Worthington had given to police on two separate occasions in August and November 2009. Defendant filed motions in limine to suppress Worthington's statements and to suppress information about a prior incident of abuse defendant had inflicted on a different woman. The trial court granted the motion concerning the incident with the other woman, but denied the motion concerning Worthington's August and November statements to the police.

By the time of trial in May 2010, Worthington was pregnant with defendant's child. When the prosecutor called her to testify, Worthington recast and recharacterized many of the facts from her November statements. She testified that when she went to the police in November, she was enraged because defendant was having a relationship with another woman. She further testified that because of her anger she had embellished and exaggerated the facts in her statement. For example, she testified that although defendant was living with her, she had told the police he was not living with her. She also testified that the text messages she had shown the police were out of context. She attempted to justify the text message that said, "You trying to die?" by explaining that the message was his response to her text message informing him that she would be walking home from a bar late at night. Similarly, she minimized the conduct that had occurred on the morning she wrote the statement and testified that defendant was just checking on her to make sure she was all right. At the close of the prosecutor's direct examination, Worthington testified that defendant had never beaten her and had never threatened her.

II. ADMISSIBILITY OF PRIOR STATEMENTS AND PRIOR ACTS EVIDENCE

A. STANDARD OF REVIEW

Defendant's appeal requires interpretation and application of MCL 768.27c and MCL 768.27b. We review de novo issues of statutory interpretation. *People v Swafford*, 483 Mich 1, 7; 762 NW2d 902 (2009). We also review de novo defendant's assertion that as a matter of law, MCL 768.27c precluded the admission of Worthington's statements. *People v Roper*, 286 Mich App 77, 91; 777 NW2d 483 (2009). We review the trial court's ultimate decision to

admit the evidence for abuse of discretion. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010).

B. ADMISSIBILITY OF STATEMENTS MADE TO THE POLICE

1. APPLICABLE LAW

Our Legislature enacted MCL 768.27c as a substantive rule of evidence reflecting specific policy concerns about hearsay in domestic violence cases.[1] See generally *People v Pattison*, 276 Mich App 613, 619-620; 741 NW2d 558 (2007) (addressing MCL 768.27a). In MCL 768.27c, the Legislature determined that under certain circumstances, statements made to law enforcement officers are admissible in domestic violence cases. The statute allows trial courts to admit hearsay statements into evidence if all the following conditions apply:

> (a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
>
> (b) The action in which the evidence is offered under this section is an offense involving domestic violence.
>
> (c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.
>
> (d) The statement was made under circumstances that would indicate the statement's trustworthiness.
>
> (e) The statement was made to a law enforcement officer. [MCL 768.27c(1).]

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[1] " 'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). The Michigan Rules of Evidence identify general circumstances in which hearsay is admissible. See MRE 801 through MRE 806.

The statute goes on to give examples of "circumstances relevant to the issue of trustworthiness" as well as to define the terms "declarant" and "domestic violence." MCL 768.27c(2) and (5)(a) and (b).[2]

2. INTERPRETATION AND APPLICATION OF MCL 768.27c(1)(a) AND (c)

Defendant argues that the trial court erred by admitting Worthington's November statements into evidence. According to defendant, the trial court should have excluded the statements because of the amount of time that elapsed between the charged offense and Worthington's report to the police later the same day.

Defendant's argument misconstrues subsections (1)(a) and (c) of the statute. Neither subsection requires that the statements at issue describe the charged domestic violence offense. Subsection (1)(a) places a factual limitation on the admissibility of statements; subsection (1)(c) places a temporal limitation on admissibility. Subsection (1)(a) requires only that the statement "narrate, describe, or explain the infliction or threat of physical injury upon the declarant." MCL 768.27c(1)(a). Similarly, subsection (1)(c) requires that the statement be made at or near the time of the infliction or threat of injury described in subsection (1)(a). We must interpret the statute according to the Legislature's plainly expressed meaning, and we must apply the statute as written. *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). Taken together,

[2] Certain testimony offered pursuant to MCL 768.27c may be subject to challenge based on the Confrontation Clause. US Const, Am VI; Const 1963, art 1, § 20. In this case, however, defendant acknowledges that the declarant (Worthington) was available for cross-examination; accordingly, this case does not present a Confrontation Clause issue. Cf. *Davis v Washington*, 547 US 813, 821-822; 126 S Ct 2266; 165 L Ed 2d 224 (2006).

subsections (1)(a) and (c) indicate that a hearsay statement can be admissible if the declarant made the statement at or near the time the declarant suffered an injury or was threatened with injury.

In this case, Worthington made her November statements at or near the time defendant threatened her with injury. The record demonstrates that Worthington sought police assistance in the late afternoon or early evening. Shortly before she arrived at the police station, or perhaps while she was at the station, she received extremely threatening text messages from defendant. She described these messages in her written statement. Even at trial, Worthington acknowledged that after she informed defendant she had contacted the police, he sent a message stating that he would beat her. Accordingly, the trial court was not required to calculate or consider the number of hours that elapsed between the time of the charged offense and the time Worthington gave the statements to the police. The court could instead determine that Worthington's statements met the requirements of subsection (1)(a) because the statements described text messages that threatened physical injury, and met the requirements of subsection (1)(c) because she made the statements at or very near the time she received one or more of the threatening text messages.

Moreover, as the prosecutor points out on appeal, Worthington's statements described physical injuries that defendant had inflicted on her in the months before she made the statement. In particular, she described an August 2009 confrontation with defendant, in which she thought she would die from the way he was choking her. Further, she described the charged offense in which defendant apparently forced entry into her apartment, pushed her shoulder, and tossed coins at

her. For the purposes of MCL 768.27c, her descriptions of the choking injury and of the charged offense fulfilled both the factual requirement in subsection (1)(a) and the temporal requirement in subsection (1)(c).

3. INTERPRETATION AND APPLICATION OF MCL 768.27c(2)

MCL 768.27c(2) provides guidance for trial courts to assess whether a statement was made under circumstances that would indicate the statement's trustworthiness. MCL 768.27c(2) provides that

> circumstances relevant to the issue of trustworthiness include, but are not limited to, all of the following:
>
> (a) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.
>
> (b) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.
>
> (c) Whether the statement is corroborated by evidence other than statements that are admissible only under this section.

Defendant argues that Worthington's November statements lacked any circumstances of trustworthiness. Specifically, defendant argues that the written statement does not fulfill the three considerations in subsection (2) and that the trial court therefore erred by admitting the statement. We disagree, on four grounds.

First, Worthington's statements were corroborated, and thus the statements fulfilled subsection (2)(c). At trial, Worthington testified that defendant had sent her a threatening text message: when the prosecutor asked, "What is it that you said or did to deserve the Defendant to tell you [sic] that he was going to beat the shit out of

you?" Worthington answered, "I'm sure that I was telling him that I went to the police and wrote a statement." The prosecutor also presented corroborating testimony concerning the August incident by eliciting testimony from Worthington that during the August incident defendant put her up against the wall with one hand. In addition, the police officer who had responded to the August incident testified that he observed red marks on both sides of Worthington's neck.

Second, subsection (2) does not limit the factors a trial court may use to assess trustworthiness. Instead, subsection (2) is a nonexclusive list of possible circumstances that may demonstrate trustworthiness. The subsection expressly states that the circumstances relevant to trustworthiness are *not* limited to the three examples given in subsections (2)(a), (b), and (c). Given that these subsections are not the sole means to establish trustworthiness, a lack of proof on the subsections did not require the trial court to exclude the statements in this case.

Third, subsection (2) does not require a trial court to make factual findings regarding the three circumstances. Rather, the subsection permits the court to consider all factors that pertain to the trustworthiness of the proffered statement. In this case, before ruling on the admissibility of the statements, the trial court inquired about Worthington's demeanor at the time she made the statements and about whether she contemporaneously indicated any fear of defendant. Subsection (2) did not require the court to ask specific questions regarding the circumstances described in the statutory subdivisions. The trial court made a valid determination that Worthington's statements were trustworthy on the basis of the information presented to the court.

Fourth, contrary to defendant's contention, subsection (2)(a) does not require a trial court to discredit a state-

ment given by a victim to the police. Defendant contends that because Worthington made her statements to the police, she must have made the statements in contemplation of litigation. Defendant then concludes that subsection (2)(a) required the trial court to disregard or discredit Worthington's statements on the ground that they were made in contemplation of litigation.

Defendant's interpretation of subsection (2)(a) would require all domestic violence victims to endure the indignity of tainted trustworthiness if they took the step of reporting the charged offense to the police. This interpretation is in derogation of the statutory structure. According to subsection 1(e), the only statements admissible under the statute are statements made to law enforcement officers. To interpret subsection (2)(a) to impose credibility concerns on victims' police statements would be to ignore subsection 1(e), which renders those same statements admissible. This Court cannot interpret subsection (2)(a) to require trial courts to discount the credibility of the very statements the statute was designed to admit. See *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011) (stating that courts must read parts of a statute to give effect to the statute as a whole). Accordingly, when the declarant is an alleged domestic violence victim, the reference in subsection (2)(a) to statements in contemplation of litigation does not pertain to the victim's report of the charged offense. Rather, the subsection pertains to litigation in which the declarant could gain a property, financial, or similar advantage, such as divorce, child custody, or tort litigation. In this case, there was no evidence that Worthington's statements could give her any advantage in any related litigation. Therefore, subsection (2)(a) was not applicable to Worthington's statements. In sum, the trial court properly applied

MCL 768.27c to find that Worthington's prior statements to the police were admissible.

C. ADMISSIBILITY OF PRIOR ACTS EVIDENCE

1. APPLICABLE LAW

MCL 768.27b(1) provides, in pertinent part, that "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403." Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Relevant evidence may be excluded under MRE 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

Evidence offered against a criminal defendant is, by its very nature, prejudicial to some extent. *People v Fisher*, 449 Mich 441, 451; 537 NW2d 577 (1995). Exclusion of the evidence is appropriate only when *unfair* prejudice outweighs the probative value of the evidence, meaning "there is a danger that the evidence will be given undue or preemptive weight by the jury" or "it would be inequitable to allow use of the evidence." *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008).

2. APPLICATION OF MCL 768.27b

Defendant asserts that the trial court erred by admitting evidence of his prior acts, because those acts

differed from the charged offense. We disagree. Prior acts of domestic violence can be admissible under MCL 768.27b regardless of whether the acts were identical to the charged offense. See, e.g., *People v Cameron*, 291 Mich App 599, 608-612; 806 NW2d 371 (2011).

Defendant also asserts that even if the evidence of prior acts of domestic violence was relevant, the evidence was unfairly prejudicial. We conclude that the trial court was within its discretion in finding the prior acts admissible. Any potential unfair prejudice to defendant was substantially outweighed by the evidence's probative value. The prior acts of domestic violence illustrated the nature of defendant's relationship with Worthington and provided information to assist the jury in assessing her credibility.

III. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

This Court reviews de novo defendant's challenge to the sufficiency of the evidence. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime to have been proved beyond a reasonable doubt. *Id*.

B. APPLICABLE LAW ON HOME INVASION AND DOMESTIC VIOLENCE

First-degree home invasion is defined in MCL 750.110a(2):

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters

> a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling.

Second-offense domestic assault is defined in MCL 750.81(3):

> An individual who commits an assault or an assault and battery in violation of [MCL 750.81(2)], and who has previously been convicted of assaulting or assaulting and battering his or her spouse or former spouse, an individual with whom he or she has or has had a dating relationship, an individual with whom he or she has had a child in common, or a resident or former resident of his or her household, under any of the following, may be punished by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both:
>
> (a) This section or an ordinance of a political subdivision of this state substantially corresponding to this section.
>
> (b) [MCL 750.81a, 750.82, 750.83, 750.84, or 750.86].
>
> (c) A law of another state or an ordinance of a political subdivision of another state substantially corresponding to this section or [MCL 750.81a, 750.82, 750.83, 750.84, or 750.86].

C. EVIDENCE ON HOME INVASION AND DOMESTIC VIOLENCE CHARGES

Both the home invasion charge and the domestic violence charge required the prosecution to prove that defendant assaulted Worthington. Defendant contends that the prosecution failed to show that he assaulted Worthington. Neither MCL 750.110a nor MCL 750.81(3) defines "assault." Instead, Michigan gener-

ally defines an assault as "either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). "A battery is an intentional, unconsented and harmful or offensive touching of the person of another . . . ." *People v Reeves*, 458 Mich 236, 240 n 4; 580 NW2d 433 (1998).

In this case, the prosecution presented sufficient evidence to prove that defendant committed an assault. Defendant threw change at Worthington and pushed her. These acts constituted an offensive touching, from which a reasonable jury could find that defendant assaulted Worthington.

D. APPLICABLE LAW ON OBSTRUCTION OF JUSTICE CHARGE

Obstruction of justice is a common-law charge that can be prosecuted under MCL 750.505 and "is generally understood as an interference with the orderly administration of justice." *People v Thomas*, 438 Mich 448, 455; 475 NW2d 288 (1991). Obstruction of justice is considered a category of offenses; a common example is witness coercion. *People v Tower*, 215 Mich App 318, 320; 544 NW2d 752 (1996). Coercion involves an attempt to dissuade a witness from testifying, and "[w]ords alone may be sufficient to constitute the crime." *Id*.

E. EVIDENCE ON OBSTRUCTION OF JUSTICE CHARGE

The prosecution presented evidence that defendant sent several harassing text messages to Worthington. At least one of the text messages explicitly referred to a police investigation, while the other text messages implied police involvement in the dispute. For example, the investigating officer testified that some of the text messages stated:

> "You made grave mistake and now you will reap the repercussions."
>
> "If you really did that, then I am going to beat the shit out of you."
>
> "How did I fuck you? Whatever. I'll be there in a bit. If you really called the cops, you will really get beat bad."

A reasonable jury could find that these messages constituted obstruction of justice. Defendant sent the messages to Worthington shortly after breaking into her apartment and assaulting her. The messages made it clear that he would harm Worthington if she made a statement to police. By sending the text messages to Worthington, defendant "wilfully and corruptly hamper[ed], obstruct[ed], and interfere[d] with a proper and legitimate criminal investigation." *People v Somma*, 123 Mich App 658, 662; 333 NW2d 117 (1983).

IV. ALLEGED PROSECUTORIAL MISCONDUCT

A. STANDARD OF REVIEW

We review claims of prosecutorial misconduct to determine whether the defendant received a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Unpreserved arguments are reviewed for plain error that affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

B. APPLICABLE LAW

A prosecutor's role within our judicial system is to seek justice and not merely to convict. *People v Erb*, 48

Mich App 622, 631; 211 NW2d 51 (1973). Prosecutors have discretion on how to argue the facts and reasonable inferences arising therefrom, and are not limited to presenting their arguments in the blandest terms possible. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). "A prosecutor's comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial." *Id*. at 64. However, it is improper for a prosecutor to appeal to the jury's sympathy for the victim. *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988).

C. PROSECUTOR'S OPENING STATEMENT AND CLOSING ARGUMENT

Defendant first asserts that the prosecutor unduly appealed to the jury's sympathy by reading Worthington's written statement during his opening statement. We disagree. The prosecutor was stating facts that he intended to prove at trial, which is permissible in opening statements. *People v Ericksen*, 288 Mich App 192, 200; 793 NW2d 120 (2010). Reading this statement was not so inflammatory that it prejudiced defendant. Therefore, it was not improper for the prosecutor to read Worthington's statement.

Defendant next asserts that the prosecutor used the prestige of his office to bolster a police witness's credibility. "Included in the list of improper prosecutorial commentary or questioning is the maxim that the prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *Bahoda*, 448 Mich at 276. In *People v Boske*, 221 Mich 129, 133; 190 NW 656 (1922), the prosecutor inappropriately commented to the jury that the sheriff knew that he had the right defendant on trial for the crime. This argument urged

the jury to convict the defendant because the sheriff believed the defendant was guilty, instead of independently considering his guilt. *Id*. at 134. Defendant contends that the prosecution encouraged a guilty verdict in his closing argument in a manner similar to the improper comments in *Boske*. We disagree. The prosecutor's comments in this case summarized testimony elicited by defense counsel during cross-examination. Moreover, the trial court instructed the jury to consider the testimony of police officers the same as that of any other witness, to determine the facts of the case, to apply the law as given by the court, and to decide whether the prosecution proved the elements of the crime beyond a reasonable doubt. Jurors are presumed to follow the instructions of the court. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant additionally asserts that the prosecutor engaged in misconduct when he introduced facts that were otherwise not in evidence by explaining how domestic violence victims will recant or attempt to explain initial statements implicating their alleged abusers. An attorney may not refer to facts that are not in the record. *People v Knolton*, 86 Mich App 424, 428; 272 NW2d 669 (1978). In this case, the prosecutor did not introduce specific evidence regarding recantation of domestic violence victims' testimony. However, reversal is not required because the trial court clearly instructed the jury that "[t]he lawyer[s'] statements and arguments are not evidence." See *Graves*, 458 Mich at 486.

Defendant also asserts that the prosecutor denigrated defense counsel by stating that he could tell the defense was "in trouble." Prosecutors are allowed to argue "that a defendant's story is unworthy of belief as long as such argument is based on the evidence rather than on matters not of record or the prestige of the

prosecutor's office." *People v Pawelczak*, 125 Mich App 231, 238; 336 NW2d 453 (1983). To the extent that the prosecutor's comment exceeded the permissible bounds, any prejudicial effect was cured by the trial court's instructions that "[y]ou must not let sympathy or prejudice influence your decision" and that "[t]he lawyer[s'] statements and arguments are not evidence." See *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

V. ARGUMENTS IN DEFENDANT'S STANDARD 4 BRIEF

A. STANDARD OF REVIEW

Defendant presents two challenges in his Standard 4 brief.[3] First, defendant contends that the jury instructions were erroneous. However, defense counsel expressly agreed to the proposed jury instructions and thereby waived appellate review of the instructions. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Second, defendant contends that his counsel was ineffective. We review challenges to the effectiveness of counsel to determine whether defendant has met the heavy burden of showing that counsel's performance was deficient and that he was prejudiced by the deficiency. See *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). We apply a presumption that counsel's challenged actions were sound trial strategy, and the alleged deficiency required must be so serious that counsel was not performing as guaranteed by the Sixth Amendment. *Id.*; US Const, Am VI. A defendant must show that the error was so prejudicial that the outcome would have been different if trial counsel had not committed the error. *Id.*

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[3] See Administrative Order No. 2004-6.

B. APPLICABLE LAW ON EFFECTIVENESS OF COUNSEL

Both the United States and the Michigan Constitutions guarantee a defendant the right to counsel. US Const, Am VI; Const 1963, art 1, § 20. This right to counsel includes the right to effective assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Our Supreme Court has held that the Michigan Constitution guarantees a defendant the same right to counsel as the United States Constitution, and Michigan has adopted the standard for evaluating the effectiveness of counsel set out by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Pickens*, 446 Mich 298, 326; 521 NW2d 797 (1994).

Strickland set forth a two-part test to determine whether defense counsel was effective in a particular case. First, the defendant must show that counsel's "representation fell below an objective standard of reasonableness." *Strickland*, 466 US at 688. Second, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. Proof of both prongs is needed to show that a conviction " 'resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable . . . .' " *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002), quoting *Strickland*, 466 US at 687. The relevant inquiry "is not whether a defendant's case might conceivably have been advanced by alternate means," but whether defense counsel's errors were so serious that they deprived the defendant of a fair trial. *People v LeBlanc*, 465 Mich 575, 582; 640 NW2d 246 (2002).

C. REVIEW OF COUNSEL'S EFFECTIVENESS

Defendant first argues that trial counsel should have objected to comments that were inappropriately made by the prosecution during opening statements and closing argument. As discussed in part IV of this opinion, we have concluded that any prejudice resulting from the two comments was cured by the jury instructions. Accordingly, we conclude that the lack of objections does not require reversal.

Defendant next argues that his counsel was ineffective for failing to subpoena evidence and for failing to interview witnesses that would have established that he lived in the apartment with Worthington. We disagree. Defense counsel's decision regarding which witnesses to call is presumed to be sound trial strategy. *People v Seals*, 285 Mich App 1, 21; 776 NW2d 314 (2009). Defense counsel adequately presented the defense that defendant lived at the apartment. Defendant provides nothing beyond his assertions to establish that additional witnesses would have provided different evidence on this issue.

Last, defendant argues that his counsel was ineffective for failing to request a jury instruction on his defense theory, i.e., that he had permission to be in the apartment because he lived there with Worthington. Again, we disagree. The charged offense required the prosecutor to prove that defendant broke into and entered a dwelling, in keeping with CJI2d 25.2a. The record indicates that defense counsel researched the issue and stated that he was satisfied on that issue. Defense counsel was not ineffective regarding this decision.

Affirmed.

OWENS, P.J., and JANSEN, J., concurred with O'CONNELL, J.

PEOPLE v WILLIAMS

Docket No. 299809. Submitted September 8, 2011, at Grand Rapids. Decided September 15, 2011. Approved for publication October 25, 2011, at 9:05 a.m. Leave to appeal denied, 491 Mich 854.

Robert J. Williams, Jr., already serving a jail sentence for domestic violence, was convicted of being a prisoner in possession of a controlled substance and delivery of less than five kilograms of marijuana in the Berrien Circuit Court. The court, Angela M. Pasula, J., sentenced defendant to 34 months to 30 years' imprisonment for the prisoner-in-possession conviction and 34 months to 15 years' imprisonment for the delivery conviction. The court ordered that the sentences be served consecutively to each other and to the domestic-violence sentence. The court further ordered that defendant be given credit for 27 days that he spent in jail after the expiration of the domestic-violence sentence and before his sentencing on the prisoner-in-possession and delivery convictions, but the court only applied the credit toward the prisoner-in-possession sentence. Defendant appealed.

The Court of Appeals *held*:

1. The Double Jeopardy Clause bars the imposition of multiple punishments for the same offense unless multiple punishments are specifically authorized by the Legislature. Absent clear legislative intent to impose multiple punishments, a court must determine whether the sentences were imposed for the same offense as determined by the statutory elements of the offenses. If each offense requires proof of a fact that the other does not, they are separate offenses notwithstanding a substantial overlap in the proof offered to establish the crimes. To prove a charge of prisoner in possession of a controlled substance, a prosecutor must show that the individual was a prisoner, but an individual need not be a prisoner to be convicted of delivery of less than five kilograms of marijuana. Further, a person need not deliver a controlled substance to be a prisoner in possession. Thus, the offenses of prisoner in possession and delivery of less than five kilograms of marijuana each require proof of a fact that the other does not, and a person may be convicted of both offenses based on the same transaction.

2. If the issue is properly preserved, a new trial may be granted on the basis that the evidence preponderates heavily against the verdict and a serious miscarriage of justice would occur if the conviction were allowed to stand. A challenge to the sufficiency of the evidence need not be preserved. The evidence will be reviewed in a light most favorable to the prosecution to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. In this case, the evidence was more than sufficient. The evidence established that the defendant had bragged to other inmates that he could supply them with marijuana in the jail. He then approached another inmate and told him that he would trade marijuana for candy. The other inmate reported the offer to jail officials who arranged for a controlled exchange. Before the transaction, the officials searched the informant to ensure that he did not already possess marijuana. The informant then exchanged candy for a package which was found to contain marijuana. A surveillance camera recorded the transaction. Direct view of the exchange by a police officer was not required.

3. Defendant failed to support his claim that he did not receive a fair trial because two members of the jury were biased given that the challenged jurors were excused before the trial.

4. A consecutive sentence may be imposed only if specifically authorized by statute. Under MCL 768.7a(1), a person who is incarcerated in a penal or reformatory institution and who commits a crime during that incarceration which is punishable by imprisonment in a penal or reformatory institution must, upon conviction of that crime, be sentenced as provided by law. The term of imprisonment imposed for the crime must begin to run at the expiration of the term or terms of imprisonment which the person is serving or has become liable to serve. An inmate has become liable to serve a sentence only if that sentence was imposed, or the act underlying the sentence occurred, in the past. Thus, a defendant convicted of an offense committed while incarcerated for a prior offense will be given a sentence consecutive to the sentence he or she is currently serving for that prior offense. And, if the defendant has committed any offenses between his or her original sentencing offense and the new sentencing offense, the defendant's new sentence will also be consecutive to the sentences for those prior offenses. However, if an incarcerated defendant commits two offenses contemporaneously and those offenses are tried and sentenced together, the defendant has become liable to serve the sentences at the same time and the consecutive-sentencing statute is inapplicable. In this case, defendant was simultaneously

convicted of contemporaneous offenses, and the trial court improperly ordered that the sentences for his prisoner-in-possession and delivery convictions run consecutively to each other. The two sentences were required to be concurrent, although consecutive to his prior sentence for domestic violence.

5. Under MCL 769.11b, whenever any person is convicted of any crime and has served any time in jail before sentencing because of being denied or unable to furnish bond for the offense of which he or she is convicted, the trial court in imposing sentence must grant credit against the sentence for the time served in jail prior to sentencing. In this case, defendant completed his domestic-violence sentence shortly after he was convicted of the controlled-substances offenses, and he continued to be incarcerated pending his sentencing on the controlled-substances offenses. Defendant was entitled to credit for the time spent in jail pending sentencing. Because the court erroneously ordered that defendant's sentences had to run consecutively, the court also erroneously applied defendant's jail credit only to the prisoner-in-possession sentence. The court should have applied the jail credit to both sentences.

6. Under prior record variable (PRV) 7 of the sentencing guidelines, MCL 777.57, a court must assess 10 points if the defendant has one concurrent or subsequent conviction. The trial court properly assessed 10 points for PRV 7 in light of defendant's concurrent controlled-substances convictions.

Affirmed in part, vacated in part, and remanded for correction of sentence.

1. CONSTITUTIONAL LAW — DOUBLE JEOPARDY — PRISONER IN POSSESSION OF A CONTROLLED SUBSTANCE — DELIVERY OF LESS THAN FIVE KILOGRAMS OF MARIJUANA.

The Double Jeopardy Clause bars the imposition of multiple punishments for the same offense unless multiple punishments are specifically authorized by the Legislature; absent clear legislative intent to impose multiple punishments, a court must determine whether the sentences were imposed for the same offense as determined by the statutory elements of the offenses; if each offense requires proof of a fact that the other does not, they are separate offenses notwithstanding a substantial overlap in the proof offered to establish the crimes; to prove a charge of prisoner in possession of a controlled substance, a prosecutor must show that the individual was a prisoner, but an individual need not be a prisoner to be convicted of delivery of less than five kilograms of marijuana, and a person need not deliver a controlled substance to

be a prisoner in possession; thus, the offenses of prisoner in possession and delivery of less than five kilograms of marijuana each require proof of a fact that the other does not, and a person may be convicted of both offenses based on the same transaction (US Const, Am V; Const 1963, art 1, § 15; MCL 333.7401[1], MCL 333.7401[2][d][*iii*], MCL 801.263[2]).

2. SENTENCES — CONSECUTIVE SENTENCES — PRISONS AND PRISONERS.

A consecutive sentence may be imposed only if specifically authorized by statute; a person who is incarcerated in a penal or reformatory institution and who commits a crime during that incarceration which is punishable by imprisonment in a penal or reformatory institution must, upon conviction of that crime, be sentenced as provided by law; the term of imprisonment imposed for the crime must begin to run at the expiration of the term or terms of imprisonment which the person is serving or has become liable to serve; an inmate has become liable to serve a sentence only if that sentence was imposed, or the act underlying the sentence occurred, in the past; thus, a defendant convicted of an offense committed while incarcerated for a prior offense will be given a sentence consecutive to the sentence he or she is currently serving for that prior offense; and, if the defendant has committed any offenses between his or her original sentencing offense and the new sentencing offense, the defendant's new sentence will also be consecutive to the sentences for those prior offenses; however, if an incarcerated defendant commits two offenses contemporaneously and those offenses are tried and sentenced together, the defendant has become liable to serve the sentences at the same time and the consecutive-sentencing statute is inapplicable (MCL 768.7a[1]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Arthur J. Cotter*, Prosecuting Attorney, and *Elizabeth A. Wild*, Assistant Prosecuting Attorney, for the people.

Michael A. Faraone, PC (by *Michael A. Faraone*), and Robert J. Williams, Jr., *in propria persona*, for defendant.

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

PER CURIAM. While serving a 330-day jail sentence for domestic violence, defendant decided to trade marijuana for a candy bar. Unfortunately for defendant, the other inmate involved in the trade acted as an informant for jail officials. As a result, defendant was charged with and convicted of being a prisoner in possession of a controlled substance, MCL 801.263(2), and delivery of marijuana, MCL 333.7401(1) and (2)(d)(*iii*). Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 34 months to 30 years' imprisonment for the prisoner-in-possession conviction and 34 months to 15 years' imprisonment for the delivery conviction, to be served consecutively to each other and to the domestic-violence sentence he was serving when he committed the new offenses.

Both through appointed appellate counsel and in a Standard 4 appellate brief,[1] defendant challenges the sufficiency of the evidence supporting his convictions, the propriety of making the prisoner-in-possession and delivery sentences consecutive to each other, and the constitutionality of convicting and sentencing him for both possession and delivery pertaining to a single underlying event. Because the prosecution presented sufficient evidence to support defendant's convictions and defendant was not twice placed in jeopardy for the same offense, we affirm defendant's convictions.

However, the trial court improperly ordered defendant's sentences for his prisoner-in-possession and delivery convictions to run consecutively to each other. As a result of that error, the court also erroneously applied defendant's 27 days of jail credit only to the prisoner-in-possession sentence. Accordingly, we vacate the judgment of sentence and remand to allow the circuit court

[1] See Administrative Order 2004-6, Standard 4.

to impose concurrent sentences for these two offenses and to apply the jail credit to which defendant is entitled to both sentences.

I. UNDERLYING FACTS AND PROCEEDINGS

On March 17, 2010, defendant was housed in dormitory 2-L at the Berrien County Jail. Defendant was serving a 330-day sentence for domestic violence. Fellow inmate Jimmie Ray Bradley was assigned to work duty and was sweeping and mopping the floors near 2-L when he was summoned by defendant. Bradley testified that defendant stated that he had marijuana to sell and asked Bradley if he would advertise this information to other inmates.

Bradley subsequently approached the jail guard and asked to speak to Berrien County Sheriff's Deputy Juan Mata. Bradley informed Mata about defendant's request. Mata directed Bradley to return to 2-L and ask defendant if he still possessed the marijuana. Bradley did so, and when he returned, he informed Mata that defendant still possessed the marijuana and wanted to trade it for a pack of Reese's Peanut Butter Cups from the jail commissary.

Bradley agreed to cooperate with the deputies and engage in a controlled buy of marijuana from defendant. The deputies conducted a strip search of Bradley to ensure that he did not have any evidence on his person. Mata gave Bradley an unopened Reese's Peanut Butter Cups package and instructed Bradley on where to walk and stand to ensure that the trade was captured by security cameras. Mata walked Bradley as close to 2-L as he could without being seen by defendant. Other deputies remained in the jail's control booth to observe the security footage while the sale was conducted.

Bradley approached dormitory 2-L and handed defendant the Reese's Peanut Butter Cups package through the cell bars. Defendant, in turn, handed Bradley marijuana folded inside a makeshift toilet-paper packet. Bradley turned and walked back toward Mata. Bradley showed Mata the toilet-paper packet, and Mata walked Bradley to the control room. Once inside, the deputies took the toilet-paper packet into evidence and strip searched Bradley again. Later forensic testing revealed that the toilet-paper packet contained 0.102 grams of marijuana.

Approximately 20 minutes after the transaction, a team of deputies searched the entire dormitory and searched defendant's person. In defendant's breast pocket, the deputies found scraps of toilet paper and one remaining Reese's Peanut Butter Cup inside its package. The deputies found no marijuana on defendant or in the dormitory. A canine unit was brought to the scene and the dog alerted on a book found on the ground next to defendant's bunk. However, the deputies found nothing inside the book.

Fellow inmate Vel Gene Sampson testified that defendant was "digging around in his [defendant's] stuff" on the morning of March 17, 2010. About 10 or 15 minutes later, Sampson witnessed Bradley approach the cell bars of the dormitory. Sampson saw Bradley hand a candy bar to defendant and saw defendant hand an unidentified object to Bradley. At some point, defendant bragged to the other inmates in the dormitory that "he could get them whatever they wanted" in the jail. Sampson specifically heard defendant say that he could get marijuana for other inmates.

Defendant testified on his own behalf. He denied exchanging marijuana for candy. Instead, defendant indicated that he offered to trade Bradley two commis-

sary items in the future if Bradley would get him a candy bar that day. Defendant asserted that when Bradley gave him the candy bar, he merely shook Bradley's hand and did not give him marijuana. Moreover, defendant stated that he did not know Bradley and, therefore, would not have trusted Bradley to conduct such an exchange. Rather, if defendant had wanted to trade marijuana, he would have contacted another inmate assigned to work duty, one he had known for almost 40 years.

Ultimately, a jury disbelieved defendant's version of events and convicted defendant as charged. The court subsequently sentenced defendant to two separate terms of imprisonment for the delivery and prisoner-in-possession convictions. The court ordered that those sentences be served consecutively to each other and to the domestic-violence sentence that defendant was serving at the time of the new offenses. The Michigan Department of Corrections terminated defendant's jail sentence for the domestic-violence conviction on June 15, 2010, four days after the jury trial convictions for prisoner in possession and delivery. At the July 12, 2010 sentencing, the court awarded defendant 27 days of jail credit for time served since the June 15 termination of his domestic-violence sentence. However, the court applied that credit only to the prisoner-in-possession sentence. Defendant now appeals his convictions and sentences.

II. DOUBLE JEOPARDY

Through his appellate attorney, defendant contends that his convictions for both possession and delivery, arising from the single sale of marijuana, violate his constitutional right to be free from double jeopardy. A criminal defendant is protected from being "twice put in jeopardy" for the same offense under both US Const, Am

V and Const 1963, art 1, § 15. As a constitutional issue, we review de novo a defendant's double-jeopardy challenge. *People v Ream*, 481 Mich 223, 226; 750 NW2d 536 (2008).

Under the Michigan Constitution's Double Jeopardy Clause, a defendant is given " 'three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense.' " *Id.* at 227, quoting *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). This case involves a "multiple punishments" issue because defendant challenges the court's duplicative sentencing for what he believes was one act.

The state is generally barred from imposing multiple sentences for the same offense. However, "[w]here the Legislature does clearly intend to impose such multiple punishments, imposition of such sentences does not violate the Constitution, regardless of whether the offenses share the same elements." *People v Smith*, 478 Mich 292, 316; 733 NW2d 351 (2007) (quotation marks and citation omitted). Absent such clear legislative intent to impose multiple punishments, this Court must determine whether the sentences were imposed for the "same offense" as defined by the test in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932). *Smith*, 478 Mich at 315-316. The *Blockburger* test "focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Nutt*, 469 Mich at 576 (quotation marks and citation omitted).

Defendant confuses the double-jeopardy issue by structuring his appellate argument as if he was con-

victed of simple possession of marijuana. Defendant was actually convicted of being a prisoner in possession of a controlled substance in violation of MCL 801.263(2), which provides, "a prisoner shall not possess or have under his or her control any . . . controlled substance." To establish a defendant's guilt under MCL 801.263(2), the prosecution must prove (1) that the defendant was a prisoner who (2) possessed or controlled (3) a controlled substance.

Defendant was also convicted of delivery of less than five kilograms of marijuana in violation of MCL 333.7401(1) and (2)(d)(*iii*). The elements of delivery of less than five kilograms of marijuana are (1) the defendant delivered a controlled substance, (2) the controlled substance was marijuana or a mixture containing marijuana, (3) the defendant knew he was delivering marijuana, and (4) the delivery consisted of less than five kilograms of marijuana. See MCL 333.7401(1) and (2)(d)(*iii*); *People v Mass*, 464 Mich 615, 638; 628 NW2d 540 (2001).

The statutory offenses in this case each possess an element not found in the other. To prove a charge of prisoner in possession, the prosecution must show that the individual was a prisoner. An individual need not be a prisoner to be convicted of delivery of less than five kilograms of marijuana. Moreover, a person need not deliver a controlled substance to be a prisoner in possession. Because "each [offense] requires proof of a fact that the other does not, the *Blockburger* test is satisfied," *Nutt*, 469 Mich at 576 (quotation marks and citation omitted), and defendant's constitutional rights were not violated.

III. GREAT WEIGHT OR SUFFICIENCY OF THE EVIDENCE

Defendant, through his Standard 4 brief, argues that his convictions are either against the great weight of

the evidence or based on legally insufficient evidence. Specifically, defendant contends that his guilt cannot be established given that the security footage fails to show any object passed from defendant to Bradley, the deputies were unable to see the actual transaction, and the deputies lost sight of Bradley for a few seconds on his route from 2-L to Deputy Mata following the transaction.

Defendant failed to request a new trial based on the great weight of the evidence and, therefore, this challenge is not preserved for appellate review. Generally, however, this Court would review such a challenge to determine if "the evidence preponderates heavily against the verdict and a serious miscarriage of justice" would occur if the conviction were allowed to stand. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). A defendant need not take any action to preserve a challenge to the sufficiency of the evidence. When reviewing a defendant's challenge to the sufficiency of the evidence, we review "the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). A prosecutor need not present direct evidence of a defendant's guilt. Rather, "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (quotation marks and citation omitted).

The prosecutor presented sufficient evidence to prove that defendant delivered marijuana to Bradley. Bradley testified that, during the controlled buy, he handed defendant a candy bar and defendant handed him a small packet of toilet paper. Security video

footage showed Bradley and defendant handing each other items through the cell bars, but the images were not clear enough to identify the items. Bradley walked away from the jail dormitory and was out of Deputy Mata's sight and could not be seen by the security cameras for a matter of seconds before he reached Deputy Mata's location. Bradley then showed the toilet-paper packet to Mata. Deputies took that same toilet-paper packet from Bradley and placed it into evidence. The substance found wrapped inside the toilet paper was forensically tested and proved to be marijuana. The deputies conducted a strip search of Bradley both before and after the exchange to ensure that he could not plant evidence. Moreover, Sampson testified to witnessing the transaction between defendant and Bradley right after defendant feverishly dug through his belongings, presumptively to find something (such as marijuana). Sampson further testified that defendant bragged to his dorm mates that he could acquire marijuana for them.

This evidence more than sufficiently links defendant to the marijuana given to Bradley on March 17, 2010. Similarly, if defendant passed the marijuana to Bradley, defendant must have possessed the marijuana before the transaction. We unhesitatingly reject defendant's suggestion that a prosecutor may only establish delivery of a controlled substance if a police officer directly views an illegal narcotics exchange and can identify the item from afar as a controlled substance. Accordingly, we affirm defendant's convictions based on the evidence presented at the jury trial.

IV. BIASED JURY/INEFFECTIVE ASSISTANCE OF COUNSEL

In his Standard 4 brief, defendant attacks trial counsel's failure to challenge two jurors who, he claims, knew Deputy Mata. Defendant asserts that these jurors

were then impaneled, resulting in a biased trial. We need not reach the substance of this challenge, however, as these jurors were, in fact, dismissed from duty and were not selected to hear the trial. Juror 19 indicated that he or she knew Mata, but had not seen him in years. Juror 25 indicated that he or she knew another Sheriff's deputy who was scheduled to be called as a witness during trial. Both of these jurors were excused before trial. Accordingly, there is no error for defendant to challenge in this regard.

V. SENTENCING

Through appellate counsel, defendant raises several challenges to the sentences imposed for his prisoner-in-possession and delivery convictions.

A. CONSECUTIVE SENTENCING

The trial court ordered that defendant's sentences for prisoner in possession and delivery run consecutively to each other and to the domestic-violence sentence defendant was serving when he committed the current offenses. Defendant concedes that, pursuant to MCL 768.7a(1), the court was required to make his prisoner-in-possession and delivery sentences run consecutively to his previous domestic-violence sentence. However, defendant challenges the court's decision to make the prisoner-in-possession and delivery sentences consecutive to each other. We agree with defendant's point of error.

"In this jurisdiction, concurrent sentencing is the norm. A consecutive sentence may be imposed only if specifically authorized by statute." *People v Brown*, 220 Mich App 680, 682; 560 NW2d 80 (1996) (citation omitted). MCL 768.7a(1) provides for consecutive sentencing as follows:

> A person *who is incarcerated* in a penal or reformatory institution in this state, or who escapes from such an institution, and who *commits a crime during that incarceration* or escape which is punishable by imprisonment in a penal or reformatory institution in this state *shall, upon conviction of that crime, be sentenced as provided by law*. The term of imprisonment imposed for the crime *shall begin to run at the expiration of the term or terms of imprisonment which the person is serving or has become liable to serve* in a penal or reformatory institution in this state. [Emphasis added.]

The key to resolving this issue is the interpretation of the phrase "or has become liable to serve" in MCL 768.7a(1).

> Well-established principles guide this Court's statutory construction efforts. We begin by examining the specific statutory language under consideration, bearing in mind that [w]hen faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute. We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous. Where the language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written. [*Prins v Mich State Police*, 291 Mich App 586, 589; 805 NW2d 619 (2011) (quotation marks and citations omitted; formatting altered) (alteration in original).]

Moreover, in relation to consecutive-sentencing statutes, this Court has held:

> The consecutive sentencing statutes should be construed liberally in order to achieve the deterrent effect intended by the Legislature. The statute clearly provides that the sentence shall commence "at the expiration of a term or terms of imprisonment which the person is serving or has become liable to serve . . . ." The deterrent effect of

> the statute can only be achieved by imposing consecutive sentences for the crimes committed by an escapee [or incarcerated individual]. Otherwise, it is possible that a defendant may never have to serve any time for the subsequent crimes. [*People v Piper*, 181 Mich App 583, 585-586; 450 NW2d 72 (1989) (citations omitted).]

This Court has repeatedly interpreted the phrase "or has become liable to serve" in MCL 768.7a(1) as allowing a sentencing court to "stack" or cumulate a defendant's sentences for separate offenses committed while incarcerated or on escapee status. By way of example, assume a defendant was sentenced in 1981 for committing offense A, was sentenced in 1982 for committing offense B while incarcerated, and then was sentenced in 1983 for committing offense C while incarcerated. Pursuant to MCL 768.7a(1), the sentencing court would be required to make each sentence consecutive to the others. The defendant would serve his or her sentence for offense A before commencing the sentence for offense B and would serve the sentence for offense B before commencing the sentence for offense C. See, e.g., *People v McKee*, 167 Mich App 258; 421 NW2d 655 (1988) (holding that a sentence of imprisonment imposed for an escape conviction had to be served consecutively to both the defendant's original sentence for unlawfully driving away an automobile and to the defendant's pending sentence for an assault he committed while incarcerated); *People v Mandell*, 166 Mich App 620; 420 NW2d 834 (1987) (holding that the trial court properly sentenced the defendant to a term of imprisonment for his escape conviction that was to run consecutively to the sentence he was serving when he escaped, and that the trial court properly ordered that the defendant's sentence for breaking and entering a motor vehicle while an escapee was to run consecutively to his sentence for the escape conviction).

However, there is no precedent for using MCL 768.7a(1) as a means of imposing consecutive sentences for convictions arising out of contemporaneous offenses that were tried together in one trial.[2] When interpreting a statute, we must read the statutory language "in its grammatical context, unless it is clear that something else was intended." *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). The statute states that the defendant's new prison term begins to run at the expiration of the term or terms of imprisonment that the defendant is serving or "has become liable to serve." "Has become" is the present perfect tense of the verb "become." "The present perfect tense generally indicates action that was started in the past and has recently been completed or is continuing up to the present time, or shows that a current action is logically subsequent to a previous recent action." *Deschaine v St Germain*, 256 Mich App 665, 672; 671 NW2d 79 (2003) (quotation marks and citations omitted). Accordingly, a defendant "has become liable to serve" a sentence only if that sentence was imposed (or the act underlying the sentence occurred) in the past. When the new sentence and its underlying offense are logically subsequent to the sentence for which the defendant "has become liable to serve" the court may order the new sentence to run consecutively.

Stated differently, a defendant convicted of an offense committed while he or she was incarcerated for a prior offense will be given a sentence that runs consecutively to the sentence he or she is currently serving for that prior offense. If the defendant has committed any

[2] Moreover, neither statute under which defendant was convicted requires or allows the court to impose consecutive, rather than concurrent, sentences. Accordingly, we cannot hold that imposing consecutive sentences for the prisoner in possession and delivery convictions would be a sentence "as provided by law." MCL 768.7a(1).

offenses between his or her original sentencing offense and the new sentencing offense, the defendant's new sentence will also run consecutively to the sentences for those interceding offenses. However, if an incarcerated defendant commits two offenses contemporaneously and those offenses are tried and sentenced together, it is illogical to claim that one of those contemporaneous sentences "started in the past . . . ." *Id*. The defendant has become liable to serve the sentences at the same time, one does not precede the other, and therefore the consecutive-sentencing statute is inapplicable.

As such, we conclude that the trial court erred by ordering defendant's sentences for his prisoner-in-possession and delivery convictions to run consecutively to each other. The offenses occurred at the same time, the charges were tried together, and the court imposed the sentences at one proceeding. While the trial court correctly concluded that the sentences for the current offenses must run consecutively to defendant's underlying domestic-violence sentence, the current sentences must run concurrently with each other. Accordingly, we vacate the judgment of sentence and remand to allow the circuit court to amend the order so that the current sentences run concurrently with each other.

B. AMOUNT OF JAIL CREDIT

At sentencing, the court acknowledged that defendant's underlying domestic-violence sentence was terminated on June 15, 2010, shortly after the jury convicted defendant of prisoner in possession and delivery. The court further acknowledged that defendant had remained incarcerated pending sentencing on the current charges following the termination of his previous sentence. Accordingly, the court awarded defendant 27 days of jail credit, reflecting the period between the

termination of his original sentence and the sentencing on the current charges.[3] Because the court ordered defendant's sentences for prisoner in possession and delivery to run consecutively to each other, the court applied the jail credit only to the prisoner-in-possession sentence, i.e., the first sentence to be served. Defendant contends that the trial court was required to apply the jail credit to both sentences because the sentences should run concurrently. We agree.

Michigan's jail-credit statute, MCL 769.11b, provides:

> Whenever any person is hereafter convicted of any crime within this state *and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted*, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing. [Emphasis added.]

After defendant's original sentence was terminated on June 15, 2010, defendant remained in jail only "because of being denied or unable to furnish bond for the offense of which he is convicted . . . ." MCL 769.11b. Defendant remained in jail only because he was awaiting sentencing on the current charges. Accordingly, the jail-credit statute applies to this action. And, as we have determined that the court should have ordered defendant's prisoner-in-possession and delivery sentences to run concurrently with each other, the jail credit should have been applied to both sentences. We therefore

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[3] This was proper under our Supreme Court's recent opinion in *People v Idziak*, 484 Mich 549, 567 n 17; 773 NW2d 616 (2009) (noting that a parolee who is returned to prison after a parole violation continues serving out his or her original sentence and is not entitled to jail credit pending trial on the parole violation; however, if the term of parole expires while the parolee is incarcerated awaiting trial on the violation, then he or she is entitled to jail credit after the parole expiration date).

vacate the award of jail credit in the judgment of sentence and remand to allow the circuit court to apply 27 days of jail credit to both the prisoner-in-possession and delivery sentences.

C. PRIOR RECORD VARIABLE 7

Finally, defendant challenges the scoring of prior record variable (PRV) 7. Specifically, defendant contends that, because the court ordered his prisoner-in-possession and delivery *sentences to run consecutively*, the underlying *convictions cannot be considered "concurrent"* for purposes of the sentencing guidelines. And, thus, the court erred by assessing 10 points for PRV 7.

The scoring of PRV 7 is governed by MCL 777.57:

> (1) Prior record variable 7 is subsequent or concurrent felony convictions. Score prior record variable 7 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) The offender has 2 or more subsequent or concurrent convictions ..... 20 points
>
> (b) *The offender has 1 subsequent or concurrent conviction* ..... 10 points
>
> (c) The offender has no subsequent or concurrent convictions ..... 0 points
>
> (2) All of the following apply to scoring record variable 7:
>
> (a) Score the appropriate point value if the offender was convicted of multiple felony counts or was convicted of a felony after the sentencing offense was committed.
>
> (b) Do not score a felony firearm conviction in this variable.
>
> (c) Do not score a concurrent felony conviction if a mandatory consecutive sentence or a consecutive sentence

> imposed under section 7401(3) of the public health code, 1978 PA 368, MCL 333.7401, will result from that conviction. [Emphasis added.]

