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COURT OF APPEALS CASES

GROVES v DEPARTMENT OF CORRECTIONS

Docket No. 302640. Submitted June 10, 2011, at Lansing. Decided December 6, 2011, at 9:00 a.m.

Securus Technologies, Inc., Ralph Groves, an employee of Securus, and four other employees of Securus brought an action in the Ingham Circuit Court against the Department of Corrections, the Department of Technology, Management and Budget, and Public Communications Services, Inc. (PCS), challenging a contract bidding process run by the state defendants. PCS was the winning bidder. Defendants moved for summary disposition. The court, William E. Collette, J., granted the motion, concluding that plaintiffs lacked standing to bring the case. Plaintiffs appealed.

The Court of Appeals *held*:

1. Recent Michigan caselaw uniformly conditions taxpayer standing on the plaintiff taxpayers having suffered some harm distinct from that inflicted on the general public. The individual plaintiffs in this case asserted that they had suffered particular harm because they could lose their jobs at Securus as a result of the contract having been awarded to PCS, but that was not the type of injury contemplated by the standing inquiry given that the individual plaintiffs had no expectancy that the state would award the contract to Securus. Nor did plaintiffs suffer a cognizable injury as members of the general public because even if plaintiffs' factual allegations were true, there would be no increased expenditures by the state as a result of PCS's winning bid.

2. The only circumstance that may provide a basis for an action to review the bidding process is the presence of evidence of fraud, abuse, or illegality, and such an action must be brought by the proper public official.

3. When alleging fraud, the circumstances constituting fraud or mistake must be stated with particularity, although conditions of mind may be alleged generally. In this case, plaintiffs alleged fraud in the bidding process and argued that the fraud claim established standing to seek injunctive relief, but, in addition to plaintiffs' not being the proper party to bring a claim of fraud, plaintiffs' allegations failed to state a claim for fraud because there was no evidence regarding defendants' state of mind and the alleged errors in the

process provided no implication of malice. Further, plaintiffs alleged no cognizable injury arising from the fraud.

4. Under MCL 600.2041(3), an action to prevent the illegal expenditure of state funds may be brought in the names of at least five taxpaying residents. In this case, plaintiffs argued that they had standing as taxpayers seeking the prevention of the illegal expenditure of state funds. However, the expenditures referred to by plaintiffs would occur regardless of the identity of the successful bidder, so standing was not established.

5. To establish standing to seek a declaratory judgment under MCR 2.605, there must be a case of actual controversy. An actual controversy exists when a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his or her legal rights. In this case, a judgment was not necessary to guide plaintiffs' future conduct or preserve their legal rights because the contract had already been awarded to PCS.

6. Under the Michigan Constitution, the right of all individuals, firms, corporations, and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings may not be infringed. An "investigation" is the act or process of investigating, or the condition of being investigated; to "investigate" is to search or examine into the particulars of, or examine in detail. In this case, the state defendants collected information voluntarily provided by bidders as part of a preliminary information gathering process; the passive efforts of the state did not constitute an investigation under Const 1963, art 1, § 17. Because plaintiffs failed to state a claim for fraud, declaratory judgment, or a constitutional violation, and otherwise had no standing to object to the outcome of the bidding process, the trial court properly granted summary disposition.

Affirmed.

1. ACTIONS — STANDING — PUBLIC CONTRACTS.

To have taxpayer standing, a taxpayer must have suffered some harm distinct from that inflicted on the general public; the fact that an individual may lose his or her job because the individual's employer failed to secure the winning bid on a public contract is not the type of injury contemplated by the standing inquiry because bidders for public contracts generally have no expectancy in the contract to be awarded.

2. ACTIONS — STANDING — PUBLIC CONTRACTS — FRAUD.

The only circumstance that may provide a basis for an action to review the bidding process for a public contract is the presence of

evidence of fraud, abuse, or illegality; such an action must be brought by the proper public official.

3. CONSTITUTIONAL LAW — FAIR AND JUST TREATMENT — INVESTIGATIONS.

Under the Michigan Constitution, the right of all individuals, firms, corporations, and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings may not be infringed; an "investigation" is the act or process of investigating, or the condition of being investigated; to "investigate" is to search or examine into the particulars of, or examine in detail; the passive collection of information by the state from voluntary bidders for a state contract as part of a preliminary information gathering process does not constitute an investigation (Const 1963, art 1, § 17).

Varnum LLP (by *Bryan R. Walters*) for Ralph Groves, Helen McCoy, William Scott, Michael Schnurer, Michael Stump, and Securus Technologies, Inc.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Matthew C. Keck* and *Jennifer M. Jackson*, Assistant Attorneys General, for the Department of Corrections and the Department of Technology, Management and Budget.

Dykema Gossett PLLC (by *Gary P. Gordon*, *Leonard C. Wolfe*, and *Courtney F. Kissel*) for Public Communications Services, Inc.

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

MARKEY, J. Plaintiffs appeal by right from an order granting defendants summary disposition and dismissing plaintiffs' case for lack of standing.[1] Plaintiffs challenged a contract bidding process run by the Department of

[1] Intervening plaintiffs are not parties to this appeal. Consequently, when referring to "plaintiffs" in this opinion, we mean only Securus Technologies, Inc., and the five individual plaintiffs who are identified as its employees.

Corrections (DOC) and the Department of Technology, Management and Budget (DTMB; collectively, the state). We affirm.

The DTMB issued a request for proposal (RFP) on behalf of the DOC, soliciting proposals for the installation and maintenance of inmate telephone systems (ITS) at the DOC's facilities. The state would not directly pay the ITS provider but would expend funds administering the contract and monitoring inmate use of the system. Seven companies submitted timely bids, including plaintiff Securus Technologies, Inc., and defendant Public Communications Services, Inc. (PCS). A committee was to recommend the bidder who offered the best value in terms of technical criteria and price. Plaintiffs claim that the committee allowed PCS to alter its pricing proposal after the deadline without granting a similar opportunity to other bidders. Plaintiffs further claim that the committee erred in a number of ways in evaluating the bid proposals. PCS won the contract, and plaintiffs filed suit requesting an order nullifying the contract and requiring a rebid.

I. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Whether a party has standing is a question of law subject to review de novo. *Manuel v Gill*, 481 Mich 637, 642; 753 NW2d 48 (2008). Questions of statutory interpretation are also subject to review de novo. *Id.* at 643.

II. STANDING

The general rule regarding standing is set forth in *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010) (*LSEA*):

> [A] litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.

Michigan jurisprudence has never recognized that a disappointed bidder such as Securus has the right to challenge the bidding process. See *Talbot Paving Co v Detroit*, 109 Mich 657; 67 NW 979 (1896), and *Rayford v Detroit*, 132 Mich App 248, 256-257; 347 NW2d 210 (1984).

Plaintiffs first argue that common law allows taxpayers a cause of action to enforce Michigan's public bidding requirements; therefore, the individual plaintiffs have the requisite standing. Although early cases appear to support this position, see, e.g., *Berghage v Grand Rapids*, 261 Mich 176, 177; 246 NW 55 (1933), more recent cases uniformly condition taxpayer standing on the plaintiff taxpayers having suffered some harm distinct from that inflicted on the general public. *LSEA*, 487 Mich at 372; *Waterford Sch Dist v State Bd of Ed*, 98 Mich App 658, 662; 296 NW2d 328 (1980). Plaintiffs have not alleged a cognizable injury. There is no allegation in the complaint that Securus would have won the contract but for the claimed errors in the bid evaluations. Indeed, when the government has broad discretion to choose its contractors, a bidder has no expectancy in the contract to be awarded. See *Cedroni Assoc, Inc v Tomblinson, Harburn Assoc, Architects & Planners, Inc*, 290 Mich App 577, 590; 802 NW2d 682

(2010) (MURPHY, C.J.); *id*. at 621-624 (K. F. KELLY, J., dissenting); see also *Trepel v Pontiac Osteopathic Hosp*, 135 Mich App 361, 378; 354 NW2d 341 (1984). The committee evaluating the bids at issue here had substantial discretion to determine their technical and financial merits.

Plaintiffs alleged that all taxpayers were harmed by the faulty process and that the individual plaintiffs suffered particular harm because they could lose their jobs. This alleged harm is not the type of injury contemplated by the standing inquiry. The individual plaintiffs had no expectancy that the state would award the contract to their employer. Moreover, the state cannot control the personnel decisions of bidders for its contracts. Indeed, if this were considered a sufficient injury, the general rule that a disappointed bidder does not have standing would be completely eliminated. Disappointed bidders could simply threaten to fire an employee if they did not win the contract and thereby claim standing to bring suit.

Further, even if plaintiffs' factual allegations are true, there is no harm to the general public. There will be no increased expenditures by the state that will have an impact on taxpayers, including the taxpayer plaintiffs. Additional costs of the winning bid will instead be charged only to inmates and the people they call from prison. Plaintiffs, either as individuals or as members of the general public, have not suffered a cognizable injury.

In fact, while they ostensibly seek to rectify a public wrong, in reality, as employees of the disappointed bidder for a government contract, plaintiffs seek to further their own interests and circumvent the century-old rule that denies standing to disappointed bidders to challenge the discretionary award of a public contract.

Talbot, 109 Mich at 661-662; *Rayford*, 132 Mich App at 256. "Though the act accepting the second [lowest] bid may have been against the interest of the citizens, certainly the plaintiff[, the disappointed bidder,] could have no action to redress that wrong and injury." *Talbot*, 109 Mich at 662. The rule recognizes that competitive bidding on public contracts is designed for the benefit of taxpayers and not those seeking the contract. *Id*.; *Rayford*, 132 Mich App at 256. Put differently, the purpose of competitive bidding is to guard against favoritism, fraud, corruption, and "to secure the best work at the lowest price practicable . . . ." *Lasky v City of Bad Axe*, 352 Mich 272, 276; 89 NW2d 520 (1958) (quotation marks and citation omitted). What is in the public interest must be assessed by weighing numerous factors, of which, price will be one of many that may affect that determination. See e.g., *Cedroni Assoc*, 290 Mich App at 591-593 (concluding that under the school district's fiscal management policy, the district was required to select the lowest *responsible* bidder), and *Berghage*, 261 Mich at 181-182 (concluding that the defendant city was not required to select the lowest bidder for a printing contract when a higher bidder had a larger circulation).

Litigation aimed at second-guessing the exercise of discretion by the appropriate public officials in awarding a public contract will not further the public interest; it will only add uncertainty, delay, and expense to fulfilling the contract. See *Great Lakes Heating, Cooling, Refrigeration & Sheet Metal Corp v Troy Sch Dist*, 197 Mich App 312, 314-315; 494 NW2d 863 (1992). The only circumstance that may provide a basis for an action to review the bidding process is the presence of evidence of "fraud, abuse, or illegality." *Id*. at 315. But such an action must be brought by the proper public official. *Rayford*, 132 Mich App at 257, citing *Attorney*

General ex rel Allis-Chalmers Co v Public Lighting Comm of Detroit, 155 Mich 207; 118 NW 935 (1908). Opening the floodgates of litigation to every disappointed bidder that believes it has been aggrieved by the bidding process would serve the interests of neither the government nor the citizen-taxpayers that the bidding process is designed to advance. *Great Lakes Heating*, 197 Mich App at 315.

Plaintiffs further assert that the allegations of fraud set forth in the complaint provide both the taxpayers and Securus with standing to seek injunctive relief under the exception discussed in *Great Lakes Heating*. We conclude, however, that in addition to not being proper parties, *Rayford*, 132 Mich App at 257, plaintiffs have failed to state a claim for fraud. When alleging fraud, "the circumstances constituting fraud or mistake must be stated with particularity," although "conditions of mind may be alleged generally." MCR 2.112(B). Although plaintiffs state with particularity a number of errors the state allegedly made during the bidding process, these allegations do not constitute fraud without evidence of defendants' state of mind. See *Hord v Environmental Research Institute of Mich (After Remand)*, 463 Mich 399, 404; 617 NW2d 543 (2000). Plaintiffs do not allege that defendants have agreed that they made mistakes, nor is there any reason to think that defendants intended to damage Securus's bid.

The alleged errors themselves provide no implication of malice. For example, plaintiffs complain that defendants considered a noncomparable system that Securus operates in another state. But it is within the state's authority to determine whether a system is similar enough to consider how well that system has worked when evaluating a new proposal. Plaintiffs also com-

plain that they did not receive credit for their past satisfactory work for the DOC, but it is for the DOC to determine the value of any prior work and whether and to what extent the prior working relationship experience was positive. In the absence of allegations that the state secretly agreed with plaintiffs' assertions and deliberately sabotaged plaintiffs' bid, plaintiffs fail to allege that defendants had the culpable mental state necessary for fraud. In addition, a claim of fraud requires the plaintiff to have suffered some injury. *Hord*, 463 Mich at 404. Plaintiffs in this case have not properly alleged any cognizable injury.

Plaintiffs next contend that this suit is authorized by MCL 600.2041(3). Under that subsection, "an action to prevent the illegal expenditure of state funds or to test the constitutionality of a statute relating thereto may be brought" in the names of at least five taxpaying residents. *Id.* The present case is not testing the constitutionality of a statute. As for the expenditure of funds, in *House Speaker v Governor*, 443 Mich 560, 573; 506 NW2d 190 (1993), our Supreme Court held that a lawsuit seeking to enjoin the creation of a new executive agency concerned the expenditure of state funds because running the agency would necessarily involve expenditures. In this case, even if successful, litigation will not prevent public expense. Plaintiffs argue that the state will be forced to expend funds administering the contract and monitoring inmate calls, but these expenses will be necessary no matter which bidder is awarded the contract. Plaintiffs also allege that the transition to a new ITS provider will cost the state money. The documentation submitted with the complaint shows that the contractor will bear the cost of installing a new system, not the state; therefore, plaintiffs do not have standing under MCL 600.2041(3).

Plaintiffs next seek standing under MCR 2.605. "[W]henever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment." *LSEA*, 487 Mich at 372. MCR 2.605(A)(1) requires "a case of actual controversy" within the trial court's jurisdiction brought by an interested party. The key is that plaintiffs " ' "plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised." ' " *LSEA*, 487 Mich at 372 n 20, quoting *Associated Builders & Contractors v Dep't of Consumer & Indus Servs Dir*, 472 Mich 117, 126; 693 NW2d 374 (2005),[2] quoting *Shavers v Attorney General*, 402 Mich 554, 589; 267 NW2d 72 (1978). The "actual controversy" requirement prevents courts from involving themselves in hypothetical issues, but it does not prohibit them from deciding issues before the occurrence of an actual injury. *Shavers*, 402 Mich at 589. An " 'actual controversy' exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights." *Id.* at 588.

In this case, a judgment is not necessary to guide plaintiffs' future conduct or preserve their legal rights. Plaintiffs have not suffered a cognizable injury and will not suffer such an injury in the future because the contract has already been awarded to PCS; consequently, we find no actual controversy. The declaratory judgment rule does not provide plaintiffs with standing.

Plaintiffs next submit that the Legislature intended to confer standing on taxpayers for issues brought under the bidding provisions of the Management and Budget Act, MCL 18.1101 *et seq*., as well as restrictions on public officials' accepting gifts to influence their official actions, MCL 15.342. Plaintiffs reiterate the

[2] Overruled in part by *LSEA* on other grounds, 487 Mich at 371 n 18.

contention that taxpayers have standing to enforce Michigan's bidding requirements because the requirements are meant to benefit the general public. As discussed earlier in this opinion, there is no such taxpayer standing under current Michigan law. *LSEA*, 487 Mich at 372. Plaintiffs cite no caselaw to show that the facts in this case are somehow different. "A party may not merely announce 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).

III. THE FAIR AND JUST TREATMENT CLAUSE

Plaintiffs next maintain that they stated a cause of action under Const 1963, art 1, § 17, which provides: "The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed." Securus alleges that it was unfairly treated and that the bidding process constitutes an investigation. This Court considered the meaning of the term "investigations" in the context of the Fair and Just Treatment Clause in *Carmacks Collision, Inc v Detroit*, 262 Mich App 207; 684 NW2d 910 (2004). The Court held that the plaintiff had failed to allege an investigation. The *Carmacks* Court found compelling the discussion of the term "investigation" in *Messenger v Dep't of Consumer & Indus Servs*, 238 Mich App 524; 606 NW2d 38 (1999), which considered the meaning of that term in the context of a statute. Examining a dictionary to determine the common meaning of "investigation," the *Messenger* Court defined the term as "the act or process of investigating or the condition of being investigated" and noted that to "investigate" means "to search or examine into the

particulars of; examine in detail." *Id.* at 534 (quotation marks and citation omitted). The *Messenger* Court did not find that there had been an investigation. The defendant in that case did no more than collect documents from public agencies and monitor a criminal proceeding against the plaintiff. *Id.* at 534-535. The Court found that these passive efforts were merely preparatory to a formal investigation. *Id.* at 535. The defendant did not "engage in a searching inquiry for ascertaining facts, nor did it conduct a detailed or careful examination of the events surrounding plaintiff's alleged misconduct." *Id.* at 534.

In *Carmacks*, the defendant merely asked for certain information and documentation to judge the bidders' qualifications, including proof of residency and that bidders' taxes were up-to-date. *Carmacks*, 262 Mich App at 211. It did not closely scrutinize the plaintiff or its activities. *Id.* "This was merely a preliminary information gathering process in which plaintiff voluntarily participated by submitting a bid. The relatively passive efforts by defendant in gathering innocuous and basic information from prospective bidders do not rise to the level of an 'investigation' as that term is properly understood." *Id.* at 211-212. The Court therefore held that the plaintiff had failed to state a claim for a violation of the Fair and Just Treatment Clause. *Id.* at 212.

We find the present case factually similar to *Carmacks*. The bidders voluntarily provided data and references. Defendants' efforts consisted of gathering and evaluating information the bidders and the bidders' references provided; consequently, Securus has failed to state a claim for a violation of the Fair and Just Treatment Clause.

Because plaintiffs failed to state a claim for fraud, declaratory judgment, or a constitutional violation, and otherwise had no standing to object to the outcome of the bidding process, we agree that summary disposition was appropriate under MCR 2.116(C)(5) and (8).[3]

We affirm.

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

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[3] The trial court's decision appears to be based exclusively on MCR 2.116(C)(5), but this Court may affirm for reasons other than those stated by the court below when there is sufficient support in the record. *Brown v Drake-Willock Int'l, Ltd*, 209 Mich App 136, 143; 530 NW2d 510 (1995).

HILLS AND DALES GENERAL HOSPITAL v PANTIG

Docket No. 298237. Submitted August 10, 2011, at Detroit. Decided December 6, 2011, at 9:05 a.m.

Hills and Dales General Hospital filed an action in the Tuscola Circuit Court against Liberata J. Pantig, M.D., Avelina M. Oxholm-Dababneh, D.O., and Huron Memorial Hospital, doing business as Huron Medical Center, claiming that all three defendants had violated a covenant to not compete. In 2007, both doctors signed employment contracts with Hills and Dales that contained a clause in which they agreed that in the event of separation from employment, they would not practice medicine within a 35-mile radius of Cass City, Michigan. Both doctors had thereafter begun working for Huron Medical, which Hills and Dales claimed to be within the prohibited 35-mile radius. Huron Medical and Oxholm-Dababneh moved for a change of venue to Huron County, arguing that Huron Medical could not be sued in Tuscola County because it did not conduct business in that county. Pantig subsequently joined the motion. The court, Joslyn Patrick Reed, J., denied the motion, reasoning that Huron Medical had conducted business in Tuscola County through two joint ventures located in Tuscola County and that defendants had waived any objection to venue because the motion was not timely under MCR 2.221. Huron Medical and Oxholm-Dabaneh appealed by leave granted, and Pantig cross-appealed.

The Court of Appeals *held*:

1. Under MCR 2.221(A), a motion for change of venue must be filed before or at the time the defendant files an answer. The circuit court erred by finding that the defendants' motion for change of venue was untimely. In accordance with MCR 2.221(A), Huron Medical and Oxholm-Dababneh appropriately filed their answers to the complaint and their motion for change of venue on the same day. Defendants did not waive their venue challenge by failing to schedule the venue motion hearing in an expeditious manner. The delay was mainly related to Pantig's initial removal of the case to federal court and settlement efforts.

2. Under MCL 600.1621(a), venue is proper in the county in which (1) a defendant resides, (2) a defendant has a place of

business, (3) a defendant conducts business, or (4) the registered office of a defendant corporation is located. In Michigan, a corporation is an entity distinct and separate from its owners even when it is owned by a single individual. For venue to be proper, there must be a true business connection between the defendant and the selected venue. Conducting business does not include the performance of acts merely incidental to the business in which the defendant is ordinarily engaged. Moreover, venue lies in the county where a defendant conducts its usual and customary business, and the activity must be of such a nature as to localize the business and make it an operation within the county. Huron Medical's registered office was in Huron County, which was where the hospital maintained a place of business and conducted its systematic and regular activities. Huron Medical did not conduct business in Tuscola County even though it had percentage interests through stock ownership in two Tuscola County-based medical enterprises, one a limited liability corporation and the other a nonprofit corporation. As a shareholder in these medical enterprises, Huron Medical was a corporate entity separate and distinct from them. There was no evidence that Huron Medical controlled the daily business affairs of the joint venture medical enterprises, and its stock ownership in those companies did not constitute "conducting business" within the meaning of MCL 600.1621(a). There was no true business connection between Huron Medical and Tuscola County because it neither owned nor operated any medical facility in that county, its solicitation of business for the separate medical entities did not amount to conducting business, and the business of those medical enterprises may not be attributed to Huron Medical.

Reversed and remanded.

1. VENUE — CORPORATIONS — CONDUCTING BUSINESS — TRUE BUSINESS CONNECTION.

Under MCL 600.1621(a), venue is proper in the county in which (1) a defendant resides, (2) a defendant has a place of business, (3) a defendant conducts business, or (4) the registered office of a defendant corporation is located; there must be a true business connection between the defendant and the selected venue in order for venue to be proper; for purposes of determining venue, conducting business does not include the performance of acts merely incidental to the business in which the defendant is ordinarily engaged; venue lies in the county where the defendant conducts its usual and customary business, and the activity must be of such a nature as to localize the business and make it an operation within the county.

2. VENUE — CORPORATIONS — CONDUCTING BUSINESS — SEPARATE ENTERPRISE.

In Michigan, a corporation is an entity distinct and separate from its owners even when it is owned by a single individual; under MCL 600.1621(a), ownership of a percentage interest in a separate enterprise, without more, does not qualify as "conducting business" for purposes of establishing venue; in the context of establishing venue, the conduct of a separate entity may not be attributed to another entity through its percentage ownership interest.

Miller Canfield Paddock and Stone, PLC (by *Carolyn Pollock Cary*), for Hills and Dales General Hospital.

Rogers Mantese & Associates, P.C. (by *Theresamarie Mantese*, *Rolf E. Lowe*, and *Gregory M. Nowakowski*), for Liberata J. Pantig.

Smith Haughey Rice & Roegge (by *Calvin Sterk* and *Brian J. Kilbane*) for Huron Medical Center and Avelina M. Oxholm-Dababneh.

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

PER CURIAM. Hills and Dales General Hospital brought this action against the Huron Medical Center and two physicians, claiming that all three violated a covenant not to compete. Not surprisingly, Hills and Dales elected to file suit in Tuscola County, its home turf. The Huron Medical Center maintains its principal place of business in nearby Huron County and strenuously objected to the Tuscola County venue. The circuit court found that Huron Medical's partial ownership of two Tuscola County-based health-care businesses justified Hills and Dales' venue selection. We reverse and remand.

I

In 2007, Hills and Dales hired defendants Avelina M. Oxholm-Dababneh, D.O., and Liberata J. Pantig, M.D., "to

provide medical services in the field of Internal Medicine at the Hospital[.]" Both doctors signed employment agreements containing identical covenants not to compete. The covenant provided that "[i]n the event of separation from Hills & Dales General Hospital, Physician will not practice medicine within a 35-mile radius of Cass City, Michigan, unless this requirement is waived in writing by the hospital." In July 2009, Hills and Dales filed suit in Tuscola County against Oxholm-Dababneh, Pantig, and Huron Medical, averring that Huron Medical had recruited and employed Oxholm-Dababneh and Pantig in violation of the covenant.

In August 2009, Huron Medical and Oxholm-Dababneh timely answered the complaint and concomitantly filed a motion for change of venue to Huron County. A few days later, Pantig removed the matter to federal court, invoking federal-question jurisdiction. Hills and Dales moved to remand the case to the state court; Huron Medical and Oxholm-Dababneh joined in Pantig's removal petition. On October 26, 2009, Judge Thomas L. Ludington of the United States District Court for the Eastern District of Michigan granted Hills and Dales' remand motion.

When the case returned to the Tuscola Circuit Court, the parties spent several months fighting legal battles unconnected with venue. In January 2010, Hills and Dales finally responded to defendants' venue motion, and on May 3, 2010, the circuit court entertained oral argument concerning venue.[1] The parties focused their dispute on whether Huron Medical could be sued in Tuscola County.[2] In support of its venue selection, Hills

[1] On November 25, 2009, Pantig filed a notice that she joined and concurred with her codefendants' motion for change of venue.

[2] Oxholm-Dababneh and Pantig reside in Oakland and Lapeer counties, respectively, and no evidence suggests that either conducted business in Tuscola County at the time the suit was filed.

and Dales pointed out that Huron Medical "conducted business" in two "joint ventures" located in Tuscola County, Thumb MRI Center L.L.C. and Thumb Area Dialysis Center, a nonprofit corporation. Huron Medical countered that Thumb MRI and Thumb Area Dialysis "are separate legal entities" in which Huron Medical merely held stock. Huron Medical's counsel queried, "If stockholders could be dragged in for venue, do you hold any GM stock? Can you be sued in Wayne County? Do you hold any stock in Perrigo? Can you be sued in Allegan County? I think not."

In a written opinion and order, the circuit court denied the motion for change of venue, reasoning:

> Tuscola County is an appropriate venue since Huron Medical conducts business in Tuscola County. Huron Medical advertises in Tuscola County as well as provides medical care as part of Thumb MRI and Thumb Area Dialysis—both located in Tuscola County. Furthermore, the motion for change of venue is not timely under MCR 2.221. Defendants filed answers already and cannot claim that the motion is based on facts that could not with reasonable diligence have been known. Therefore Defendants have waived an objection to venue.

This Court granted Huron Medical and Oxholm-Dababneh's application for leave to appeal. *Hills & Dales Gen Hosp v Pantig*, unpublished order of the Court of Appeals, entered June 29, 2010 (Docket No. 298237). Pantig cross-appealed.

II

We first consider the timeliness of defendants' venue motion by reviewing de novo the circuit court's interpretation and application of the relevant court rule. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). MCR 2.221(A) provides, "A motion for change of

venue must be filed before or at the time the defendant files an answer." Huron Medical and Oxholm-Dababneh filed their motion to change venue on August 14, 2009, the same day they answered the complaint. We decline plaintiff's invitation to hold that defendants waived their venue challenge by failing to more expeditiously schedule the motion for hearing. The removal proceedings initiated by Pantig accounted for a substantial portion of the delay in obtaining a venue ruling from the circuit court. After the federal court remanded the case, unsuccessful settlement efforts consumed additional time. While we encourage early resolution of venue disputes, Huron Medical and Oxholm-Dababneh filed their motion with their answer, in accordance with MCR 2.221(A). Thus, the circuit court erred by finding defendants' change of venue motion untimely.

III

We now turn to the propriety of Tuscola County venue. We review for clear error a circuit court's decision to grant or deny a motion to change venue. *Shock Bros, Inc v Morbark Industries, Inc*, 411 Mich 696, 698-699; 311 NW2d 722 (1981). Clear error exists when some evidence supports the circuit court's finding, but a review of the entire record leaves this Court with the definite and firm conviction that the circuit court made a mistake. *Schadewald v Brulé*, 225 Mich App 26, 41; 570 NW2d 788 (1997).

The parties agree that MCL 600.1621(a) governs whether Hills and Dales selected a proper venue. The statute provides that venue is proper in "[t]he county in which a defendant resides, has a place of business, or conducts business, or in which the registered office of a defendant corporation is located." Huron Medical's registered office is situated in Huron County, where the

hospital maintains a place of business. Hills and Dales contends that Huron Medical's participation in two Tuscola County-based medical enterprises, the Thumb Area Dialysis Center and the Thumb MRI Center L.L.C., qualifies as "conducting business" in Tuscola County. Huron Medical owns an 8 percent interest in Thumb Area Dialysis and a 10 percent interest in Thumb MRI. According to its website, Thumb Area Dialysis "is a joint venture between Bay Regional Medical Center, Hills & Dales General Hospital, Huron Medical Center, MidMichigan Health and Scheurer Hospital." Several of the same hospitals also own shares in Thumb MRI.

Ascertaining proper venue in a case involving a natural person presents little difficulty. A person's residence is generally easy to establish, as are the locations of a person's business activities. But determining venue in an action against a corporation can be troublesome. As Justice Felix Frankfurter observed: "When the litigants are natural persons the conceptions underlying venue present relatively few problems in application. But in the case of corporate litigants these procedural problems are enmeshed in the wider intricacies touching the status of a corporation in our law." *Neirbo Co v Bethlehem Shipbuilding Corp, Ltd*, 308 US 165, 168; 60 S Ct 153; 84 L Ed 167 (1939).

A corporation is its own "person" under Michigan law, an entity distinct and separate from its owners, even when a single shareholder holds ownership of the entire corporation. *Jones v Martz & Meek Constr Co, Inc*, 362 Mich 451, 455; 107 NW2d 802 (1961); *Bourne v Muskegon Circuit Judge*, 327 Mich 175, 191; 41 NW2d 515 (1950); *Foodland Distrib v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996). Michigan law presumes that parent and subsidiary corporations con-

stitute separate legal entities. *Seasword v Hilti, Inc* (*After Remand*), 449 Mich 542, 547; 537 NW2d 221 (1995). Moreover, Michigan law does not recognize the existence of a "joint venture" or "joint enterprise" as a "distinct commercial business entity." *First Pub Corp v Parfet*, 468 Mich 101, 106-107; 658 NW2d 477 (2003). The rules respecting the corporate form apply equally to limited liability corporations. See *Florence Cement Co v Vettriano*, 292 Mich App 461; 468-469; 807 NW2d 917 (2011). Thus, Huron Medical, as a shareholder in the limited liability corporation of Thumb MRI and the nonprofit corporation of Thumb Area Dialysis, is a corporate entity separate and distinct from both clinics.

In essence, Hills and Dales asserts that we should pierce the corporate veil of the two Tuscola County clinics and impose on Huron Medical a form of "vicarious venue." No evidence suggests that Huron Medical controls the daily business affairs of the two Tuscola County clinics or that the clinics exist only as "alter egos" or "mere instrumentalities" of Huron Medical. *Id*. at 469; *Foodland Distrib*, 220 Mich App at 456-457. We discern no legal or factual basis for disregarding Huron Medical's separate corporate form and decline to impute to Huron Medical the business activities of the Tuscola County clinics. Moreover, we share the objection of Huron Medical's counsel to venue premised on shareholder status. Equating stock ownership with "conducting business" expands the statutory language beyond the plain meaning of the term. Although Huron Medical holds stock in two health facilities situated in Tuscola County, we hold that it conducts no business in Tuscola County and that the circuit court clearly erred by concluding otherwise.

Hills and Dales insists that it properly fixed venue in Tuscola County because Huron Medical's website

"takes credit" for the work of Thumb MRI and Thumb Area Dialysis. According to Hills and Dales, Huron Medical's participation in the two Tuscola County clinics demonstrates "real presence" in the county and evidences "systematic, continuous business dealings" sufficient to support venue. Hills and Dales premises its flawed argument on a line of cases decided by this Court that *limit* the reach of the language "conducting business" found in MCL 600.1621(a).

In *Saba v Gray*, 111 Mich App 304, 312-313; 314 NW2d 597 (1981), the Court examined whether a real estate agent assigned to sell property in Monroe County could be sued in Wayne County. The agent advertised in newspapers circulating in Wayne County and had received a single referral from Wayne County. *Id.* at 314. This Court determined that the defendant could not be "properly characterized as conducting business in Wayne County," explaining that "the purpose behind the venue statute [is] that an action should be instituted in a county in which the defendant has some real presence such as might be shown by systematic or continuous business dealings inside the county." *Id.* at 314-315.

Subsequently, this Court fleshed out *Saba*'s "systematic and continuous business dealings" standard. In *Pulcini v Doctor's Clinic, PC*, 158 Mich App 56; 404 NW2d 702 (1987), the plaintiff sued a physician and his professional corporation in Wayne County based solely on the physician's ability to admit patients to a Wayne County hospital, a privilege he had never actually exercised. Relying on *Saba*, this Court held the physician's professional contact with Wayne County inadequate to support that he conducted business there because the doctor lacked any " 'real presence' or systematic or continuous business dealings in Wayne

County." *Id.* at 59. The Court elaborated: "Conducting business does not include the performance of acts merely incidental to the business in which the defendant is ordinarily engaged." *Id.* In *Chiarini v John Deere Co*, 184 Mich App 735; 458 NW2d 668 (1990), the plaintiffs suffered snowblower-related injuries in Macomb County and sued the defendant snowblower distributor in Wayne County. The plaintiffs defended their selection of Wayne County venue by noting the presence of several independent dealers within Wayne County selling John Deere equipment and the defendant's contribution to the dealerships' advertising and insurance expenses. *Id.* at 737. In rejecting the plaintiffs' argument, this Court adopted a rule established by the Illinois Supreme Court in *Stambaugh v Int'l Harvester Co*, 102 Ill 2d 250; 464 NE2d 1011 (1984), that proper venue lies in the county where a defendant conducts "its usual and customary business . . . . The activity must be of such a nature as to localize the business and make it an operation within the county." *Chiarini*, 184 Mich App at 738. Applying *Stambaugh*, the Court found the John Deere Company's periodic visits and economic contributions to Wayne County snowblower dealerships insufficient to establish venue. *Id.* at 738-739.

We interpret this line of cases as requiring a true business connection between the defendant and the selected venue. Huron Medical, a full-service hospital, carries out its systematic and regular activities in Huron County. It neither owns nor operates any medical facility in Tuscola County. Huron Medical's solicitation of business for entirely separate entities in which it holds stock does not amount to conducting business. In *Chiarini*, this Court declined to treat the John Deere Company and independent John Deere dealers as a single business entity. We likewise reject that the business of the Tuscola County clinics may be attributed to

Huron Medical. As such, Huron Medical does not regularly or systematically conduct business in Tuscola County.

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

MARKEY, P.J., and SAAD and GLEICHER, JJ., concurred.

PARISE v DETROIT ENTERTAINMENT, LLC

Docket No. 295183. Submitted September 13, 2011, at Detroit. Decided September 20, 2011. Approved for publication December 6, 2011, at 9:10 a.m. Leave to appeal denied, 491 Mich 915.

Italo M. Parise brought an action in the Wayne Circuit Court, seeking to recover his gambling losses at Detroit Entertainment, L.L.C., doing business as MotorCity Casino. Parise alleged that he lost more than $600,000 at the casino between 2002 and 2009 and asserted that he had a right to recover his gambling losses under MCL 600.2939(1). The parties filed cross-motions for summary disposition. MotorCity Casino argued that under § 3(3) of the Michigan Gaming Control and Revenue Act (MGCRA), MCL 432.203(3), Parise was precluded from relying on MCL 600.2939(1) to recover his losses. The court, Michael F. Sapala, J., agreed and granted MotorCity's motion. Parise appealed.

The Court of Appeals *held*:

When two statutes are *in pari materia* but conflict with one another on a particular issue, the more specific statute controls over the more general statute. In addition, a more recently enacted law takes precedence over an older statute, especially when one statute is both the more specific and the more recent. MCL 600.2939(1) is a general statute that allows a party to recover for the loss of money or goods through gaming. The MGCRA, to which MotorCity Casino is subject as a Detroit casino licensee, takes precedence over the gaming-loss-recovery provision in MCL 600.2939(1) because it is a more specific act that applies directly to legalized non-Indian casino gambling in Detroit. MCL 432.203(3) provides that any law inconsistent with the MGCRA does not apply to casino gaming as provided for by the MGCRA. Under MCL 432.203(3), MotorCity Casino would not be subject to liability for a patron's gambling losses because it would be inconsistent with the legalization of casino gambling provided for by the MGCRA. The circuit court properly concluded that Parise, as a participant in legalized casino gambling, could not claim the remedy provided by MCL 600.2939(1).

Affirmed.

STATUTES — GAMING — MICHIGAN GAMING CONTROL AND REVENUE ACT — RECOVERY OF GAMBLING LOSSES.

MCL 600.2939(1), which allows a party to recover for the loss of money or goods through gaming, does not apply to casino gaming in Detroit; § 3(3) of the Michigan Gaming Control and Revenue Act (MGCRA), MCL 432.203(3), provides that any law inconsistent with the MGCRA does not apply to casino gaming in Detroit as provided for by the MGCRA; the MGCRA applies specifically to legalized non-Indian casino gambling in Detroit and a casino operating in Detroit under the MGCRA is not subject to liability under MCL 600.2939(1) for a patron's gambling losses because it would be inconsistent with the legalization of casino gambling.

Italo M. Parise *in propria persona*.

Nemeth Burwell, P.C. (by *Patricia Nemeth* and *Deborah Brouwer*), for Detroit Entertainment, L.L.C.

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM. Plaintiff brought this action to recover his gambling losses at defendant's casino pursuant to MCL 600.2939(1). The parties filed cross-motions for summary disposition. The trial court denied plaintiff's motion and granted defendant's motion under MCR 2.116(C)(8). Plaintiff now appeals as of right and we affirm.