Nothing in the statute suggests that the consecutive nature of a defendant's sentences affects whether the *convictions* were entered concurrently. However, we need not resolve that issue in this appeal. Because we conclude that the trial court erred and should have ordered defendant's prisoner-in-possession and delivery sentences to run concurrently, the court properly scored PRV 7 at 10 points under defendant's own analysis.

Affirmed in part, vacated in part, and remanded for correction of defendant's judgment of sentence. We do not retain jurisdiction.

GLEICHER, P.J., and HOEKSTRA and STEPHENS, JJ., concurred.

PEOPLE v CORTEZ

Docket No. 298262. Submitted September 13, 2011, at Grand Rapids. Decided October 27, 2011, at 9:00 a.m. Vacated in part and remanded, 491 Mich 925.

Burton D. Cortez was convicted by a jury in the Montcalm Circuit Court, David A. Hoort, J., on two counts of being a prisoner in possession of a weapon and was sentenced as a second-offense habitual offender. Defendant appealed, alleging that the court erred by ruling that the Department of Corrections officer who questioned defendant following the discovery of two weapons in his cell was not required to provide him the warnings mandated by *Miranda v Arizona*, 384 US 436 (1966), before subjecting him to questioning and by admitting in evidence a recording of the incriminating statements defendant made during the questioning.

The Court of Appeals *held*:

1. The circumstances of the questioning in this case did not require *Miranda* warnings. The *Miranda* requirements were not intended to impede the on-the-scene questioning traditionally conducted by police officers when investigating a crime. Similarly, when *Miranda* is applied to a prison setting, it is also not intended to hamper the efforts of prison officials when investigating an offense committed in prison.

2. The primary rationale behind the *Miranda*-warnings requirement is to protect against the possibility of governmental agents compelling someone to make incriminating statements while in custody. *Miranda* warnings must be given when a person is subjected to custodial interrogation. Custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his or her freedom of action in any significant way. Being restricted or deprived of freedom, in the context of prison, is relative to additional limitations being placed on a prisoner beyond simply being in prison.

3. Under the circumstances of this case, where defendant was questioned by a corrections officer regarding an offense within the prison and for the purpose of maintaining prison safety, defendant was presented with very limited evidence of his guilt, and he was restricted and isolated pursuant to departmental procedure when

dangerous weapons are found in an inmate's area of control, the questioning was more like general on-the-scene questioning and questioning essential to the administration of the prison than the type of custodial interrogation requiring *Miranda* warnings. *Miranda* warnings were not necessary under the circumstances. The trial court did not err by holding that there was no violation of defendant's Fifth Amendment rights.

4. The recording containing defendant's admissions that he made the weapons and hid them in his cell was highly relevant to establishing defendant's guilt. The statements in the recording regarding defendant's possible gang affiliation were relevant to explaining why defendant's cell was searched and possible reasons for him to be in possession of a weapon. The trial court gave a limiting instruction before playing only part of the recording to the jury. The probative value of the recording was not substantially outweighed by the danger of unfair prejudice. The trial court did not err by admitting the shortened version of the recording.

Affirmed.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Andrea Krause*, Prosecuting Attorney, and *Joel D. McGormley*, Assistant Attorney General, for the people.

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

Before: O'CONNELL, P.J., and METER and BECKERING, JJ.

PER CURIAM. Defendant, Burton David Cortez, appeals as of right his convictions on two counts of being a prisoner in possession of a weapon, MCL 800.283(4), entered after a jury trial. The trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to concurrent terms of 24 to 90 months in prison.

At the time of the incident in question defendant was an inmate at the Carson City Correctional Facility. On

July 21, 2009, Michigan Department of Corrections (MDOC) officers discovered two weapons in defendant's cell during a search of a number of inmates' cells. Before trial, defendant moved to suppress a recorded statement taken during an interview with him after the weapons were discovered and in which he admitted possessing the weapons. At issue on appeal is whether the trial court erred by ruling that the MDOC officer who questioned defendant during the interview was not required to provide him with *Miranda*[1] warnings before subjecting him to the questioning and by admitting defendant's incriminating statements at trial. We affirm.

I

On July 21, 2009, a "siren drill" was carried out at the prison. Leading up to the drill there had been several assaults and fights involving suspected gang members; weapons were used and there were shots fired by corrections officers from the gun tower. On the morning of the drill, two homemade weapons had been found on an inmate who was a suspected gang member. Prison officials decided to conduct the siren drill to search for more weapons and identify inmates involved in the suspected gang activity.

Pursuant to protocol for the siren drill, all inmates were required to return to their cells for a lockdown, and the corrections officers then searched various cells for contraband. During the drill, an MDOC officer, Lieutenant Robert Vashaw,[2] provided other corrections

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] Lieutenant Vashaw testified at the suppression hearing in this matter and stated that at the time of this incident he was "an acting Inspector" for the facility.

officers with a list of suspected gang members whose cells were to be searched. Defendant's name was on the list.

MDOC Officer Robert Hanes explained that before a cell is searched, the corrections officers have the inmates step out one at a time, undergo a pat-down search, and then proceed to a day room while their cell is searched. According to defendant, about 30 minutes after the drill started, he was asked to leave his cell and was patted down.[3] He was then sent to a day room or activity room.

Officer Hanes searched the area of defendant's cell that was considered to be in defendant's area of control. The cell was basically divided so that defendant, who slept on the bottom bunk, had the left side of the cell and the inmate who slept on the top bunk had the right side of the cell as their areas of control. Officer Hanes found pieces of metal in a trash can on the left side of defendant's cell. He also noticed that a metal shelf was missing from defendant's desk. At that point, Lieutenant Vashaw directed that a thorough search of the cell be conducted. The search revealed a homemade shank, specifically a piece of sharpened metal that was inserted into a white plastic handle. The shank was stuck in the bottom bunk's framework on the under-side of the bed frame. Officer Hanes turned the shank over to Lieutenant Vashaw and then continued to search the cell. A second shank was found inside a corner of the mattress on the bottom bunk. The second shank was made of a piece of metal wrapped in a bluish cloth and was also turned over to Lieutenant Vashaw.

Lieutenant Vashaw testified that he took control of the shanks, "bagged and tagged" them, and placed

[3] Defendant did not testify at the suppression hearing, but he did testify at trial.

them in the Michigan State Police evidence locker. Once the shanks were in the locker, Lieutenant Vashaw no longer had control over them; only the state police had access to them. Lieutenant Vashaw testified that the two shanks were in the evidence locker when he later interviewed defendant but that the trash can containing the metal pieces may have been in the interview room during the interview. Defendant, on the other hand, testified that the shanks, which had been placed inside tubes, and the trash can, were all in the interview room.

Officer Vashaw testified that if an inmate is found with dangerous contraband, departmental policy calls for the inmate to be placed in segregation until his misconduct report is heard. On the basis of the items found in defendant's area of control, Officer Hanes prepared a misconduct report, and Lieutenant Vashaw ordered staff to escort defendant to a segregation cell or solitary confinement.[4] While in the segregation unit, an inmate must be handcuffed and escorted by a staff member whenever he leaves segregation.

Approximately an hour to an hour and a half after Officer Hanes found the second shank, Lieutenant Vashaw requested to speak with defendant. Because defendant was already in segregation, he was escorted in handcuffs to the control center to meet Lieutenant Vashaw.[5] According to the lieutenant, he had defendant come to the control center to be interviewed because inmates are often reluctant to speak openly in front of

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[4] According to defendant, before being placed in segregation, he was ordered to quickly shower with his prison clothes on and was then strip-searched and given a brown jumpsuit to put on.

[5] Defendant testified that he had been in segregation for approximately 15 or 20 minutes when he was handcuffed and escorted to the control center.

others. Lieutenant Vashaw and defendant then went to a back office for the interview.[6]

According to Lieutenant Vashaw, defendant hesitated to speak at the outset of the interview and initially "denied everything." The lieutenant then told defendant that the evidence the corrections officers had obtained was "pretty damaging" and that two weapons had been found in defendant's area of control. Lieutenant Vashaw said that defendant needed to tell him what was going on inside the prison because violent events had recently occurred; defendant needed to tell him why he was making weapons or was in possession of weapons. The lieutenant testified that he never threatened defendant.

Lieutenant Vashaw further testified that defendant soon started to talk, and the lieutenant brought out a tape recorder. Defendant knew the recorder was running, and he did not hesitate to discuss the matter. On the recording, which was played, in part, for the jury, defendant said that the weapons were his and that gang members had forced him to make them. One weapon was for his own protection, and the other was to be sold. He also admitted selling a third weapon the previous day. Defendant also talked about gangs that operated within the prison. The interview lasted approximately 15 minutes, and defendant never sought to end the interview. After the interview, a staff member escorted defendant back to segregation pursuant to departmental policy.

According to defendant, Lieutenant Vashaw showed him the trash can and both shanks in the interview room. Defendant told the lieutenant that the items were not his, but then the lieutenant told him they

[6] The office belonged to the facility's "Inspector" and was being used at that time by Lieutenant Vashaw as "an acting Inspector."

could make a deal. Lieutenant Vashaw proposed that defendant either admit possessing the weapons, do his segregation time after his misconduct ticket was heard, and go home as scheduled in approximately 11 months, or the lieutenant could keep defendant from ever going home. Defendant testified that everything he admitted on the recording was untrue; he just said what he needed to say in order to get out of prison and go home.

Before trial, defendant moved to suppress his confession on the grounds that he was not given *Miranda* warnings and it was highly prejudicial because the recording of his confession mentioned the length of time he had been in prison and detailed gang-related activity. Defendant renewed his objection to the admission of the recording during trial.

At the suppression hearing, during direct examination, Lieutenant Vashaw testified about his reasons for placing defendant in segregation and interviewing him:

> *Q.* So—you end up in possession of that first weapon found?
>
> *A.* Well, he, Officer Hanes . . . gave it to me and I took possession of it then, yes.
>
> *Q.* Okay. And then were you called back to the cell, or somehow you found another—came into possession of another weapon from the defendant's cell?
>
> *A.* Well, I wanted to get control of the prisoner, so I instructed Officer Hanes to do—I want you guys to finish going through this cell because there could be possibly more weapons in here, and then I left with the weapon and the metal contraband. I called in some additional staff to take Mr. Cortez to segregation.
>
> *Q.* Okay. So, you moved him from the day room to . . .
>
> *A.* Segregation.
>
> *Q.* What's segregation? What's that, what . . .

A. Solitary confinement. They're placed in there for detention and various protection and they're also placed in there pending, what we call, investigation or due process. Pending . . . investigation until we finish looking in to this incident or pending due process until we write misconduct and then they have a certain amount of days to be heard on that misconduct.

Q. And that's all stuff that's done internally within the prison?

A. Correct.

* * *

Q. Okay. And—and the reason, what is the reason he was put into segregation, at that point?

A. Because prisoner[s], when they're found with dangerous contraband which was the broken pieces of metal or a weapon, that's called a non bondable offense and for that reason, we're required to place them in segregation.

Q. This is all Department of Corrections policy?

A. Correct.

Q. Nothing that the police have directed you have to?

A. No.

* * *

A. Well, after he's placed in seg[regation] . . . Officer Hanes . . . subsequently found the second weapon in his mattress.

* * *

A. . . . Given the nature of what had been goin [sic] on for the past week, I wanted to talk to him [defendant] about the activity.

Q. For what reason?

A. To try to get a handle, make sure we—cuz [sic] it's not every day that you find two weapons on a guy and then

the same two weapons we found in his cell were similar to the first two we found in the start of the day. So, it's leadin [sic] me to believe we've got a gang problem going on, plus with the stuff that happened earlier in the week, I was trying to interview him find out what exactly was going on with those gang members or specifically in that level four unit.

Q. And—and you wanted information on the gang members because of what reason?

A. For prison safety. For future, I mean, if we got a war going on that's something we need to take control of.

* * *

Q. Okay. Were you requested by any police agency to question him regarding the knives, the weapons that were found in his cell?

A. No, I was not.

Q. Did you even have any contact with any outside police agency like the State Police, prior to questioning him in any regard?

A. No, I did not.

In regard to the content of his interview of defendant, Lieutenant Vashaw testified:

Q. So, how does the conversation start? I mean what—what do you say to him?

A. Basically, what's going on out there? I mean, we found these weapons in your cell, . . . I want to know what—can you tell me what's going on. I mean, this doesn't look good, you know. And that's how it starts out.

Q. But again, you wanted to know what's going on because of what reason?

A. Prison safety, with—we're having these gang problems and I want to know are we expecting more trouble, are we—you know, is there more weapons floating around out there, you know, concerned about the prisoner and staff safety.

* * *

Q. Did he tell you about the gang activity and his take on who's who—who's members of a gang and . . .

A. Yes.

* * *

Q. Was that helpful to you, in terms of again, maintaining peace and order in the prison?

A. Yes, specifically, because one name he did mention was a prisoner named Cain (phonetic) and we had received previous information that some of the Gangster Disciples had actually put a hit out on one of our officers. And we believed it to be credible enough, we kept the officer out of the institution, out of the inside and that prisoner Cain (phonetic), he was telling me about was one of the suspected GD's that was going to stab this officer.

Q. GD is—is what?

A. Gangster Disciple.

Q. That's the name of a gang?

A. Yes.

Later during the suppression hearing, the court asked Lieutenant Vashaw whether the MDOC had any arrangement with the state police in regard to conducting interviews of inmates suspected of criminal activity:

Q. Does the department have any type of arrangement or policy with the State Police, that you folks will do the interview? So they don't have to come out?

A. No, they've never—they've never said that. Typically we give them whatever information we have and then we lay [sic] it to them if they would like to come out and talk to the . . .

Q. So, there's no DOC policy that the Inspector or someone else would do, or interview, possible defendants for the State Police?

A. Uh, uh. Not unless—I mean there's no policy on it, no, that I've ever seen.

Q. Okay. Was there an arrangement or an unofficial policy or anything like that?

A. . . . [N]o sir . . .

Defense counsel continued with a similar line of questioning on recross-examination:

Q. Is it your practice to provide those interviews to the State Police?

A. If we're going to seek prosecution, yes.

Q. Okay. So, whenever you might seek criminal prosecution, you provide, not only the physical evidence that you've put in their police locker, but you also provide a report?

A. If they want it.

Q. Okay.

A. I've—well I, typically I fill out—we give em [sic] a synopsis of what we've had. We tell em [sic] either . . . verbally or, you know, in writing, what—what's transpired and we would like to seek prosecution on this inmate, you know, and I'm just talking in general, you know, for different instances. And they may come and talk to the inmate themselves or they may not. They may take the report we have, and use—just use that.

* * *

A. They will usually come to the facility there after, and say what do [you] have? And then if we have a report or what—whatever evidence or information we have, we then give [it] to them.

The court then resumed its questioning of the lieutenant:

Q. The distinction I was trying to—to make, it seems like you guys do have an arrangement or a policy that if there's evidence, you put it into the State Police, what do you call it?

A. Evidence locker.

* * *

Q. Yes?

A. Yes.

Q. Okay. But you don't have any type of arrangements or policy that you will do the interview for the State Police?

A. Right. No, we don't.

The trial court denied defendant's motion to suppress and objections to the recording. The court determined that defendant was in custody and was being interrogated but that Lieutenant Vashaw's testimony was credible and that he was not "acting as a tool of the State Police." In so holding, the court cited *People v Anderson*, 209 Mich App 527; 531 NW2d 780 (1995), wherein this Court explained that "constitutional protections apply only to governmental action" and, therefore, that "a person who is not a police officer and is not acting in concert with or at the request of the police is not required to give *Miranda* warnings before eliciting a statement." *Id*. at 533, citing *Grand Rapids v Impens*, 414 Mich 667, 673; 327 NW2d 278 (1982). Additionally, the trial court in this case noted that "there were many good, legitimate reasons why the Department of Corrections followed up with an interview of the defendant, relating to the safety and security of the prison, not only corrections officers but also inmates. Also, in [an] effort to find out, not only what is going on, but whether there was a gang problem, and specifically what's going on in that unit."

Further, while the trial court denied defendant's motion to suppress and objections to the recording, it attempted to minimize the prejudicial effect of the recording by allowing only a shortened version of it to

be played for the jury. The shortened version eliminated any reference to defendant's length of incarceration. The court also gave a limiting instruction to the jury.

The jury returned a verdict of guilty on both counts of being a prisoner in possession of a weapon. Defendant was sentenced as described. He now appeals as of right.

II

Defendant argues that the trial court committed error that requires reversal by ruling that Lieutenant Vashaw, the corrections officer who questioned him, was not required to provide him with *Miranda* warnings before subjecting him to custodial interrogation, contrary to his Fifth Amendment rights, and therefore erroneously admitted his incriminating statements at trial. We disagree. Although the facts of this case fall in the middle area of a spectrum of cases in which the factual situations of some require *Miranda* warnings and others do not, the circumstances of the questioning in this case did not require *Miranda* warnings.

When reviewing a motion to suppress evidence of a confession, we defer to the trial court's findings of fact unless they are clearly erroneous. *People v Herndon*, 246 Mich App 371, 395; 633 NW2d 376 (2001). We review legal conclusions de novo. *Id*.

The protections of the Fifth Amendment, US Const, Am V, and Const 1963, art 1, § 17 have " 'been extended beyond criminal trial proceedings "to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." ' " *People v Honeyman*, 215 Mich App 687, 694; 546 NW2d 719 (1996), quoting *People v Schollaert*, 194 Mich App 158, 164; 486 NW2d 312 (1992), quoting *Miranda*, 384 US at 467. An exception

to the requirement that *Miranda* warnings be given is general on-the-scene questioning of citizens during the fact-finding process. *Miranda*, 384 US at 477-478. *Miranda* was not intended to impede the on-the-scene questioning traditionally conducted by police officers when investigating a crime. *Id.* Similarly, when *Miranda* is applied to prison settings, it is also not intended to hamper the efforts of prison officials when investigating an offense committed in the prison. See *Fields v Howes*, 617 F3d 813, 819 (CA 6, 2010), cert gtd *Howes v Fields*, 562 US ___; 131 S Ct 1047; 178 L Ed 2d 862 (2011). To conclude "that any investigatory questioning inside a prison requires *Miranda* warnings . . . could totally disrupt prison administration" and "torture [*Miranda*] to the illogical position of providing greater protection to a prisoner than to his nonimprisoned counterpart." *Cervantes v Walker*, 589 F2d 424, 427 (CA 9, 1978), discussing *Mathis v United States*, 391 US 1; 88 S Ct 1503; 20 L Ed 2d 381 (1968).

The primary rationale behind the *Miranda*-warnings requirement is to protect against the possibility of governmental agents compelling someone to make incriminating statements while in custody. *Honeyman*, 215 Mich App at 694. *Miranda* warnings must be given when a person is subjected to a custodial interrogation. *Anderson*, 209 Mich App at 532. Custodial interrogation is " 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' " *People v Hill*, 429 Mich 382, 387; 415 NW2d 193 (1987), quoting *Miranda*, 384 US at 444. Being restricted or deprived of freedom, in the prison context, is relative to additional limitations being placed on a prisoner beyond simply being in prison. *Cervantes*, 589 F2d at 428. In *Cervantes*, the United States Court of

Appeals for the Ninth Circuit evaluated the concept of restricting one's freedom in a prison environment:

> The concept of "restriction" is significant in the prison setting, for it implies the need for a showing that the officers have in some way acted upon the defendant so as to have "deprived [him] of his freedom of action in any significant way," [*Miranda*, 384 US at 444]. In the prison situation, this necessarily implies a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement. Thus, restriction is a relative concept, one not determined exclusively by lack of freedom to leave. Rather, we look to some act which places further limitations on the prisoner.
>
> In defining this concept we adhere to the objective, reasonable person standard and the same four factors we have employed under the "free to leave" test. *See United States v. Curtis*, [568 F2d 643, 646 (CA 9, 1978)]. Therefore, the language used to summon the individual, the physical surroundings of the interrogation, the extent to which he is confronted with evidence of his guilt, and the additional pressure exerted to detain him must be considered to determine whether a reasonable person would believe there had been a restriction of his freedom over and above that in his normal prisoner setting. Such a situation requires *Miranda* warnings. [*Id*.]

The *Cervantes* court held that a sheriff's deputy's questioning of the defendant inmate in that case was not an instance of custodial interrogation requiring *Miranda* warnings. *Id*. at 426, 429. The defendant had recently been involved in a fight with another inmate. *Id*. In response to the fight, a sheriff's deputy moved the defendant from one cell to another. *Id*. While the defendant was being questioned in the jail library by the shift commander, the deputy searched the defendant's belongings outside the library door, in accordance with "standard jail procedure when moving inmates." *Id*. at 427. The deputy found a matchbox

containing a green odorless substance, which he suspected was marijuana, among the defendant's belongings. *Id*. at 427. He was not *certain* of what the substance was, however, because he had no specific training in identifying marijuana. *Id*.

> [The deputy] took the matchbox and contents into the library in order to have [the defendant] identify the substance. The library dimensions were about six feet by four feet. In the presence of [the shift commander], and at a distance of about one and one-half feet to two feet from [the defendant], [the deputy] opened the matchbox, showed the contents to [the defendant] and asked, "What's this?" [The defendant] replied, "That's grass, man." [The deputy] then placed [the defendant] under arrest. The matchbox contained a usable quantity of marijuana. [*Id*.]

The *Cervantes* court reasoned that under the circumstances, the deputy's questioning was an instance of on-the-scene questioning to determine whether a crime was in progress, rather than an instance of custodial interrogation. *Id.* at 429. The court noted that the marijuana was discovered during a routine search and that the deputy's questioning sought to ascertain the nature of the substance, took place in the prison library, and was apparently a spontaneous reaction to the discovery. *Id*.

More recently, in *Wilson v Cain*, 641 F3d 96 (CA 5, 2011), the United States Court of Appeals for the Fifth Circuit evaluated the physical circumstances of a prisoner during questioning. The defendant inmate was involved in an altercation with another inmate, whereafter he and the other inmate were handcuffed and taken to separate rooms for " 'post-fight interview[s].' " *Id*. at 98. During his interview, the defendant indicated that he had " 'stomped on' " a third inmate, which he demonstrated by jumping up and down three times, with both feet coming off the floor. *Id*. The corrections

officer conducting the interview testified that up to that point he had been unaware that a third inmate was involved in the altercation. *Id*. The third inmate was then discovered lying on a floor, injured to the extent that he was rendered totally disabled. *Id*. The defendant was charged with attempted second-degree murder. *Id*. Before trial, the defendant moved to suppress his statements during the interview because he had not been given *Miranda* warnings. *Id*. The trial court denied the motion, and the defendant was convicted of attempted manslaughter. *Id*. at 98-99. The Fifth Circuit evaluated whether *Miranda* warnings were required preceding the defendant's postfight interview, given the defendant's physical circumstances:

> [The defendant] was handcuffed, isolated from the rest of the prison population and questioned in an office, from which he was not free to go at any point during the interview. These physical circumstances, while as a general matter supportive of [the defendant's] right to *Miranda* warnings, nonetheless do not present a situation where it was unreasonable for the state court to have found that *Miranda* warnings were not necessary. Such a finding is not contrary to Supreme Court precedent, because *Mathis* did not describe the physical circumstances of the interrogation. Further, [the defendant's] physical circumstances were only slightly more indicative of custody than the circumstances in the circuit court cases of [*United States v Conley*, 779 F2d 970 (CA 4, 1985)] and *Cervantes*, where *Miranda* warnings were not required. *See Conley*, 779 F.2d at 971 (inmate questioned while handcuffed in small conference room in prison "control center," where he was awaiting transfer to the infirmary for medical treatment needed following the altercation); *Cervantes*, 589 F.2d at 426-27 (inmate questioned in small prison library, where the inmate was awaiting a move to another cell). Furthermore, [the defendant] was isolated from the prison population as a part of the prison's usual immediate "post-fight" procedure, designed to protect the safety of the prison by

> ensuring non-contact with the other inmates and securing the area. And . . . a victim of [the defendant's] assault, and [the defendant] were both handcuffed and subjected to the same sort of routine immediate post-fight questioning in separate rooms. [*Id*. at 103-104.]

But see *Fields*, 617 F3d at 822-823 (holding that the "critical issue" in determining whether a defendant inmate has been subjected to custodial interrogation is "whether the prisoner is isolated from the general prison population for questioning" as "isolation is perhaps the most coercive aspect of custodial interrogation," and thus, that a "bright line approach" without "fact-specific inquiries" should be applied).

The *Wilson* court further found that a particularly important factor in determining whether a prisoner is entitled to *Miranda* warnings is whether the questioning was conducted by a prison guard or an outside state official:

> One fact having particular importance is that [the defendant's] questioning was conducted by a guard employed at the prison in which he was incarcerated, rather than by an outside state official. This fact distinguishes this case from the relevant Supreme Court cases in which the interrogations found to require *Miranda* warnings were undertaken by outside state officials. *See Mathis*, [391 US at 3 n 2] (IRS agent questioned inmate); [*Maryland v Shatzer*, 559 US___, ___; 130 S Ct 1213, 1215–1216, 1224; 175 L Ed 2d 1045, 1049, 1057-1058 (2010)] (police detective not affiliated with prison questioned inmate). In contrast, in all of the analogous circuit court cases in which *Miranda* warnings were found unnecessary, the questioning of the prisoner had been undertaken by a member of the prison staff. *See Conley*, 779 F.2d at 971-73 (questioning by prison guard); *Cervantes*, 589 F.2d at 428 (questioning by the deputy sheriff, who worked at the county jail where defendant was being held); [*United States v Scalf*, 725 F2d 1272, 1275 (CA 10, 1984)] (questioning by correctional officer

> employed at prison). In *Conley*, the Fourth Circuit explicitly contrasted statements made by the defendant to a prison guard, on the one hand, and statements made to an FBI investigator, on the other hand; the court noted with approval the exclusion from evidence of statements made to the FBI investigator because he was "in a different category . . . He's an outside agent who has come in." *Conley*, 779 F.2d at 974 n. 5. The Ninth Circuit in *Cervantes* also stressed this factor, distinguishing *Mathis* by stating that "[t]he questioning of Mathis by a government agent, not himself a member of the prison staff, on a matter not under investigation within the prison itself may be said to have constituted an additional imposition on his limited freedom of movement, thus requiring *Miranda* warnings." *Cervantes*, 589 F.2d at 428. Finally, in *Fields v. Howes*, which is now pending before the Supreme Court, the Sixth Circuit distinguished its facts from those of the other circuit court cases just discussed *because* the questioning was by "state agents unaffiliated with the prison" rather than on-the-scene questioning by prison officials. *Fields*, 617 F.3d at 821 (and also because the questioning concerned "criminal conduct that took place outside the jail or prison," *id.* at 820). [*Wilson*, 641 F3d at 103.]

See also *Anderson*, 209 Mich App at 533, and the cases cited therein.

The *Wilson* court finally stated that the overall circumstances of the questioning, specifically whether the corrections officers were aware that the defendant may have committed a crime or were merely investigating what they believed to be a routine matter at the prison, pursuant to standard prison procedure, was relevant in determining whether the questioning was investigatory or accusatory. *Wilson*, 641 F3d at 104, citing "*Cervantes*, 589 F.2d at 428 (listing 'extent to which he is confronted with evidence of his guilt' as a factor in determining whether an inmate was 'in custody.')." Considering all the circumstances, the court held that "because the questioning was conducted by

members of the prison staff, using the prison's routine immediate 'post-fight' procedure to ensure the safety of the general prison population," the trial court did not err by concluding that "this was more like general on-the-scene questioning . . . rather than a custodial interrogation" requiring *Miranda* warnings. *Wilson*, 641 F3d at 104.

In this case, leading up to defendant's interview, several assaults and fights involving suspected gang members broke out in the prison. On the morning of July 21, the day of the interview, two homemade weapons had been found on a suspected gang member. Lieutenant Vashaw conferred with prison officials, and they decided to conduct a siren drill, wherein all inmates were required to return to their cells for a lockdown, and the corrections officers searched cells to find contraband and identify inmates involved in the suspected gang activity. After two homemade weapons were found hidden in defendant's cell, in his area of control, defendant was transferred to a segregation cell, and Officer Hanes filed a misconduct report. Lieutenant Vashaw testified that departmental procedure requires him to place inmates in segregation "when they're found with dangerous contraband[;] that's called a non bondable offense," and "pending, what we call, investigation or due process. Pending . . . investigation until we finish looking in to this incident or pending due process until we write [a] misconduct [report] and then [the inmates] have a certain amount of days to be heard on that misconduct [report]," which is "all . . . done internally within the prison."

Lieutenant Vashaw interviewed defendant within an hour and a half of the weapons' being found in his cell. Corrections officers escorted defendant, who was handcuffed, to and from the interview, again pursuant to

departmental procedure. Lieutenant Vashaw met defendant in the control center and then interviewed him in a back office belonging to the prison's Inspector, away from other inmates. In the beginning of the 15-minute interview, the lieutenant told defendant that the evidence the corrections officers had obtained was "pretty damaging" and that two weapons had been found in defendant's area of control. He said that defendant needed to tell him what was going on inside the prison because violent events had recently occurred; defendant needed to tell him why he was making weapons or was in possession of weapons. Once defendant began responding to Lieutenant Vashaw's questions, the lieutenant started a recorder, which defendant knew was running. During the recorded portion of the interview, defendant admitted possessing the weapons and described gang activity occurring in the prison.

In regard to the physical circumstances of the questioning, like the defendant in *Wilson*, defendant's freedom was restricted in that he was handcuffed and isolated in a back office away from the rest of the prison population. See *Wilson*, 641 F3d at 103-104. We note that in *Wilson*, the defendant engaged in an altercation with another inmate before being questioned and was isolated to ensure noncontact with the other inmates and secure the area. *Id*. at 98, 103-104. Here, defendant did not engage in any violent activity leading up to his interview. But both defendants were restrained and isolated pursuant to departmental procedure. See *id*. Dangerous weapons were recovered from defendant's cell, for which a misconduct report was filed. Departmental procedure required that he be placed in segregation and handcuffed whenever outside of segregation. Further, like the corrections officers in *Wilson*, see *id*., Lieutenant Vashaw interviewed defendant for safety purposes. During his testimony, which the trial court

found credible, the lieutenant explained that, given the recent violent activity in the prison involving suspected gang members and the fact that the weapons found in defendant's area of control closely resembled the weapons found on another suspected gang member earlier that morning, he "wanted to talk to [defendant] about the activity" and try to "find out what exactly was going on with those gang members or specifically in that level four unit." The lieutenant testified that he wanted to know what "was going on" for "[p]rison safety, with—we're having these gang problems and I want to know are we expecting more trouble[?] [A]re we—you know, is there more weapons floating around out there[?] . . . [I was] concerned about the prisoner and staff safety." During the interview, Lieutenant Vashaw attempted to elicit information from defendant that would be helpful in maintaining prison safety, and defendant provided such information, particularly the name of a gang member suspected of "putting a hit out" on one of the corrections officers.

Further, according to Lieutenant Vashaw, he did not confront defendant with evidence of his guilt other than some general, opening statements regarding "pretty damaging" evidence—two weapons—being found in defendant's area of control. See *Cervantes*, 589 F2d at 428. The lieutenant did not describe the weapons or the particular places where they were found. He testified that the weapons were not in the interview room and that the trash can containing the broken metal pieces may have been in the room but that he did not recall showing it to defendant. In *Cervantes*, while the deputy questioned the defendant as, apparently, a spontaneous response to the discovery of the matchbox filled with marijuana among the defendant's belongings, the deputy believed that the substance he had discovered was marijuana, and, when he asked the defendant to

identify it, he showed both the matchbox and its contents to the defendant while they were alone in a small room with only the shift commander. *Id*. at 427. Even under those circumstances, the *Cervantes* court held that the deputy's questioning was not an interrogation. *Id*. at 429.

It is also particularly important that defendant was questioned by Lieutenant Vashaw, who is an MDOC officer and not an outside state official, regarding conduct occurring within the prison. See *Wilson*, 641 F3d at 103; *Anderson*, 209 Mich App at 533. We note that there is clearly a cooperative relationship between the MDOC and the Michigan State Police. Lieutenant Vashaw placed the two shanks found in defendant's cell in the state police evidence locker, and he explained at the suppression hearing that corrections officers report any information they obtain regarding possible criminal violations to the state police, if requested to do so. We further acknowledge that there may be circumstances under which a corrections officer wears "two hats" in that the officer seeks to both investigate criminal activity or possible criminal activity as a part of prison administration *and* conduct a custodial interrogation. But we do not find that to be the case here. Lieutenant Vashaw restrained and isolated defendant pursuant to departmental procedure and repeatedly testified that by interviewing defendant he was not acting in the place of a police officer. He was not asked by any outside agency to interview defendant, and his purpose in conducting the interview was to elicit information from defendant that would be helpful to maintaining prison safety, considering the recent violent and possibly gang-related activity occurring in the prison. Again, the trial court found Lieutenant Vashaw's testimony to be credible, and we do not find clear error in that regard.

Although this case presents a close call because defendant was questioned by a corrections officer regarding an offense within the prison and for the purpose of maintaining prison safety, he was presented with very limited evidence of his guilt, and he was restrained and isolated pursuant to departmental procedure when dangerous weapons are found in an inmate's area of control, we find that the questioning was more like general on-the-scene questioning, see *Miranda*, 384 US at 477-478, and *Fields*, 617 F3d at 819, and questioning essential to the administration of a prison, see *Cervantes*, 589 F2d at 427, than the type of custodial interrogation requiring *Miranda* warnings. *Miranda* warnings were not necessary under the circumstances and to require them would unreasonably impede prison administration. Thus, the trial court did not err by finding no violation of defendant's Fifth Amendment rights.

III

Defendant further argues that, even if his Fifth Amendment rights were not violated, the recording of his statement was admitted in violation of MRE 403 because it was unfairly prejudicial since it included information that he was possibly affiliated with two gangs. We disagree.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010). The abuse-of-discretion standard recognizes that there may be no single correct outcome in certain situations. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Instead, there may be more than one reasonable and principled outcome. *Id*. When the trial court selects one of these principled outcomes, it has not abused its discretion,

and the reviewing court should defer to the trial court's judgment. *Id*. An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes. *Id*.

MRE 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Evidence may be considered unfairly prejudicial if there is a danger that " 'marginally probative evidence will be given undue or preemptive weight by the jury.' " *Mardlin*, 487 Mich at 627, quoting *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

In this case, the recording contained an admission by defendant that he had made the two weapons, one for himself and one to sell, and hid them in his cell. The recording was, therefore, highly relevant to establishing defendant's guilt. But, as defendant notes, the recording also contained statements of possible gang affiliation. We note, however, that other evidence of defendant's gang affiliation was presented to the jury before the recording was played. Lieutenant Vashaw testified that the MDOC keeps a list of suspected gang members and that defendant's name was on the list. Lieutenant Vashaw also testified that, because of the increased violence in the prison, he directed a search of cells belonging to suspected gang members, including defendant's cell. The evidence of defendant's suspected gang affiliation was relevant to explaining why his cell was searched and possible reasons for him to be in possession of a weapon.

Furthermore, in addition to reducing the length of the recording played for the jury, the trial court gave the jury the following limiting instruction:

> If you find that the defendant was a prisoner, that fact, plus any testimony relating to his incarceration or gang activity, is no evidence otherwise of the defendant's guilt in this case. You should not think just because that he was a prisoner, or that there was testimony relating to his incarceration or gang activity, that the defendant did something wrong or committed the crimes charged in this case.

We conclude that the probative value of the recording was not substantially outweighed by the danger of unfair prejudice. Any prejudice to defendant was minimal, considering the other evidence of defendant's gang affiliation admitted at trial and the trial court's limiting instruction. Accordingly, the trial court did not abuse its discretion by admitting the shortened version of the recording.

Affirmed.

O'CONNELL, P.J., and METER and BECKERING, JJ., concurred.

In re PAROLE OF ELIAS

Docket No. 300113. Submitted August 10, 2011, at Detroit. Decided November 1, 2011, at 9:00 a.m.

The Macomb County Prosecutor applied in the Macomb Circuit Court for leave to appeal the Parole Board's grant of parole to Michelle Elias, a prisoner under the jurisdiction of the Department of Corrections (DOC). The Parole Board intervened. The prosecutor argued that even though Elias's parole guidelines score indicated a high probability of parole, there had been substantial and compelling reasons on the record to deny Elias parole. The court, James M. Biernat, Sr., J., agreed with the prosecutor and reversed the Parole Board's decision. It concluded that the board had abused its discretion and determined that substantial and compelling reasons had supported her continued incarceration. Elias sought leave to appeal, which the Court of Appeals denied. The Supreme Court, in lieu of granting Elias's application for leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted. 488 Mich 1034 (2011).

The Court of Appeals *held*:

1. Under MCL 791.234(11), the decision to grant or deny parole is within the sole discretion of the Parole Board, but the Parole Board's discretion is not absolute. Under MCL 791.233(1)(a), (e), and (f), the board may not release a prisoner who has been incarcerated for two or more years unless he or she has earned a GED and may not grant parole unless there is satisfactory evidence that arrangements have been made for employment, education, or for the prisoner's care if he or she is physically ill or incapacitated and the board has reasonable assurance after considering all of the facts and circumstances that the prisoner will not become a menace to society or to the public safety. MCL 791.233e also requires the DOC to promulgate parole guidelines that quantify the applicable factors that should be considered in a parole decision and are intended to inject more objectivity and uniformity into the process to minimize recidivism and to prevent improper factors from being considered, such as race. The parole guidelines do not require the board to be absolutely objective. Rather, the Parole Board must consider all the facts and circum-

stances, including the prisoner's mental and social attitude, which requires the evaluation of subjective factors.

2. Before a prisoner's earliest release date, a DOC staff member prepares a parole eligibility report (PER) for the board which includes the prisoner's prior record, adjustment, and other information required by MCL 791.235. The DOC's case preparation unit uses the PER, along with the prisoner's entire file, to score the prisoner's parole guidelines. The parole guidelines are scored as required by DOC policy and result in a final score that is then categorized into a high, average, or low probability of parole. A prisoner facing parole may also be interviewed by one or more Parole Board members. Under MCL 791.233e(6), the board may depart from the parole guidelines, but to allow meaningful appellate review, it must state in writing substantial and compelling reasons for such a departure. A departure from the parole guidelines probability may be justified on identified reasons that keenly or irresistibly grab the board's attention and are of considerable worth in deciding whether it should deny or grant parole even though the guidelines score indicated a high or low probability of parole, respectively.

3. The DOC properly compiled a PER for Elias and calculated her parole guidelines score (which placed her in the high-probability-of-parole category), created a COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) risk assessment (which indicated that she had a low risk of engaging in violent or recidivist behavior), and prepared a transition accountability plan report to prepare Elias for the possibility of release. The Parole Board's decision to grant parole was not an abuse of its discretion and did not violate the Constitution or any statute, rule, or regulation. The board's decision was consistent with the parole guidelines. The circuit court improperly substituted its determination that substantial and compelling reasons mandated denial of Elias's parole for that of the Parole Board rather than affording any meaningful deference to the board. The circuit court improperly placed too much emphasis on static factors like the nature of the sentencing offense and Elias's prison misconduct, even though the most recent misconduct had occurred more than five years before her parole and the facts of the sentencing offense had already been considered in the calculation of both the sentencing and parole guidelines.

4. Contrary to the circuit court's conclusion, it was not an abuse of discretion for the Parole Board to grant Elias parole even though prior panels of the board had reached a different conclusion using the same evidence. Notwithstanding conflicting evi-

dence, the board's determination that Elias had accepted responsibility for the crime was supported by evidence in the record. There is no statute or caselaw that requires the board to specify which documents it reviewed in rendering its decision. Letters from the victim's family arguing against the grant of parole were contained in the record, and there was no evidence to support the circuit court's assumption that the board had not reviewed or considered them in its decision process.

Reversed.

1. PAROLE — PAROLE BOARD — GRANTS OR DENIALS OF PAROLE — DISCRETION.

The decision to grant or deny parole is discretionary, the Parole Board's discretion is not absolute; the board may not release a prisoner who has been incarcerated for two or more years unless he or she has earned a GED and may not grant parole unless there is satisfactory evidence that arrangements have been made for employment, education, or for the prisoner's care if he or she is physically ill or incapacitated and the board has reasonable assurance after considering all of the facts and circumstances that the prisoner will not become a menace to society or to the public safety (MCL 791.233[1][a], [e], [f]).

2. PAROLE — PAROLE BOARD — PAROLE GUIDELINES — DEPARTURES — SUBSTANTIAL AND COMPELLING REASONS.

The parole guidelines quantify the applicable factors that the Parole Board should consider in a parole decision and are intended to inject more objectivity and uniformity into the process in order to minimize recidivism and to prevent improper factors from being considered, such as race; the parole guidelines do not require the board to be absolutely objective; rather, the board must consider all the facts and circumstances, including a prisoner's mental and social attitude, which requires the evaluation of subjective factors; under MCL 791.233e(6), the board may depart from the parole guidelines, but to allow meaningful appellate review there must be substantial and compelling reasons stated in writing for the departure; the reasons justifying departure from the guidelines must be reasons that keenly or irresistibly grab the board's attention and are of considerable worth in deciding whether it should nonetheless deny or grant parole.

Eric J. Smith, Prosecuting Attorney, *Joshua D. Abbott* and *Kerry Ange*, Assistant Prosecuting Attorneys, for the Macomb County Prosecutor.

State Appellate Defender (by *Susan M. Meinberg*) for Michelle Elias.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *H. Steven Langschwager*, Assistant Attorney General, for the Parole Board.

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

GLEICHER, J. The Michigan Parole Board (the Board) granted Michelle Elias parole after she had served approximately 25 years of a 20- to 40-year sentence. The Macomb County Prosecutor objected to Elias's release and sought leave in the circuit court to appeal the Board's parole decision. The circuit court ruled that the Board abused its discretion by granting Elias parole and found that substantial and compelling reasons supported her continued incarceration. We conclude that the circuit court invaded the Board's authority and substituted its judicial judgment for that of the Board. Specifically, the Board fully adhered to the statutes, regulations, and internal procedures governing parole decisions, thoroughly reviewed the facts and circumstances before paroling Elias, and granted parole based on objective scoring strongly supporting Elias's paroled release. Because the circuit court overstepped the bounds of judicial review, we reverse and reinstate the Board's grant of parole.

I. THE PAROLE PROCESS IN MICHIGAN

There is scant published caselaw analyzing the multipart mechanics of Michigan's current parole process. Consequently, circuit courts lack useful precedent when called upon to review the propriety of a parole decision. We take this opportunity to explain the elements cul-

minating in a parole decision and offer guidance to circuit courts confronted with a parole-decision challenge.

The Legislature created the Parole Board as part of the Michigan Department of Corrections (DOC). MCL 791.231a. The Board consists of 10 members serving staggered terms. *Id.* "Most parole decisions are made by three-member panels of the Parole Board. Decisions for prisoners serving a life sentence are made by majority vote of all ten members of the Parole Board."[1] A prisoner sentenced to a term of years comes under the jurisdiction of the Board when he or she has served the minimum sentence, adjusted for any good time or disciplinary credits. MCL 791.233(1)(b) through (d); MCL 791.234(1) through (5). Several months before the prisoner's earliest release date, a DOC staff member must conduct an in-depth evaluation of the prisoner in order to advise the Board. A prison staff member prepares for the Board's review a "Parole Eligibility Report" (PER) summarizing the "prisoner's prior record, adjustment and other information[.]" DOC Policy Directive 06.05.103, p 1;[2] see also MCL 791.235(7). In preparing a PER, the staff member interviews the prisoner and gathers vital documentation, such as the results of any mental-health examinations and evaluations from prison programs. DOC Policy Directive 06.05.103, ¶¶ I, M, p 2. The PER "shall contain information as required by MCL 791.235"[3] and

[1] Department of Corrections, *The Parole Consideration Process* <http://www.michigan.gov/corrections/0,4551,7-119-1435_11601-22909--,00.html> (accessed August 26, 2011).

[2] DOC policy directives are available at <http://www.michigan.gov/corrections/0,1607,7-119-1441_44369--,00.html> (accessed August 26, 2011).

[3] MCL 791.235(7) provides that the PER must outline the prisoner's major misconduct charges, his or her work and educational record while

any other information requested by the Board for its review. *Id.* at ¶ O, p 2. Prison officials submit the PER to the Board's "Case Preparation Unit," along with the contents of the prisoner's central file. The unit uses the PER and file documents to score the prisoner's parole guidelines. DOC Policy Directive 06.05.100, ¶ D, p 1.

Statutorily mandated parole guidelines form the backbone of the parole-decision process. As described by this Court in *In re Parole of Johnson*, 219 Mich App 595, 599; 556 NW2d 899 (1996), "[t]he parole guidelines are an attempt to quantify the applicable factors that should be considered in a parole decision" and are "intended to inject more objectivity and uniformity into the process in order to minimize recidivism and decisions based on improper considerations such as race." The Legislature directed that the DOC refine the statutory guidelines by developing more detailed regulations "to assist the [Board] in making release decisions that enhance the public safety." MCL 791.233e(1). The DOC has fulfilled this command by promulgating detailed regulations and adopting policies and procedures consistent with the regulations.

In MCL 791.233e(2) and (3) the Legislature enumerated both mandatory and permissive factors for parole guidelines to be incorporated in the DOC's more comprehensive regulatory scheme:

> (2) In developing the parole guidelines, the [DOC] shall consider factors including, but not limited to, the following:
>
> (a) The offense for which the prisoner is incarcerated at the time of parole consideration.
>
> (b) The prisoner's institutional program performance.

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in prison, the results of any medical or mental examinations, information regarding the prisoner's cooperation with the authorities, and a statement regarding disciplinary time.

(c) The prisoner's institutional conduct.

(d) The prisoner's prior criminal record . . . .

(e) Other relevant factors as determined by the [DOC], if not otherwise prohibited by law.

(3) In developing the parole guidelines, the [DOC] may consider both of the following factors:

(a) The prisoner's statistical risk screening.

(b) The prisoner's age.

Pursuant to this legislative mandate, the DOC promulgated regulations outlining certain factors for the Board to consider when making a parole decision:

(2) The [Board] may consider all of the following factors in determining whether parole is in the best interests of society and public safety:

(a) The prisoner's criminal behavior, including all of the following:

(i) The nature and seriousness of the offenses for which the prisoner is currently serving.

(ii) The number and frequency of prior criminal convictions.

(iii) Pending criminal charges.

(iv) Potential for committing further assaultive or property crimes.

(v) Age as it is significant to the likelihood of further criminal behavior.

(b) Institutional adjustment, as reflected by the following:

(i) Performance at work or on school assignments.

(ii) Findings of guilt on major misconduct charges and periods of confinement in administrative segregation.

(iii) Completion of recommended programs.

(iv) Relationships with staff and other prisoners.

(v) Forfeitures or restorations of good time or disciplinary credits.

(c) Readiness for release as shown by the following:

(i) Acquisition of a vocational skill or educational degree that will assist in obtaining employment in the community.

(ii) Job performance in the institution or on work-pass.

(iii) Development of a suitable and realistic parole plan.

(d) The prisoner's personal history and growth, including the following:

(i) Demonstrated willingness to accept responsibility for past behavior.

(ii) Employment history before incarceration.

(iii) Family or community ties.

(e) The prisoner's physical and mental health, . . . which would reduce the likelihood that he or she would be able to commit further criminal acts.

(3) The [Board] may consider the prisoner's marital history and prior arrests that did not result in conviction or adjudication of delinquency, but shall not base a denial of parole solely on either of these factors.

* * *

(5) A prisoner being considered for parole shall receive psychological or psychiatric evaluation before the release decision is made if the prisoner has a history of any of the following:

(a) Hospitalization for mental illness within the past 2 years.

(b) Predatory or assaultive sexual offenses.

(c) Serious or persistent assaultiveness within the institution. [Mich Admin Code, R 791.7715(2), (3), and (5).]

Thus, the comprehensive regulatory parole guidelines supplement the legislative guidelines by adding highly

specific, objective criteria that must be considered during the parole-decision process.