Plaintiff alleges that between 2002 and 2009, he lost more than $600,000 gambling at defendant MotorCity Casino in Detroit. Plaintiff filed this action asserting a right to recover his gambling losses under MCL 600.2939(1). In lieu of filing an answer to plaintiff's complaint, defendant, a casino subject to the Michigan Gaming Control and Revenue Act (MGCRA), MCL 432.201 *et seq*., filed a motion for summary disposition under MCR 2.116(C)(8). Defendant argued that § 3(3) of the MGCRA, MCL 432.203(3), precluded plaintiff from relying on MCL 600.2939(1) to recover his losses

incurred while legally gambling at MotorCity Casino. The trial court agreed and granted defendant's motion.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Newton v Bank West*, 262 Mich App 434, 437; 686 NW2d 491 (2004). The motion should be granted only if no factual development could justify recovery. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006).

This appeal also involves a question of statutory interpretation, which is reviewed de novo as a question of law. *Klooster v City of Charlevoix*, 488 Mich 289, 295; 795 NW2d 578 (2011). The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Booker v Shannon*, 285 Mich App 573, 575; 776 NW2d 411 (2009). "When the Legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself, and judicial construction is not permitted." *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). "Courts must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory." *Id.* "Statutes that relate to the same subject matter or share a common purpose are *in pari materia* and must be read together as one law . . . to effectuate the legislative purpose as found in harmonious statutes." *In re Project Cost & Special Assessment Roll for Chappel Dam*, 282 Mich App 142, 148; 762 NW2d 192 (2009). "If two statutes lend themselves to a construction that avoids conflict, that construction should control." *Id.* "When two statutes are *in pari materia* but conflict

with one another on a particular issue, the more specific statute must control over the more general statute." *Donkers v Kovach*, 277 Mich App 366, 371; 745 NW2d 154 (2007). "[T]he rules of statutory construction also provide that a more recently enacted law has precedence over the older statute." *Travelers Ins v U-Haul of Mich, Inc*, 235 Mich App 273, 280; 597 NW2d 235 (1999). "This rule is particularly persuasive when one statute is both the more specific and the more recent." *Id.*

In 1996, Michigan voters passed the ballot initiative Proposal E to allow the operation of up to three casinos in qualifying cities. The Legislature implemented Proposal E by passing the MGCRA to regulate legalized casino gambling in Detroit. Defendant is one of the three casino licensees permitted to operate a casino in Detroit and is subject to the MGCRA. Plaintiff contends that despite the passage of Proposal E and the enactment of the MGCRA, he is entitled to recover his gambling losses from defendant under § 2939(1) of the Revised Judicature Act, MCL 600.2939(1), which provides:

> In any suit brought by the person losing any money or goods, against the person receiving the same, when it appears from the complaint that the money or goods came to the hands of the defendant by gaming, if the plaintiff makes oath before the court in which such suit is pending, that the money or goods were lost by gaming with the defendant as alleged in the complaint, judgment shall be rendered that the plaintiff recover damages to the amount of the said money or goods, unless the defendant makes oath that he did not obtain the same, or any part thereof by gaming with the plaintiff; and if he so discharges himself, he shall recover of the plaintiff his costs; but the plaintiff may at his election, maintain and prosecute his action according to the usual course of proceedings in such actions at common law.

Whereas MCL 600.2939(1) is a general statute that purports to apply to money or goods lost through gaming, the MGCRA is a specific act that governs legalized non-Indian casino gambling in Detroit. It is undisputed that defendant is a Detroit casino licensee subject to the MGCRA. Section 3 of the MGCRA provides that "[a]ny other law that is inconsistent with this act does not apply to casino gaming as provided for by this act." MCL 432.203(3). Subjecting defendant to liability for patrons' gambling losses under MCL 600.2939(1) would be plainly inconsistent with the legalization of casino gambling as provided for by Proposal E and the MGCRA.

Plaintiff contends that Proposal E must be strictly construed to reflect the voters' limited intention of "tolerating" legalized casino gaming in Detroit, without repealing or abrogating any gambling laws except criminal statutes prohibiting casino gambling. Plaintiff contends that the MGCRA provides a restrictive definition of "gaming," see MCL 432.202(x), that is narrower than the common-law definition and therefore has no effect on MCL 600.2939(1), which incorporates the common-law definition. Plaintiff asserts that because the common-law and MGCRA definitions of gaming are distinct, it is possible for a casino patron to engage in "gaming" under MCL 600.2939(1) but not "casino gaming" under the MGCRA. He maintains that in the casino-gambling situation, the house (i.e., the casino licensee) will always be engaged in casino gaming under MCL 432.202(x), but the patron might be engaged in common-law gaming of the type regulated by MCL 600.2939(1). Plaintiff also argues that the MGCRA governs only the casinos, and not the casinos' patrons.

We find no merit in plaintiff's arguments. Plaintiff does not contend that he was engaged in anything other

than statutorily approved casino gaming while gambling in defendant's casino, placing bets against the casino licensee in games approved by the Michigan Gaming Control Board (MGCB). See MCL 432.202(v). Plaintiff's assertion that only the casino licensee, and not the patron, are engaged in casino gambling is untenable. Although plaintiff suggests that casino patrons are not governed by the MGCRA, we note that MCL 432.204(17)(d)(*iii*) clearly provides that the MGCB has the authority to promulgate rules to "[l]icense and regulate persons participating in or involved with casino gaming authorized in this act." As a participant in legalized casino gambling, plaintiff cannot claim the remedy provided by MCL 600.2939(1), which is clearly inconsistent with the MGCRA. MCL 432.203(3). Accordingly, the trial court did not err by ruling that plaintiff had failed to state a claim for relief under MCL 600.2939(1). Summary disposition was properly granted. MCR 2.116(C)(8).

Plaintiff also argues that defendant was not entitled to summary disposition on the ground that he failed to exhaust his administrative remedies under the MGCRA before filing his circuit court complaint. Although defendant argued in its motion for summary disposition that the trial court lacked subject-matter jurisdiction over plaintiff's action because plaintiff had failed to exhaust his administrative remedies with the MGCB, the trial court did not decide this issue. Instead, the trial court dismissed plaintiff's complaint solely for failing to state a legally cognizable claim. In light of our conclusion that plaintiff failed to state a legally cognizable claim for relief under MCL 600.2939(1) and that summary disposition was therefore proper under MCR 2.116(C)(8), it is unnecessary to consider this latter issue.

We likewise need not consider any of the other remaining arguments raised by the parties on appeal.

Affirmed.

RONAYNE KRAUSE, P.J., and CAVANAGH and JANSEN, JJ., concurred.

PEOPLE v ARMISTED

Docket No. 302902. Submitted October 12, 2011, at Detroit. Decided December 6, 2011, at 9:15 a.m.

Jose Armisted pleaded no contest in the Tuscola Circuit Court, Michael J. Matuzak, J., of furnishing a cellular telephone to a prisoner, MCL 800.283a, and was sentenced as a fourth-offense habitual offender, MCL 769.12, to 1 to 10 years' imprisonment. Defendant's plea was conditioned on his ability to appeal his conviction on the basis that the prohibition did not apply because, according to defendant, the person to whom he had given the telephone had been released on parole and had not been in a correctional facility. Defendant appealed by delayed leave granted.

The Court of Appeals *held*:

1. Under MCL 800.283a, a person may not sell, give, or furnish, or aid in the selling, giving, or furnishing of, a cellular telephone or other wireless communication device to a prisoner in a correctional facility, or dispose of a cellular telephone or other wireless communication device in or on the grounds of a correctional facility. Under MCL 800.281a(g), a "prisoner" is a person committed to the jurisdiction of the Department of Corrections who has not been released on parole or discharged. Because the Legislature specifically excluded from the definition of "prisoner" only those persons "released on parole," as opposed to all parolees or all persons on parole, the term "prisoner" includes all parolees who have not been released. Release on parole requires release into the community. In this case, defendant was assigned to an intermediate facility while on parole, and he provided a cellular telephone to another inmate of the facility. Because the inmates at the intermediate facility had not been released into the community, they remained prisoners within the meaning of MCL 800.281a(g) and MCL 800.283a.

2. In relevant part, MCL 800.281a(e) defines a "correctional facility" as a state prison. A "state prison" is any facility operated by the Department of Corrections to confine or involuntarily restrain persons committed to its jurisdiction. It is the purpose for which a facility is used, and not its label, that determines its essential character as a state prison. The intermediate facility in

which defendant was an inmate, the Tuscola Residential Reentry Program, was operated by the Department of Corrections and was a secure facility from which the inmates could not leave without permission. Accordingly, it was a state prison for the purpose of the prohibition against providing contraband to prisoners. The district court did not abuse its discretion by binding defendant over to the circuit court, and the circuit court did not abuse its discretion by denying defendant's motion to quash the information.

3. Defendant's failure to move to withdraw his plea before the circuit court within six months after sentencing in accord with MCR 6.310(C), or to move for relief from the judgment under MCR 6.500 *et seq*., precluded appellate review of whether the plea was "coerced."

4. When ineffective assistance of counsel is claimed in the context of a plea, the pertinent inquiry is whether the defendant tendered the plea voluntarily and understandingly. In this case, irrespective of any misstatements by counsel as to defendant's likely minimum sentence, defendant would have been subject to a much greater maximum sentence than the one he actually received had he been tried and convicted. And a party may not create a factual dispute by submitting an affidavit that contradicts his or her own sworn testimony or prior conduct. In this case, while sworn during the plea proceedings, defendant stated that he fully understood the plea and sentencing agreement. Defendant's contrary assertion in his affidavit, submitted eight months after his sentencing, could not establish a basis for appeal in contravention of his earlier sworn statement. Under the circumstances, defendant did not receive ineffective assistance of counsel.

5. Whenever any person is convicted of any crime and has served 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 specifically grant credit against the sentence for such time served in jail before sentencing. However, upon arrest for a new felony, a parolee continues to serve the unexpired portion of his or her earlier sentence. The parolee is required to remain in jail pending the resolution of the new criminal charge for reasons independent of his or her eligibility for or ability to furnish bond for the new offense. Therefore, when a person on parole commits a subsequent felony and is detained, the time of detention continues to accrue toward the fulfillment of the originally imposed sentence on which parole was granted.

6. Absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's

sentence, a minimum sentence that falls within the appropriate guidelines range must be affirmed on appeal. In this case, defendant argued that his sentence of 1 to 10 years in prison was, although within the guidelines range, disproportionate. However, appellate review of sentences imposed under the legislative sentencing guidelines is limited and does not specifically encompass proportionality. And even if a sentence within the appropriate guidelines range could be deemed disproportionate in unusual circumstances, defendant failed to demonstrate such circumstances.

7. Facts considered in calculating the sentencing guidelines minimum range need not be admitted by the defendant or proven to the trier of fact beyond a reasonable doubt. Defendant was properly sentenced.

Affirmed.

1. PRISONS AND PRISONERS — CONTRABAND — CELLULAR TELEPHONES — PAROLEES.

A person may not sell, give, or furnish, or aid in the selling, giving, or furnishing of, a cellular telephone or other wireless communication device to a prisoner in a correctional facility, or dispose of a cellular telephone or other wireless communication device in or on the grounds of a correctional facility; a "prisoner" is a person committed to the jurisdiction of the Department of Corrections who has not been released on parole or discharged; release on parole requires release into the community; a parolee confined in a intermediate facility has not been released on parole and, therefore, is a prisoner for the purpose of the prohibition against providing cellular telephones to prisoners (MCL 800.281a[g], MCL 800.283a).

2. PRISONS AND PRISONERS — CONTRABAND — CELLULAR TELEPHONES — CORRECTIONAL FACILITIES — STATE PRISONS — INTERMEDIATE FACILITIES.

A person may not sell, give, or furnish, or aid in the selling, giving, or furnishing of, a cellular telephone or other wireless communication device to a prisoner in a correctional facility, or dispose of a cellular telephone or other wireless communication device in or on the grounds of a correctional facility; the term "correctional facility" includes a state prison; a "state prison" is any facility operated by the Department of Corrections to confine or involuntarily restrain persons committed to its jurisdiction; it is the purpose for which a facility is used, and not its label, that determines its essential character as a state prison; a secure intermediate facility operated by the Department of Corrections from which the inmates cannot leave without permission is a

state prison for the purpose of the prohibition against providing cellular telephones to prisoners (MCL 800.281a[e], MCL 800.283a).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Mark E. Reene*, Prosecuting Attorney, and *Ariana E. Hemerline*, Assistant Prosecuting Attorney, for the people.

Joseph L. Stewart for defendant.

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

PER CURIAM. Defendant appeals by delayed leave granted following his conditional no-contest plea to the offense of furnishing a cellular phone to a prisoner, MCL 800.283a, for which he was sentenced as a fourth habitual offender, MCL 769.12, to a prison term of 1 to 10 years. Defendant's no-contest plea was conditioned on the outcome of this appeal. We affirm.

I

On October 26, 2009, a corrections officer working at the Tuscola Residential Reentry Program (TRRP) searched an inmate room and found a cellular phone in the trash can. Matthew Huggard, who was defendant's roommate at TRRP, told an officer at the facility that defendant had given him the cellular phone and that he had used it. Defendant later told the Michigan State Police that it was his phone.

Defendant argued before the district court that he had not furnished a cellular phone to a "prisoner in a correctional facility" within the meaning of MCL 800.283a because the inmates at TRRP are "parolees" rather than prisoners. Defendant thus asserted that he should not be bound over to the circuit court. The

district court determined that there was sufficient probable cause to believe that defendant had committed the crime of furnishing a cellular phone to a prisoner and bound defendant over to the circuit court for further proceedings.

A motion hearing was held before the circuit court judge. The parties stipulated that the inmates at TRRP are classified by the Department of Corrections (the Department) as parolees. Defendant again argued that he had not given a cellular phone to a "prisoner" because the inmates at TRRP are merely parolees. Defendant also argued that TRRP was a community relations program rather than a correctional facility. The circuit court ruled that TRRP inmates are prisoners within the meaning of MCL 800.281a(g) and MCL 800.283a. Defendant then entered his conditional no-contest plea. The parties acknowledged on the record that they had reached a sentencing agreement of 1 to 10 years.

Defendant later submitted an affidavit in which he averred that he was granted parole and released from the Parnell Correctional Facility on September 24, 2009, and that he was subsequently transferred to TRRP. Defendant claimed that he was the only person who had used the cellular phone in question. Defendant also averred that he was effectively coerced into accepting the no-contest plea by his attorney, who had allegedly informed him that he would likely be sentenced to a term of 11 years to life in prison if he did not agree to the plea deal.

II

Defendant first argues that he did not furnish a cellular phone to a "prisoner in a correctional facility" within the meaning of MCL 800.283a because the inmates at TRRP are parolees rather than prisoners

and because TRRP is not a correctional facility. Therefore, he argues, the district court erred by binding him over to the circuit court and the circuit court erred by denying his motion to quash the information.

We review for an abuse of discretion the circuit court's ruling on a motion to quash the information and the district court's decision to bind over a defendant to the circuit court. *People v Hill*, 269 Mich App 505, 513-514; 715 NW2d 301 (2006), overruled in part on other grounds by *People v Hill*, 486 Mich 658; 786 NW2d 601 (2010). However, if the decision concerns whether the alleged conduct falls within the scope of a penal statute, the issue presents a question of law that we review de novo. *Hill*, 269 Mich App at 514.

Our primary goal when interpreting a statute is to ascertain and give effect to the intent of the Legislature. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). The first step in determining legislative intent is to examine the specific language of the statute. *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004). The Legislature is presumed to have intended the meaning that it plainly expressed. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007). Judicial construction is only appropriate if reasonable minds could differ concerning the statute's meaning. *People v Warren*, 462 Mich 415, 427; 615 NW2d 691 (2000).

The Legislature has made it a felony to furnish certain types of contraband to prisoners in correctional facilities. See MCL 800.281 *et seq*. This includes a prohibition against furnishing cellular phones to prisoners. MCL 800.283a. In the present case, defendant entered a conditional no-contest plea to the offense of furnishing a cellular phone to a prisoner in violation of MCL 800.283a, which provides:

> A person shall not sell, give, or furnish, or aid in the selling, giving, or furnishing of, a cellular telephone or other wireless communication device to a prisoner in a correctional facility, or dispose of a cellular telephone or other wireless communication device in or on the grounds of a correctional facility.

There is no question that defendant possessed a cellular phone while he was an inmate at TRRP. Instead, the pertinent questions are whether the inmate to whom defendant allegedly furnished the phone was a prisoner and whether TRRP is a correctional facility.

A

For the reasons that follow, we conclude that the inmates at TRRP are "prisoner[s]" within the meaning of MCL 800.283a.

For purposes of MCL 800.281 *et seq*., the Legislature has defined the term "prisoner" as "a person committed to the jurisdiction of the department [of corrections] who has not been released on parole or discharged." MCL 800.281a(g). It is undisputed that the persons housed at TRRP have all been committed to the Department's jurisdiction and, as parolees, are subject to the Department's rules. See MCL 791.238(1) (stating that prisoners on parole remain in the Department's legal custody); MCL 791.206(1)(c) (granting the Department authority to promulgate rules concerning the supervision and control of parolees). Similarly, it is uncontested that the persons housed at TRRP have not been "discharged" from the Department's jurisdiction. Thus the only dispute concerns whether the persons housed at TRRP have been "released on parole" as that phrase is used in MCL 800.281a(g).

Michigan courts have long recognized that a grant of parole generally constitutes permission to leave con-

finement with certain restrictions. See *In re Dawsett*, 311 Mich 588, 595; 19 NW2d 110 (1945) (stating that parole is simply a permit to leave the enclosure of the prison, and not a release); see also *People v Raihala*, 199 Mich App 577, 579; 502 NW2d 755 (1993) (characterizing the grant of parole as a "conditional release" from prison). However, it is noteworthy that in drafting MCL 800.281a(g), the Legislature did not exclude all parolees or persons on parole from the definition of "prisoner." Instead, it excluded only those persons who have been "released on parole." This Court must, if possible, construe the phrase "released on parole" by giving meaning to each word in the phrase. *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009). Because the Legislature specifically excluded from the definition persons "released on parole"—as opposed to all parolees or all persons on parole—we conclude that the Legislature intended to limit the exclusion to a specific class of parolees rather than apply it to parolees in general. That is, we construe the term "prisoner" as defined in MCL 800.281a(g) to include all parolees who have not yet been released. For this reason, we reject the notion that any person who is on parole is not a "prisoner" within the meaning of MCL 800.281a(g).

Our understanding of the phrase "released on parole" is consistent with the Legislature's decision to place separate requirements on the grant of parole and the release of a parolee. See MCL 791.233(1); MCL 791.238(6). In particular, MCL 791.238(6) provides that "[a] parole shall be construed as a permit to the prisoner to leave the prison, *and not as a release*." (Emphasis added.) Likewise, the Legislature has provided that a parolee may not be released from custody until the parole board has satisfactory evidence that arrangements have been made for the parolee's employment, education, or care, MCL 791.233(1)(e), that pa-

rolees may be retained in custody under certain circumstances, MCL 791.233(2), and that the parole board has the authority to rescind a parole order before a parolee is released into the community, MCL 791.236(2). In similar fashion, this Court has recognized the distinction between being *granted* parole and being *released* on parole. See *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 154; 532 NW2d 899 (1995). Specifically, we have observed that even after parole is granted, it is not unreasonable to impose additional requirements before the parolee is actually released. *Id*.; see also MCL 791.233(1)(e). Quite simply, the *grant* of parole and a parolee's *release* after being paroled are two different things under Michigan law, which plainly recognizes that a person who has been granted parole might nevertheless remain in custody.

There is also a compelling policy reason for differentiating between all parolees and parolees who have been released into the community. The purpose underlying MCL 800.281 *et seq*. is to keep contraband out of state correctional facilities and to ensure order and discipline within those facilities. See *People v Krajenka*, 188 Mich App 661, 664; 470 NW2d 403 (1991). This purpose would be undermined if we were to construe the phrase "released on parole" as including all parolees, and, on that basis, to conclude that parolees who remain in custody are not prisoners within the meaning of MCL 800.281a(g). The Legislature has determined that parolees who have not yet been released into the community should be treated as "prisoners" for purposes of the statutory ban on contraband in correctional facilities, and this Court will respect that policy choice.

Nor can we conclude that the statutory phrase "released on parole" refers to a prisoner's release to

an intermediate facility such as TRRP rather than a parolee's ultimate release into the community. We must construe the phrase "released on parole" according to its plain and ordinary meaning. MCL 8.3a; *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008). A person of ordinary intelligence would understand the phrase "released on parole" to mean released from confinement—that is, released into the community—and would not consider a transfer from one of the Department's secured facilities to another of the Department's secured facilities to constitute being "released on parole." See *Random House Webster's College Dictionary* (1997) (defining "release" to mean, in relevant part, "to free from confinement [or] bondage"). This is true even if the facility to which the prisoner is transferred has less severe restrictions and is intended as an intermediate step before release into the community at large. And the statutes governing parole lend support to our conclusion that being "released on parole" means being released into the community. See MCL 791.237(1) (requiring the Department to provide a prisoner who is released on parole with clothing and a nontransferable ticket to the place where the prisoner is to reside and providing discretion to give the prisoner an advance of money for a 2-week period). In short, we conclude that the phrase "released on parole" in MCL 800.281a(g) refers to a parolee's ultimate release into the community at large.

Although the inmates at TRRP are on parole, they have not been released from confinement or sent into the community at large. Therefore, TRRP inmates have not been "released on parole" and they remain prisoners within the meaning of MCL 800.281a(g) and MCL 800.283a.

B

We also conclude that TRRP is a "correctional facility" within the meaning of MCL 800.283a.

To be guilty of violating MCL 800.283a, a person must have furnished a cellular phone or wireless device to a prisoner in a "correctional facility." MCL 800.281a(e) defines a "correctional facility" as:

> (*i*) A state prison, reformatory, work camp, or community corrections center.
>
> (*ii*) A youth correctional facility operated by the department or a private vendor . . . .
>
> (*iii*) A privately operated community corrections center or resident home which houses prisoners committed to the jurisdiction of the department.
>
> (*iv*) The land on which a facility described in subparagraph (*i*), (*ii*), or (*iii*) is located.

TRRP is not a privately operated facility and is plainly not a youth correctional facility. Thus, the pertinent definition for purposes of this case is that provided by MCL 800.281a(e)(*i*).

The Legislature has not defined the term "state prison" within the text of MCL 800.281 *et seq*., but has defined the term "prison" elsewhere. For example, MCL 750.193(2) defines "prison" as "a facility that houses prisoners committed to the jurisdiction of the department of corrections . . . ." Immediately before its amendment by way of 1998 PA 510, MCL 750.193(2) defined "prison" in pertinent part as "a state prison, penitentiary, reformatory, state house of correction, *community residential center* either operated or leased by the department of corrections, or a penal camp . . . ." Former MCL 750.193(2) (emphasis added). Similarly, various Michigan courts have examined what constitutes a prison for purposes of MCL 750.193, the prison

escape statute. For instance, in *People v Mayes*, 95 Mich App 188, 190; 290 NW2d 119 (1980), this Court concluded that "a halfway house is a prison" for purposes of the escape statute, and in *People v Granquist*, 183 Mich App 343, 346; 454 NW2d 207 (1990), this Court determined that a defendant's own place of residence constituted a "prison" for purposes of the escape statute because the defendant's apartment was under the Department's surveillance by way of electronic monitoring. This Court has also held that a YMCA corrections program and a community corrections program can constitute prisons within the meaning of the escape statute. *People v Johnson*, 96 Mich App 84, 87-88; 292 NW2d 489 (1980); *People v Strong*, 53 Mich App 620, 624; 219 NW2d 804 (1974).

While these definitions may provide some evidence of the Legislature's intent, they are not dispositive for purposes of interpreting the term "state prison" as it is used in MCL 800.281a(e)(*i*). It therefore remains our duty to interpret the term "state prison" in MCL 800.281a(e)(*i*) according to its ordinary and commonly understood meaning. MCL 8.3a; *Brackett*, 482 Mich at 276. A "prison" is commonly understood to be "a building for the confinement of accused persons awaiting trial or persons sentenced after conviction" or "any place of confinement or involuntary restraint." *Random House Webster's College Dictionary* (1997). It follows that a "state prison" is a prison operated by the state of Michigan—that is, by the Department. We conclude that a "state prison" is any facility operated by the Department to confine or involuntarily restrain persons committed to its jurisdiction.

It is the purpose for which a facility is used, and not its exact name or label, that determines its essential character as a state prison. See *People v Gobles*, 67 Mich

475, 479; 35 NW 91 (1887) (observing that "[a]lthough the prison at Ionia is called 'a house of correction and reformatory,' it is no less than a [s]tate prison"). The specific name given to TRRP is therefore irrelevant. Instead, we must examine the actual purposes for which the facility is used. TRRP is operated by the Department and designed to involuntarily restrain or confine persons committed to its jurisdiction while those persons receive certain remedial services designed to help them transition into the community at large. The fact that the persons confined at TRRP are parolees and will eventually be released into the community (assuming that they meet the requirements for release) does not alter the fact that TRRP is a secure facility from which the inmates cannot leave without permission. We conclude that TRRP is a state prison within the meaning of MCL 800.281a(e)(*i*), and therefore a correctional facility within the meaning of MCL 800.283a.[1]

C

Before accepting defendant's no-contest plea, the circuit court was required to establish a factual basis for the plea. MCR 6.302(D)(2)(b); see also *People v Holmes*, 181 Mich App 488, 490; 449 NW2d 917 (1989). Similarly, to bind over defendant to the circuit court, the

[1] In light of our conclusion that TRRP constitutes a state prison within the meaning of MCL 800.281a(e)(*i*), we need not decide whether it is also a reformatory or community corrections center within the meaning of the statute. However, we note that a "community corrections center" is defined merely as "a facility either contracted for or operated by the department [of corrections] in which a security staff is on duty 7 days per week, 24 hours per day." MCL 791.265a(9)(a). It appears from the record that the TRRP inmates are monitored or guarded 24 hours a day and seven days a week. Thus, although we do not decide the issue, it would appear that TRRP also qualifies as a community corrections center within the meaning of MCL 800.281a(e)(*i*).

district court was required to determine that there was "probable cause to believe that a felony was committed and that the defendant committed the offense." *People v Jenkins*, 244 Mich App 1, 14; 624 NW2d 457 (2000); see also MCL 766.13; MCR 6.110(E). As noted earlier, defendant does not deny that he possessed a cellular phone while he was an inmate at TRRP. Rather, he claims only that his conduct did not fall within the prohibitions of MCL 800.283a.

As already explained, the inmate to whom defendant allegedly provided the cellular phone at issue was a "prisoner in a correctional facility" within the meaning of MCL 800.283a. Accordingly, we conclude that there was probable cause to believe that defendant had furnished a cellular phone to a prisoner in violation of MCL 800.283a and that there was a sufficient factual basis to support defendant's no-contest plea in this case. The district court did not abuse its discretion by binding over defendant to the circuit court and the circuit court did not abuse its discretion by denying defendant's motion to quash the information. *Hill*, 269 Mich App at 513-514.

III

Defendant next argues that his no-contest plea was involuntary as the result of "undue coercion" and that he should therefore be permitted to withdraw the plea. Defendant also claims that his trial attorney coerced him into accepting the plea with threats of a long prison sentence and that his attorney rendered ineffective assistance of counsel in this regard.

Defendant did not timely seek to withdraw his plea or challenge the voluntariness of his plea before the circuit court. Nor did defendant challenge the effectiveness of

his trial attorney or seek a *Ginther*[2] hearing with regard to his claim of ineffective assistance of counsel. These issues are therefore unpreserved for appellate review. MCR 6.310(D); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000); see also *People v Nowicki*, 213 Mich App 383, 385; 539 NW2d 590 (1995).

We review unpreserved claims, both constitutional and nonconstitutional, for outcome-determinative plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Hanks*, 276 Mich App 91, 92; 740 NW2d 530 (2007). We review unpreserved claims of ineffective assistance of counsel for errors apparent on the record. *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008).

A

Defendant argues that he should be permitted to withdraw his no-contest plea for the reason that it was involuntary. Specifically, he contends that his trial attorney coerced him into accepting the plea by threatening him with the prospect of a longer prison sentence if he did not agree to the plea deal.

In response to the circuit court's questioning at the plea proceeding, defendant stated on the record that he understood that there was a sentencing agreement of 1 to 10 years, that he did not know what the court's actual sentence would be, and that he had not been threatened or promised any favors or leniency in exchange for his plea. On appeal, defendant does not argue that he did not understand the plea to which he agreed. Instead, he contends merely that he was somehow "coerced" into accepting the plea when his trial

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

attorney allegedly informed him that he would likely be sentenced to a term of 11 years to life in prison if he was tried and ultimately convicted of furnishing a cellular phone to a prisoner.

Furnishing a cellular phone to a prisoner in violation of MCL 800.283a is a Class E offense, for which the statutory maximum sentence is five years. MCL 777.17g. However, as a fourth habitual offender, defendant was subject to enhanced sentencing, including a 100 percent increase in the upper limit of the recommended minimum sentence range, MCL 777.21(3)(c), and a maximum sentence of any number of years or life, MCL 769.12(1)(a).

As for defendant's maximum sentence, defendant alleges that his attorney informed him that he could receive a maximum sentence of life in prison if convicted. As just set forth, counsel was correct in this regard. As a fourth habitual offender, defendant was subject to a maximum sentence of any number of years or life. MCL 769.12(1)(a).

With respect to defendant's minimum sentence, defendant contends that his attorney informed him that he would likely receive a minimum sentence of 11 years. This information does not appear to be correct. The sentencing information report contained in the circuit court file indicates that defendant had a total prior record variable (PRV) score of 50 and a total offense variable (OV) score of 20. Thus, after doubling the upper limit of the recommended minimum sentence range on account of defendant's status as a fourth habitual offender, defendant was subject to a minimum term of incarceration of between 10 and 46 months if sentenced within the guidelines. MCL 777.21(3)(c); MCL 777.66. In other words, if defendant were sentenced within the guidelines, his minimum sentence

could not have exceeded 46 months (3 years and 10 months), and certainly would not have been 11 years.

The problem with defendant's argument, of course, is that he never sought to withdraw his plea in the circuit court. Under MCR 6.310(C), defendant was required to move to withdraw his plea within six months after sentencing or to move for relief from judgment according to the procedures set forth in MCR 6.500 *et seq*. Defendant's affidavit dated February 14, 2011, filed eight months after his sentencing, did not comply with this court rule. Because defendant failed to file a motion to withdraw his plea in the circuit court, appellate review of this issue is precluded. MCR 6.310(D); *People v Dixon*, 217 Mich App 400, 410; 552 NW2d 663 (1996).

B

Defendant also argues that his trial attorney rendered ineffective assistance of counsel by incorrectly informing him that he would be subject to a minimum sentence of 11 years if tried and convicted and by using this misinformation to coerce him into accepting the plea deal. We simply cannot agree.

"When ineffective assistance of counsel is claimed in the context of a plea, the pertinent inquiry is whether the defendant tendered the plea voluntarily and understandingly." *People v Swirles (After Remand)*, 218 Mich App 133, 138; 553 NW2d 357 (1996). We fully acknowledge that defendant averred in his affidavit that trial counsel had informed him that, if convicted of the charge of furnishing a cellular phone to a prisoner, he would likely be sentenced to a term of 11 years to life in prison. As noted previously, assuming that counsel actually made this representation to defendant, it appears that counsel was mistaken with respect to the minimum sentence.

However, irrespective of any misstatements by counsel, the fact remains that defendant would have been subject to a much greater maximum sentence than the one he actually received had he been tried and ultimately convicted. See MCL 769.12(1)(a). Moreover, defendant does not argue that any failures of trial counsel actually kept him from understanding the plea to which he agreed. Indeed, defendant testified under oath at the plea proceeding that he fully understood the plea and sentencing agreement. Just as a party or witness may not create a factual dispute by submitting an affidavit that contradicts his or her own sworn testimony or prior conduct, *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480; 633 NW2d 440 (2001); *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 155; 565 NW2d 868 (1997), we conclude that defendant's affidavit dated February 14, 2011, was insufficient to contradict or overcome his previous sworn statements at the plea proceeding of April 12, 2010. Given defendant's unequivocal confirmation in open court that he understood the plea and sentencing agreement, we cannot conclude that defendant's counsel was ineffective. See *Swirles*, 218 Mich App at 138-139.

IV

Defendant next argues that the circuit court erred by failing to award him credit for time served in jail. We disagree.

Whether a defendant is entitled to credit for time served in jail before sentencing is a question of law that we review de novo. *People v Waclawski*, 286 Mich App 634, 688; 780 NW2d 321 (2009).

Defendant argues that he should have been credited for time served before sentencing according to MCL 769.11b, which provides:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

As explained earlier, although defendant had not yet been released into the community, he was technically on parole while he was an inmate at TRRP. Thus, it necessarily follows that defendant was on parole at the time he committed the instant offense of furnishing a cellular phone to a prisoner.

MCL 768.7a(2) provides:

> If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.

MCL 769.11b, the jail credit statute, is not applicable when a parolee is convicted and sentenced to a new term of imprisonment for a felony committed while on parole because, once arrested for the new felony, the parolee continues to serve out the unexpired portion of his or her earlier sentence. *People v Idziak*, 484 Mich 549, 562-563; 773 NW2d 616 (2009). When a person on parole commits a subsequent felony and is detained, the time of detention continues to accrue toward the fulfillment of the originally imposed sentence on which parole was granted. MCL 791.238(1), (2), and (6); *People v Johnson*, 283 Mich App 303, 308-310; 769 NW2d 905 (2009). The parolee is required to remain in jail pending the resolution of the new criminal charge for reasons independent of his or her eligibility for or ability to furnish bond for the new offense; therefore, the jail credit

statute does not apply. *Idziak*, 484 Mich at 566-567. Defendant is entitled to no relief on this issue.

V

Defendant next argues that even though his sentence of 1 to 10 years in prison falls within the statutory sentencing guidelines, it is disproportionate to the relatively benign nature of the offense of which he was convicted. We cannot agree.

We review for an abuse of discretion whether a sentence is proportionate to the seriousness of the offense. See *People v Crawford*, 232 Mich App 608, 621-622; 591 NW2d 669 (1998). A sentence that falls within the appropriate sentencing guidelines range is presumptively proportionate. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008).

Under the judicial sentencing guidelines that were in effect before 1999, the rule in Michigan was that even a sentence falling within the guidelines could conceivably be disproportionate in "unusual circumstances." *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). However, it does not appear that this "unusual circumstances" rule of *Milbourn* has survived the Legislature's enactment of the statutory sentencing guidelines, MCL 777.1 *et seq*.[3] See *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001) (noting that the principles and ground rules governing the application of the former judicial sentencing guidelines do not necessarily govern the application of the statutory sentencing guidelines); *People v Babcock*, 244 Mich App 64, 73; 624 NW2d 479 (2000) (observing that, in enacting the statutory guidelines, "the Legislature

[3] The Legislature enacted the statutory sentencing guidelines in 1998, and they took effect on January 1, 1999. 1998 PA 317; see also *People v Hegwood*, 465 Mich 432, 438-439; 636 NW2d 127 (2001).

intended to preclude any appellate scrutiny of sentences falling within the appropriate guidelines range absent scoring errors or reliance on inaccurate information"). Under the statutory sentencing guidelines, this Court must affirm a minimum sentence that falls within the appropriate guidelines range "absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10); see also *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). Conspicuously absent from Michigan's current sentencing statutes is any mention of the principle of proportionality or any discussion of factors that would render an otherwise proper sentence disproportionate.[4]

As noted earlier, considering defendant's total PRV and OV scores, and given his status as a fourth habitual offender, defendant was subject to a recommended minimum sentence of between 10 and 46 months. MCL 777.21(3)(c); MCL 777.66. Thus, defendant's minimum sentence of one year fell squarely within the statutory sentencing guidelines range. Defendant does not argue on appeal that the circuit court erred in scoring the guidelines or that the court relied on inaccurate information during sentencing. We must therefore affirm defendant's minimum sentence in this case. MCL 769.34(10).

Nor do we perceive any error in the circuit court's determination of defendant's maximum sentence.[5] As

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[4] Even assuming arguendo that the "unusual circumstances" rule of *Milbourn* has survived the enactment of the statutory sentencing guidelines, defendant has simply failed to demonstrate the existence of any unusual circumstances that would render his sentence disproportionate to the crime of which he was convicted. See *People v Lee*, 243 Mich App 163, 187-188; 622 NW2d 71 (2000); *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994); *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992).

[5] It is only the *minimum* sentence that must be within the appropriate sentencing guidelines range. MCL 769.34(2); *People v Babcock*, 469 Mich 247, 255 n 7; 666 NW2d 231 (2003).

already explained, the felony of furnishing a cellular phone to a prisoner in violation of MCL 800.283a carries a statutory maximum sentence of five years. MCL 777.17g. However, as a fourth habitual offender, defendant was subject to a maximum sentence of any number of years or life. MCL 769.12(1)(a). We cannot conclude that the circuit court abused its discretion by setting defendant's maximum sentence at 10 years. See *id*.; see also *People v Babcock*, 469 Mich 247, 255 n 7; 666 NW2d 231 (2003).

VI

Lastly, relying on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), defendant argues that the circuit court erred to the extent that it calculated his sentence on the basis of certain facts that were not admitted by defendant or proven to the trier of fact beyond a reasonable doubt. Our Supreme Court has repeatedly rejected this very argument. *People v McCuller*, 479 Mich 672, 683; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 163-164; 715 NW2d 778 (2006). And although defendant insists that *McCuller* and *Drohan* were wrongly decided, this Court is without authority to reverse decisions of the Michigan Supreme Court. *People v Mitchell*, 428 Mich 364, 369-370; 408 NW2d 798 (1987); *Ratliff v Gen Motors Corp*, 127 Mich App 410, 416; 339 NW2d 196 (1983).

Affirmed.

OWENS, P.J., and JANSEN and O'CONNELL, JJ., concurred.

KESSLER v KESSLER

Docket No. 302492. Submitted November 8, 2011, at Grand Rapids. Decided December 6, 2011, at 9:20 a.m.

Stephanie Kessler brought an action for divorce from Robert Kessler in the Oceana Circuit Court, Family Law Division. Both parties sought primary physical custody of their three minor children, who were living with both parents in the marital home during the divorce proceedings. The court, Anthony A. Monton, J., did not determine whether there was an established custodial environment pursuant to MCL 722.27(1)(c), but proceeded to award the parties joint legal custody and defendant primary physical custody after concluding that the best-interest factors of MCL 722.23 favored this outcome by a preponderance of the evidence. Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court did not err by failing to apply the statutory change-of-domicile factors set forth in MCL 722.31(4). Under the plain language of MCL 722.31(1), these factors apply only to petitions for a change of domicile in situations where there is already a custody order governing the parties' conduct, which there was not in this case.

2. The trial court clearly erred by failing to address whether an established custodial environment existed. MCL 722.27(1)(c) prohibits a court from issuing an order that changes the established custodial environment of a child without clear and convincing evidence that it is in the child's best interest. The plain language of this provision indicates that it applies not only to modifications and amendments of existing custody orders but also to new custody orders. The trial court's error was not harmless and requires the matter to be remanded because this factual determination establishes the proper burden of proof in regard to the best interests of the children.

3. The trial court's findings with regard to factor (b), which addresses the parties' capacity and disposition to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any, were not insufficient on the ground that they addressed only the religious component of that factor. The court was not required to explicitly address all the evidence presented and arguments raised with respect to each factor.

4. The trial court's finding that factor (d) favored defendant was not against the great weight of the evidence. Factor (d) addresses the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity. Although plaintiff had a specific plan regarding the children's home and school in Florida and defendant was uncertain about whether he would be able to afford the marital home and school tuition in Michigan on his own, the children had never lived in Florida, so there was no continuity in that environment to maintain.

5. The trial court's finding that factor (e) was neutral was not against the great weight of the evidence. Factor (e) addresses the permanence, as a family unit, of the existing or proposed custodial home or homes. While defendant's future living arrangement was not certain, plaintiff's move to Florida would have removed the children from an environment where they had extended family and others who provided a support system.

6. The trial court's finding that factor (h), which addresses the child's home, school, and community record, slightly favored defendant was supported by evidence that he had more flexibility in attending to the children's needs.

7. The trial court's finding that factor (j) was neutral was not against the great weight of the evidence. This factor addresses the willingness and ability of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents. Other parties, including defendant, testified that both parents loved their children and would do what was best for the children. The only basis for plaintiff's claims that defendant interfered with her relationship with the children was plaintiff's own testimony, and deference is given to the trial court's credibility determinations.

8. The trial court's finding that factor (k), which addresses domestic violence, was neutral was not against the great weight of the evidence. Although plaintiff testified about three alleged incidents of domestic violence, defendant's testimony presented a different version of each incident. Deference is given to the trial court's credibility determinations.

Judgment affirmed in part and reversed in part; case remanded.

1. DIVORCE — PARENT AND CHILD — CHILD CUSTODY — ORIGINAL CHILD CUSTODY ORDERS — ESTABLISHED CUSTODIAL ENVIRONMENT.

A court may not issue an order that changes the established custodial environment of a child without clear and convincing evidence that it is in the best interest of the child; the court must determine whether there is an established custodial environment

with either or both of the parties before making its original custody determination (MCL 722.27[1][c]).

2. DIVORCE — PARENT AND CHILD — CHILD CUSTODY — BEST-INTEREST FACTORS — FACTUAL FINDINGS.

A trial court rendering a custody decision must state on the record its factual findings and conclusions regarding each of the statutory factors for determining a child's best interests; these findings and conclusions need not explicitly address every aspect of a given factor or consider every piece of evidence entered and argument raised by the parties (MCL 722.23).

Law Office of Alisa A. Peskin-Shepherd PLLC (by *Alisa A. Peskin-Shepherd*) for Stephanie Kessler.

Law Offices of James A. Marek (by *James A. Marek*) for Robert Kessler.

Before: WILDER, P.J., and HOEKSTRA and BORRELLO, JJ.

PER CURIAM. In this custody dispute, plaintiff appeals as of right the trial court's order awarding the parties joint legal custody and defendant primary physical custody. For the reasons stated in this opinion, we affirm in part, reverse in part, and remand.

Plaintiff and defendant have three minor children. The parties were married in 1999, and moved to Montague, Michigan in 2002. The children have lived in Montague their entire lives. Defendant grew up in Montague, and at the time of the custody hearing his parents still lived there. There is no indication that plaintiff has family in Montague or ever lived in Montague before residing there with defendant. Plaintiff filed for divorce in June 2010. There was no custody order in place before the custody hearing, which was held in December 2010, and the parties did not have an informal custody arrangement. Rather, the parties continued to live together in the marital home during the divorce and custody proceedings. During the custody

hearing, both parties requested an award of primary physical custody. Plaintiff, who earned a significantly higher salary than defendant, began a new job in Florida on November 1, 2011, and sought to move the children to Florida at the end of the school year. Neither party had relatives living in Florida at the time of the hearing. Defendant intended to remain in Montague and sought to have the children remain with him in the marital home.[1] After hearing testimony and considering the statutory best-interest factors, the trial court awarded defendant primary physical custody. This appeal followed the trial court's order.

On appeal, plaintiff first argues that the trial court erred by failing to apply the statutory change-of-domicile factors set forth in MCL 722.31(4). Specifically, plaintiff maintains that the trial court was required to consider custody and change of domicile separately and that the evidence before the trial court would have compelled it to grant her petition for change of domicile. In making its custody determination, the trial court considered only the best-interest factors set forth in MCL 722.23.

Questions of law, such as the applicability and interpretation of a statute, are reviewed de novo. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009).

We hold that the trial court did not err by failing to consider the change-of-domicile factors set forth in MCL 722.31(4)(a) through (e). MCL 722.31 provides in pertinent part:

> (1) A child *whose parental custody is governed by court order* has, for the purposes of this section, a legal residence

[1] Defendant expressed uncertainty regarding whether he would be financially able to remain in the marital home; however, defendant testified that he intended to build a smaller, more affordable home in Montague if he could not remain in the marital home.

> with each parent. Except as otherwise provided in this section, a parent of a child *whose custody is governed by court order* shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued.
>
> * * *
>
> (4) Before permitting a legal residence change otherwise restricted by subsection (1), the court shall consider [the five factors set forth in (a) through (e)]. [Emphasis added.]

According to the plain language of the statute, the change-of-domicile factors specifically apply only to petitions for change of domicile in situations where there is already a custody order governing the parties' conduct. MCL 722.31(1); *Thompson v Thompson*, 261 Mich App 353, 361 n 2; 683 NW2d 250 (2004) (noting that this Court interprets statutory language according to its plain and ordinary meaning). In this case, the custody order at issue is the first and only custody order governing the parties' conduct. Consequently, the factors set forth in MCL 722.31 do not apply.

Next, plaintiff argues that the trial court erred by failing to determine whether the children had an established custodial environment with either party and by applying a "preponderance of the evidence" standard when making its custody determination. Additionally, plaintiff argues that the trial court should have determined that there was only an established custodial environment with her.

We affirm a custody order "unless the trial court's findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008); see also MCL 722.28.

Initially, we address whether the trial court erred by failing to consider whether an established custodial environment existed with either or both of the parties. In this case, the trial court did not make any factual findings or otherwise address whether there was an established custodial environment. Rather, the trial court merely commented that the case did not present a "situation where one party has . . . had custody; so we're dealing with the burden of proof here by the preponderance of the evidence," and proceeded to make its custody determination on the basis of the preponderance of the evidence after considering each of the statutory best-interest factors.

In effect, the trial court operated on the premise that because the parties were living together with the children in the marital home up to the time of the custody hearing and no custody order had been entered by the court, it was not required to address whether an established custodial environment existed.[2]

The Child Custody Act governs child custody disputes. MCL 722.21 *et seq.*; *Berger*, 277 Mich App at 705. Determining whether the trial court erred by failing to consider the existence of an established custodial environment before making its custody ruling requires the interpretation of § 7 of the Child Custody Act, MCL 722.27. Statutory interpretation is a question of law we consider de novo. *Thompson*, 261 Mich App at 358. The

[2] We reject defendant's claim that the trial court's statements that neither party had custody and that the burden of proof was a preponderance of the evidence constituted an adequate determination regarding whether an established custodial environment existed with either party. A trial court is required to provide a factual basis and articulate its reasons in regard to its determination of whether an established custodial environment exists. See *Foskett v Foskett*, 247 Mich App 1, 7-8; 634 NW2d 363 (2001). In this case, the trial court never even mentioned an "established custodial environment."

language of a statute must be accorded its plain and ordinary meaning. *Id.* at 361 n 2. The primary goal of judicial interpretation is to ascertain and give effect to the intent of the Legislature. *Id.* The Child Custody Act should be liberally construed and is intended to promote the best interests of the children. *Berger*, 277 Mich App at 705.

Custody awards are governed by MCL 722.27, which provides in pertinent part:

> (1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
>
> (a) Award the custody of the child to 1 or more of the parties involved or to others and provide for payment of support for the child, until the child reaches 18 years of age.
>
> * * *
>
> (c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age and, subject to section 5b of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605b, until the child reaches 19 years and 6 months of age. The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

In *Thompson*, 261 Mich App at 360-362, this Court interpreted the language of MCL 722.27. The issue in that case was whether the trial court was required to find proper cause or a change of circumstances before entering a custody award after the initial evidentiary hearing regarding the best-interest factors when the parties had stipulated to a temporary custody order before the hearing. *Id.* at 358. This Court held that it did not, explaining:

> The first sentence of MCL 722.27(1)(c) only refers to when a party is attempting to "[m]odify or amend," while the second sentence mandates that the trial court not "modify or amend its previous judgments or orders *or issue a new order* so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." (Emphasis added.) In light of the clear intention of the Legislature, the first sentence of the MCL 722.27(1)(c) [sic] does not apply [to] the trial court's initial or "new" custody order in this matter. The trial court's award of custody was not a modification or amendment; it was a new order that is only subject to the limitation provided in the second sentence of MCL 722.27(1)(c). [*Id.* at 361-362.]

Consistently with *Thompson* and the plain language of MCL 722.27, a trial court is required to determine whether there is an established custodial environment with one or both parents before making *any* custody determination. See also *Bowers v Bowers*, 190 Mich App 51, 53-54; 475 NW2d 394 (1991). Accordingly, a party who seeks to change an established custodial environment of a child is required to show by clear and convincing evidence that the change is in the child's best interests. We conclude that the trial court clearly erred when it failed to determine whether there was an established custodial environment with either or both of the parties before making its custody determination.

Having agreed with plaintiff that the trial court clearly erred when it failed to first address whether an established custodial environment existed, we next address plaintiff's assertion that the evidence submitted during the custody hearing demonstrated that the children have an established custodial environment with her alone. In *Fletcher v Fletcher*, 447 Mich 871, 882; 526 NW2d 889 (1994), our Supreme Court expressly stated that "review of custody orders is not de novo." The trial court's failure to apply the law by not first determining whether there was an established custodial environment is clear legal error, and, according to *Fletcher*, we must remand unless the error is harmless. *Id.* The failure to determine whether there is an established custodial environment is not harmless because the trial court's determination regarding whether an established custodial environment exists determines the proper burden of proof in regard to the best interests of the children. *Foskett v Foskett*, 247 Mich App 1, 6-7; 634 NW2d 363 (2001). Accordingly, we decline to decide whether the children had an established custodial environment with plaintiff alone because that is a question of fact for the trial court, *Berger*, 277 Mich App at 706, and we do not engage in review de novo of custody orders, *Fletcher*, 447 Mich at 882.

On remand, the trial court must determine whether an established custodial environment existed with plaintiff, defendant, or both parties before it determines the custody arrangement that serves the best interests of the children. In this case, both parents seek primary physical custody. Accordingly, if the trial court determines that an established custodial environment exists with either plaintiff or defendant or both parties, the party seeking to change that established custodial environment must demonstrate that the change is in the

best interests of the children by clear and convincing evidence. After making its determination regarding the existence of an established custodial environment and evaluating the best-interest factors, the trial court shall determine whether either party has met its burden and fashion its award of custody accordingly. On remand, the trial court "should consider up-to-date information" and "any other changes in circumstances arising since the trial court's original custody order." *Fletcher*, 447 Mich at 889.

Lastly, plaintiff argues that the trial court's findings were against the great weight of the evidence when it determined that the best interests of the children required awarding defendant primary physical custody. Specifically, plaintiff challenges the trial court's findings in regard to factors (b), (d), (e), (h), (j), and (k).

We review the trial court's findings of fact in a custody case under the "great weight of the evidence" standard. *Vodvarka v Grasmeyer*, 259 Mich App 499, 507; 675 NW2d 847 (2003). Under this standard of review, we affirm a trial court's findings "unless the evidence clearly preponderates in the opposite direction." *Berger*, 277 Mich App at 705.

In making a custody determination, a trial court is required to evaluate the best interests of the children under the 12 statutorily enumerated factors.[3] MCL

[3] The best-interest factors are codified at MCL 722.23, which provides:

> As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

722.23; *Harvey v Harvey*, 470 Mich 186, 187; 680 NW2d 835 (2004). We defer to the trial court's credibility determinations, and "the trial court has discretion to accord differing weight to the best-interest factors." *Berger*, 277 Mich App at 705. We conclude that the trial court's findings regarding the best-interest factors challenged by plaintiff were not against the great weight of the evidence.

Plaintiff first argues that the trial court should have concluded that factor (b), the "capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any," MCL

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

722.23(b), favored her instead of finding that it was neutral. The trial court found that both parties were committed to Christianity and that the factor therefore favored neither party. Plaintiff argues that the trial court's finding was insufficient because it only referenced religion. However, a trial court need not consider "every piece of evidence entered and argument raised by the parties" when it states its factual findings and conclusions on each of the best interest factors. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 452; 705 NW2d 144 (2005). A trial court's failure to discuss every fact in evidence that pertains to a factor "does not suggest that the relevant among them were overlooked." *Fletcher*, 447 Mich at 884. Consequently, we conclude that the trial court's factual finding in regard to factor (b) was not against the great weight of the evidence.

Plaintiff argues that the trial court erred when it determined that factor (d), the "length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," MCL 722.23(d), favored defendant because plaintiff had a specific plan regarding the children's home and school in Florida while defendant was uncertain about whether he would be able to afford the marital home and school tuition in Michigan on his own. We conclude that the trial court's findings on this factor were not against the great weight of the evidence. The children had never lived in Florida, much less lived there for any "length of time," so there could be no continuity to maintain with respect to that environment. For this reason, the environment in Florida was not even relevant under this factor. Although it is true that the divorce would change the environment in Michigan, it was still the only environment the children knew. The children had family,

friends, school, church, a godmother, a daycare provider, and others in Michigan.

Next, plaintiff challenges the trial court's finding that factor (e), the "permanence, as a family unit, of the existing or proposed custodial home or homes," MCL 722.23(e), did not favor either party. Plaintiff argues that defendant's future is uncertain because it was not clear that defendant would be capable of maintaining the marital home. We conclude that the trial court's finding that this factor was neutral was not against the great weight of the evidence. While defendant's future living arrangement was not completely certain, plaintiff's move to Florida would remove the children from an environment in which they had extended family and others that provided a support system.

Regarding factor (h), the "home, school, and community record of the child," MCL 722.23(h), the trial court found that the children's home, school, and community record was excellent and that both parties were committed to maintaining it. The trial court also found that this factor slightly favored defendant because he had slightly more flexibility in attending to the children's needs. We conclude that the trial court's factual findings in regard to this factor were not against the great weight of the evidence. The evidence presented during the hearing clearly supports the trial court's finding that defendant has a more flexible work schedule than plaintiff; both parties admitted that defendant's flexibility was the primary reason that he transported the children to school and daycare the majority of the time. The evidence also demonstrated that the children were doing well in their schools and in the community.

Plaintiff next argues that factor (j), the "willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the

parents," MCL 722.23(j), was improperly found by the trial court to be neutral because substantial evidence showed that defendant was interfering with her relationship with the children. The trial court found the factor to be neutral because it was given no reason to believe that either parent would interfere with the other parent's relationship with the children. We conclude that the trial court's finding on this factor was not against the great weight of the evidence. The only basis for plaintiff's claims that defendant interfered with her relationship with the children was plaintiff's own testimony, and we defer to the trial court's credibility determinations. *Berger*, 277 Mich App at 705. There was sufficient evidence for the trial court to find that this factor was neutral because other parties, including defendant, testified that both parents loved their children and would do what was best for the children.

Lastly, plaintiff argues that factor (k), "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child," MCL 722.23(k), should have favored her instead of being found neutral. Plaintiff testified about three alleged incidents of domestic violence, but defendant's testimony presented a different version of each of the incidents. The trial court's factual finding that these incidents did not amount to domestic violence was not against the great weight of the evidence, specifically in light of the fact that we defer to the trial court's credibility determinations. *Berger*, 277 Mich App at 705.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

WILDER, P.J., and HOEKSTRA and BORRELLO, JJ., concurred.

PEOPLE v KLOOSTERMAN

Docket No. 301283. Submitted December 6, 2011, at Grand Rapids. Decided December 13, 2011, at 9:00 a.m.

Brett M. Kloosterman was convicted by a jury in the Kent Circuit Court of breaking and entering a vehicle, causing damage, MCL 750.356a(3), and was sentenced to one to five years in prison as a second-offense habitual offender. Defendant had moved for a directed verdict at the close of the prosecution's proofs, arguing that the prosecution had not offered sufficient evidence to prove beyond a reasonable doubt the damage element of MCL 750.356a(3). The court, George S. Buth, J., denied the motion. Defendant appealed.

The Court of Appeals *held*:

MCL 750.356a(2) proscribes larceny from motor vehicles, house trailers, trailers, and semitrailers. Under MCL 750.356a(3), punishment is enhanced if damage is done to any part of a motor vehicle, house trailer, trailer, or semitrailer in the commission of the larceny, which includes damage done to all portions of the trailer in whatever degree, or whatever separate or distinct pieces of the trailer that were broken, torn, cut, or otherwise damaged. The trial court properly denied defendant's directed-verdict motion because there was sufficient evidence to prove the damage element of MCL 750.356a(3). Defendant cut a padlock that secured the trailer's latches when he broke into the victim's truck trailer. The victim had purchased the padlocks and trailer on the same day from the same trailer company to secure his tools while in the trailer. Because the padlocks on the trailer were a distinct part of the trailer and served the trailer's function of transporting and securing tools, cutting the padlock during the breaking and entering constituted sufficient evidence to satisfy the damage element of MCL 750.356a(3).

Affirmed.

LARCENY — MOTOR VEHICLES AND TRAILERS — DAMAGE — DEFINITION.

The sentence for larceny from motor vehicles, house trailers, trailers, and semi-trailers is enhanced if damage is done to any part of a motor vehicle, house trailer, trailer, or semitrailer in the com-

> mission of the larceny; the phrase "any part" of the trailer includes all portions of the trailer in whatever degree, or whatever separate or distinct pieces of the trailer that were broken, torn, cut, or otherwise damaged (MCL 750.356a[2][a] and [b], [3]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, and *Timothy K. McMorrow* and *Kimberly M. Manns*, Assistant Prosecuting Attorneys, for the people.

Laurel Kelly Young for defendant.

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

PER CURIAM. A jury convicted defendant of breaking and entering a vehicle, causing damage, MCL 750.356a(3), and the trial court sentenced him as a second-offense habitual offender to a prison term of one to five years. Defendant appeals as of right. We affirm.

Defendant argues that the trial court erred when it denied his motion for a directed verdict because the prosecution did not offer sufficient evidence to prove beyond a reasonable doubt the damage element of MCL 750.356a(3). We disagree.

MCL 750.356a(2) proscribes larceny from motor vehicles or trailers. MCL 750.356a(2)(a) and (b) punish the theft of property from motor vehicles, house trailers, trailers, and semitrailers when the property's value is less than $1,000. However, MCL 750.356a(3) imposes an enhanced sentence if damage is done to any part of a motor vehicle, house trailer, trailer, or semitrailer in the commission of a violation of MCL 750.356a(2)(a) or (b).

Defendant does not dispute that a padlock securing the trailer's latches was cut. Rather, defendant argues that the padlock was not "any part" of the trailer and, therefore, that under MCL 750.356a(3), the trailer was

not damaged. This argument presents a question of statutory interpretation that we review de novo. *People v Pitts*, 222 Mich App 260, 265; 564 NW2d 93 (1997).

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Michigan Legislature. *People v Droog*, 282 Mich App 68, 70; 761 NW2d 822 (2009). To accomplish that, we begin by examining the language of the statute. *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003). When the Legislature has not expressly defined the terms in a statute, we may use dictionary definitions to aid in construing those terms in accordance with their ordinary and generally accepted meanings. *People v Morey*, 461 Mich 325, 330-331; 603 NW2d 250 (1999).

"Any" is defined as including "whatever or whichever it may be" and "every; all" and "in whatever degree; to some extent; at all." *Random House Webster's College Dictionary* (2000). "Part" is defined as "a portion or division of a whole that is separate or distinct; piece, fraction, or section." *Id*. Therefore, "[a]ny part of . . . [a] trailer" as used in MCL 750.356a(3) covers all portions of the trailer in whatever degree, or whatever separate or distinct pieces of the trailer that were broken, torn, cut, or otherwise damaged.

The victim here purchased his trailer and the padlocks for the trailer on the same day from the same trailer company. The latches on the trailer were compatible with the padlocks the victim purchased. The padlocks were intended to be purchased with the trailer in order to lock the trailer. The victim purchased the trailer for the purpose of storing and transporting his tools and used the locks to secure his tools while they were in the trailer. The padlocks on the victim's trailer were a distinct piece of the trailer that served the trailer's function of transporting and securing tools.

Accordingly, the trial court did not err by denying defendant's motion for a directed verdict because there was sufficient evidence to prove the damage element of MCL 750.356a(3).

Affirmed.

MARKEY, P.J., and FITZGERALD and BORRELLO, JJ., concurred.

CITIMORTGAGE, INC v MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC

Docket No. 298004. Submitted November 9, 2011, at Detroit. Decided December 15, 2011, at 9:00 a.m.

CitiMortgage, Inc., and Federal Home Loan Mortgage Corporation (FHLMC) brought an action in the Wayne Circuit Court against Sheryll D. Catton, Gregory J. Catton, and Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for GMAC Mortgage, L.L.C., to quiet title to real property. In 2000, the Cattons purchased property in Wayne County, assigning a mortgage to ABN AMRO Mortgage Group, Inc., as security for a home loan. In 2001, the Cattons refinanced that loan, discharging the original mortgage in favor of a new mortgage, which was also assigned to ABN AMRO. On July 11, 2002, the Cattons obtained a home-equity loan from GMAC, and assigned MERS, as nominee for GMAC, a second mortgage on the property. On November 5, 2002, the Cattons refinanced the loan they obtained from ABN AMRO in 2001, discharging the 2001 mortgage in favor of a new mortgage granted to ABN AMRO. On August 22, 2005, the Cattons filed for bankruptcy, and their property was subsequently sold at a foreclosure sale to FHLMC. FHLMC filed suit with ABN AMRO's successor in interest, Citimortgage, to quiet title to the property. The Cattons defaulted. The court, Jeanne Stempien, J., denied plaintiffs' motion for summary disposition and granted MERS's motion for summary disposition. Plaintiffs appealed.

The Court of Appeals *held*:

1. Under former MCL 565.25(1) and (4), a first-recorded mortgage had priority over a later-recorded mortgage, and according to *Ameriquest Mtg Co v Alton*, 273 Mich App 84 (2006), the use of equity by the courts to overcome the plain language of former MCL 565.25(1) and (4) was permitted only in the presence of unusual circumstances such as fraud or mutual mistake. However, Michigan's recording statute was amended by 2008 PA 357, eliminating former MCL 565.25(1) and (4). Because the analysis in *Ameriquest* relied on those former subsections, *Ameriquest* is no longer controlling.

2. Equitable subrogation may be used when a senior mortgagee discharges its mortgage of record and contemporaneously

takes and records a replacement mortgage, so that the lending mortgagee may retain its seniority as against intervening lienholders. However, the lending mortgagee seeking subrogation must be the same lender that held the original mortgage before the intervening interests arose, or a bona fide successor in interest to the original lender, and the application of equitable subrogation is subject to a careful examination of the equities and of any potential prejudice to the intervening lienholders. The trial court is the forum best suited to evaluating any prejudice and the competing equities; therefore, remand was required in this case.

3. The "mere volunteer" rule, which provides that equitable subrogation may not be extended to a party that is a mere volunteer, i.e., one who pays the mortgage but has no interest in the land, does not apply when the new mortgagee and the original mortgagee are the same.

Reversed and remanded.

1. MORTGAGES — PRIORITY OF LIENS — EQUITY — EQUITABLE SUBROGATION.

Equitable subrogation may be used when a senior mortgagee discharges its mortgage of record and contemporaneously takes and records a replacement mortgage, so that the lending mortgagee may retain its seniority as against intervening lienholders; however, the lending mortgagee seeking subrogation must be the same lender that held the original mortgage before the intervening interests arose, or a bona fide successor in interest to the original lender, and the application of equitable subrogation is subject to a careful examination of the equities and of any potential prejudice to the intervening lienholders.

2. MORTGAGES — PRIORITY OF LIENS — EQUITY — EQUITABLE SUBROGATION — MERE VOLUNTEERS.

The "mere volunteer" rule, which provides that equitable subrogation may not be extended to a party that is a mere volunteer who pays the mortgage but has no interest in the land, does not apply when the new mortgagee and the original mortgagee are the same.

Clark Hill PLC (by *Richard A. Sundquist* and *Matthew W. Heron*) for CitiMortgage, Inc., and Federal Home Loan Mortgage Corporation.

Schneiderman & Sherman, P.C. (by *Erin R. Katz* and *Andrew J. Hubbs*), for Mortgage Electronic Registration Systems, Inc.

Before: MURPHY, C.J., and BECKERING and RONAYNE KRAUSE, JJ.

PER CURIAM. Plaintiffs appeal as of right from the trial court's order denying plaintiffs' motion for summary disposition and granting defendant's[1] motion for summary disposition. We reverse and remand for further proceedings.

The facts of this case are not in dispute. On September 6, 2000, Sheryll D. Catton and Gregory J. Catton (the Cattons) purchased property in Wayne County with a mortgage granted to ABN AMRO Mortgage Group, Inc. On May 4, 2001, the Cattons refinanced their loan, discharging the original mortgage in favor of a new mortgage also granted to ABN AMRO. On July 11, 2002, the Cattons obtained a home-equity loan from GMAC Mortgage, L.L.C., granting Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for GMAC, a second mortgage on the property. On November 25, 2002, the Cattons refinanced their 2001 loan, discharging the 2001 ABN AMRO mortgage in favor of another mortgage granted to ABN AMRO. There is no dispute that ABN AMRO was unaware of the MERS mortgage at the time it took the new mortgage even though MERS's mortgage had been recorded. On August 22, 2005, the Cattons filed for bankruptcy, and their property was subsequently sold at a foreclosure sale to Federal Home Loan Mortgage Corporation (FHLMC). FHLMC sued, along with ABN AMRO's successor in interest, CitiMortgage, Inc., to quiet title.

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[1] Defendants Sheryll D. Catton and Gregory J. Catton defaulted in this case and are not part of this appeal. References herein to "defendant" are to defendant-appellee, Mortgage Electronic Registration Systems, Inc., as nominee for GMAC Mortgage, L.L.C.

The issue in this matter is, as between the two lienholders, which of the two mortgage liens is superior. CitiMortgage holds the refinanced mortgage lien, and defendant holds the second mortgage, which would have been the junior lien but for the subsequent refinancing. More specifically, the issue is whether CitiMortgage can place its lien in first priority over defendant's lien through application of the doctrine of equitable subrogation. The trial court concluded that CitiMortgage could not, and this appeal followed. We review motions for summary disposition and questions of law de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999); *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001).

Under Michigan's former race-notice recording statute, MCL 565.25(1) and (4), as amended by 1996 PA 526, a first-recorded mortgage had priority over a later-recorded mortgage, and equity—and therefore equitable subrogation—was used by the courts to overcome the plain language of the statute only in the presence of " ' "unusual circumstances" ' such as fraud or mutual mistake." *Ameriquest Mtg Co v Alton*, 273 Mich App 84, 93-94, 99-100; 731 NW2d 99 (2006), quoting *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 590; 702 NW2d 539 (2005). See also *Ameriquest*, 273 Mich App at 100 (MURPHY, J., concurring). Other "unusual circumstances" that might have supported the use of equitable relief included a "preexisting jumble of convoluted case law through which the plaintiff was forced to navigate" and misconduct by another party. *Devillers*, 473 Mich at 590 nn 64-65. However, Michigan's recording statute was amended by 2008 PA 357, eliminating the former MCL 565.25(1) and (4). Because the analysis in *Ameriquest* relied on those former subsections, *Ameriquest* is no longer controlling.

That being the case, we conclude that the caselaw on point in Michigan is consistent with Restatement Property, 3d, Mortgages, § 7.3, pp 472-473, which provides as follows:

> (a) If a senior mortgage is released of record and, as part of the same transaction, is replaced with a new mortgage, the latter mortgage retains the same priority as its predecessor, except
>
> (1) to the extent that any change in the terms of the mortgage or the obligation it secures is materially prejudicial to the holder of a junior interest in the real estate, or
>
> (2) to the extent that one who is protected by the recording act acquires an interest in the real estate at a time that the senior mortgage is not of record.
>
> (b) If a senior mortgage or the obligation it secures is modified by the parties, the mortgage as modified retains priority as against junior interests in the real estate, except to the extent that the modification is materially prejudicial to the holders of such interests and is not within the scope of a reservation of right to modify as provided in Subsection (c).
>
> (c) If the mortgagor and mortgagee reserve the right in a mortgage to modify the mortgage or the obligation it secures, the mortgage as modified retains priority even if the modification is materially prejudicial to the holders of junior interests in the real estate, except as provided in Subsection (d).
>
> (d) If a mortgage contains a reservation of the right to modify the mortgage or the obligation as described in Subsection (c), the mortgagor may issue a notice to the mortgagee terminating that right. Upon receipt of the notice by the mortgagee, the right to modify with retention of priority under Subsection (c) becomes ineffective against persons taking any subsequent interests in the mortgaged real estate, and any subsequent modifications are governed by Subsection (b). Upon receipt of the notice, the mortgagee must provide the mortgagor with a certificate in recordable form stating that the notice has been received.

Of particular note, comment b to this section of the Restatement provides that "[u]nder § 7.3(a) a senior mortgagee that discharges its mortgage of record and records a replacement mortgage does not lose its priority as against the holder of an intervening interest unless that holder suffers material prejudice." *Id*. at p 474. The associated Reporters' Note, voluminously citing many cases from other jurisdictions, explains that "[c]ourts routinely adhere to the principle that a senior mortgagee who discharges its mortgage of record and takes and records a replacement mortgage, retains the predecessor's seniority as against intervening lienors unless the mortgagee intended a subordination of its mortgage or 'paramount equities' exist." *Id*. at p 483.

For the reasons we discuss later in this opinion, we conclude that § 7.3 of the Restatement, limited to the situations described by the quoted commentary—specifically, cases in which the senior mortgagee discharges its mortgage of record and contemporaneously takes a replacement mortgage, as often occurs in the context of refinancing—is consistent with Michigan precedent. Thus limited, because § 7.3 of the Restatement reflects the present state of the law in Michigan, we hereby adopt it. We caution, however, that the lending mortgagee seeking subrogation and priority over an intervening interest relative to its newly recorded mortgage *must be the same lender* that held the original mortgage before the intervening interest arose; and, furthermore, any application of equitable subrogation is subject to a careful examination of the equities of all parties and potential prejudice to the intervening lienholder.

Our Supreme Court discussed what it called the doctrine of equitable mistake in *Schanhite v Plymouth United Savings Bank*, 277 Mich 33, 39; 268 NW 801 (1936), stating:

> It is a general rule that the cancellation of a mortgage on the record is not conclusive as to its discharge, or as to the payment of the indebtedness secured thereby. And where the holder of a senior mortgage discharges it of record, and contemporaneously therewith takes a new mortgage, he will not, in the absence of paramount equities, be held to have subordinated his security to an intervening lien unless the circumstances of the transaction indicate this to have been his intention, or such intention upon his part is shown by extrinsic evidence. [Quotation marks and citation omitted.]

This reflects "the well-settled rule that the acceptance by a mortgagee of a new mortgage and his cancellation of the old mortgage do not deprive the mortgagee of priority over intervening liens." *Washington Mut Bank v ShoreBank Corp*, 267 Mich App 111, 126; 703 NW2d 486 (2005).

In *Washington Mut Bank*, this Court rejected an equitable-subrogation argument made by the plaintiff bank. The plaintiff had provided refinancing on real property that had earlier been encumbered by a first mortgage, which was paid off with the proceeds from the refinancing. However, the property had also been encumbered by two intervening mortgages in favor of other banks before the refinancing. Importantly, and distinguishable from the facts here, the plaintiff was *not* the original lender-mortgagee.[2] *Id*. at 112. After an exhaustive examination of the caselaw regarding equi-

[2] The descriptor "original mortgagee" might cause confusion and therefore requires clarification. By "original mortgagee," we mean not only the *originating* mortgagee, but also any bona fide successor in interest. In this case, CitiMortgage was not the original mortgagee, nor was it the new mortgagee at the time of the refinancing transaction. However, ABN AMRO was the original and new mortgagee, and CitiMortgage is ABN AMRO's successor in interest, so CitiMortgage stands in the shoes of ABN AMRO for purposes of our analysis.

table subrogation and citing the "well-settled rule" from *Schanhite*, the Court stated:

> [I]n this case, we are not presented with a new mortgage being accepted by the holder of the old mortgage. That is, had the new mortgage been given to Option One Mortgage [the original lender], and Option One was before us rather than plaintiff, *Schanhite* might provide the authority to revive the original mortgage and give the new mortgage the same priority as the one it replaced. . . .
>
> * * *
>
> . . . [W]e are unaware of any authority regarding the application of the doctrine of equitable subrogation to support the general proposition that a new mortgage, granted as part of a generic refinancing transaction, can take the priority of the original mortgage, which is being paid off, giving it priority over intervening liens. . . . *Such bolstering of priority may be applicable where the new mortgagee is the holder of the mortgage being paid off* . . . . [*Id.* at 127-128 (emphasis added); see also *Van Dyk Mtg Corp v United States*, 503 F Supp 2d 876 (WD Mich, 2007) (applying *Washington Mut Bank* and *Schanhite* in granting equitable subrogation under circumstances comparable to those presented by this case).]

Washington Mut Bank does not permit us to extend application of the Restatement to cases in which the new mortgagee was not the holder of the original mortgage being discharged through refinancing; consequently, we cannot adopt the Restatement in its entirety. But it does fully support, along with *Schanhite*, applying the Restatement to cases, like this one, in which the new mortgagee seeking priority and subrogation held the original mortgage, and we do so here.

We note also that the refinancing in *Schanhite* actually worked to the benefit of the second mortgagee, because "the property would have been lost to the tax

man" otherwise, so restoring the original lien priority was the equitable outcome for all parties. *Washington Mut Bank*, 267 Mich App at 126-127. Our Supreme Court has noted that "[t]he theory of equitable or conventional subrogation is that the junior lienor's position is left unchanged by the conduct of the party seeking subrogation and that he is not wronged any by permitting subrogation." *Lentz v Stoflet*, 280 Mich 446, 451; 273 NW 763 (1937). Consistent with § 7.3 of the Restatement in the limited form in which we adopt it, a refinanced mortgage maintains the priority position of the original mortgage as long as any junior lienholder is not prejudiced as a consequence.

Finally, we find it necessary to address the "mere volunteer" rule, which provides that equitable subrogation may not be extended to a party that is a mere volunteer, i.e., one who pays the mortgage but has no interest in the land. *Ameriquest*, 273 Mich App at 94-95. Underlying the rejection of the plaintiff bank's equitable-subrogation argument in *Washington Mut Bank* was the Court's conclusion that the plaintiff was a mere volunteer. *Washington Mut Bank*, 267 Mich App at 119-120. The Court observed that

> the doctrine of equitable subrogation does not allow a new mortgagee to take the priority of the older mortgagee merely because the proceeds of the new mortgage were used to pay off the indebtedness secured by the old mortgage. [And] [i]t is clear to us that . . . plaintiff is a mere volunteer and, therefore, is not entitled to equitable subrogation. [*Id.*]

Importantly, *Washington Mut Bank* reflected that the "mere volunteer" rule does not apply when the new mortgagee and the old mortgagee are the same, even in a standard refinancing transaction, otherwise the panel would not have suggested a different outcome had the

plaintiff bank held the original mortgage. See *id*. at 126-127. Indeed, the *Schanhite* Court did not indicate that the rule allowing qualifying mortgagees to retain priority could only be employed on a finding that a mortgagee was not a mere volunteer. And the Restatement contains no such restriction or limitation. We hold that the "mere volunteer" rule has no applicability when the new mortgagee was also the original mortgagee.

We conclude that equitable subrogation is available to place a new mortgage in the same priority as a discharged mortgage if the new mortgagee was the original mortgagee and the holders of any junior liens are not prejudiced as a consequence. We further conclude that the Restatement, in the limited form in which we have adopted it, sets forth a reasonable and proper framework for determining whether junior lienholders have been prejudiced and whether the equities ultimately favor equitable subrogation. Because the trial court is the forum best suited to evaluating any prejudice and the competing equities, including making any relevant factual determinations, we remand this matter to the trial court to do so.