When scoring the parole guidelines, the Board must consider "all relevant facts and circumstances, including the prisoner's probability of parole as determined by the parole guidelines . . . and any crime victim's statement . . . ." Mich Admin Code, R 791.7715(1). Under Mich Admin Code, R 791.7716(3), the scoring must be based on "the length of time the prisoner has been incarcerated for the offense for which parole is being considered and each of the following factors":

> (a) The nature of the offense(s) for which the prisoner is incarcerated at the time of parole consideration, as reflected by all of the following aggravating and mitigating circumstances:
>
> (i) Use of a weapon or threat of a weapon.
>
> (ii) Physical or psychological injury to a victim.
>
> (iii) Property damage of more than $5,000.00.
>
> (iv) Excessive violence or cruelty to a victim beyond that necessary to commit the offense.
>
> (v) Sexual offense or sexually assaultive behavior.
>
> (vi) Victim transported or held captive beyond that necessary to commit the offense.
>
> (vii) Multiple victims.
>
> (viii) Unusually vulnerable victim, as reflected by age, impairment, or physical disproportionality.
>
> (ix) The prisoner acted as a leader of joint offenders.
>
> (x) The prisoner has been designated as involved in organized crime . . . .
>
> (xi) The prisoner has been designated as being a career criminal . . . .
>
> (xii) The prisoner has been designated as a drug trafficker . . . .

(xiii) The prisoner is serving life or a long indeterminate sentence and is being considered for parole under [MCL 791.234(4)].

(xiv) The act was a situational crime with low probability of reoccurrence.

(xv) The prisoner's role was minor or peripheral to other joint offenders.

(b) The prisoner's prior criminal record, as reflected by all of the following:

(i) Assaultive misdemeanor convictions that occurred after the prisoner's seventeenth birthday.

(ii) The number of jail and prison sentences imposed.

(iii) The number of felony convictions.

(iv) The number of convictions for assaultive felonies . . . .

(v) The number of prior convictions for sex offenses or sexually motivated crimes.

(vi) The number of probation, delayed sentence, and parole failures.

(vii) Whether the offense for which parole is being considered was committed while the prisoner was on probation, delayed sentence, or parole.

(viii) Whether the prisoner was incarcerated for a violation while on probation for the offense for which parole is being considered.

(ix) The number of commitments as a juvenile for acts that would have been crimes if committed by an adult.

(x) Whether the prisoner was on probation as a juvenile for acts that would have been crimes if committed by an adult at the time the offense for which parole is being considered was committed.

(c) The prisoner's conduct during confinement to a department facility, . . . as reflected by the following:

(i) The number of major misconduct convictions and security classification increases *over the previous 5 years and during the year immediately before parole consideration*.

(ii) The number of nonbondable major misconduct convictions over the previous 5 years.

(iii) The number of major misconduct convictions for assault, sexual assault, rioting, or homicide during the previous 5 years.

(d) The prisoner's placement on the assaultive and property risk screening scales.

(e) The prisoner's age at the time of parole eligibility.

(f) The prisoner's performance in institution programs and community programs during the period between the date of initial confinement on the sentence for which parole is available and parole eligibility, including, but not limited to, participation in work, school, and therapeutic programs.

(g) The prisoner's mental health as reflected by the following:

(i) A psychiatric hospitalization as a result of criminal activity in the background of the prisoner.

(ii) A history of physical or sexual assault related to a compulsive, deviant, or psychotic mental state.

(iii) A serious psychotic mental state that developed after incarceration.

(iv) Whether subsequent behavior or therapy suggests that improvement has occurred. [Emphasis added.]

To facilitate scoring, the Board separated the parole-guideline factors into eight sections: (1) active sentence, (2) prior criminal record, (3) conduct, (4) statistical risk, (5) age, (6) program performance, (7) mental health, and (8) housing (referring to the prisoner's security level within the prison system). DOC Policy Directive 06.05.100, Attachment A, p 1. Much like the legislative sentencing guidelines, each parole-guideline section includes a list of factors to be scored and instructions on the point value to be assigned, which include both positive and negative points. *Id.* at 1-9. After every

factor is scored, the scores are aggregated to reach a total section score and ultimately the "Final Parole Guidelines Score." *Id.* at 1, 10. "That score is then used to fix a probability of parole determination for each individual on the basis of a guidelines schedule. Prisoners are categorized under the guidelines as having a high, average, or low probability of parole." *Johnson*, 219 Mich App at 599. A prisoner with a score of +3 or greater merits placement in the high-probability category, a score of –13 or less warrants assignment to the low-probability category, and a score between those figures falls within the average-probability category. DOC Policy Directive 06.05.100, Attachment A, p 10.

A prisoner being considered for parole may also undergo an interview conducted by one or more Board members assigned to the prisoner's panel. If the prisoner's guidelines score falls within either the high- or low-probability-of-parole categories and the Board intends to follow the guidelines recommendation to grant or deny parole respectively, the Board need not interview the prisoner. MCL 791.235(1), (2); DOC Policy Directive 06.05.104, ¶ J, p 3. In all other situations, at least one member of the panel must personally interview the prisoner. "Parole interviews are informal, non-adversarial proceedings." DOC Policy Directive 06.05.104, ¶ R, p 4. During the prisoner's parole interview, he or she is entitled to bring a "representative" and to "present relevant evidence in support of release," but the representative may not be another prisoner or an attorney. MCL 791.235(6); DOC Policy Directive 06.05.104, ¶ S, p 4. "[A] staff member familiar with classification and program matters" also attends the interview to assist the prisoner and the Board member "by presenting or clarifying pertinent information in a fair and objective manner." DOC Policy Direc-

tive 06.05.104, ¶ S, p 4. Following the parole interview, a "Case Summary Report" is created for the Board's review.

In 2005, the DOC began implementing the Michigan Prisoner ReEntry Initiative (MPRI) in various stages. The MPRI is a multiagency, multicommunity project designed to promote public safety and reduce the likelihood of parolee recidivism. *The MPRI Model: Policy Statements and Recommendations*, Michigan Prisoner ReEntry Initiative, January 2006, p 2.[4] The mission of the MPRI "is to significantly reduce crime and enhance public safety by implementing a seamless plan of services and supervision developed with each offender and delivered through state and local collaboration . . . ." DOC Policy Directive 03.02.100, p 1. One goal of the MPRI is to "improve[] decision making at critical decision points," such as when the Board is considering whether to release a prisoner from incarceration on parole. *Id.* at ¶¶ C, E.2, pp 1-2. Under the MPRI, the DOC and the Board are now required to prepare and consider additional reports, and in particular the transition accountability plan (TAP):

> The lynchpin of the MPRI Model is the development and use of Transition Accountability Plans (TAPs) at four critical points in the offender transition process that succinctly describe for the offender, staff, and community exactly what is expected for offender success. The TAPs, which consist of summaries of the offender's Case Management Plan at critical junctures in the transition process, are prepared with each prisoner . . . at the point of the parole decision . . . . [*MPRI Model*, p 5.]

A staff member from the DOC must formulate a TAP with each prisoner, mostly to assist the prisoner's

[4] This report is available at <http://www.michigan.gov/documents/THE_MPRI_MODEL_1005_140262_7.pdf> (accessed August 26, 2011).

reentry into society, but also to assist the Board in rendering its parole decision. A TAP contains four elements:

> ➢ ***Needs*** are criminogenic[5] factors that contribute to risk and are individually assessed using the COMPAS risk assessment instrument.
>
> ➢ ***Goals*** are designed to mitigate each criminogenic need.
>
> ➢ ***Tasks*** are developed with each offender to meet the goals defined in the plan.
>
> ➢ ***Activities*** are created with each offender to break each task down into manageable steps.[6]

COMPAS, the acronym referred to in the TAP guidelines, stands for the "correctional offender management profiling for alternative sanctions" program. COMPAS is a comprehensive risk and needs assessment system, which takes into account both static information (such as the prisoner's past criminal offenses) and dynamic data (such as the prisoner's evolving attitudes and mental condition).[7] "COMPAS is designed to support treatment, programming and case management decisions. The various COMPAS reports describe the offender's risk and criminogenic needs. The fundamental

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[5] The term "criminogenic" is defined as "[p]roducing or tending to produce crime or criminality." *The American Heritage Dictionary of the English Language* (4th ed, 2000). Accordingly, a "criminogenic factor" is a factor that produces or tends to produce crime or criminality.

[6] *Implementation of the Transition Accountability Plan, 4th Quarter Fiscal Year 2009 Report*, p 1, available at <http://www.michigan.gov/corrections/0,1607,7-119-1441_1513---,00.html> by clicking on Transaction Accounting Plan – Fourth Quarter under the 2009 list (accessed August 26, 2011).

[7] Northpointe Institute for Public Management Inc., *COMPAS Risk and Need Assessment System: Selected Questions Posed by Inquiring Agencies*, January 14, 2010, pp 1-2, available at <http://www.northpointeinc.com/software-suite.aspx> by clicking on Overview and then on Download FAQ Document (accessed August 26, 2011).

task is to 'connect the dots' among the various factors and develop a more integrated and coherent interpretation of each persons [sic] support needs."[8]

In conducting a COMPAS risk assessment, a case manager considers various characteristics of the offender and the offense and inputs scores into the COMPAS computer software program. The software generates a score ranking the offender's statistical likelihood of violence, recidivism, success on parole, and other factors.[9] The COMPAS program incorporates information gleaned from the offender's prior criminal history, drug involvement, early indicators of juvenile delinquent problems, and criminal associations to assess a "general recidivism risk."[10] The prisoner's history of violent or assaultive crimes, prior use of weapons, past parole experience, and other similar factors contribute to the prisoner's "violent recidivism risk."[11] COMPAS also assesses more benign factors such as the level of the prisoner's family support and the prisoner's ability to gain employment, manage his or her finances, and find suitable housing once paroled.[12]

Ultimately, "matters of parole lie solely within the broad discretion of the [Board] . . . ." *Jones v Dep't of Corrections*, 468 Mich 646, 652; 664 NW2d 717 (2003); see also *Hopkins v Parole Bd*, 237 Mich App 629, 637; 604 NW2d 686 (1999); MCL 791.234(11). Notwithstanding, the Legislature has clearly imposed certain statutory restrictions on the Board's exercise of its

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[8] *Id.* at 3.

[9] *Id.* at 4-5

[10] Northpointe Institute for Public Management, Inc, *Measurement & Treatment Implications of COMPAS Reentry Scales* (2009) p 4, available at <http://www.michigan.gov/documents/corrections/Timothy_Brenne_Ph.D._Meaning_and_Treatment_Implications_of_COMPAS_Reentry_Scales_297503_7.pdf> (accessed August 26, 2011).

[11] *Id.* at 5.

[12] *Id.* at 11, 16-17.

discretion. In addition to creating the framework shaping the regulatory parole guidelines, the Legislature forbade the Board from releasing a prisoner who has been incarcerated for two or more years unless that prisoner has earned a general education development certificate GED. MCL 791.233(1)(f). The Board may not grant parole unless it "has satisfactory evidence that arrangements have been made for . . . employment . . . , for the prisoner's education, or for the prisoner's care if the prisoner is mentally or physically ill or incapacitated." MCL 791.233(1)(e). Most importantly, "[a] prisoner shall not be given liberty on parole until the board has reasonable assurance, after consideration of all of the facts and circumstances, including the prisoner's mental and social attitude, that the prisoner will not become a menace to society or to the public safety." MCL 791.233(1)(a); see also *Johnson*, 219 Mich App at 598.

The Legislature recognized, however, that in some circumstances the parole guidelines fail to take into account adequate information. Accordingly, the Legislature expressly granted the Board discretion to depart from the parole guidelines:

> The parole board *may depart* from the parole guidelines by denying parole to a prisoner who has a high probability of parole as determined under the parole guidelines or by granting parole to a prisoner who has a low probability of parole as determined under the parole guidelines. A departure under this subsection *shall be for substantial and compelling reasons stated in writing*. [MCL 791.233e(6) (emphasis added).]

The DOC adopted an identical regulatory provision allowing for parole departures. Mich Admin Code, R 791.7716(5). Once the Board has rendered its decision, it must issue in writing "a sufficient explanation for its decision" to allow "meaningful appellate review,"

Glover v Parole Bd, 460 Mich 511, 519, 523; 596 NW2d 598 (1999), and to inform the prisoner of "specific recommendations for corrective action" if necessary "to facilitate release," MCL 791.235(12).

II. PRIOR AND CURRENT CONSIDERATION FOR PAROLE

With this framework in mind, we now consider the history of Elias's imprisonment and the progression of her parole reviews. In 1985, a jury convicted Elias of second-degree murder, MCL 750.317, and possession a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Elias's convictions arose from the murder of Brian Barczynski. Elias had been in a romantic relationship with Barczynski's wife, Vicki. According to Elias, Barczynski had physically abused Vicki, motivating Elias to end the abuse. While under the influence of mescaline, Elias waited until the Barczynski family went out before breaking into their home. She positioned herself in a second-story window with a single-shot shotgun and waited for Barczynski to return. Barczynski drove up to the house with his wife, his four-year-old daughter, and another young child. When Barczynski got out of his vehicle, Elias shot him from her window perch, reloaded the shotgun, and shot him a second time. Elias then came outside, stood over Barczynski's body, and shot him in the face at close range. On August 28, 1985, then Circuit Court Judge Lawrence Zatkoff sentenced Elias to consecutive prison terms of two years for the felony-firearm conviction and 20 to 40 years for the murder conviction. The trial court imposed these sentences under the now-superseded judicial sentencing guidelines.[13]

[13] The judicial guidelines score sheet is not included in the lower court record. However, from our independent review of the offense variables

During much of her incarceration, Elias was not a model prisoner. Between 1986 and 2003, the prison issued her 35 major misconduct tickets. Elias's misconduct generally related to disobedience, presence in unauthorized areas, and sexual contact with other prisoners. In 1996 Elias pleaded guilty to one charge of attempted malicious destruction of prison property (a vending machine) and was sentenced to an additional consecutive six-month term of imprisonment.[14] In 1999, Elias placed a piece of burning paper into a prison dumpster and started a fire, which led to an administrative adjudication of guilt.

Yet Elias's record also documents noteworthy accomplishments, and she has not committed any type of misconduct since 2003. Elias earned her GED in 1986, and later completed a vocational training program in custodial work. She worked full-time in the prison food service program and received positive reports from her supervisors. Elias voluntarily participated in several substance abuse programs and completed group therapy for assaultive offenders (AOT). She recently married a longtime pen pal, who appears to be an exemplary citizen of Jacksonville, Florida.

Elias first became eligible for parole consideration on January 1, 2006, after serving 21 years and 3 months of her aggregated 22 1/2-year minimum term of imprisonment. At that time, Elias's parole guidelines scored at +3 points, equating with an average probability of parole. The Board had access to Elias's March 14, 2006 AOT "Termination Report," which indicated that Elias

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applicable at that time, Elias's minimum sentence of 20 years is well within the seemingly applicable minimum judicial guidelines range of 10 years to life.

[14] MCL 768.7a(1) provides for consecutive sentencing when a defendant is convicted of additional criminal offenses committed during incarceration.

had attended 47 sessions of AOT while incarcerated. In relation to Elias's general participation in group therapy, the report stated that Elias had displayed honesty and completed her assigned tasks; however, she had not actively and openly participated in the therapy and showed little empathy toward other participants. The AOT described that Elias made great strides toward cultivating "better understanding and more effective management of [her] criminal behaviors." Elias was able to describe her criminal acts, explain what led to her criminal acts, and accept responsibility for those acts. Elias had also "[p]repared a comprehensive plan for managing [her] criminal behavior." However, Elias did not have similar insight into her feelings and emotions. While Elias demonstrated an ability to manage her anger, she was unable to identify her feelings and emotions or connect those feelings to her outward criminal behavior. Although Elias had not completely met her therapy goals, the evaluator noted that Elias "completed the Assaultive Offender Program."

The Board also considered the September 19, 2005 case-summary report prepared after two panel members interviewed Elias. The case summary noted that Elias minimized her responsibility by rationalizing that she had been under the influence of drugs and shot Barczynski to avenge his physical abuse of his wife. The Board denied parole on March 28, 2006.

By October 2007, Elias had improved her parole-guideline score to +9 points, placing her in the high-probability-of-parole category. A case summary prepared in September 2007 noted that Elias's behavior had improved over the course of her incarceration. The interviewing Board member indicated that Elias had accepted responsibility for her crime: "Says she did commit the crime, says she was having a relationship

with [Barczynski's] wife, says [Barczynski] was abusing [his wife], says she decided to take matter into her [own] hands, says she shot [Barczynski] thinking she was doing the right thing at that time." Moreover, Elias felt "horrible about what she did to" Barczynski. However, the case summary inconsistently notes that Elias "seems to be in denial and continue[s] to minimize[] the crime" and "did not demonstrate enough insight into her crime." The Board denied parole on October 15, 2007, stating as its "substantial and compelling reasons" for departure that Elias "did not demonstrate enough insight into her crime" during the parole interview and "showed no remorse" for her crime or empathy for her victim.

Staff members at the DOC did not evaluate Elias under the TAP or COMPAS programs until September 2008. Elias's TAP report indicated that she had a low risk for violence and recidivism. Elias's strengths included her mature age, ability to transition into a stable and appropriate residence and social environment, full-time employment within the prison, and GED. However, the TAP case manager determined that Elias had a high probability of engaging in criminal thought and needed to further develop her social attitude (leading to a score of +9 points on a 10-point scale). Similarly, the report indicated that Elias would probably have difficulty with cognitive behavior (score of +6 points). The case manager predicted that Elias would probably have difficulty reentering the work force given her minimal vocational training and educational deficiencies (score of +7 points).

Elias's COMPAS risk-assessment report indicated that Elias was at low risk of engaging in violent or recidivist behavior. The report described the sentencing offense as a violent felony and included references to

the separate property offenses Elias committed while incarcerated. The scales used to assess Elias's risks and needs reflected that Elias had no current substance abuse problem but could benefit from further treatment to prevent its resurgence (leading to a score of +1 point on a 10-point scale).[15] Elias was assessed as having "probable" difficulty in reentering the work force given her lack of education and minimal vocational training. Moreover, Elias required additional training in methods of finding employment (scores of 6 and +7 points).[16] Elias was judged unlikely to have housing problems upon release, and her family members had no criminal involvement (scores of +1 point and +2 points).[17] The report also expressed that Elias was unlikely to face financial problems upon her release (score of +4 points)[18] and had a positive mental-health outlook (score of +1 point). In relation to "Cognitive Behavioral/Psychological" criminogenic needs, the report denoted that Elias does not likely have a criminal personality and that her conduct/thought process appears devoid of impulsivity, risk-taking, restlessness/boredom, and selfishness. However, the case manager failed to assign a numeric score for that factor.[19]

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[15] See *Measurement & Treatment Implications of COMPAS Reentry Scales*, p 19.

[16] The COMPAS assessment includes gender-specific scales to gauge a female parolee's employment, financial, and educational needs upon reentry into society. See *id.* at 20-21.

[17] See *id.* at 17 ("A low score . . . indicates an offender who has a stable and verifiable address[.]"); *id.* at 8 (noting that a parolee may need to plan for minimizing family contact if family members are likely to engage in criminal behaviors).

[18] *Id.* at 17.

[19] The "Reentry Cognitive Behavioral" scale is "a higher order scale that incorporates the concepts and items included in the Criminal Associates, Criminal Opportunity, Criminal Thinking, Early Socializa-

Based on the 2006 AOT termination report and the 2008 TAP and COMPAS reports, the Board denied Elias parole on December 2, 2008. An August 2008 case summary indicated that Elias minimized her criminal responsibility and failed "to comprehend the seriousness of" her offense. The summary further noted that Elias "relates little interest in the victim." Because Elias remained in the high probability-of-parole category, the Board provided "substantial and compelling" reasons for its departure from the guidelines. The Board cited Elias's explanation during her parole interview for murdering Barczynski. Elias "couldn't explain her actions, was in a rage,& [sic] didn't know why. [Board] is not convinced [Elias] has gained sufficient insight into her assaultive behavior to assure risk is reduced."

By March 2009, Elias had improved her parole-guideline score to +15 points, well above the score of +3 points necessary for placement in the high-probability-of-parole-category. Moreover, a March 2009 case-summary report indicated that Elias had accepted responsibility for her criminal actions. On May 29, 2009, however, the Board again denied Elias parole. As its "substantial and compelling reasons" to depart from the guidelines, the Board stated that Elias "demonstrated a lack of insight into her behavior. This, along with [the AOT termination report] indicating a lack of insight into her emotions, demonstrates that risk remains . . . "

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tion, and Social Adjustment scales." *Id*. at 15. The scale also takes into consideration "all items from" the Criminal Thinking Observations, Negative Social Cognitions, Life Goals/Aimless, Low Empathy, Early Onset, and Prison Misconduct scales. A score of seven or greater "suggest[s] a need for cognitive restructuring intervention" or "close supervision." *Id.*

Despite its previous four denials of parole, the Board granted parole to Elias on February 10, 2010. In preparation for the Board's review, the DOC prepared a PER on November 24, 2009. The PER indicated that Elias posed a "very low" assault risk and "low" property risk. The PER included as Elias's "active offenses" the felony-firearm, second-degree murder, and malicious destruction of property charges and observed that Elias had no prior criminal record. In relation to Elias's institutional adjustment, the PER mentioned Elias's 35 major misconducts while incarcerated. However, the PER indicated that Elias had not committed any misconduct since her last PER and had remained in the lowest security level at the prison since at least 2006. The report even stated that Elias's "[m]ost recent reports are excellent." In relation to institutional programming, the PER noted that Elias had earned her GED in March 1986 and participated in a custodial maintenance vocational training program. Elias had been working in the prison's food service program since 2003 and had consistently received "very good to excellent" reports. Elias completed substance abuse counseling in 1999, never required referral for psychological counseling, and completed AOT in 2006. The PER summarized that Elias had completed all recommended programs and that "at least 2/3 of all program reports [were] above average" and further noted that Elias planned to move to Jacksonville, Florida to live with her husband when released on parole.

The Board's Case Preparation Unit then used the PER to calculate Elias's parole guidelines. We now turn to a summary of Elias's scores in the eight guidelines sections. The Board scored three aggravating factors under the "active sentence" portion of the guidelines. Specifically, Elias received –1 point for the use of a weapon during the offense, –3 points for using force

that caused death, and –1 point for engaging in "violence or cruelty beyond that necessary to commit" the crime. Accordingly, Elias received an active-sentence score of –5 points. However, a prisoner receives credit toward the active sentence score to reflect the length of time he or she has already served. After the adjustment, Elias received an aggregate active-sentence score of –2 points. See DOC Policy Directive 06.05.100A, pp 1-2.

Although Elias had no criminal history before committing the sentencing offense, the Board assigned a score for the prior criminal record variables under the guidelines. Given the length of time Elias had already served, her score was neutralized at zero points. See *id.* at 3-4. In relation to institutional conduct, the guidelines required scoring points only for major misconducts or increased security classifications within the previous five years and within the year prior to the parole consideration. As Elias had not engaged in misconduct since 2003 and remained in a low-security classification, she received zero points for this category. The Board again weighted Elias's score, which resulted in an aggregate institutional-conduct score of +8 points. See *id.* at 4-5.

Elias's COMPAS statistical-risk analysis placed her in the "very low assaultive risk and low property risk" categories. This combination resulted in an aggregate statistical-risk score of +3 points. See *id.* at 6. Her age of 48 further reduced her scored risk for committing criminal offenses. Accordingly, Elias received an "age" score of +3 points. See *id.* at 7.

The "programming section" of the parole guidelines measures "[t]he prisoner's completion of recommended and approved programming . . . ." *Id.* at 8. This section is scored on a pass-fail basis, with the prisoner receiving credit for adequate completion of a program and demer-

its for inadequate completion of a program. Elias was assigned +1 point, representing that she had "no inadequates and at least two-thirds of the programs were rated as excellent/outstanding." Elias's adjusted aggregate programming score was +3 points. See *id.*[20] Ultimately, her final parole-guideline score equaled +15 points, placing her in the high-probability-of-parole category.

Following Elias's parole interview, a case summary prepared on December 14, 2009, acknowledged that Elias had committed an assaultive crime resulting in death. The summary noted, however, that Elias "accepts responsibility" for her crime and criminal behavior and quoted Elias's description of the offense:

> [Elias] says she was in a realtionship [sic] with a girlfriend, her husband and her boyfriend. Says they got into a fight and she ended up shooting her [sic] husband. [Elias] says she was intended [sic] to shoot herself and when she saw the victim she started shooting.. [sic] Says the gunbelonged [sic] to her boyfriend. Says she had always been fighting with the victim because he was very abusive to her girlefriend [sic]. Says the way she grew up violence was the way to solve problems.. [sic] Says the Clintio [sic] Township police had been called earlier because she would not lea[v]e the victim[']s home.. [sic] [Elias] was involved in a lover[']s triangle plus 1.

The case summary explained that Elias's "behavior reflected in the [prison] misconducts" had "diminished." Elias had received "satisfactory block reports" and had not committed any misconduct since October 1,

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[20] The evaluator did not score the mental-health or housing sections of Elias's guidelines because those variables were inapplicable in this case. The mental-health section is scored when the prisoner has a history of committing sexual offenses, and the housing section applies to prisoners housed in top-level-security facilities. See DOC Policy Directive 06.05.100A, pp 8-9.

2003. The interviewing Board member believed that Elias also accepted responsibility for her misconduct while incarcerated.

The case summary noted that Elias had "completed therapy," including a "psychoeducational group" in 1994, had "maximized the benefits of [AOT]," and had "made progressive improvement in her insight & deter-[m]ination to control her impulses, depressive feelings & irratability [sic]." Elias had also completed several substance abuse therapy programs, self-help programming, and a 1989 "alternative to violence" group counseling program. The summary also cited Elias's vocational training and work performance, as well as the GED she earned in 1986. The interviewing Board member accepted the truth of Elias's statement that "she ha[d] learned to deal with situations, and to have better control."

The case summary noted that Elias had "maintained family support" while incarcerated and that her proposed placement with her husband in Jacksonville, Florida was "acceptable." Moreover, the interviewing Board member indicated that he had reviewed the relevant documents, including the AOT termination report. The case summary quoted the Board member as indicating:

> [Elias] is very emotional, says she takes full responsibility.. [sic] Knows she hurt the victim and his family.. [sic] Says she prays everyday, wishes there was some way she could go back and change it.. [sic] Says the victim was her friend and that they did have some good times also. [Elias] says if given the chance, she has a husband and will never be a problem.. [sic] Says she wants to enjoy the years she has left.. [sic] Says she has learned a lot and can walk away from anything.. [sic] Says there will never be any problems... [sic] [The interviewing Board member] feel[s] she will do well. She has great support, was very emotional, has

> insight and a strong desire to make it. Husband works with the sheriff[']s department, knows the rule about no guns.. [sic] He love[s] his wife and will give her everything she needs. Willing to give inmate a second chance at tlife.. [sic]

Before making its decision, the Board panel was also able to review the interviews and assessments made during prior parole considerations. Barczynski's widow and now-grown children submitted several letters urging the Board to deny Elias parole and continue her imprisonment for the maximum 40-year term.

After considering the vast wealth of information before it, the Board granted Elias parole on February 10, 2010, to begin effective July 1, 2010. The notice of decision specified that "[r]easonable assurance exists that the prisoner will not become a menace to society or to the public safety . . . ." The Board expressed its belief that Elias accepted responsibility for her crime and criminal behavior. Further, Elias's history of institutional misconducts had diminished and she had earned satisfactory reports from the cellblock guards. The Board noted that Elias had earned her GED, completed vocational training, self-help programming, and substance abuse counseling and was adequately involved in her prison employment. Elias also "maintained family support" while in prison and had a family support system in place upon her release. The Board further determined that Elias's placement in Florida with her husband was acceptable.

III. PROSECUTOR'S APPEAL OF PAROLE BOARD DECISION

The Macomb County Prosecutor appealed the Board's decision in the Macomb Circuit Court. The court issued a stay pending its review and, as a result, Elias remains in prison. The prosecutor argued that the Board had abused its discretion by granting parole,

despite Elias's scoring as having a high probability for parole, because substantial and compelling reasons supported a departure from the guidelines recommendation. More specifically, the prosecutor challenged the Board's current decision to grant parole when it had denied parole on two previous occasions using the same TAP and COMPAS reports and on two additional previous occasions in reliance on the same AOT termination report.

The circuit court reversed the Board's decision. While recognizing the many positive factors in the record, the court determined following a review of "the entire record and the guidelines" that the Board had clearly abused its discretion. Reviewing the Board's brief summary of the underlying offense, the circuit court concluded that the Board had failed to fully consider the egregious nature of the crime. The court challenged the Board's reliance on the fact that Elias had simply "completed" therapy designed to overcome her assaultive behavior. Considering the "substance" of the therapy report, the circuit court noted that Elias "only partially completed" the stated goals of her treatment. The court concluded that the Board should also have considered the details within the therapy report, which revealed Elias's unsatisfactory performance. The circuit court also believed that the Board had given inadequate weight to Elias's long history of institutional misconduct by simply noting that Elias's "behavior reflected in misconducts has diminished."

The circuit court also took into account "other relevant factors" and reasoned as follows:

> The Court finds relevant the letters by the victim's relatives, regarding the release of [Elias], directed to the [Board] and included in the record. . . . [I]t is unclear from

> the record whether the [Board] gave these letters any consideration when making its determination.
>
> The Court further recognizes that [Elias] has been denied parole on at least six occasions.[21] The parole denials consistently found [Elias] had no insight into her behavior and does not demonstrate empathy. The most recent denial of parole on May 29, 2009 stated "the prisoner demonstrated lack of insight into her behavior." . . . The [Board] relied on the [AOT] Termination Report, dated March 14, 2006, indicating "a lack of insight into her emotions, demonstrates that risk remains." . . . The [Board] also reasoned their denials were consistent with the prisoner's [AOT] Termination Report, which indicated that she "completed" [AOT], but also indicates that defendant only "partially" completed the only two goals of the programs. . . .[22] The [Board] then relies on this same [AOT] Termination Report when it grants [Elias] parole approximately eight months later. The Court cannot reconcile the [Board's] use of this report and finds its recent reliance on this report to grant parole is a clear abuse of discretion.
>
> Further, the COMPAS report, dated September 11, 2008, indicates overall low violence and low recidivism. . . . However, the report fails to provide a score for the cognitive behavioral/psychological section. . . . The TAP report, dated September 11, 2008, indicates a score of highly probable to continue having problems with criminal thinking; probable to have reentry vocation/education problems;

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[21] From the record before us, it appears that Elias was denied parole on four occasions, not six. The record includes information gathered in a 1995-1996 parole review more than 10 years before Elias was even eligible for parole, which might have resulted in a fifth denial of parole had she been eligible.

[22] The therapy program actually included three goals: (1) to "[a]chieve better understanding and more effective management of your criminal behaviors," (2) to "[a]chieve better understanding and more effective management of feelings which seem to be connected with your criminal behavior," and (3) to "[a]chieve better understanding and more effective management of thoughts which seem to be connected to your criminal behavior."

and probable cognitive behavioral problems. . . . [Elias] was denied parole on three occasions after these reports were generated.[23]

The Case Summary Reports further detail[] the information the [Board] relied upon in making its decision. . . . The reports repeatedly indicate [Elias] minimizes her responsibility for the underlying crimes and provides numerous excuses. . . . However, based on the same information, several Case Summary Reports come to the conclusion that defendant has now accepted responsibility for the underlying crime. . . . The conflicting [DOC] assessments are evidence of the [Board's] clear abuse of discretion.

While the Notice of Decision states the [Board] considered the facts and circumstances, it appears that the [Board] did not give sufficient consideration to the circumstances of the crime resulting in [Elias's] conviction. Specifically, the severity and details of the crime and its affect [sic] on the victim's family were not significantly weighed. In addition, the substance of the [AOT] Termination Report was not properly considered. Further, it is unclear what evidence supports the [Board's] conclusion that [Elias] has now taken responsibility for her criminal actions. For these reasons, it is the Court's opinion that the [Board] did not fully consider, as required by MCL 791.233(1)(a), "all of the facts and circumstances, including the prisoner's mental and social attitude," in order to determine that "the prisoner will not become a menace to society or to the public safety." The failure to consider such facts and circumstances violates the statutory requirement. MCL 791.233(1)(a)[].

Further, other than mere conclusions, the [Board] has failed to cite sufficient verifiable facts or circumstances which provide reasonable assurance that [Elias] will no longer be a menace to society or to the public safety upon her release from prison. For these reasons, the Court finds that the [Board's] decision to grant parole was not supported by competent, material and substantial evi-

[23] Elias was actually denied parole on *two* occasions after these reports were generated.

> dence. . . .[24] Upon thorough review of the entire record, the Court believes that the decision to grant parole falls outside the range of reasonable and principled outcomes. . . .
>
> Finally, the [Board] argues that it could not deviate from the parole guidelines absent [substantial] and compelling reasons pursuant to MCL 791.233e(6). However, there were substantial and compelling reasons to depart, as identified above, and the [Board] clearly abused its discretion by not acting on those reasons . . . .

The Board subsequently filed a motion for reconsideration, highlighting that the circuit court relied on the wrong standard of review by requiring the Board to support its decision with "competent, material and substantial evidence," a standard applicable only under the Administrative Procedures Act. The Board further accused the circuit court of improperly substituting its judgment for that of the executive agency. The circuit court denied the Board's motion and affirmed its earlier decision.

Elias filed an application for leave to appeal in this Court, which we initially denied. *In re Parole of Elias*, unpublished order of the Court of Appeals, entered

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[24] The Administrative Procedures Act (APA), MCL 24.201 *et seq.*, provides specific procedures for the parties and agency to follow in a "contested case." MCL 24.271. A "contested case" is defined as "a proceeding . . . in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing." MCL 24.203(3). The Board's decision to grant or deny parole is not a "contested case," however, because a prisoner sentenced to a term of years is not entitled to a "hearing" before the Board's decision. *Hopkins*, 237 Mich App at 638. The scope of judicial review outlined in the APA applies only to contested cases. MCL 24.301. Only in a contested case does the court determine if the agency's decision was "[n]ot supported by competent, material and substantial evidence on the whole record." MCL 24.306(1)(d). As the APA is inapplicable in this case, the circuit court improperly relied on the APA standard of review.

October 21, 2010 (Docket No. 300113). Elias pursued her application to the Michigan Supreme Court, which remanded to this Court for consideration as on leave granted. *In re Parole of Elias*, 488 Mich 1034 (2011). On full review before our Court, we find that the circuit court exceeded the limits of judicial review appropriate in parole decision cases. We therefore reverse the circuit court's judgment and reinstate the Board's grant of parole.

IV. STANDARD OF REVIEW

Judicial review of the Board's decision to grant parole is limited to the abuse-of-discretion standard. *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 153; 532 NW2d 899 (1995). Either the prosecutor or the victim of an offense may appeal in the circuit court when the Board grants a prisoner parole. MCL 791.234(11); *Morales v Parole Bd*, 260 Mich App 29, 35; 676 NW2d 221 (2003). Under MCR 7.104(D)(5) the challenging party has the burden to show either that the Board's decision was "a clear abuse of discretion" or was "in violation of the Michigan Constitution, a statute, an administrative rule, or a written agency regulation." An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).[25] Importantly, a review-

[25] Previous opinions of this Court described the abuse-of-discretion standard in parole cases as follows: "An abuse of discretion will generally be found where an unprejudiced person, considering the facts on which the decisionmaker acted, would say there is no justification or excuse for the ruling." *In re Parole of Glover (After Remand)*, 241 Mich App 127, 129; 614 NW2d 714 (2000). However, the *Babcock* standard "more accurately describes the appropriate range of the trial court's discretion," *Babcock*, 469 Mich at 269, and is appropriate to apply to parole review cases, see *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809

ing court may not substitute its judgment for that of the Board. *Morales*, 260 Mich App at 48.

V. THE CIRCUIT COURT IMPROPERLY SUBSTITUTED ITS JUDGMENT FOR THAT OF THE PAROLE BOARD

The Board did not abuse its discretion or violate the Constitution or any statute, rule, or regulation by granting parole to Elias. Elias had a parole-guideline score of +15 points, placing her in the high-probability-of-parole-category. Accordingly, the Board was required to grant parole absent substantial and compelling reasons to depart from that decision. After personally interviewing Elias and fully reviewing her file, including a multitude of reports prepared specifically for the Board's consideration, the Board found no substantial and compelling reason to depart from the parole guidelines. This decision fell within the range of principled outcomes in light of the record evidence.

We first note that the DOC carefully followed the statutory and regulatory procedures for evaluating Elias's probability of parole. Several months before the Board's current parole consideration, the DOC evaluated Elias and prepared a PER. As previously discussed, the PER accurately detailed the abundant documentation contained Elias's prison files, and was prepared in a manner consistent with the procedures outlined in DOC Policy Directive 06.05.103.

The DOC also adhered to its procedures in conducting Elias's COMPAS risk assessment. A DOC staff member inputted the required data from Elias's prison file into the COMPAS software program, which then calculated Elias's statistical risk of committing future

(2006) ("While *Babcock* dealt with a criminal sentencing issue, we prefer the articulation of the abuse-of-discretion standard in *Babcock* . . . and, thus, adopt it as the default abuse-of-discretion standard.").

assaultive or property crimes. COMPAS assessed Elias as having a low risk of engaging in violent or recidivist behavior and specifically described Elias as having a positive mental-health outlook. In its opinion reversing the Board's decision to grant parole, the circuit court cited the absence of a score on the COMPAS's "cognitive behavioral" scale, which the court found troubling in light of the TAP report assessment that Elias would likely experience cognitive behavioral difficulties on reentering society. We are unconcerned with this omission, however, because the evaluator provided a narrative summary based on the instructions accompanying the scale. That narrative portrayed Elias as lacking the character traits that lead to criminal behavior.

The DOC also properly prepared a TAP report with Elias to prepare her for the possibility of release. That report is more negative than the COMPAS assessment, indicating that Elias needed to further develop her social attitude and manage her criminal thoughts. But a TAP report serves to guide a prisoner on the steps needed to rehabilitate and earn parole. See *The MPRI Model*, p 5. As such, a TAP is a necessarily dynamic document; it identifies areas in which the prisoner needs further development and allows the prisoner to work toward achieving stated goals. When evaluating Elias's chance of parole in February 2010, the Board evaluated a TAP prepared in September 2008. The Board was not required to treat this 14-month-old document as accurately summarizing Elias's current potential to successfully transition into society and could assess for itself whether Elias had met the outlined goals and was ready for parole.

Consistently with its internal operating procedures, the DOC also required Elias to participate in AOT while imprisoned. DOC psychological services staff prepared

an AOT termination report documenting Elias's progress in that program. More than five years have now elapsed since Elias completed the AOT. The prosecutor and the circuit court noted that Elias did not fully meet her therapeutic objectives. Nevertheless, the report concluded that she displayed "better understanding and more effective management of her criminal behaviors." Under that goal, Elias made "excellent" and "good" progress toward meeting various objectives. Specifically, Elias "[d]emonstrated the ability to clearly describe any of [her] criminal behaviors in detail," "[a]ccepted complete responsibility for [her] criminal behaviors," "[d]emonstrated the ability to cope with group confrontation in a non-defensive, nonthreatening and appropriate manner," "[d]emonstrated an institutional record free of misconduct while enrolled in therapy," "[d]emonstrated the ability to clearly explain what led to [her] criminal behavior," and "[p]repared a comprehensive plan for managing [her] criminal behavior." And again, the Board could have, within its discretion, determined that Elias's overall mental health had improved in the five years following her completion of the AOT program.[26]

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[26] The prosecutor and the circuit court imply that Elias should have sought out additional AOT to work toward completely meeting her therapeutic goals. We doubt that Elias was able to obtain such additional treatment. As noted in DOC Director's Office Memorandum 2011-7, December 13, 2010,

> [a]s part of reception processing, prisoners convicted of specifically identified assaultive offenses were recommended for assaultive offender programming. Assaultive offender programming also was recommended for prisoners who have a history of assaultive behavior even though they were not serving for one of the specifically identified assaultive offenses. There was only one program available for these prisoners, which had to be provided by psychological services staff who also were responsible for providing psychological assessments and treatment of prisoner mental

Using all the required reports, the Board then calculated Elias's parole guidelines score. In doing so, the Board considered the statutory and regulatory required factors and assessed specific scores consistent with DOC Policy Directive 06.05.100A. In fact, it appears that the Board erroneously treated Elias as having a prior criminal history. Accordingly, Elias's stellar score of +15 points on the parole guidelines likely should have been even higher. Ultimately, as Elias's parole-guideline score placed her in the high-probability-of-parole category, the Board was required to grant parole unless it found "substantial and compelling reasons" to deny.

Michigan courts have yet to define the phrase "substantial and compelling reasons" when used in the parole context. Like the parole guidelines, the Michigan legislative sentencing guidelines afford the sentencing court discretion to depart from the guidelines recommended minimum sentence range " 'if the court has a substantial and compelling reason for that departure.' " *Babcock*, 469 Mich at 256, quoting MCL 769.34(3). The *Babcock* Court defined a "substantial and compelling reason" as "an objective and verifiable reason that keenly or irresistibly grabs our attention; is of considerable worth in deciding the length of a sentence; and exists only in exceptional cases." *Babcock*, 469 Mich at 258 (quotation marks and citation omitted).

Under the parole guidelines, however, the Board "is not held to a requirement of absolute objectivity." *Killebrew v Dep't of Corrections*, 237 Mich App 650, 655;

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health needs. The need therefore existed for additional evidence-based programming which would not only meet the needs of the prisoners recommended for such programming but could be provided in an effective and efficient manner. [Available at<http://www.michigan.gov/corrections/documents/2011-7_342069_7.pdf> (accessed August 26, 2011).]

604 NW2d 696 (1999). Rather, the Board must consider "all of the facts and circumstances, including the prisoner's mental and social attitude . . . ." MCL 791.233(1)(a). "An evaluation of a prisoner's mental and social attitude involves a subjective determination for which the parole guidelines cannot account." *Killebrew*, 237 Mich App at 655. As the Legislature has directed the Board to consider certain *subjective* factors in making a parole decision, reliance on the objective analytical process underlying *Babcock*'s definition of "substantial and compelling" reasons for a sentencing departure would be misplaced. The Board may identify reasons "that keenly or irresistibly grab[] [its] attention" and are "of considerable worth in deciding" whether it should deny parole to a prisoner who was otherwise assessed as having a high chance of parole. See *Babcock*, 469 Mich at 258 (citation and quotation marks omitted). And if those substantial and compelling reasons also qualify as "objective and verifiable," a reviewing court would be more apt to affirm the Board's decision. See *Macomb Co Prosecutor v Osantowski*, 488 Mich 952; 790 NW2d 687 (2010) (reinstating the Board's grant of parole because it "was based on evaluation of objective criteria established by [MDOC] policy directives that were required by statute, and was within the range of principled outcomes," and reversing an unpublished opinion of this Court to the contrary); see also *Johnson*, 219 Mich App at 600-601 (holding that parole was improperly granted when the objective factors weighed almost exclusively in favor of denial and the Board appeared to rely solely on the subjective opinion of one Board member who had interviewed the prisoner).

Rather than affording any meaningful deference to the Board, the circuit court substituted its determination that substantial and compelling reasons man-

dated denial of Elias's parole. In reaching this result, the circuit court relied excessively on static factors such as the nature of the sentencing offense and Elias's former prison misconduct. As each successive parole opportunity was considered, the length of time since Elias's last prison misconduct citation increased. The DOC specifically intended to give a potential parolee positive treatment under the guidelines for maintaining a clean prison record over an extended period. Rule 791.7716(3)(c) expressly provides that a prisoner's misconduct "over the previous 5 years and during the year immediately before parole consideration" must be considered in calculating the prisoner's parole-guideline score. When the DOC calculated Elias's guidelines score in 2009, she had not been charged with any misconduct within the preceding five years. She has now spent eight years free of institutional misconduct. Given the DOC's objective policy of minimizing the scoring effect of stale misconduct charges, we fail to see how the Board abused its discretion in this regard.

The prosecutor and the circuit court mistakenly assume that unchangeable factors related to past events, such as the sentencing offense, must be given greater consideration when formulating a COMPAS risk assessment and scoring the parole guidelines. Nothing in the statutes, regulations, or COMPAS guidelines supports that assumption. Rather, the Board must also look to the prisoner's rehabilitation and evolution throughout his or her incarceration. Giving the various static and dynamic factors similar weight allows the Board to effectuate both the punitive and rehabilitative features of the corrections system. As noted by our Supreme Court in *People v Schultz*, 435 Mich 517, 531-532; 460 NW2d 505 (1990),

> [f]our factors may be taken into consideration to determine the appropriateness of a sentence: rehabilitation, deterrence, the protection of society, and punishment. . . .
>
> * * *
>
> . . . [T]he ultimate goal of sentencing in this state is not to exact vengeance, but to protect society through just and certain punishment reasonably calculated to rehabilitate and thereby " 'convert bad citizens into good citizens. . . .' " [Citations omitted.]

Elias's parole-guideline score took into account the nature of the sentencing offense. In fact, the only negative score in Elias's parole guidelines arose from consideration of that offense. We further note that the sentencing court indisputably considered the heinousness of the sentencing offense when imposing the minimum and maximum terms of imprisonment.[27] The sentencing court heard the evidence against Elias and was well informed regarding her offender and offense characteristics before it imposed sentence. The 20-year

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[27] Elias was sentenced in 1985 under the judicial sentencing guidelines. As noted in *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001),

> [f]rom 1983 through 1998, Michigan's courts employed guidelines crafted by this Court and promulgated by administrative order. The effort reflected this Court's attempt to respond to unwarranted disparities in sentencing practices between judges. Thus, the very premise of the guidelines is that judicial discretion will be restricted to a certain degree.
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> This Court's sentencing guidelines were "mandatory" only in the sense that the sentencing court was obliged to follow the procedure of "scoring" a case on the basis of the circumstances of the offense and the offender, and articulate the basis for any departure from the recommended sentence range yielded by this scoring. However, because the recommended ranges found in the judicial guidelines were not the product of legislative action, a sentencing judge was not necessarily obliged to impose a sentence within those ranges. [Citations omitted.]

minimum sentence reflected the seriousness of the crime, and that time has since been served. As indicated by the plain language of the parole statutes, Elias has served her minimum term and therefore comes within the jurisdiction of the Board. MCL 791.233(1)(b); MCL 791.234(1).

We also disagree with the circuit court's conclusion that the current Board panel abused its discretion because it reached a different result based on the same evidence placed before previous panels. As already noted, the Board could have, within its discretion, determined that Elias had improved her overall outlook since the 2006 AOT report and the 2008 COMPAS and TAP reports were prepared. Moreover, we do not find the presence of conflicting information in the reports to be dispositive. In other contexts, this Court has repeatedly determined that there is no abuse of discretion when a court or a fact-finder is faced with conflicting information and makes a reasonable and principled decision regarding which side to believe. See, e.g., *People v Wybrecht*, 222 Mich App 160, 173; 564 NW2d 903 (1997) ("[A] sentence is not invalid because probation agents and a defendant's psychologists use undisputed facts to draw conflicting conclusions about the defendant's character."). The current Parole Board panel read the conflicting statements regarding Elias's acceptance or lack of acceptance of responsibility for killing Barczynski. A member of the current panel also interviewed Elias and was able to update those reports. The Board's determination that Elias had accepted responsibility for her acts is supported by evidence in the record, and the Board did not abuse its discretion by granting parole based on that evidence.

Moreover, the circuit court unreasonably and improperly assumed that the Board ignored the letters from the victim's family members. The Board must provide a written explanation for a parole decision that departs from the guidelines recommendation, and that explanation must have sufficient detail to allow appellate review. *Glover*, 460 Mich at 519, 523; MCL 791.233e(6); Mich Admin Code, R 791.7716(5). However, nothing in the statutes, regulations, or caselaw requires the Board to specifically cite the documents it reviewed in rendering its decision. *In re Parole of Scholtz*, 231 Mich App 104, 113; 585 NW2d 352 (1998) (holding in regard to a similar written-explanation provision in MCL 791.235[12] that "[t]he statute does not establish the degree of specificity with which the [Board] must articulate its reasons" but "[t]he explanation must, however, contain sufficient detail to facilitate this Court's review of the parole decision for an abuse of discretion"). The family letters were part of the record placed before the Board, and we have every reason to believe that the Board read and considered these letters before rendering its parole decision.