Reversed and remanded to the trial court for further proceedings consistent with this opinion. We direct that no taxable costs shall be awarded to any party under MCR 7.219. We do not retain jurisdiction.

MURPHY, C.J., and BECKERING and RONAYNE KRAUSE, JJ., concurred.

STROZIER v FLINT COMMUNITY SCHOOLS

Docket No. 299704. Submitted December 7, 2011, at Detroit. Decided December 20, 2011, at 9:00 a.m.

Alexus Strozier, a minor, by her next friend, Abbey Strozier, brought an action in the Genesee Circuit Court against Flint Community Schools, Middle Cities Risk Management Trust, and Gallagher Bassett Services, seeking damages for injuries sustained when a city of Flint sanitation truck collided with the school bus in which she was riding. The driver of the school bus and the driver of the sanitation truck gave different versions of how the accident occurred. Strozier later amended her complaint to add the City of Flint Department of Sanitation, claiming that the garbage truck driver had negligently operated the truck when the accident occurred. The sanitation department moved for summary disposition pursuant to MCR 2.116(C)(7) and (10), arguing that Strozier's claim was barred by governmental immunity and that she had failed to present sufficient evidence of the garbage truck driver's negligence. The court, Archie L. Hayman, J., denied the sanitation department's motion, holding that the conflicting testimony regarding whether the garbage truck was moving at the time of the incident created a genuine issue of material fact, but did not address the issue of governmental immunity. The sanitation department appealed.

The Court of Appeals *held*:

1. Alexus's deposition testimony that the garbage truck was moving forward when it collided with the bus was not inadmissible hearsay, MRE 602, because her references to remembering the events reflected personal knowledge.

2. Under MCL 691.1407(1), a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. The motor-vehicle exception to this rule, MCL 691.1405, allows a party to maintain an action against a governmental agency for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle that the governmental agency owns. Operation of a motor vehicle means that the motor vehicle must have been

operating as a motor vehicle and only encompasses activities that are directly associated with the driving of a motor vehicle. Alexus's claim against the sanitation department was not barred by governmental immunity because even if the garbage truck was stopped at the time of the accident, it was carrying out its intended function of picking up garbage. Because a garbage truck cannot perform that function without periodically stopping to pick up garbage, doing so is necessarily included within the "operation" of the truck under the motor-vehicle exception. Summary disposition under MCR 2.116(C)(7) was properly denied because the motor-vehicle exception applied under either party's version of the accident.

Affirmed.

GOVERNMENTAL IMMUNITY — MOTOR-VEHICLE EXCEPTION — OPERATION OF A MOTOR VEHICLE — GARBAGE TRUCKS.

A governmental agency is immune from tort liability if the agency is engaged in the exercise or discharge of a governmental function; under the motor-vehicle exception to governmental immunity, however, a party can maintain an action against a governmental agency for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner; "operation" requires that the motor vehicle must have been operating as a motor vehicle and only encompasses activities that are directly associated with the driving of a motor vehicle; temporary stops on the road to pick up garbage are included within the operation of a garbage truck (MCL 691.1405, 691.1407[1]).

The Thurswell Law Firm, P.L.L.C.. (by *Mark E. Boegehold*), for Alexus Strozier.

Foster, Swift, Collins & Smith, P.C. (by *Scott L. Mandel* and *Pamela C. Dausman*), for Flint Community Schools and Middle Cities Risk Management Trust.

Thomas L. Kent for the City of Flint Department of Sanitation.

Before: MURPHY, C.J., and JANSEN and OWENS, JJ.

PER CURIAM. Defendant-appellant City of Flint Department of Sanitation[1] appeals as of right the trial court's order denying its motion for summary disposition under MCR 2.116(C)(7) and (10). We affirm.

I. FACTS

This case arose out of a collision between a school bus and a garbage truck that injured Alexus Strozier,[2] a passenger on the school bus. On April 2, 2007, city of Flint sanitation department employee Mathew Dingel and his partner, Aaron Slagg, were collecting garbage on Fleming Road. Dingel drove the garbage truck, making periodic, brief, temporary stops in the right lane to allow Slagg to collect the garbage and deposit it into the back of the garbage truck. As they collected garbage, a school bus approached from behind the left side of the garbage truck and then, according to Dingel, as it passed the truck, merged into the lane in which the garbage truck was sitting. Although he remembered thinking that the bus had nearly hit his truck, Dingel initially thought that the bus had missed the truck because he did not feel an impact. Dingel and Slagg continued their garbage route. About two hours later, Dingel received a call from his supervisor, who told him that Dingel had been involved in an accident with the bus. Dingel realized that the bus driver had straightened out too quickly after merging, which had caused the rear end of the bus to swing into the truck. Dingel stated that the garbage truck had been running and ready to proceed to the next stop, but was not moving at the time of the collision, and that the bus ran into the truck.

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[1] In this opinion, the term "defendant" will refer only to defendant-appellant City of Flint Department of Sanitation.

[2] Because Strozier is a minor, her mother, Abbey Strozier, brought this action on her daughter's behalf.

Slagg described the events slightly differently. Slagg stated:

> Well, I was off of the truck when the bus passed by us, okay? I was picking up the trash and he passed by at a pretty -- at an excessive speed. And I was thinking to myself if my kid was riding that bus I would be very upset at how that guy was driving because there was a car coming -- see, Fleming Road is a two lane road. There was a car coming northbound and we were heading southbound so our garbage truck takes up the full lane and he passed between the cars, the bus driver, he cut the guy who was heading northbound off and cut in front of us. And when I stepped back on the truck to go my partner started to take off and he jammed on the brakes, made me slam into the back of the truck, you know, and I got pretty upset, I was yelling at him. And he went like this and there was a bus, he stopped right in front of us. And we stopped. And when the bus took off, I guess, I don't know if there was a collision or not, but I didn't feel any collision on the back of the truck, you know, when I was standing on the back of the truck so . . . [.]

The driver of the bus, Renzellus Brown, stated that he felt a bump as he drove past the garbage truck. Brown initially thought that the street had caused the bump he felt, but a student on the bus told him that the bus had been hit. Brown continued to drive for about a block before pulling the bus to the side of the road. He then inspected the bus and saw that it had been damaged in the rear. Brown stated during his deposition that he had not seen the collision with the truck and that he had not seen the truck move. However, Brown wrote an accident report on the day of the collision in which he stated that the truck "started to take off and clipped" the bus.

Alexus Strozier also stated that the truck moved forward and hit the bus. Strozier stated:

> We was -- after we left my stop we went to some more stops. We turned off Pasadena on to -- I can't remember

> what street it was, but we turned on I think it's Myrtle. If I'm not mistaken it's Myrtle Street on to Leerda and picked up some kids.
>
> And then we went down some more -- we was going -- the bus -- no, the garbage truck had stopped. So the bus was going around the garbage truck. And then the garbage truck started moving and then that's when he had picked up some speed and ended up hitting the school bus.

After the collision, Brown finished his bus route and dropped the children off at school. After they arrived at school, some of the children told a teacher what had happened, and the teacher had them write out statements. Several of these statements also support plaintiff's contention that the garbage truck was moving at the time of the collision.

As a result of the collision, plaintiff filed a complaint against the Flint Community Schools and the school's insurer, alleging that Brown's negligent driving had caused the collision. Plaintiff later amended her complaint to add the City of Flint Department of Sanitation as a defendant, alleging that Dingel had negligently operated the garbage truck. Defendant then filed a motion for summary disposition under MCR 2.116(C)(7) and (10), arguing that governmental immunity barred plaintiff's claim and that plaintiff had failed to produce sufficient evidence of defendant's negligence. The trial court denied defendant's motion for summary disposition, holding that the conflicting testimony regarding whether the garbage truck was moving at the time of the incident created a genuine issue of material fact.

II. MOTOR-VEHICLE EXCEPTION TO GOVERNMENTAL IMMUNITY

Defendant argues that the trial court erred when it declined to grant its motion for summary disposition under MCR 2.116(C)(7) and (10). It contends that

governmental immunity bars plaintiff's claim and that plaintiff did not present evidence sufficient to create a question of fact regarding whether the garbage truck driver, Dingel, negligently operated the garbage truck. We disagree.

In this case, the parties disagree whether the use of the garbage truck falls within the meaning of the phrase "negligent operation" in MCL 691.1405. The parties first dispute a factual question: whether the garbage truck was moving at the time it collided with the school bus. The parties also dispute a legal question: whether the term "operation" requires the truck to have been moving at the time of the collision or whether a stationary vehicle may be operating within the meaning of the statute.

Defendant briefly argues that this Court should not consider Strozier's deposition testimony that the truck moved forward and hit the bus because the statement was based on hearsay and plaintiff did not establish that Strozier testified on the basis of personal knowledge. See MRE 602. We disagree. Strozier's statement shows that her testimony reflected personal knowledge. Throughout her testimony, she consistently referred to what she could "remember" of the events, and plaintiff's counsel consistently asked Strozier what she "remembered." These references show that Strozier testified on the basis of personal knowledge, and defendant's assertions of hearsay are without merit.

Next, we address defendant's legal argument that the garbage truck was not in "operation" for purposes of the governmental-immunity statute because it was stopped at the time of the accident. This issue involves an interesting conundrum that arises when motions for summary disposition are brought under both MCR 2.116(C)(10) and (7). Under MCR 2.116(C)(10), when a

court determines that a genuine issue of material fact exists, it must deny the motion for summary disposition and allow the fact-finder to resolve the disputed issues of fact at a trial. *Dextrom v Wexford Co*, 287 Mich App 406, 430; 789 NW2d 211 (2010). However, as this Court stated in *Dextrom*, "[a] *trial* is not the proper remedial avenue to take in resolving the factual questions under MCR 2.116(C)(7) dealing with governmental immunity." *Id*. at 431. Whether the motor-vehicle exception to governmental immunity applies here is a matter of law, and it is a threshold matter of law at that. *Id*. at 431. When faced with a nearly identical procedural issue, the *Dextrom* Court resolved this dilemma by remanding the case to the trial court for a full evidentiary hearing. We conclude that a remand is unnecessary in this case.

Even if the facts are exactly as asserted by defendant, and the garbage truck was temporarily stopped on the road when the collision occurred, we hold that temporary stops on the road to pick up garbage are included in the meaning of "operation" of a garbage truck and that the motor-vehicle exception to governmental immunity applies. In general, "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). There are, however, six exceptions to governmental immunity, including the motor-vehicle exception, which allows a private party to maintain an action against a governmental agency for "bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner . . . ." MCL 691.1405; see also *Robinson v City of Lansing*, 486 Mich 1, 5-6; 782 NW2d 171 (2010).

Our Supreme Court has defined "operation," in the context of the governmental-immunity statute, to mean " 'an act or instance, process, or manner of functioning or operating.' " *Chandler v Muskegon Co*, 467 Mich 315, 320; 652 NW2d 224 (2002) (citation omitted). In applying this definition, the Court held that "operation" requires that the motor vehicle be operating as a motor vehicle and only "encompasses activities that are directly associated with the driving of a motor vehicle." *Id*. at 321. The Court found this limitation necessary, because to define the term otherwise would allow this exception to apply overbroadly to include virtually any situation in which a motor vehicle injured someone, regardless of the use of the vehicle at the time of the accident. *Id*. Defendant relies on *Chandler* to support its assertion that because the garbage truck was stopped, it could not be in "operation" at the time of the incident. We disagree.

In *Chandler*, the Supreme Court held that the situation of a bus parked at a maintenance garage did not fall within the statutory meaning of "operation." *Chandler*, 467 Mich at 316. While waiting to clean the bus, the plaintiff saw the driver become trapped in the bus doors as the driver attempted to exit it. *Id*. The plaintiff tried to open the doors and injured his shoulder in the process. *Id*. The Court held that because the bus was in maintenance at the time of the injury, and bus maintenance is distinct from bus operation, governmental immunity barred the plaintiff's claim. *Id*. at 316, 320-322.

In *Poppen v Tovey*, 256 Mich App 351, 352, 355-356; 664 NW2d 269 (2003), this Court held that a water truck parked on the curb lane of a two-lane street was not in "operation." The plaintiff in *Poppen* hit the truck while it was parked with its warning lights flashing, as

the city employee in possession of the truck inspected a nearby fire hydrant. *Id*. at 352. This Court held that the truck was not in operation because it was not engaged in an activity " 'directly associated with the driving' of that vehicle." *Id*. at 355-356 (citation omitted). The Court therefore upheld the trial court's grant of summary disposition. *Id*. at 356.

In an order entered by our Supreme Court, in *Martin v Rapid Inter-Urban Partnership*, 480 Mich 936 (2007), the Court stated that "[t]he loading and unloading of passengers is an action within the 'operation' of a shuttle bus." The Court provided no further facts and provided no analysis regarding why the exception applied, even though the bus was apparently not moving. *Id*. Justice CORRIGAN provided further facts in her dissent, indicating that the plaintiff claimed that the defendant's failure to install a heater to thaw the steps or to properly scrape the steps had caused the plaintiff to fall on an icy step. *Id*. at 936 (CORRIGAN, J., dissenting). She further noted that the majority's order seemed to confuse the Court's previous definition of the term "operation," which had explicitly excluded bus "maintenance." *Id*. at 936-937. In her view, the Court should have granted leave to fully discuss the implication of the majority's opinion that " 'operation' means something more than driving" and answer the question: "What precisely *does* 'operation' mean?" *Id*. at 937.

This case is factually similar to *Martin* and distinct from *Chandler* and *Poppen*. In *Poppen*, the defendant parked the truck on the road, with its hazard lights on, for about five minutes, in a way that indicated it was not currently in use as a vehicle. Similarly, in *Chandler*, the bus was parked in a maintenance garage as the driver got out of the vehicle, indicating that use of the

bus as a vehicle had ended. In this case, even if the garbage truck was stopped, it was stopped because it was carrying out its intended function of picking up garbage. As it is impossible for a garbage truck to perform the function for which it was designed without periodically stopping to pick up garbage, we conclude that stopping to pick up garbage is necessarily included within the "operation" of a garbage truck. Therefore, summary disposition under MCR 2.116(C)(7) was not warranted because the motor-vehicle exception to governmental immunity would apply regardless of whether the facts are as plaintiff contends or as defendant contends.

Affirmed.

MURPHY, C.J., and JANSEN and OWENS, JJ., concurred.

PEOPLE v MINCH

Docket No. 301316. Submitted December 14, 2011, at Grand Rapids. Decided December 20, 2011, at 9:05 a.m. Reversed, 493 Mich 87.

Kurtis R. Minch pleaded guilty in the Muskegon Circuit Court to charges of possessing a short-barreled shotgun, MCL 750.224b, and possessing a firearm during the commission of a felony, MCL 750.227b. The trial court, Timothy G. Hicks, J., granted defendant's motion for the return of numerous firearms that were not contraband and had been seized during a police raid of his home and ordered the police department to return the firearms to his designee. The prosecution appealed this order by leave granted.

The Court of Appeals *held*:

Allowing the police department to deliver the noncontraband firearms to defendant's designee would not violate MCL 750.224f(2), which prohibits a person convicted of a specified felony from, among other things, distributing a firearm unless certain conditions have been met. A criminal defendant is entitled to the return of his or her property after the underlying case is concluded unless there is a lawful reason to deny its return. Denying defendant's designee the right to take possession of the weapons when they were not the subject of a forfeiture proceeding would deprive defendant of his property without due process of law.

Affirmed.

CRIMINAL LAW — WEAPONS — RETURN OF SEIZED ITEMS — DUE PROCESS.

A criminal defendant is entitled to the return of property seized in connection with his or her case after the case is concluded unless there is a lawful reason to deny its return; a police department's return of noncontraband firearms to a defendant's designee does not violate MCL 750.224f(2).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Tony Tague*, Prosecuting Attorney, and *Charles F. Justian*, Chief Appellate Attorney, for the people.

Nolan Law Offices, PLLC (by *Kevin J. Wistrom*), for defendant.

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

PER CURIAM. The prosecution appeals by leave granted an order of the trial court directing the Fruitport Police Department to turn certain firearms over to defendant's designee, Carol L. Cutler, who is also his mother. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Defendant pleaded guilty to one count of possession of a short-barreled shotgun, MCL 750.224b, and one count of possessing a firearm during the commission of a felony, MCL 750.227b. The trial court granted defendant's motion for the return of 86 noncontraband firearms seized during a police raid of defendant's home and ordered the Fruitport Police Department to return the firearms to defendant's designee—his mother, Carol L. Cutler. The police initially seized 87 firearms from defendant, but only one firearm, the short-barreled shotgun, was illegal to possess. The prosecution did not bring forfeiture proceedings, nor did it intend to do so in the future.

We granted the prosecution's emergency application for leave to appeal, *People v Minch*, unpublished order of the Court of Appeals, entered December 1, 2010 (Docket No. 301316), as well as the prosecution's motion to stay enforcement of the trial court's order pending the resolution of this appeal, *People v Minch*, unpublished order of the Court of Appeals, entered November 29, 2010 (Docket No. 301316).

II. ANALYSIS

Under the felon-in-possession statute, MCL 750.224f, it is illegal for defendant to possess or distribute firearms. The prosecution argues that allowing the police to deliver the firearms to Cutler would be akin to allowing defendant to distribute them and that this action should be barred under MCL 750.224f. We disagree. We review de novo the interpretation and application of statutes. *People v Waclawski*, 286 Mich App 634, 645; 780 NW2d 321 (2009).

MCL 750.224f(2) provides, in relevant part:

> A person convicted of a specified felony[1] shall not possess, use, transport, sell, purchase, carry, ship, receive, *or distribute* a firearm in this state until all of the following circumstances exist:
>
> (a) The expiration of 5 years after all of the following circumstances exist:
>
> (*i*) The person has paid all fines imposed for the violation.
>
> (*ii*) The person has served all terms of imprisonment imposed for the violation.
>
> (*iii*) The person has successfully completed all conditions of probation or parole imposed for the violation.
>
> (b) The person's right to possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm has been restored pursuant to section 4 of Act No. 372 of the Public Acts of 1927, being section 28.424[2] of the Michigan Compiled Laws. [Emphasis added.]

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[1] A "specified felony" under the statute includes a felony for the unlawful possession or distribution of a firearm. MCL 750.224f(6)(*iii*). In this case, defendant's possession of a short-barreled shotgun offense or his felony-firearm offense qualifies as a "specified felony."

[2] MCL 28.424 allows a person to apply to the county concealed weapon licensing board in his or her county of residence for a restoration of these rights.

Our primary obligation when interpreting a statute is to ascertain the intent of the Legislature from the plain language of the statute and to give effect to that intent. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). "When interpreting statutes, this Court looks to the plain meaning of terms unless those terms are defined within the statute." *People v Osby*, 291 Mich App 412, 415; 804 NW2d 903 (2011). " '[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.' " *People v Breidenbach*, 489 Mich 1, 10; 798 NW2d 738 (2011), quoting *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003). The Legislature is presumed to have intended its plain meaning, and this Court should enforce unambiguous statutes as written. *People v Patton*, 285 Mich App 229, 234; 775 NW2d 610 (2009).

The Michigan Penal Code does not specifically define "distribute" in the context of firearms violations. We may therefore consult a dictionary to determine the meaning of "distribute." See *People v Haynes*, 281 Mich App 27, 29; 760 NW2d 283 (2008). The definition of "distribute" includes "deliver." Black's Law Dictionary (9th ed); *Random House Webster's College Dictionary* (1997). The prosecution argues that if defendant is permitted to authorize the police department to dispose of the weapons on his behalf, the department would effectively be acting as defendant's agent when it delivers the weapons to Cutler. However, the prosecution's position fails to account for defendant's due-process rights or previous decisions of this Court. The Fruitport police have not instituted forfeiture proceedings, nor have they asserted that forfeiture proceedings would be proper. Therefore, denying defendant's designee the right to take possession of the weapons would deprive defendant of his property without due process of law.

Banks v Detroit Police Dep't, 183 Mich App 175, 180; 454 NW2d 198 (1990); *People v Oklad*, unpublished opinion per curiam of the Court of Appeals, issued March 3, 2000 (Docket No. 206589).[3]

A criminal defendant is entitled to the return of his or her property after the case is concluded unless there is a lawful reason to deny its return. *Banks*, 183 Mich App at 178. The party seeking to retain the property "has the burden of proof to establish a lawful reason for denying the return of the property to the person from whom it was seized." *Id.* However, while criminal defendants are entitled to the return of property that is legal to possess, they are not entitled to the return of contraband. *Id.* at 181. Likewise, criminal defendants are not entitled to property that has been forfeited. See *id.* at 178.

In *Banks*, this Court addressed an issue similar to the one raised in this appeal, although it was decided under the federal felon-in-possession statute, not the Michigan felon-in-possession statute. *Banks*, 183 Mich App at 179-180. In *Banks*, police officers had seized various items from the plaintiff while executing a search warrant, including firearms that were not illegal to possess. *Id.* at 177. The Detroit Police Department did not institute forfeiture proceedings against the seized property. *Id.* at 180. The plaintiff, who had been convicted on felony charges in a previous criminal proceeding, sought return of his property, including the firearms, to a designated third party. *Id.* at 177-178. The police department opposed his request with regard to the firearms because the plaintiff was a convicted felon and,

[3] While an unpublished opinion has no precedential value, this Court may follow the opinion if it finds the reasoning persuasive. See *People v Green*, 260 Mich App 710, 720 n 5; 680 NW2d 477 (2004); MCR 7.215(C)(1).

as such, was prohibited by federal law from possessing or transporting firearms.[4] *Id.* at 179-180. This Court acknowledged that under the federal felon-in-possession statute, the plaintiff could not himself possess or transfer the firearms; however, it concluded that allowing the police to retain possession of the firearms without having instituted forfeiture proceedings would violate the plaintiff's due-process rights. *Id.* at 180. Accordingly, this Court allowed the plaintiff to designate someone to receive the firearms, even though it would have been illegal for the plaintiff to transfer or possess them. *Id.*

While *Banks* addressed the federal felon-in-possession statute, this Court applied the holding in *Banks* to Michigan's felon-in-possession statute in *Oklad*, in which police officers had seized guns and illegal contraband from the defendant's home. *Oklad*, unpub op at 2-3. As with the firearms seized in *Banks*, the firearms seized were not illegal to possess and were not the subject of forfeiture proceedings. *Id.* at 3-4. The defendant, who was a convicted felon, moved for the return of his firearms, arguing that withholding the guns was a deprivation of property without due process. *Id.* at 3. The prosecution objected to the return of the firearms, citing MCL 750.224f and arguing that it would be illegal for the defendant to possess them because of his status as a convicted felon. *Id.* Consistently with its holding in *Banks*, this Court held that although the defendant could not legally possess, use, transport, or distribute the firearms, he was nonetheless entitled to designate an individual to receive them. *Id.* at 4. This Court determined that if the firearms

[4] Under 18 USC 922(g), convicted felons are prohibited from possessing or transporting firearms that affect or have been transported in interstate commerce.

were not the subject of forfeiture proceedings, the police lacked a valid reason to retain possession of them and, therefore, due process required that the firearms be returned to the defendant's designee. *Id.* at 3-4.

The prosecution attempts to distinguish these cases by arguing that defendant's due-process rights are not implicated because the Fruitport Police Department is not seeking to retain the firearms permanently. However, the prosecution explains neither what the department will do with the firearms if it does not deliver them to Cutler nor how any other action could be consistent with defendant's due-process rights. It fails to acknowledge that any other action the department could take, whether it be selling the weapons, melting them down, or retaining possession of them permanently, could only be accomplished through a forfeiture proceeding. The trial court did not err by ordering the Fruitport Police Department to deliver the firearms to defendant's designee.

Affirmed.

HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ., concurred.

WELLS FARGO BANK, NA v CHERRYLAND MALL LIMITED PARTNERSHIP

Docket No. 304682. Submitted December 14, 2011, at Lansing. Decided December 27, 2011, at 9:00 a.m. Remanded, 493 Mich 859.

Wells Fargo Bank, N.A., brought an action in the Grand Traverse Circuit Court against Cherryland Mall Limited Partnership, David Schostak, and Schostak Brothers & Co., Inc., to recover a deficiency owed under the terms of a mortgage. Cherryland had obtained an $8.7 million commercial mortgage-backed securities loan in 2002 from Archon Financial, LP, using a mall it owned as collateral. David Schostak was the guarantor of the loan. Archon transferred the Cherryland loan and attendant loan documents to Wells Fargo. After Cherryland's failure to make a loan payment, Wells Fargo foreclosed on the property by advertisement in 2010. Wells Fargo was the successful bidder at the foreclosure sale with a bid of $6 million, which left a deficiency of $2.1 million. Wells Fargo asserted that it was entitled to recover damages in the amount of the loan deficiency from both Schostak and Cherryland because Cherryland's insolvency constituted a failure to maintain its single-purpose-entity status as required by the loan documents. Wells Fargo moved for summary disposition on multiple grounds. The court, Philip E. Rodgers, Jr., J., granted Wells Fargo's motions in part, ruling that as guarantor on the mortgage, Schostak was liable for the loan deficiency. In addition, the court awarded attorney fees to Wells Fargo. Cherryland Mall and Schostak appealed.

The Court of Appeals *held*:

1. Generally, foreclosure extinguishes a mortgage, and mortgages are nonrecourse in Michigan absent an agreement to the contrary. A deficiency action for money owed under a mortgage following foreclosure by sale is permissible if the note provides that the loan was a recourse loan. Although the trial court decided the issue on incorrect grounds, Wells Fargo was entitled to maintain a mortgage deficiency action because the note provided that the debt was fully recourse.

2. The failure of the mortgage to define "single purpose entity" does not make the mortgage ambiguous. A term that is not defined

in a contract will be interpreted in accordance with its commonly used meaning, and terms in a particular trade are given their natural and ordinary meaning in that trade. Extrinsic evidence may be used to define an undefined technical term because it generally translates the language of the trade into ordinary language. A single purpose entity is an entity formed concurrently with or immediately before the transaction that is unlikely to become insolvent as a result of its own activities and is adequately insulated from the consequences of any related party's insolvency. The mortgage, as incorporated into the note, required Cherryland to remain solvent to maintain its single-purpose-entity status. The trial court properly determined that Cherryland breached the covenants of the mortgage requiring it to be a single purpose entity when it became insolvent, at which point the loan became fully recourse.

Affirmed.

1. MORTGAGES — FORECLOSURE BY ADVERTISEMENT — DEFICIENCY ACTION — RECOURSE.

Foreclosure generally extinguishes a mortgage, and mortgages are nonrecourse absent an agreement to the contrary; a deficiency action for money owed under a mortgage following foreclosure by sale is permissible, however, if the note provides that the loan was a recourse loan.

2. MORTGAGES — BREACH OF COVENANT — RECOURSE — SINGLE PURPOSE ENTITY STATUS VIOLATED.

A single purpose entity (SPE) is an entity formed concurrently with or immediately before the subject transaction that is unlikely to become insolvent as a result of its own activities and that is adequately insulated from the consequences of any related party's insolvency; if remaining solvent is part of the SPE covenants in a mortgage or loan document, an entity's insolvency breaches that covenant and may trigger provisions making a mortgage or loan fully recourse.

Miller, Canfield, Paddock and Stone, P.L.C. (by *James L. Allen*, *Larry J. Saylor*, and *Dennis G. Bonucchi*), for Wells Fargo Bank, N.A.

Honigman Miller Schwartz and Cohn, LLP (by *John Pirich* and *I. W. Winsten*), for Cherryland Mall Limited Partnership and David Schostak.

Amici Curiae:

McClelland & Anderson, LLP (by *Gregory L. McClelland* and *Melissa A. Hagen*), for the Michigan Association of Realtors.

Kupelian Ormond & Magy, P.C. (by *Paul S. Magy* and *Matthew W. Schlegel*), and *Fried, Frank, Harris, Shriver & Jacobson LLP* (by *Greg L. Weiner*, *Shahzeb Lari*, and *Nazar Altun*) for the Building Owners and Managers Association International, the Building Owners and Managers Association of Metro Detroit, the International Council of Shopping Centers, NAIOP – The Commercial Real Estate Development Association, and the National Association of Real Estate Investment Trusts.

Robert S. LaBrant for the Michigan Chamber of Commerce.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Christopher W. Braverman*, Assistant Attorney General, for the Attorney General.

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

PER CURIAM. In this mortgage deficiency action, defendants[1] Cherryland Mall Limited Partnership and David Schostak (Schostak) appeal as of right the trial court's judgment awarding plaintiff, Wells Fargo Bank, N.A., $2,142,697.86 on the mortgage deficiency claim and $260,000 in stipulated attorney fees and costs, plus interest. We affirm.

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[1] Defendant Schostak Brothers & Co., Inc. is not involved in this appeal. Accordingly, references to "defendants" are only to Cherryland and Schostak.

I. BASIC FACTS AND PROCEDURAL HISTORY

At the heart of this case lies a commercial mortgage-backed securities (CMBS) loan. CMBS loans have a unique structure, as described by the Commercial Mortgage Securities Association and the Mortgage Bankers Association:

> Prior to the development of the CMBS market, commercial real estate was often financed on a recourse basis by banks, thrifts, specialty finance companies and other lenders. Such financing included a first mortgage lien on the real estate and a recourse note or guaranty allowing the lender to seek payment on the mortgage debt from the note obligor (customarily the property owner) or its constituent owner(s) as sureties. The holder of such a mortgage loan might hold the loan in its own portfolio as a whole loan or perhaps sell one or more pieces of it, often through traditional loan syndication or participation structures. With the advent of the CMBS market came the greater availability of non-recourse, asset specific financing for commercial real estate through the use of capital markets, an expansion that attracted new and varied sources of capital to this sector and permitted property owners to acquire and more easily finance real estate without putting their personal balance sheets at risk. In a simple CMBS structure, a lender would make a number of disparate mortgage loans to unrelated entities, then deposit each of the loans into a trust that would issue securities in the public or private markets backed by the cash flow and collateral from the pool of mortgage loans. These securities would be created in a senior/junior structure such that the more senior securities would have payment priority as to both interest and principal during the term as well as at liquidation (and hence a lower coupon rating reflecting the lower risk) over the more junior securities. . . . As many fixed income bond investors—that would otherwise not be active real estate lenders—could now participate in the commercial real estate market through the purchase of CMBS, the flow of capital to the commercial real estate mortgage markets increased significantly and played a major role in leading

the country out of the nationwide real estate depression caused by the savings and loan crisis of the late 1980s. . . .

One of the bedrock elements of a CMBS financing is the isolation of the asset to be financed. This is the essential bargain between borrower and lender that permits financing on a non-recourse basis: the lender agrees not to pursue recourse liability directly or indirectly against the borrower or its owners, provided that the lender can comfortably rely on the assurance that the financed asset will be "ring-fenced" from all other endeavors, creditors and liens related to the parent of the property owner or affiliates, and from the performance of any asset owned by such parent entity or affiliates. More specifically, it is not just the isolation of the real property asset, but the isolation of the cash flows coming from the operation of the real property, from which debt service is paid on the mortgage loan and subsequently distributed to the holders of the securities issued backed by such mortgages. . . .

The twin components of asset isolation are (i) separateness covenants (the "Separateness Covenants") and (ii) narrow limitations on the lender's general agreement not to pursue recourse liability (the "Limited Recourse Provisions"). . . .

The Separateness Covenants, while often referred to and discussed as a unitary concept, are really a package of separate and independent covenants made by a borrower to a CMBS lender. The following is a sample set of Separateness Covenants, taken from the form documents for a CMBS lender:

The borrower has not and, for so long as the mortgage loan shall remain outstanding, shall not:

* * *

(xviii) fail to remain solvent or pay its own liabilities (including, without limitation, salaries of its own employees) only from its own funds . . . .

* * *

The Limited Recourse Provisions are the other key element of asset isolation in CMBS financing. It is important to note that the nature and purpose of this limited recourse is different from a financing that relies on recourse to the borrower, its parent or sponsor for additional credit enhancement beyond the security offered by the mortgaged property. In a CMBS financing, in the event of certain "bad acts" (the "Recourse Triggers") on the part of the borrower and/or its affiliates, the lender's basic agreement not to pursue recourse liability against a borrower or its owners or principals has limited application, allowing the lender to pursue recourse as part of its remedies. The Recourse Triggers would typically be divided into two categories, with differing recourse consequences. In the first category, the recourse would be limited to the amount of any losses incurred by the lender. These Recourse Triggers include [fraud, intentional misrepresentation, misappropriation of rents if the loan were in default, misappropriation of insurance proceeds, actual waste or arson]. To pursue recourse under any of the foregoing Recourse Triggers, a lender would have to establish not only the existence of the Recourse Trigger, but also determine the magnitude of its resulting loss.

For the second category of Recourse Triggers, the lender could seek recourse liability against the borrower in the amount of the total outstanding balance of the mortgage loan, plus any accrued and unpaid interest, regardless of whether the lender had actually suffered a loss. These Recourse Triggers are:

(i) a material breach by borrower [or] its affiliates of the Separateness Covenants;

(ii) any breach of the due-on-transfer or due-on-encumbrance provisions of the loan documents; or

(iii) any voluntary or collusive involuntary bankruptcy or insolvency filing by or on behalf of the borrower.

This list of Recourse Triggers, taken from the document template for a CMBS lender, is representative of the

> limitations found in most CMBS loans. Both with respect to the Recourse Triggers tied to actual losses and those triggering full recourse liability for the entire loan amount, the purpose is the same, namely to provide a credible and enforceable disincentive for the borrower to engage in any act that would constitute a Recourse Trigger. This is wholly different in concept as compared to a recourse-based financing that relies on a direct payment obligation by the borrower or a payment guaranty from its parent as credit support for the loan. [Amended brief of amici curiae Commercial Mortgage Securities Association and Mortgage Bankers Association, filed in *In re Gen Growth Props, Inc*, 409 BR 43 (SD NY, 2009), pp 4-14.]

In October 2002, Cherryland obtained an $8.7 million CMBS loan from Archon Financial, LP, using the mall it owned located at 1712 S. Garfield Road, Garfield Township, Michigan, as collateral. Schostak was the guarantor on the loan. At closing, Cherryland executed the mortgage, note, and assignment, along with other documents, and Schostak signed the guaranty (collectively, the loan documents). Archon transferred the Cherryland loan and the attendant loan documents to plaintiff. The loan was then made a part of a real estate mortgage investment conduit (REMIC) trust, which is governed by a pooling and servicing agreement dated December 1, 2002. Plaintiff is the trustee of the REMIC trust, which contains the Cherryland loan as part of its $685 million pool of CMBS loans.

In 2009, Cherryland failed to make the August 1, 2009, mortgage payment. Plaintiff ultimately commenced foreclosure by advertisement, and the sheriff's sale was conducted on August 18, 2010. Plaintiff was the successful bidder with a bid of $6 million, leaving a deficiency of roughly $2.1 million.

On August 19, 2010, the day after the foreclosure sale, plaintiff filed the instant action against Cherry-

land to enforce the loan documents. Plaintiff subsequently filed an amended complaint, adding Schostak as a defendant as the guarantor of the loan. Plaintiff asserted that it was entitled to recover damages in the amount of the loan deficiency from both Cherryland and Schostak because Cherryland's insolvency constituted a failure to maintain its single purpose entity (SPE) status.

On January 31, 2011, after the close of discovery, plaintiff filed multiple summary disposition motions under MCR 2.116(C)(10) and a motion to disgorge attorney fees. Motion No. 1 sought a judgment against Schostak, as the guarantor, for the entire loan deficiency on the ground that Cherryland's insolvency constituted a failure to maintain its SPE status. Motion No. 2 also sought a judgment against Schostak as the guarantor for the entire loan deficiency, but on the additional ground that Cherryland had entered into unfair transactions with an affiliate, also an alleged failure to maintain its SPE status. Motion No. 4[2] also sought a judgment against Schostak, again as the guarantor, for $61,958 for a distribution Cherryland made to its owners in 2010. Motion No. 5 requested that defendants' attorneys disgorge $34,371 in attorney fees that they received from Cherryland.

After hearing arguments from the parties, the trial court ruled from the bench and found in favor of plaintiff on Motion Nos. 1, 4, and 5, but in favor of defendants on Motion No. 2. After the trial court's ruling, the parties placed several stipulations on the record, one of which related to attorney fees. Subsequently, the parties disagreed about the order for Motion No. 4 (summary disposition for $61,958). Plaintiff

[2] Motion No. 3 related solely to Schostak Brothers & Co., Inc., and is accordingly not relevant to this appeal.

demanded that the order for that claim also include a $260,000 attorney-fee award; defendants claimed that the stipulation was for $260,000 for the entire action related to the $2,142,697 mortgage deficiency, not just the $61,958 claim, particularly because the $61,958 claim had only been asserted in the second amended complaint, filed just one month before. After a hearing, the trial court determined that the $260,000 attorney-fee stipulation would also be included in the order for Motion No. 4. The final judgment was then entered. Defendants moved for reconsideration on March 28, 2011, which the trial court denied.

Defendants appeal only two of the trial court's rulings: (1) On Motion No. 1, they challenge the finding that Schostak, as guarantor, was liable for the entire loan deficiency on the basis of the trial court's conclusion that insolvency was a violation of Cherryland's SPE status, and (2) on Motion No. 4, they challenge the attorney fee award of $260,000.

II. STANDARD OF REVIEW

We review de novo the trial court's decision to grant motions for summary disposition brought under MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). The facts are considered in the light most favorable to the nonmoving party. *Id*. We review the record and the documentary evidence, but do not make findings of fact or weigh credibility. *Taylor v Lenawee Co Bd of Co Rd Comm'rs*, 216 Mich App 435, 437; 549 NW2d 80 (1996).

We also review de novo issues involving the proper interpretation of a contract or the legal effect of a contractual clause. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

III. ANALYSIS

A. SUIT ON THE MORTGAGE

Defendants first contend that the mortgage was extinguished upon its foreclosure, thereby barring plaintiff's lawsuit because it was initiated after the foreclosure sale, at which time the mortgage—and, thus, its terms and conditions—no longer existed. Generally speaking, defendants are correct that foreclosure extinguishes a mortgage. See *Senters v Ottawa Savings Bank, FSB*, 443 Mich 45, 56; 503 NW2d 639 (1993) ("[P]laintiff and defendant were parties to a mortgage agreement that was extinguished by the foreclosure sale in August of 1989."); *New York Life Ins Co v Erb*, 276 Mich 610, 615; 268 NW 754 (1936) ("A mortgage is not extinguished by foreclosure until the sale."). In addition, MCL 565.6 provides that absent agreement to the contrary, mortgages are nonrecourse in Michigan:

> No mortgage shall be construed as implying a covenant for the payment of the sum thereby intended to be secured; and where there shall be no express covenant for such payment contained in the mortgage, and no bond or other separate instrument to secure such payment, shall have been given, the remedies of the mortgagee shall be confined to the lands mentioned in the mortgage.

See, also, 1 Cameron, Michigan Real Property Law (3d ed), § 18.11, pp 687-688.

The trial court concluded that the terms and conditions of the mortgage had not been extinguished by the foreclosure because ¶ 36 of the mortgage provided for indemnification for losses based on the failure of the mortgagor to comply with the terms of the mortgage and such indemnification survived any foreclosure. Defendants argue that ¶ 36 was inapplicable because plaintiff's cause of action was not for indemnification.

We find it unnecessary to determine whether the mortgage was extinguished or whether the indemnification provision in ¶ 36 was applicable because, even accepting defendants' arguments as true, plaintiff still has a basis for its lawsuit.

Our Supreme Court has long held that actions at law are permissible for deficiencies on foreclosures by advertisement:

> "While it is true that a sale on statutory foreclosure satisfies the debt secured by the foreclosed mortgage *to the extent of the proceeds of the sale,* and *thus far* releases the personal obligation, yet***."
>
> As the general rule has been recognized by our legislature and court and is fundamentally sound, we hold that an action at law may be instituted for the deficiency on statutory foreclosure of a mortgage. [*New York Life*, 276 Mich at 613, quoting *Moore v Smith*, 95 Mich 71, 76; 54 NW 701 (1893).]

The basis for such deficiency lawsuits is not the mortgage, as both parties assume, but the note:

> When the borrower cannot repay a loan and the lender pursues foreclosure, the lender may or may not be able to sue the borrower to collect any shortfall commonly known as a deficiency. The key difference is whether or not that loan is classified as a recourse loan or a nonrecourse loan. If the loan is recourse, the lender can attempt to collect a deficiency, which must be done through a court action. This can be done either as part of a judicial foreclosure or as a separate action filed after a foreclosure by advertisement is completed. In either event, *it is based on the enforcement of the covenants of the note* signed by the borrower. [Nathanson, Michigan Residential Real Estate Transactions (ICLE) (2009 update), § 11.2, p 568 (emphasis added).]

In this case, ¶ 49 of the mortgage, setting forth the recourse provisions, is identical to ¶ 13 of the note

except that the mortgage uses the terms "Mortgagor/Mortgagee" and the note uses the terms "Borrower/Lender." The note provides:

> Notwithstanding anything to the contrary in this Note or any of the Loan Documents, . . . the Debt shall be fully recourse to Borrower in the event that . . . Borrower fails to maintain its status as a single purpose entity as required by, and in accordance with the terms and provisions of the Mortgage . . . .

The terms of the note thus entitled plaintiff to maintain a suit for a deficiency judgment. Accordingly, we affirm the trial court's decision to permit plaintiff's lawsuit, albeit for different reasons. *Gleason v Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

B. SINGLE PURPOSE ENTITY REQUIREMENTS AND VIOLATIONS

Defendants next argue that the trial court erred by holding defendants liable for the deficiency on the basis of a violation of the mortgage's SPE requirements. They contend that either the mortgage was unambiguously nonrecourse and insolvency was not a violation of Cherryland's SPE status or that the mortgage was ambiguous and the extrinsic evidence presented showed that solvency was not required to maintain SPE status.

The note, mortgage, and guaranty all provide, in nearly identical language, that the loan debt becomes fully recourse with respect to the borrower (mortgage and note) or the guarantor (guaranty) in the event that Cherryland "fails to maintain its status as a single purpose entity as required by, and in accordance with the terms and provisions of this Mortgage." Indeed, there is no dispute between the parties that the loan documents provide for full recourse liability if Cherryland failed to maintain its "single purpose entity" status. However, they do dispute what the language "as

required by, and in accordance with the terms and provisions of the Mortgage" means. In other words, the parties disagree about what Cherryland must do to maintain that status, which presents a straightforward question of contract interpretation.

"In interpreting a contract, our obligation is to determine the intent of the contracting parties." *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). "[A]n unambiguous contractual provision is reflective of the parties' intent as a matter of law." *Id*. Courts " 'must . . . give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory.' " *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003) (citation omitted). "[I]f the language of a contract is clear and unambiguous, its construction is a question of law for the court." *Mich Nat'l Bank v Laskowski*, 228 Mich App 710, 714; 580 NW2d 8 (1998). However, "the meaning of an ambiguous contract is a question of fact that must be decided by the jury" or other trier of fact. *Klapp*, 468 Mich at 469. A " 'contract is ambiguous when its provisions are capable of conflicting interpretations.' " *Id*. at 467 (citation omitted). But "[i]f the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous." *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997).

As an initial matter, we observe that although the suit is premised on the note, we must still interpret the terms of the mortgage as they relate to SPE status because the note and guaranty expressly incorporate those provisions. See *Forge v Smith*, 458 Mich 198, 207; 580 NW2d 876 (1998) ("Where one writing references another instrument for additional contract terms, the

two writings should be read together."). Accordingly, the first question is whether the mortgage provisions are unambiguous. If so, we may interpret the contract as a matter of law. *Mich Nat'l Bank*, 228 Mich App at 714. If not, the case must be remanded for trial because summary disposition was inappropriate. *Klapp*, 468 Mich at 469.

Paragraph 9 of the mortgage provides as follows:

> **9. Single Purpose Entity/Separateness.** Mortgagor covenants and agrees as follows:
>
> (a) Mortgagor does not own and will not own any asset or property other than (i) the Mortgaged Property, and (ii) incidental personal property necessary for the ownership and operation of the Mortgaged Property.
>
> (b) Mortgagor will not engage in any business other than the ownership, management and operation of the Mortgaged Property.
>
> (c) Mortgagor will not enter into any contract or agreement with any affiliate of the Mortgagor, any constituent party of the Mortgagor, Guarantor, or any affiliate of Guarantor, or any constituent party of the Guarantor, except upon terms and conditions that are intrinsically fair and substantially similar to those that would be available on an arms-length basis with third parties other than any such party.
>
> (d) Mortgagor does not have as of the date hereof and will not after the date hereof incur any indebtedness, secured or unsecured, direct or indirect, absolute or contingent (including guaranteeing any obligation), other than (i) the Debt, (ii) unsecured trade and operational debt incurred in the ordinary course of business with trade creditors and in amounts as are normal and reasonable under the circumstances, (iii) debt incurred in the financing of equipment and other personal property used on the Premises and (iv) debt incurred to obtain the Letter of Credit and Replacement Letter of Credit. No indebtedness other than the Debt may be secured (subordinate or pari passu) by the Mortgaged Property.

(e) Mortgagor does not have oustanding as of the date hereof and will not make after the date hereof any loans or advances to any third party (including any affiliate or constituent party of Mortgagor, Guarantor, or any affiliate or any constituent party of Guarantor), and shall not acquire obligations or securities of its affiliates or any constituent party.

(f) *Mortgagor is and will remain solvent and Mortgagor will pay its debts and liabilities (including, as applicable, shared personnel and overhead expenses) from its assets as the same shall become due.*

(g) Mortgagor has done or caused to be done and will do all things necessary to observe organizational formalities and preserve its existence, good standing and right to do business in the state where it is organized or registered and in the state where the Premises are located, and Mortgagor will not, and will not permit any general partner, manager or managing member, as the case may be, or Guarantor, to amend, modify or otherwise change the partnership certificate, partnership agreement, articles of incorporation and bylaws, articles of organization and operating agreement, trust or other organizational documents of Mortgagor or such other party in any material respect or in any manner which violates or is contrary to this Paragraph 9, without the prior written consent of Mortgagee.

(h) Mortgagor will maintain all of its books, records, financial statements and bank accounts separate from those of its affiliates and any constituent party and Mortgagor will file its own tax returns. Mortgagor shall maintain its books, records, resolutions and agreements as official records.

(i) Mortgagor will be, and at all times will hold itself out to the public as, a legal entity separate from any other entity (including any affiliate or any constituent party of Mortgagor, Guarantor, or any affiliate [or] any constituent party of Guarantor), shall correct any known misunderstanding regarding its status as a separate entity, shall conduct business in its own name, shall not identify itself or any of its affiliates as a division or part of the other and shall maintain and utilize a separate telephone number and separate stationery, invoices and checks.

(j) Mortgagor will maintain adequate capital for the normal obligations reasonably foreseeable in a business of its size and character and in light of its contemplated business operations.

(k) Neither Mortgagor, Guarantor nor any general partner, managing member or manager, as the case may be, of Mortgagor or Guarantor, will seek the dissolution, winding up, liquidation, consolidation or merger, in whole or in part, of the Mortgagor, Guarantor or such entity's general partner, managing member or manager.

(*l*) Mortgagor will not commingle the funds and other assets of Mortgagor with those of any affiliate or constituent party of Mortgagor, Guarantor, or any affiliate or any constituent party of Guarantor, or any other person.

(m) Mortgagor will maintain its assets in such manner that it will not be costly or difficult to segregate, ascertain or identify its individual assets from those of any affiliate or constituent party of Mortgagor, Guarantor, or any affiliate or any constituent party of Guarantor, or any other person.

(n) Mortgagor will not hold itself out to be responsible for the debts or obligations of any other person.

(o) If Mortgagor is a limited partnership or a limited liability company, its general partner, manager or managing member, as the case may be, shall be an entity whose sole asset is its interest in Mortgagor and each such general partner, manager or managing member will at all times comply, and will cause Mortgagor to comply, with each of the agreements and covenants contained in this Paragraph 9 as if such agreement and covenant was made directly by such general partner, manager or managing member. [Emphasis added.]

Plaintiff asserts that Cherryland became insolvent in violation of the dictates of ¶ 9(f) of the mortgage—which required Cherryland to remain solvent to maintain its SPE status—and thus triggered full recourse against the borrower and the guarantor pursuant to the terms of the loan documents. Defendants contend that ¶ 9(f) is not a requirement to maintain SPE status.

Defendants first point out that the mortgage does not define "single purpose entity." However, the failure to define a contractual term does not render a contract ambiguous. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). "Rather, if a term is not defined in a contract, we will interpret such term in accordance with its 'commonly used meaning.' " *Terrien v Zwit*, 467 Mich 56, 76-77; 648 NW2d 602 (2002), quoting *Henderson*, 460 Mich at 354. "Terms in a particular trade are given their natural and ordinary meaning in that trade." *Ososki v St Paul Surplus Lines*, 156 F Supp 2d 669, 675 (ED Mich, 2001). Furthermore,

> "[p]arol evidence is always receivable to define and explain the meaning of words or phrases in a written instrument which are technical and not commonly known, or which have two meanings—the one common and universal and the other technical. Similarly, where a new and unusual word or phrase is used in a written instrument, or where a word or phrase is used in a peculiar sense as applicable to a particular trade, business, or calling or to any particular class of people, it is proper to receive extrinsic evidence to explain or illustrate the meaning of that word or phrase. Such evidence neither varies nor adds to the written memorandum, but merely translates it from the language of trade into the ordinary language of the people generally." [*Moraine Prod, Inc v Parke, Davis & Co*, 43 Mich App 210, 213; 203 NW2d 917 (1972) (citation omitted).]

The record makes clear that "single purpose entity" is a specific, technical term in the mortgage business. Accordingly, the trial court erred both by failing to define "single purpose entity" and by failing to consider extrinsic evidence to the extent necessary to determine definitions for "single purpose entity" and "separateness."[3]

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[3] Remand is unnecessary, however, because interpretation of an unambiguous contract is a matter of law. *Mich Nat'l Bank*, 228 Mich App at

Quoting the integration clause of the guaranty, ¶ 5.12, plaintiff asserts that use of extrinsic evidence was expressly excluded. The clause provides:

> Entirety. THIS GUARANTY EMBODIES THE FINAL, ENTIRE AGREEMENT OF GUARANTOR AND LENDER WITH RESPECT TO GUARANTOR'S GUARANTY OF THE GUARANTEED OBLIGATIONS AND SUPERSEDES ANY AND ALL PRIOR COMMITMENTS, AGREEMENTS, REPRESENTATIONS, AND UNDERSTANDINGS, WHETHER WRITTEN OR ORAL, RELATING TO THE SUBJECT MATTER HEREOF. THIS GUARANTY IS INTENDED BY GUARANTOR AND LENDER AS A FINAL AND COMPLETE EXPRESSION OF THE TERMS OF THE GUARANTY, AND NO COURSE OF DEALING BETWEEN GUARANTOR AND LENDER, NO COURSE OF PERFORMANCE, NO TRADE PRACTICES, AND NO EVIDENCE OF PRIOR, CONTEMPORANEOUS OR SUBSEQUENT ORAL AGREEMENTS OR DISCUSSIONS OR OTHER EXTRINSIC EVIDENCE OF ANY NATURE SHALL BE USED TO CONTRADICT, VARY, SUPPLEMENT OR MODIFY ANY TERM OF THIS GUARANTY AGREEMENT. THERE ARE NO ORAL AGREEMENTS BETWEEN GUARANTOR AND LENDER.

Assuming, without deciding, that the integration clause in the guaranty is controlling in this case,[4] plaintiff's argument still fails. The integration clause provides that no extrinsic evidence may be used "to contradict, vary, supplement or modify any term of this guaranty agreement." (Formatting altered to lowercase.) Here, however, extrinsic evidence is being used to define an undefined technical term. Such a use " 'nei-

714. Accordingly, we may determine the definition of "single purpose entity" and construe the mortgage accordingly.

[4] Notably, the note does not contain an integration clause, and the one in the mortgage does not contain any language expressly prohibiting extrinsic evidence.

ther varies nor adds to the written memorandum, but merely translates it from the language of trade into the ordinary language of the people generally.' " *Moraine Prod, Inc*, 43 Mich App at 213 (citation omitted); see, also, 5 Corbin, Contracts (rev ed), § 24.12, p 108 (stating that when "the court seeks merely to interpret a contract term, which is to discern the meaning of a term already contained in the contract, the question of whether the parties intended their agreement to be integrated is not relevant"). Therefore, we may and must turn to the extrinsic evidence in the record to determine the trade definition for "single purpose entity."

A "single purpose entity" "is an entity, formed concurrently with or immediately prior to the subject transaction, that is unlikely to become insolvent as a result of its own activities and that is adequately insulated from the consequences of any related party's insolvency." *U.S. CMBS Legal and Structured Finance Criteria*, Standard & Poors, May 1, 2003, at 89. Nothing in this definition suggests, however, that all the items found in ¶ 9 of the mortgage document are not required to maintain SPE status. Indeed, a further review of the extrinsic evidence provided by defendants actually counsels against their interpretation.

In the New York bankruptcy amici curiae brief provided by defendants, the Commercial Mortgage Securities Association and the Mortgage Bankers Association made no explicit reference to the term "single purpose entity." Rather they stated that "[o]ne of the bedrock elements of a CMBS financing is the isolation of the asset to be financed" and that "[t]he twin components of asset isolation are (i) separateness covenants . . . and (ii) narrow limitations on the lender's general agreement not to pursue recourse liability . . . ." In addition,

the sample separateness provisions set forth in the brief contain most of the provisions included in ¶ 9 of the mortgage document in this case, including the solvency provision in ¶ 9(f).[5] Indeed, only the provision in ¶ 9(o) of the mortgage has no equivalent provision in the list of separateness covenants found in the brief. On the one hand, that could indicate that defendants are correct and that there are, in fact, no SPE covenants contained in the mortgage, only separateness covenants. However, a different interpretation is more likely: that separateness is a component part of SPE, so that maintaining SPE status requires abiding by the separateness covenants. This interpretation accepts that "single purpose entity" and "separateness" are two different concepts, but recognizes that they are intertwined, making the singular heading "Single Purpose Entity/Separateness" in the mortgage both logical and unambiguous.

This interpretation is also consistent with ¶ 43 of the mortgage, which provides that headings and captions "are for convenience of reference only and are not to be construed as defining or limiting, in any way, the scope or intent of the provisions hereof." The heading at issue here is simply being used as a reference. The note, guaranty, and mortgage all refer to Cherryland's need to maintain its SPE status. The heading "Single Purpose Entity/Separateness" simply provides a reference point in the mortgage to where one should look for that information.

Defendants and the amici curiae in this case argue that this interpretation is inconsistent with ¶ 43 be-

[5] The paragraphs of the mortgage matching provisions in the brief are: 9(a) = (ii); 9(b) = (i); 9(c) = (ix); 9(d) = (vii); 9(e) = (xii); 9(f) = (xviii); 9(g) = (iv); 9(h) = (viii); 9(i) = (xiv); 9(j) = (xv); 9(k) = (xvi); 9(*l*) = (vi); 9(m) = (x); and 9(n) = (xi).

cause it results in the heading defining and limiting the provisions of the mortgage. We disagree. If the mortgage contained provisions throughout that referred to requirements for maintaining SPE status and the provisions were interpreted as not being full recourse triggers because they did not appear in ¶ 9, this interpretation would violate ¶ 43 because the heading for ¶ 9 would limit or define the mortgage. That is not the case here. Rather, the loan documents all refer to the need to maintain "single purpose entity" status as provided in the mortgage, rendering it necessary to look at the mortgage and see what it requires. The logical and reasonable approach is to find references in the mortgage to the term "single purpose entity." As long as each reference to the term contained in the mortgage is considered, ¶ 43 is not violated. In this case, the *only* reference is the heading. Therefore, it is natural and logical to conclude that *all* of ¶ 9, and *only* ¶ 9, sets forth the terms necessary to maintain SPE status.

Further, the interpretation suggested by defendants and the amici curiae violates the rules of contract construction because it renders multiple portions of the loan documents nugatory. "A court must 'give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory.' " *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 638; 734 NW2d 217 (2007), quoting *Klapp*, 468 Mich at 468. Defendants rely on ¶ 43 to assert that the headings must be ignored, resulting in there being no reference to "single purpose entity" in the mortgage documents and, therefore, nothing that defendants had to do to maintain SPE status. This interpretation not only renders the heading of ¶ 9 nugatory, which is not the purpose of ¶ 43, but also renders nugatory the provisions of the mortgage, note, and guaranty documents

that provide that the loan would become fully recourse in the event that Cherryland failed to maintain its SPE status. Given that no fewer than three of the loan documents at issue include the failure to maintain SPE status as a full recourse trigger, it is unreasonable to interpret the mortgage as having no such requirements.

Defendants are correct in their assertion that no cases have held that insolvency is a violation of SPE status. However, the interpretation adopted by the trial court is supported by federal caselaw from Louisiana and Massachusetts and is consistent with a 2001 trial court ruling from Wayne County. The guaranties and mortgages in those cases involved loan documents with headings similar or identical to ¶ 9(f): Single Purpose Entity/Separateness" or "Maintain Single-Purpose Entity Status." Accordingly, those courts' determinations that all the covenants found below the heading were required to maintain SPE status render them squarely on point to the present case, regardless of which of the listed covenants was actually breached.

In *LaSalle Bank NA v Mobile Hotel Props, LLC*, 367 F Supp 2d 1022, 1025-1026 (ED La, 2004), the plaintiff lender sought a deficiency judgment against the defendant borrower, alleging that the full recourse provisions were triggered when the defendant amended its articles of organization and incurred additional debt without the lender's consent. The court noted that the mortgage provided, "(ii) *the Debt shall become fully recourse to Mortgagor* in the event that: . . . (B) Mortgagor . . . fails to maintain its status as a single purpose entity, [] as required by, and in accordance with the provisions of, this Mortgage . . . ." *Id*. at 1029 (quotation marks omitted; some alterations in original). The court then noted, "The Single Purpose Entity/Separateness provision of the mortgage, at ¶ 10, includes a list of fourteen sepa-

rate conditions, representations, covenants or warranties required of the mortgagor that describe and define the scope and limits of the single purpose entity and separateness requirements." *Id*. Looking at ¶ 10 of the *LaSalle Bank* mortgage, it is almost identical to ¶ 9 of the mortgage in this case and included a provision requiring solvency. The *LaSalle Bank* mortgage also contained an identical provision regarding headings. Because the court concluded that all 14 items in ¶ 10 of the *LaSalle Bank* mortgage were requirements that, if violated, resulted in full recourse liability, it made no difference which of the 14 covenants were at issue:

> In its memorandum in support of its motion for summary judgment, LaSalle argues that several additional warranties and covenants were also violated by Borrower, further compromising its status as a single purpose entity and triggering the full recourse provision of the Mortgage and Mortgage Note. Finding that the Borrower's violation of any one of the covenants listed [is] sufficient to make the Mortgage a full recourse obligation, the Court does not discuss these additional "violations". [*Id*. at 1029 n 7.]

Thus, had the defendant in *LaSalle* been found to be insolvent, rather than as having amended its articles of organization, the result would have been identical to the instant case.

In *Blue Hills Office Park LLC v JP Morgan Chase Bank*, 477 F Supp 2d 366, 377 (D Mass, 2007), the defendant lender filed a counterclaim against the plaintiff borrower for a $10.7 million deficiency under a nonrecourse loan. The lender argued that, by transferring parts of the mortgaged property without prior written consent from the lender, the borrower had breached the mortgage agreement and became liable for the deficiency. *Id*. The court also found a violation of the guaranty because the borrower "failed to maintain its status as a single purpose entity." *Id*. at 382. It noted

that the guaranty "unambiguously states that the '[g]uarantor shall be liable for the full amount of the Debt in the event that . . . B) Borrower fails to maintain its status as a single purpose entity, as required by, and in accordance with, the Mortgage' " and concluded that "[p]aragraph 12 of the mortgage agreement provides the covenants to which [the borrower] agreed concerning its single purpose entity status." *Id*. (some alterations in original). As was true of both the *LaSalle Bank* mortgage and the mortgage in the instant case, the *Blue Hills* mortgage contained a single section titled "Single Purpose Entity/Separateness" that provided multiple covenants, including one regarding remaining solvent, as well as an identical headings section. Again, different covenants were violated by the borrower—¶ 12(*l*), (m), and (r)—but the result was the same: "Consequently, [borrower] has failed to maintain its status as a single purpose entity and, as a result, violated section 1.2 of the guaranty." *Id*. at 383. The reasoning from *Blue Hills* is entirely consistent with the trial court's interpretation in the present case.

Finally, plaintiff has provided a copy of a transcript of a 2001 hearing and some exhibits in *Wells Fargo Bank Minnesota, NA v Leisure Village Assoc*, Wayne Circuit Court, Docket No. 00-031860-CZ. The *Leisure Village* documents are slightly different and, arguably, more clearly written, but suggest the same result. The note provided that "the agreement not to pursue recourse liability shall become null and void in the event of borrowers' default under Section 13 or 25 of the mortgage." Section 25 of the mortgage provided:

> SINGLE PURPOSE ENTITY. Until the Indebtedness is paid in full, Mortgagor shall maintain its status as a Single Purpose Entity and comply with all those covenants with respect to its status as a Single Purpose Entity as set forth in Section 5.4 of the Loan Agreement.

Section 5.4 of the loan agreement is titled "Maintain Single-Purpose Entity Status," and sets forth 19 covenants, including a requirement that the borrower will not "become insolvent or fail to pay its debts from its assets as the same shall become due." Although the borrower was alleged to have violated a different subsection, the defendants made arguments identical to those made to this Court, i.e., that only some of the covenants listed pertained to single purpose entity status. In *Leisure Village*, the trial court noted:

> Defendant[s] argue that only a few of the 19 covenants are directed toward the maintenance of a single purpose entity and none of those have been violated. In other words, defendants argue that Leisure Village Associates, in order to avoid a default under Section 25 of the mortgage, was only required to comply with those particular covenants, the non-compliance with which would destroy its status as a single purpose entity. The Court disagrees.
>
> The important sentence in Section 25 has two parts, separated with the word "and." It states first that the mortgagor shall maintain its status as a single purpose [entity], then states, after the word and, a separate duty. To comply with all those covenants with respect to its status as a single purpose entity as set forth in Section 5.4 of the loan agreement.
>
> Defendants[']reading of the sentence renders the second clause superfluous for purposes of Section 25 of the mortgage. . . .
>
> As set forth above, Section 25 states that the borrower shall comply with all those covenants with respect to its status as a single purpose entity, as set forth in Section 5.4 of the loan agreement. This is, obviously, a reference to the fact that Section 5.4 is captioned "Maintain Single Purpose Entity Status."
>
> Defendant [sic] states that the Court must disregard the caption because mortgage section 29 states that the captions and headings of the sections of this instrument shall

> be disregarded in construing this instrument. However, 5.4 appears in the loan agreement, which states that headings are for convenience of reference only, are not to be considered part thereof, and shall not limit or otherwise effect [sic] any of the terms hereof.
>
> In referencing the maintaining of single purpose entity status, the mortgage references the section of the loan agreement captioned "Maintain Single Purpose Entity Status." In other words, it references the entire section, which it may do properly under the language of the loan agreement.
>
> * * *
>
> The Court agrees with plaintiff that the language of the agreement is clear as a matter of law, ultimately and after much reading, and that to violate any of the provisions of Section 5.4 is, in fact, a default under Section 25 of the mortgage. Defendant[s] argue[] that this interpretation would make no sense and must be improper, because otherwise the loan would become recourse if, for example, Leisure Village ever failed to pay any debt. I agree that such relief seems extreme, but it should be remembered that the lender stated specifically in the preamble that the exceptions were being placed in that section in order to induce the lender to make the loan. The borrowers were apparently not able to negotiate for less strict language and this Court declines to write it into the contract.

Thus, the trial court in *Leisure Village* dealt with, and rejected, all the arguments made by defendants in this case. Further, even ignoring the differences in the documents and their interplay, what is clear in each of these cases, but especially from the clarity in the *Leisure Village* ¶ 5.4 reference, is that maintaining solvency is always one of the covenants required to maintain SPE status. Indeed, there is no reference at all in the *Leisure Village* mortgage or loan agreement to "separateness" covenants. Thus, cases interpreting

similar loan documents do not support defendants' position that all the covenants contained in ¶ 9 of the mortgage do not relate to maintaining SPE status.

Defendants argue in the alternative that even if ¶ 9(f) was an SPE requirement, it was not breached. Defendants assert that the provision was intended to prevent owners from removing all the money from Cherryland, thereby leaving it without assets sufficient to pay its debts. And because the owners did not remove any assets in the three years predating the default, Cherryland's insolvency was not created by the owners and was therefore not a violation of ¶ 9(f).

First, defendants do not contend that ¶ 9(f) is ambiguous; thus, there is no reason to resort to extrinsic evidence to interpret it. Second, the parties agree that Cherryland became insolvent. Cherryland's only basis for its contention that ¶ 9(f) was not violated is that the insolvency was based not on its own actions, but on the downward spiral of the market. Paragraph 9(f), however, does not require insolvency to occur in any specific manner. Rather, any failure to remain solvent, no matter what the cause, is a violation. As the court noted in *LaSalle Bank*, 367 F Supp 2d at 1030:

> It is irrelevant that [the borrower] did not ever actually engage in, or for that matter, never intended to engage in, any activity other than the operation of the hotel property. *Its motive* for amending its Articles of Organization *is also irrelevant*. . . .
>
> The language of the mortgage means what it says. [The borrower]'s amendment of its Articles of Organization breached the covenant to maintain its status as a single purpose entity and triggered the full recourse provision of the mortgage. [Emphasis added.]

Similarly, the mortgage in the instant case has no scienter requirement. Cherryland was required to re-

main solvent and it failed to do so. That failure breached the covenant to maintain its status as an SPE and triggered the full recourse provision of the mortgage.

We recognize that our interpretation seems incongruent with the perceived nature of a nonrecourse debt and are cognizant of the amici curiae's arguments and calculations that, if accurate, indicate economic disaster for the business community in Michigan if this Court upholds the trial court's interpretation. Nevertheless, the documents at issue appear to be fairly standardized nationwide, and defendants elected to take that risk—as did many other businesses in Michigan and nationwide. It is not the job of this Court to save litigants from their bad bargains or their failure to read and understand the terms of a contract. See *Farm Bureau Mut Ins Co of Mich v Nikkel*, 460 Mich 558, 567; 596 NW2d 915 (1999) (" 'This court has many times held that one who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms.' ") (citation omitted); *Allied Supermarkets, Inc v Grocers' Dairy Co*, 391 Mich 729, 737; 219 NW2d 55 (1974) ("A court of equity may not be used . . . as the means of avoiding the consequences of a legal contract now regarded as a bad bargain."). Indeed, our Supreme Court has made clear that

> [t]his approach, where judges divine the parties' reasonable expectations and then rewrite the contract accordingly, is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstances, such as a contract in violation of law or public policy. [*Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003).]

Defendants and the amici curiae attempt to invoke this Court's power to avoid enforcement by alleging that these contracts violate public policy. However, our Supreme Court has consistently stated that it is the role of the Legislature to address matters of public policy:

> " 'As a general rule, making social policy is a job for the Legislature, not the courts. See *In re Kurzyniec Estate*, 207 Mich App 531, 543; 526 NW2d 191 (1994). This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another: "The responsibility for drawing lines in a society as complex as ours—of identifying priorities, weighing the relevant considerations and choosing between competing alternatives—is the Legislature's, not the judiciary's." *O'Donnell v State Farm Mut Automobile Ins Co*, 404 Mich 524, 542; 273 NW2d 829 (1979).' "
>
> * * *
>
> This case illustrates why this Court should frequently defer policy-based changes in the common law to the Legislature. When formulating public policy for this state, the Legislature possesses superior tools and means for gathering facts, data, and opinion and assessing the will of the public. . . .
>
> The judiciary, by contrast, is designed to accomplish the discrete task of resolving disputes, typically between two parties, each in pursuit of the party's own narrow interests. We are " 'limited to one set of facts in each lawsuit, which is shaped and limited by arguments from opposing counsel who seek to advance purely private interests.' " We do not generally consider the views of nonparties on questions of policy, and we are limited to the record developed by the parties. The reality of our judicial institutional limitations is a significant liability in regard to our ability to make informed decisions when we are asked to create public policy by changing the common law. [*Woodman v Kera LLC*, 486 Mich 228, 245-247; 785 NW2d 1 (2010) (opinion by YOUNG, J.) (citations omitted).]

In summary, on the basis of the rules of contract interpretation and the persuasive authority of decisions of other courts that have interpreted nearly identical loan documents, we agree with the trial court that the mortgage, as incorporated into the note, unambiguously required Cherryland to remain solvent in order to maintain its SPE status. Having admittedly become insolvent, Cherryland violated the SPE requirements, resulting in the loan becoming fully recourse.[6]

Affirmed. No costs, a significant question of public interest being involved.

CAVANAGH, P.J., and SAWYER and METER, JJ., concurred.

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[6] In light of our affirmance, we need not consider defendants' claims related to the attorney-fee stipulation.

PEOPLE v DOUGLAS

Docket No. 301233. Submitted December 14, 2011, at Detroit. Decided December 29, 2011, at 9:00 a.m. Leave to appeal denied, 493 Mich 861.

Todd A. Douglas was charged in the Wayne Circuit Court with copying audio and video recordings for gain in violation of MCL 752.1052(1)(d), which prohibits a person from selling, renting, distributing, or transporting a recording with knowledge that it does not contain the manufacturer's name and address in a prominent place as required by MCL 752.1053. The trial court, Michael J. Callahan, J., dismissed the case after ruling that the phrase "prominent place" rendered the statute unconstitutionally vague. The prosecution appealed.

The Court of Appeals *held*:

1. A statute is void for vagueness if it does not provide fair notice of the proscribed conduct, confers on the trier of fact unstructured and unlimited discretion to decide when an offense has been committed, or is overbroad and impinges on protected First Amendment rights.

2. The trial court erred by ruling that the phrase "prominent place" rendered the statute unconstitutionally vague. The statute provides that a person shall not sell, rent, distribute, transport, or possess for the purpose of selling, renting, distributing, or transporting, or any combination thereof, a recording with knowledge that the recording does not contain in a prominent place on its cover, box, jacket, or label the true name and address of the manufacturer. Although the possible vagueness of the term "prominent place" might affect the manner in which a recording displays the required information, the statute clearly and unequivocally requires the information to be displayed, which defendant had made no attempt to do. Further, the term "prominent place" provides adequate notice of the prohibited or required conduct, given that a person of ordinary intelligence would understand, by reference to prior judicial opinions, the common law, dictionaries, or the common meaning of words, that the statute requires the manufacturer's name and address to be on a particular portion of the cover, box, jacket, or label of the recording so that the information would stand out and be easily seen.

3. If a statute does not contain adequate standards to guide those who are charged with its enforcement, the statute is void because it impermissibly gives the trier of fact unstructured and unlimited discretion in applying the law. However, a statute cannot be held void on this ground unless the wording of the statute itself is vague. Because the definition and common meaning of the phrase "prominent place" sufficiently provides people of ordinary intelligence with notice of what conduct the statute prohibits, the statute's wording itself is not vague. Even if its wording had been vague, the statute would not have impermissibly conferred discretion on the trier of fact. The statute sufficiently sets forth the elements that the prosecution must prove, which are that a defendant performed one of the specifically enumerated acts with the requisite mental state and that the material lacked the required information. The requirement that the prosecution prove that a defendant knew the label lacked the manufacturer's name and address limits the potential reach of the statute to illegitimate manufacturers and distributors.

4. To facially challenge a statute that regulates both speech and conduct, a defendant must show that its overbreadth is real and substantial in relation to its plainly legitimate sweep and that it presents a realistic danger of significantly compromising the recognized First Amendment protections of parties not before the Court. The overbreadth doctrine does not apply to commercial speech, but the statute at issue regulates both commercial and noncommercial speech by requiring that all recordings distributed or possessed for the purpose of distribution bear the manufacturer's name and address, given that distribution does not require a commercial transaction. Because freedom of expression includes the right to distribute information anonymously, the statute regulates substantially more noncommercial speech and conduct than its plainly legitimate sweep allows. The statute must therefore be construed as limited to reach only those cases in which a person has commercially distributed a recording or possessed a recording for commercial distribution.

Reversed and remanded for further proceedings.

1. CONSTITUTIONAL LAW — STATUTES — VAGUENESS.

A statute is void for vagueness if it does not provide fair notice of the proscribed conduct, is so indefinite as to confer on the trier of fact unstructured and unlimited discretion to decide when an offense has been committed, or is overbroad and impinges on protected First Amendment rights.

2. CONSTITUTIONAL LAW — STATUTES — VAGUENESS — CONFERRING OF DISCRETION ON FACT-FINDER.

A statute may not be voided for conferring unstructured and unlimited discretion on the fact-finder unless the wording of the statute itself is vague; the wording of a statute is not vague if it sufficiently provides people of ordinary intelligence with notice of what conduct the statute prohibits; a statute that clearly and plainly sets forth the elements that the prosecution must prove does not confer unstructured and unlimited discretion on the fact-finder.

3. CONSTITUTIONAL LAW — STATUTES — UNAUTHORIZED DUPLICATION OF RECORDINGS FOR GAIN — VAGUENESS — OVERBREADTH.

The statutory requirement that all recordings distributed or possessed for the purpose of distribution bear the manufacturer's name and address applies only to cases in which a person has commercially distributed a recording or possessed a recording for commercial distribution (MCL 752.1052[1][d], 752.1053).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training and Appeals, and *Jason W. Williams*, Assistant Prosecuting Attorney, for the people.

John F. Royal for defendant.

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

WHITBECK, J. The prosecution charged defendant Todd Alan Douglas, Sr., with copying audio or video recordings for gain. The trial court dismissed the case, ruling that a provision of 1994 PA 210,[1] the statute under which he was charged, was unconstitutional because the statutory term "prominent place" was vague. The prosecution appeals.

The statute provides that "[a] person shall not . . . [s]ell, rent, distribute, transport, or possess for the

[1] MCL 752.1051 through 752.1057.

purpose of selling, renting, distributing, or transporting, or any combination thereof, a recording with knowledge that the recording"[2] does not "contain *in a prominent place* on its cover, box, jacket, or label the true name and address of the manufacturer."[3] Because we conclude that the statute gave Douglas constitutionally adequate notice of the conduct prohibited or required, we reverse. However, we confine the scope of the statute to commercial speech to eliminate its application to activities that the First Amendment protects.

I. BASIC FACTS

In late April 2010, Officers James Wiencek and Eric Smielski of the Detroit Police Department observed a red car stop for an unusually long time at an intersection. While the car was stopped, Douglas, who was the driver of the car, and the passenger, his son, talked with a woman in another car parked on the side of the road. For several minutes, the red car blocked the lane leading into the intersection so that other cars could not pass through, causing a traffic backup. The red car finally turned right at the intersection. The officers pulled up next to the woman in the parked car, and she told them, "Thank you. You saved me." The officers then activated the patrol car lights and stopped the red car.

Upon approaching the red car, Officer Wiencek noticed several digital video discs (DVDs) lying on the floor by the passenger seat. Officer Wiencek realized that the DVDs were marked with titles of movies that were still playing in theaters. In addition, the DVDs were not packaged and the titles were handwritten. The officers ordered Douglas out of the car, and although he initially refused to follow the officers' orders, he even-

[2] MCL 752.1052(1)(d).