Ultimately, Elias was deemed to be a low risk for future violence or criminal behavior. Although her therapy reports were not perfect, she admitted responsibility for her criminal actions and learned to recognize and manage her criminal behaviors. Elias has the financial and emotional support of her family and husband to assist her reentry into society. Further, she is 48 years old and has spent the last 26 years in prison. These factors tend to reinforce the conclusion that Elias would not become a menace to society. The Board was within its discretion to grant parole consistently with Elias's parole-guideline score and based on its analysis of the objective factors outlined in the statutes, regulations, and agency directives. The circuit court improp-

erly substituted its judgment regarding the record evidence for that of the legislatively designated executive agency.

Accordingly, we reverse the decision of the circuit court and reinstate the order of the Parole Board granting Elias parole.

MARKEY, P.J., and SAAD, J., concurred with GLEICHER, J.

In re PAROLE OF HAEGER

Docket No. 297099. Submitted August 10, 2011, at Detroit. Decided November 1, 2011, at 9:05 a.m.

The Alpena County Prosecutor applied in the Alpena Circuit Court for leave to appeal the Parole Board's grant of parole to Raymond H. Haeger, a prisoner under the jurisdiction of the Department of Corrections. The Parole Board intervened. After granting the prosecutor's application, the court, Michael G. Mack, J., initially remanded the matter to the board for an explanation of its decision pursuant to MCR 7.104(D)(7). On remand, the board affirmed its decision to grant parole, and the prosecutor renewed his application for leave to appeal. The court granted the application and reversed the board's decision pursuant to MCR 7.104(D)(8), ruling that the board had abused its discretion by granting parole despite the fact that Haeger's assessed probability for parole had declined since the board's previous considerations, which had resulted in denials of parole. The Court of Appeals denied Haeger leave to appeal, and the Supreme Court, in lieu of granting Haeger's application for leave to appeal, remanded the matter to the Court of Appeals for consideration as on leave granted. 488 Mich 1033 (2011).

The Court of Appeals *held*:

1. The circuit court's decision to reverse the Parole Board's grant of parole did not violate the separation-of-powers doctrine. The circuit court did not order the board to deny Haeger parole; rather, it ruled that the board's decision was inconsistent with the objective factors outlined in the statutes and regulations and the facts on the record. This action was proper under MCR 7.104(D), which allows a circuit court to reverse or remand a parole decision if an appellant proves that the decision was in violation of the Michigan Constitution, a statute, an administrative rule, or certain written agency regulations or was otherwise a clear abuse of discretion.

2. The circuit court did not violate Haeger's right to due process by failing to provide him notice and an adequate opportunity to be heard in connection with the prosecutor's appeal of the Parole Board's decision. A prisoner enjoys no constitutional or

inherent right to be conditionally released from a validly imposed sentence. Further, although a parolee has a right to notice and the opportunity to be heard before parole is revoked, a potential parolee who remains in prison has no liberty for the Due Process Clause to protect. In any event, the record indicated that the prosecutor did properly notify Haeger of his intent to appeal the board's decision, that Haeger moved to dismiss the prosecutor's application for leave to appeal and filed two briefs in the circuit court supporting the board's decision, and that Haeger never requested a formal hearing.

3. The circuit court was correct to reverse the Parole Board's decision to grant Haeger parole, although it did so on the wrong basis. Absent a complete record and an updated psychological evaluation, it was impossible for the circuit court to have discerned whether the board committed a clear abuse of discretion in granting parole. However, the fact that the record was incomplete indicated that the Parole Board violated its duty to consider all relevant facts and circumstances in determining whether parole was in the best interests of society and public safety as required by Mich Admin Code, R 791.7715. Specifically, there were no case summary reports of Parole Board interviews, no indication that a transition accountability plan for Haeger had been developed pursuant to Rule 791.7715(2)(c)(iii), and no indication that he had received the psychological or psychiatric evaluation required for assaultive sexual offenders under Rule 791.7715(5)(b). The psychological evaluations Haeger received upon his incarceration in 1992 and in preparation for appeal in 1993 were of little relevance in determining whether his parole was in the best interests of society and public safety.

4. The board did not abuse its discretion by relying on a statement in a report that contained an internal inconsistency. It is not an abuse of discretion when a fact-finder faced with conflicting information makes a reasonable and principled decision regarding which side to believe. Moreover, the statement in question was supported by evidence elsewhere in the record. Further, the circuit court should not have disregarded the decision of the current Parole Board panel simply because it conflicted with the decisions of previous panels. It is not an abuse of discretion for two fact-finders to reach different conclusions from the complex and potentially conflicting information within a prisoner's record. Finally, the board did not give undue weight to the favorable aspects of the various scales used to assess Haeger's risk to the public; rather, it properly recognized that the circumstances of

Haeger's sentencing offense, which he could do nothing to change, consistently reduced his assessment scores.

5. The circuit court's decision to reverse the grant of parole was not fatal to Haeger's chances for parole. After a thorough review as required by the applicable statutes, regulations, and department policy directives, the Parole Board may use its discretion to either grant or deny parole to Haeger if it considers all the necessary information and adequately and accurately documents these steps in the record.

Affirmed.

PAROLE — CONSTITUTIONAL LAW — DUE PROCESS.

A prisoner enjoys no constitutional or inherent right to be conditionally released from a validly imposed sentence; although a parolee has a right to notice and the opportunity to be heard before parole is revoked, a potential parolee who remains in prison has no liberty for the Due Process Clause to protect.

Raymond H. Haeger *in propria persona*.

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

GLEICHER, J. The Michigan Parole Board (the Board) granted Raymond Harold Haeger parole after he had served approximately 17 years of a 15- to 30-year sentence. The Alpena County Prosecutor objected to Haeger's release and sought leave in the circuit court to appeal the Board's parole decision. The circuit court ruled that the Board had abused its discretion by granting parole despite that Haeger's probability for parole had actually declined since the Board's last consideration. Accordingly, the circuit court reversed the Board's decision.[1]

We affirm the circuit court's reversal of the Board's decision but on different grounds. The Board failed to

[1] This Court originally denied Haeger's delayed application for leave to appeal, *People v Haeger*, unpublished order of the Court of Appeals, entered July 26, 2010 (Docket No. 297099), but the Supreme Court remanded for review as on leave granted, *People v Haeger*, 488 Mich 1033 (2011).

comply with certain regulatory provisions before reaching its parole decision. Specifically, Mich Admin Code, R 791.7715(5)(b) mandates that a prisoner with "a history of . . . [p]redatory or assaultive sexual offenses" undergo a "psychological or psychiatric evaluation before the release decision is made . . . ." There is no record indication that Haeger received such an evaluation after 1993. It is also unclear whether the Board considered Haeger's "[d]evelopment of a suitable and realistic parole plan," as required by Mich Admin Code, R 791.7715(2)(c)(iii), because Haeger's transition accountability plan (TAP) does not appear in the record. We are further concerned that Parole Board Member Charles Brown based his decision, in part, on Haeger's completion of additional sexual offender therapy (SOT) in 2009 despite that no documentation of that therapy exists in Haeger's file. In addition, "holes" in the record that the Board failed to remedy persist even after the circuit court ordered the Board to supplement Haeger's file. Because the Board violated its regulatory duty to defer its decision until Haeger received a psychological evaluation and its duty to consider Haeger's development of a parole plan, and because the Board's failure to adequately and timely comply with the circuit court's remand order resulted in an incomplete record, we affirm the circuit court's decision to reverse the Board's grant of parole to Haeger.

I. THE PAROLE PROCESS IN MICHIGAN

The Parole Board, consisting of 10 members, is located within the Michigan Department of Corrections (DOC). MCL 791.231a(1). Prisoners come under the Board's jurisdiction after serving their minimum sentence, adjusted for any good time or disciplinary credits. MCL 791.233(1)(b) through (d); MCL 791.234(1)

through (5). For each potential parolee, a DOC staff member must evaluate the prisoner, ensure the completeness of the prisoner's file, and prepare a summary "Parole Eligibility Report" (PER) to advise the Board. See *In re Parole of Elias*, 294 Mich App 507, 511; 811 NW2d 541 (2011), citing DOC Policy Directive 06.05.103, p 1,[2] and MCL 791.235(7). Board staff members use this compiled information to score the prisoner's parole guidelines. DOC Policy Directive 06.05.100, ¶ D, p 1.

"Statutorily mandated parole guidelines form the backbone of the parole-decision process." *Elias*, 294 Mich App at 511. The guidelines " 'attempt to quantify' " various factors relevant to the parole decision in order " 'to inject more objectivity and uniformity into' " the parole process. *Id.*, quoting *In re Parole of Johnson*, 219 Mich App 595, 599; 556 NW2d 899 (1996). The Legislature directed the DOC to refine the statutory guidelines by developing more detailed regulations. MCL 791.233e(1). "Pursuant to this legislative mandate, the DOC promulgated regulations outlining certain factors for the Board to consider when making a parole decision[.]" *Elias*, 294 Mich App at 513. The Board must determine "whether parole is in the best interests of society and public safety" considering the prisoner's past and current criminal behavior, "[i]nstitutional adjustment," "[r]eadiness for release," "personal history and growth," and "physical and mental health." Mich Admin Code, R 791.7715(2). Moreover, when a prisoner has a history of "predatory or assaultive sexual offenses," the prisoner must undergo a "psychological or psychiatric evaluation before the release decision is made . . . ." Mich Admin Code, R 791.7715(5).

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[2] DOC policy directives are available at <http://www.michigan.gov/corrections/0,1607,7-119-1441_44369--,00.html> (accessed September 8, 2011).

The DOC regulations further direct the Board to consider "all relevant facts and circumstances, including the prisoner's probability of parole as determined by the parole guidelines . . . ." Mich Admin Code, R 791.7715(1). The guidelines, in turn, require that scoring be based on the prisoner's time served as well as the "aggravating and mitigating circumstances" of the sentencing offense, the "prisoner's prior criminal record," the number of major misconducts committed by the prisoner within the preceding one- and five-year periods, the prisoner's score on "risk screening scales," the prisoner's age, the prisoner's performance in recommended institutional programs, and "[t]he prisoner's mental health" status. Mich Admin Code, R 791.7716(3).[3] The guideline factors are separated into eight sections, each with a list of subfactors to be scored and instructions on the point value to be assigned. *Elias*, 294 Mich App at 517, citing DOC Policy Directive 06.05.100, Attachment A, pp 1-9. The aggregated score is " 'used to fix a probability of parole determination for each individual on the basis of a guidelines schedule. Prisoners are categorized under the guidelines as having a high, average, or low probability of parole.' " *Elias*, 294 Mich App at 518, quoting *Johnson*, 219 Mich App at 599.

A prisoner being considered for parole may also undergo an informal and nonadversarial "interview conducted by one or more Board members assigned to the prisoner's panel." *Elias*, 294 Mich App at 518, citing DOC Policy Directive 06.05.104, ¶ R, p 4. Following the parole interview, a "Case Summary Report" is generally created for the Board's review.[4] See *Elias*, 294 Mich App at 519.

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[3] The parole-guideline factors are quoted in full in *Elias*, 294 Mich App at 515-517.

[4] There are no case summary reports in the file submitted to this Court.

As described in *Elias*, the DOC recently implemented the Michigan Prisoner ReEntry Initiative (MPRI), which is "designed to promote public safety and reduce the likelihood of parolee recidivism" and to " 'improve[] decision making at critical decision points,' such as when the Board is considering whether to release a prisoner from incarceration on parole." *Id*., quoting DOC Policy Directive 03.02.100, ¶ C p 1. Under the MPRI, the DOC and the Board are now required to prepare and consider additional reports, in particular the transition accountability plan TAP.[5] The TAP "succinctly describe[s] . . . exactly what is expected for offender success." *The MPRI Model: Policy Statements and Recommendations*, Michigan Prisoner ReEntry Initiative, January 2006, p 5.[6] A DOC staff member "must formulate a TAP with each prisoner, mostly to assist the prisoner's reentry into society, but also to assist the Board in rendering its parole decision." *Elias*, 294 Mich App at 519-520. The TAP analyzes the prisoner's risk factors, sets goals to decrease those risks, and establishes a plan for the prisoner to reach his or her goals. *Id.* Under the MPRI, the Board is also now required to conduct a "correctional offender management profiling for alternative sanctions" (COMPAS) evaluation. The COMPAS program

> is a comprehensive risk and needs assessment system, which takes into account both static information (such as the prisoner's past criminal offenses) and dynamic data (such as the prisoner's evolving attitudes and mental condition). . . .
>
> [A] case manager considers various characteristics of the offender and the offense and inputs scores into the

[5] As noted, there is no TAP in the file submitted to this Court.

[6] This document is available at <http://www.michigan.gov/documents/THE_MPRI_MODEL_1005_140262_7.pdf> (accessed September 8, 2011).

> COMPAS computer software program. The software generates a score ranking the offender's statistical likelihood of violence, recidivism, success on parole, and other factors. [*Id.* at 520-521.]

Although "matters of parole lie solely within the broad discretion of the [Board]," *Jones v Dep't of Corrections*, 468 Mich 646, 652; 664 NW2d 717 (2003); see also *Hopkins v Parole Bd*, 237 Mich App 629, 637; 604 NW2d 686 (1999); MCL 791.234(11), that discretion is clearly restricted by legislative limitations. "In addition to creating the framework shaping the regulatory parole guidelines," *Elias*, 294 Mich App at 522, the Legislature dictates that " '[a] prisoner shall not be given liberty on parole until the board has reasonable assurance, after consideration of all of the facts and circumstances, including the prisoner's mental and social attitude, that the prisoner will not become a menace to society or to the public safety,' " *Johnson*, 219 Mich App at 598, quoting MCL 791.233(1)(a). Moreover, "[o]nce the Board has rendered its decision, it must issue in writing 'a sufficient explanation for its decision' to allow 'meaningful appellate review,' *Glover v Parole Bd*, 460 Mich 511, 519, 523; 596 NW2d 598 (1999), and to inform the prisoner of 'specific recommendations for corrective action' if necessary 'to facilitate release,' MCL 791.235(12)." *Elias*, 294 Mich App at 522-523.

II. PRIOR AND CURRENT PAROLE CONSIDERATIONS

With this framework in mind, we now consider the history of Haeger's imprisonment and the progression of his parole reviews. In 1992, Haeger pleaded *nolo contendere* to breaking and entering an occupied dwelling with the intent to commit a felony inside, MCL 750.110a(2)(b), and first-degree criminal sexual con-

duct committed during a felony, MCL 750.520b(1)(c). Haeger was sentenced to concurrent terms of 15 to 30 years' imprisonment for each offense. Haeger's convictions arose from the forcible rape of his cousin in the early morning hours of February 2, 1992. After consuming a large amount of alcohol at an Alpena bar, Haeger began driving toward his home in Hillman. At approximately 3:00 a.m., Haeger passed the home of his cousin and decided to stop. Haeger later told police that he had used a pair of his girlfriend's underwear to mask his face. He then entered his cousin's home by removing a basement window. Once inside, Haeger went into the kitchen and took a seven-inch knife from a drawer. Haeger made a noise, waking his cousin, who had fallen asleep on the couch in the adjacent living room. The victim entered the kitchen and found a masked man holding a knife crouched down next to the refrigerator. Haeger, armed with the knife, lunged at the victim and the two struggled. Ultimately, Haeger pinned the victim facedown on the ground and forcibly penetrated her vagina with his penis. When Haeger left, he threatened to return and kill the victim if she told anyone what had happened. The victim later told police that she recognized the voice of her assailant as belonging to Haeger. Haeger admitted to his parents in front of police officers that he had broken into the victim's home and raped her. The officers then transported Haeger to the Alpena Police Department, where he gave tape-recorded and written statements describing the offense in great detail.

Upon Haeger's imprisonment, the DOC referred him for a psychological evaluation. On October 6, 1992, the evaluating psychologist noted that Haeger "was polite and cooperative, admitting to guilt of instant offense." After conducting various diagnostic tests, the psychologist noted that Haeger's evaluation "reflects an imma-

ture, impulsive, alcohol abusive young male with a self-centered attitude" who "seems to have had a deep feeling of psychosexual inadequacy coupled with alcohol abuse that infringed on his judgment."

In preparation for Haeger's appeal of his convictions, appellate defense counsel procured another psychological evaluation of his client. On April 9, 1993, Dr. Michael Abramsky submitted a report opining that Haeger should have received a much shorter sentence for his offense. Abramsky described Haeger as "a rather shy, seclusive [sic] young man[.]" Haeger told Abramsky that he had "blacked out" and did not remember attacking his cousin. Haeger accused the police of feeding him the details of the crime. Abramsky completed a "Hare Psychopathy Check List," which "measures tendencies towards chronic criminality." From that test, Abramsky noted "a gross absence of psychopathic indicators." Specifically, Abramsky noted that Haeger "show[ed] no history of pathological lying . . . [or] of being callous or having a lack of empathy." Moreover, Haeger's "behavior has always been well controlled and there is no history of a loss of behavioral control." Based on the Hare evaluation, Abramsky believed Haeger had "a low probability" of recidivism and "chronic criminality."

Abramsky also evaluated Haeger under the Minnesota Multiphasic Personality Inventory (MMPI),[7] which Abramsky concluded did not show a patter[n] compatible with psychopathic deviance." Rather, Haeger's scores revealed an individual with "learning disabilities and attention deficit disorder." Abramsky administered

[7] The MMPI tests "configurations of personality traits in normal persons and . . . the personality patterns occurring in various types of mental illness." *Random House Dictionary of the English Language: Second Edition Unabridged* (1987).

a Rorschach test to measure Haeger's "more unconscious processes" and determined that Haeger did not appear unusually aggressive or preoccupied with sex.

Haeger was admitted into a sexual offender therapy (SOT) program in 2000. In order to be admitted into the program, Haeger had to "[a]ccept[] responsibility for his sex crime" and "[r]ecognize[] he has a problem and needs to change." Haeger was prematurely discharged from SOT on December 14, 2000, when he was transferred to a lower security facility. However, he completed the "Relapse Prevention" portion of the therapy. The treating psychologist indicated that Haeger's overall progress was rated 7 on a 10-point scale, indicating "good" performance. Haeger needed a score of 9 to be considered as having achieved the goals of therapy. Haeger scored 7 points for each of the following therapeutic goals:

> a. Develop a clear understanding of his responsibility for setting up and committing his sex offense.
>
> b. Examine his offense cycle, deviancy, thinking, beliefs, feelings, self-concept and behavior that led to his sexual offense.
>
> c. Develop and demonstrate victim empathy.
>
> d. To honestly self-disclose to the group about his deviant sexual behavior.
>
> e. Examine his sexuality, morals, values, social and sexual relationship.
>
> f. Develop a practical relapse prevention plan.
>
> g. Learn self-control skills to shut down his deviant arousal pattern.

The treating psychologist concluded that Haeger "has made a positive effort to examine himself in a reflective manner. He has achieved a good understanding of his responsibility in the offense, offense cycle, victim em-

pathy, has self-disclosed, developed a plan to prevent relapse and seems better able to shut down deviant arousal pattern."

Haeger began working in the prison's food service department in 2001. Haeger's supervisors consistently gave him excellent reviews. Haeger was even commended for voluntarily transferring to a higher security, neighboring facility so he could continue to work while the lower security facility's kitchen was being remodeled.

Because of good-time credits, Haeger first became eligible for parole in 2004, after serving approximately 12 years of his original 15-year minimum sentence. In preparation for the Board's first parole review, a DOC staff member prepared a PER. Consistently with regulatory requirements, Haeger's 2004 PER noted that he had no major misconduct tickets, "interact[ed] well with staff and peers," and "present[ed] no management problems." The report further indicated that Haeger "received above average work evaluations" and was on a waiting list to attend a job-seeking-skills class. Haeger participated in Alcoholics Anonymous from 1992 through 1994 and completed a "Substance Abuse Phase II" program in 2002. The PER noted that Haeger had completed SOT on December 14, 2000. Overall, Haeger had "completed all . . . recommended programs" and "at least 2/3 of all program reports [were] above average."

Using Haeger's file and PER, the Board then calculated Haeger's parole guidelines score. Under the parole guidelines, a prisoner is assigned positive or negative points for variables in eight categories. These points are aggregated to reach a "Final Parole Guidelines Score" that determines whether a prisoner's probability of parole is high, average, or low. See DOC Policy Directive

06.05.100, Attachment A. At that time, Haeger received a final score of +6 points, placing him in the "high probability of parole" category.[8] The PER, parole guidelines, and Haeger's prison file were then sent to a three-member panel of the Board to render a parole decision. The Board determined that there were substantial and compelling reasons[9] to deviate from the parole guidelines and deny parole: "During interview [Haeger] failed to convince [the Board] that he has gained significant insight into the cause of his deviant behavior. [Haeger] stated that he was young and immature and unwilling to deal with stress and blew up." The Board recommended that Haeger continue to earn "positive work reports" and program reports as well as "good block or staff reports." The Board further recommended that Haeger "provide additional demonstration of positive prison behavior."

The Board again denied Haeger parole on July 13, 2005. Haeger continued to score +6 points on the parole guidelines, but the panel noted that Haeger "has not demonstrated enough insight into his crime, [Haeger] showed little or no empathy for the victim, which indicates that [Haeger] has not gain[ed]

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[8] A score greater than +3 points corresponds to a high probability of parole, between –13 and +3 is an average probability, and less than –13 is low. See DOC Policy Directive 06.05.100, Attachment A, p 10. Haeger was assessed –1 point for each of his active sentence variables, which reflected his use of a weapon, "threat of force" or injury, "violence or cruelty beyond that necessary to commit" the offense, and commission of a sexual offense. Haeger was assessed +1 point on his prior criminal record variables, +8 points on his institutional conduct variables, and –5 points on his mental health variables, reflecting that he had committed a sexual assault stemming from a "compulsive, deviant, or psychotic mental state." See Mich Admin Code, R 791.7716(3)(g)(ii). Haeger received +1 point each for his age, statistical risk, and programming variables.

[9] See *Elias*, 294 Mich App at 522, citing MCL 791.233e(6) and Mich Admin Code, R 791.7716(5).

enough knowledge about his deviant behavior which was a brutal rape on his victim." The Board limited its recommended corrective actions to earning positive program reports and providing "additional demonstration of positive prison behavior."

On June 27, 2006, the Board denied Haeger parole a third time. Haeger's parole-guideline score had increased to +7 points because he was assigned an additional point for his age variable. Moreover, the PER prepared for the Board's review indicated that Haeger had an above average work record while imprisoned and received excellent reports from the cellblock guards. As its substantial and compelling reasons for denying parole, the panel noted the following: "[Haeger] minimizes his behavior based on his being drunk. This was a very d[e]liberate, planned rape. [Haeger] laid in hidding [sic]. Used a mask. The [victim] was his cousin. He presents a belief that his victim is fine and didn't suffer any injury. No insight or remorse." The Board recommended that Haeger "demonstrate responsible behavior by earning positive" program reports and "by avoiding" misconduct citations. The Board further recommended that Haeger participate in DOC-sanctioned activities, "enter into or continually involve [him]self in substance abuse programming," and "identify and develop community resources to address special needs identified through group therapy."

On June 21, 2008, the DOC conducted a COMPAS risk assessment of Haeger. That assessment indicated that Haeger was a low risk for violence, recidivism, and future substance abuse and could likely secure employment, maintain housing, and manage his finances once released. On the COMPAS Cognitive Behavioral/Psychological scale, Haeger scored 2 points, indicating that he was unlikely to "blam[e] others, mak[e] excuses or mini-

mize[e] the seriousness of [his] offense" and was also "unlikely to lead a high risk lifestyle or make impulsive decisions." However, the narrative statement accompanying this scale, which concludes that Haeger has a "likely criminal personality," was inconsistent with the assigned score. We now know that this inconsistency resulted from a computer software error. In its motion for reconsideration following the circuit court's reversal of the Board's 2009 grant of parole, the Board finally presented an affidavit from a DOC Department Specialist, Teresa Chandler. Chandler reviewed Haeger's COMPAS report and noted that the criminal personality scale is not a factor in considering the cognitive behavioral scale and was erroneously included on the report.

The Board denied parole a fourth time on August 4, 2008. The panel indicated, "In spite of the completion of recommended [SOT], [Haeger] lacks the necessary insight into his deviant behavior. [Haeger] is still considered a risk to the general public safety." At that time, the Board continued Haeger's sentence for a 24-month period before reconsidering parole. The Board again recommended that Haeger "demonstrate responsible behavior by earning positive" program reports and "good block or staff reports of conduct" and "by avoiding . . . misconduct citations." The Board also continued to recommend that Haeger "enter into or continually involve [him]self in substance abuse programming."

On November 5, 2008, Haeger committed his first and only major misconduct while imprisoned. Haeger pleaded guilty at an administrative hearing of possessing dangerous contraband. Specifically, guards found within Haeger's cell various metal objects, which Haeger claimed to use for "fix[ing] electronic devices." As a

result of this misconduct, Haeger was temporarily placed in a higher security level and forfeited 90 days of good-time credit.

On February 11, 2009, Haeger was evaluated under the Vermont Assessment of Sex Offender Risk (VASOR) scale.

> The [VASOR] is a risk assessment scale for adult male sex offenders age 18 and older. It was originally designed to assist probation and parole officers in making placement and supervision decisions. Because the VASOR does not provide a comprehensive survey of all factors relevant to sexual offending, it is best used as a decision aid along with professional judgement [sic] and other appropriate tools. Although reliability and validity studies are encouraging, it still should be considered an experimental instrument.
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> * * *
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> The VASOR is composed of two scales, a 13-item reoffense risk scale and a 6-item violence scale. The reoffense risk scale is designed for assessing the likelihood of sexual recidivism. The violence scale is designed for assessing the nature of an individual's violence history and offense severity. The interaction of these variables, reoffense risk and violence, are considered important factors for determining an individual's overall risk level.
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> * * *
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> The scoring process ideally should include an interview with the individual, in addition to carefully reviewing correctional case file information.
>
> Scores on the two VASOR scales are plotted on a scoring grid where their intersection falls into one of three risk categories; low, moderate, or high. These risk categories can be used to inform placement and supervision decisions. Offenders who score in the "low" range (i.e., low reoffense risk score and low violence score) are generally considered appropriate for community supervision and treatment.

> Offenders who score in the "moderate" range may or may not be considered appropriate for community placement. Offenders who score in the "high" range (i.e., high reoffense risk score and/or high violence score) are generally considered inappropriate for community supervision and treatment. For public protection purposes, incarceration is generally recommended for offenders who score in the "high" range. [McGrath & Hoke, *Vermont Assessment of Sex Offender Risk Manual* (Research ed, 2001), p 1 (citations omitted).][10]

Notably, VASOR is "designed to be scored easily by probation and parole officers and correctional caseworkers." *Id.* at 2. A psychologist need not perform a prisoner's evaluation under this test.

On the VASOR reoffense-risk scale, Haeger received 10 points for the use of a potentially deadly weapon, 5 points for committing a sexual offense against an acquaintance, 5 points because his alcohol abuse had caused serious life disruptions and 3 points because his "drug" use had caused some legal and social problems.[11] With a total reoffense-risk score of 23 points, Haeger was considered a low risk for reoffense. On the "violence scale," Haeger received a score of 30 points for the use of a potentially deadly weapon during the commission of a sexual assault, 10 points for committing penile-vaginal penetration, and 10 points for causing injury not requiring formal medical treatment. With a total "violence score" of 50 points, Haeger was placed in the high "violence level." Considered together, Haeger was given a high overall risk classification on the VASOR assessment.

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[10] This manual is available at <http://www.csom.org/pubs/VASOR.pdf> (accessed September 8, 2011).

[11] There is no indication in the record that Haeger ever abused any substance other than alcohol.

On April 6, 2009, the DOC prepared an updated PER for the Board's consideration, which included Haeger's 2008 major misconduct conviction. The PER indicated that Haeger's security level had been increased from Level I to Level II as a result. The PER described Haeger's work performance as adequate but no longer included a commentary on his performance. The PER noted that Haeger completed technical career counseling in 2008, substance abuse counseling in 2002, Alcoholics Anonymous in 1994, and SOT in 2000.

On April 21, 2009, the DOC prepared an "Offender Supervision Summary Report" and scored Haeger's parole guidelines. The summary report noted that Haeger posed a "middle to potential high" assaultive risk and a low risk for property crimes. The DOC scored Haeger's parole guidelines as a long-term offender. Haeger received a weighted score of –1 point for his active sentence variables and +1 point for prior criminal record variables. While Haeger had previously received favorable scores on the institutional conduct variables, his 2008 major misconduct reduced this section score to zero points. The DOC noted that Haeger's placement in the risk categories for assaultive and property crimes required a score of +1 point for the statistical risk variables. Haeger received a score of +2 points on the age scale, reflecting that Haeger was less likely to engage in further criminal activity given his more mature age. Haeger had received at least one adequate report and no inadequate reports from recommended prison programs, which also equated with a score of +2 points. Because Haeger had committed a sexual assault, he was given –5 points under the mental-health variables. Because of his recent major misconduct, Haeger's overall parole-guideline score was reduced to zero points, placing him, for the first time, in the "average probability of parole" category.

On June 26, 2009, two members of the Board panel voted to grant Haeger parole, citing Haeger's acceptance of responsibility for his past offenses, "satisfactory block reports," adequate involvement in work assignments, completion of vocational counseling, completion of substance abuse programming, and maintenance of family and community support while in prison. The Board noted, however, that Haeger's parole was "contingent upon the successful completion of MPRI InReach Phase."

We presume that the Board's reference to the "In-Reach Phase" means completion of "in-reach programming [provided] to prisoners eligible for parole." DOC Policy Directive 03.02.101, ¶ A. In order to receive "in-reach programming," a prisoner must be transferred to a facility that provides such services. *Id.*, ¶ E. Haeger is currently housed in the Cooper Street Correctional Facility and was previously housed in the Pugsley and Ryan Correctional Facilities, which are all designated MPRI "in-reach facilities." *Id.*, Attachment A. The record does not identify the type of services provided to Haeger. However, a September 30, 2009 "referral" indicates that Haeger had completed "programming."

III. CIRCUIT COURT REVIEW OF THE PAROLE BOARD'S DECISION

The Alpena County Prosecutor appealed the Board's grant of parole in the circuit court. The circuit court initially determined that the Board had not provided sufficient information regarding its decision to grant parole and, therefore, the court was unable to adequately review the Board's decision. On September 1, 2009, the court remanded the matter to the Board "for reconsideration and, if necessary, a more complete explanation of why it is convinced Mr. Haeger 'will not

become a menace to society or to the public safety.' " The Board contends that it reconsidered the grant of parole and simply reaffirmed its decision. Accordingly, the Board issued a new decision ordering Haeger's release on parole. The Board did not provide any additional support for its decision at that time.

The prosecution renewed its application for leave to appeal, noting the lack of positive record evidence since the 2008 parole denial. On January 25, 2010, the Board finally provided the court with affidavits from the panel members explaining their decision to grant parole to Haeger. Charles Brown stated that he interviewed Haeger in May 2009, and he felt that "Haeger demonstrated insight, empathy, and responsibility for the crime he was involved in." Haeger admitted to Brown "that he raped his cousin after breaking into her home" and indicated that he "wanted to show [he] was a man." Brown further stated that "Haeger made it clear that he had learned his triggers by attending [SOT], and was blunt, honest, and candid about what he did, including acknowledgement that he had threatened to kill the victim." Brown indicated that he reviewed the COMPAS and VASOR assessments, which described Haeger as a low risk to sexually reoffend. Brown noted that Haeger "was also required to attend additional [SOT] before parole was finalized. He completed this program successfully on September 30, 2009."[12] Brown acknowledged that Haeger had committed a major misconduct in 2008. Ultimately, Brown argued that Haeger would be paroled with many special conditions in addition to the standard protocol and, after considering the seriousness of Haeger's offense, Brown determined that Haeger had "made a positive change."

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[12] Nothing in the record supports this assertion.

Miguel Berrios stated that he reviewed the reports from all DOC-recommended programs and specifically noted that Haeger had completed SOT with positive reports. Berrios also reviewed the COMPAS and VASOR assessments, which showed Haeger to be a low risk for sexually reoffending. Berrios described Haeger's general institutional conduct as good with the exception of the 2008 misconduct. Berrios indicated that he had not personally interviewed Haeger, but had reviewed the information from the interview with Brown. Berrios felt that Haeger had lowered his chances of reoffending and being a risk to society and had "made good progress toward re-entering society."

Ultimately, the circuit court reversed the Board's decision to grant parole to Haeger. The court provided the following justification for its decision:

> [A]s noted by the Parole Board in its brief, "[t]he common theme for the denials appears to be the member's [sic] belief that the prisoner failed to show proper insight concerning his crime." Indeed, in spite of somewhat favorable evaluations used by the [DOC], this was typically the overriding factor in the Parole Board's decision not to grant parole. Their denials repeated, over and over, his lack of "significant insight into the cause of his deviant behavior" and rationalization that he had been "young and immature . . . and blew up"; he "showed little or no empathy for the victim"; "minimizes his behavior based on his being drunk" and went so far as to suggest that the victim "is fine and didn't suffer any injury," reflecting an absence of "insight or remorse"; and generally "lacks the necessary insight into his deviant behavior." Yet even as Mr. Haeger's major contraband violation reduced his probability of parole from "high" to "average," the Parole Board suddenly changes its mind, on the basis of no reasons in the record, and decides that Mr. Haeger's past history of deflecting responsibility for his actions is cured and that he now accepts responsibility for his behavior.

To the extent that there are any reasons in the record at all since Mr. Haeger was most recently denied parole, they tend not to reflect well on Mr. Haeger. A COMPAS evaluation of Mr. Haeger, dated June 6, 2008, is generally positive but eviscerates its own credibility with the total disconnect between its evaluation of his Behavioral/Psychological condition ("likely absence of blaming others, making excuses or minimizing the seriousness of the offense . . . unlikely to lead a high risk lifestyle or make impulsive decisions") and the accompanying "statement," which says that Mr. Haeger has "a likely criminal personality which may include impulsivity, risk-taking, restlessness/boredom, absence of guilt (callousness), selfishness and narcissism, interpersonal dominance, anger and hostility, and a tendency to exploit others." Additionally, Mr. Haeger was scored on the VASOR system, dated February 11, 2009, which graded him at a "high" risk level. Yet, with only these evaluations of Mr. Haeger as further developments of his parole eligibility, the Parole Board departed from four prior denials of parole (including its own timeline, which had scheduled a 24-month interim before reconsidering Mr. Haeger's parole status) to suddenly grant him parole.

To be sure, Mr. Haeger has filed an extremely well-argued brief in defense of being granted parole, and the Court does not wish to trivialize his efforts at that or rehabilitation. The issue here, however, is the acceptability of the Parole Board's actions. While Mr. Haeger may or may not have come to accept his own responsibility for what happened in 1992, there is no evidence in the *record* that he has. The Parole Board has consistently denied him parole on this basis, and then suddenly decides he has satisfied their standards, without any evidence of gradual improvement or the other gradations in their observations of his behavior that would be consistent with such a change of heart. Indeed, to the extent that there is anything in the record that would induce the Parole Board to change its mind, it is the extremely troubling COMPAS evaluation and the unflattering VASOR score. Ignoring these tests, or cherry-picking only the most favorable elements of them in order to rationalize what the Parole Board had previously considered to be overwhelming evi-

> dence against granting parole, is an arbitrary act which abuses the discretion vested in the Parole Board to make principled decisions. [Citations omitted.]

Following the court's decision, the Board and Haeger both moved for reconsideration. At that time, the Board finally supplied the court with Teresa Chandler's affidavit regarding the computer software error on Haeger's COMPAS report. The court denied the motions for reconsideration and, as a result, Haeger remains in prison.

IV. STANDARD OF REVIEW

> Judicial review of the Board's decision to grant parole is limited to the abuse-of-discretion standard. *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 153; 532 NW2d 899 (1995). Either the prosecutor or the victim of an offense may appeal in the circuit court when the Board grants a prisoner parole. MCL 791.234(11); *Morales v Parole Bd*, 260 Mich App 29, 35; 676 NW2d 221 (2003). Under MCR 7.104(D)(5) the challenging party has the burden to show either that the Board's decision was "a clear abuse of discretion" or was "in violation of the Michigan Constitution, a statute, an administrative rule, or a written agency regulation." An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Importantly, a reviewing court may not substitute its judgment for that of the Board. *Morales*, 260 Mich App at 48. [*Elias*, 294 Mich App at 538-539.]

V. HAEGER'S CONSTITUTIONAL CHALLENGES LACK MERIT

Haeger contends that the circuit court ordered the Board to deny him parole and thereby violated the separation-of-powers doctrine. We disagree with Haeger's interpretation of the court's order.

MCR 7.104(D)(8) governs the conduct of the Board after a circuit court "reverse[s] or remand[s]" a parole decision as follows:

> If a decision of the parole board is reversed or remanded, the board shall review the matter and take action consistent with the circuit court's decision within 28 days. If the circuit court order requires the board to undertake further review of the file or to reevaluate its prior decision, the board shall provide the parties with an opportunity to be heard.

This Court extensively described the separation of powers between the judiciary and the Board, which is an arm of the executive branch, and the interplay of the court rule in *Hopkins*, 237 Mich App at 642:

> MCR 7.104(D)(8) contemplates that a Parole Board decision whether to grant parole may be reversed or the matter may be remanded. In reversing a Parole Board decision, the circuit court simply undoes it; to "reverse" means
>
> "[t]o overthrow, vacate, set aside, make void, annul, repeal, or revoke; as, to reverse a judgment, sentence or decree of a lower court by an appellate court, or to change to the contrary or to a former condition. To reverse a judgment means to overthrow it by contrary decision, make it void, undo or annul it for error." [Black's Law Dictionary.]
>
> In remanding a decision to the Parole Board, the circuit court does not specifically overrule it, but simply returns it to the Parole Board for some further consideration or activity. To "remand" is
>
> "[t]o send back. The act of an appellate court when it sends a case back to the trial court and orders the trial court to conduct limited new hearings or an entirely new trial, or to take some other further action." [*Id.*]

Consistently with the definitions of "reverse" and "remand," *Hopkins* held that MCR 7.104(D)(5)[13] allows the circuit court to

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[13] MCR 7.104(D)(5) states:

> The burden shall be on the appellant to prove that the decision of the parole board was

> review the Parole Board's decision to ensure that the board complied with the constitution, the statutory provisions, and applicable administrative rules, and, if so, that the board did not otherwise commit a clear abuse of discretion. As MCR 7.104(D)(8) contemplates, the court may reverse the Parole Board's decision or order further action consistent with the applicable constitutional, statutory, and administrative provisions. While the court may order that the Parole Board conform its conduct to the applicable provisions, no applicable provision authorizes the court to order that the Parole Board release a prisoner on parole. [*Hopkins*, 237 Mich App at 645-646.]

In this case, the circuit court did not order the Board to deny Haeger parole. Rather, the court held that the Board's decision was inconsistent with the objective factors outlined in the statutes and regulations and the record facts. The circuit court declined to simply "remand" the decision to the Board under MCR 7.105(D)(7), which provides:

> On timely motion by a party, or on the court's own motion, the court may remand the matter to the parole board for an explanation of its decision. The parole board shall hear and decide the matter within 28 days of the date of the order, unless the board determines that an adjournment is necessary to obtain evidence or that there is other good cause for an adjournment.

The court had already remanded pursuant to subrule (D)(7) on September 1, 2009, and the Board failed to adequately explain its decision. Accordingly, the court proceeded under subrule (D)(8) and reversed the Board's decision. The Board must now "review the

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> (a) in violation of the Michigan Constitution, a statute, an administrative rule, or a written agency regulation that is exempted from promulgation pursuant to MCL 24.207, or
>
> (b) a clear abuse of discretion.

matter and take action consistent with the circuit court's decision," MCR 7.104(D)(8), by "conform[ing] its conduct" to "the applicable constitutional, statutory, and administrative provisions," *Hopkins*, 237 Mich App at 646.

We also reject Haeger's contention that he was denied due process of law because the circuit court deprived him of his right to parole without providing an adequate opportunity to be heard.[14] Haeger argues that once the Board decides to grant parole, the prisoner has a vested liberty interest, regardless of whether the prisoner remains in prison pending release. Haeger further contends that he was unable to respond to the prosecutor's application for leave to appeal in the circuit court and that the court was required to conduct a hearing rather than decide the issue on the briefs.

Haeger's argument is fatally flawed. "A prisoner enjoys no constitutional or inherent right to be conditionally released from a validly imposed sentence." *Jones*, 468 Mich at 651; see also *Morales*, 260 Mich App at 48, and *Greenholtz v Inmates of Nebraska Penal & Correctional Complex*, 442 US 1, 7; 99 S Ct 2100; 60 L Ed 2d 668 (1979). If parole is granted and the prisoner is actually released from prison on parolee status, that parolee gains an interest in continued liberty. Although the parolee is still under the supervision of the DOC, he or she "can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life." *Morrissey v Brewer*, 408 US 471, 482; 92 S Ct 2593; 33 L Ed 2d 484 (1972).

[14] In the circuit court, Haeger asserted that his right to due process had been violated by the prosecutor's failure to notify him of his right to respond to the application for leave as required by MCR 7.104(D)(2)(c)(iii)(A). However, the prosecutor did notify Haeger of his rights on the required form on August 1, 2009.

Therefore, when a parolee commits a parole violation leading to revocation of his parole, the parolee has a due-process right to "notice and the opportunity to be heard." *Jones*, 468 Mich at 652.

However, a potential parolee who remains in prison has no liberty to protect. As noted by the United States Supreme Court, "parole *release* and parole *revocation* are quite different. There is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires." *Greenholtz*, 442 US at 9. A prisoner awaiting release on parole remains "confined and thus subject to all of the necessary restraints that inhere in a prison." *Id.* The "mere hope that the benefit" of parole "will be obtained" is too general and uncertain and, therefore, "is not protected by due process." *Id.* at 11.

In any event, Haeger received notice and had an opportunity to be heard before the circuit court reviewed the prosecutor's application for leave to appeal the Board's decision. The prosecutor notified Haeger of his intent to appeal the Board's decision. Haeger then moved to dismiss the prosecutor's application for leave to appeal on September 11, 2009. The circuit court granted the prosecutor's application on November 3, 2009, and scheduled a hearing for November 25, 2009. Once the circuit court granted the application for leave to appeal, Haeger filed two separate briefs supporting the Board's decision to grant him parole. The circuit court ultimately canceled the November 25 hearing and proceeded on the briefs alone as no party had requested argument pursuant to MCR 7.101(K), which states that, in an appeal to the circuit court, "[a] party who has filed a timely brief is entitled to oral argument by writing 'ORAL ARGUMENT REQUESTED' in boldface type on the title page of the party's brief." Haeger

never objected to the court's order and failed to raise this complaint in his motion for reconsideration filed after the circuit court's opinion. We will not fault the circuit court for failing to provide an aggrieved party with a formal hearing when that party never requested one.

VI. THE PAROLE BOARD DID NOT CONFORM ITS CONDUCT TO THE STATUTES AND REGULATIONS

Although we disagree with the reasoning employed by the circuit court, we agree with its decision to reverse the Board's grant of parole to Haeger. MCR 7.105(D)(5)(a) provides that a prosecutor appealing a Board decision has the burden to show that the decision was entered "in violation of . . . a statute, an administrative rule, or a written agency regulation . . . ." From the record before this Court, it appears that the Board violated its duty to "consider[] all relevant facts and circumstances," Mich Admin Code, R 791.7715(1), "in determining whether parole is in the best interests of society and public safety," Mich Admin Code, R 791.7715(2).

Mich Admin Code, R 791.7715(2)(c)(iii) provides that the Board may consider a prisoner's "readiness for release" as evinced by his or her "[d]evelopment of a suitable and realistic parole plan." Since as early as 2005, the DOC has used TAPs to assist prisoners in reaching this goal. According to an October 2005 DOC report, all state correctional facilities were scheduled to be involved in the MPRI model by September 2007.[15] And as noted, the development of TAPs is "the lynch-

[15] *The MPRI Statewide Implementation Plan: A Three-Step Approach*, October 2005, available at <http://www.michigan.gov/documents/3-_Statewide_Implementation_Plan_140266__7.pdf> (accessed September 8, 2011).

pin" of the MPRI model.[16] In the 2008 appropriations act for the DOC, 2008 PA 245, § 403(8), the Legislature made the DOC's 2009 appropriation contingent on the imposition of a TAP requirement, stating that the DOC "shall ensure that each prisoner develops a [TAP] at intake in order to successfully reenter the community after release from prison. Each prisoner's [TAP] shall be reviewed at least once each year to assure adequate progress." Although the DOC did not formally require that TAPs be prepared with potential parolees until March 2010,[17] it is apparent that these reports were already in widespread use by then. However, it appears from the record before us that the DOC did not develop a TAP with Haeger to outline his transition into society.

More importantly, the Board violated the mandate of Mich Admin Code, R 791.7715(5) by making its parole decision in the absence of evidence that Haeger had participated in a psychological or psychiatric evaluation. The regulation provides that a prisoner with a history of predatory or assaultive sexual offenses must undergo such an evaluation before the Board may render a parole decision. Mich Admin Code, R 791.7715(5)(b). Haeger underwent psychological evaluations in 1992, when he entered the prison system, and in 1993, in preparation for appealing his convictions and sentences. Nothing in the record indicates that Haeger has been psychologically evaluated in the last 18 years. The information in the historical evaluations is of

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[16] *The MPRI Model: Statements and Recommendations*, p 5.

[17] DOC Policy Directive 03.02.101, ¶ I, p 2, provides, in relation to a prisoner receiving MPRI in-reach services, that a TAP "shall be developed or updated for the prisoner, as appropriate, to identify programming and other tasks and activities that the prisoner is expected to complete in order to reduce his/her identified risks, including any specifically identified by the Parole and Commutation Board."

little relevance in determining "whether parole is in the best interests of society and public safety" as Rule 791.7715(2) requires.

Similarly, Parole Board Member Brown indicated in his affidavit that Haeger completed additional SOT in 2009 while receiving in-reach services. However, we have located no record description of any services provided to Haeger during the in-reach program. The record is also devoid of information regarding Haeger's performance in those programs. Neither this Court nor the circuit court can properly review a Board decision on the basis of an obviously incomplete record. Regardless of fault for the omissions, Haeger's file lacks case summary reports produced following Board interviews, any reports produced following in-reach services, or any TAP that may have been developed with Haeger. These gaps in the record support a single conclusion: that the Board granted Haeger parole in violation of controlling administrative rules and agency regulations.

Absent a complete record and an updated psychological evaluation, we cannot discern whether the Parole Board committed a clear abuse of discretion by granting parole. Accordingly, the circuit court erred by reversing the Board's decision on that ground. We note that the circuit court did attempt to fill the holes in the record, but the Board was less than forthcoming and expedient in providing the necessary information for the court's review. In any event, we will briefly address certain errors in the circuit court's analysis of the Board's actions to prevent any future error.

First, the circuit court correctly noted the internal inconsistency in the COMPAS report. The Board exacerbated the error by failing to remedy or explain the inconsistency until its motion for reconsideration of the court's order of reversal. We do not find the presence of

conflicting information in the report to be dispositive. In other contexts, this Court has repeatedly determined that there is no abuse of discretion when a court or a fact-finder faced with conflicting information makes a reasonable and principled decision regarding which side to believe. See, e.g., *People v Wybrecht*, 222 Mich App 160, 173; 564 NW2d 903 (1997) ("[A] sentence is not invalid because probation agents and a defendant's psychologists use undisputed facts to draw conflicting conclusions about the defendant's character."). The current Board panel read the conflicting statements regarding Haeger's psychological and behavioral health. A member of the current panel also interviewed Haeger and reached his own conclusion regarding Haeger's mentality. The Board chose to believe the COMPAS statement that Haeger did not have criminal ideations, that statement is supported by record evidence, and the Board did not abuse its discretion in granting parole based on that evidence.

Similarly, we reject the circuit court's disregard for the current panel's decision simply because it conflicted with the decisions of previous Parole Board panels. Each and every parole panel faces some conflicting information in making its decision. Each panel member has the discretion to consider the evidence and make a reasonable choice regarding which version of the evidence to believe. It is not an abuse of discretion for two fact-finders to reach different conclusions from the complex and potentially conflicting information within a prisoner's record.