[3] MCL 752.1053 (emphasis added).

tually got out of the car after backup and supervisory officers arrived. The officers then arrested Douglas and searched the car. In total, the officers confiscated two compact disc (CD) and DVD burners, 334 counterfeit CDs and DVDs, and 100 blank recordable discs. After the officers arrested Douglas, he told them that he did not want his son to get into trouble and that "[e]verything in the car is mine . . . ."

The officers later confirmed that some of the DVDs that they found in Douglas's car had not yet been released in DVD format on the date that the officers confiscated them. They also determined that the CDs and DVDs were illegitimate copies made with a burner and that the CDs and DVDs did in fact contain audio and video recordings. Neither the DVDs nor the CDs contained any written information on them besides the handwritten titles. They did not contain the studio logo, the name or address of the manufacturer, or the other markings that legitimate manufacturers normally place on these labels.

Douglas moved to suppress the evidence and dismiss the case for lack of evidence, claiming that the officers unlawfully stopped his car. At the hearing on the motion, the trial court expressed concern about the constitutionality of MCL 752.1053 and requested that the attorneys research whether the statute was impermissibly vague or overbroad. The trial court suggested to Douglas that he move to dismiss the case on vagueness grounds.

At the subsequent hearing on Douglas's motion to dismiss, the trial court engaged in the following dialogue with the prosecutor:

> *The Court*: Well, I indicated to the lawyers that I thought that there was a constitutional problem with the words, prominent place. As is evident now and on the basis of this case, the charging [statute] . . . indicates, quote, recordings did not contain in a prominent place on the cover box, jacket or label the true name and address of the manufacturer.

> The problem that I have is, not that I am anti prosecutor, but the state gets to decide if that statute is violated and that I do not believe that that's how the legislature can work in enacting statutes. Therefore—
>
> [*The Prosecutor*]: Your honor, I am sorry. In this case with the CDs that the Defendant has the name is written in marker on the CD or DVD. Obviously, that is in violation of the statute.
>
> *The Court*: Well, it would be a factual problem if the case could go to the jury. However, I didn't rent the DVDs from whatever the video store is near my house, but my children did and I looked at the box. The manufacturer's detail is typically in the lower left corner of the back of the DVD box.
>
> I don't see how anybody can consider that a prominent place, leading me to the problem that this case brings to fore that the prominent place is something decided as a matter of law by the prosecution and I think that is void for vagueness.
>
> The matter is dismissed because I find that the statute under which he has [been] charged is unconstitutional. Go ahead.
>
> [*The Prosecutor*]: Your Honor, only that this Defendant didn't have any boxes, just a CD that had a name written on it in marker. So, I don't know that is comparable to what your Honor just described.

The trial court held the statute unconstitutional and, as a result, dismissed the charge against Douglas. The prosecution now appeals.

II. VAGUENESS

A. STANDARD OF REVIEW

The constitutionality of a statute is a question of law that this Court reviews de novo.[4]

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[4] *People v Barton*, 253 Mich App 601, 603; 659 NW2d 654 (2002).

B. LEGAL STANDARDS

This Court must assume that a statute is constitutional and construe that statute as constitutional unless it is clearly unconstitutional.[5] " 'The party challenging a statute has the burden of proving its invalidity.' "[6] A defendant may challenge a statute for vagueness on three grounds: (1) the statute does not provide fair notice of the proscribed conduct, (2) the statute is so indefinite as to confer on the trier of fact " 'unstructured and unlimited discretion' " to decide when an offense has been committed, and (3) the statute is overbroad and impinges on protected First Amendment rights.[7]

C. CONSTITUTIONALITY "AS APPLIED" AND ADEQUATE NOTICE

To challenge the statute on the ground that it did not provide adequate notice, Douglas bore the burden to identify specific facts that suggested he complied with the statute and then argue that the term "prominent place" was vague.[8]

In *People v Beam*, this Court addressed the constitutionality of a statute[9] that imposed criminal liability on dog owners for their dogs' attacks if the owner had previously trained the dog to fight.[10] The statute, however, only held the owner liable if the victim had not provoked the attack.[11] The defendant argued that the

[5] *People v Dipiazza*, 286 Mich App 137, 144; 778 NW2d 264 (2009).

[6] *Id*., quoting *In re Ayres*, 239 Mich App 8, 10; 608 NW2d 132 (1999).

[7] *People v Petrella*, 424 Mich 221, 253; 380 NW2d 11 (1985), quoting *Woll v Attorney General*, 409 Mich 500, 533; 297 NW2d 578 (1980).

[8] See *People v Beam*, 244 Mich App 103, 107-108; 624 NW2d 764 (2000).

[9] MCL 750.49(10).

[10] *Beam*, 244 Mich App at 107.

[11] *Id*.

statutory term "provocation" was impermissibly vague, rendering the statute void for vagueness.[12] The trial court agreed and dismissed the case.[13] This Court disagreed, held the statute constitutional as applied to the defendant, and reinstated the charge.[14] The Court held that, to mount a vagueness defense, the defendant must "point to some facts suggesting 'provocation' and argue that, because that term is so vague, the trier of fact is granted unstructured and unlimited discretion in determining whether it occurred."[15] Because the facts did not even arguably fall within the meaning of "provocation," the Court held the statute constitutional as applied.[16]

Douglas similarly fails to point to any facts indicating that he complied with the statute *at all*—that is, that his CDs and DVDs *somewhere* displayed the manufacturer's true name and address. Therefore, he cannot claim that vagueness in the words "prominent place" caused him to violate the statute because, at a minimum, MCL 752.1053 requires that the manufacturer's information be displayed *somewhere* on the item. Because the CDs and DVDs in Douglas's car did not contain this information *anywhere*, the issue of whether the words "prominent place" provided him adequate notice and instruction such that he could be expected to follow the law does not actually arise.

Although, hypothetically, the meaning of "prominent place" might be confusing, causing the distribution or selling of CDs or DVDs that are labeled incorrectly, Douglas cannot argue that this possible confusion caused him

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[12] *Id*. at 105.

[13] *Id*.

[14] *Id.* at 109-110.

[15] *Id*. at 107-108.

[16] *Id*.

to violate the statute when his CDs and DVDs contained absolutely *no* attempt to convey the required information. Stated another way, the possible vagueness of the term "prominent place" might affect *how* the recording must display the required information—for example, in what location, size, color, or font. But the term does not create any doubt regarding *whether* the recording must state the information; this the statute clearly, unequivocally, and very directly requires.

Regardless, the term "prominent place" provides adequate notice of the prohibited or required conduct. It is a fundamental principle of due process that " '[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes'."[17] If, because of the vagueness of the statutory language, a person of ordinary intelligence would not understand the statute's meaning, this Court must hold the statute void for vagueness.[18] But due process requires only that a statute provide notice of what conduct " 'is probably or certainly criminal.' "[19] " 'Provided that conduct is of a sort widely known among the lay public to be criminal . . . a person is not entitled to clear notice that the conduct violates a *particular* criminal statute.' "[20] Additionally, a statute provides fair notice if a person could fairly ascertain its meaning by reference to prior judicial opinions, the common law, dictionaries, or the common meanings of words.[21]

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[17] *People v Lynch*, 410 Mich 343, 359; 301 NW2d 796 (1981) (LEVIN, J., concurring), quoting *Lanzetta v New Jersey*, 306 US 451, 453; 59 S Ct 618; 83 L Ed 888 (1939).

[18] *People v Munn*, 198 Mich App 726, 727; 499 NW2d 459 (1993).

[19] *People v Lino*, 447 Mich 567, 576 n 4; 527 NW2d 434 (1994), quoting *United States v White*, 882 F2d 250, 252 (CA 7, 1989).

[20] *Id*.

[21] *Beam*, 244 Mich App at 105, citing *People v Noble*, 238 Mich App 647, 651-652; 608 NW2d 123 (1999).

Absent a statutory definition, this Court must give each word of a statute its plain and ordinary meaning.[22] If a statute does not define its terms, this Court may consult dictionary definitions to assist in determining the ordinary meaning of the statutory terms.[23] In this case, the statute does not provide a definition or other direction regarding the meaning of the phrase "prominent place."

Random House Webster's College Dictionary (2001) defines the term "prominent" as "standing out as to be seen easily; conspicuous." It defines "place" as "a particular portion of space, whether of definite or indefinite extent." Together with the wording of the statute, these terms require the manufacturer's true name and address to be on a particular portion of the cover, box, jacket, or label so that the information will stand out and be easily seen. This language is sufficiently clear to provide notice of what the statute requires.

D. LIMITATION OF DISCRETION

If a statute does not contain adequate standards to guide those who are charged with its enforcement, the statute is void because it impermissibly gives the trier of fact "unstructured and unlimited discretion" in applying the law.[24] However, this Court cannot determine that a statute impermissibly confers unstructured and unlimited discretion unless it first concludes that the wording of the statute itself is vague.[25] As discussed

[22] *People v Nichols*, 262 Mich App 408, 413; 686 NW2d 502 (2004), citing *People v Cathey*, 261 Mich App 506; 681 NW2d 661 (2004).

[23] *Id*.

[24] *West Bloomfield Charter Twp v Karchon*, 209 Mich App 43, 54; 530 NW2d 99 (1995).

[25] *People v White*, 212 Mich App 298, 313; 536 NW2d 876 (1995).

earlier, the definition and common meaning of the phrase "prominent place" sufficiently provides people of ordinary intelligence with notice of what conduct the statute prohibits. The wording of the statute, therefore, is not so indefinite that it confers unstructured and unlimited discretion on the trier of fact.[26]

But even if this statutory language had been vague, the statute would not have impermissibly conferred discretion on the trier of fact. If a statute "clearly and plainly sets forth the elements that the prosecutor must prove beyond a reasonable doubt," then "it does not leave the jury with unstructured and unlimited discretion in finding guilt."[27] In *People v Russell*, this Court held that, because the criminal sexual conduct statute sufficiently defined "sexual contact" and required the trier of fact to find that the defendant had engaged in "sexual contact," the statute met the constitutional threshold.[28] In contrast, this Court held in *People v Gagnon*[29] that a statute proscribing any intoxicated person from causing a "public disturbance" vested unlimited discretion in the trier of fact because the statutory standard did not "elaborate on what actions qualify as a public disturbance . . . ."[30]

Read together, MCL 752.1052 and MCL 752.1053 sufficiently set forth the elements that the prosecution must prove. These provisions state that "[a] person shall not . . . [s]ell, rent, distribute, transport, or possess for the purpose of selling, renting, distributing, or transporting, or any combination thereof, a recording with

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[26] *Petrella*, 424 Mich at 253.

[27] *People v Russell*, 266 Mich App 307, 312; 703 NW2d 107 (2005); see also *id*. at 311.

[28] *Id*. at 311-312.

[29] *People v Gagnon*, 129 Mich App 678, 684; 341 NW2d 867 (1983).

[30] *Id*. at 683-684.

knowledge that the recording"[31] does not "contain in a prominent place on its cover, box, jacket, or label the true name and address of the manufacturer."[32] The prosecution must therefore prove that a defendant performed one of the specified acts with the requisite mental state and that the material lacked the required information.

Most importantly, the prosecution must prove that a defendant knew the label lacked the manufacturer's name and address. This requirement substantially limits the potential reach of the statute because, in general, only illegitimate manufacturers and distributors of these materials will have actual knowledge that the items they sell or deal in do not contain the required information. (The exception being the person who distributes original recordings to spread a message. This exception will be discussed later.) Thus, the innocent resale of legitimately bought items would generally not violate the statute even if the *manufacturer* had failed to place the required information on the item, because the *seller* would lack such knowledge. For these reasons, the limited amount of discretion the statute may confer on the jury in interpreting the meaning of "prominent place" is a far cry from the "unstructured and unlimited discretion" that *Russell* and other cases prohibit.

E. OVERBREADTH

Generally, a defendant may only challenge a statute as vague or overbroad in light of the facts of the case at issue.[33] If the defendant's conduct falls within the constitutional scope of the statute, the charge may not be defended on the basis that the statute is vague or over-

[31] MCL 752.1052(1)(d).

[32] MCL 752.1053.

[33] *People v Rogers*, 249 Mich App 77, 95; 641 NW2d 595 (2001).

broad.[34] However,

> [t]his rule of standing is relaxed when First Amendment rights are involved. Recognizing that the "First Amendment needs breathing space," the overbreadth doctrine permits litigants "to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[35]

When a defendant challenges a statute that regulates both speech and conduct, the defendant must show that the overbreadth of the statute is not only " 'real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.' "[36] As the United States Supreme Court has explained, the "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge."[37] Rather, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds."[38]

The statute at issue regulates both speech and conduct. It prohibits selling, renting, distributing, and possessing certain recordings—which, reasonable minds would agree, constitute conduct—as well as the dissemination of the speech and ideas contained within those recordings.[39]

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[34] *Id*.

[35] *Id.* at 95, quoting *Broadrick v Oklahoma*, 413 US 601, 611-612; 93 S Ct 2908; 37 L Ed 2d 830 (1973).

[36] *Rogers*, 249 Mich App at 96, quoting *Broadrick*, 413 US at 615.

[37] *Los Angeles City Council v Taxpayers for Vincent*, 466 US 789, 800; 104 S Ct 2118; 80 L Ed 2d 772 (1984).

[38] *Id*. at 801.

[39] See *Briggs v State*, 281 Ga 329, 336-337; 638 SE2d 292 (2006) (Melton, J., dissenting); *People v Anderson*, 235 Cal App 3d 586, 588; 286 Cal Rptr 734 (1991).

The overbreadth doctrine, however, does not apply to commercial speech.[40] Commercial speech does not require the additional protection because "commercial speech is more hardy, less likely to be 'chilled,' and not in need of surrogate litigators."[41] In essence, the law presumes that the economic incentive to speak will outweigh the chilling effect a law may have, removing any need to allow a party to raise the rights of third parties not before the court.

The statute here regulates both commercial and noncommercial activity. Although the statute regulates selling and renting, it goes further to regulate distribution and possession for the purpose of distribution. Disregarding the parts of the statute that regulate commercial activity, the statute requires labeling of all recordings "distributed" or "possessed for the purpose of . . . distribution . . . ."[42] Because the statute does not define the word "distribute," and no case has yet interpreted the meaning of "distribute" in MCL 752.1053, this Court may turn to dictionary definitions in giving this statutory term its ordinary and generally accepted meaning.[43]

"Distribute" can mean several things, including (1) "to divide and give out in shares; allot," (2) "to spread throughout a space or over an area; scatter," (3) "to pass out or deliver: *to distribute pamphlets*," and (4) "to sell (merchandise) in a specified area."[44] Under the first three of these definitions, a person may "distribute"

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[40] *Hoffman Estates v Flipside, Hoffman Estates*, 455 US 489, 497; 102 S Ct 1186; 71 L Ed 2d 362 (1982).

[41] *State Univ of New York Bd of Trustees v Fox*, 492 US 469, 481; 109 S Ct 3028; 106 L Ed 2d 388 (1989).

[42] MCL 752.1053.

[43] *People v Tombs*, 260 Mich App 201, 209; 679 NW2d 77 (2003).

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

recordings without conducting a commercial transaction, because these definitions do not require the person to engage in any type of sale.

We conclude that the statute regulates substantially more noncommercial speech and conduct than its plainly legitimate sweep allows. In *Talley v California*,[45] the United States Supreme Court struck down a law that prohibited the distribution of any handbill that did not contain the name of the person who "printed, wrote, compiled or manufactured the same." The Court held that this identification requirement impermissibly restricted the freedom of expression, which includes the right to distribute information anonymously because " '[l]iberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' "[46] The Court explained:

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies[,] was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. . . . It is plain that anonymity has sometimes been assumed for the most constructive purposes.[47]

Although the state of California had a legitimate interest in preventing fraud, false advertising, and libelous

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[45] *Talley v California*, 362 US 60, 61; 80 S Ct 536; 4 L Ed 2d 559 (1960).

[46] *Id*. at 64, quoting *Lovell v City of Griffen*, 303 US 444, 452; 58 S Ct 666; 82 L Ed 949 (1938).

[47] *Talley*, 362 US at 64-65.

messages, in *Talley*, the Supreme Court held that the legislature had regulated too much speech because the statute did not limit its reach to materials containing such statements.[48] The Supreme Court, therefore, struck down the statute as facially overbroad.[49]

MCL 752.1053 clearly, and impermissibly, prohibits the anonymous distribution of CDs, DVDs, and other recordings, and a defendant may therefore challenge the statute on overbreadth grounds.[50] CDs and DVDs today spread information in a way similar to the handbills and pamphlets so common in England and colonial America. People can, and do, create and record original commentaries, speeches, documentaries, and other political and social communication on CDs and DVDs. Because of their audio and visual format, these recordings may be even more effective in evoking a reaction than the printed form. The Legislature designed the statute at issue to prohibit and punish the unauthorized duplication of movies, music, and other so-called "pirated" media. The statute as written, however, applies overbroadly to the innocent distribution of original recordings containing political messages and social commentary and of countless other noncommercial recordings.

But this Court can construe MCL 752.1053 to limit its reach to avoid the necessity of striking it down. "A statute may be saved from being found to be facially invalid on overbreadth grounds where it has been or could be afforded a narrow and limiting construction by state courts or if the unconstitutionally overbroad part of the statute can be severed."[51] A trial court has the

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[48] *Id.* at 64.

[49] *Id*. at 65.

[50] See, e.g., *Briggs*, 281 Ga at 331.

[51] *Rogers*, 249 Mich App at 96.

"duty to uphold the constitutionality of a statute or ordinance and, if necessary, to give . . . a limiting construction if to do so would render it constitutional."[52] If the trial court can limit the construction of a statute consistently with the Legislature's ascertainable intent, it must do so before holding the statute unconstitutional.[53]

We therefore limit the statute's reach to those cases in which a person has commercially distributed a recording or possessed a recording for commercial distribution.[54] This limitation adequately restricts the sweep of the statute to commercial speech, which the state may regulate more broadly.[55] Limiting the statute to commercial speech allows innocent distributors of original works to give away their original recordings and prevents a potential First Amendment violation. This result removes Douglas's overbreadth challenge to the statute, as the limitation required the prosecution to show that he possessed the recordings for the purpose of commercial distribution or, alternatively, to dismiss the charges against him.

In summary, in enacting the statute, the Legislature intended to prohibit the sale, distribution, and posses-

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[52] *Barton*, 253 Mich App at 606.

[53] *People v Johnson*, 427 Mich 98, 137; 398 NW2d 219 (1986), quoting *People v O'Donnell*, 127 Mich App 749, 757; 339 NW2d 540 (1983) (" '[I]t is the Court's duty to give the statute a narrowing construction so as to render it constitutional if such a construction is possible without doing violence to the Legislature's intent in enacting the statute.' ").

[54] See also *Briggs*, 281 Ga at 331 (recognizing that a similar statute "aims to protect the public and entertainment industry from piracy and bootlegging"), and *Anderson*, 235 Cal App 3d at 590-591 (stating the state's interest in a similar statute was "the desire to protect the public in general, and the many employees of the vast entertainment industry in particular, from the hundreds of millions of dollars in losses suffered as a result of 'piracy and bootlegging' of the industry's products").

[55] Cf. *Anderson*, 235 Cal App 3d 586.

sion of illegally manufactured CDs, DVDs, and other recordings by making it a crime to take these actions unless the manufacturer's name and address were printed on the label. The Legislature, however, chose an impermissible way of achieving this goal when it made the law applicable to all distribution and possession of these recordings, whether commercial or noncommercial in nature. Because this Court can narrowly construe the statute consistently with the Legislature's intent, and thereby avoid the constitutional problem presented, we do so rather than strike the statute as unconstitutional.

We reverse and remand for further proceedings in accordance with this opinion. We do not retain jurisdiction.

SHAPIRO, P.J., and GLEICHER, J., concurred with WHITBECK, J.

PONTIAC SCHOOL DISTRICT v PONTIAC EDUCATION ASSOCIATION

Docket No. 300555. Submitted December 7, 2011, at Detroit. Decided January 5, 2012, at 9:00 a.m. Leave to appeal denied, 493 Mich 861.

The Pontiac Education Association (PEA) filed an unfair-labor-practice complaint in the Michigan Employment Relations Commission (MERC) after the Pontiac School District laid off occupational therapists (OTs) and physical therapists (PTs) employed by the district who had been represented by the PEA and entered into a contract with a private entity to provide OT and PT services. The school district contended that the OTs and PTs provided "noninstructional support services" and, therefore, under MCL 423.15(3)(f), the school district was not required to enter into collective bargaining with regard to its decision. The PEA contended that the OTs and PTs provided instructional support services and, therefore, the statute did not prevent collective bargaining with regard to the subject. A hearing referee agreed with the PEA and recommended that the charge be upheld. The MERC issued a decision and order adopting the hearing referee's recommendation. The school district appealed.

The Court of Appeals *held*:

1. The words "noninstructional support services" are not defined in MCL 423.215 and must be given their plain and ordinary meaning. A dictionary defines "non" as a prefix meaning not. It defines "instruction" as the act or practice of instructing or teaching, education, knowledge or information imparted, or the act of furnishing with authoritative directions. Therefore, the term "instruction" is not ambiguous but, rather, is broad in definition because it applies to knowledge or information imparted without placing qualifications or restrictions on the type of knowledge or information imparted. The term is not limited to knowledge or information imparted with regard to the core curriculum of the school. Therefore, positions in which individuals impart knowledge or information to students may be subject to collective bargaining under MCL 423.215(3)(f). The testimony of an OT and a PT showed that they engaged in imparting knowledge and information to students, teachers, and parents. Although the OTs

and the PTs are not certified teachers of the core curriculum, they do instruct certain students with respect to addressing and overcoming problems associated with fine and gross motor skills and work in conjunction with teachers to impart knowledge and information. There was competent, material, and substantial evidence to support the decision of the MERC.

2. The MERC did not rely on the legislative history of MCL 423.215 to reach its conclusion; instead it focused on the plain and unambiguous language of the statute.

3. There is no indication that the Legislature intended state and federal regulations governing special education to apply to public schools generally for purposes of the statute.

4. If an error occurred with regard to the applicable burden of proof, it was not relevant to the ultimate disposition of the case and reversal is not warranted on this ground.

Affirmed.

JANSEN, J., dissenting, stated her belief that the PTs and OTs provide services that are not a component of the traditional, instructional environment of a classroom. The functions performed by the PTs and OTs are not "instructional" within the commonly understood meaning of that term; the services they provide are noninstructional in nature. In the context of special education, the Superintendent of Public Instruction has determined that PTs and OTs provide services that are noninstructional in nature. The judgment of the MERC should be reversed and the matter should be remanded to the MERC for the dismissal of the charge.

1. SCHOOLS — COLLECTIVE BARGAINING — NONINSTRUCTIONAL SUPPORT SERVICES.

Positions in which individuals impart knowledge or information to students may be subject to collective bargaining by a public school employer under the provisions of MCL 423.215(3)(f); there is no requirement that the knowledge or information imparted relate to the core curriculum of the school; collective bargaining cannot include matters pertaining to third-party contracts relative to noninstructional support services.

2. SCHOOLS — COLLECTIVE BARGAINING — WORDS AND PHRASES — NONINSTRUCTIONAL SUPPORT SERVICES.

There is no indication that the Legislature intended state and federal regulations governing special education, which define "instructional services" and "related services," to apply in construing the undefined term "noninstructional support services" in MCL 423.215(3)(f).

Secrest Wardle (by *Dennis R. Pollard* and *Mark S. Roberts*) for the Pontiac School District.

Law Offices of Lee & Correll (by *Michael K. Lee* and *Erika P. Thorn*) for the Pontiac Education Association.

Before: MURPHY, C.J., and JANSEN and OWENS, JJ.

MURPHY, C.J. Respondent, Pontiac School District ("school district" or "district"), appeals as of right the decision by the Michigan Employment Relations Commission (MERC) finding in favor of the charging party, Pontiac Education Association (PEA), and against the school district, with respect to the PEA's unfair-labor-practice complaint. We affirm.

In May 2004, the school district chose to privatize services through a third-party contract with respect to services that had been provided by occupational therapists (OTs) and physical therapists (PTs) employed by the district. The PEA, which represented the OTs and PTs, asserted that the school district could not unilaterally act because the issue was subject to bargaining under the parties' collective-bargaining agreement. Nonetheless, the school district laid off the OTs and PTs and entered into a contract with a private entity to provide OT and PT services. Consequently, the PEA filed an unfair-labor-practice complaint. The dispute in this case concerns the interpretation of MCL 423.215(3)(f), which provides that "[c]ollective bargaining between a public school employer and a bargaining representative of its employees shall not include . . . [t]he decision of whether or not to contract with a third party for 1 or more *noninstructional support services* . . . ." (Emphasis added.) Noninstructional support services could therefore be contracted out to third parties without collective bargaining on the subject. The PEA argues that OTs and PTs do not provide noninstruc-

tional support services, or, stated otherwise, the PEA contends that OTs and PTs provide instructional support services. The school district contends that OTs and PTs provide noninstructional support services; therefore, collective bargaining played no role when the district chose to privatize those services.[1]

An evidentiary hearing was held before a hearing referee. The PEA presented testimony from an OT and PT regarding their responsibilities while employed by

[1] The school district has filed a supplemental authority, asserting that a recent amendment of MCL 423.215, pursuant to 2011 PA 103, requires us to reject the MERC's remedy. The newly enacted MCL 423.215(3)(k) precludes collective bargaining with respect to decisions concerning a "reduction in force" or "any other personnel determination resulting in the elimination of a position . . . ." MCL 423.215(3)(f), with which we are concerned, was not amended under 2011 PA 103. Given that subsection (3)(f) was not amended and that, perhaps arguably, this case does not truly involve a reduction in force or the elimination of positions but rather the replacement or substitution of school OTs and PTs with privately contracted OTs and PTs at a lesser cost, we question whether MCL 423.215(3)(k) has the effect argued by the school district. Regardless, we need not resolve the proper construction of the amendatory language, because we hold that MCL 423.215(3)(k) operates prospectively only. Whether an amendment to a statute applies retroactively presents a question of law subject to review de novo. *Brewer v A D Transp Express, Inc*, 486 Mich 50, 53; 782 NW2d 475 (2010). To determine whether a statute should be applied retroactively or prospectively only, the primary rule is that the legislative intent must govern. *Id*. at 55-56. This principle prevails over all other rules of construction and operation. *Id*. at 56. An amendment to a statute is presumed to operate prospectively only. *Davis v State Employees' Retirement Bd*, 272 Mich App 151, 155; 725 NW2d 56 (2006). "The Legislature's expression of an intent to have a statute apply retroactively must be clear, direct, and unequivocal as appears from the context of the statute itself." *Id*. at 155-156. Retroactive application of a statute may not occur if the amendment "abrogates or impairs vested rights, creates new obligations, or attaches new disabilities concerning transactions or considerations occurring in the past." *Id*. at 158. In the present case, the effective date of 2011 PA 103 is stated as July 19, 2011, and there is no clear, direct, and unequivocal evidence of the Legislature's intent to abrogate the rights and remedies for this unfair-labor charge filed in 2004. Accordingly, we will address the merits of the school district's claim of appeal.

the school district. These individuals testified that they identified students' needs with regard to physical limitations and fine motor skills, identified the manner in which to treat or correct the problem, obtained the necessary materials to alleviate the problem, addressed the problem in therapy, and recruited teachers and parents to continue the therapy in the classroom or home setting. The OTs and PTs had continual contact with teachers and parents regarding student difficulties and the manner in which to address the obstacles. The testimony reflected that OTs and PTs provided students with training and instruction in the skills necessary for them to learn core-curriculum subjects. On the contrary, the school district presented testimony from its administrators that OTs and PTs were not certified teachers, could not provide instruction, and did not aid in the core curriculum. The school district also asserted that state and federal regulations did not include OTs and PTs as individuals providing instructional services. The hearing referee weighed the testimony, utilized the rules of statutory construction, and examined the legislative history and the regulations. The hearing referee, in recommending that the unfair-labor charge be upheld, concluded that the services provided by OTs and PTs were subject to collective bargaining, because they did not provide noninstructional support services; rather, the OTs and PTs provided instructional support services. The MERC issued its decision and order, adopting the hearing referee's recommendation. The school district appeals as of right pursuant to MCL 423.216(e).

The school district contends that the MERC erred by concluding that OTs and PTs did not constitute "noninstructional support staff" and that the negative employment action should have been the subject of collective bargaining. We disagree. The standards governing

our review of MERC rulings were set forth in *Branch Co Bd of Comm'rs v Int'l Union, United Auto, Aerospace & Agriculture Implement Workers of America, UAW*, 260 Mich App 189, 192-193; 677 NW2d 333 (2003):

> We review MERC decisions pursuant to Const 1963, art 6, § 28, and MCL 423.216(e). MERC's findings of fact are conclusive if they are supported by competent, material, and substantial evidence on the record considered as a whole. MERC's legal determinations may not be disturbed unless they violate a constitutional or statutory provision or they are based on a substantial and material error of law. In contrast to . . . MERC's factual findings, its legal rulings are afforded a lesser degree of deference because review of legal questions remains de novo, even in MERC cases. [Citations and quotation marks omitted.]

An agency's interpretation of a statute is not binding on the courts, and that interpretation cannot conflict with the Legislature's intent as expressed in the plain language of the statute. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008). The reviewing court, however, must give " 'respectful consideration' " to the agency's construction of the statute and provide " 'cogent reasons' " for overruling the agency's interpretation. *Id*.

An issue involving statutory interpretation presents a question of law reviewed de novo. *Klooster v City of Charlevoix*, 488 Mich 289, 295-296; 795 NW2d 578 (2011). In *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156-157; 802 NW2d 281 (2011), our Supreme Court, reiterating the well-established principles of statutory construction, recently stated:

> The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language. The first step in that determination is to review the language of the statute itself.

> Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. We may consult dictionary definitions to give words their common and ordinary meaning. When given their common and ordinary meaning, the words of a statute provide the most reliable evidence of its intent[.] [Citations and quotation marks omitted.]

Here, the disputed statutory language is found in MCL 423.215, which, at the time of the events at issue, provided, in relevant part, as follows:

> (3) Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects:
>
> * * *
>
> (f) The decision of whether or not to contract with a third party for 1 or more noninstructional support services; or the procedures for obtaining the contract; or the identity of the third party; or the impact of the contract on individual employees or the bargaining unit.
>
> * * *
>
> (4) The matters described in subsection (3) are prohibited subjects of bargaining between a public school employer and a bargaining representative of its employees, and, for the purposes of this act, are within the sole authority of the public school employer to decide.

Therefore, collective bargaining cannot include matters pertaining to third-party contracts relative to noninstructional support services, because such matters would be within the sole authority of the public school employer. Because the statute does not define what constitutes "noninstructional support services," the words should be given their plain and ordinary meaning, which may be ascertained through use of a dictionary. *Krohn*, 490 Mich

at 156. The word "non" is defined as "a prefix meaning 'not,' usu. having a simple negative force, as implying a mere negation or absence of something[.]" *Random House Webster's College Dictionary* (2000). The word "instruction" is defined as "the act or practice of instruction or teaching[,] education . . . [;] knowledge or information imparted . . . [;] [or] the act of furnishing with authoritative directions." *Id*. Consequently, the term "instruction" is not ambiguous, but rather is broad in definition because it applies to "knowledge or information imparted" without placing qualifications or restrictions on the type of knowledge or information imparted. It fails to limit the knowledge or information imparted to the core curriculum, as inaccurately contended by the school district. In sum, positions in which individuals impart knowledge or information to students may be subject to collective bargaining under MCL 423.215(3)(f). We shall now review the testimony of an OT and a PT, which shows that they engaged in imparting knowledge and information to students, teachers, and parents.

Roseanne Bartush was employed by the school district from 1982 to 2004 as an OT. She was a department head from 1994 to 2004, overseeing individuals with teaching certificates. In fact, she oversaw 25 staff members, including paraprofessionals, teachers, OTs, PTs, and speech pathologists. Bartush worked at an elementary school for the last 10 years of her employment with the district. She testified that the beginning of an average day was spent on one or more of the following matters: preparation time (preparing for therapy sessions with students); meetings with teachers; attending Individualized Education Planning (IEP) meetings; answering phone calls from parents; or addressing other related matters. Once school started, Bartush would see students as they arrived for group or

individual therapy sessions. She had 50 to 60 students on her caseload. The informal meetings with teachers usually involved questions about students, classroom activities, progress reports, or concerns. There were a variety and different types of IEP meetings. One type was a review meeting to go over a student's progress through the year involving teachers, therapists, and any others who worked with the student. Bartush was also involved in initial IEP meetings for students identified as having special education needs. The IEP meetings involved sharing reports, making recommendations for therapy, and constructing goals and objectives. Bartush would personally offer goals and objectives and had input into an IEP form or document, which was created or crafted as a result of the meetings and constituted a legal document containing Bartush's objectives along with a teacher's objectives. Bartush had direct contact with parents; she was not required to make contact through a certified teacher. She had daily contact with parents, either informally in the hall when the parents brought the students in to school or when returning the two to three phone calls from parents received during a typical week.

According to Bartush, a student was directed to occupational therapy in different ways. A diagnostic team, that included Bartush, would conduct an initial evaluation to determine if a student was eligible for special education. Also, a student, teacher, parent, or anyone who was concerned about a student's progress or difficulties could ask her to conduct an evaluation. The end result would be a formal plan to share information and determine if therapy was necessary. At Bartush's school, the diagnostic team typically consisted of a speech pathologist and an OT. If there was a physical impairment or significant motor-skills delay, a PT would become involved.

As an OT, Bartush evaluated students for fine motor skills, self care, and sensory processing disorders, and then she would prepare a report. For the data collection and observation, Bartush employed standardized testing. If a student was added to her caseload for treatment, Bartush prepared objectives with the teacher and implemented them on a weekly basis. When treating a group, she prepared activities geared toward the group's needs, and she worked with both the teacher and the paraprofessional in the classroom setting in the hopes that the activities would carry over through the week. For example, Bartush worked in preschool where there were a number of children with physical impairments, such as deficiencies in cutting skills. Bartush would modify the scissors or build an adaptation and leave it in the classroom so the students could work on their skills. Bartush would periodically visit the class to check on the children's progress. Bartush testified that skills such as cutting with scissors served to elevate children in preschool from simple to complex tasks.

Bartush testified that there was also a large population with autism. She played a major role in managing behavior, designing sensory diets, and devising other approaches in order to allow the students to function in the classroom and to allow the staff to manage the students. A fair assessment of Bartush's responsibilities was that she assisted the student in being able to receive instruction from the classroom teacher. During her career, Bartush did provide classroom instruction when she worked with physically impaired high school students for a year or two. The class was not a "core" subject, but rather addressed daily living skills on such matters as cooking and computer usage. Bartush described her duties as an OT as follows: "To make [students] as independent as possible and to function within the classroom to the best of their ability[.]"

Annmarie Kammann worked for the school district as a PT from 1986 until she was laid off in May or June of 2004. When she worked for the school district, her average day started by examining her chart of students who were scheduled for appointments that day. She would identify treatment goals and plans, discuss issues with teachers, and gather any necessary equipment before the children arrived. She aided the children in walking from the bus to the classroom to work on their gait and then she would start individualized treatment. On a typical day, Kammann treated 8 to 10 children with sessions lasting for 30 to 45 minutes. She regularly consulted with teachers, particularly when bringing a new piece of equipment into a classroom. She showed teachers how to use the equipment and when to use it. Kammann also consulted with teachers if students had difficulties. For example, if a child had a posture problem, she might explore wedges or a therapy ball as a solution. Kammann also prepared evaluations at the beginning of the school year, reports for IEP meetings, progress notes for physicians, letters of medical necessity relative to equipment for students, and general correspondence directed to physicians. She also identified short-term and long-term goals and objectives for IEP meetings. Kammann had personal contact with parents of students four to five times a week plus telephone contacts, and these contacts did not occur with a certified teacher as an intermediary. Kammann opined that she contributed from an instructional standpoint because children with attention deficiencies and physical limitations could not learn their academics from teachers until those problems were addressed. Kammann testified that she had daily contacts with teachers to address what was best for the students. She was on the IEP team and had to assess whether her goals and objectives were met.

In her job, Kammann examined a child's head control, trunk control, movement from one place to another, and use of the body to manipulate different things; it was hands-on physical therapy. For example, she would address head control in a sitting position on a therapy ball, address the prone position to allow a child to write, and address walking and balance to allow a student to be mainstreamed in the most efficient manner. Kammann testified that PTs prepare treatment plans that contain short- and long-term goals. When setting these goals, the treatment plan sets forth different activities to perform. It may include instructions for the parents to perform at home. It also involves advising the teachers of how to carry out activities in the classroom. In her therapy room, Kammann had equipment such as crutches, balls, canes, weights, wedges, splints, bikes, standers, and extra walkers. When asked to differentiate between an OT and a PT, she testified that PTs worked on the overall gross motor picture of the child, whereas an OT addressed fine motor skills. Kammann was familiar with what transpired in the classrooms. In her view, there was no difference between the function she performed and classroom teaching.

It is abundantly clear from the record that OTs and PTs, while not being certified teachers of core curriculum, instruct certain students with respect to addressing and overcoming problems associated with fine and gross motor skills. They work in conjunction with teachers to impart knowledge and information. We agree with the observations made by the MERC in the following passage from its ruling, which is supported by competent, material, and substantial evidence on the record:

> The [OTs] and [PTs] are not certified teachers. However, they work closely with certified teachers and other

professional staff, as well as with paraprofessionals in evaluating the needs of students and providing the students with activities and tools that would assist them in the educational process. An [OT] and a [PT], who were previously employed by [the school district], testified at length about their job duties. Their testimony identified a wide range of services that they provided to assist schoolchildren in acquiring and developing skills necessary for them to achieve educational goals. As explained in detail in the [hearing referee's] decision, the therapists would prepare activities for students to assist them in developing certain skills. In addition to working with the students on those activities, the therapists would explain those activities to the classroom teacher and paraprofessionals, so, in the therapists' absence, those employees could continue to assist the students with the activities that were designed to aid the students in acquiring skills necessary to reach their academic goals. While the therapists did not teach the core curriculum, they provided the students with training and instruction in skills necessary for them to learn those subjects taught as part of the core curriculum.[2]

Moreover, like the [hearing referee], we find it particularly relevant that the request for proposals (RFP) prepared by [the school district] in seeking to subcontract the services of the [OTs] and [PTs] stated that the services it sought to obtain from a private contractor were to include: "physical therapy/occupational therapy services" to address disabilities "that interfere with learning in the educational environment." The therapists whose services were sought under [the school district's] RFP were to: plan therapy services "for each individualized education program (IEP) as a member of the multidisciplinary

[2] The school district complains that OTs and PTs simply provide services that are physical and not instructional in nature. While there is clearly a physical component to their work, the district's argument fails to appreciate the instructional elements of the work performed by OTs and PTs in the school setting. And again, the school district's argument is based more on a restrictive reading of the statute that confines instruction to instruction on core curriculum, but there is no basis in the statutory language to place such a restriction.

> educational/assessment team;" to engage in "consultation and education;" and to "administer . . . therapy services within the educational environment." Accordingly, we conclude that the services [the school board] sought to contract for in the RFP, and the services previously provided by the [OTs] and [PTs] in this case, were services of an instructional nature. Whether they were instructional services, or instructional support services, we need not decide, as they were clearly not "noninstructional support services." [Omission in original.]

While the school district's expert witnesses concluded that the OTs and PTs did not provide "instruction," the duty to interpret and apply the law is allocated to the courts, not the parties' expert witnesses. *Hottmann v Hottmann*, 226 Mich App 171, 179-180; 572 NW2d 259 (1997). Moreover, regardless of any conflicting evidence, there was nonetheless competent, material, and substantial evidence supporting the MERC's decision.

The school district argues that the hearing referee and the MERC misinterpreted the legislative history and failed to apply state and federal regulations governing special education that define "instructional services" and "related services" separately. With respect to the legislative history of the act, legislative history of any type is not to be utilized as a tool of interpretation unless a statute is ambiguous. *In re Certified Question from the United States Court of Appeals for the Sixth Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003). A review of the MERC's decision and order reveals that it did not rely on the legislative history—an early house bill version of the statute—to reach its conclusion. Instead, the MERC correctly focused on the plain and unambiguous language of the statute. Again, the school district seeks to place limitations on the terms at issue by arguing that instructional means part of the curricu-

lum, such as teaching a core subject. The Legislature, however, could have defined the phrase "noninstructional support services" in that manner, but chose not to do so.

We also reject the school district's contention that state and federal regulations regarding special education, which define "instructional services" and "related services," should be applied. There is no indication whatsoever in MCL 423.215 that the Legislature intended state and federal regulations governing special education to apply to public schools generally for purposes of the statute.[3] Moreover, the cited regulatory terms are not even the same terms at issue here, and our terms are also being examined in a different context. The school district also points to state and federal regulations defining "physical therapy" and "occupational therapy"; however, these general definitions provide no insight to construing the statute, even assuming that they are contextually relevant, especially where *testimony* was the crucial determinative factor regarding the parameters of the job duties actually performed by the OTs and PTs in the school district on a day-to-day basis.

Finally, the school district maintains that the MERC erred in its application of the burden of proof. This argument does not entitle the district to appellate relief. "The applicable burden of proof presents a question of law that is reviewed de novo on appeal." *FACE Trading, Inc v Dep't of Consumer & Indus Servs*, 270 Mich App 653, 661; 717 NW2d 377 (2006). "The charging party,

[3] The argument premised on the regulation defining "instructional services" would require us to find that only teachers provide such services. The Legislature could easily have used limiting language if it intended for all school personnel but teachers to fall into the collective-bargaining exception in MCL 423.215(3)(f), but the Legislature did not do so.

and not MERC, has the burden of establishing the unfair labor practice." *Mich Employment Relations Comm v Reeths-Puffer Sch Dist*, 391 Mich 253, 267 n 20; 215 NW2d 672 (1974). Assuming that there was an error with respect to the applicable burden of proof, it was not relevant to the ultimate disposition of the case. The MERC did not predicate its holding on the school district's failure to meet its alleged burden of proof. Rather, the hearing referee and the MERC appropriately applied the rules of statutory construction. Indeed, the MERC essentially found that the PEA provided evidence establishing that the OTs and PTs did not provide noninstructional support services. Reversal is unwarranted.

Affirmed. The PEA, having fully prevailed on appeal, is awarded taxable costs pursuant to MCR 7.219.

OWENS, J., concurred with MURPHY, C.J.

JANSEN, J. (*dissenting*). Because I believe that physical therapists (PTs) and occupational therapists (OTs) constitute "noninstructional support staff" within the meaning of MCL 423.215(3)(f), I respectfully dissent.

MCL 423.215(3)(f) provided at the time of the events at issue:

> Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects:
>
> * * *
>
> (f) The decision of whether or not to contract with a third party for 1 or more noninstructional support services; or the procedures for obtaining the contract; or the identity of the third party; or the impact of the contract on individual employees or the bargaining unit.

It is clear that contracting for "noninstructional support services" is a prohibited subject of collective bargaining between public schools and their employees. MCL 423.215(3)(f); MCL 423.215(4); see also *Mich State AFL-CIO v Employment Relations Comm*, 453 Mich 362, 380; 551 NW2d 165 (1996) (opinion by BRICKLEY, C.J.). However, the Legislature has not defined the phrase "noninstructional support services." When a term or phrase has not been defined by the Legislature, this Court must give the term or phrase its ordinary and commonly understood meaning. MCL 8.3a; *Stanton v Battle Creek*, 466 Mich 611, 617; 647 NW2d 508 (2002).

Although not directly germane to the case at bar, MCL 380.761(1) provides a list of various "noninstructional services" that intermediate school districts are required to address when issuing their reports on the sharing of services. Among others, the statute requires that intermediate school districts consider "[a]ny other *noninstructional services* identified by the superintendent of public instruction." MCL 380.761(1)(m) (emphasis added). Within the context of special education, the Superintendent of Public Instruction has differentiated between "[i]nstructional services," "[o]ccupational therapy," and "[p]hysical therapy." Mich Admin Code, R 340.1701b(a), (c), and (f). In particular, Rule 340.1701b(a) provides that "[i]nstructional services" include only those "services provided by teaching personnel . . . ."

PTs and OTs are not teachers. Instead, they are licensed under part 178 of Michigan's Public Health Code, MCL 333.17801 *et seq*., and part 183 of Michigan's Public Health Code, MCL 333.18301 *et seq*., respectively. In other words, at least in the context of special education, the Superintendent of Public Instruc-

tion has determined that PTs and OTs provide services that are *noninstructional* in nature.

I find persuasive this differentiation between instructional services, physical therapy services, and occupational therapy services. Quite simply, the services provided by PTs and OTs are not a component of the traditional, instructional environment of the classroom. Instead, they are specialized services that are provided only for certain students with specific types of disabilities. In short, the functions performed by PTs and OTs are not *instructional* within the commonly understood meaning of that term. It follows, in my opinion, that these services are *noninstructional* in nature.

I conclude that the MERC committed a substantial and material error of law when it determined that physical therapy services and occupational therapy services are not "noninstructional support services" within the meaning of MCL 423.215(3)(f). See *Oak Park Pub Safety Officers Ass'n v Oak Park*, 277 Mich App 317, 324; 745 NW2d 527 (2007). Because physical therapy services and occupational therapy services are "noninstructional support services," MCL 423.215(3)(f), the Pontiac School District was not required to collectively bargain with the Pontiac Education Association before contracting with a private entity to provide PT and OT services. I would reverse the judgment of the MERC and remand for a dismissal of the unfair-labor-practice charge.

PEOPLE v LOCKETT

PEOPLE v JOHNSON

Docket Nos. 296747 and 296848. Submitted June 8, 2011, at Detroit. Decided January 10, 2012, at 9:00 a.m. Leave to appeal denied, 493 Mich 852.

Ashanti B. Lockett and Tadarius R. Johnson were tried together before separate juries in the Wayne Circuit Court. Lockett was convicted of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(c) (penetration under circumstances involving another felony), and accosting a minor for immoral purposes, MCL 750.145a. Johnson was convicted of two counts of CSC-I, MCL 750.520b(1)(a) (penetration involving a person under 13) and MCL 750.520b(1)(c) (penetration under circumstances involving another felony). The "other felony" supporting defendants' convictions for violating MCL 750.520b(1)(c) was disseminating sexually explicit matter to a minor, MCL 722.675(1)(b). The convictions involved two separate incidents. In the first incident, Johnson and another man entered a home where four siblings lived with their mother. Johnson attempted to have sex with J., the youngest sister, who was 12 years old. The second incident occurred several days later when defendants picked up J. and her sisters S. and G., respectively aged 17 and 14, in Lockett's van and took them to a park where defendants engaged in sexual intercourse with S. in the presence of J. The court, Patricia Fresard, J., sentenced Lockett as a fourth-offense habitual offender to concurrent terms of 25 to 45 years' imprisonment for the CSC-I conviction and to 5 to 15 years' imprisonment for the accosting conviction. The court sentenced Johnson to concurrent terms of 25 to 37½ years' imprisonment for the CSC-I conviction under MCL 750.520b(1)(a) and to 5 to 15 years' imprisonment for the CSC-I conviction under MCL 750.520b(1)(c). Lockett (Docket No. 296747) and Johnson (Docket No. 296848) appealed separately. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. A statute might be unconstitutionally vague if it fails to provide fair notice of the conduct proscribed or is so indefinite that it confers unlimited and unstructured discretion on the trier of fact to determine whether an offense has occurred. MCL

750.520b(1)(c) requires the prosecution to prove that (1) sexual penetration occurred and (2) it occurred under circumstances involving the commission of any other felony. To establish CSC-I under MCL 750.520b(1)(c), there must be a direct relationship between the felony and the penetration. Examining the statute's language and scheme as a whole, it is reasonable to conclude that the Legislature intended that the circumstances involving the commission of the other felony directly impact a victim, or recipient, of the sexual penetration. When construed in that manner, the statute is not unconstitutionally vague. However, the statute unconstitutionally invites arbitrary and abusive enforcement when it is applied to situations where, as here, engaging in consensual legal sexual penetration is elevated to CSC-I solely because a minor was present and the "victim" of the sexual penetration was not impacted by the other felony. Thus, the defendants were improperly convicted of CSC-I under MCL 750.520b(1)(c) because S., the "victim" of the sexual penetration in the park, was not affected by the other felony: disseminating sexually explicit matter to a minor, J. Accordingly, the convictions had to be reversed.

2. Under MCL 722.675(1)(b), a person is guilty of disseminating sexually explicit matter to a minor if that person knowingly exhibits to a minor a sexually explicit performance that is harmful to minors. For the purpose of the offense of disseminating sexually explicit matter to a minor, to "disseminate" is to sell, lend, give, exhibit, show, or allow to examine. And to "exhibit" is to present a performance. A "sexually explicit performance" is a motion picture, video game, exhibition, show, representation, or other presentation that, in whole or in part, depicts nudity, sexual excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse. Therefore, a person commits the offense of disseminating sexually explicit matter to a minor if he or she knowingly exhibits to a minor a depiction of nudity, sexual excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse which is harmful to minors. In this case, defendants knew that J., aged 12, was present when they engaged in intercourse with her sister, and given J.'s age and her close proximity to the sexual acts, a jury could have reasonably inferred that defendants were presenting a performance that J. could see and that they knew J. was a minor. There was sufficient evidence to convict defendants of disseminating sexually explicit matter to a minor.

3. A necessarily included lesser offense is an offense whose elements are subsumed within the elements of a greater offense. When evaluating whether an offense is a lesser included offense,

the crimes are to be analyzed with an eye toward how the crimes were actually charged. If the elements at issue are subsumed within the charged offense, the crime is a necessarily included lesser offense. When a conviction for a greater offense is reversed on grounds affecting only the greater offense, an appellate court may remand for entry of judgments of conviction on necessarily included lesser offenses. In this case, the jury could not have convicted the defendants of CSC-I under MCL 750.520b(1)(c) without finding that they had disseminated sexually explicit matter to a minor. Thus, the latter offense was a necessarily included offense and remand for entry of convictions of disseminating sexually explicit matter to a minor, MCL 722.675(1)(b), was appropriate.

4. Under offense variable (OV) 4 of the sentencing guidelines, MCL 777.34, a court must assess 10 points if the victim suffered a serious psychological injury that might require professional treatment. That the victim did not seek professional treatment is not conclusive when scoring the variable, but there must be some evidence of psychological injury on the record to justify the assessment of the points. In this case, the trial court assessed 10 points under OV 4 when scoring Lockett's OVs, stating that the circumstances of the crime would cause any normal person to have suffered psychological injury. However, the record was devoid of evidence that J. had suffered any such injury. Therefore, OV 4 was improperly scored.

5. Under OV 10 of the sentencing guidelines, MCL 777.40, a court must assess 15 points if predatory conduct was involved. "Predatory conduct" is conduct which occurred before the commission of the offense and which was directed at the victim for the primary purpose of victimization. In this case, Lockett picked up the girls in his van in the middle of the night, drove to a liquor store, and then drove to a city park and parked the vehicle. Lockett's actions permitted an inference that he had engaged in this preoffense conduct for the purpose of victimization, and because of J.'s age, she was susceptible to injury, physical restraint, or temptation. The trial court properly assessed 15 points to Lockett under OV 10.

6. Under OV 14 of the sentencing guidelines, MCL 777.44, a trial court must assess 10 points if the defendant was a leader in a multiple-offender situation. The entire criminal episode must be evaluated to determine whether a defendant was a leader. In this case, Lockett argued that it was Johnson who knew the girls and who had coordinated with S. regarding picking the girls up. However, Lockett was significantly older than Johnson, who was

only 18, Lockett owned the van, and it is reasonable to assume that Lockett purchased the alcohol. Thus, there was evidence supporting the trial court's determination that Lockett was a leader in a multiple-offender situation.

7. For reversal to be warranted because the trial court did not give a cautionary accomplice instruction, a defendant must show that it was more probable than not that the error affected the outcome of the proceedings. In this case, the trial court gave the jury a cautionary instruction regarding witness immunity because S. had been given immunity in exchange for her testimony. But the court declined to give the cautionary accomplice instruction, concluding that giving both instructions would confuse the jury. The trial court did not abuse its discretion by denying the request to give both instructions because the instructions given fairly presented the issues and sufficiently protected defendants' rights.

8. To establish an ineffective assistance of counsel claim, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the result was fundamentally unfair or unreliable. In this case, Johnson argued that he had received ineffective assistance of counsel because his attorney chose to have the court give the witness-immunity instruction rather than the accomplice instruction, but there was no record evidence to show that the result of the proceedings would have been different if trial counsel had chosen the accomplice instruction over the immunity instruction.

9. A defendant is guilty of CSC-I under MCL 750.520b(1)(a) if he or she engaged in sexual penetration with another person and the other person was under 13 years of age. "Sexual penetration" includes sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body. Penetration includes any intrusion into the vagina or labia majora. In this case, Johnson had gone to the siblings' home and attempted to have sex with J. Although J. testified that no penetration occurred, she also testified that their genitals had touched and that she had felt pain and told Johnson to stop. Under the circumstances a rational trier of fact could conclude that Johnson's penis had intruded into J.'s vagina or labia majora and, thus, sufficient evidence was presented to sustain Johnson's conviction of CSC-I under MCL 750.520b(1)(a).

Affirmed in part, reversed in part, and remanded.

1. CRIMINAL LAW — CRIMINAL SEXUAL CONDUCT — CIRCUMSTANCES INVOLVING ANY OTHER FELONY — CONSTITUTIONALITY — VAGUENESS.

To convict a defendant of first-degree criminal sexual conduct for penetration under circumstances involving any other felony, the prosecution must prove that (1) sexual penetration occurred and (2) it occurred under circumstances involving the commission of any other felony; there must be a direct relationship between the felony and the penetration; the Legislature intended that the circumstances involving the commission of the other felony directly impact a victim, or recipient, of the sexual penetration, and when construed in that manner, the statute is not unconstitutionally vague; however, the statute unconstitutionally invites arbitrary and abusive enforcement when it is applied to situations in which engaging in consensual legal sexual penetration is elevated to first-degree criminal sexual conduct solely because a minor was present and the "victim" of the sexual penetration was not impacted by the other felony (MCL 750.520b[1][c]).

2. CRIMINAL LAW — DISSEMINATION OF SEXUALLY EXPLICIT MATTER TO A MINOR — SEXUALLY EXPLICIT PERFORMANCES.

A person is guilty of disseminating sexually explicit matter to a minor if that person knowingly exhibits to a minor a sexually explicit performance that is harmful to minors; for the purpose of the offense of disseminating sexually explicit matter to a minor, to "disseminate" is to sell, lend, give, exhibit, show, or allow to examine; and to "exhibit" is to present a performance; a "sexually explicit performance" is a motion picture, video game, exhibition, show, representation, or other presentation that, in whole or in part, depicts nudity, sexual excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse; therefore, a person commits the offense of disseminating sexually explicit matter to a minor if he or she knowingly exhibits to a minor a depiction of nudity, sexual excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse which is harmful to minors (MCL 722.675[1][b]).

3. CRIMINAL LAW — NECESSARILY INCLUDED LESSER OFFENSES — FIRST-DEGREE CRIMINAL SEXUAL CONDUCT — DISSEMINATING SEXUALLY EXPLICIT MATTER TO A MINOR.

A necessarily included lesser offense is an offense whose elements are subsumed within the elements of a greater offense; when evaluating whether an offense is a lesser included offense, the crimes are to be analyzed with an eye toward how the crimes were actually charged; if the elements at issue are subsumed within the charged offense, the crime is a necessarily included lesser offense;

> when a conviction for a greater offense is reversed on grounds affecting only the greater offense, an appellate court may remand for entry of judgments of conviction on necessarily included lesser offenses; when a jury cannot convict a defendant of first-degree criminal sexual conduct without finding that the defendant disseminated sexually explicit matter to a minor, the latter offense is a necessarily included lesser offense (MCL 722.675[1][b], MCL 750.520b[1][c]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Jason W. Williams*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Michael L. Mittlestat*) for Ashanti B. Lockett.

Neil J. Leithauser for Tadarius R. Johnson.

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

PER CURIAM. Defendant Ashanti Bryant Lockett appeals as of right from his convictions by a jury of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(c) (penetration under circumstances involving another felony), and accosting a minor for immoral purposes, MCL 750.145a. The trial court, applying a fourth-offense habitual offender enhancement under MCL 769.12, sentenced Lockett to 25 to 45 years' imprisonment for the CSC-I conviction and to a concurrent term of 5 to 15 years' imprisonment for the accosting conviction. Defendant Tadarius Rashard Johnson appeals as of right from his convictions by a jury of two counts of CSC-I, MCL 750.520b(1)(a) and (c) (penetration involving a person under 13; penetration under circumstances involving another felony). The trial court sentenced Johnson to concurrent terms of 25 to 37½ years' imprisonment for

the conviction under subdivision (a) and to 5 to 15 years' imprisonment for the conviction under subdivision (c). We affirm Johnson's conviction of CSC-I under MCL 750.520b(1)(a) and affirm Lockett's conviction of accosting a minor for immoral purposes. We reverse both defendants' convictions of CSC-I under MCL 750.520b(1)(c) and remand this case for entry of convictions on the lesser included offense of disseminating sexually explicit matter to a minor, MCL 722.675(1)(b).

I. FACTS AND PROCEDURAL HISTORY

During the early morning hours of September 6, 2009, Johnson and another man entered the home where S. (17 years old), N. (16 years old), G. (14 years old), and J. (12 years old) lived with their mother. The men entered by climbing up a metal awning outside of the building. After Johnson woke J. from her sleep, J. walked to a different room where she saw G. with another man. J. did not recognize the other man and eventually returned to her bed. J. removed her pajamas and Johnson removed his clothing and J.'s underwear. Johnson and J. attempted to have sex. J. testified that there was no penetration, but that she felt pain "where she pees" and she told Johnson to stop. Johnson stopped and got dressed. Johnson and the other man stayed until approximately 8:00 a.m. before leaving.

The girls' mother noticed damage to her awning that morning and questioned the children about it. She learned that two men had been over during the night, and she took G. and J. to the police station. J. told the police that no penetration had occurred between her and Johnson. The mother subsequently took J. to the hospital for an examination, which revealed nothing out of the ordinary. No DNA evidence was found.

G. and J. decided to run away from home with S. because of punishments imposed by their mother. S., G., and J. left their mother's home and stayed at a friend's house. Very early on September 9, 2009, S., G., and J. left the friend's house. Johnson called S. on her cellular telephone, and S. told Johnson where to pick up the girls. Johnson and Lockett arrived in a van. The girls got in and then drove with defendants to a liquor store, where defendants acquired liquor. Lockett then drove the van to a park and parked the vehicle.

The interior of the van had three rows of seats, including a driver's and passenger's seat in the front row, two "captain-style" seats in the second row, and a bench seat in the third row that had been folded down to resemble a bed. While G. and J. were seated in the van's front driver's and passenger's seats, Lockett and S. moved to the rear of the van, disrobed, and engaged in sexual intercourse. After Lockett and S. had finished, Johnson moved to the rear row of the van and engaged in sexual intercourse with S. At some point Lockett asked G. and J. to go into the rear of the van with him. J. refused, but G. eventually agreed to go. J. testified that Lockett grabbed her arm at one point while trying to persuade her to go into the back of the van with him.

Officer Michael Garrison of the Detroit Police Department was on patrol with his partner at around 1:30 a.m. on September 9 when he saw a van parked after hours in a city park. Officer Garrison saw a girl he later identified as G. sitting on a park bench near the van. As Officer Garrison approached the van, G. ran into the van. When Officer Garrison arrived at the van, he could see through the front and driver's side windows. He saw that no one was in the front seats, S. was straddling Lockett in the nude on one of the captain's seats, and

Johnson and J. were lying in the rear row. J.'s shirt was pulled down and her breasts were exposed.

Lockett was eventually charged with CSC-I under MCL 750.520b(1)(c), for penetration of S. committed under circumstances involving a felony, where the felony was disseminating sexually explicit matter to J., a minor who was in plain view, under MCL 722.675(1)(b). The trial court found that there was a sufficient nexus between Lockett's sexual penetration of S. and the crime of disseminating sexually explicit matter to J. to justify the charge of CSC-I. Lockett was also charged with accosting a minor for immoral purposes, MCL 750.145a.

Johnson was eventually charged with CSC-I under MCL 750.520b(1)(a) for penetrating J. at her home. Johnson was charged with a second count of CSC-I under MCL 750.520b(1)(c) for penetration of S. committed under circumstances involving a felony, where the felony was, as with Lockett, disseminating sexually explicit matter to J., a minor who was in plain view, under MCL 722.675(1)(b). The trial court once again found that there was a sufficient nexus between the sexual penetration of S. and the crime of disseminating sexually explicit matter to J. to justify the charge of CSC-I.

Lockett and Johnson were tried together but with separate juries. At the conclusion of the trial, both Lockett and Johnson were convicted as charged.

II. ANALYSIS

A. SEXUAL PENETRATION UNDER CIRCUMSTANCES INVOLVING ANOTHER FELONY

Defendants first argue that MCL 750.520b(1)(c) is unconstitutionally vague and that it invites arbitrary and

abusive enforcement by prosecutors, police, and juries when applied to situations such as the instant one.

This Court determines de novo whether a statute is unconstitutionally vague. *People v Rogers*, 249 Mich App 77, 94; 641 NW2d 595 (2001). This Court also reviews de novo issues of statutory interpretation. *People v Giovannini*, 271 Mich App 409, 411; 722 NW2d 237 (2006). A statute might be unconstitutionally vague if, among other reasons, it "fails to provide fair notice of the conduct proscribed" or "is so indefinite that it confers unlimited and unstructured discretion on the trier of fact to determine whether an offense has occurred." *People v Hrlic*, 277 Mich App 260, 263; 744 NW2d 221 (2007). To determine whether a statute is unconstitutionally vague, this Court examines the entire text of the statute and gives the words of the statute their ordinary meanings. *Id*. The meanings of all terms contained in the statute "must be fairly ascertainable by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words." *Id*. (quotation marks and citations omitted).

Defendants challenge MCL 750.520b(1)(c), which states:

> (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> * * *
>
> (c) Sexual penetration occurs under circumstances involving the commission of any other felony.

The plain language of the statute requires the prosecution to prove that (1) sexual penetration occurred and (2) it occurred "under circumstances involving the

commission of any other felony." This Court has previously held that there must be a sufficient nexus between the "other felony" and the sexual penetration; specifically, there must be a "direct interrelationship" between the felony and the penetration. *People v Waltonen*, 272 Mich App 678, 691-693; 728 NW2d 881 (2006).

In *Waltonen*, this Court found that the other felony, also referred to as the underlying felony, was directly related to the sexual penetration when the defendant demanded and received sex in exchange for providing Oxycontin. *Id*. at 682, 693. Oxycontin contains oxycodone, a controlled substance, and the unauthorized delivery of Oxycontin is a felony. *Id*. at 679-680. Thus, the other felony was committed when the defendant provided the Oxycontin. *Id*. This Court found that the other felony and the sexual penetration were directly related because "the only reason the victim engaged in sexual penetration was to acquire the drugs," and the controlled substance "would be delivered to the victim after the sexual act and only because of the sexual act." *Id*. at 693.

In this case, the trial court found a sufficient nexus between the other felony and the sexual penetration. The court found that the other felony occurred when Lockett and Johnson engaged in sexual penetration with S. in plain view of J., a minor. Under MCL 722.675(1)(b), a person is guilty of the felony of disseminating sexually explicit matter to a minor if that person knowingly exhibits a sexually explicit performance to a minor that is harmful to the minor. The prosecution argues that there was a sufficient nexus between the sexual penetration and the other felony because the exhibition would not have occurred had there not been sexual penetration. Defendants argue, however, that

the statute invites arbitrary and abusive enforcement when the victim of the other felony is not the "victim" of the sexual penetration.

Defendants point out a number of "ridiculous" circumstances in which a sexual penetration could occur during the commission of another felony. Many of the circumstances defendants cite involve situations in which the underlying felony would not have a sufficient nexus to the sexual penetration. While this Court, in discussing the broad scope of MCL 750.520b(1)(c) and urging the Legislature to revisit the statute, has previously noted that "a voluminous number of felonious acts can be found in the Penal Code," *Waltonen*, 272 Mich App at 694 n 8, and there may very well be a number of "ridiculous" hypothetical circumstances to which the statute could apply,[1] defendants cannot argue that a statute is unconstitutionally vague when First Amendment freedoms are not involved and when the argument is based on hypotheticals. *People v Knapp*, 244 Mich App 361, 374 n 4; 624 NW2d 227 (2001). The focus must instead be on the specifics of the case at hand. *Id*. Therefore, this Court is only concerned with whether defendants' specific conduct was fairly within the constitutional scope of the statute.

MCL 750.520b(1)(c) prohibits engaging in sexual penetration with another person under circumstances involving the commission of any other felony, as long as that felony is directly related to the sexual penetration. *Waltonen*, 272 Mich App at 691. Arguably, the sexual penetration and the other felony were directly related in this case, because the other felony likely would not have occurred had there not been a sexual penetration.

[1] For instance, a person could commit CSC-I by engaging in adultery because adultery is prohibited as a felony under MCL 750.30. See *Waltonen*, 272 Mich App at 694 n 8.

However, we find that MCL 750.520b(1)(c) unconstitutionally invites arbitrary and abusive enforcement when it is applied to situations where, as here, engaging in consensual, legal sexual penetration is elevated to CSC-I solely because a minor was present and the "victim" of the penetration was not impacted by the additional felony. When a general class of offenses is plainly within a statute's terms but marginal cases may lead to unconstitutionality, this Court has a duty to give a reasonable statutory construction to the statute to prevent the entire statute from being rendered unconstitutional. *People v Gagnon*, 129 Mich App 678, 684; 341 NW2d 867 (1983). A paramount principle in statutory construction is that this Court reads the statute "as a whole" rather than reading each provision alone. *People v Jackson*, 487 Mich 783, 791; 790 NW2d 340 (2010). While individual words and phrases are important, they must be read in context so that the legislative intent is given effect. *Id*. at 790-791.

MCL 750.520b(1)(c) can be made constitutionally definite by a reasonable construction. MCL 750.520b(1) provides that "[a] person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person" and certain other conditions are met. These other conditions are subsequently set forth in eight subdivisions, MCL 750.520b(1)(a) through (h). While subdivision (a) does not use the term "victim," there can be no dispute that this subdivision's purpose is to protect minors under 13 years of age. Subdivision (b) uses the term "other person" rather than "victim," but immediately afterward, subparagraphs (b)(*i*) through (*iii*) refer to the "other person" as "the victim." Subdivisions (d) through (h) all refer to "the victim." The references to "the victim" in these subdivisions clearly refer back to the language in the first sentence of subsection (1)

concerning "another person." Further, in describing the penalties for violating subsection (1), subsection (2) indicates that a violation of the statute is a crime *against* the other person:

> Criminal sexual conduct in the first degree is a felony punishable as follows:
>
> (a) Except as provided in subdivisions (b) and (c), by imprisonment for life or for any term of years.
>
> (b) For a violation that is committed by an individual 17 years of age or older *against an individual* less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years.
>
> (c) For a violation that is committed by an individual 17 years of age or older *against an individual* less than 13 years of age, by imprisonment for life without the possibility of parole if the person was previously convicted of a violation of this section or section 520c, 520d, 520e, or 520g committed against an individual less than 13 years of age or a violation of law of the United States, another state or political subdivision substantially corresponding to a violation of this section or section 520c, 520d, 520e, or 520g committed against an individual less than 13 years of age. [MCL 750.520b(2).]

When this Court examines the statute's language and scheme as a whole, it is clear that when referring to "another person" in MCL 750.520b(1) the Legislature thought that the "person" would be a victim and that a violation of the statute would be a crime against that "person." It is reasonable to conclude that, in enacting MCL 750.520b(1)(c), the Legislature intended that the "circumstances involving the commission of [the] other felony" directly impact a "victim," or recipient, of the sexual penetration.

This reading is consistent with other cases that have interpreted MCL 750.520b(1)(c). In *Waltonen*, this Court repeatedly referred to the other person as "the

victim" of the sexual penetration. *Waltonen*, 272 Mich App at 680-693. In addition, the victim of the sexual penetration was directly impacted by the circumstances of the other felony because the defendant delivered the Oxycontin to the victim. *Id*. at 682, 693. In *People v Pettway*, 94 Mich App 812, 814; 290 NW2d 77 (1980), the defendant was convicted of CSC-I after he broke into a home and sexually penetrated a victim. The victim of the sexual penetration was also a victim of the other felony because the victim was an occupant of the home that the defendant broke into and entered. *Id*. at 818. In *People v Wilkens*, 267 Mich App 728, 736; 705 NW2d 728 (2005), the defendant was convicted of CSC-I after he produced sexually abusive material involving a minor. The penetration "victims"[2] were the children with whom the defendant produced the sexually abusive material. See *id*. at 732, 737-738. The victims of the sexual penetration were also victims of the underlying felony because they were involved in the production of the sexually abusive material. *Id*.

In this case, defendants were convicted of CSC-I when the underlying felony was disseminating sexually explicit matter to a minor, J., who was then 12 years old. J. was not the "victim" of the sexual penetration. Even though the "explicit matter" would not have been disseminated to J. without the sexual penetration of S., this Court cannot uphold a conviction of CSC-I when the "victim" of the sexual penetration was not impacted

[2] We use quotation marks here because one of the victims was 16, i.e., above the age of consent. See *Wilkens*, 267 Mich App at 732, MCL 750.520d(1)(a) (stating that sexual penetration with another person who is at least 13 years of age and less than 16 years of age is third-degree criminal sexual conduct), and MCL 750.520e(1)(a) (stating that sexual contact with another person who is at least 13 years of age but less than 16 years of age by a person who is five or more years older than that person is fourth-degree criminal sexual conduct).

by the circumstances of the underlying felony. This Court reverses defendants' convictions of CSC-I under MCL 750.520b(1)(c).

B. DISSEMINATING SEXUALLY EXPLICIT MATTER TO A MINOR

Defendants next argue that there was insufficient evidence to convict each of them of the underlying felony of disseminating sexually explicit matter to a minor under MCL 722.675(1)(b). This Court reviews de novo challenges to the sufficiency of the evidence to determine whether "any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007) (quotation marks and citation omitted). This Court resolves all conflicts regarding the evidence in favor of the prosecution, and "[c]ircumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *Wilkens*, 267 Mich App at 738.

MCL 722.675(1) provides that

> [a] person is guilty of disseminating sexually explicit matter to a minor if that person . . .
>
> * * *
>
> (b) [k]nowingly exhibits to a minor a sexually explicit performance that is harmful to minors.

MCL 722.671(b) defines "disseminate" as "to sell, lend, give, exhibit, show, or allow to examine . . . ." "Exhibit" is defined, in part, as "[p]resent a performance," MCL 722.671(c)(*i*), and " 'sexually explicit performance' means a motion picture, video game, exhibition, show, representation, or other presentation that, in whole or in part, depicts nudity, sexual excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse,"

MCL 722.673(g). Therefore, a defendant violates MCL 722.675(1)(b) if he or she knowingly exhibits to a minor a depiction of nudity, sexual excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse that is harmful to minors.

When viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found beyond a reasonable doubt that defendants violated MCL 722.675(1)(b). Defendants knew that J. was present in the van when each of them disrobed and engaged in sexual intercourse with S. Defendants argue that they were not "exhibiting" because each defendant and S. moved to the back of the van and they were not attempting to stage a performance or make their efforts visible. Defendants also note that J. testified that it was "hard to see back there" and that she only looked there once. However, given the age of J. and her close proximity to the sexual acts, a jury could have reasonably inferred that defendants were presenting a performance that J. could see and that they knew J. was a minor. A reasonable juror could have found that even though defendants and S. moved to the back of the van, they were still exhibiting to a minor a sexually explicit performance that was harmful to the minor. There was sufficient evidence to convict defendants of disseminating sexually explicit matter to a minor under MCL 722.675(1)(b).

"[W]hen a conviction for a greater offense is reversed on grounds that affect only the greater offense," this Court may remand for entry of judgments of conviction on necessarily included lesser offenses. *People v Bearss*, 463 Mich 623, 631; 625 NW2d 10 (2001) (quotation marks and citation omitted). "A necessarily included lesser offense" is an offense whose elements are subsumed within the elements of a greater offense. *People*

v Wilder, 485 Mich 35, 41; 780 NW2d 265 (2010). When evaluating whether an offense is a lesser included offense, the crimes are to be analyzed with an eye toward how the crimes were actually charged. See *id.* at 45. "As long as the elements at issue are subsumed within the charged offense, the crime is a necessarily included lesser offense." *Id.* at 44.

Defendants were charged with committing CSC-I, MCL 750.520b(1)(c), by sexually penetrating S. while committing the felony of disseminating sexually explicit matter to a minor, MCL 722.675(1)(b). Because a jury could not have convicted defendants on the charged counts of CSC-I under MCL 750.520b(1)(c) without determining that defendants also committed the underlying felony, the underlying felony is a necessarily included lesser offense. Thus, we remand this case for entry of convictions on defendants' lesser included offenses under MCL 722.675(1)(b).

C. LOCKETT'S SENTENCING GUIDELINES

Lockett argues that the trial court incorrectly assessed 10 points for offense variable (OV) 4 (psychological injury to victim), 15 points for OV 10 (exploitation of vulnerable victim), and 10 points for OV 14 (offender's role). This Court reviews a trial court's scoring of a sentencing guidelines variable for clear error. *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003). A scoring decision is not clearly erroneous if the record contains "*any* evidence in support of the decision." *Id.* (quotation marks and citations omitted).

We agree that the court incorrectly assessed 10 points for OV 4. OV 4 asks the court to determine whether a serious psychological injury requiring professional treatment occurred to a victim. MCL 777.34. The court properly assesses 10 points when a victim suffers a

serious psychological injury that might require professional treatment. MCL 777.34(2). The fact that the victim did not seek professional treatment is not conclusive when scoring the variable. MCL 777.34(2); *Wilkens*, 267 Mich App at 740. There must be some evidence of psychological injury on the record to justify a 10-point score. *Hicks*, 259 Mich App at 535.

The record is devoid of evidence to indicate whether J. suffered a serious psychological injury. There was no testimony indicating that J. suffered a psychological injury, the presentence report contains no information that would indicate any victims suffered psychological harm, and the record does not include a victim-impact statement. The trial court's entire statement on the matter was that "[c]learly this type of situation, looking at the whole circumstances of the sexual situation with the sisters being involved, and these two defendants, would cause any normal person of that age serious psychological injury; whether there was treatment or not, is not an issue." The trial court may not simply assume that someone in the victim's position would have suffered psychological harm because MCL 777.34 requires that serious psychological injury "*occurred* to a victim." (Emphasis added.) This Court cannot find any evidence to support the trial court's decision to assess 10 points for OV 4.

Lockett also argues that the trial court incorrectly assessed 15 points for OV 10. OV 10 addresses the exploitation of a vulnerable victim. MCL 777.40. The court must assess 15 points when "[p]redatory conduct was involved[.]" MCL 777.40(1)(a). "Predatory conduct" means conduct that occurred before the commission of the offense and that was directed at the victim for the primary purpose of victimization. MCL 777.40(3)(a); *People v Cannon*, 481 Mich 152, 160-161; 749 NW2d 257 (2008).