We further reject the circuit court's dismissal of the Board's analysis of various assessment scales. The COMPAS and VASOR assessments and the parole guidelines all include static and dynamic factors. Haeger cannot change the circumstances of his past offense,

and those variables will consistently reduce his overall scores on risk assessments. Haeger may improve his parole outlook, however, by engaging in services toward rehabilitation. Giving the various static and dynamic factors similar weight allows the Board to effectuate both the punitive and rehabilitative features of the corrections system. As our Supreme Court noted in *People v Schultz*, 435 Mich 517, 531-532; 460 NW2d 505 (1990),

> [f]our factors may be taken into consideration to determine the appropriateness of a sentence: rehabilitation, deterrence, the protection of society, and punishment. . . .
>
> * * *
>
> . . . [T]he ultimate goal of sentencing in this state is not to exact vengeance, but to protect society through just and certain punishment reasonably calculated to rehabilitate and thereby " 'convert bad citizens into good citizens . . . .' " [Citations omitted.]

Accordingly, we disagree with the circuit court's conclusion that the Board "cherry-picked" the most favorable aspects of Haeger's COMPAS and VASOR assessments. Rather, the Board recognized that Haeger's overall VASOR rating was heavily affected by the circumstances of the sentencing offense. Based on that observation, the Board gave special consideration to Haeger's low risk of recidivism found on both assessments. The Board's seemingly weighted consideration of Haeger's VASOR score is supported by commentary regarding this scale. While incarceration is generally recommended for a prisoner scored as a high risk on the VASOR scale,[18] official sources acknowledge that "the violence risk scale [as it was previously designated] was

[18] McGrath & Hoke, p 1.

not designed to nor does it predict sexual or other types of reoffense risk particularly well . . . ."[19] The scale has been renamed "Violence Scale" to reflect that "its primary purpose is to quantify the severity of an individual's violence history rather than the likelihood of violent recidivism."[20]

Ultimately, while the Board properly considered the evidence that was placed before it, it did not have a complete record on which to base the parole decision. The Board violated its regulatory duty to defer its parole decision until Haeger submitted to a psychological or psychiatric evaluation. And the Board or the DOC, or both, failed to maintain careful records documenting Haeger's participation in services and completion of steps necessary for parole. Accordingly, we agree with the circuit court's decision to reverse the Board's grant of parole. This conclusion is not fatal to Haeger's chances for parole. Rather, the Board must now ensure that it considers all necessary information in rendering its parole decision and adequately and accurately documents these steps in the record. After a thorough review as required by statute, regulation, and DOC policy directive, the Board may use its discretion to either grant or deny parole to Haeger.

Affirmed.

MARKEY, P.J., and SAAD, J., concurred with GLEICHER, J.

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[19] *Id.* at 6.

[20] *Id.* at 7.

MOON v MICHIGAN REPRODUCTIVE & IVF CENTER, PC

Docket No. 299623. Submitted September 7, 2011, at Grand Rapids. Decided September 29, 2011. Approved for publication November 8, 2011, at 9:00 a.m.

Alison Moon brought an action in the Kent Circuit Court against Michigan Reproductive and IVF Center, P.C. (MRIC), and Grand Rapids Fertility & IVF, P.C. (GRFI), alleging that the clinics had discriminated against her on the basis of marital status contrary to Michigan's Civil Rights Act (CRA), MCL 37.2101 *et seq*. Moon stipulated to the dismissal of her claim against MRIC. The court, Mark A. Trusock, J., granted GRFI's motion for summary disposition, concluding that under Michigan common law, physicians may refuse to enter into a physician-patient relationship for any reason or no reason at all, and that GRFI's refusal to treat Moon was, accordingly, permitted by law. The court further noted that even if Moon had stated a claim for which relief could be granted under the CRA, it would have dismissed her claim against GRFI on the merits because the court believed that GRFI had articulated a legitimate, nondiscriminatory reason for refusing to treat Moon. Moon appealed.

The Court of Appeals *held*:

1. Under MCL 37.2302(a) of the CRA, "[e]xcept where permitted by law," a person may not deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of marital status. Marital status refers to whether an individual is married or not. The phrase "except where permitted by law" encompasses statutory law, common law, and constitutional law. However, the contractual nature of the physician-patient relationship, which under the common law permitted a physician to decline to enter into the relationship for any reason, does not allow a physician to decline to enter into the relationship on the basis of the patient's protected status under the CRA. Rather, a physician may only refuse to enter into a physician-patient relationship with a potential patient on the basis of legally permissible, nondiscriminatory reasons, and the trial court erred by holding otherwise.

2. To state a claim for violation of the CRA under MCL 37.2302(a), a plaintiff must establish (1) discrimination based on a protected characteristic (2) by a person (3) resulting in the denial of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations (4) of a place of public accommodation. In a discrimination action based on disparate treatment, the plaintiff has the initial burden to establish the existence of illegal discrimination, either through direct or indirect evidence. Direct evidence is evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the decision-maker's actions. The presentation of direct evidence of discrimination requires that the case proceed as an ordinary civil matter. In this case, Moon provided direct evidence in support of her claim, specifically, e-mail messages that she received from GRFI which stated that GRFI did not provide services to single women. Accordingly, the case should have proceeded as an ordinary civil matter to discovery and trial. The provision of rebuttal evidence by GRFI was irrelevant at the summary disposition phase in light of the direct evidence of discrimination.

Reversed and remanded.

1. CIVIL RIGHTS — MARITAL STATUS — PUBLIC ACCOMMODATIONS — PHYSICIAN-PATIENT RELATIONSHIPS.

Under Michigan's Civil Rights Act (CRA), "[e]xcept where permitted by law," a person may not deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of marital status; marital status refers to whether an individual is married or not; the phrase "except where permitted by law" encompasses statutory law, common law, and constitutional law; however, the contractual nature of the physician-patient relationship, which under the common law permitted a physician to decline to enter into the relationship for any reason, does not allow a physician to decline to enter into the relationship on the basis of the patient's protected status under the CRA; rather, a physician may only refuse to enter into a physician-patient relationship with a potential patient on the basis of legally permissible, nondiscriminatory reasons (MCL 37.2302[a]).

2. CIVIL RIGHTS — DISCRIMINATION BASED ON PROTECTED CHARACTERISTICS — PUBLIC ACCOMMODATIONS — DISPARATE TREATMENT — DIRECT EVIDENCE.

To state a claim for violation of Michigan's Civil Rights Act (CRA), a plaintiff must establish (1) discrimination based on a protected characteristic (2) by a person (3) resulting in the denial of the full

> and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations (4) of a place of public accommodation; in a discrimination action based on disparate treatment, the plaintiff has the initial burden to establish the existence of illegal discrimination, either through direct or indirect evidence; direct evidence is evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the decision-maker's actions; the presentation of direct evidence of discrimination requires that the case proceed as an ordinary civil matter; the provision of rebuttal evidence by the defendant is irrelevant at the summary disposition phase if the plaintiff has presented direct evidence of discrimination (MCL 37.2302[a]).

Rathert Law Offices, P.C. (by *Kenneth A. Rathert*), and *MD Smith Law Office, PLLC* (by *Marlo D. Smith*), for Alison Moon.

Garan Lucow Miller, P.C. (by *Megan K. Cavanagh* and *Michael D. Wade*), for Grand Rapids Fertility & IVF, P.C.

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

PER CURIAM. Plaintiff Alison Moon contacted Grand Rapids Fertility & IVF, P.C. (GRFI), and Michigan Reproductive & IVF Center, P.C. (MRIC), and specifically asked if the clinics would provide in vitro fertilization (IVF)[1] services to a single woman. Both facilities responded that they did not provide IVF services to single women. Moon filed suit against both, alleging a single count of discrimination based on marital status under

[1] "In vitro fertilization" is defined as "fertilization of an egg in a laboratory dish or test tube; specifically: mixture usually in a laboratory dish of sperm with eggs which have been obtained from an ovary that is followed by introduction of one or more of the resulting fertilized eggs into a female's uterus[.]" MedlinePlus, Medical Dictionary <http://www.merriam-webster.com/medlineplus/in%20vitro%20fertilization> (accessed September 1, 2011).

the Civil Rights Act (CRA), MCL 37.2101 *et seq*. The circuit court dismissed Moon's discrimination action, stating that, under the common law, a doctor could refuse to enter into a doctor-patient relationship with any individual for any reason or no reason at all. Accordingly, the court concluded that the common law permitted a doctor to reject a potential patient even for discriminatory reasons.

Under the circuit court's reasoning, a doctor could refuse to treat any patient based solely on a characteristic protected under the CRA, including race, and yet avoid legal liability. Because such a result certainly was not contemplated by the Legislature, we reverse and remand for further proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

Moon began receiving IVF treatments from the University of Michigan Health System in Ann Arbor, but she desired to continue her treatments closer to her home in Portage. On July 3, 2008, Moon sent an e-mail to GRFI and specifically inquired if the facility provided IVF treatment to single women. Dr. Douglas Daly responded via e-mail that while GRFI provided various fertility treatments to all women, it did not provide insemination services to single women. Dr. Daly referred Moon to another clinic that is not a party to this suit. Dr. Daly's response stated in full:

> We provided [sic] medically indicated treatment for all women. However, the state of Mochigan [sic], like most states, does not have adequate statutory or case law for reproductive health. All children have the right to child support (the basis of paternity payments) but in the case of donor insemination (or any conception outside a marriage) the law does not provide any definition for paternity. By contract the donor is protected by the company processing the sperm. The company is protected by the legal agree-

> ment with the MD. The inseminated woman can NOT sign away the right to child support for the child, therefore in the absence of any controlling law or legal precident [sic] the child may be able to claim child support from the MD involved. And make that claim retroactively until 21 yrs of age (maybe longer) – similar to the precedent set by malpractice litigation.
>
> Until I feel there is adequate law I will not be providing insemination services to single individuals. While the issue is somewhat different there is an IVF program in Boston Ma (a terribly conservative state) that has been ordered to pay 1.2M in child support – no one believed (except me) when the case was filled [sic] there was any chance the plantive [sic] would win. I am not willing to gamble my financial future on this issue. If you only need insemination – contact [another clinic] – we supply them with all medical treatment for the patient – other than IVF.

Moon queried whether the recommended clinic would similarly deny her treatment. Dr. Daly responded that the recommended clinic might deny her treatment. However, he indicated:

> They are not as jaded regarding the legal profession as I am and since they are not an IVF program they have a much lower profile. They have been providing this service for many years – and I have provided any necessary infertility based medical evaluation and treatment – other than the actual inseminations.

Dr. Daly and Moon subsequently exchanged two more e-mails discussing her chances of pregnancy and multiple pregnancy using different types of fertility drugs.

In August 2008, Moon falsely informed MRIC that she was in a relationship in order to secure an initial consultation. When Moon ultimately informed Dr. James Young that she was single, the doctor informed her that MRIC does not provide IVF services for single women. Dr. Young referred Moon to a nurse practitioner who could perform

the artificial inseminations. Upon meeting Moon, however, the nurse practitioner felt that Moon was "emotionally unstable" and informed Dr. Young that Moon intended to file suit against him. Accordingly, Dr. Young and MRIC refused to treat Moon. As a result of GRFI's and MRIC's denial of treatment, Moon travelled to Ypsilanti, over two hours away from her home, to receive IVF treatment.

Moon filed suit against GRFI and MRIC on May 20, 2010, alleging a single count of discrimination based on marital status under MCL 37.2302 of the CRA. GRFI filed a motion for summary disposition, citing the statute's express exception to the antidiscrimination legislation: discrimination is prohibited "[e]xcept where permitted by law . . . ." GRFI asserted that the creation of a doctor-patient relationship is consensual under the common law and "a physician is not required to render services to anyone." Accordingly, GRFI contended that the CRA was inapplicable to the doctor-patient relationship. Rather, the CRA was intended to prevent discrimination in more informal relationships, such as those between a retail store and its customer or a common carrier and its passengers.

Moon responded that, in light of the comments made by Dr. Daly in his e-mails, GRFI had refused to provide IVF treatment to her solely because she is a single woman. Moon conceded that GRFI was not required to enter into a doctor-patient relationship with her. However, Moon argued that the decision to accept or deny her as a patient had to be for legitimate, nondiscriminatory reasons.

The circuit court granted GRFI's motion for summary disposition under MCR 2.116(C)(8) and additionally under MCR 2.116(C)(10). The circuit court agreed with GRFI that, under the Michigan common law:

> [A] physician-patient relationship is voluntary and consensual, and a physician may refuse to enter into such a relationship for any reason or no reason at all. This Court does not believe the [CRA] was intended to function so as to force professionals to enter into relationships with clients. That is likely one reason why MCL 37.2302 begins with the phrase "[e]xcept where permitted by law." [Third alteration in original.]

Although the circuit court dismissed Moon's complaint for failure to state a legally cognizable claim, the court further noted that it would have dismissed Moon's claim on the merits as well. Specifically, the court treated Moon's claim as presenting indirect evidence of disparate treatment, and ruled that GRFI could avoid liability by providing a legitimate, nondiscriminatory reason for refusing treatment. The circuit court believed that Dr. Daly had provided such a legitimate reason—"potential financial liability given the lack of regulation and caselaw in Michigan regarding IVF services."[2]

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted." *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998).

> "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." In evaluating such a motion, a court considers the entire record in the light most

[2] Moon subsequently stipulated to the dismissal of her claim against MRIC with prejudice.

> favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004) (citation omitted).]

We review de novo underlying issues of statutory interpretation. *Eggleston v Bio-Med Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003). The goal of statutory interpretation is to discern the intent of the Legislature from the language of the statute. "If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written." *Rose Hill Ctr, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997). If a statute is ambiguous, however, judicial construction is permitted. *Detroit City Council v Detroit Mayor*, 283 Mich App 442, 449; 770 NW2d 117 (2009).

III. A PLAINTIFF MAY FILE SUIT AGAINST A "PROFESSIONAL" UNDER THE CRA

First and foremost, we reject the circuit court's conclusion that a professional, such as a doctor, may reject a patient or client for any reason, including discriminatory animus toward a protected characteristic. This runs afoul of the very purpose of all antidiscrimination legislation and cannot be supported.

Marital status occupies a coequal place in the catalog of protected characteristics identified in the CRA. MCL 37.2102(1) provides:

> The opportunity to obtain employment, housing and other real estate, *and the full and equal utilization of public accommodations*, public service, and educational facilities without discrimination because of religion, race, color,

> national origin, age, sex, height, weight, familial status, or *marital status* as prohibited by this act, is recognized and declared to be a civil right. [Emphasis added.]

The Michigan Supreme Court defined "marital status" under the CRA in *Miller v C A Muer Corp*, 420 Mich 355, 362-363; 362 NW2d 650 (1984), as referring simply to whether an individual is married or not.

MCL 37.2301(a) defines a "place of public accommodation" as "a business, or . . . health . . . facility . . . whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public." MCL 37.2302 prohibits discrimination by a place of public accommodation as follows:

> *Except where permitted by law*, a person shall not:
>
> (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status. [Emphasis added.]

For purposes of summary disposition, GRFI stipulated that it is a place of public accommodation to which the statutory prohibition of discrimination applies. The parties disagree whether GRFI was able to "[d]eny [Moon] the full and equal enjoyment of" its services because the denial was otherwise "permitted by law." *Id*.

This Court has previously held that the phrase "[e]xcept where permitted by law" in MCL 37.2302 encompasses the common law and constitutional law, as well as statutory law. *People v Walker*, 135 Mich App 267, 278; 354 NW2d 312 (1984); *Cheeseman v American Multi-Cinema, Inc*, 108 Mich App 428, 433; 310 NW2d 408 (1981). Compare *Dep't of Civil Rights ex rel Forton*

v Waterford Twp Dep't of Parks & Recreation, 425 Mich 173, 189; 387 NW2d 821 (1986) (declining to answer the query whether the phrase "except as permitted by law" includes "constitutional and common law as well as statutory law"). Assuming arguendo that the statutory exception includes discrimination permitted under the common law, we disagree with the circuit court's overly broad interpretation of the consensual and voluntary nature of the doctor-patient relationship.

GRFI correctly notes that a doctor-patient relationship is contractual and may only be established voluntarily and through the consent, either express or implied, of both the doctor and the patient. *Oja v Kin*, 229 Mich App 184; 581 NW2d 739 (1998), citing *Hill v Kokosky*, 186 Mich App 300; 463 NW2d 265 (1990), *St John v Pope*, 901 SW2d 420 (Tex, 1995), and *McKinney v Schlatter*, 118 Ohio App 3d 328; 692 NE2d 1045 (1997). However, the cases cited by GRFI describe the creation of a doctor-patient relationship in establishing the necessary elements of a medical-malpractice claim. The cited cases absolve a doctor of medical-malpractice liability if the doctor did not explicitly or implicitly consent to enter into a doctor-patient relationship with the plaintiff. GRFI has not cited a single case in which a doctor was allowed to use the consensual nature of the doctor-patient relationship to discriminate against potential patients based on protected characteristics such as race or marital status.

As noted by our Supreme Court in *Miller*, 420 Mich at 362-363:

> Civil rights acts seek to prevent discrimination against a person because of stereotyped impressions about the characteristics of a class to which the person belongs. The [CRA] is aimed at the prejudices and biases borne against persons because of their membership in a certain class, and

> seeks to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases. [Quotation marks and citations omitted.]

The CRA certainly serves to prohibit doctors and medical facilities from refusing to form a doctor-patient relationship based solely on the patient's protected status. A contrary interpretation would allow a doctor to follow his or her personal prejudices or biases and deny treatment to a patient merely because the patient is African-American, Jewish, or Italian. Rather, following this state's enactment of the CRA, a doctor may only deny his or her consent to enter into a doctor-patient relationship with a potential patient based on legally permissible, nondiscriminatory reasons.

We find *Lyons v Grether*, 218 Va 630; 239 SE2d 103 (1977), instructive in this regard. In *Lyons*, 218 Va at 631, the plaintiff was a blind patient who had entered a physician's waiting room with her guide dog. The doctor refused to treat the plaintiff unless she removed her dog from the office. Under Virginia law, the blind are " 'entitled to full and equal accommodations' " and " 'privileges of . . . places of public accommodation' " and also have " 'the right to be accompanied by a dog guide . . . .' " *Id.* at 632 n 1, quoting former Va Code Ann 63.1-171.2. The Virginia Supreme Court acknowledged that, under the common law, "a physician has no legal obligation to accept as a patient everyone who seeks his services" and that the creation of the doctor-patient relationship is consensual and contractual. *Id.* at 632-633. However, the court determined that there was a remaining issue of material fact whether the defendant doctor discriminatorily terminated his relationship with the plaintiff patient because she exercised her rights under the state's "White Cane Act." *Id.* at 634-635. The current case poses the similar question of

whether a doctor may refuse to enter into a doctor-patient relationship with a patient based on discriminatory factors in violation of the CRA. The answer to that question clearly is no. Accordingly, the circuit court erred by dismissing Moon's discrimination claim pursuant to MCR 2.116(C)(8).

IV. MOON PRESENTED DIRECT EVIDENCE OF DISCRIMINATION AND THE CIRCUIT COURT IMPROPERLY DISMISSED HER CLAIM ON THE MERITS

We further reject the circuit court's conclusion that Moon failed to create a genuine issue of material fact that GRFI discriminatorily rejected her as a patient.

> In order to state a claim under MCL 37.2302(a), plaintiff must establish four elements: (1) discrimination based on a protected characteristic (2) by a person, (3) resulting in the denial of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations (4) of a place of public accommodation. [*Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007).]

Moon clearly established that she was denied the enjoyment of the goods, services, facilities, privileges, advantages, or accommodations offered by GRFI, which stipulated to being a place of public accommodation for purposes of summary disposition. The only question remaining is whether she created a genuine issue of material fact that GRFI discriminated against her based on marital status. In this regard, Moon argues that she was given disparate treatment from married women.

In a discrimination action based on disparate treatment, the plaintiff has the initial burden to establish the existence of illegal discrimination, either through direct or indirect evidence. *Hazle v Ford Motor Co*, 464 Mich 456, 462-463; 628 NW2d 515 (2001). "[P]roof of

discriminatory motive is required in order to establish a prima facie case" of disparate treatment. *Dep't of Civil Rights ex rel Peterson v Brighton Area Schools*, 171 Mich App 428, 439; 431 NW2d 65 (1988); see also *Farmington Ed Ass'n v Farmington School Dist*, 133 Mich App 566, 572; 351 NW2d 242 (1984). Direct evidence is " 'evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the' " decision-maker's actions. *Hazle*, 464 Mich at 462, quoting *Jacklyn v Schering-Plough Healthcare Prod Sales Corp*, 176 F3d 921, 926 (CA 6, 1999).

Moon proffered direct evidence of discrimination, specifically, the e-mail messages that she received from Dr. Daly, indicating that GRFI did not provide IVF treatment to single women. Dr. Daly's statement, "Until I feel there is adequate law I will not be providing insemination services to single individuals," tends to establish " 'that unlawful discrimination was at least a motivating factor' " in Dr. Daly's decision to deny Moon IVF services. *Hazle*, 464 Mich at 462 (citation omitted). When a plaintiff presents direct evidence of discrimination, " 'the case should proceed as an ordinary civil matter.' " *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 540; 620 NW2d 836 (2001), quoting *DeBrow v Century 21 Great Lakes, Inc*, unpublished opinion of the Court of Appeals, issued August 13, 1996 (Docket No. 161048) (YOUNG, J., dissenting) (*DeBrow I*). As an ordinary civil matter, the circuit court should have denied GRFI's motion for summary disposition on the merits and proceeded through discovery and to trial if necessary.

We note that the circuit court's error stemmed from its application of the shifting burdens standard of *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct

1817; 36 L Ed 2d 668 (1973), to Moon's discrimination claim. "The shifting burdens of proof described in *McDonnell Douglas* are not applicable if a plaintiff can cite direct evidence of unlawful discrimination." *DeBrow (After Remand)*, 463 Mich at 539. As Moon presented *direct evidence* of discrimination, she was not required to "present a rebuttable prima facie case . . . from which a factfinder could infer" discriminatory animus. *Hazle*, 464 Mich at 462 (quotation marks, citation, and emphasis omitted). Further, it was irrelevant at the summary disposition phase whether GRFI had rebutted Moon's discrimination claim by articulating "a legitimate, nondiscriminatory reason for its" actions. *Id.* at 464. Rather, the credibility of GRFI's claimed motive for denying IVF treatment to Moon (fear of financial liability for the child conceived) is a question for the fact-finder. And, " '[n]either this Court nor the trial court can make factual findings or weigh credibility in deciding a motion for summary disposition.' " *DeBrow (After Remand)*, 463 Mich at 540, quoting *DeBrow I* (YOUNG, J., dissenting).

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

GLEICHER, P.J., and HOEKSTRA and STEPHENS, JJ., concurred.

PEOPLE v DANTO

PEOPLE v NATER

Docket Nos. 302986, 302991, 303064, and 303525. Submitted August 10, 2011, at Detroit. Decided November 8, 2011, at 9:05 a.m.

Michael S. Danto and Andrew B. Nater were each charged separately in the Oakland Circuit Court with one count of manufacturing marijuana and one count of possession with intent to deliver marijuana. In each case, the court, Leo Bowman, J., denied the prosecution's motion to admit evidence of other acts by the defendant. In each case the trial court also granted the prosecution's motion to preclude assertion of the Michigan Medical Marihuana Act (MMA), MCL 333.26421 *et seq*., as an affirmative defense and to preclude reference to the MMA at trial. The prosecution appealed by leave granted the denial of its motions to admit other-acts evidence (Docket No. 302986 [Danto] and Docket No. 302991 [Nater]). Each defendant appealed by leave granted the granting of the prosecution's motion to preclude assertion of the MMA as an affirmative defense and reference to the MMA at trial (Docket No. 303064 [Nater] and Docket No. 303525 [Danto]). Danto also appealed the denial of his motion for an evidentiary hearing and to dismiss the charges. The appeals were consolidated by the Court of Appeals.

The Court of Appeals *held*:

1. Other-acts evidence must satisfy three requirements in order to be admissible under MRE 404(b). It must be offered for a proper purpose, it must be relevant, and its probative value must not be substantially outweighed by the danger of unfair prejudice. The trial court may, on request, instruct the jury regarding the limited use of the evidence.

2. The other-acts evidence offered against both defendants was relevant, offered for a proper purpose, and its probative value was not outweighed by the danger of unfair prejudice. The trial court abused its discretion by refusing to admit the other-acts evidence. The orders denying the motions to admit the evidence are reversed and the cases must be remanded to the trial court for further proceedings.

3. Defendants did not meet their burden of production to establish that the marijuana found in defendants' home was kept in an enclosed, locked facility, as required by MCL 333.26424, therefore, defendants were not entitled to assert the affirmative defense provided under MCL 333.26428. The trial court's order precluding assertion of the affirmative defense and references to the MMA at trial are affirmed.

4. The trial court did not abuse its discretion by denying Danto's request for an evidentiary hearing under the MMA. MCL 333.26428(b) does not create an automatic right to an evidentiary hearing upon the filing of a motion to dismiss. It merely requires dismissal if the defendant establishes the elements of the affirmative defense under MCL 333.26428.

Affirmed in part, reversed in part, and remanded.

GLEICHER, J., concurring in part and dissenting in part, agreed that the trial court abused its discretion by precluding admission of the other-acts evidence and did not abuse its discretion by prohibiting defendants from asserting the affirmative defense provided in MCL 333.26428 because they failed to adequately support the proffered defense. Judge GLEICHER, however, disagreed with the determination of the majority that defendants were properly precluded from referring to the MMA at trial and, to prevent prejudice to defendants, would reverse the part of the trial court's order precluding such references at trial.

1. EVIDENCE — RELEVANT EVIDENCE — UNFAIR PREJUDICE.

All relevant evidence is prejudicial; only unfairly prejudicial evidence may be excluded; unfair prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by the jury; unfair prejudice may arise when considerations extraneous to the merits of the case, such as jury bias, sympathy, anger, or shock, are injected.

2. CONTROLLED SUBSTANCES — MARIJUANA — MEDICAL MARIJUANA — AFFIRMATIVE DEFENSES — BURDEN OF PROOF.

The Michigan Medical Marihuana Act provides an affirmative defense to prosecution; the defendant has the burden to establish a prima facie case for the affirmative defense by presenting some evidence on all the elements of the defense; if the defendant fails to establish an element of the defense, the defense should not be presented to the jury (MCL 333.26428).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attor-

ney, and *Thomas R. Grden* and *Danielle Walton*, Assistant Prosecuting Attorneys, for the people.

Rosemary Gordon Pánuco for defendants.

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

MARKEY, P.J. In these four consolidated, interlocutory appeals both the prosecution and defendants, Michael Danto and Andrew Nater, appeal the trial court's pretrial evidentiary rulings. In Docket No. 302986 (Danto) and Docket No. 302991 (Nater), the prosecution appeals by leave granted the trial court's order denying its motion to admit evidence of other acts committed by the respective defendants. In Docket No. 303064 (Nater) and Docket No. 303525 (Danto), the respective defendants appeal by leave granted the trial court's order granting the prosecution's motion to preclude assertion of the Michigan Medical Marihuana Act (MMA), MCL 333.26421 *et seq*.,[1] as an affirmative defense and to preclude reference to the MMA at trial. Danto also appeals the trial court's order denying his motion for an evidentiary hearing and to dismiss under the provisions of the MMA. We affirm the trial court's orders in Docket Nos. 303064 and 303525, reverse the trial court's orders in Docket Nos. 302986 and 302991, and remand for further proceedings.

In Docket No. 302986, the prosecution argues that the trial court abused its discretion by barring the admission of evidence of other acts Danto committed. We agree. We review a trial court's evidentiary decisions

[1] The MMA uses the spelling "marihuana." This opinion follows the lead of *People v King*, 291 Mich App 503; 804 NW2d 911 (2011), lv gtd 489 Mich 957 (2011), and *People v Redden*, 290 Mich App 65; 799 NW2d 184 (2010), and uses the more common spelling "marijuana" except in quotations.

for an abuse of discretion. *People v Martzke*, 251 Mich App 282, 286; 651 NW2d 490 (2002). A trial court abuses its discretion when its decision falls outside the range of principled outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

"To be admissible under MRE 404(b), bad-acts evidence must satisfy three requirements: (1) the evidence must be offered for a proper purpose; (2) the evidence must be relevant; and (3) the probative value of the evidence must not be substantially outweighed by [the danger of] unfair prejudice." *People v Kahley*, 277 Mich App 182, 184-185; 744 NW2d 194 (2007). Also, the trial court, on request, may instruct the jury regarding the limited use of the evidence. *People v Watson*, 245 Mich App 572, 577; 629 NW2d 411 (2001).

> Evidence relevant to a noncharacter purpose is *admissible* under MRE 404(b) *even if* it also reflects on a defendant's character. Evidence is *inadmissible* under this rule *only* if it is relevant *solely* to the defendant's character or criminal propensity. Stated another way, the rule is not exclusionary, but is inclusionary, because it provides a nonexhaustive list of reasons to properly admit evidence that may nonetheless also give rise to an inference about the defendant's character. Any undue prejudice that arises because the evidence also unavoidably reflects the defendant's character is then considered under the MRE 403

> balancing test, which permits the court to exclude relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice . . . ." MRE 403. [*People v Mardlin*, 487 Mich 609, 615-616; 790 NW2d 607 (2010) (citations omitted).]

All relevant evidence is prejudicial; only *unfairly* prejudicial evidence may be excluded. *People v McGhee*, 268 Mich App 600, 613-614; 709 NW2d 595 (2005). "Unfair prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by the jury." *Id*. at 614. Unfair prejudice may arise where considerations extraneous to the merits of the case, such as jury bias, sympathy, anger, or shock, are injected. *Id*.

Here, the prosecution moved to admit evidence that on the same date that Danto and Nater's residence was searched, officers executed a search warrant at a café in which marijuana was sold and smoked. At the café, Danto was found at a table with 323 grams of marijuana packaged for sale, hashish, THC (tetrahydrocannabinol) candy, packaging material, a scale, a tally sheet, a cell phone, and $2,434 in cash. A document in the cashbox at the front door of the café indicated that Danto had paid an entrance fee to sell marijuana at the café. The proper purposes for the evidence included establishing Danto's knowledge of and control over the marijuana found in his residence. "Constructive possession of an illegal substance requires proof that the defendant knew of its character." *Id.* at 610. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Danto was not present in the home when the search warrant was executed, and he contended that the small amount of marijuana found in his bedroom was within the amount permitted by the MMA. Therefore, whether Danto knew

about and controlled the larger amount of marijuana found in the living room was a material issue. Evidence that Danto was found in possession of a large quantity of marijuana that was packaged for sale identically to the marijuana found in the living room of his home on the same day would tend to make it more likely than not that he knew the substance in the living room was marijuana and that he controlled it.

The prosecution has identified the additional proper purpose of establishing Danto's intent to distribute the marijuana. "[P]ossession with intent to distribute an illegal substance requires the specific intent to distribute." *McGhee*, 268 Mich App at 610. In *People v Williams*, 240 Mich App 316, 324; 614 NW2d 647 (2000), this Court upheld the admission of evidence of the defendant's prior drug transactions within five weeks before his arrest because "the evidence was directly relevant to intent, knowledge, and scheme, all of which were at issue in the case. The relevance was direct, in that there was a direct relationship between the prior sales and the crimes charged, and did not involve an impermissible intermediate inference to character." And in *People v Mouat*, 194 Mich App 482, 484; 487 NW2d 494 (1992), this Court affirmed the admission of testimony about prior drug activity that showed the defendant's intent to distribute cocaine. Here, a reasonable inference exists that the marijuana grown in Danto's home was the source of the marijuana he possessed at the café given the identical packaging and the substantial number of plants being grown in the residence. Also, Danto's packaging of the marijuana for sale and possession of other accouterments of drug trafficking at the café tends to increase the likelihood that he intended to distribute the marijuana found at his residence.

The next question is whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. As discussed, evidence is unfairly prejudicial when it tends to adversely affect the objecting party's position by injecting extraneous considerations such as jury bias, sympathy, anger, or shock. *McGhee*, 268 Mich App at 614. No such extraneous considerations have been identified here. The trial court did not explain why it concluded that the prejudicial effect substantially outweighed the probative value of the evidence. Danto contends that the evidence was unfairly prejudicial for two reasons: first, he would be unable to effectively cross-examine the undercover officers regarding the alleged use of false medical-marijuana cards to obtain access to the café given the trial court's ruling precluding mention of the medical use of marijuana at trial, and, second, the evidence would confuse or prejudice the jury because the Oakland County Prosecuting Attorney and law enforcement officials are engaged in a concerted and well-publicized attack on the medical use of marijuana. Neither argument is persuasive.

The fact that undercover officers used false medical-marijuana cards to gain access to the café has no bearing on the theory under which the other-acts evidence was offered. The prosecution seeks to use evidence that Danto possessed identically packaged marijuana for sale and accouterments of drug trafficking at the café to establish his knowledge of and control over the marijuana in his home and his intent to distribute that marijuana. Whether an undercover officer used a false medical-marijuana card to gain entry into the café has no bearing on whether Danto knew about, possessed, or intended to distribute the marijuana found in his home. Further, no evidence exists that any false cards were ever shown to Danto.

Also, Danto's allegation that the Oakland County Prosecuting Attorney and law enforcement officials are engaged in a concerted and well-publicized attack on the medical use of marijuana does not establish prejudice. Danto has offered no particular facts to establish that any such campaign exists, nor has he presented any meaningful argument regarding how even very zealous enforcement of the law results in unfair prejudice to the defense. Accordingly, no basis exists on which to find that the admission of the other-acts evidence would be *unfairly* prejudicial to Danto. We conclude that the trial court's exclusion of the other-acts evidence falls outside the range of principled outcomes.

In Docket No. 302991, the prosecution argues that the trial court abused its discretion by barring the admission of evidence of other acts Nater committed. We agree. The prosecution moved to admit evidence that Nater had sold marijuana to undercover officers at the same café three times in the approximately one-month period preceding the execution of the search warrant on his and Danto's home. As in Docket No. 302986, we agree with the prosecution that the other-acts evidence was offered for proper purposes of establishing Nater's knowledge of and control over the marijuana found in his home. Like Danto, Nater was not in the house when the search warrant was executed. Evidence that Nater had sold marijuana on three occasions in the month preceding the execution of the search warrant and that after one of the sales he was followed back to the house at which the marijuana was found would tend to make it more likely that he knew about and controlled the marijuana found in the house and that he knew that the substance was marijuana. In addition, the evidence was relevant to the proper purpose of establishing Nater's intent to distribute the

marijuana found in his home. Reasonable inferences exist that the marijuana operation in Nater's home was the source of the marijuana that he sold on the prior occasions and that as part of his ongoing scheme to manufacture and sell marijuana, he intended to sell the marijuana found in the home.

As in Danto's case, the trial court failed to explain why it concluded that the prejudicial effect of the other-acts evidence substantially outweighed its probative value. Nater argued in the trial court that admitting evidence of prior medical-marijuana sales and activities while precluding references to the medical use of marijuana at trial would deny him his constitutional rights to confrontation and to present a defense because he would be unable to effectively cross-examine the officers regarding their alleged use of false medical-marijuana cards to gain entry into the café where the sales occurred. If this was the basis for the trial court's ruling, then we disagree with Nater. The right to present a defense extends only to *relevant* evidence. *People v Likine*, 288 Mich App 648, 658; 794 NW2d 85 (2010). The fact that undercover officers might have used false medical-marijuana cards to gain access to the café has no bearing on whether Nater knew about, possessed, or intended to distribute the marijuana found in his home. Further, no evidence exists that any false medical-marijuana cards were ever shown to Nater himself.

In any event, Nater has identified no provision in the MMA that would have authorized him to sell marijuana to the undercover officers. MCL 333.26424(b) provides that "[a] primary caregiver who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty . . . for assisting a qualifying patient to whom he or she is connected

through the [Michigan Department of Community Health's] registration process with the medical use of marihuana in accordance with this act . . . ." Nater does not claim or offer evidence that he was connected through the department's registration process with the undercover officers to whom he sold marijuana. Therefore, because the MMA did not authorize Nater's sales to the officers, no unfair prejudice would arise from precluding cross-examination of those officers regarding marijuana for medical use. We conclude that the trial court abused its discretion by refusing to admit the other-acts evidence.

In Docket Nos. 303064 and 303525, defendants argue that the trial court erred by relying on *People v King*, 291 Mich App 503; 804 NW2d 911 (2011), lv gtd 489 Mich 957 (2011), to preclude defendants from raising a defense under § 8 of the MMA, MCL 333.26428, and from mentioning the medical use of marijuana at trial because *King* conflicts with two prior decisions of this Court. We disagree. "For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Although Nater raised this argument in the trial court, Danto failed to do so. Danto opposed the prosecution's motion on other grounds, but an objection on one ground is insufficient to preserve an appellate argument based on a different ground. *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003). Because Danto failed to preserve this issue, our review in his case is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Whether *King* conflicts with prior decisions of this Court is a question of law we review de novo. *People v Waclawski*, 286 Mich App 634, 693; 780 NW2d 321

(2009). We also review de novo issues of statutory construction. *People v Malone*, 287 Mich App 648, 654; 792 NW2d 7 (2010).

Section 4 of the MMA, MCL 333.26424, provides various protections for qualifying patients and primary caregivers. Section 4(a) states:

> A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, *12 marihuana plants kept in an enclosed, locked facility*. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount. [Emphasis added.]

Section 4(b) provides:

> A primary caregiver who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for assisting a qualifying patient to whom he or she is connected through the department's registration process with the medical use of marihuana in accordance with this act, provided that the primary caregiver possesses an amount of marihuana that does not exceed:
>
> (1) 2.5 ounces of usable marihuana for each qualifying patient to whom he or she is connected through the department's registration process; and

(2) for each registered qualifying patient who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants *kept in an enclosed, locked facility*; and

(3) any incidental amount of seeds, stalks, and unusable roots. [Emphasis added.]

" 'Qualifying patient' means a person who has been diagnosed by a physician as having a debilitating medical condition." MCL 333.26423(h). " 'Enclosed, locked facility' means a closet, room, or other enclosed area equipped with locks or other security devices that permit access only by a registered primary caregiver or registered qualifying patient." MCL 333.26423(c).

Section 8 of the MMA, MCL 333.26428, provides a defense to a prosecution involving marijuana:

(a) *Except as provided in section 7*, a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana, and this defense shall be presumed valid where the evidence shows that:

(1) A physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition;

(2) The patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; and

(3) The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.

(b) A person may assert the medical purpose for using marihuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection (a). [Emphasis added.]

Section 7 of the MMA, MCL 333.26427, further limits the medical use of marijuana:

(a) *The medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions of this act.*

(b) This act shall not permit any person to do any of the following:

(1) Undertake any task under the influence of marihuana, when doing so would constitute negligence or professional malpractice.

(2) Possess marihuana, or otherwise engage in the medical use of marihuana:

(A) in a school bus;

(B) on the grounds of any preschool or primary or secondary school; or

(C) in any correctional facility.

(3) Smoke marihuana:

(A) on any form of public transportation; or

(B) in any public place.

(4) Operate, navigate, or be in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of marihuana.

(5) Use marihuana if that person does not have a serious or debilitating medical condition.

(c) Nothing in this act shall be construed to require:

(1) A government medical assistance program or commercial or non-profit health insurer to reimburse a person for costs associated with the medical use of marihuana.

(2) An employer to accommodate the ingestion of marihuana in any workplace or any employee working while under the influence of marihuana.

(d) Fraudulent representation to a law enforcement official of any fact or circumstance relating to the medical use of marihuana to avoid arrest or prosecution shall be punishable by a fine of $500.00, which shall be in addition to any other penalties that may apply for making a false statement or for the use of marihuana other than use undertaken pursuant to this act.

(e) All other acts and parts of acts inconsistent with this act do not apply to the medical use of marihuana as provided for by this act. [Emphasis added.]

In *People v Redden*, 290 Mich App 65; 799 NW2d 184 (2010), the majority rejected the prosecution's argument that the affirmative defense under § 8 was unavailable because the defendants did not possess valid registry identification cards under § 4. The majority concluded that the MMA provides two ways to show the legal use of marijuana for medical purposes: obtaining a registry identification card under § 4 or remaining unregistered and then asserting the affirmative defense under § 8 if faced with prosecution. Whereas § 4 refers to a "qualifying patient" who has been issued and possesses a registry identification card which protects the qualifying patient from "arrest, prosecution, or penalty in any manner," MCL 333.26424(a), § 8 refers only to a "patient" who may "assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana," MCL

333.26428(a). Thus, the majority concluded that the two sections provide differing levels of protection, and § 8 may apply to a patient who does not satisfy § 4.[2] The majority nonetheless affirmed the circuit court's reversal of the district court's denial of a bindover because "colorable issues" existed for the trier of fact regarding elements of the § 8 defense. *Redden*, 290 Mich App at 85.

The majority in *Redden* also noted that the defendants in that case did not raise the issue whether a § 8 defense was viable where the marijuana was not kept in an enclosed, locked facility. *Id.* at 82 n 8. The majority observed that the language regarding an enclosed, locked facility was contained in § 4 rather than § 8. *Id.* Nonetheless, the majority expressly declined to address the issue without the benefit of full briefing by the parties. *Id.*

In *People v Kolanek*, 291 Mich App 227; 804 NW2d 870 (2011), lv gtd 489 Mich 956 (2011), the Court held that the defendant's postarrest affidavit and his discussion with his physician before the MMA was enacted were insufficient to meet the requirements of a § 8 defense. Consequently, the Court remanded for reinstatement of the charge of possession of marijuana, MCL 333.7403(2)(d), but held that the MMA defense could be raised at trial:

> Because the statute does not provide that the failure to bring, or to win, a pretrial motion to dismiss deprives the defendant of the statutory defense before the factfinder, defendant's failure to provide sufficient proofs pursuant to his motion to dismiss does not bar him from asserting the

[2] Whether § 4(a) must be satisfied in order to assert a valid defense under § 8(a) of the MMA is pending before our Supreme Court in *People v King*, 489 Mich 957 (2011).

> § 8 defense at trial nor from submitting additional proofs in support of the defense at that time. [*Kolanek*, 291 Mich App at 241-242.]

In *King*, 291 Mich App at 509, the majority held that § 8 incorporates by reference other provisions of the MMA with which a defendant must comply where it states "[e]xcept as provided in section 7 . . . ." The majority concluded that the reference to § 7 in § 8, and the requirement of § 7(a) that the medical use of marijuana be carried out in accordance with the provisions of the act required the defendant to comply with the growing provisions in § 4. *King*, 291 Mich App at 510. The majority held "that because defendant did not comply with § 4, he also failed to meet the requirements of § 8 and, therefore, he is not entitled to the affirmative defense in § 8 and is not entitled to dismissal of the charges." *Id.* The majority explained that an unlocked closet and a moveable chain-link dog kennel that was open on the top did not fall within the definition of an enclosed, locked facility. *Id*. at 511-514. Thus, because the defendant failed to comply with the requirement that he keep the marijuana in an enclosed, locked facility, he was subject to prosecution, and the trial court abused its discretion in dismissing the charges. *Id*. at 514.

In *People v Anderson*, 293 Mich App 33, 35; 809 NW2d 176 (2011),[3] the majority adopted a portion of Judge M. J. KELLY's concurring opinion concluding that a trial court may bar a defendant from arguing the affirmative defense provided in § 8 of the MMA where

[3] Our Supreme Court has stayed lower court proceedings, *People v Anderson*, unpublished order of the Supreme Court, entered August 23, 2011 (Docket No. 143339), and held further appeal in abeyance pending decisions in *People v Kolanek* (Docket Nos. 142695 and 142712) and *People v King* (Docket No. 142850), *People v Anderson*, unpublished order of the Supreme Court, entered September 26, 2011 (Docket No. 143339).

on the basis of the undisputed evidence no reasonable jury could find that all the elements of § 8 were satisfied. *Id*. at 49-57 (M. J. KELLY, J., concurring). Judge KELLY explained "that the defendant has the burden to establish a prima facie case for his or her affirmative defense by presenting some evidence on all the elements of that defense." *Id.* at 64. If the defendant fails to establish an element of the defense, the trial court should not present the defense to the jury. *Id*. Judge KELLY then applied these principles to the affirmative defense available under § 8 of the MMA:

> The MMA provides an affirmative defense to prosecution for any marijuana offense, but that defense is quite limited. Because of those limitations, there may be situations when a defendant simply cannot establish the right to assert a § 8 defense. In such situations, a trial court might be warranted in barring a defendant from presenting evidence or arguing at trial that he or she is entitled to the defense set forth in § 8(a). Therefore, I conclude that a trial court may bar a defendant from presenting evidence and arguing a § 8 defense at trial when, given the undisputed evidence, no reasonable jury could find that the elements of the § 8 defense had been met.
>
> In this case, there is no dispute about the number of plants that Anderson possessed or that the plants were not kept in an enclosed, locked facility. No reasonable jury could, therefore, find that he had 12 or fewer plants or that the plants were in an enclosed, locked facility. Consequently, no reasonable jury could acquit Anderson on the basis of a § 8 defense. The trial court did not err when it precluded Anderson from presenting a § 8 defense at trial. [*Id*. at 64-65.]

The majority adopted this portion of Judge KELLY's concurrence.

Under *King* and *Anderson*, then, an essential element of a § 8 affirmative defense is the requirement in § 4 that the marijuana be kept in an enclosed, locked

facility. Defendants contend that *King* conflicts with *Redden* and *Kolanek*. As discussed, however, the *Redden* majority expressly declined to address whether a § 8 defense was viable where the marijuana was not kept in an enclosed, locked facility because the issue had not been raised or fully briefed in that case. *Redden*, 290 Mich App at 82 n 8. Because the issue was not resolved in *Redden*, the majority in *King* did not violate MCR 7.215(J)(1), which requires following the rule of law established by a prior, published decision of this Court. Further, although *Kolanek* held that a defendant's failure to bring or to win a pretrial motion to dismiss does not bar assertion of a § 8 defense at trial, *Kolanek* did not eliminate the defendant's burden of production. See *Anderson*, 293 Mich App at 35 (per curiam); *id*. at 63-65 (M. J. KELLY, J., concurring). We thus discern no basis to conclude that *King* conflicts with either *Redden* or *Kolanek*.

Here, defendants have offered nothing to rebut the preliminary examination testimony that the marijuana was kept in various locations throughout defendants' home, including in the bathroom, living room, kitchen, bedrooms, and a basement with no door at the entrance. Because defendants have not met their burdens of production to establish that the marijuana was kept in an enclosed, locked facility, MCL 333.26424, the trial court's order precluding assertion of the MMA affirmative defense and references to the MMA at trial was not erroneous.

Finally, in Docket No. 303525, Danto argues that the trial court abused its discretion by denying his request for an evidentiary hearing under the MMA. We disagree. A trial court's decision to hold an evidentiary hearing is generally reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d

272 (2008). To the extent that this issue requires interpretation of a provision of the MMA, this Court reviews statutory construction issues de novo. *Malone*, 287 Mich App at 654. Section 8(b) of the MMA, MCL 333.26428(b), provides that "[a] person may assert the medical purpose for using marijuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection (a)." This provision does not create an automatic right to an evidentiary hearing upon the filing of a motion to dismiss. It merely requires dismissal of marijuana charges if the defendant establishes the elements of the § 8 defense at an evidentiary hearing. Here, the trial court did not abuse its discretion because Danto has not identified a factual dispute to resolve at an evidentiary hearing or established that the marijuana was kept in an enclosed, locked facility, as required by MCL 333.26424.

We affirm in Docket Nos. 303064 and 303525, reverse in Docket Nos. 302986 and 302991, and remand for further proceedings. We do not retain jurisdiction.

SAAD, J., concurred with MARKEY, P.J.

GLEICHER, J. (*concurring in part and dissenting in part*). I agree with the majority that the trial court abused its discretion by precluding the prosecution's presentation of "other acts" evidence under MRE 404(b).[1] I also agree that defendants failed to adequately support their proffered defense under the Michigan Medical Marihuana Act (MMA), MCL 333.26421 *et seq*., requiring the exclusion of that affirmative defense.

[1] At oral argument, defense counsel readily conceded that controlling Michigan law construing MRE 404(b) compelled the introduction of the prosecution's other-acts evidence.