Evidence on the record supports the trial court's decision to assess Lockett 15 points for OV 10. Lockett picked up J. in the middle of the night in his van. Lockett drove to a liquor store to purchase alcohol. He then drove the van to a city park and parked it. Because of J.'s young age, she was susceptible to injury, physical restraint, or temptation. Moreover, given Lockett's actions that night, it is a reasonable inference that victimization was his primary purpose for engaging in the preoffense conduct. The trial court correctly scored OV 10.

Finally, Lockett argues that the trial court erroneously assessed 10 points for OV 14. A trial court appropriately assesses 10 points for OV 14 when the defendant was a leader in a multiple-offender situation. MCL 777.44(1)(a); *People v Apgar*, 264 Mich App 321, 330; 690 NW2d 312 (2004). The entire criminal episode must be evaluated to determine whether a defendant was a leader. MCL 777.44(2)(a); *Apgar*, 264 Mich App at 330.

Lockett argues that it was Johnson who had the preexisting relationship and contact with the girls and who coordinated with S. regarding when and where to pick the girls up, and that even though Lockett was older than Johnson, none of the participants showed Lockett any deference based on his age. While we agree that there are facts that may indicate that Johnson was a leader, our review is limited to an evaluation for clear error, and a scoring decision is not clearly erroneous if the record contains *any* evidence supporting the decision. *Hicks*, 259 Mich App at 522. Lockett was 35 and Johnson was 18, making Lockett significantly older than Johnson; Lockett owned and drove the van in which he picked the girls up and in which the sexual acts occurred; and it is reasonable to assume that

Lockett purchased the alcohol. The trial court noted that Johnson "could not even have done all this on his own, with the lack of aid, and the van." There is evidence on the record to support the trial court's determination that Lockett was a leader in this situation.

D. ACCOMPLICE CAUTIONARY INSTRUCTION

Defendants next argue that the trial court abused its discretion when it failed to give the jury the accomplice cautionary instruction and instead only gave the jury the immunity instruction regarding S.'s testimony. A trial court's decision whether to give a cautionary accomplice instruction is reviewed for an abuse of discretion. *People v Young*, 472 Mich 130, 135; 693 NW2d 801 (2005). "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).

Jury instructions are to be read as a whole and, even if somewhat imperfect, no error exists if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). For reversal to be warranted based on the absence of a cautionary accomplice instruction, a defendant has the burden to show that it was more probable than not that the error affected the outcome of the proceedings. *Young*, 472 Mich at 141-142.

The trial court refused to give both the immunity instruction contained in CJI2d 5.13 and the accomplice instruction contained in CJI2d 5.6 because it determined that providing both instructions would be "very confusing to the jury," and instead it let defendants choose which of the two instructions was to be given.

We conclude that the trial court did not abuse its discretion in denying the request to have both instructions presented because the instructions as given fairly presented the issues to the jury and sufficiently protected defendants' rights. The primary purpose of both instructions is to raise the jury's awareness of the potential ulterior motives of the witness. Both the accomplice and immunity instructions caution the jury that the witness may have some reason not to testify truthfully. The immunity instruction's cautions about S.'s credibility were extensive enough to sufficiently protect defendants' rights. Defendants have also failed to establish that a difference in jury instructions would have affected the outcome of the case, given that S.'s testimony that she had sexual intercourse with each defendant in the back of the van was supported by other testimony, including the testimony of J. and Officer Garrison.

Johnson also argues that he was denied the effective assistance of counsel when his trial counsel chose the immunity instruction instead of the accomplice instruction. We disagree. Unpreserved issues concerning ineffective assistance of counsel are reviewed for errors apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). "If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id*.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. See *id*. at 578. To establish an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008). A defendant must also show that the result that did occur was fundamentally unfair or unreliable. *Id*.

There is no evidence on the record to support Johnson's contention that his trial counsel's performance was objectively unreasonable, and there is no evidence on the record to support Johnson's contention that the result of the proceedings would have been different had his trial counsel chosen the accomplice instruction over the immunity instruction.

E. SEXUAL PENETRATION OF A CHILD UNDER AGE 13

Johnson argues that the prosecution presented insufficient evidence to support his conviction of CSC-I under MCL 750.520b(1)(a) (penetration of a person under age 13). The elements of CSC-I under MCL 750.520b(1)(a) are that (1) the defendant engaged in sexual penetration with another person and (2) the other person was under 13 years of age. *People v Hammons*, 210 Mich App 554, 556-557; 534 NW2d 183 (1995). " 'Sexual penetration' means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body . . . ." MCL 750.520a(r). Johnson does not contest the second ele-

ment, that J. was 12 years old at the time of the alleged penetration. Johnson argues that because J. repeatedly denied that penetration occurred, no rational trier of fact could have found beyond a reasonable doubt that he engaged in sexual penetration with J. We disagree.

J. did deny that any penetration occurred. However, J. was not given the legal definition of "penetration." According to the law, "penetration" is *any* intrusion, however slight, into the vagina *or* the labia majora. *Id.*; *People v Whitfield*, 425 Mich 116, 135 n 20; 388 NW2d 206 (1986). J. testified that she and Johnson were attempting to have sexual intercourse and that Johnson's "private" was touching her "private." She testified that Johnson's "private" was touching where she would use tissue while wiping after urination, and that she experienced pain going into her "private parts."

When viewing J.'s testimony in the light most favorable to the prosecution, the jury could have reasonably inferred that Johnson's penis intruded, however slightly, into J.'s vagina or labia majora. Because a rational trier of fact could have found that Johnson engaged in sexual penetration with J., we affirm Johnson's conviction of CSC-I for engaging in sexual penetration with a person under 13 years of age.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

METER, P.J., and CAVANAGH and SERVITTO, JJ., concurred.

ALFIERI v BERTORELLI

Docket No. 297733. Submitted October 4, 2011, at Grand Rapids. Decided January 10, 2012, at 9:05 a.m. Leave to appeal denied, 491 Mich 925.

Frank Alfieri, IV, and Tonya Alfieri brought an action in the Van Buren Circuit Court against Marc and Brenda Bertorelli, Marc Bertorelli Builder, LLC, Meryl Green, and Weber Seiler Realtors, Inc., alleging, in part, silent fraud and negligent misrepresentation pertaining to plaintiffs' purchase of a condominium unit that was contaminated with trichloroethylene. Plaintiffs had been led to believe that the contamination had been cleaned up, in part on the basis of a newspaper article and a sales brochure that indicated that the site had been decontaminated, and they, therefore, purchased the property without conducting an independent analysis. The Bertorelli defendants were dismissed by stipulation of the parties. Defendants moved for summary disposition, a directed verdict, and judgment notwithstanding the verdict, alleging that they did not breach any legal duty they owed to plaintiffs because they were sellers' agents, there was insufficient evidence of reliance by plaintiffs and any reliance would have been unreasonable, and defendants did not make any misrepresentations. The trial court, William C. Buhl, J., gave the jury a comparative-negligence instruction over plaintiffs' objection. The jury found defendants liable for silent fraud and negligent misrepresentation, but found plaintiffs to be 35 percent at fault on the negligent-misrepresentation claim. The trial court entered a judgment consistent with the verdict. Defendants appealed the denial of their motions and plaintiffs cross-appealed with regard to the comparative-negligence jury instruction.

The Court of Appeals *held*:

1. The trial court correctly determined that there was a genuine question of fact and that reasonable minds could differ on whether defendants owed a duty of disclosure to plaintiffs because the evidence showed that plaintiffs had made direct inquiries of defendants about the condition of the property and the Department of Environmental Quality had advised defendants that the sales brochure contained inaccurate and misleading information.

2. Plaintiffs presented sufficient evidence to establish that they reasonably relied on the sales brochure. No further inquiry on their part was necessary. The trial court properly denied defendants' motions.

3. The trial court did not abuse its discretion by declining to give defendants' requested jury instruction that was based on facts distinguishable from those of this case.

4. The trial court properly instructed the jury on comparative negligence. The jury could have found some comparative fault on the part of plaintiffs with respect to the negligent-misrepresentation claim.

5. Plaintiffs engaged in a joint venture by purchasing the condominium; therefore, it was appropriate to apply the doctrine of imputed knowledge to plaintiffs and the trial court did not err by declining to instruct the jury to consider each plaintiff's comparative negligence separately.

Affirmed.

1. FRAUD — SILENT FRAUD — NEGLIGENT MISREPRESENTATION.

Silent fraud and negligent misrepresentation both require a defendant to owe a duty to the plaintiff; silent fraud is based on a defendant suppressing a material fact that the defendant was legally obligated to disclose, rather than making an affirmative misrepresentation; a misleading incomplete response to an inquiry can constitute silent fraud; a claim for negligent misrepresentation requires a plaintiff to prove that a party justifiably relied to his or her detriment on information prepared without reasonable care by one who owed the relying party a duty of care.

2. FRAUD — SILENT FRAUD — DUTY TO DISCLOSE.

A duty to disclose may be imposed on a seller's agent to disclose newly acquired information that is recognized by the agent as rendering a prior affirmative statement untrue or misleading; this is especially true when the agent knows that the buyer has a particular concern with the subject matter of the statement; a duty to disclose may arise solely because the buyer expresses a particularized concern or directly inquires of the seller regarding the subject matter.

3. FRAUD — DEFRAUDED PARTY'S DUTY TO CONDUCT FURTHER INQUIRY.

The general rule that there cannot be any fraud if the party allegedly defrauded has the means to determine for himself or herself the truth of the matter only applies when the party allegedly defrauded was either presented with the information and chose to

> ignore it or had some other indication that further inquiry was needed; when a defrauded party has troubled to examine some extrinsic evidence supporting a false statement, that party owes no duty to the defrauder to exercise diligence to uncover additional evidence disapproving the defrauder's representations.

Bolhouse, Vander Hulst, Risko & Baar, P.C. (by *Mark Hofstee*), and *Risko Law Office, P.C.* (by *Michael P. Risko*), for Frank Alfieri, IV, and Tonya Alfieri.

Kallas & Henk PC (by *Leonard A. Henk*) for Meryl Greene and Weber Seiler Realtors, Inc.

Before: MARKEY, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

PER CURIAM. Defendants[1] appeal as of right the trial court's denial of various motions for summary disposition, a directed verdict, and judgment notwithstanding the verdict (JNOV). Plaintiffs cross-appeal as of right certain of the jury instructions given by the trial court. We affirm.

This matter arises out of plaintiffs' purchase of a condominium unit in what had once been an abandoned factory. The factory had been contaminated with trichloroethylene, and, in the process of converting it into condominiums, a vapor barrier was installed, but the site was never properly decontaminated. Plaintiffs were led to believe that the contamination had been cleaned up, in part on the basis of a newspaper article and a sales brochure both indicating that the site had been decontaminated, so they purchased the condo-

[1] The Bertorelli defendants, Marc and Brenda Bertorelli and Marc Bertorelli Builder, LLC, and some of the original claims were dismissed by stipulation, so we refer only to the defendants remaining in this matter as "defendants" and only discuss the legal theories remaining and applicable to them.

minium without conducting an independent analysis. The site later turned out to be seriously contaminated. Plaintiffs commenced this suit on theories of, in relevant part, silent fraud and negligent misrepresentation against defendants. Defendants filed motions for summary disposition, a directed verdict, and JNOV at various stages in this litigation, all essentially making the same arguments that they did not breach any legal duty they owed to plaintiffs because they were sellers' agents, there was insufficient evidence of reliance by plaintiffs and any reliance would be unreasonable, and defendants did not make any misrepresentations. The trial court gave a comparative-negligence instruction over plaintiffs' objection. The jury found defendants liable for silent fraud and negligent misrepresentation, but found plaintiffs to be 35 percent at fault on the negligent misrepresentation claim.

We review de novo a trial court's ruling on a motion for summary disposition and consider the evidence and all legitimate inferences therefrom in the light most favorable to the nonmoving party to determine whether there exists any genuine issue of material fact.[2] *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006). When reviewing a ruling on a motion for a directed verdict, we likewise consider the evidence and any reasonable inferences de novo in the light most favorable to the nonmoving party to determine whether there exists a question of fact on which reasonable minds could differ. *Hord v Environmental Research Institute of Mich (After Remand)*, 463 Mich 399, 410; 617 NW2d 543 (2000); *Thomas v McGinnis*, 239 Mich

[2] We presume that the motion here was granted pursuant to MCR 2.116(C)(10), which tests the factual sufficiency of a claim, because the trial court considered material outside the pleadings. See *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).

App 636, 643-644; 609 NW2d 222 (2000). We review a denial of a motion for JNOV de novo as well, again considering the evidence and any reasonable inferences in the light most favorable to the nonmoving party to determine whether the evidence fails to establish a claim. *Prime Fin Servs LLC v Vinton*, 279 Mich App 245, 255-256; 761 NW2d 694 (2008). Thus, our standard of review for all three of defendants' motions is essentially the same, so we will review them collectively as defendants' "motions."

Defendants contend that the trial court should have granted their motions because as sellers' agents they owed no duty to plaintiffs because plaintiffs' reliance on the sales brochure was unreasonable and because plaintiffs' reliance on defendant Meryl Greene's statements was unreasonable. We conclude that the trial court properly denied defendants' motions.

Common-law fraud or fraudulent misrepresentation entails a defendant making a false representation of material fact with the intention that the plaintiff would rely on it, the defendant either knowing at the time that the representation was false or making it with reckless disregard for its accuracy, and the plaintiff actually relying on the representation and suffering damage as a result. *M&D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). Silent fraud is essentially the same except that it is based on a defendant suppressing a material fact that he or she was legally obligated to disclose, rather than making an affirmative misrepresentation. *Id*. at 28-29. Such a duty may arise by law or by equity; an example of the latter is a buyer making a direct inquiry or expressing a particularized concern. *The Mable Cleary Trust v The Edward-Marlah Muzyl Trust*, 262 Mich App 485, 500; 686 NW2d 770 (2004); *M&D, Inc*, 231 Mich App at 31, 33. A misleadingly incomplete response to an inquiry can

constitute silent fraud. *The Mable Cleary Trust*, 262 Mich App at 500. "A claim for negligent misrepresentation requires plaintiff to prove that a party justifiably relied to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Unibar Maintenance Servs, Inc v Saigh*, 283 Mich App 609, 621; 769 NW2d 911 (2009) (citations and quotation marks omitted).

Silent fraud and negligent misrepresentation both require a defendant to owe a duty to the plaintiff. Defendants rely on this Court's explanation in *McMullen v Joldersma*, 174 Mich App 207, 212; 435 NW2d 428 (1988), that Michigan jurisprudence had never imposed on sellers' agents a duty per se of disclosure to buyers, in contrast to the duty it has imposed on sellers themselves. However, a duty of disclosure may be imposed on a seller's agent to disclose newly acquired information that is recognized by the agent as rendering a prior affirmative statement untrue or misleading. *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 126-128; 313 NW2d 77 (1981). This is especially true when the agent knows that the buyer has a particular concern with the subject matter of that statement. *Id*. at 127. Indeed, a duty to disclose may arise solely because "the buyers express a particularized concern or directly inquire of the seller . . . ." *M&D, Inc*, 231 Mich App at 33. There is evidence that plaintiffs made direct inquires of defendants about the condition of the property and that the Department of Environmental Quality advised defendants that the sales brochure contained inaccurate and misleading information. The trial court correctly determined that there was a genuine question of fact and that reasonable minds could differ on whether defendants owed a duty of disclosure to plaintiffs.

Defendants next rely on the general rule that there cannot be any fraud if the party allegedly defrauded had

the means to determine for him- or herself the truth of the matter. *Nieves v Bell Indus*, *Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994). Although defendants accurately state the general rule, it is not an absolute. As this Court has explained, that general rule is only applied when the plaintiffs "were either presented with the information and chose to ignore it or had some other indication that further inquiry was needed." *The Mable Cleary Trust*, 262 Mich App at 501. Furthermore, it has long been the rule that, at least when a defrauded party troubled to examine some extrinsic evidence supporting a false statement, that party owes no duty to the defrauder to exercise diligence to uncover additional evidence disproving the defrauder's representations. *Smith v Werkheiser*, 152 Mich 177, 179-180; 115 NW 964 (1908); see also *In re People v Jory*, 443 Mich 403, 417 n 10; 505 NW2d 228 (1993). The case relied on by defendants, *Fejedelem v Kasco*, 269 Mich App 499; 711 NW2d 436 (2006), is notable because in that case the plaintiff was directly given considerable evidence that certain financial information was incomplete and unreliable, making the plaintiff negligent for nonetheless relying on it. *Id*. at 503-504.

Here plaintiff Frank Alfieri, IV, testified that it was his understanding that the site had been cleaned up based on general public discussions, conversations with Marc Bertorelli and Meryl Greene, and local newspaper articles. Plaintiffs directly inquired of Greene regarding the condition of the property and whether it had been cleaned up at the time they signed the purchase agreement. Frank testified that he trusted Greene's representations, both oral and in the sales brochure, that the site had been cleaned up. Greene testified that she prepared the contents of the sales brochure, with direction from Marc, and that until plaintiffs filed suit, she had no reason to believe that the sales brochure was

inaccurate. Frank also testified that he had no indication that the information in the sales brochure that the contaminated condominium site had been cleaned up was incomplete. Indeed, Greene confirmed the representations in the sales brochure with the newspaper article affirming that the site was no longer contaminated. While the facts set out in the sales brochure could have been independently verified, plaintiffs actually alleged that the factual representations in the sales brochure, i.e., that the contaminated condominium site had been cleaned up, were false in themselves.

Viewing the evidence and all reasonable inferences that can be drawn from it in the light most favorable to plaintiffs, plaintiffs presented sufficient evidence to establish that they reasonably relied on the sales brochure when numerous sources—including Marc, Greene, the local newspaper, and public "buzz"—indicated that the site had been cleaned up. No further inquiry was necessary. The trial court properly denied all three of defendants' motions.

Defendants also argue that the trial court erred by failing to give their requested instruction regarding their duty as sellers' agents. We review a trial court's decision regarding jury instructions for an abuse of discretion. *Hashem v Les Stanford Oldsmobile, Inc*, 266 Mich App 61, 87; 697 NW2d 558 (2005). Defendants' requested instruction was based on facts specific to *McMullen*, 174 Mich App at 212, which were distinguishable from those in this case. Further, the given instruction accurately reflected general caselaw. The trial court did not abuse its discretion by declining to give defendants' requested instruction.

Defendants finally argue that their motion for JNOV should have been granted on the negligent-misrepresentation claim because the jury found plain-

tiffs to be 35 percent at fault. Defendants appear to be essentially asserting an argument premised on the doctrine of contributory negligence, which has long and properly been abandoned in Michigan in favor of comparative fault. *Jimkoski v Shupe*, 282 Mich App 1, 8 n 3; 763 NW2d 1 (2008). The extent of a plaintiff's fault is a question for the jury. *Id*. Indeed, the trial court instructed the jury on comparative negligence at defendants' request. Denial of defendants' motion for JNOV on that basis was appropriate.

On cross-appeal, plaintiffs argue that the trial court erred by instructing the jury on comparative negligence, M Civ JI 11.01, because their negligent-misrepresentation claim does not involve a claim seeking damages for personal injury, property damage, or wrongful death as set out in MCL 600.2959. We review de novo claims of instructional error. *Lewis v LeGrow*, 258 Mich App 175, 211; 670 NW2d 675 (2003). We review for an abuse of discretion a trial court's determination whether a standard jury instruction is applicable and accurate. *Id*. We find the trial court's instruction appropriate.

Plaintiffs rely on *Sweet v Shreve*, 262 Mich 432, 435; 247 NW 711 (1933), in which "a suit brought for the recovery of damages caused plaintiffs as a result of fraudulent representations made by defendants" in a real estate transaction was deemed not to be "one for injuries to person or property." However, *Sweet* addressed which of the then-existing limitations periods applied, and it "was decided consistently with a long line of Michigan cases which applied the six-year period of limitations to fraud actions." *Nat'l Sand, Inc v Nagel Constr, Inc*, 182 Mich App 327, 333; 451 NW2d 618 (1990). Today, the statute of limitations for "injuries to persons or property," MCL 600.5805, "applies to several

causes of action that rarely or never involve physical injury." *Local 1064, RWDSU AFL-CIO v Ernst & Young*, 449 Mich 322, 328; 535 NW2d 187 (1995). *Sweet* discussed which long-repealed statute of limitations an action should be shoehorned into. We doubt it resolves whether a particular claim of damages constitutes one for "personal injury or property damage" for comparative-negligence purposes today.

Indeed, this Court has observed that "what constitutes 'injuries to persons' [includes] 'invasions of rights that inhere in man as a rational being.' " *Nat'l Sand*, 182 Mich App at 335 (citations and some quotation marks omitted) (cited with approval in *Local 1064*, 449 Mich at 328). This is consistent with the modern definition of a "personal injury" as potentially referring to any invasion of a personal right, not only bodily injuries. Black's Law Dictionary (9th ed). Additionally, "comparative negligence should be applied in all common-law tort actions sounding in negligence where the defendant's misconduct falls short of being intentional," *Vining v Detroit*, 162 Mich App 720, 727; 413 NW2d 486 (1987), and "the question is whether, in viewing the evidence most favorably to the defendant, there is sufficient evidence for the jury to find negligence on the part of the injured plaintiff." *Duke v American Olean Tile Co*, 155 Mich App 555, 566; 400 NW2d 677 (1986). Although both these cases predate the Legislature's adoption of MCL 600.2959, we think both remain "good law" and comport with Michigan's public policy of fairly apportioning damages according to each party's fault.

Given plaintiffs' decision not to obtain an environmental inspection and execution of a purchase agreement specifically stating that defendants had no knowledge of the property's environmental conditions, we

conclude that, when the evidence is viewed most favorably to defendants, the jury could have found some comparative fault on the part of plaintiffs with respect to the negligent-misrepresentation claim. The trial court's instruction was proper.

Plaintiffs finally argue that the trial court should have instructed the jury to consider each plaintiff's comparative negligence separately. We disagree. The doctrine of imputed knowledge is applicable to joint ventures, which have been defined as associations to carry out a single business enterprise for a profit. *Kay Investment Co, LLC v Brody Realty No 1, LLC*, 273 Mich App 432, 437; 731 NW2d 777 (2006); *Christy v Prestige Builders, Inc*, 94 Mich App 784, 796; 290 NW2d 395 (1980), rev'd on other grounds 415 Mich 684 (1982). Plaintiffs purchased the condominium at a reduced price as an investment; each contributed money toward the down payment, did not intend to live there, and planned to sell it for profit. Plaintiffs clearly engaged in a joint venture, so it was appropriate to apply the doctrine of imputed knowledge. Therefore, the trial court did not err by declining to instruct the jury to consider each plaintiff's comparative negligence separately.

Affirmed.

MARKEY, P.J., and SERVITTO and RONAYNE KRAUSE, JJ., concurred.

KIM v JPMORGAN CHASE BANK, NA

Docket No. 302528. Submitted January 5, 2012, at Detroit. Decided January 12, 2012, at 9:00 a.m. Affirmed in part and reversed in part, 493 Mich 98.

Euihyung Kim and In Sook Kim brought an action in the Macomb Circuit Court against JPMorgan Chase Bank, N.A., seeking, in part, to set aside a sheriff's sale of their home. Plaintiffs had obtained a loan from Washington Mutual Bank to refinance their home and granted Washington Mutual a mortgage interest in the property to secure the loan. The federal government subsequently closed Washington Mutual and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver for the bank. Defendant acquired Washington Mutual's loans and loan commitments pursuant to a purchase and assumption agreement that it reached with the FDIC. After plaintiffs defaulted on their loan payments, defendant foreclosed on the property by advertisement and purchased the property at the sheriff's sale. Both plaintiffs and defendant sought summary disposition. In relevant part, plaintiffs asserted that defendant had failed to satisfy the statutory prerequisites for foreclosure by advertisement because it had not recorded its mortgage interest before the sheriff's sale. The court, Richard L. Caretti, J., concluded that defendant was not required to record its interest before the sale and granted summary disposition in favor of defendant. Plaintiffs appealed.

The Court of Appeals *held*:

The right to foreclose by advertisement is conferred by statute, and strict compliance with the statutory provisions is required. At the time of the foreclosure proceedings in this case, MCL 600.3204, as amended by 2004 PA 186, provided that a party could foreclose a mortgage by advertisement if (1) a default in a condition of the mortgage had occurred by which the power to sell became operative, (2) an action or proceeding had not been instituted at law to recover the debt secured by the mortgage or any part of the mortgage; or, if an action or proceeding had been instituted, the action or proceeding had been discontinued; or an execution on a judgment rendered in an action or proceeding had been returned unsatisfied, in whole or in part, (3) the mortgage containing the power of sale had been properly recorded, and (4) the party

foreclosing the mortgage was either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage. If the party foreclosing a mortgage by advertisement was not the original mortgagee, a record chain of title must have existed before the date of sale evidencing the assignment of the mortgage to the party foreclosing the mortgage. Thus, under the plain language of MCL 600.3204(3), defendant was required to record its interest before the date of the sheriff's sale. The statutory language made no exception for mortgage interests acquired by operation of law and, in any event, defendant did not acquire its mortgage interest by operation of law. Rather, under federal law, the mortgage interest was acquired by the FDIC, which later conveyed the interest to defendant through a purchase agreement. Because defendant did not record its interest before the sheriff's sale, it was not statutorily authorized to proceed with the sale, and the trial court erred by granting summary disposition to defendant rather than to plaintiffs, who were entitled to set aside the sheriff's deed.

Reversed and remanded.

MORTGAGES — FORECLOSURES BY ADVERTISEMENT — STATUTORY REQUIREMENTS — RECORDED INTERESTS.

The right to foreclose by advertisement is conferred by statute, and strict compliance with the statutory provisions is required; if the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title must have existed before the date of sale evidencing the assignment of the mortgage to the party foreclosing the mortgage; the statute makes no exception for mortgage interests acquired by operation of law (MCL 600.3204[3]).

Christenson & Fiederlein, P.C. (by *Bernhardt D. Christenson*), for plaintiffs.

Dykema Gossett PLLC (by *Joseph H. Hickey*, *Joseph A. Doerr*, and *Brandon M. Blazo*) for defendant.

Before: DONOFRIO, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

DONOFRIO, P.J. Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of

defendant in this mortgage foreclosure dispute. Because defendant was not authorized to proceed with the sheriff's sale, given that it had failed to record its mortgage interest before the sale as required by MCL 600.3204(3), we reverse and remand.

On July 11, 2007, plaintiffs (husband and wife) obtained a $615,000 loan from Washington Mutual Bank (the Bank) to refinance their home. As security for their indebtedness, plaintiffs granted the Bank a mortgage interest in the property, and, on July 25, 2007, the Bank recorded its interest with the Macomb County Register of Deeds. On September 25, 2008, the Office of Thrift Supervision within the United States Department of Treasury closed the Bank and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver. Pursuant to a purchase and assumption agreement between the FDIC, as receiver, and defendant, defendant acquired all of the Bank's loans and loan commitments. When plaintiffs defaulted on their loan payments, defendant sought to foreclose by advertisement. A notice of foreclosure was published in the *Macomb County Legal News* on May 25, 2009, June 1, 2009, June 8, 2009, and June 15, 2009. On June 26, 2009, defendant purchased the property at a sheriff's sale for $218,000.

On November 30, 2009, plaintiffs filed a complaint against defendant seeking, among other relief, to set aside the sheriff's sale. Thereafter, defendant moved for summary disposition; plaintiffs countered defendant's motion by asserting entitlement to summary disposition under MCR 2.116(I)(2). Pertinent to this appeal, plaintiffs argued that defendant had failed to satisfy the statutory requisites to foreclose by advertisement because it failed to record its mortgage interest before the sheriff's sale. Relying on an opinion of the Michigan Attorney General, OAG, 2003-2004, No 7147, p 93

(January 9, 2004), the trial court determined that defendant was not required to record its interest before the sale because it acquired its interest by operation of law. For this and other reasons not relevant to this appeal, the trial court granted summary disposition in defendant's favor.

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). Defendant moved for summary disposition pursuant to both MCR 2.116(C)(8) and (10). A motion under subrule (C)(8) tests the legal sufficiency of the complaint using the pleadings alone "to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). Summary disposition under subrule (C)(10) is appropriate "if the affidavits or other documentary evidence demonstrate that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). Plaintiffs sought summary disposition pursuant to MCR 2.116(I)(2), which is properly granted if the opposing party, rather than the moving party, is entitled to judgment as a matter of law. *Auto-Owners Ins Co v Martin*, 284 Mich App 427, 433; 773 NW2d 29 (2009).

Plaintiffs argue that the trial court erred by granting summary disposition for defendant because chapter 32 of the Revised Judicature Act (RJA), MCL 600.3201 *et seq.*, concerning foreclosure by advertisement, required defendant to record its mortgage interest "prior to" the sheriff's sale. When interpreting statutory language, "[our] goal is to ascertain and give effect to the intent of the Legislature by enforcing plain language as it is

written." *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 276; 730 NW2d 523 (2006). Thus, our analysis begins with the statutory language itself. *Ameritech Publishing, Inc v Dep't of Treasury*, 281 Mich App 132, 147; 761 NW2d 470 (2008). When language is clear and unambiguous, we must apply the terms of the statute to the circumstances of the case, and judicial construction is unnecessary. *Dep't of Transp v Tomkins*, 481 Mich 184, 191; 749 NW2d 716 (2008).

At the time of the foreclosure proceedings at issue, MCL 600.3204[1] provided, in relevant part:

> (1) A party may foreclose a mortgage by advertisement if all of the following circumstances exist:
>
> (a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.
>
> (b) An action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage; or, if an action or proceeding has been instituted, the action or proceeding has been discontinued; or an execution on a judgment rendered in an action or proceeding has been returned unsatisfied, in whole or in part.
>
> (c) The mortgage containing the power of sale has been properly recorded.
>
> (d) *The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness* secured by the mortgage or the servicing agent of the mortgage.
>
> * * *
>
> (3) *If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall*

[1] As amended by 2004 PA 186. The statute was subsequently amended by 2009 PA 29, effective July 5, 2009; 2011 PA 72, effective July 1, 2011; and 2011 PA 301, effective December 22, 2011.

> *exist prior to the date of sale* under section 3216[2] *evidencing the assignment of the mortgage to the party foreclosing the mortgage.* [Emphasis added.]

In this case, defendant was not the original mortgagee and acquired its interest in the mortgage by assignment.[3] Thus, pursuant to the plain language of MCL 600.3204(3),[4] defendant was required to record its interest "prior to" the date of the sheriff's sale. Our Supreme Court has recognized that "[t]he right to foreclose by advertisement is conferred solely by the statute" and that strict compliance with such statutory provisions is required. *Dohm v Haskin*, 88 Mich 144, 147; 50 NW 108 (1891).

Defendant argues that the recording provision of MCL 600.3204(3) is inapplicable because defendant acquired its interest in the mortgage by operation of law. The trial court granted summary disposition in defendant's favor on this basis. MCL 600.3204(3), however, makes no exception for mortgage interests acquired "by operation of law." "A court must not judicially legislate by adding into a statute provisions that the Legislature did not include." *In re Wayne Co Prosecutor*, 232 Mich App 482, 486; 591 NW2d 359 (1998). Because the Attorney General's opinion in OAG No 7147 did not comport with the plain statutory language at issue here, the trial court's reliance on the opinion was misplaced. In pronouncing that assignments effected by operation of law need not be recorded before

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[2] MCL 600.3216 pertains to the time and place of sheriff's foreclosure sales.

[3] Although defendant argues that it complied with MCL 600.3204(1)(d) because it was the "owner of the indebtedness" before it initiated the foreclosure, plaintiffs do not challenge that issue on appeal.

[4] Although MCL 600.3204 has been amended since the time of the foreclosure proceedings at issue here, the language of MCL 600.3204(3) remains the same.

foreclosure by advertisement, the Attorney General was addressing a previous version of chapter 32 of the RJA and relied on conclusory statements in Michigan Land Title Standards (5th ed), a publication of the Land Title Standards Committee of the Real Property Law Section of the State Bar of Michigan. The Attorney General's opinion simply did not address the statutory language at issue in this case. The trial court's reliance on the Attorney General's opinion was also misplaced because opinions of the Attorney General are not binding on this Court. *Danse Corp v City of Madison Hts*, 466 Mich 175, 182 n 6; 644 NW2d 721 (2002).

In any event, it does not appear that defendant acquired its interest by operation of law. The FDIC was appointed as the Bank's receiver, and 12 USC 1821 governed the FDIC's authority. That statute states, in pertinent part:

> The [FDIC] shall, as conservator or receiver, and *by operation of law*, succeed to—
>
> (i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution; and
>
> (ii) title to the books, records, and assets of any previous conservator or other legal custodian of such institution. [12 USC 1821(d)(2)(A)(i) and (ii) (emphasis added).]

The FDIC had the authority to dispose of the Bank's assets as set forth in 12 USC 1821(d)(2)(G), which provides:

> MERGER; TRANSFER OF ASSETS AND LIABILITIES.—
>
> (i) IN GENERAL.— The [FDIC] may, as conservator or receiver—

> (I) merge the insured depository institution with another insured depository institution; or
>
> (II) subject to clause (ii), transfer any asset or liability of the institution in default (including assets and liabilities associated with any trust business) without any approval, assignment, or consent with respect to such transfer.
>
> (ii) APPROVAL BY APPROPRIATE FEDERAL BANKING AGENCY.—No transfer described in clause (i)(II) may be made to another depository institution . . . without the approval of the appropriate Federal banking agency for such institution.

Consistently with this authority, the FDIC and defendant entered into the purchase and assumption agreement, pursuant to which defendant acquired plaintiffs' indebtedness. The agreement states that defendant, as the "Assuming Bank," "desires to purchase substantially all of the assets and assume all deposit and substantially all other liabilities of the Failed Bank . . . ." Article III of the agreement, pertaining to the "PURCHASE OF ASSETS," provides, in relevant part:

> **3.1 Assets Purchased by Assuming Bank.** Subject to Sections 3.5, 3.6 and 4.8, the Assuming Bank hereby purchases from the Receiver, and the Receiver hereby sells, assigns, transfers, conveys, and delivers to the Assuming Bank, all right, title, and interest of the Receiver in and to all of the assets . . . of the Failed Bank . . . . [T]he Assuming Bank specifically purchases all mortgage servicing rights and obligations of the Failed Bank.

Reading the agreement together with the federal statutory provisions, it appears that the FDIC, as receiver, rather than defendant, acquired the Bank's rights, titles, powers and privileges "by operation of law." Defendant simply purchased the loans from the FDIC after they were transferred to the FDIC by operation of law.

Therefore, pursuant to the plain language of MCL 600.3204(3), defendant was required to record its mortgage interest before the sheriff's sale. Because defendant failed to do so, it was not statutorily authorized to proceed with the sale. See MCL 600.3204(3) ("If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title *shall* exist prior to the date of sale . . . ." (emphasis added); see also *Davenport v HSBC Bank USA*, 275 Mich App 344, 347-348; 739 NW2d 383 (2007) ("Because defendant lacked the statutory authority to foreclose, the foreclosure proceedings were void *ab initio*."). Accordingly, the trial court erred by granting summary disposition for defendant and denying summary disposition for plaintiffs when they were entitled to set aside the sheriff's deed. Given our resolution of this issue, it is unnecessary to address plaintiffs' argument that the trial court erred by prematurely disposing of their cause of action without permitting discovery.

Reversed and remanded. We do not retain jurisdiction. Plaintiffs, being the prevailing parties, may tax costs pursuant to MCR 7.219.

STEPHENS and RONAYNE KRAUSE, JJ., concurred with DONOFRIO, P.J.

YOOST v CASPARI

Docket No. 294299. Submitted February 1, 2011, at Grand Rapids. Decided January 17, 2012, at 9:00 a.m. Leave to appeal denied, 491 Mich 944.

Wally Yoost brought an action in the Berrien Circuit Court against Patricia E. Caspari and subsequently amended his complaint to add Lawrence I. Frankle and Irwin C. Zalcberg. Yoost claimed that Caspari had attempted to extort from Yoost half the value of a residence he allegedly owned and that Frankle and Zalcberg had encouraged her actions. He also sought damages for the intentional infliction of emotional distress. Ellen Frankle, as personal representative of the estate of Lawrence Frankle, was substituted as a defendant. Zalcberg filed a counterclaim against Yoost and Hank Asher, claiming that they had conspired to commit the tort of abuse of process. Asher, a resident of Florida, moved for summary disposition pursuant to MCR 2.116(C)(1), arguing that the court lacked jurisdiction over him. The court, John E. DeWane, J., denied the motion without prejudice, concluding that Michigan had limited personal jurisdiction over Asher under MCL 600.705(2). Asher appealed by leave granted.

The Court of Appeals *held*:

1. A court must have personal jurisdiction over a party before it may require the party to comply with its orders. While the plaintiff bears the burden of establishing jurisdiction over the defendant, he or she need only make a prima facie showing of jurisdiction to defeat a motion for summary disposition. If the parties present conflicting affidavits, all factual disputes are resolved in the plaintiff's favor and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party. To determine whether a Michigan court may exercise limited personal jurisdiction over a defendant, the court must determine (1) whether jurisdiction is authorized by Michigan's long-arm statute, and (2) whether the exercise of jurisdiction is consistent with the requirements of the Due Process Clause of the Fourteenth Amendment.

2. The trial court erred by concluding that it had jurisdiction over Asher under MCL 600.705(2). Under subsection (2) of Michigan's long-arm statute, MCL 600.705(2), a court may exercise

limited personal jurisdiction over an individual if a relationship exists between an individual or his or her representative and the state arising out of doing an act or causing an act to be done, or consequences to occur, in this state resulting in a tort action. In the case of an alleged conspiracy, a conspirator not within the forum state may be subject to the jurisdiction of the forum state on the basis of the acts the coconspirator committed there. To establish a prima facie case, a party may not merely allege that a conspiracy exists between the defendant and another party over whom the court has jurisdiction; rather, evidence or facts must support the allegations of conspiracy. A prima facie case may be established using