However, I respectfully disagree with the majority's conclusion that "trial court's order precluding assertion of the MMA affirmative defense and references to the MMA at trial was not erroneous."

The trial court granted the prosecution's motion to preclude defendants from asserting an affirmative defense under the MMA. The trial court's order further provides, "neither the Defendants nor their attorneys may make any reference in the presence of the jury to the Michigan Medical Marihuana Act or the use of the term medical marijuana in conjunction with, or in reference to, the marijuana in the present case." At oral argument, the prosecuting attorney conceded that if this Court held the other-acts evidence admissible, a blanket order prohibiting mention of the MMA or "the term medical marijuana" would qualify as overbroad. The prosecutor specifically acknowledged that mention of the medical use of marijuana would be necessary to explain the "res gestae" of the crime and the other-acts evidence. Consequently, I am mystified that the majority nevertheless holds that the prosecution may introduce evidence invoking the term "medical marijuana," but the defense may not.[2] Defendants aptly note that their ability to cross-examine the witnesses will be limited to the point of absurdity if the trial court's order remains in place—the prosecution will be able to elicit testimony regarding the officers' undercover personas as medical-marijuana purchasers, but defendants will be precluded from repeating those terms in cross-examination.

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[2] According to the prosecuting attorney's oral argument, the prosecution intends to present evidence that the police found medical-marijuana cards when they executed a search warrant at defendants' home. The police acquired the other-acts evidence by using fake medical-marijuana cards to enter a medical-marijuana dispensary, and the prosecutor admitted that these facts would be presented to the jury in the prosecution's case.

In light of our reversal of the trial court's other-acts ruling, the challenged order now impermissibly limits defendants' ability to cross-examine the witnesses on matters likely to be brought out on direct examination and on matters that are potentially relevant to bias and credibility. While a court may impose reasonable limits on cross-examination to protect against confusion of the issues or the introduction of only marginally relevant evidence, a comprehensive limitation of otherwise relevant cross-examination violates the Confrontation Clause. *Delaware v Van Arsdall*, 475 US 673, 679; 106 S Ct 1431; 89 L Ed 2d 674 (1986). To prevent prejudice to defendants, I would reverse that portion of the trial court's March 8, 2011 one-sided order precluding defendants' reference to the MMA or "medical marijuana" at trial.

MACATAWA BANK v WIPPERFURTH

Docket No. 300451. Submitted November 1, 2011, at Grand Rapids. Decided November 8, 2011, at 9:10 a.m. Leave to appeal denied, 491 Mich 915.

Macatawa Bank filed a request for garnishment in the Kent Circuit Court seeking to satisfy a judgment against Kurt and Janice Wipperfurth (who were domiciled in Florida) by garnishing money from their individual retirements accounts (IRAs) held at TD Ameritrade in Michigan. Defendants had objected to the writ of garnishment, arguing that under Michigan caselaw the IRAs were exempt from garnishment. The court, George S. Buth, J., rejected defendants' objection and granted the writ of garnishment against defendants' IRAs. Defendants appealed.

The Court of Appeals *held*:

Under MCL 600.4011(1)(a), Michigan courts may garnish personal property belonging to the person against whom the claim is asserted that is in the possession or control of a third person if the third person is subject to the judicial jurisdiction of the state and the personal property to be applied is within the boundaries of this state. In general, the situs of intangible assets such as an IRA is the domicile of the owner unless it is fixed by some positive law. While the circuit court had jurisdiction over TD Ameritrade, defendants were domiciled in Florida and as such their IRAs were not located within the boundaries of Michigan. Because there was no statute or caselaw that altered the general rule, the IRAs did not fall with the scope of personal property that may be garnished by a Michigan court.

Reversed.

GARNISHMENT — WRITS OF GARNISHMENT — LOCATION OF INTANGIBLE ASSETS — DOMICILE OF OWNER.

Michigan courts may garnish personal property belonging to the person against whom the claim is asserted that is in the possession or control of a third person if the third person is subject to the judicial jurisdiction of the state and the personal property to be applied is within the boundaries of this state; generally, the situs of intangible assets is the domicile of the owner unless it is fixed by some positive law (MCL 600.4011[1][a]).

Steven E. Bratschie & Associates, P.C. (by *Scott Mancinelli* and *Julianna Hyatt-Wierzbicki*), for Macatawa Bank.

Law, Weathers & Richardson, P.C. (by *Michael J. Roth*), for Kurt and Janice Wipperfurth.

Before: JANSEN, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM. Defendants in this appeal argue that plaintiff may not garnish their individual retirement accounts (IRAs) in Michigan. We agree and reverse the order of the circuit court.

The facts in this case are undisputed. Defendants reside in Florida and have not maintained a home in Michigan for many years. On February 19, 2010, plaintiff obtained a judgment against defendants in the Kent Circuit Court for $42,622.13. Plaintiff then filed a request for garnishment with the circuit court, naming TD Ameritrade as garnishee.[1] Defendants have three IRAs with TD Ameritrade, two of which are individually sufficient to satisfy the judgment against defendants.

Defendants objected to the writ of garnishment, arguing that the IRAs are exempt from garnishment under Michigan law.[2] The parties agree that TD Ameritrade is subject to jurisdiction in Michigan. The circuit court rejected defendants' objection without explana-

[1] Defendants complain that plaintiff did not serve them with the writ of garnishment. However, under MCR 3.101(F)(1) plaintiff was only required to serve the garnishee, TD Ameritrade. The garnishee was then responsible for notifying the defendant, MCR 3.101(F)(2), which TD Ameritrade did.

[2] Plaintiff states that defendants did not timely file their objection. However, MCR 3.101(K)(1) clearly states that objections may be filed more than 14 days after a defendant is served with the writ of garnishment. Late objections simply do not automatically stay payment by the garnishee. *Id.*

tion, and defendants appealed. We review de novo questions of law. *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 406; 751 NW2d 443 (2008).

Defendants, who are domiciled in Florida, argue, *inter alia*, that their IRAs may not be garnished in Michigan because the IRA accounts constitute intangible personal property the situs of which, under Michigan law, is the state in which the owner is domiciled. This specific argument was not raised below. Nonetheless, we may review an unpreserved issue if it presents a question of law and all the facts necessary for its resolution are before the Court. *Westfield Cos v Grand Valley Health Plan*, 224 Mich App 385, 387; 568 NW2d 854 (1997). We do so in this case because the facts are not in dispute, the issue has been fully briefed, and the situs of the accounts presents a question that we conclude must be answered before we can reach the other matters considered by the circuit court.

MCL 600.4011(1)(a) describes the conditions under which Michigan courts may garnish personal property:

> [T]he court has power by garnishment to apply the following property or obligation, or both, to the satisfaction of a claim evidenced by contract, judgment of this state, or foreign judgment, whether or not the state has jurisdiction over the person against whom the claim is asserted:
>
> (a) Personal property belonging to the person against whom the claim is asserted but which is in the possession or control of a third person if the third person is subject to the judicial jurisdiction of the state and the personal property to be applied is within the boundaries of this state.

The parties in this case agree that the court had jurisdiction over TD Ameritrade, but defendants argue that their IRAs are not legally "within the boundaries of this state." The parties also agree that an IRA is

intangible personal property, similar to a bank account. See *In re Rapoport's Estate*, 317 Mich 291, 293, 301; 26 NW2d 777 (1947).

The longstanding rule in Michigan is that "the situs of intangible assets is the domicile of the owner unless fixed by some positive law." *Rapoport's Estate*, 317 Mich at 301; see also *In re Dodge Bros*, 241 Mich 665, 669; 217 NW 777 (1928), *Mills v Anderson*, 238 Mich 643, 655-656; 214 NW 221 (1927), and 5 Michigan Civil Jurisprudence, Conflict of Laws, § 58, p 412-413. It is undisputed that defendants' state of domicile is Florida. Therefore, their IRAs are not located "within the boundaries" of Michigan. Because plaintiff cites no "positive law" holding that the situs of an IRA is fixed other than by this general rule and the situs of defendants' IRAs is unquestionably Florida, the IRAs do not fall within the scope of personal property that may be garnished by a Michigan court.

Plaintiff argues that *Rapoport's Estate* is distinguishable because it dealt with the distribution of property upon death, rather than garnishment. However, the case clearly states that the rule described earlier is the general rule.[3]

Plaintiff would have us instead follow *Acme Contracting, Ltd v Toltest, Inc*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued October 3, 2008 (Docket No. 07-10950), which held that the funds in a bank account "are 'located' wherever they are available for withdrawal." We are not bound by opinions of lower federal courts, *Allen v Bloomfield Hills Sch Dist*, 281 Mich App

[3] "It should be noted . . . that the generally accepted rule, the situs of intangible assets is the domicile of the owner unless fixed by some positive law, applies to the descent and distribution of personal property." *Rapoport's Estate*, 317 Mich at 301.

49, 59; 760 NW2d 811 (2008), and do not agree that this unpublished decision provides relevant guidance. The *Toltest* court noted that the parties did not provide it with "any Michigan authority" addressing the question, and so that court did not consider our Supreme Court's holding in *Rapoport's Estate*. *Toltest*'s reliance on the fact that the bank accounts at issue were available for withdrawal at any of the bank's branches does not provide a basis for us to overrule *Rapoport's Estate*. Indeed, though it may now be *easier* to access bank accounts from various states, the decision in *Rapoport's Estate* does not predate this system. Plaintiff has not cited a case or statute that altered the general rule set forth in *Rapoport's Estate*, and we are bound by that Supreme Court precedent.[4] Accordingly, the IRAs are not located in Michigan and may not be garnished by a Michigan court.

Reversed.

JANSEN, P.J., and SAWYER and SHAPIRO, JJ., concurred.

[4] Plaintiff also cites cases from Georgia and Arkansas, but these are irrelevant in the face of controlling Michigan precedent.

PEOPLE v WHITE

Docket No. 303228. Submitted September 13, 2011, at Lansing. Decided November 15, 2011, at 9:00 a.m. Affirmed, 493 Mich ___.

Kadeem Dennis White was charged in the Jackson Circuit Court with first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b, in connection with the shooting death of Benjamin Willard. Before trial, defendant filed a motion to suppress his inculpatory statement to the police. He argued that the statement should have been suppressed because it was made after asserting his right to remain silent and was made in response to a detective's statement that had been the functional equivalent of interrogation under *Rhode Island v Innis*, 446 US 291 (1980). The court, Thomas D. Wilson, J., granted the motion to suppress, finding that although the detective's statement had not been express questioning, it was the functional equivalent because the only reason for making the comment had been to elicit a response. The prosecution appealed the decision by delayed leave granted.

The Court of Appeals *held*:

Statements made during custodial interrogations that the defendant did not volunteer are admissible only if a suspect voluntarily, knowingly, and intelligently waived his or her Fifth Amendment rights. Interrogation of a suspect in custody can be through express questioning or its functional equivalent, which is defined as any words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response from the suspect. The focus should be on the suspect's perception, rather than the intent of the police, there must be no evidence suggesting that the police were aware that the suspect was peculiarly susceptible to an appeal to a suspect's conscience or was unusually disoriented or upset at the time, and the conversation must have been short with no lengthy or passionate speech. The trial court's determination that the detective had not expressly questioned the defendant after he invoked his right to an attorney was not clearly erroneous. The trial court also did not err by finding that the

detective's statements did not constitute the functional equivalent of interrogation. Before defendant's inculpatory statement, the detective specifically informed defendant that he was not asking defendant any questions, but was merely telling defendant that he hoped the gun used in the charged offense was in a place where no one could find it and be hurt. Nothing in the record indicated that the detective was aware of any peculiar susceptibility of defendant, and the detective had not made a lengthy speech. Given these facts, the detective would not have reasonably expected that defendant would suddenly make a self-incriminating statement in response to the remark.

Reversed.

SHAPIRO, P.J., dissenting, would have affirmed the trial court's order to suppress defendant's statement, concluding that the detective's actions constituted express questioning, or at least its functional equivalent. The detective's comments were unequivocally and expressly directed to defendant, and he expressly invited a response from defendant.

CONSTITUTIONAL LAW — SELF-INCRIMINATION — CUSTODIAL INTERROGATIONS — EXPRESS QUESTIONING OR ITS FUNCTIONAL EQUIVALENT.

The right against compelled self-incrimination is guaranteed by both the United States and Michigan Constitutions; statements made during custodial interrogations that the defendant did not volunteer are admissible only if a suspect voluntarily, knowingly, and intelligently waived his or her Fifth Amendment rights; interrogation of a suspect in custody can be through express questioning or its functional equivalent, which is defined as any words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response from the suspect; the focus should be on the suspect's perception, rather than the intent of the officers; there must be no evidence suggesting that the police officers were aware that the suspect was peculiarly susceptible to an appeal to his or her conscience, or was unusually disoriented or upset at the time, and the conversation must have been short with no lengthy or passionate speech (US Const, Am V; Const 1963, art 1, § 17).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Henry C. Zavislak*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Assistant Prosecuting Attorney, for the people.

Rappleye & Rappleye, P.C. (by *Robert K. Gaecke, Jr.*), for defendant.

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

MURRAY, J. Plaintiff appeals by leave granted the trial court's March 8, 2011, order granting defendant's motion to suppress his statement to police. We reverse and remand for further proceedings.

I. BACKGROUND

Defendant was charged with first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b, arising from the shooting death of Benjamin Willard. The prosecutor's theory was that defendant attempted to rob Willard at gunpoint and when Willard resisted, defendant shot him. After defendant was arrested, he was provided his warnings under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), and he asserted his right to remain silent. In response, the following occurred between the interviewing detective (Detective Stiles) and defendant:

> [*Detective Stiles*]: Okay. [T]his is what they call the acknowledgment and waiver paragraph I'm going to read this to you. If you wish to talk to me, I'm going to need you to sign and date the form. Even though you sign and date the form, you still have your rights to stop at any time you wish. Do you understand that?
>
> [*The Defendant*]: No. No thank you sir. I'm not going to sign it.
>
> [*Detective Stiles*]: Okay. Okay. Sounds good.
>
> [*The Defendant*]: I don't even want to speak.
>
> [*Detective Stiles*]: I understand. I understand Kadeem.

Okay then. The only thing I can tell you Kadeem, is good luck man.

Okay. Don't take this personal. It's not personal between me and you, I think I may have had one contact with you on the street. Okay. I've got to do my job. And I understand you've got to [do] what you've got to do to protect your best interests. Okay.

The only thing that I can tell you is this, and *I'm not asking you questions, I'm just telling you*. I hope that the gun is in a place where nobody can get a hold [sic] of it and nobody else can get hurt by it, okay?

All right?

[*The Defendant*]: I didn't even mean for it to happen like that. It was a complete accident.

[*Detective Stiles*]: I understand. I understand.

But like I said, you, uhh, you get your attorney, man.

Hey, look dude, I don't think you're a monster, all right? I don't think that. You could have came down to me and turned yourself in and there ain't no damn way I'd beat you up.

[*The Defendant*]: Yeah.

[*Detective Stiles*]: Okay, man?

You all set, you straight with me?

Who knows you're here? Who knows of your family? Because I know a lot of your family in town now.

[*The Defendant*]: (unintelligible reply). I know that I didn't mean to do it. I guarantee that, I know I didn't mean to do it. [Emphasis added.]

Defendant moved to suppress his statement arguing that the detective's statement constituted the functional equivalent of interrogation under *Rhode Island v Innis*, 446 US 291; 100 S Ct 1682; 64 L Ed 2d 297 (1980). The trial court agreed, focusing on the presumed purpose of the question, which was inferred

from the fact that the detective made the statement directly to defendant:

> Or where *Innis* does appear to be on point, the case concludes that Miranda safeguards are applicable whenever a person in custody is subject to either expressed questioning or its functional equivalent. Now, in this case there's no dispute that defendant was in custody and I think anybody reviewing the tape would find that *the officer's statement was not expressed questioning, not in the way that it was worded*. Then we come to the other portion where the Court identified the functional equivalent, any words or actions on part of the police other than those normally intended to arrest in custody, that the police should know or reasonably likely to elicit an incriminating response for the suspect. . . . *The ultimate question is whether the officer should have known that such a response would be the result of his statement. And, in this particular case it's difficult to find another reason for making the statement, the officer made the statement while looking directly at the defendant.* . . . Now, (Inaudible) – made distinction in Innis is that the officers were speaking to each other. *Here the officer and the defendant were the only ones in the room, it may have been reasonable to make a similar statement to any other person within the defendant's hearing and not expect a response, but when the statement is made directly to the defendant while looking directly at him it suggest* [sic] *that the remark was designed to elicit a response as to the location of the gun.* Therefore, the [c]ourt is granting the motion to suppress on self-incrimination grounds. *The only reasonable interpretation of the officer's statement at that point appears to be* [*de*]*signed to elicit information about the location of the gun.* The information qualifies as an incriminating statement and the statement qualifies as the functional equivalent of expressed questioning, because it occurred after the defendant invoked his right to remain silent. It must be suppressed, however it can be used for impeachment purposes should your client take the witness stand. [Emphasis added.]

Based on this ruling on the record, the trial court ordered defendant's subsequent statements suppressed. It is from that order that we granted leave to appeal.

II. ANALYSIS

This Court reviews a trial court's ruling on a motion to suppress evidence for clear error; it reviews attendant questions of law de novo. *People v Hawkins*, 468 Mich 488, 496; 668 NW2d 602 (2003); *People v Sobczak-Obetts*, 463 Mich 687, 694; 625 NW2d 764 (2001); *People v Unger*, 278 Mich App 210, 243; 749 NW2d 272 (2008). What this means is that if factual findings are made by the trial court in relation to the motion to suppress, we defer to those findings by use of the clearly erroneous standard of review. *People v Kowalski*, 230 Mich App 464, 471-472; 584 NW2d 613 (1998). The application of those facts to the constitutional provision at issue—the Fifth Amendment to the United States Constitution—is a legal determination to which we owe no deference to the trial court, and therefore we apply a de novo standard of review to the ultimate conclusion. *Id*.; see also *People v Stevens (After Remand)*, 460 Mich 626, 631; 597 NW2d 53 (1999), quoting *People v Nelson*, 443 Mich 626, 631 n 7; 505 NW2d 266 (1993) (" 'Application of constitutional standards by the trial court is not entitled to the same deference as factual findings.' ").

The right against compelled self-incrimination is guaranteed by both the United States and Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 17; *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005). Non-volunteered statements made during custodial interrogations are admissible only if a defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *People v Akins*, 259 Mich App

545, 564; 675 NW2d 863 (2003). There is no dispute that defendant was in custody at the time he made the statement, and that he had previously invoked his right to remain silent. Thus, the only question is whether the trial court erred by concluding that the detective's comments to defendant regarding the location of the gun constituted the "functional equivalent of interrogation."

We agree with the prosecution that the United States Supreme Court's decision in *Innis*, 446 US at 291, mandates reversal of the trial court's order suppressing defendant's statement. In *Innis*, three police officers were transporting the respondent to the police station following his arrest. While en route, one of the officers commented that "there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves," and that it would be "too bad" if a girl picked up the gun used in the armed robbery in which the respondent was a suspect and killed herself. *Id*. at 294-295. A second officer also expressed his concern about the location of the weapon. *Id*. at 295. The respondent, having previously been advised of his *Miranda* rights, "interrupted the conversation, stating that the officers should turn the car around so he could show them where the gun was located." He then directed the officers to the gun, which he had hidden in a field near the location of his arrest. *Id*. at 294-295.

The Supreme Court concluded that the respondent was not subjected to interrogation, within the meaning of *Miranda*, when being subjected to the conversation between the officers. *Innis*, 446 US at 302-303. The Court first explained that

> the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its

> functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response. [*Id*. at 300-302].

It then concluded that the respondent was not "interrogated" as contemplated by *Miranda*:

> It is undisputed that the first prong of the definition of "interrogation" was not satisfied, for the conversation between [the officers] included no express questioning of the respondent. Rather, that conversation was, at least in form, nothing more than a dialogue between the two officers to which no response from the respondent was invited. [*Id*. at 302.]

With respect to whether the respondent was subject to the "functional equivalent" of questioning (which is what the trial court in our case found), the *Innis* Court held that given (1) there was no evidence suggesting the police were aware that respondent was peculiarly susceptible to an appeal to his conscience or that respondent was unusually disoriented or upset at the time, (2) the conversation consisted of only a few short remarks,

(3) there was not a "lengthy harangue" in the presence of the respondent and (4) the comments were not particularly evocative, the officers should not have known that the respondent would move to make a self-incriminating statement:

> The case thus boils down to whether, in the context of a brief conversation, the officers should have known that the respondent would suddenly be moved to make a self-incriminating response. Given the fact that the entire conversation appears to have consisted of no more than a few off hand remarks, we cannot say that the officers should have known that it was reasonably likely that Innis would so respond. This is not a case where the police carried on a lengthy harangue in the presence of the suspect. Nor does the record support the respondent's contention that, under the circumstances, the officers' comments were particularly "evocative." It is our view, therefore, that the respondent was not subjected by the police to words or actions that the police should have known were reasonably likely to elicit an incriminating response from him. [*Innis*, 446 US at 303.]

Since *Innis* a number of cases have established that in general an officer's statements that provide a defendant with information about the charges against him, about inculpatory evidence located by the police, or about statements made by witnesses or codefendants, which allow a defendant to make an informed and intelligent reassessment of his decision whether to speak to the police, do not constitute interrogation. See *Kowalski*, 230 Mich App at 468, 483-484; *People v McCuaig*, 126 Mich App 754, 759-760; 338 NW2d 4 (1983); *United States v Hurst*, 228 F3d 751, 760 (CA 6, 2000).[1]

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[1] In our order granting leave to appeal, this Court directed the parties to address "the application of *New York v Quarles*, 467 US 649 [104 S Ct 2626; 81 L Ed 2d 550] (1984) and its progeny to the facts of this case." Upon further review, we agree with the parties that the public safety

Here, the trial court found that the detective did not expressly question defendant after he invoked his right to silence, a finding that is not clearly erroneous, so we are left to apply the *Innis* considerations in determining whether the detective engaged in "its functional equivalent." *Innis*, 446 US at 300-301. Keeping in mind the type of "psychological ploys" that the *Innis* and *Miranda* courts were concerned about when addressing tactics that may be the functional equivalent of express questioning, see *Innis*, 446 US at 299-302, *Miranda*; 384 US at 453-455; *United States v Kimbrough*, 477 F3d 144, 148 (CA 4, 2007), we hold under these facts that Detective Stiles's comment did not constitute the functional equivalent of express questioning.

Or, stated in the terms of the test articulated by the *Innis* court, we conclude that Detective Stiles should not have known that defendant would suddenly make a self-incriminating statement in response to his one remark. *Innis*, 446 US at 302. The Supreme Court tells us that our focus should primarily be on the perception of defendant, rather than the intent of Detective Stiles. *Pennsylvania v Muniz*, 496 US 582, 601-602; 110 S Ct 2638; 110 L Ed 2d 528 (1990).[2] For one, the detective specifically told defendant that he was *not* asking him any questions, but was instead "telling" him that he hoped the gun was not found by anyone who could get hurt. Hence, in reviewing what defendant would have perceived from the statement in its context, the use of "okay" and "all right" can reasonably be seen as seeking confirmation from defendant that he heard the cursory comment, and not to elicit a response. *People v*

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exception set forth in *Quarles* and its progeny was not implicated by the facts and circumstances presented here.

[2] Detective Stiles intent would be relevant if it revealed his awareness of any particular sensitivity defendant had to the statement made, *Muniz*, 496 US at 601, but there is no evidence on this issue.

Raper, 222 Mich App 475, 480-481; 563 NW2d 709 (1997). Thus, Detective Stiles did not direct any question to defendant, but merely articulated his concern to him.

Additionally, nothing in the record suggests that the detective was aware of any peculiar susceptibility of defendant (or that he even had any). So, focusing on what defendant would have perceived from the statement in its context, we can only conclude that Detective Stiles should not have reasonably expected defendant to make an incriminating statement. After all, Detective Stiles had already told defendant both that he was not asking a question and that he understood defendant's invocation of his right to remain silent. Amidst these other permissible comments—and absent any known sensitivities of defendant—it would not be reasonable to conclude that the one comment about the possibility of the gun being located and endangering others would result in a statement about the crime itself. Just as importantly, this "is not a case where the police carried on a lengthy harangue in the presence of" defendant, nor was Detective Stiles's comment "evocative." *Innis*, 446 US at 302-303. And these latter two points make any distinction between a direct remark made to defendant and a defendant overhearing remarks between police as in *Innis* insufficient to come to a different constitutional conclusion. See *Fleming v Metrish*, 556 F3d 520, 527 (CA 6, 2009).

The dissent asserts that we have applied different standards of review to the two conclusions of the trial court.

We again note the well-settled principle that in an appeal of an order denying or granting a motion to suppress, our review of any findings of fact is for clear error. *People v Attebury*, 463 Mich 662, 668; 624 NW2d

912 (2001). But, to the extent that we must apply uncontested facts to constitutional standards, our review is de novo. *Id*. Here, in deciding whether the detective asked defendant an express question, we are not guided by constitutional or other legal standards. Instead, whether a question was asked involves a fact-intensive inquiry that must be made by the trial court in the first instance. Hence, we apply the clear error standard to that finding. *Raper*, 222 Mich App at 481 (clearly erroneous standard applied by this Court in reviewing factual findings that express questioning did not occur).

Because the only evidence submitted to the trial court on the motion to suppress was the audio/video disk, and that is something that we can review as easily as the trial court, the clearly erroneous standard may not even apply to the trial court's finding that defendant was not subjected to express questioning. See *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 130 n 1; 743 NW2d 585 (2007), citing *People v Zahn*, 234 Mich App 438, 445-446; 594 NW2d 120 (1999) (courts need not defer when the trial court reviewed the same record as this Court). Even under a de novo review of the evidence, however, we conclude, as did the trial court, that no express questioning occurred. After defendant invoked his right to remain silent, the detective informed defendant that he was not asking anymore questions and was only going to make a statement. The brief statement was made, and though the detective stated "okay" and "alright" after the statement, the video makes clear that in context the detective was seeking affirmation that defendant heard the statement, not that he was seeking a response to the statement. And the detective's response once defendant blurted out an incriminating statement shows he had not intended that there be any sort of substantive

response to the statement. Consequently, there was no express questioning of defendant.

As far as whether the detective engaged in the "functional equivalent" of questioning, this requires application of a constitutional standard articulated by the *Innis* court to the undisputed facts. These undisputed facts include that no express question was asked by the detective—a necessary factual finding—for if an express question was asked, there would be no need to determine if its functional equivalent occurred. In any event, since we review de novo the application of a constitutional standard to undisputed facts, our standard of review on this issue is different than that applicable to the initial question of whether an express question was asked. And, of course, as the parties themselves recognize, the ultimate decision on a motion to suppress is reviewed de novo. *People v Darwich*, 226 Mich App 635, 637; 575 NW2d 44 (1997).

The dissent's disagreement with our conclusion that the detective did not engage in the functional equivalent of express questioning is based primarily upon the fact that a "word of inquisition" was added at the end of his statement, that there was a pause after the statement, and that the comments were made directly to defendant when defendant was alone with the detective. These factors are unconvincing. For one, they do not address the factors outlined in *Innis*, i.e., there is no suggestion by the dissent that the detective should have known that defendant "would suddenly be moved to make a self-incriminating response," *Innis*, 446 US at 303, or that the detective carried on a "lengthy harangue" of defendant, *id*, or that the statement was "particularly 'evocative.' " *Id*. These factors were critical to the Supreme Court's creation of the functional equiva-

lent standard, *Kimbrough*, 477 F3d at 150-152, and the dissent simply does not address them.

Additionally, the federal courts have repeatedly held that revealing evidence or other facts directly to the defendant does not constitute the functional equivalent of questioning, absent any of the other *Innis* criteria. See, for example, *Fleming*, 556 F3d at 527; *Acosta v Artuz*, 575 F3d 177, 191-192 (CA 2, 2009), and cases cited therein. It is certainly commonplace for a police officer to inform a defendant—after invoking his right to remain silent—about facts surrounding the investigation, possible penalties from a conviction, etc, and nothing in the brief comment by the detective supports a conclusion that defendant was interrogated in violation of *Miranda*. The fact that one could glean some "subtle compulsion" from the circumstances surrounding the statement is not enough, as a matter of law, to find interrogation. *Arizona v Mauro*, 481 US 520, 528-529; 107 S Ct 1931; 95 L Ed 2d 458 (1987); *Innis*, 446 US at 300-303; *Kimbrough*, 477 F3d at 148-152.[3]

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

WILDER, J., concurred with MURRAY, J.

SHAPIRO, P.J. (*dissenting*). Because the detective's actions constituted express questioning, or at the very least, the functional equivalent thereof, I would affirm the trial court's suppression of defendant's statements. Therefore, I respectfully dissent.

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[3] The dissent's concern that the prosecution offered no explanation for why the statement was made, implying that "why else would the police do that" other than to obtain a response, is not a relevant consideration under the law. *United States v Fortes*, 2008 WL 4219493 (D RI, 2008).

After defendant was arrested he was transported to the police station and placed in an interrogation room.[1] After several minutes, a detective entered the room. He advised defendant of his *Miranda*[2] rights and defendant unequivocally asserted his right to remain silent. Defendant declined to sign the acknowledgement and waiver form, stating: "No thank you sir. I'm not going to sign it. . . . I don't even want to speak." Rather than terminating the interview at that time, the interviewing detective then said:

> Okay then. The only thing I can tell you Kadeem, is good luck man. Okay. Don't take this personal. It's not personal between me and you. I think I may have had one contact with you on the street. Okay. I've got to do my job. And I understand you've got to do what you've got to [do] to protect your best interests. Okay. The only think I can tell you is this, and I'm not asking you questions, I'm just telling you. I hope that the gun is in a place where nobody can get a hold of it and nobody can get hurt by it, okay?

These remarks were followed by a pause of several seconds during which the detective remained at the table, opposite defendant. The officer then said "all right?" and at that point, defendant made an inculpatory statement.

The parties do not dispute the facts and as noted, the events were recorded.[3] The facts being uncontested, the matter is purely one of law, i.e., the application of a

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[1] The interrogation room was equipped with a video camera. The recording of the interaction between the investigating officer and defendant is part of the record and was reviewed by the trial court and by this Court.

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[3] While both we and the trial court have reviewed the videotape, a transcript was also provided by defense counsel and no objection to the transcript was made by the prosecution.

constitutional standard to uncontested facts and so our review is de novo. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).[4]

The dispositive case in this matter is *Rhode Island v Innis*, 446 US 291; 100 S Ct 1682; 64 L Ed 2d 297 (1980). In *Innis*, three police officers were transporting the defendant to a police station following his arrest. While en route, one of the officers commented to another officer that "there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves," and that it would be "too bad" if a girl picked up the gun used in the armed robbery of which the defendant was a suspect and killed herself. *Id*. at 294-295. A second officer also expressed his concern about the location of the weapon. *Id*. at 295. The defendant, having been previously advised of his *Miranda* rights on three separate occasions, "interrupted the conversation, stating that the officers should turn the car around so he could show them where the gun was located." He then directed the officers to the gun, which he had hidden in a field near the location of his arrest. *Id*. at 294-295.

The United States Supreme Court concluded that the defendant was not subjected to interrogation, within

[4] The majority appears to apply differing standards of review to the trial court's conclusions whether express questioning occurred and whether the functional equivalence of questioning occurred. On the issue of express questioning the majority opines that the clear error standard of review of that conclusion is appropriate, while it reviews de novo the issue of the functional equivalence of questioning. What we are to review is the trial court's conclusion that the officer violated the defendant's explicitly asserted right to remain silent and the facts are wholly undisputed. Thus, there is no basis to apply different standards of review as to the trial court's conclusions regarding what constitutes explicit questioning as opposed to what constitutes the functional equivalence of questioning.

the meaning of *Miranda*, by virtue of the conversation between the officers. *Id*. at 302-303. Such is not the case here. While the detective's comments to defendant were similar in content to comments made during the conversation between the officers in *Innis*, unlike in that case, here they were expressly and unequivocally directed to defendant. Further, in *Innis*, the Court found that "[t]he record in no way suggest[ed] that the officers' remarks were *designed* to elicit a response" from the defendant. *Id*. at 303 n 9. In contrast, in this case the detective expressly invited a response from defendant, by speaking directly to him, looking directly at him, by adding the question "okay?" at the end of his comment regarding the location of the gun and then pausing for several seconds as if waiting for a response. The detective's preface that he was "not asking questions" is belied by the fact that he asked defendant a question. To permit officers to ask direct questions of defendants so long as they preface it with "I'm not asking you any questions, but . . ." is to make a mockery of *Miranda*. The detective and the defendant were the only persons present in the room at the time of the interview; the detective looked directly at, and spoke directly to, defendant; and the detective concluded his remarks regarding the location of the gun with the question "okay?" These undisputed facts all support the conclusion that the detective's remarks constituted express questioning.[5]

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[5] The majority notes that in two cases we have held it permissible, after the right to remain silent has been asserted, for an officer to "provide a defendant with information about the charges against him, about inclupatory evidence located by the police, or about statements made by witnesses or codefendants, which allow a defendant to make an informed and intelligent reassessment of his decision whether to speak to the police . . . ." *Ante* at 630. However, the officer's comments in this case did not provide defendant with information about the charges against him, about inclupatory evidence the police possessed, or about witness

Moreover, even if the detective's remarks could, somehow, be construed as not asking defendant a question, the detective's remarks certainly constituted the functional equivalent of express questioning. In *Innis*, the Supreme Court instructed that the intent of the police is relevant to the extent that "it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response." *Innis*, 446 US at 301 n 7. Indeed, the conclusion that the defendant had not been interrogated in *Innis* was based, in part, on the policy decision that "the police surely cannot be held accountable for the unforeseeable results of their words or actions . . . ." *Id.* at 301-302. Rather, "the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." *Id*. at 302.

The content of the detective's comments, including the word of inquisition added at the end, followed by the pause of several seconds, together with the fact that the comments were made directly to defendant and in the presence only of defendant, demonstrate that the detective knew or should have known that his comments and actions were reasonably likely to elicit a response from defendant. Indeed, it is difficult to conceive of another reason and notably, no other reason has been proffered by the prosecution. "A party may not merely announce

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statements. The officer's comments did not offer any new information that could provide a basis for an intelligent reassessment of the defendant's decision to remain silent. Moreover, unlike in this case, in *People v Kowalski*, 230 Mich App 464; 584 NW 2d 613 (1998) (cited by the majority to support this argument), it was only after more than an hour had passed and defendant had spoken to a friend on the phone that the police gave defendant an opportunity to "reassess" whether he wanted to speak with the officers.

a position and leave it to this Court to discover and rationalize the basis for the claim." *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007).

The detective engaged in either explicit questioning or the functional equivalence of questioning and the trial court properly suppressed the defendant's statements. I would affirm.

STATE TREASURER v SNYDER

Docket No. 298554. Submitted September 13, 2011, at Detroit. Decided November 29, 2011, at 9:00 a.m.

The State Treasurer brought an action in the Berrien Circuit Court against Wayne Snyder, a prisoner subject to the jurisdiction of the Michigan Department of Corrections, under the State Correctional Facility Reimbursement Act (SCFRA), MCL 800.401 *et seq*., to recover, as reimbursement for the cost of his incarceration, 90 percent of the $2,500 Snyder received as the beneficiary of his mother's life insurance policy. Snyder responded by filing a disclaimer of property interest pursuant to the Disclaimer of Property Interests Law (DPIL), MCL 700.2901 *et seq*., purporting to disclaim any interest he had in the proceeds of the life insurance policy. Snyder asserted that he was entitled to summary disposition because of the disclaimer. The court, John E. Dewane, J., disagreed, concluding that Snyder could not disclaim his interest under the DPIL because he knew that the insurance proceeds had been deposited into his prison account and had accepted the proceeds before filing his purported disclaimer. The court ordered that 90 percent of the $2,500 be applied toward reimbursing the state under the SCFRA. Snyder appealed by delayed leave granted.

The Court of Appeals *held*:

The SCFRA authorizes the filing of a complaint in the circuit court to secure reimbursement from the assets of a prisoner for the expenses incurred by the state for the cost of care of the prisoner during the entire period of his or her incarceration. Under the SCFRA, "assets" include property, tangible or intangible, real or personal, belonging to or due a prisoner from any source whatsoever. Thus, proceeds a prisoner is due from a life insurance policy are considered an asset for purposes of the SCFRA. Under the DPIL, a person may disclaim a disclaimable interest, which the DPIL defines as including property and the right to receive property. However, the right to disclaim a property interest is not absolute; it is barred to the extent provided by other applicable law. Under the SCFRA, the attorney general may use any remedy, interim order, or enforcement

procedure allowed by law or court rule to prevent a prisoner from disposing of assets, and the circuit court presiding over an SCFRA action may appoint a receiver to protect and maintain assets pending resolution of the action. The authority conferred on the attorney general and the circuit court suggests a legislative intent to bar a prisoner from alienating his or her ownership interest in any assets that may be subject to confiscation under the SCFRA. Thus, a prisoner may not avoid the confiscation of his or her assets by disclaiming interest in the assets pursuant to the DPIL. Rather, assets are subject to the SCFRA if they belong to, or are due to, the prisoner. In this case, once Snyder's mother died, the life insurance proceeds became due to Snyder and were thus assets subject to the SCFRA. Snyder could not avoid his liability under the SCFRA through disclaimer of the proceeds, and the trial court properly declared that the disclaimer was void, albeit for the wrong reason.

Affirmed.

PRISONS AND PRISONERS — REIMBURSEMENT OF COSTS OF INCARCERATION — LIFE INSURANCE PROCEEDS — DISCLAIMERS OF INTEREST.

The State Correctional Facility Reimbursement Act (SCFRA) authorizes the filing of a complaint in the circuit court to secure reimbursement from the assets of a prisoner for the expenses incurred by the state for the cost of care of the prisoner during the entire period of his or her incarceration; under the SCFRA, "assets" include property, tangible or intangible, real or personal, belonging to or due a prisoner from any source whatsoever; proceeds a prisoner is due from a life insurance policy are considered an asset for purposes of the SCFRA; under the Disclaimer of Property Interests Law (DPIL), a person may disclaim a disclaimable interest, which the DPIL defines as including property and the right to receive property; however, the right to disclaim a property interest is not absolute; it is barred to the extent provided by other applicable law; under the SCFRA, the attorney general may use any remedy, interim order, or enforcement procedure allowed by law or court rule to prevent a prisoner from disposing of assets, and the circuit court presiding over an SCFRA action may appoint a receiver to protect and maintain assets pending resolution of the action; the authority conferred on the attorney general and the circuit court suggests a legislative intent to bar a prisoner from alienating his or her ownership interest in any assets that may be subject to confiscation under the SCFRA; thus, a prisoner may not avoid the confiscation of his or her assets by disclaiming interest in the assets pursuant to the

DPIL; rather, assets are subject to the SCFRA if they belong to, or are due to, the prisoner (MCL 700.2901 *et seq*., MCL 800.401 *et seq*.).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Juandisha Harris*, Assistant Attorney General, for the State Treasurer.

Wayne Snyder *in propria persona*.

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM. Defendant, Wayne Snyder, appeals by delayed leave granted an order holding that his purported disclaimer of life insurance proceeds was void and directing that 90 percent of those proceeds be paid to plaintiff, the State Treasurer, in partial reimbursement for the cost of defendant's incarceration as mandated by the State Correctional Facility Reimbursement Act (SCFRA), MCL 800.401 *et seq*. We affirm.

Defendant has been incarcerated since 1999 at a substantial cost to the state of Michigan and its citizens. Thus, when defendant received $2,500 as the beneficiary of his mother's life insurance policy, plaintiff filed a complaint against him under the SCFRA, seeking partial reimbursement for the costs associated with his incarceration. See MCL 800.404(1). Defendant responded to plaintiff's complaint by filing a disclaimer of property interest pursuant to the Disclaimer of Property Interests Law (DPIL), MCL 700.2901 *et seq*., purporting to disclaim any and all interest in the proceeds of his mother's life insurance policy. Then defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that dismissal of plaintiff's case was necessary because he had disclaimed his

interest in the insurance proceeds.[1] Plaintiff opposed the motion, arguing that defendant was barred by the SCFRA from disclaiming his interest in the insurance proceeds and, in the alternative, that he could not disclaim his interest under the DPIL because he had received the proceeds before he filed his purported disclaimer. See MCL 700.2910(1)(c).

The circuit court agreed with plaintiff, holding that defendant could not disclaim his interest under the DPIL because he knew that the insurance proceeds had been deposited into his prison account and had accepted the proceeds before filing his purported disclaimer. See MCL 700.2910(1)(c). Because defendant's disclaimer was void, the court ordered that 90 percent of the $2,500 be applied toward reimbursing the state as provided in SCFRA. A final order consistent with the court's opinion followed and the case was dismissed. Thereafter, defendant filed a delayed application for leave to appeal with this Court, which was granted. *State Treasurer v Snyder*, unpublished order of the Court of Appeals, entered December 13, 2010 (Docket No. 298554).

On appeal, defendant argues that he had the right to disclaim his interest in the insurance policy proceeds after being sued by plaintiff; therefore, the circuit court decision must be reversed. We disagree. Although the circuit court did not decide this issue involving statutory interpretation, it is an issue of law that was raised by the parties, the facts necessary for its resolution are present, and the issue is dispositive of defendant's appeal; therefore, we will consider and decide the issue.

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[1] This motion was rejected by the court clerk for failure to pay the motion fee, but it was treated by the court as an answer to plaintiff's complaint and response to the order to show cause.

See *Michigan Twp Participating Plan v Fed Ins Co*, 233 Mich App 422, 435-436; 592 NW2d 760 (1999).

This Court reviews de novo issues of statutory interpretation as questions of law. *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005). The primary goal of statutory interpretation is to ascertain and give effect to the legislative intent "that may reasonably be inferred from the statutory language itself." *Id*. at 526; see, also, *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). "If the plain and ordinary meaning of the statutory language is clear, then judicial construction is neither necessary nor permitted." *Walters v Bloomfield Hills Furniture*, 228 Mich App 160, 163; 577 NW2d 206 (1998).

The SCFRA imposes a civil, statutory duty on prisoners to reimburse the state for the cost of their incarceration. *State Treasurer v Schuster*, 456 Mich 408, 419; 572 NW2d 628 (1998); *Auditor General v Hall*, 300 Mich 215, 221; 1 NW2d 516 (1942). Likewise, the SCFRA grants the state a statutory right to reimbursement of up to 90 percent of the value of a prisoner's assets. MCL 800.403(3); *State Treasurer v Sheko*, 218 Mich App 185, 188; 553 NW2d 654 (1996). That is, the SCFRA authorizes the filing of a complaint in the circuit court "to secure reimbursement, from the assets of a prisoner, for the expenses incurred by the state for the cost of care of the prisoner during the entire period of his incarceration." *Id*. at 187 n 1; see, also, MCL 800.404(1) and (8). "Assets" are defined by the SCFRA to include "property, tangible or intangible, real or personal, belonging to or due a prisoner . . . from any other source whatsoever . . . ." MCL 800.401a(a). Thus, proceeds a prisoner is due from a life insurance policy are considered an asset for purposes of the SCFRA.

In this case, however, defendant argues that the insurance proceeds that he was due after his mother died were not his "assets" within the meaning of MCL 800.401a(a) because he disclaimed his interest in the proceeds pursuant to the DPIL. MCL 700.2902(1) of the DPIL provides that a person "may disclaim a disclaimable interest in whole or in part." MCL 700.2901(2)(b) defines a "disclaimable interest" as including property and the right to receive property. The insurance proceeds involved here appear to be a disclaimable interest. But the right to disclaim is not absolute. MCL 700.2910(2) provides, for example, that the "right to disclaim is barred to the extent provided by other applicable law." Thus we turn to the issue whether defendant had the right to disclaim his interest in the insurance proceeds, i.e., whether his right to disclaim was barred by the SCFRA.

Under the SCFRA, if the attorney general "has good cause to believe that a prisoner has sufficient assets to recover not less than 10% of the estimated cost of care of the prisoner . . . the attorney general shall seek to secure reimbursement for the expense of the state of Michigan for the cost of care of that prisoner." MCL 800.403(2). After a complaint against the prisoner has been filed seeking reimbursement, "the court shall issue an order to show cause why the prayer of the complainant should not be granted." MCL 800.404(2). MCL 800.404(3) provides:

> At the time of the hearing on the complaint and order, if it appears that the prisoner has any assets which ought to be subjected to the claim of the state under this act, the court shall issue an order requiring any person, corporation, or other legal entity possessed or having custody of those assets to appropriate and apply the assets or a portion thereof toward reimbursing the state as provided for under this act.

However, "before entering any order on behalf of the state against the defendant, the court shall take into consideration any legal obligation of the defendant to support a spouse, minor children, or other dependents and any moral obligation to support dependents to whom the defendant is providing or has in fact provided support." MCL 800.404(5). Further, in seeking to secure reimbursement, the attorney general is empowered under MCL 800.404a(1) to "use any remedy, interim order, or enforcement procedure allowed by law or court rule including an ex parte restraining order to restrain the prisoner . . . from disposing of certain property pending a hearing on an order to show cause why the particular property should not be applied to reimburse the state as provided for under this act." A receiver may also be appointed, MCL 800.404a(2), but any judgment obtained under the SCFRA may not be executed against the prisoner's homestead, MCL 800.404a(3).

Review of the broad and mandatory language of the SCFRA reveals the Legislature's manifest intent to recover, when possible, the cost of prisoner incarceration by seeking and securing prisoner assets through any legal means necessary. As our Supreme Court noted in *Schuster*, 456 Mich at 418, "the plain and broad language of the reimbursement provisions at issue indicates a legislative intent to shift the burden of incarceration expenses to prisoners and from the taxpayers whenever possible." The Legislature's vigor in this endeavor is only tempered by its recognition of a prisoner's legal and moral obligations to support dependents, MCL 800.404(5), and the importance of a prisoner's homestead, MCL 800.401a(a)(*i*) and MCL 800.404a(3).

More particularly, the SCFRA (1) broadly defines a prisoner's "assets" that are subject to the reach of the

SCFRA, (2) empowers and commands the attorney general to secure the assets and seek reimbursement through those "sufficient assets," and (3) directs the presiding circuit court to consider the attorney general's claim, determine whether the prisoner "has any assets which ought to be subjected to the claim" and, if so, order reimbursement from those assets after consideration of a prisoner's legal and moral support obligations.[2] The circuit court's determination of the "assets which ought to be subjected to the claim," MCL 800.404(3), is guided by the definition of "assets" set forth in the SCFRA, MCL 800.401a(a), which excludes from consideration a prisoner's homestead up to $50,000 in value and money saved by the prisoner from wages and bonuses paid while incarcerated.

In this case, defendant clearly attempted to avoid his statutory duty and frustrate the state's statutory right to partial reimbursement for his incarceration costs by attempting to disclaim his interest in the insurance proceeds. However, we conclude that the SCFRA barred defendant from disclaiming his interest. First, we note that the Legislature's primary intent would be ignored, and clearly frustrated, if prisoners were permitted to disclaim their interest in assets to which they are, or become, entitled in a dual effort to circumvent their statutory duty and deprive the state of its statutory right. As this Court noted in *Sheko*, 218 Mich App at 189, "a prisoner cannot impede the state's clear statutory right to reimbursement . . . ."

Second, the SCFRA specifically recognizes certain rights and obligations with regard to prisoner assets, but the purported right to disclaim an interest in a potential asset is not recognized. And the fact that MCL

[2] See MCL 800.401a(a), 800.403(2), 800.404(1), 800.404(3), and 800.404(5).

800.404a(1) allows the attorney general to "use any remedy, interim order, or enforcement procedure allowed by law or court rule" to prevent a prisoner from disposing of assets suggests a legislative intent to bar a prisoner from alienating his or her ownership interest in any assets that might be subject to confiscation. Similarly, the authority conferred on the circuit court by MCL 800.404a(2) to appoint a receiver to protect and maintain the assets pending resolution of the action also suggests a legislative intent to bar a prisoner from alienating his or her ownership interest in assets that might be subject to confiscation.

Third, the SCFRA's definition of an "asset" includes property "belonging to or due a prisoner . . . ." MCL 800.401a(a). Thus, the state's right to seek reimbursement through a prisoner's assets does not depend on whether the prisoner accepted or received the particular asset sought by the state—it need only be "due a prisoner." Under the DPIL, the legal effect of a disclaimer is that the disclaimant is treated as never having accepted or received the disclaimed interest. MCL 700.2909(2). However, under the SCFRA acceptance and receipt of the asset is irrelevant; again, the property must merely be due a prisoner. In this case, once defendant's mother died, defendant was "due" the insurance proceeds. See *Aetna Life Ins Co v Owens*, 318 Mich 129, 138-139; 27 NW2d 607 (1947); *Dogariu v Dogariu*, 306 Mich 392, 406; 11 NW2d 1 (1943). Accordingly, there is no conflict between the SCFRA and the DPIL.

Fourth, in *Sheko*, 218 Mich App at 188-189, this Court rejected a similar attempt by a prisoner to avoid his statutory duty to reimburse the state for incarceration costs under the SCFRA. In that case, the prisoner sought to repay a debt owed to his brother with proceeds from a lawsuit settlement and

opposed the state's efforts to recover those proceeds pursuant to the SCFRA. *Id*. at 186-187. The prisoner argued that his common-law right to prefer creditors was violated by the state's action. *Id*. at 187. This Court rejected the argument, noting that even if the defendant had such a common-law right to prefer creditors, "no such right exists in an action brought under the SCFRA." *Id*. at 188. And "[a]ccepting defendant's position would lead to the absurd result of the state receiving reimbursement only when a prisoner has no other financial obligations, or having other financial obligations, does not object to the state securing reimbursement from the prisoner's assets." *Id*. In the case before us, defendant objected to the state's action by asserting a purported right to disclaim his interest in the insurance proceeds. Defendant opposed the state's action for, ultimately, the same reasons rejected in *Sheko*—to avoid his statutory duty of reimbursement and to deny the state its statutory right to reimbursement. Permitting a prisoner to use the DPIL to accomplish these objectives would similarly lead to an absurd result.

In summary, the SCFRA bars a prisoner from disclaiming an interest in assets pursuant to the DPIL. Defendant had no right to disclaim his interest in the insurance proceeds; thus, the circuit court reached the correct result albeit for the wrong reason. See *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005). In light of our resolution of this dispositive issue, we need not consider defendant's other issue on appeal pertaining to whether his purported disclaimer was barred under the DPIL.

Affirmed.

RONAYNE KRAUSE, P.J., and CAVANAGH and JANSEN, JJ., concurred.

HARDRICK v AUTO CLUB INSURANCE ASSOCIATION

Docket Nos. 294875, 298661, and 299070. Submitted April 5, 2011, at Detroit. Decided December 1, 2011, at 9:00 a.m. Leave to appeal denied, 493 Mich 867.

William J. Hardrick was injured when he was struck by a vehicle while a pedestrian. Auto Club Insurance Association admitted responsibility for paying his personal protection insurance benefits and paid Hardrick's parents $10.25 to $10.50 an hour to provide the attendant-care services he needed. Hardrick brought an action in the Oakland Circuit Court against Auto Club and others, seeking a determination that his parents qualified as "behavioral technicians," entitling them to charge a higher hourly rate. Auto Club did not contest the number of hours that plaintiff's parents worked providing attendant care. Before trial, the court, Michael Warren, J., determined that Auto Club had violated its discovery orders by providing belated and incomplete responses to discovery requests. Plaintiff sought a default judgment, but the court opted to impose a "lesser sanction," precluding Auto Club from presenting witnesses or evidence and limiting it to cross-examining plaintiff's witnesses and challenging his proffered evidence. During trial, plaintiff's witness testified that the value of the care provided by plaintiff's parents fell within the $25 to $45 an hour range. The trial court, Edward Avadenka, J., denied Auto Club's motion to modify the sanctions and limited the jury's reasonable-charge calculation to the range of $25 to $45. The jury ultimately determined that $28 an hour represented a reasonable charge for plaintiff's parents' attendant-care services. The court then ordered Auto Club to pay plaintiff's attorney fees for unreasonably delaying making proper payment. Auto Club brought three separate appeals from the trial court's orders. The appeals were consolidated.

The Court of Appeals *held*:

1. The trial court abused its discretion by selecting the discovery sanction it imposed. A court's chosen discovery sanction must be proportionate and just. The trial court clearly erred by concluding that Auto Club's discovery violations severely prejudiced plaintiff. The trial was adjourned for nearly six months through no

fault of Auto Club following the imposition of the sanction. This additional time allowed additional discovery to occur and the extended period reduced the prejudice caused by Auto Club's earlier discovery violation and supported Auto Club's request to modify the sanction. The sanction was disproportionate and affected the entirety of the trial. The judgment of the trial court is vacated and the case is remanded for a new trial at which the trial court may impose a just sanction.

2. The market rate for agency-provided attendant-care service bears relevance to establishing the rate for family-provided services. The rates charged by an agency to provide attendant-care services are not dispositive of the reasonable rate chargeable by a relative caregiver, however, this does not detract from the relevance of such evidence. The rate charged by an agency for the care provided by a "behavioral technician" relates to a consequential fact, the reasonableness of plaintiff's claimed charge for his parents' "behavioral technician" services, and falls within the range of litigated matters in controversy. The fact that an agency charges a certain rate for precisely the same services that plaintiff's parents provide does not prove that the rate should apply to the parents' services. However, an agency rate for attendant-care services, routinely paid by a no-fault carrier, is a piece of evidence that throws some light on the reasonableness of a charge for attendant-care services, supplying one measure of the value of attendant care worthy of consideration by the jury. The fact that different charges for the same service exist in the marketplace does not render one charge irrelevant as a matter of law. The evidence of agency rates is relevant and the trial court properly rejected Auto Club's attempt to exclude it.

3. The Legislature selected reasonableness as the operative criterion for determining the amount of a charge for services. To the extent that the market for a particular service bears on its reasonableness, the parameters of the relevant market present jury questions. The relevant market for attendant-care services includes agency-provided services, family-provided services, and independently contracted care. It is implausible that a relevant market may exclude real-life competitors for precisely the same services.

4. The no-fault act does not confine a provider's reasonable charge to the amount the provider customarily receives from third-party payors.

5. A jury may consider a provider's wage as one piece of evidence relevant to the reasonable charge for attendant-care services. The reasonableness inquiry encompasses any evidence

bearing on fair compensation for the particular services rendered. Evidence of the employee's hourly wage throws some light on the reasonableness of a charge for attendant-care services. The jury should hear such evidence.

6. Evidence of the "overhead" incurred or not incurred by plaintiff's parents and the "opportunity cost," the amount that is sacrificed when choosing one activity over the next best alternative, of the parents in providing attendant-care services are relevant in calculating a reasonable charge for such services.

7. An objective standard guides an assessment of the term "reasonable charge."

8. The amount charged for attendant-care services substantially similar to the services provided by plaintiff's parents affords a logical basis for calculating a reasonable charge. The charges made by others for the same services provided by plaintiff's parents may incorporate fees and costs not present within plaintiff's household, but these shortcomings affect the weight of the evidence rather than its admissibility.

9. The trial court properly rejected instructing the jury pursuant to Auto Club's proposed Alternative A instruction because it would have precluded the jury's consideration of relevant evidence. The trial court should have presented Auto Club's proposed Alternative B, which recognized the multifaceted nature of the required calculation and allowed the jury to consider a broad spectrum of relevant evidence.

Vacated and remanded.

MARKEY, J., concurring in part and dissenting in part, agreed with the majority that the trial court abused its discretion by imposing an unjust and disproportionate discovery sanction and, therefore, the judgment for attendant-care services and attorney fees must be vacated and the case must be remanded for a new trial. Judge MARKEY disagreed, however, that agency rates are relevant to determining a reasonable charge for attendant-care services provided by family members under the no-fault insurance act. She would hold that evidence of rates agencies charge to provide caregivers is not admissible because the hourly rate necessary to operate a business to provide individual caregivers is not material to the question of a reasonable charge to compensate individual family members who provide attendant care to injured loved ones. She would also hold that the trial court erred by not granting Auto Club's motion in limine that sought to preclude plaintiff from introducing evidence of the amounts health-care agencies charge for providing home attendant care and by refusing

to instruct the jury as requested by Auto Club and would reverse the judgment of the trial court for those reasons as well. Allowable expenses are implicitly purchased by the injured person at their reasonable market value. The reasonable or market value of the attendant-care services plaintiff purchased from his parents is what they could receive by marketing similar services to unrelated purchasers when insurance is not involved. What payment plaintiff's parents could command on the open market would depend on their qualifications, training, experience, the demand for the service, and other factors. What an agency might charge to provide a caregiver of such services is not relevant because it does not accurately reflect what the individual caregiver would earn. Agency rates are not relevant to prove a reasonable charge for family-provided attendant-care services. To the extent that evidence regarding agency rates satisfies the "any tendency" standard for relevant evidence under MRE 401, it should be excluded because its probative value is substantially outweighed by the danger of confusion of the issues or misleading the jury.

1. PRETRIAL PROCEDURE — DISCOVERY — SANCTIONS.

A sanction imposed by a trial court for a discovery violation must be proportionate and just; a trial court's imposition of discovery sanctions is reviewed by the Court of Appeals for an abuse of discretion; an abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes.

2. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — ATTENDANT CARE — FAMILY-PROVIDED CARE — REASONABLE CHARGES.

The market rate for agency-provided attendant-care services bears relevance to establishing a rate for family-provided attendant-care services under the no-fault insurance act; although rates charged by an agency to provide attendant-care services are not dispositive of the reasonable rate chargeable by a relative caregiver, they supply one measure of the value of attendant care and are relevant to the determination of a reasonable charge for family-provided attendant-care services (MCL 500.3107[1][a]).

3. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — ALLOWABLE EXPENSES REASONABLE CHARGES.

The Legislature selected reasonableness as the operative criterion for determining the allowable expenses incurred for reasonably necessary products, services, and accommodations for the care, recovery, or rehabilitation of a person injured in a motor vehicle accident; to the extent that the market for a particular service bears on its reasonableness, the parameters of the relevant market

present jury questions; the relevant market for attendant-care services includes agency-provided services, family-provided services, and independently contracted care; the no-fault act does not confine a provider's reasonable charge to the amount the provider customarily receives from third-party payors; an objective standard guides an assessment of the term "reasonably necessary"; the question whether expenses are reasonable and reasonably necessary is generally one of fact for the jury and, in making this determination, the jury is entitled to consider evidence relevant to the reasonableness of the charge (MCL 500.3107[1][a]).

Liss, Seder & Andrews, P.C. (by *Nicholas S. Andrews* and *Arthur Y. Liss*), and *Larry A. Smith*, for William Hardrick.

Hom, Killeen, Siefer, Arene & Hoehn (by *Kevin S. Carden*) and *Gross & Nemeth, P.L.C.* (by *Mary T. Nemeth*), for Auto Club Insurance Association.

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

GLEICHER, P.J. In this no-fault insurance action, a jury found defendant Auto Club Insurance Association (ACIA) liable to plaintiff William Hardrick for family-provided attendant-care services at a rate of $28 an hour. The jury reached this judgment after a trial at which ACIA was barred from presenting any evidence.[1] We vacate that judgment and remand for a new trial as the lower court abused its discretion by imposing an unjust and disproportionate sanction against ACIA.

The parties vigorously contest the parameters of the evidence relevant on retrial to prove the reasonable rate for family-provided attendant-care services. ACIA contends that agency rates are irrelevant to establish the cost of family-provided care. We conclude that evidence

[1] These three appeals all arise out of the same lower-court action for no-fault benefits and have been consolidated to advance the efficient administration of the appellate process.

of agency rates constitutes a material and probative measure of the general value of attendant-care services, including care provided by family members.

I. BACKGROUND FACTS AND PROCEEDINGS

In May 2007, a car struck Hardrick, then aged 19, as he walked home from work. Hardrick suffered a traumatic brain injury resulting in cognitive deficits and emotional instability. Extensive hospital-based rehabilitation yielded only minimal therapeutic gains. In 2008, Hardrick's psychiatrist recommended around-the-clock attendant care "for supervision and safety." Hardrick's parents provide the prescribed attendant care.

ACIA admitted responsibility for paying Hardrick's personal protection insurance (PIP) benefits, "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). ACIA classified Hardrick's parents as "home health aides," and paid them a rate of $10.25 to $10.50 an hour for the attendant care they provided. Hardrick filed this lawsuit seeking a determination that his parents qualified as "behavioral technicians," entitling them to charge a higher hourly rate. Throughout the litigation, the parties disputed only the "reasonable charge" for Hardrick's parents' services. ACIA never contested the number of hours Hardrick's parents worked providing attendant care or its responsibility to pay PIP benefits.[2]

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[2] ACIA's counsel conceded in a pretrial motion that "The only issue for [t]rial is the amount of compensation for Plaintiff's family members who provide Plaintiff the needed 24 hour a day attendant care." At the hearing on Hardrick's motion for a default judgment, ACIA's counsel further conceded: "The only issue in this case is whether or not the attendant care rate being paid to the parents of this injured individual is

Before trial, the circuit court determined that ACIA had violated its discovery orders by providing belated and incomplete responses to discovery requests. Hardrick pursued a default judgment, but the court opted to impose a "lesser sanction." The court precluded ACIA from presenting any witnesses or evidence. As a result, ACIA was limited to cross-examining Hardrick's witnesses and challenging his proffered evidence.

At the trial, Hardrick presented the testimony of Robert Ancell, Ph.D., a vocational rehabilitation counselor and case manager. Ancell opined that Hardrick's psychiatrist ordered attendant-care services at a level consistent with the care provided by behavioral technicians. Ancell explained that within the attendant-care rubric, a "companion, like a baby sitter," fulfills the lowest level of responsibility. At the next level, nurse's aides, also known as home health aides, attend to "basic care needs" such as "[b]athing, feeding, dressing" and spending time with the brain-injured patient. Licensed practical nurses occupy the next rung of the responsibility ladder. "Somewhere comparable" to the licensed practical nurses, behavioral therapists "understand[] how to deal with behavior issues" by "cuing" and "structuring" behavior. According to Ancell, Hardrick's psychiatrist ordered supervision "by someone with [the] experience of a behavioral technician or life skills trainer, or someone who is very familiar to the patient who knows how to distract him, structure him, and set limits on him in a way that won't escalate his behaviors."

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a fair rate. That's the only issue. There's no medical issues, there's no coverage issues, there's no issues of anything else." Given these concessions at the trial level, ACIA is precluded from complaining on appeal that Hardrick's parents did not actually serve the logged number of attendant-care hours.

Ancell testified that Hardrick's parents have fulfilled the supervisory duties described by their son's psychiatrist, and opined that the value of their care ranged between $25 and $45 an hour. Ancell derived this range from "the market place . . . as it relates to providing that kind of service to individuals and individuals who are clients of ours that receive those types of services[.]" During cross-examination, Ancell clarified that although the "value" of the care fell within the $25 to $45 range, a behavioral technician's hourly wage would be less. Ancell explained that his value calculation factored in benefits and other "government mandated inclusions" applicable to agencies and conceded that employment benefits constitute 30 percent of an agency employee's hourly rate. Ancell agreed that independent contractors receive no benefits, but noted that they pay social security taxes at a rate two times greater than agency employees.

The trial court limited the jury's reasonable-charge calculation to a range of $25 to $45 an hour, and the jury ultimately concluded that $28 an hour represented a reasonable charge for Hardrick's parents' attendant-care services. The trial court then ordered ACIA to pay Hardrick's attorney fees, pursuant to MCL 500.3148(1) of the no-fault act, at a rate of $500 an hour, finding that ACIA "unreasonably delayed in making proper payment."

II. DISCOVERY VIOLATION

ACIA concedes "that it did not timely respond to Plaintiff's . . . interrogatories and requests for discovery" and that the trial court was justified in imposing a sanction. ACIA challenges only the court's choice of a sanction.

As a result of ACIA's failure to provide timely and complete discovery, Hardrick filed a motion for a default judgment. The trial court noted that a default judgment is a "drastic sanction" that "should be only used when there has been a flagrant and wanton refusal to facilitate discovery." The court further noted that it was required to consider "whether a lesser sanction would better serve the interest of justice." The court found that Hardrick had been severely prejudiced by ACIA's reticence because discovery had since closed, case evaluation was completed, and the time to file a motion for summary disposition had passed. Yet, the court found that ACIA was not "obfuscating and attempting to impair discovery in a malicious sense." The trial court then ruled, "I find in light of that that an appropriate *lesser sanction* is to not allow the defendant to produce any witnesses at all. And that is the Court's finding, that that lesser sanction is appropriate." (Emphasis added.)

Following the court's imposition of the sanction, the court twice adjourned the trial to accommodate the needs of Hardrick's counsel. As the date for the rescheduled trial approached, ACIA filed a motion for reconsideration, expressing its desire to introduce "expert witnesses regarding rate and level of care." By then, ACIA had supplied Hardrick with complete discovery and Hardrick had had a sufficient opportunity to review the information, thereby eliminating any possible prejudice. In the interim, however, the case had been reassigned to a visiting judge who declined to overrule the original judge's penalty imposed for ACIA's past conduct.

We review a trial court's imposition of discovery sanctions for an abuse of discretion. *Dorman v Clinton Twp*, 269 Mich App 638, 655; 714 NW2d 350 (2006). An

abuse of discretion occurs when the decision is outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). The trial court sanctioned ACIA pursuant to MCR 2.313. "The interpretation and application of a court rule involves a question of law that this Court reviews de novo." *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 387; 761 NW2d 353 (2008). This Court reviews any factual findings underlying a trial court's decision for clear error. MCR 2.613(C). "A finding is clearly erroneous when this Court is left with a definite and firm conviction that a mistake has been made." *Johnson*, 281 Mich App at 387.

MCR 2.313(B)(2) provides for the imposition of discovery sanctions as follows:

> If a party or an officer, director, or managing agent of a party, or a person designated . . . to testify on behalf of a party, fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may order such sanctions as are just, including, but not limited to the following:
>
> (a) an order that the matters regarding which the order was entered or other designated facts may be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (b) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters into evidence;
>
> (c) an order striking pleadings or parts of pleadings, staying further proceedings until the order is obeyed, dismissing the action or proceeding or a part of it, or rendering a judgment by default against the disobedient party;
>
> * * *

> In lieu of or in addition to the foregoing orders, the court shall require the party failing to obey the order or the attorney advising the party, or both, to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

It is readily apparent that the trial court abused its discretion by selecting the sanction imposed. The court specifically concluded that ACIA's conduct did not merit the drastic sanction of a default judgment. Even though the court labeled its order as "a lesser sanction," the court actually imposed a sanction more severe and limiting than a default judgment would have been. Had the court granted Hardrick's request for a default judgment, ACIA would have been permitted to present evidence to prove the extent of Hardrick's damages. *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 578; 321 NW2d 653 (1982), mod on other grounds by *Smith v Khouri*, 481 Mich 519 (2008) (while "a default settles the question of liability as to well-pleaded allegations and precludes the defaulting party from litigating that issue," it is not an admission of damages); *Dollar Rent-A-Car Sys v Nodel Constr*, 172 Mich App 738, 743; 432 NW2d 423 (1988) (a default "operates as an admission by the defaulting party of issues of liability, but leaves the issues of damages" to be resolved at a hearing at which the defaulting party has "full participatory rights"). The court's actual sanction went further and precluded ACIA from presenting any evidence, even on the damages issue.

A court may impose the severe sanction of a default judgment "only when a party flagrantly and wantonly refuses to facilitate discovery, not when the failure to comply with a discovery request is accidental or involuntary." *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d

727 (1999), overruled in part on other grounds *Dimmitt & Owens Fin, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618, 628 (2008); *Mink v Masters*, 204 Mich App 242, 244; 514 NW2d 235 (1994).

> Before imposing the sanction of a default judgment, a trial court should consider whether the failure to respond to discovery requests extends over a substantial period of time, whether an existing discovery order was violated, the amount of time that has elapsed between the violation and the motion for a default judgment, the prejudice to defendant, and whether wilfulness has been shown. [*Thorne v Bell*, 206 Mich App 625, 632-633; 522 NW2d 711 (1994).]

Ultimately, the court's chosen discovery sanction must "be proportionate and just . . . ." *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 87; 618 NW2d 66 (2000).

The trial court correctly determined that ACIA had violated the court's discovery order by providing belated and incomplete discovery. ACIA's failure to adequately respond to discovery requests extended over several months, even after an order to compel was entered. The court also correctly concluded that ACIA's discovery violation was not flagrant and wanton, but more likely negligent. Given the lack of flagrant and wanton conduct on ACIA's part, the court properly determined that a default judgment would be too severe a sanction.

Yet, as noted, the trial court found that Hardrick had suffered severe prejudice. At that point, the date originally set for trial was drawing nigh and the court was concerned that ACIA's delay amounted to a "trial by ambush." The court expressed further concern over the effect of ACIA's delay on the court's docket: "The alternative would be for this Court to basically re-start and re-gear up the scheduling order which would include significantly expanding the time that the Court

would have to dedicate to this case, re-opening discovery, case evaluation, motions for summary disposition. That is completely inappropriate."

The trial court clearly erred by concluding that ACIA's discovery violations severely prejudiced Hardrick. Hardrick controlled the necessary information regarding his treatment, progress, and the attendant-care services provided by his parents. Hardrick bore the burden of proof on the reasonable value of the attendant-care services and could investigate the issue without assistance from ACIA. Hardrick was also fully aware of ACIA's defense theory given that ACIA had compensated his parents at "health aide" rates. He easily could have accessed the United States Department of Labor's statistics on which ACIA based its payment schedule. Moreover, at the time of the discovery-violation hearing, the parties had agreed to proceed with witness depositions despite the expiration of the discovery period. Thus, the court and Hardrick were aware that Hardrick would discover additional information regarding ACIA's defense before trial. The court could have allayed its concern that ACIA was attempting to conduct a trial by ambush by precluding ACIA's presentation of any undisclosed witnesses or evidence. And the proper remedy for the inconvenience caused to the court's docket would be to hold ACIA in contempt of court. MCR 2.313(B)(2)(d); *Johnson*, 281 Mich App at 387. Moreover, the trial was adjourned for nearly six months following the imposition of the sanction and by no fault of ACIA. This additional time more than amply allowed continued discovery, which did, in fact, occur. The extended trial-preparation period certainly reduced the prejudice caused by ACIA's earlier discovery violation and supported ACIA's subsequent request to modify the existing sanction.

In the end, the trial court's error cost ACIA the opportunity to present any evidence regarding the reasonable rate of service, an element of damages. Because the sanction was disproportionate and affected the entirety of the trial, we vacate the jury's judgment in Hardrick's favor and remand for a new trial.[3] On remand, the court may find a lesser degree of prejudice caused to Hardrick and may impose some sanction on ACIA for its violation of discovery orders. However, the court should carefully consider what sanctions are "just" under the circumstances. See MCR 2.313(B)(2).

III. FAMILY-PROVIDED ATTENDANT CARE

By remanding this case for a new trial, we have reopened the parties' debate regarding the valuation of family-provided attendant-care services. MCL 500.3107(1)(a) provides for the payment of "[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." ACIA contends that the rates charged by health-care agencies for attendant-care services are irrelevant to establish the reasonable rate for unlicensed, family-provided services. ACIA argues that the rate for family-provided attendant care must be based on what a similarly skilled care provider doing the same work could earn if employed performing that work for an unrelated employer. According to ACIA, the pertinent rate for determining the value of the family-

[3] The trial court granted a partial directed verdict in Hardrick's favor, requiring the jury to determine a value for attendant-care services between $25 and $45 an hour. The court's decision was based on the lack of evidence contradicting Hardrick's expert witness's valuation of such services. Because ACIA will be able to present evidence regarding damages on remand, including the reasonableness of the rate, we need not consider the propriety of the court's order granting a partial directed verdict.

provided attendant care is a similar worker's wage, not the hourly fees that a health-care agency might charge to provide such services because that charge would include operating expenses as well as wages. To that end, ACIA filed a motion in limine to preclude Hardrick's evidence in this regard or, in the alternative, requested special jury instructions to limit the use of the evidence. We hold that the market rate for agency-provided attendant-care services bears relevance to establishing a rate for family-provided services.

A. RELEVANCY

ACIA relies extensively on *Bonkowski v Allstate Ins Co*, 281 Mich App 154; 761 NW2d 784 (2008), for the proposition that evidence of agency rates for attendant-care services "is irrelevant" to establish the rate for family-provided care. However, *Bonkowski* expressly acknowledged that its analysis of this issue was pure dicta:

> This case touches on an interesting question of law and statutory interpretation: whether, when determining reasonable compensation payable under MCL 500.3107(1)(a) to lay providers of attendant care services, a jury may rely on the rates charged by health care agencies that employ licensed health care professionals who provide attendant care services. We use the words "touches on" intentionally, as this issue is not squarely before us in this appeal.
>
> This Court has previously embraced the notion that "comparison to rates charged by institutions provides a valid method for determining whether the amount of an expense was reasonable and for placing a value on comparable services performed [by family members]." *Manley v Detroit Automobile Inter-Ins Exch*, 127 Mich App 444, 455; 339 NW2d 205 (1983). We question the conclusion reached in *Manley*.

* * *

> Notwithstanding our questioning of *Manley*, defendant did not argue in the trial court or on appeal in this Court that *Manley* was wrongly decided. Rather, the lower court record reflects that defendant only argued before the trial court that, under MCL 500.3107, Andrew's expenses had not been "incurred." The question whether attendant care services were "incurred" is distinct from the question whether the amount paid for attendant care services was reasonable. [*Bonkowski*, 281 Mich App at 164-165 (citation omitted).]

We are, therefore, in no way bound to follow *Bonkowski*. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 436-437; 751 NW2d 8 (2008).

In any event, we disagree with *Bonkowski*'s suggestion that agency rates are irrelevant to establish family-care rates, to wit:

> In determining reasonable compensation for an unlicensed person who provides health care services, a fact-finder may consider the compensation paid to licensed health care professionals who provide similar services. . . . For this reason, consideration of the compensation paid by health care agencies to their licensed health care employees for rendering services similar to the services provided by unlicensed family members is appropriate when determining reasonable compensation for those family members. However, the actual charges assessed by health care agencies in the business of providing such services is not relevant and provides no assistance in determining reasonable compensation for the actual provider of such services. The focus should be on the compensation provided to the person providing the services, not the charge assessed by an agency that hires health care professionals to provide such services. [*Bonkowski*, 281 Mich App at 164-165.]

We agree that the rates charged by an agency to provide attendant-care services are not dispositive of the reasonable rate chargeable by a relative caregiver. However, this does not detract from the relevance of such evidence.

Relevant evidence is evidence "having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401 (emphasis added). Relevance divides into two components: materiality and probative value. *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Material evidence relates to a fact of consequence to the action. *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000). " '[A] material fact "need not be an element of a crime or cause of action or defense but it must, at least, be 'in issue' in the sense that it is within the range of litigated matters in controversy." ' " *People v Brooks*, 453 Mich 511, 518; 557 NW2d 106 (1996), quoting *People v Mills*, 450 Mich 61, 68; 537 NW2d 909 (1995), quoting *United States v Dunn*, 805 F2d 1275, 1281 (CA 6, 1986). Materiality "looks to the relation between the propositions that the evidence is offered to prove and the issues in the case. If the evidence is offered to help prove a proposition that is not a matter in issue, the evidence is immaterial." 1 McCormick, Evidence (6th ed), § 185, p 729. Here, the material fact at issue concerns a reasonable charge for Hardrick's attendant-care services. No-fault insurers routinely pay agency rates for attendant-care services. As Ancell explained, the rates charged vary according to the level of care provided. Thus, the rate charged by an agency for the care provided by a "behavioral technician" relates to a consequential fact, the reasonableness of Hardrick's claimed charge for his parents' "behavioral technician" services, and thus falls within the range of litigated matters in controversy.[4]

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[4] In *People v VanderVliet*, 444 Mich 52, 60 n 8; 508 NW2d 114 (1993), our Supreme Court quoted approvingly from a treatise authored by Professor Edward Imwinkelried, as follows:

To be relevant, evidence must tend " 'to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' " *Crawford*, 458 Mich at 389-390. Our Supreme Court emphasized in *Crawford*, 458 Mich at 390, "The threshold is minimal: 'any' tendency is sufficient probative force." Evidence is relevant if it "in some degree advances the inquiry," McCormick, § 185, p 736, and is not objectionable simply because it fails to supply conclusive proof. "No single item of evidence can be rejected upon the sole ground that it falls short of making a case; if it contributes to that end it must be received, and its sufficiency in connection with the other evidence must be determined on a review of the whole when the case is closed." *Collins v Beecher*, 45 Mich 436, 438; 8 NW 97 (1881). Our Supreme Court highlighted this concept in *Brooks* by quoting extensively from McCormick's treatise on evidence:

> "Under our system, molded by the tradition of jury trial and predominantly oral proof, a party offers his evidence not *en masse*, but item by item. An item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered. It need not ever make that proposition appear more probable than not. Whether the entire body of one party's evidence is sufficient to go to the jury is one question. Whether a particular item of evidence is relevant to his case is quite another. It is enough if the item could reasonably show that a fact is slightly more probable than it would appear

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> "This is the normal test for materiality: Does the item of evidence even slightly increase or decrease the probability of the existence of any material fact in issue? Standing alone, the item of evidence need not have sufficient probative value to support a finding that the fact exists. So long as the item of evidence affects the balance of probabilities to any degree, the item is logically relevant." [Citation omitted.]

> without that evidence. Even after the probative force of the evidence is spent, the proposition for which it is offered still can seem quite improbable. Thus, the common objection that the inference for which the fact is offered 'does not necessarily follow' is untenable. It poses a standard of conclusiveness that very few single items of circumstantial evidence ever could meet. A brick is not a wall." [*Brooks*, 453 Mich at 519, quoting 1 McCormick, Evidence (4th ed), § 185, p 776.]

Here, the question presented is not whether an agency rate is reasonable per se under the circumstances, but whether evidence of an agency rate may assist a jury in determining a reasonable charge for family-provided attendant-care services. The fact that an agency charges a certain rate for precisely the same services that Hardrick's parents provide does not *prove* that the rate should apply to the parents' services. However, an agency rate for attendant-care services, routinely paid by a no-fault carrier, is a piece of evidence that throws some light, however faint, on the reasonableness of a charge for attendant-care services. See *Beaubien v Cicotte*, 12 Mich 459, 484 (1864). In other words, an agency rate supplies one measure of the value of attendant care and is worthy of a jury's consideration. A jury may ultimately decide that an agency rate carries less weight than the rate charged by an independent contractor, or no weight at all. But the fact that different charges for the same service exist in the marketplace hardly renders one charge irrelevant as a matter of law. Ultimately, the challenged evidence is relevant and the trial court properly rejected ACIA's attempt to exclude it.[5]

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[5] The relevancy of agency rates in determining a reasonable rate for home care has long been implied in Michigan jurisprudence. See *Reed v Citizens Ins Co of America*, 198 Mich App 443, 453; 499 NW2d 22 (1993) ("The reasonableness of the expenses incurred may be judged by comparison with rates charged by institutions."), overruled by *Griffith v*

B. REASONABLE CHARGES IN THE MARKETPLACE

The dissent argues that "market rates" should dictate a " 'reasonable charge' for no-fault services . . . ." *Post* at 692. According to the dissent, "a reasonable charge for attendant-care services provided by a family member is determined by what the family member could receive in the open market for providing similar services." *Post* at 692. The dissent reasons that the "relevant market" includes "what an individual care provider would be paid" or "what a health-care agency might pay an 'independent contractor' to provide similar services." *Post* at 692. After confining a "reasonable charge" to the wage that might be earned by a family member "in the open market," the dissent contends that agency rates lack relevance to market rates. *Post* at 692 (emphasis added).

Neither the no-fault act nor this state's vast body of no-fault caselaw mentions the term "relevant market." It commonly appears, however, in antitrust cases. A claimant seeking to prove the existence of a monopoly must establish the relevant market. *Attorney General, ex rel State Banking Comm'r v Michigan Nat'l Bank*, 377 Mich 481, 489; 141 NW2d 73 (1966). The Michigan Antitrust Reform Act, MCL 445.771 *et seq.*, defines the "relevant market" as "the geographical area of actual or

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State Farm Mut Auto Ins Co, 472 Mich 521, 540; 697 NW2d 895 (2005) (overruling the proposition that "room and board" and food provided during home care are allowable expenses); *Manley*, 127 Mich App at 455 ("[C]omparison to rates charged by institutions provides a valid method for determining whether the amount of an expense was reasonable . . . ."), rev'd 425 Mich 140 (1986) (omitting any analysis or comment on the statement relevant here); *Dunaj v Harry Becker Co*, 52 Mich App 354, 358-359; 217 NW2d 397 (1974) (holding in a workers' compensation case "that medical services provided by a claimant's wife are compensable to the same extent as they would be if the services had been rendered by someone other than the wife").

potential competition in a line of trade or commerce, all or any part of which is within this state." MCL 445.771(b). The United States Court of Appeals for the Sixth Circuit has described the test for ascertaining a relevant market as involving "the identification of those products or services that are either (1) identical to or (2) available substitutes for the defendant's product or service." *White & White, Inc v American Hosp Supply Corp*, 723 F2d 495, 500 (CA 6, 1983).[6]

A relevant market includes a cluster of services or products rather than a lone offering. "Relevant markets are generally not limited to a single manufacturer's products, but are composed of products that have reasonable interchangeability--*i.e.*, gasoline rather than ExxonMobil-branded gasoline." *Partner & Partner, Inc v ExxonMobil Oil Corp*, 326 Fed Appx 892, 899 (CA 6, 2009).

> [D]efining a relevant product market is a process of describing those groups of producers which, because of the similarity of their products, have the ability -- actual or potential -- to take significant amounts of business away from each other. A market definition must look at all relevant sources of supply, either actual rivals or eager potential entrants to the market. [*SmithKline Corp v Eli Lilly & Co*, 575 F2d 1056, 1063 (CA 3, 1978).]

Under federal law, determining the parameters of the relevant market presents questions of fact. *White & White*, 723 F2d at 499-500.

The Legislature selected "reasonableness" as the operative criterion for determining the amount of a charge for services. MCL 500.3107(1)(a). To the extent that the market for a particular service bears on its

[6] Michigan's antitrust laws are patterned after federal statutes. *ETT Ambulance Serv Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 397; 516 NW2d 498 (1994).

reasonableness, the parameters of the relevant market present jury questions. Consumers of attendant-care services may select among a variety of providers, including themselves. Viewed through the antitrust-law lens, the relevant market for attendant-care services includes agency-provided services, family-provided services, and independently contracted care. We find implausible the notion that a "relevant market" may exclude real-life competitors for precisely the same services. A true "market approach" considers the actual marketplace rather than an artificial construct restricted to but one choice.

Further, the dissent's wage-based approach to defining a "reasonable charge" cannot be reconciled with the language of the no-fault act. According to the dissent, "a reasonable charge for any attendant-care services plaintiff's parents provide is the equivalent of what compensation they could command on the open market for providing similar services to unrelated persons. This, in turn, would depend on their qualifications, training, experience, and what persons providing similar services could earn." *Post* at 692. Thus, the dissent limits a "reasonable charge" for attendant-care services supplied by family members to "what the family member could receive in the open market for providing similar services." *Post* at 692. This definition conflates an employee's wage with a provider's reasonable charge.

The governing statutory language provides that a no-fault insurer must pay "[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) (emphasis added). To charge is " '[t]o demand a fee; to bill.' " *Holland v Trinity Health Care Corp*, 287 Mich App 524, 528; 791 NW2d 724

(2010), quoting Black's Law Dictionary (8th ed). As a noun, the word "charge" means "[t]he price set or asked for something." *The American Heritage Dictionary* (2d college ed, 1982). MCL 421.44(2) defines "wages" as "remuneration paid by employers for employment[.]" A worker's wage contributes to the charge for a service, but the two are simply not equivalent. Real life examples readily distinguish the two concepts. If one orders a pizza for delivery, a delivery charge may attach. The delivery charge and the pizza deliverer's wage are highly unlikely to correspond. Alternatively, one may hire a car service to provide transportation to an airport. The charge for the service will certainly exceed the wage paid to the driver.

Another legal analogy illustrates the fundamental distinction between wages and reasonable charges. Attorney fee statutes such as 42 USC 1988 authorize courts to award a "reasonable attorney's fee" to prevailing litigants. Reasonable fees, equivalent to reasonable charges, are generally "calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or non-profit counsel." *Blum v Stenson*, 465 US 886, 895; 104 S Ct 1541; 79 L Ed 2d 891 (1984).

> In seeking some basis for a standard, courts properly have required prevailing attorneys to justify the reasonableness of the requested rate or rates. To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence -- in addition to the attorney's own affidavits -- that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. A rate determined in this way is normally deemed to be reasonable, and is referred to -- for convenience -- as the prevailing market rate. [*Id.* at 895 n 11.]

In *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008), our Supreme Court considered the method for determining a "reasonable attorney fee" under the case evaluation rule, MCR 2.403(O)(6). The Supreme Court specifically rejected the notion that a reasonable attorney fee equated with an attorney's actual wage, explaining that the court rule

> only permits an award of a reasonable fee, i.e., a fee similar to that customarily charged in the locality for similar legal services, which, of course, may differ from the actual fee charged or the highest rate the attorney might otherwise command. As *Coulter v Tennessee*, 805 F2d 146, 148 (CA 6, 1986), explains, reasonable fees "are different from the prices charged to well-to-do clients by the most noted lawyers and renowned firms in a region." [*Smith*, 481 Mich at 528 (opinion by TAYLOR, C.J.) (emphasis omitted).]

Instead, several factors determine a reasonable attorney fee, including " 'the fee customarily charged in the locality for similar legal services' " and the number of attorney hours expended in the litigation. *Id.* at 530 (citation omitted). The "relevant market" for this inquiry encompasses the locality in which the case was litigated. *Id.* The Supreme Court took pains to emphasize that "[t]he fees customarily charged in the locality for similar legal services" should be the measure, rather than the fee charged by an area's top lawyers. *Id*. at 531.

In the no-fault realm, this Court has repeatedly rebuffed efforts by both providers and insurers to circumscribe a fact-finder's reasonable-charge determination. In *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 113; 535 NW2d 529 (1995), this Court rejected the argument that the "customary fee" obtained by a provider for patients insured by Blue Cross and Blue Shield of Michigan (BCBSM) defined the "reasonable charge" for the service, reasoning:

> ACIA's reasoning is premised on the principle that BCBSM's "payments" to plaintiffs for x-rays, as opposed to plaintiffs' "charges" to BCBSM for those x-rays, are the proper criteria to be used in determining the plaintiffs' "customary charge" for x-rays. This position is untenable, however, in light of the clear statutory language of [MCL 500.3157], which states that a "charge" in a no-fault case "shall not exceed the amount [a] person or institution customarily *charges* for like products, services and accommodations in cases not involving insurance" (emphasis added). Thus, ACIA's reliance on the amount that was "paid" by BCBSM, as opposed to the amount that plaintiffs "charged," is unwarranted.

In *Mercy Mt Clemens Corp v Auto Club Ins Ass'n*, 219 Mich App 46, 54-55; 555 NW2d 871 (1996), this Court extended *Hofmann* by holding that the amount paid by Medicare, Medicaid, workers' compensation insurers, and BCBSM "is not admissible to prove the customary charge that defendant must pay under [MCL 500.3157]." These precedents instruct that the no-fault act does not confine a provider's reasonable charge to the amount the provider customarily *receives* from third-party payors.

C. OTHER RELEVANT EVIDENCE

Given that many factors influence the determination of a "reasonable charge" for attendant-care services, a jury may consider a provider's wage as one piece of evidence relevant to this calculation. We view the reasonableness inquiry as encompassing any evidence bearing on fair compensation for the particular services rendered. The principles supporting the relevancy of agency rates equally support the relevancy of other evidence. For example, Ancell testified that an agency would pay its employees less than the $25 to $45 hourly rate charged to the patient. Evidence of the employee's

hourly wage throws some light, however faint on the reasonableness of a charge for attendant-care services. *Beaubien*, 12 Mich at 484. ACIA correctly notes that the jury should hear such evidence to more fully and accurately calculate a reasonable rate for the services rendered.

Similarly, evidence of the "overhead" incurred (or not incurred) by Hardrick's parents would be relevant to calculating a reasonable charge. In this regard, we find instructive *Sharp v Preferred Risk Mut Ins Co*, 142 Mich App 499; 370 NW2d 619 (1985). In *Sharp*, this Court acknowledged that a family's provision of attendant care can include more than time for care services rendered. Sharp's mother personally hired and coordinated the home-nursing staff, and managed the business side of Sharp's care. This Court determined that the cost of such "overhead" was properly considered in calculating a reasonable rate for the caregiver's services. *Id.* at 513-515.

A parent who personally provides attendant-care services also certainly bears an "opportunity cost." "The term 'opportunity cost,' which is borrowed from the field of economics, refers to the amount that is sacrificed when choosing one activity over the next best alternative." *Mira v Nuclear Measurements Corp*, 107 F3d 466, 472 (CA 7, 1997) (citation and some quotation marks omitted). "[T]he opportunity one gives up by engaging in some activity is the cost of that activity . . . ." *Chronister Oil Co v Unocal Refining & Mktg*, 34 F3d 462, 465 (CA 7, 1994). Limiting a family member's "reasonable charge" to a wage ignores these other costs. In the end, the Legislature commanded that no-fault insurers pay a "reasonable charge" for attendant-care services, thereby consigning to a jury the necessary economic-value choices.

This analysis is consistent with *Sokolek v Gen Motors Corp*, 450 Mich 133; 538 NW2d 369 (1995). *Sokolek* is a workers' compensation case in which the parties disputed the reasonable rate for a relative who provided "other attendance" recognized under MCL 418.315(1) of the workers' compensation act. The *Sokolek* Court determined that the issue should be left to the trier of fact, noting that "[m]any considerations may be necessary to make such a determination." *Sokolek*, 450 Mich at 145 (opinion by BRICKLEY, C.J., and LEVIN, J.). As noted in *Sokolek*:

> The defendant argues that there is no reason why the plaintiff's wife should receive the extra money that an agency charges to address administrative costs. Although we agree that this argument is logically compelling, we hold that what level of compensation is reasonable is a factual determination for the magistrate to decide.
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> * * *
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> [T]he magistrate is in a better position than an appellate court to make this determination. The record before us on appeal is limited, and it is difficult for us to know whether it would be appropriate to award at least part of the extra expense required to hire a home companion from a nursing agency. Many considerations may be necessary to make such a determination.
>
> For example, the cost of minimal benefits and social security contributions may be included in the higher hourly rate paid to a nursing agency, and it may be necessary to provide similar benefits to an independent companion, over and above a standard salary. Nursing agencies may also pay to provide training to their employees above and beyond the abilities of an independent companion, training that may be necessary to care for the plaintiff. *In short, this is a multifaceted factual issue, involving the various types of in-home care available, the duties performed by them, their customary billing and*

payment practices, and the type of services being performed by the plaintiff's wife. [*Id.* at 145-146 (emphasis added).]

None of the evidence proffered by ACIA or Hardrick, or even mentioned by this Court, is *dispositive* of the reasonable-charge issue. Rather, the evidence provides a collage of factors affecting the reasonable rate that may be charged by Hardrick's parents for the services they provide.

D. RELEVANCY PRINCIPLES APPLIED

The no-fault act entitles providers of attendant care to impose a "reasonable charge" for their services. The reasonable-charge provision applies to family members, agencies, and independent contractors. In a recent case construing MCL 500.3107(1)(a), our Supreme Court set forth several definitions of the term "reasonable," including "that which is 'agreeable to or in accord with reason; logical,' or 'not exceeding the limit prescribed by reason; not excessive,' " and " 'fair, proper, or moderate under the circumstances' and '[f]it and appropriate to the end in view.' " *Krohn v Home-Owners Ins Co*, 490 Mich 145, 159; 802 NW2d 281 (2011) (citations omitted). These definitions of the term "reasonable" demonstrate "an absence of the personal sentiment, prejudice, and bias associated with a subjective point of view . . . ." *Id.* A subjective view is " 'based on an individual's perceptions, feelings, or intentions' rather than the 'externally verifiable phenomena' associated with an objective viewpoint." *Id.* (citations omitted). In *Krohn*, the Supreme Court held that an objective standard guides an assessment of the term " 'reasonably necessary.' " *Id.* at 163. We discern no basis for applying a different standard to the term "reasonable charge."

"[T]he question whether expenses are reasonable and reasonably necessary is generally one of fact for the

jury . . . ." *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 55; 457 NW2d 637 (1990). In making this determination, a jury is entitled to consider evidence relevant to the reasonableness of the charge. MRE 401 defines relevant evidence in expansive terms. As Justice COOLEY explained in *Stewart v People*, 23 Mich 63, 75 (1871): "The proper test for the admissibility of evidence ought to be . . . whether it has a tendency to affect belief in the mind of a reasonably cautious person, who should receive and weigh it with judicial fairness." The amount charged for attendant-care services substantially similar to the services provided by Hardrick's parents affords a logical basis for calculating a "reasonable charge." The charges made by others for the same services provided by Hardrick's parents may incorporate fees and costs not present within the Hardrick household, but as with any evidence, these shortcomings affect the weight of the evidence rather than its admissibility.[7]

E. JURY INSTRUCTIONS

As noted, ACIA requested special jury instructions designed to limit or direct the jury's consideration of the factors relevant to establishing a "reasonable charge" for services. We review de novo the trial court's rejection of ACIA's requested special jury instructions. *Heaton v Benton Constr Co*, 286 Mich App 528, 537; 780

[7] We respectfully disagree with the dissent's contention that evidence establishing only the "outer boundaries" of an issue "is not helpful to prove the fact at issue." *Post* at 695. Usually, no single piece of evidence proves a case. Individual pieces of evidence, like bricks, join together to form a wall of proof. An agency rate may represent the "outer boundary" of a reasonable charge for attendant-care services, but along with other evidence including rates charged by independent contractors, a litigant may elect to incorporate evidence of agency rates in a wall of proof supporting the reasonableness of the rate claimed.

NW2d 618 (2009). Instructional error warrants reversal when it affects the outcome of the trial. MCR 2.613(A); *Jimkoski v Shupe*, 282 Mich App 1, 9; 763 NW2d 1 (2008).

ACIA presented two alternative jury instructions to guide the jury's consideration. Proposed Alternative A instructed the jury that "[a]mounts charged by health care agencies cannot be considered in determining reasonable compensation." The trial court properly rejected that instruction because it would have precluded the jury's consideration of relevant evidence.

ACIA's proposed Alternative B, on the other hand, recognizes the multifaceted nature of the required calculation:

> Plaintiff can recover benefits for care provided by member[s] of Plaintiff's family at its reasonable market value. In determining the reasonable market value of such care, you are to consider:
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> (l) the type and amount of care Plaintiff reasonably needed;
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> (2) the various types of in-home care available from outside care providers;
>
> (3) the duties performed by outside care providers;
>
> (4) the customary billing and payment practices of outside care providers; and
>
> (5) the type and amount of services being performed by the member[s] of Plaintiff's family.
>
> There is evidence that rates charged by home care agencies are higher than the amounts paid to the employees who actually render care. The difference between the rates charged by agencies and the amounts paid to its employees include agency overhead, such as social security contributions, malpractice insurance, health insurance, disability insurance, office clerical staff, rent, legal fees, accounting costs and office supplies, in addition to profit for the agency. In determining the amount owed for care

> rendered by member[s] of Plaintiff's family, you are to consider whether any additional amounts charged by home care agencies are also necessary for the family member to provide care to Plaintiff.

Alternative B accurately reflects that many factors are relevant to the reasonable-rate issue. Alternative B is consistent with *Sokolek*'s analysis of a reasonable rate for home-provided care in the workers' compensation realm. See *Sokolek*, 450 Mich at 145-146 (opinion by BRICKLEY, C.J., and LEVIN, J.). It is consistent with *Sharp*'s recognition that even family-provided care may include "overhead" costs. *Sharp*, 142 Mich App at 513-515. And the proposed instruction allows the jury to consider a broad spectrum of relevant evidence. We therefore conclude that the trial court should have presented this proposed instruction to adequately and accurately inform the jury.

Whether the charge sought by Hardrick's parents qualifies as " 'fair, proper, or moderate under the circumstances' " and " '[f]it and appropriate to the end in view,' " *Krohn*, 490 Mich at 159 (citations omitted), will be more fully and clearly assessed based on evidence corresponding to this jury instruction. The jury must weigh agency charges against the charges made by other providers of the same or similar services to determine a reasonable fee. Because ACIA will be able to present such evidence on retrial, the jury will be able to calculate a reasonable charge for Hardrick's parents' services under the circumstances.[8]

Accordingly, we vacate the judgment against ACIA and remand for a new trial consistent with this opinion.

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[8] ACIA also challenges the court's award of no-fault penalty interest for unreasonably delaying payment after proof of loss was presented. Because this issue may be eliminated on retrial, we decline to comment on the propriety of the award.

Neither party may tax costs pursuant to MCR 7.219 as neither party prevailed in full. We do not retain jurisdiction.

SAWYER, J., concurred with GLEICHER, P.J.

MARKEY, J. (*concurring in part and dissenting in part*). I agree with the majority that the trial court abused its discretion by imposing an unjust and disproportionate discovery sanction and that, therefore, the judgment for attendant care and attorney fees must be vacated and this case remanded for a new trial. I respectfully disagree, however, that agency rates are relevant to determining a reasonable charge for attendant care provided by family members under the no-fault insurance act. MCL 500.3107(1)(a). I find persuasive the discussion on this issue in *Bonkowski v Allstate Ins Co*, 281 Mich App 154, 164-165; 761 NW2d 784 (2008). I would hold inadmissible evidence of rates agencies charge to provide caregivers; the hourly rate necessary to operate a business to provide individual-care givers is not material to the question of a reasonable charge to compensate individual family members who provide attendant care to injured loved ones. The jury should be instructed consistent with this ruling.

In Docket No. 294875, defendant Auto Club Insurance Association (defendant or ACIA), appeals by right the judgment entered in plaintiff's favor for attendant care as an allowable expense under the no-fault act, MCL 500.3107(1)(a). In Docket Nos. 298661 and 299070, defendant appeals the trial court's order for attorney fees under MCL 500.3148(1).

Plaintiff suffered a traumatic brain injury after being struck by an automobile while walking home from his job. Plaintiff asserted that although his parents were

not licensed or formally trained caregivers, other than receiving direction from plaintiff's treating doctors, they should be compensated $25 to $45 an hour—what agencies would charge to provide high-skilled caregivers capable of handling plaintiff's emotional problems. At trial, because of a discovery sanction, defendant was not permitted to present any witnesses or any affirmative evidence. Plaintiff's parents, the caregivers, did not testify, and defendant's cross-examination was limited to the scope of the direct testimony elicited by plaintiff. At the close of plaintiff's evidence, plaintiff moved for a directed verdict on the issues that (1) the claimed attendant-care expenses had been incurred, and (2) absent contrary evidence, the value of the attendant care was no lower than $25 and no higher than $45 an hour. The trial court granted plaintiff's motion and so instructed the jury, which returned a verdict for plaintiff that a reasonable charge for attendant care was $28 an hour. Together with penalty interest under MCL 500.3142(3), the resulting judgment was entered for $333,354.01, even though ACIA had already paid plaintiff's parents $10.25 or $10.50 an hour for all hours of care claimed.

In Docket Nos. 298661 and 299070, defendant appeals the trial court's order for attorney fees under MCL 500.3148(1), asserting bona fide factual issues existed regarding the reasonable level of attendant care plaintiff required and the reasonable rate that plaintiff's parents could charge for it. Alternatively, defendant argues that the trial court assessed an unreasonably high attorney fee.

I. FAMILY-PROVIDED ATTENDANT CARE

Before trial, defendant filed with the court requests for jury instructions based on *Sokolek v Gen Motors*

Corp, 450 Mich 133, 144-145; 538 NW2d 369 (1995), and *Bonkowski*, 281 Mich App 154. The essence of the requested instructions was that the market rate for family-provided attendant care must be based on what a similarly skilled care provider doing the same work could earn if employed by an unrelated employer. In other words, the pertinent market rate for determining the value of the family-provided care is a similar worker's wage, not the hourly fees that a health-care agency would charge to provide a health-care worker that includes the agency's operating expenses in addition to what the agency would pay the caregiver.

Defendant also filed a motion in limine seeking to preclude plaintiff from introducing evidence of amounts health-care agencies charge for providing home attendant care. On the basis of *Sokolek* and *Bonkowski*, defendant argued that rates health-care agencies charge are irrelevant in determining compensation for unlicensed family members who provide attendant care. Defendant argued that the only relevant evidence is evidence regarding what such agencies would pay to their health-care employees to provide services similar to what the family member provided. Plaintiff argued that the discussion in *Bonkowski* on this issue is nonbinding dicta, and that *Manley v Detroit Auto Inter-Ins Exch*, 127 Mich App 444; 339 NW2d 205 (1983), rev'd and remanded 425 Mich 140 (1986), provides the controlling rule of law. In *Manley*, the Court opined that "comparison to rates charged by institutions provides a valid method for determining whether the amount of an expense was reasonable and for placing a value on comparable services performed by" family members. *Manley*, 127 Mich App at 455. The trial court denied the motion and also denied defendant's request for supplemental jury instructions.

Thus, defendant presents the fundamental question: what relevance do agency rates have in determining reasonable compensation for nonlicensed family-provided attendant care?

A. STANDARD OF REVIEW

A trial court's decision to admit or exclude evidence is reviewed on appeal for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). A trial court abuses its discretion when its decision results in an outcome falling outside the range of principled outcomes. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). But questions of law underlying a trial court's evidentiary decision, such as the application of a constitutional provision, statute, court rule, or rule of evidence, are reviewed de novo. *Id*. at 159; *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002).

Allegations of instructional error are reviewed de novo. *Heaton v Benton Constr Co*, 286 Mich App 528, 537; 780 NW2d 618 (2009). Instructional error will not warrant reversal unless it affected the outcome of the trial. MCR 2.613(A); *Jimkoski v Shupe*, 282 Mich App 1, 9; 763 NW2d 1 (2008). Ultimately, this issue depends on the interpretation and application of the no-fault act, a question of law reviewed de novo. *Bonkowski*, 281 Mich App at 164.

B. ANALYSIS

The questions presented are what evidence is relevant and what courts should instruct jurors in deciding what constitutes a "reasonable charge" for reasonably necessary attendant-care services, under MCL 500.3107(1)(a), provided by a family member to another

member of the family injured in an automobile accident. Stated otherwise, how should fact-finders determine reasonable compensation for family members of the injured person who provide attendant care that is an allowable expense under the no-fault act? I find that the pertinent discussion of this issue in *Bonkowski* is persuasive dicta. "It is permissible for an appellate court to find dictum persuasive and decide to follow it." *Schoenherr v Stuart Frankel Dev Co*, 260 Mich App 172, 181; 679 NW2d 147 (2003) (WHITBECK, C.J., concurring). I also find that defendant's argument has logical merit, and is consistent with the limiting language of the no-fault act and the act's cost-containment public-policy goals. *Sokolek*, 450 Mich at 145 (opinion by BRICKLEY, C.J., and LEVIN, J.); *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 376-378; 670 NW2d 569 (2003). I would hold that the trial court erred by not granting defendant's motion in limine and also erred by refusing to instruct the jury as requested.[1] I would therefore reverse and remand for a new trial for these reasons as well.

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[1] Defendant's proposed "Alternative A" jury instruction provides:

> Family members are entitled to reasonable compensation for care provided to an injured person. In determining reasonable compensation for a family member who provides health care services, you may consider the compensation paid to licensed health care professionals who provide similar services. Amounts charged by health care agencies cannot be considered in determining reasonable compensation.
>
> In determining the amount owed for care rendered by [a] member[s] of Plaintiff's family, you are to consider:
>
> (1) the type and amount of care Plaintiff reasonably needed;
>
> (2) the type and amount of services actually performed by [a] member[s] of Plaintiff's family;
>
> (3) whether the family member was a licensed health care provider;

First, contrary to plaintiff's argument, *Manley*, 127 Mich App 444, is not controlling or binding legal precedent. *Manley* was decided before November 1, 1990, and was reversed by our Supreme Court, 425 Mich 140. Consequently, it lacks precedential authority. MCR 7.215(J); *Bradacs v Jiacobone*, 244 Mich App 263, 268-269; 625 NW2d 108 (2001), citing *Mitchell v Gen Motors Acceptance Corp*, 176 Mich App 23, 34; 439 NW2d 261 (1989). Moreover, the Supreme Court did not adopt, or even discuss, the pertinent statement in the Court of Appeals opinion that "comparison to rates charged by institutions provides a valid method for determining whether the amount of an expense was reasonable and for placing a value on comparable services performed by" family members. *Manley*, 127 Mich App at 455. As a result, there can be no remaining controlling or binding legal precedent from the Court of Appeals decision in *Manley* on the issue of family-provided attendant care. *Dunn v Detroit Auto Inter-Ins Exch*, 254 Mich App 256, 262; 657 NW2d 153 (2002).

Additionally, the issue presented in *Manley* concerned whether the parents of the injured plaintiff could claim as an allowable expense charges for room and board and nurse's aides for their son. See *Manley*, 127 Mich App at 451-455. While the Supreme Court affirmed this Court's ruling that insurers are obligated under the no-fault act to pay parents if they provide their children with services that are allowable expenses under the act, *Manley*, 425 Mich at 153, 159-160, the Court did not discuss methods for determining the

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(4) the types of in-home care available from outside care providers; and

(5) the amounts outside care providers would have been paid to provide the type and amount of services Plaintiff received from [a] member[s] of [his/her] family.

value of such services. And, although the parents obtained an award for past services, this part of the award was not considered by either appellate court. *Id.* at 149. Thus, the Court in *Manley* did not decide the method of determining a reasonable charge for family-provided attendant care.

Despite its lack of precedential value, subsequent panels of this Court have cited the *Manley* dicta. In *Sharp v Preferred Risk Mut Ins Co*, 142 Mich App 499, 513; 370 NW2d 619 (1985), the Court found it reasonable for a mother to charge the no-fault insurer slightly more than what she paid for nurses and nurse's aides to care for her injured son. The Court reasoned that this compensated the mother for administrative services of "seeking, interviewing, selecting, training, and supervising the nurses" and "billing the insurance company, and paying the nurses." *Id*. The Court found this "consistent with *Manley*" and reasonable in that case because the "plaintiff charges less than similar institutions . . . ." *Id*. at 514. Because *Sharp* was decided before November 1, 1990, it also lacks binding precedential authority. MCR 7.215(J).

In *Reed v Citizens Ins Co of America*, 198 Mich App 443; 499 NW2d 22 (1993), overruled by *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 540 (2005), this Court again followed the *Manley* dicta. *Reed* noted that the *Sharp* Court had opined that "[t]he reasonableness of the [allowable] expenses incurred may be judged by comparison with rates charged by institutions." *Reed*, 198 Mich App at 453. Because our Supreme Court subsequently overruled *Reed*, it too has no binding precedential authority. *Mitchell*, 176 Mich App at 34.

Nevertheless, even though it lacks precedential authority, I find that the *Manley* Court correctly opined that " 'allowable expenses' . . . are implicitly purchased

by [the injured person] at their reasonable market value." *Manley*, 127 Mich App at 455. That is, the reasonable or market value of the attendant-care services plaintiff "purchased" from his parents is what they could receive by marketing similar services to unrelated purchasers when insurance is not involved. This would be consistent with the plain language of MCL 500.3107(1)(a), limiting allowable expenses to "reasonable charges." What payment plaintiff's parents could command on the open market would depend on their qualifications, training, experience, demand for the service, and other factors. What an agency might charge to provide a caregiver of such services is not relevant because it does not accurately reflect what the individual caregiver would earn.

The *Bonkowski* Court discussed these market principles in a case very similar to the present case in that it involved family-provided attendant care, and many of the same experts testified. The plaintiff in *Bonkowski* was severely injured, suffering not only traumatic brain injury but also spinal injuries that rendered him a quadriplegic. *Bonkowski*, 281 Mich App at 157-158. The plaintiff was discharged from the hospital to the care of his father, Andrew, who received some training from the hospital for that purpose but otherwise only had the educational equivalent of a high school degree. *Id*. at 158-159. Allstate, the no-fault insurer, agreed to pay Andrew approximately $166,000 a year to provide attendant care for the plaintiff, but the plaintiff demanded that Andrew be paid $34 an hour instead of the $19 an hour proposed by Allstate. *Id*. at 159. At trial, defense counsel contended that the testimony of plaintiff's experts based on "agency rates" would include a plethora of business expenses that Andrew would not incur. *Id*. at 161-162. Also, the defendant's claims adjuster testified that Allstate "was unwilling to pay the

agency rate for Andrew to care for plaintiff because an agency is licensed and incurs more expenses." *Id*. at 162. The jury returned a verdict in the plaintiff's favor. *Id*. at 163.

On appeal, the issue of using agency rates as a basis for determining the reasonableness of charges for family-provided attendant care was not squarely presented because Allstate had not argued in the trial court that *Manley* was wrongly decided. Nevertheless, the *Bonkowski* Court questioned the *Manley* dicta and opined:

> Under MCL 500.3107, family members are entitled to reasonable compensation for the services they provide at home to an injured person in need of care. In determining reasonable compensation for an unlicensed person who provides health care services, a fact-finder may consider the compensation paid to licensed health care professionals who provide similar services. For this reason, consideration of the compensation paid by health care agencies to their licensed health care employees for rendering services similar to the services provided by unlicensed family members is appropriate when determining reasonable compensation for those family members. However, the actual charges assessed by health care agencies in the business of providing such services is not relevant and provides no assistance in determining reasonable compensation for the actual provider of such services. The focus should be on the compensation provided to the person providing the services, not the charge assessed by an agency that hires health care professionals to provide such services. [*Bonkowski*, 281 Mich App at 164-165.]

In dicta, the *Bonkowski* Court opined that the market rate or reasonable charge that a family member providing attendant care may charge can be determined from evidence of what persons providing similar care would be paid, not by what an agency would be paid to provide a care worker to perform similar services. But,

the Court affirmed the jury verdict because Allstate did not properly preserve or properly present the issue in this Court and because substantial evidence documented Andrew's care of the plaintiff, the reasonableness of which was a question of fact for the jury. *Bonkowski*, 281 Mich App at 167-169.

The *Bonkowski* Court also addressed the issue of agency rates when it held that the trial court had erred by awarding attorney fees under MCL 500.3148(1) because Allstate had a bona fide factual basis to challenge the plaintiff's claim. On this point, the Court opined:

> Neither the medical community nor the legal community has established a hard and fast rule for determining the reasonable rate of compensation due unlicensed individuals who provide necessary health care services to family members. While consideration of rates paid to licensed and trained health care providers is appropriate, the law does not require that unlicensed individuals who have not earned a degree in a pertinent health care profession be paid the same compensation paid to licensed health care professionals. It can hardly be disputed that the greater the time a health care professional invests in his or her education and training, the greater the compensation would be for that professional. Andrew received specialized training to allow him to provide professional quality care to his son in an array of disciplines. However, Andrew's training was provided over the course of four months. Andrew did not invest years to obtain an education and specialized training to become a medical professional. Quality care made possible by the dedication and love of family members is often preferable to institutional care. Yet, this Court has recognized that family-provided accommodations are generally less costly than institutional care. Under these circumstances we cannot conclude that defendant acted unreasonably when it offered to compensate Andrew at the lower end of the range of what a licensed and formally educated health care professional might ex-

> pect to command in the open market. [*Bonkowski*, 281 Mich App at 172-173 (citation omitted).]

I would combine the reasoning of *Manley* that market rates control what is a "reasonable charge" for no-fault services with the reasoning of *Bonkowski* regarding the relevant market: what an individual care provider would be paid. I would hold that a reasonable charge for attendant-care services provided by a family member is determined by what the family member could receive in the open market for providing similar services. So, under § 3107 a reasonable charge for any attendant-care services plaintiff's parents provide is the equivalent of what compensation they could command on the open market for providing similar services to unrelated persons. This, in turn, would depend on their qualifications, training, experience, and what persons providing similar services could earn. Perhaps the closest market equivalent is what a health-care agency might pay an "independent contractor" to provide similar services.

The companion case of *Mullins v Frank H Wilson Co*, decided with *Sokolek*, 450 Mich 133, supports my conclusion that agency rates do not accurately reflect, and therefore are not relevant to, the market rate of family-provided attendant care. At issue in *Mullins* was whether, in a workers' compensation case, Mullens's wife was entitled to be compensated for attendant care at an agency rate for a " 'homemaker companion' " or at only half that rate as the cost to hire an independent nurse's aide. *Id*. at 144 (opinion by BRICKLEY, C.J., and LEVIN, J.). As in the no-fault act, MCL 418.315(1) provides for "reasonable" services, which "refers not only to the services to be performed, but to the compensation to be paid to the provider of such services." *Sokolek*, 450 Mich at 144-145 (opinion by BRICKLEY, C.J., and LEVIN, J.). The Court found the defendant's argu-

ment "that there is no reason why the plaintiff's wife should receive the extra money that an agency charges to address administrative costs" was "logically compelling . . . ." *Id*. at 145. The Court held, however, that the reasonable level of compensation was a multifaceted factual determination for the fact-finder to resolve. *Id*. at 145-146.

Another question presented here is whether a reasonable charge for family-provided attendant care would include shift premiums, overtime, and benefits that a health-care worker might earn if employed by an agency. The *Bonkowski* Court suggested that a reasonable charge by a family member for attendant care would not include shift premiums and overtime. *Bonkowski*, 281 Mich App at 173. The Court in *Mullins* suggested it may be necessary to include benefits similar to those earned by health-care workers. *Sokolek*, 450 Mich at 145-146 (opinion by BRICKLEY, C.J., and LEVIN, J.). Under the market analysis discussed above, shift premiums, overtime, and benefits would likely not factor into determining a reasonable charge for family-provided attendant care. Shift premiums and overtime are generally paid in circumstances when the law requires it or when necessitated by supply and demand to hire and retain people to work unpopular shifts. Family members providing services to other family members are not covered by labor laws; presumably, they are motivated by nonfinancial reasons. Similarly, health-care agencies pay their workers benefits to attract and retain employees. It seems unlikely that a family member marketing his or her health-care services outside the family could command both a salary and benefits as an independent contractor. On the other hand, if there were evidence to support it, the issue would be for the fact-finder to determine. *Id*. at 145; *Bonkowski*, 281 Mich App at 169.

My market analysis is also consistent with the cost-containment public policy goals of the no-fault act. " 'The basic goal of the no-fault insurance system is to provide individuals injured in motor vehicle accidents assured, adequate and prompt reparation for certain economic losses at the lowest cost to the individual and the system.' " *Advocacy Org*, 257 Mich App at 377, quoting *Gooden v Transamerica Ins Corp of America*, 166 Mich App 793, 800; 420 NW2d 877 (1988). With respect to holding health-care costs down, "the plain and ordinary language of § 3107 requiring no-fault insurance carriers to pay no more than reasonable medical [or other allowable] expenses, clearly evinces the Legislature's intent to place a check on health care providers who have no incentive to keep the doctor [or allowable expense] bill at a minimum." *McGill v Auto Ass'n of Mich*, 207 Mich App 402, 408; 526 NW2d 12 (1994) (quotation marks and citation omitted).

Finally, while I generally agree with the majority's discussion of relevance under MRE 401, I respectfully disagree with the majority's application of the "any tendency" standard in this circumstance where agency rates can only be said to be relevant *because* they encompass evidence at the heart of the issue: what individual caregivers are paid to provide the services at issue. The analogy of "[a] brick is not a wall" the majority discusses, see *People v Brooks*, 453 Mich 511, 518; 557 NW2d 106 (1996), quoting 1 McCormick, Evidence (4th ed), § 185, p 776, illustrates the problem with admitting evidence of agency rates in this case. Admitting evidence of agency rates in this case is akin to admitting evidence of the dimensions of a brick wall to prove the dimensions of the individual bricks that comprise the wall or admitting evidence of the cost to build the brick wall to estimate the cost of the individual bricks. In

either scenario, the evidence only establishes outer boundaries; it is not helpful to prove the fact at issue.

This point is illustrated in *People v Coy*, 243 Mich App 283; 620 NW2d 888 (2000). In a murder trial, the prosecution introduced evidence that the DNA of the defendant was consistent with blood found on a knife blade and on a doorknob but did not provide evidence of the likelihood of the potential match. The Court opined that without statistical-based interpretive testimony the DNA evidence lacked " 'relevance or meaning to the trier of fact' " and was " ' "meaningless" to the jury and, thus, inadmissible.' " *Id*. at 298-299, quoting *Nelson v State*, 628 A2d 69, 76 (Del, 1993). Even though the DNA evidence clearly satisfied the "any tendency" standard of relevancy, the Court held that without the interpretive evidence, the DNA evidence "was insufficient to assist the jury in determining whether defendant contributed DNA to the mixed sample." *Coy*, 243 Mich App at 301. As an alternative, the Court also concluded that the DNA should have been excluded under MRE 403 because " 'its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.' " *Coy*, 243 Mich App at 302.

In the present case, evidence of agency rates is only relevant to determine a reasonable rate to compensate family members providing attendant care if there is also evidence separating the component of an agency's hourly fee that represents that which is necessary to compensate an individual caregiver providing similar services. *Bonkowski*, 281 Mich App at 164-165. Assuming such evidence is available, the only purpose for admitting evidence of the agency rate would be to confuse or mislead the jury into believing it reasonable to compensate family members for care provided by

them as if they were for-profit health-care providers having satisfied all the requisites to be engaged in such a business. In light of the purposes of the no-fault act, I would hold such a level of compensation for family-provided care would not be a "reasonable charge" within the meaning of MCL 500.3107(1)(a).[2] I conclude that agency rates are not relevant to prove a "reasonable charge" for family-provided attendant care, but to the extent the evidence satisfies the "any tendency" standard of MRE 401, it should be excluded because the evidence's "probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading the jury . . . ." MRE 403.

II. MOTIONS FOR A DIRECTED VERDICT

Defendant argues that because plaintiff's parents did not testify at trial, there was no evidence that they actually provided the high level of care that plaintiff sought as an allowable expense. As a result, defendant argues, plaintiff failed to prove the care his parents provided was entitled to compensation at a rate higher than that of a health aide, which defendant had already paid. Consequently, defendant argues, the trial court erred by not granting it a directed verdict. Alternatively, defendant argues that the trial court erred by granting plaintiff a directed verdict on the issue that the higher level of attendant care had been "incurred." Defendant notes that while some level of care was incurred, the lack of evidence plaintiff presented entitled defendant, on plaintiff's motion for a directed verdict, to the reasonable inference that the care provided was at the

[2] All activities in life have "opportunity costs" and I read nothing in the no-fault act or MCL 500.3107(1)(a) in particular that permits anyone—whether or not a family member—to recover as part of a "reasonable charge" for an "allowable expense" the cost of opportunities foregone.

lower level of a basic health aide. I conclude that the trial did not err by denying defendant's motion but did err by granting plaintiff's motion. The determination of a reasonable charge for the attendant care at issue should have been left for a properly instructed jury to decide.

A. PRESERVATION

Defendant opposed granting plaintiff's motions for a directed verdict that attendant care had been "incurred" and limiting the jury's consideration of a "reasonable" rate to charge for the care to between $25 and $45 an hour. Defendant also moved for a directed verdict on the issue that plaintiff had not presented proof that plaintiff's parents actually proved a higher level of care than that for which defendant had already paid. Thus, these issues are properly preserved because they were raised, addressed, and decided by the trial court.

B. STANDARD OF REVIEW

A trial court's decision on a motion for a directed verdict is reviewed de novo. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003). The evidence presented up to the point of the motion and all legitimate inferences from the evidence must be viewed in the light most favorable to the nonmoving party to determine whether a fact question existed. *Heaton*, 286 Mich App at 532. It is for the jury to weigh the evidence and decide the credibility of the witnesses. *King v Reed*, 278 Mich App 504, 523 n 5; 751 NW2d 525 (2008). A trial court properly grants a directed verdict only when no factual question exists upon which reasonable minds could differ. *Heaton*, 286 Mich App at 532.

C. ANALYSIS

On review of the record, I conclude that the trial court properly denied defendant's motion for a directed verdict on the basis of the lack of proof that the claimed attendant-care hours had been "incurred." The jury could reasonably infer the attendant-care hours were incurred from calendar time records submitted to defendant, the medical prescriptions for attendant care, Dr. Gerald Shiener's testimony that plaintiff's parents provided the prescribed attendant care, and defendant's payment of the attendant-care hours claimed. Indeed, there was no evidence from which the jury could conclude that the claimed attendant-care hours were not "incurred." Therefore, the trial court properly granted plaintiff's motion for a directed verdict on this issue.

On the other hand, under the no-fault act, "allowable expenses" must be "reasonable charges," MCL 500.3107(1)(a), and a person providing an injured person services "may charge a reasonable amount for . . . services," MCL 500.3157. "When read in harmony, §§ 3107 and 3157 clearly indicate that an insurance carrier need pay no more than a reasonable charge and that a health care provider can charge no more than that." *McGill*, 207 Mich App at 406. Further, although the trial court properly directed a verdict in plaintiff's favor by finding that the attendant care was "incurred," it did not decide the distinct question of what a reasonable charge for those services should be. *Bonkowski*, 281 Mich App at 165. The determination of a reasonable charge for an allowable product, service, or accommodation is generally for the jury to determine as a question of fact. *Id*. at 169, citing *Advocacy Org*, 257 Mich App at 379, and *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 55; 457 NW2d 637 (1990).

Here, evidence presented to the jury would permit it to infer that a reasonable charge for the services plaintiff's parents provided was less than the limited range the trial court's instructions permitted. Specifically, the jury could reasonably infer from the testimony of Dr. Robert Ancell that live-in health-care workers and independent contractors might receive compensation at a lesser hourly rate. Further, Dr. Ancell described attendant care for "safety purposes" as follows: "[A]t the lowest level of responsibility is somebody who's a companion, like a baby sitter. Okay. Somebody who is just there, may get something for somebody, basically for safety purposes. No medical training, basically a companion. They typically make $10 an hour." The jury also heard Dr. Shiener describe plaintiff as like an 11 year old in an adult body. Dr. Shiener also testified that plaintiff needed supervision for his own safety from "someone who knows how to manage behavior and knows how to interact with him in a skillful way, can be there to make sure that he's safe, that he doesn't do anything dangerous. . . . To discourage him from doing something that he's made his mind up to do when it's a bad idea." Although Dr. Shiener testified that he described a "behavioral technician or a life skills trainer . . . more than just a babysitter or a home health aide," the jury might have inferred that the skill level he described was what most parents or guardians do naturally. Finally, from evidence that defendant paid the claimed attendant-care hours at the rate of $10.25 or $10.50 an hour, the jury could have reasonably inferred that this rate represented a reasonable rate of compensation for the services rendered. "Once plaintiffs charge the insured, the insurer then makes its own determination regarding what is reasonable and pays that amount to plaintiffs." *Advocacy Org*, 257 Mich App at 379 n 4. So, evidence existed, viewed in the light most favorable to

defendant, that would permit the jury to infer that a reasonable charge for attendant-care services in this case was less than the range to which the trial court restricted the jury's determination.

Additionally, the trial court erred by limiting the jury's determination of a reasonable rate of compensation because it is the jury's responsibility to weigh the evidence and judge the credibility of witnesses. *King*, 278 Mich App at 522. The jury could have chosen to reject the evidence that supported plaintiff's theory of compensation. *Id*. at 523. " '[T]he jury is free to credit or discredit any testimony.' " *Id*. at 523 n 5, quoting *Kelly v Builders Square, Inc*, 465 Mich 29, 39; 632 NW2d 912 (2001). For example, in *Manley*, in determining a reasonable room and board charge, the "plaintiffs relied upon evidence that the Oakland County Medical Care Facility charged $78 per day" and the defendant relied upon evidence that the plaintiff "could be accommodated in a nursing home at $48 per day." *Manley*, 127 Mich App at 454. The jury rejected this evidence when it determined that $30 a day was a reasonable charge for providing room and board. *Manley*, 425 Mich at 154 n 13.

For these reasons, I conclude that the trial court erred by limiting the jury's determination regarding a reasonable charge for the attendant-care services that plaintiff's parents provided and that this error also warrants reversal and remand for a new trial.

III. CONCLUSION

I agree with the majority that the trial court abused its discretion by imposing a sanction for a discovery violation that was not just or proportionate to the violation. The disproportionate discovery sanction that precluded defendant from presenting any witnesses or

evidence at trial and the inability of defendant to confront plaintiff's parents regarding the attendant care they provided combined to deny defendant a fundamentally fair trial. Consequently, I agree that the judgment entered in this matter must be vacated and the order for sanctions must be set aside.

I also conclude that the trial court erred by not granting defendant's motion in limine regarding evidence of agency rates, by refusing to give supplemental jury instructions as requested, and by limiting the jury's fact-finding ability when determining a reasonable charge for the attendant care at issue. These errors also warrant reversal and remand for a new trial.

Because of the resolution of the issues raised in Docket No. 294875, the issues in Docket Nos. 298661 and 299070 are moot.

SPECIAL ORDERS

SPECIAL ORDERS

In this section are orders of the Court of general interest to the bench and bar of the state.

Order Entered August 25, 2011:

In re ELLIS, Docket Nos. 301884 and 301887. On the Court's own motion, it is ordered that the June 14, 2011, per curiam opinion and the August 9, 2011, order* amending that per curiam opinion are hereby vacated.

The Court orders that a published opinion per curiam in the above referenced cases is hereby issued as of today's date and is attached. Reported at 294 Mich App 30.

Order Entered January 10, 2012:

ALFIERI v BERTORELLI, Docket No. 297733. The Court orders that the motion for reconsideration is granted, and this Court's opinion issued October 18, 2011, is hereby vacated. A new opinion is attached to this order.**

Order Entered January 17, 2012:

YOOST v CASPARI, Docket No. 294299. The Court orders that the motion for reconsideration is granted, and this Court's opinion issued September 15, 2011, is hereby vacated. A new opinion is attached to this order.***

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* Order published at 293 Mich App 801—REPORTER.

** New opinion reported at 295 Mich App 189—REPORTER.

*** New opinion reported at 295 Mich App 209—REPORTER.

Index-Digest

INDEX–DIGEST

37.2202[1][a]). *Hall v Stark Reagan, PC*, 294 Mich App 88.

DISCRIMINATION BASED ON PROTECTED CHARACTERISTICS

2. To state a claim for violation of Michigan's Civil Rights Act (CRA), a plaintiff must establish (1) discrimination based on a protected characteristic (2) by a person (3) resulting in the denial of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations (4) of a place of public accommodation; in a discrimination action based on disparate treatment, the plaintiff has the initial burden to establish the existence of illegal discrimination, either through direct or indirect evidence; direct evidence is evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the decision-maker's actions; the presentation of direct evidence of discrimination requires that the case proceed as an ordinary civil matter; the provision of rebuttal evidence by the defendant is irrelevant at the summary disposition phase if the plaintiff has presented direct evidence of discrimination (MCL 37.2302[a]). *Moon v Michigan Reproductive & IVF Center, PC*, 294 Mich App 582.

MARITAL STATUS

3. Under Michigan's Civil Rights Act (CRA), "[e]xcept where permitted by law," a person may not deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of marital status; marital status refers to whether an individual is married or not; the phrase "except where permitted by law" encompasses statutory law, common law, and constitutional law; however, the contractual nature of the physician-patient relationship, which under the common law permitted a physician to decline to enter into the relationship for any reason, does not allow a physician to decline to enter into the relationship on the basis of the patient's protected status under the CRA; rather, a physician may only refuse to enter into a physician-patient relationship with a potential patient on the basis of legally permissible, nondiscriminatory reasons (MCL 37.2302[a]). *Moon v Michigan Reproductive & IVF Center, PC*, 294 Mich App 582.

tiple punishments are specifically authorized by the Legislature; absent clear legislative intent to impose multiple punishments, a court must determine whether the sentences were imposed for the same offense as determined by the statutory elements of the offenses; if each offense requires proof of a fact that the other does not, they are separate offenses notwithstanding a substantial overlap in the proof offered to establish the crimes; to prove a charge of prisoner in possession of a controlled substance, a prosecutor must show that the individual was a prisoner, but an individual need not be a prisoner to be convicted of delivery of less than five kilograms of marijuana, and a person need not deliver a controlled substance to be a prisoner in possession; thus, the offenses of prisoner in possession and delivery of less than five kilograms of marijuana each require proof of a fact that the other does not, and a person may be convicted of both offenses based on the same transaction (US Const, Am V; Const 1963, art 1, § 15; MCL 333.7401[1], MCL 333.7401[2][d][*iii*], MCL 801.263[2]). *People v Williams*, 294 Mich App 461.

EVIDENCE

4. Testimonial statements of witnesses absent from trial are admissible only when the original declarant is unavailable and the defendant has had a prior opportunity to cross-examine that declarant; a statement is considered testimonial if its primary purpose is to establish or prove past events potentially relevant to later criminal prosecution; a statement satisfies this condition if it was made under circumstances that would lead an objective witness reasonably to believe that it would be available for use at a later trial (US Const, Am VI; Const 1963, art 1, § 20). *People v Nunley*, 294 Mich App 274.

5. The document certifying that the Secretary of State mailed a person notice that his or her driver's license was suspended is testimonial in nature; it may only be admitted to prove a charge of driving with a suspended license without the testimony of its preparer if the preparer is unavailable and the defendant had a prior opportunity to cross-examine him or her (US Const, Am VI; Const 1963, art 1, § 20; MCL 257.212; MCL 257.904[1]). *People v Nunley*, 294 Mich App 274.

SELF-INCRIMINATION

6. The right against compelled self-incrimination is guar-

anteed by both the United States and Michigan Constitutions; statements made during custodial interrogations that the defendant did not volunteer are admissible only if a suspect voluntarily, knowingly, and intelligently waived his or her Fifth Amendment rights; interrogation of a suspect in custody can be through express questioning or its functional equivalent, which is defined as any words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response from the suspect; the focus should be on the suspect's perception, rather than the intent of the officers; there must be no evidence suggesting that the police officers were aware that the suspect was peculiarly susceptible to an appeal to his or her conscience, or was unusually disoriented or upset at the time, and the conversation must have been short with no lengthy or passionate speech (US Const, Am V; Const 1963, art 1, § 17). *People v White*, 294 Mich App 622.

SENTENCES

7. In determining whether a penalty constitutes cruel or unusual punishment, a court must consider (1) the severity of the sentence imposed and the gravity of the offense, (2) a comparison of the penalty to penalties for other crimes under Michigan law, and (3) a comparison between Michigan's penalty and penalties imposed for the same offense in other states; a conviction for first-degree criminal sexual conduct is punishable by imprisonment for life or any term of years, but not less than 25 years if the offense is committed by a person who is 17 years of age or older against an individual less than 13 years of age; a 25-year minimum sentence for first-degree criminal sexual conduct committed by a person who is 17 years of age or older against an individual less than 13 years of age is not cruel or unusual in light of the social consequences of sexual offenses against children and given that the 25-year mandatory minimum sentence is similar to the penalty imposed for the same offense in several other states (US Const, Am VI; Const 1963, art 1, § 16; MCL 750.520b[2][b]). *People v Benton*, 294 Mich App 191.
8. In deciding if punishment is cruel or unusual, a court considers the gravity of the offense and the harshness of the penalty, comparing the punishment to the penalty

imposed for other crimes in Michigan and the penalty imposed for the same crime in other states; a defendant over the age of 17 who commits first-degree criminal sexual conduct (CSC-I) involving a victim less than 13 years of age when the defendant was previously convicted of a similar sex crime with a victim less than 13 years of age must be sentenced to life in prison without the possibility of parole; the penalty of life in prison for a repeat offender convicted of CSC-I involving a victim under the age of 13 reflects the gravity of the offense and is similar to the penalties imposed in other states; the penalty is not unconstitutionally cruel or unusual (US Const, Am VIII; Const 1963, art 1, § 16; MCL 750.520b[2][c]). *People v Brown*, 294 Mich App 377.

CONTRACTS—*See*

ARBITRATION 1

CONTROLLED SUBSTANCES

See, also, CONSTITUTIONAL LAW 3

CRIMINAL LAW 1

MARIJUANA

1. A person facing prosecution for violating Michigan's controlled substances laws may assert an affirmative defense under MCL 333.26428(a) of the Michigan Medical Marihuana Act if a physician has stated that, in the physician's professional opinion, the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; to successfully assert this affirmative defense, the physician's statement must have been made before the person's arrest and before the illegal conduct. *People v Reed*, 294 Mich App 78.
2. A person facing prosecution for violating Michigan's controlled substances laws for using marijuana for medical purposes may assert immunity from prosecution under MCL 333.26424 of the Michigan Medical Marihuana Act, but the person must have been issued and possess a registry identification card before the illegal conduct is committed to be immune from arrest, prosecution, or penalty. *People v Reed*, 294 Mich App 78.
3. There is presumption that a person who is either a registered qualifying patient or a registered primary

caregiver under the Michigan Medical Marihuana Act is engaged in the medical use of marijuana in accordance with the provisions of the act if the person possesses a registry identification card and an amount of marijuana that does not exceed the amount allowed under the act (MCL 333.26424[d]). *People v Bylsma*, 294 Mich App 219.

4. Only one person may possess 12 marijuana plants for each specific registered qualifying patient's medical use of marijuana under the Michigan Medical Marihuana Act; that person is either the patient, if the patient has not specified that a registered primary caregiver be allowed to cultivate his or her marijuana plants, or the patient's primary caregiver, if the patient has specified that the caregiver be allowed to cultivate the patient's marijuana plants; either the registered qualifying patient or the qualifying patient's registered primary caregiver, but not both, may possess the plants for the patient's medical use of marijuana (MCL 333.26426). *People v Bylsma*, 294 Mich App 219.
5. A registered primary caregiver under the Michigan Medical Marihuana Act may not possess marijuana plants that were not grown and cultivated for registered qualifying patients to whom the caregiver is connected to through the Michigan Department of Community Health's registration process; a primary caregiver who violates this provision is not entitled to the presumption in § 4(d) of the act that he or she was engaged in the medical use of marijuana, the immunity provided by § 4(b) of the act, or the affirmative defense provided in § 8 of the act (MCL 333.26424[b] and [d]; MCL 333.26428). *People v Bylsma*, 294 Mich App 219.
6. The Michigan Medical Marihuana Act provides an affirmative defense to prosecution; the defendant has the burden to establish a prima facie case for the affirmative defense by presenting some evidence on all the elements of the defense; if the defendant fails to establish an element of the defense, the defense should not be presented to the jury (MCL 333.26428). *People v Danto*, 294 Mich App 596.

CORROBORATION OF DECLARANTS' STATEMENTS—*See*

EVIDENCE 5

examination, (2) there was an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony, (3) the proponent offers a prior statement that is consistent with the declarant's challenged in-court testimony, and (4) the prior consistent statement was made before the supposed motive to falsify arose (MRE 801[d][1][B]). *People v Mahone*, 294 Mich App 208.

3. Statements made for the purpose of medical treatment are admissible hearsay if they were reasonably necessary for diagnosis and treatment and the declarant had a self-interested motivation to be truthful in order to receive proper medical care, irrespective of whether the declarant sustained any immediately apparent physical injury; in cases of sexual assault, the injuries might be latent, such as contracting a sexually transmitted disease, or psychological in nature and thus not necessarily physically manifested at all, and a sexual assault victim's complete history and a recitation of the totality of the circumstances of the assault are properly considered to be statements made for medical treatment (MRE 803[4]). *People v Mahone*, 294 Mich App 208.
4. A hearsay statement is admissible if (1) the statement purports to narrate, describe, or explain the infliction or threat of physical injury on the declarant, (2) the action in which the evidence is offered is an offense involving domestic violence, (3) the statement was made at or near the time of the infliction or threat of physical injury and not more than five years before the current action or proceeding was filed, (4) the statement was made under circumstances that would indicate its trustworthiness, and (5) the statement was made to a law enforcement officer; a court is not required to calculate or consider the number of hours that elapsed between the time of the charged offense and the time the complainant gave the statements to the police (MCL 768.27c[1]). *People v Meissner*, 294 Mich App 438.
5. A hearsay statement in which a declarant describes to a law enforcement officer a threat or incident of domestic violence inflicted on him or her is admissible if it meets certain temporal requirements and is trustworthy; circumstances relevant to determining trustworthiness include but are not limited to whether the statement was made in contemplation of pending or anticipated litigation

in which the declarant was interested, whether and to what extent the declarant has a bias or motive for fabricating the statement, and whether the statement is corroborated by evidence other than statements that are admissible only under MCL 768.27c; a court is not required to make factual findings regarding these circumstances or to exclude a statement because they have not been established; the statutory reference to statements in contemplation of litigation does not pertain to a domestic violence victim's report of the charged offense but rather to litigation in which the declarant could gain a property, financial, or similar advantage (MCL 768.27c[1], [2]). *People v Meissner*, 294 Mich App 438.

RELEVANT EVIDENCE

6. *People v Cortez*, 294 Mich App 481.
7. All relevant evidence is prejudicial; only unfairly prejudicial evidence may be excluded; unfair prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by the jury; unfair prejudice may arise when considerations extraneous to the merits of the case, such as jury bias, sympathy, anger, or shock, are injected. *People v Danto*, 294 Mich App 596.

EVIDENCE OF DISCRIMINATION—*See*

CIVIL RIGHTS 2

EVIDENCE OF PRIOR SEXUAL CONDUCT—*See*

RAPE 1

EXCESSIVE JUDGMENTS—*See*

JUDGMENTS 1

EXCLUSIONS FROM SCHEDULES OF CONTROLLED SUBSTANCES—*See*

CRIMINAL LAW 1

EXCLUSIONS FROM UNDERINSURANCE BENEFITS—*See*

INSURANCE 3

EXECUTIVE AUTHORITY—*See*

GOVERNMENTAL IMMUNITY 2

GENERAL PROPERTY TAX ACT—*See*

TAXATION 1

GOVERNMENTAL IMMUNITY

EXECUTIVE OFFICIALS

1. Judges, legislators, and the elective or highest appointive executive officials of all levels of government are immune from tort liability for injuries to persons or damage to property if they are acting within the scope of their judicial, legislative, or executive authority; a chief of police is generally recognized as the highest appointive official in a police department; if the duties of an ordinary police officer—such as effecting arrests—are outside the scope of the police chief's executive authority, a police chief acting as an ordinary police officer is not entitled to absolute immunity simply because he or she is also the police chief, even if he or she occasionally performs those ordinary duties, but would be entitled to the immunity provided to governmental employees if all the statutory requirements for that immunity are satisfied (MCL 691.1407[2], [5].) *Petipren v Jaskowski*, 294 Mich App 419.
2. Whether an elective or highest executive official of a level of local government was acting within his or her authority and therefore immune from tort liability depends on (1) the nature of the acts, (2) the position held by the official, (3) the local law defining his or her authority, and (4) the structure and allocation of powers at that particular level of government; the official's motive is irrelevant. *Petipren v Jaskowski*, 294 Mich App 419.

HIGHWAY EXCEPTION

3. Allegations concerning a lack of warning and traffic-control devices or allegations of design defects do not by themselves implicate the highway exception to governmental immunity and the government's duty to repair and maintain a highway within its jurisdiction (MCL 691.1402[1]). *Snead v John Carlo, Inc*, 294 Mich App 343.
4. The appropriate test for determining whether a highway is open for public travel for purposes of the highway exception to governmental immunity is whether under all the circumstances a reasonable motorist traveling along the pertinent section of highway would believe that the high-

by the automobile insurance policy, the phrases "carpool" or "shared-expense carpool" describe an arrangement wherein the associated driving costs are shared, but not necessarily the cars; there is no need for members of the carpool to know each other socially and no requirement that the members of the carpool work at the same exact location. *Pugh v Zefi*, 294 Mich App 393.

deference because the court is in the best position to evaluate the credibility of the witnesses and is in the best position to make an informed decision on the issue of remittitur (MCR 2.611[E][1]). *Price v High Pointe Oil, Co, Inc*, 294 Mich App 42.

JURY INSTRUCTIONS—*See*

CRIMINAL LAW 2

JURY TRIALS—*See*

CRIMINAL LAW 2

KETAMINE—*See*

CRIMINAL LAW 1

LABOR RELATIONS

COLLECTIVE BARGAINING

1. Retirement or pension benefits and the methods of calculating them are mandatory subjects of collective bargaining. *Macomb County v AFSCME Council 25 Locals 411 & 893*, 294 Mich App 149.
2. When a term in a collective-bargaining agreement is unambiguous, a past practice may constitute a term or condition of employment only if it is so widely acknowledged and mutually accepted that it amends the contract, that is, that the parties had a meeting of the minds with respect to the new term or condition so that there was an agreement to modify the contract; if the term is unambiguous, a tacit agreement that a past practice will continue renders that practice a term or condition of employment that cannot be unilaterally altered. *Macomb County v AFSCME Council 25 Locals 411 & 893*, 294 Mich App 149.

PUBLIC EMPLOYEES

3. A public employer has a duty under the public employment relations act (PERA) to bargain in good faith over the wages, hours, and other terms and conditions of employment; a public employer commits an unfair labor practice when it refuses to bargain in good faith regarding a mandatory subject of collective bargaining, takes unilateral action on the subject absent an impasse in negotiations, or before bargaining unilaterally alters or modifies a term or condition of employment unless the employer has fulfilled its statutory obligation or been

may not grant parole unless there is satisfactory evidence that arrangements have been made for employment, education, or for the prisoner's care if he or she is physically ill or incapacitated and the board has reasonable assurance after considering all of the facts and circumstances that the prisoner will not become a menace to society or to the public safety (MCL 791.233[1][a], [e], [f]). *In re Parole of Elias*, 294 Mich App 507.

4. The parole guidelines quantify the applicable factors that the Parole Board should consider in a parole decision and are intended to inject more objectivity and uniformity into the process in order to minimize recidivism and to prevent improper factors from being considered, such as race; the parole guidelines do not require the board to be absolutely objective; rather, the board must consider all the facts and circumstances, including a prisoner's mental and social attitude, which requires the evaluation of subjective factors; under MCL 791.233e(6), the board may depart from the parole guidelines, but to allow meaningful appellate review there must be substantial and compelling reasons stated in writing for the departure; the reasons justifying departure from the guidelines must be reasons that keenly or irresistibly grab the board's attention and are of considerable worth in deciding whether it should nonetheless deny or grant parole. *In re Parole of Elias*, 294 Mich App 507.
5. *In re Parole of Haeger*, 294 Mich App 549.

PAROLE BOARD—*See*

PAROLE 3, 4, 5

PAROLE GUIDELINES—*See*

PAROLE 4

PAST PRACTICES—*See*

LABOR RELATIONS 2

PERSONAL NOTES—*See*

RECORDS 1

PERSONAL PROPERTY—*See*

GARNISHMENT 1

come falling outside the range of principled outcomes. *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651.

transportation services from the provider (MCL 460.1089). *In re Michigan Consolidated Gas Co's Compliance With 2008 PA 286 & 295*, 294 Mich App 119.

2. Eligible electric customers are exempt from charges that the customer would otherwise incur under the cost-recovery provisions of the Clean, Renewable, and Efficient Energy Act if the customer files a self-directed energy-optimization plan with its electric provider and implements the plan; the charges the customer would otherwise incur as part of the cost-recovery plan refers to the customer's electric-optimization plan costs (Former MCL 460.1093[1], as added by 2008 PA 295). *In re Michigan Consolidated Gas Co's Compliance With 2008 PA 286 & 295*, 294 Mich App 119.

PUNISHMENT FOR CRIMES—*See*

CONSTITUTIONAL LAW 7

QUALIFYING PATIENTS—*See*

CONTROLLED SUBSTANCES 3, 4

RAPE

See, also, CONSTITUTIONAL LAW 7

EVIDENCE 3

CRIMINAL SEXUAL CONDUCT

1. Under Michigan's rape-shield statute, evidence of specific instances of a victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct may not be admitted unless and only to the extent that the judge finds that the proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value; the evidence may only be of the victim's past sexual conduct with the actor or of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease; however, evidence that is not admissible under one of the statutory exceptions to the rape-shield statute may nevertheless be relevant and admissible to preserve a defendant's Sixth Amendment right of confrontation; in determining whether to admit the evidence, a court must consider the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct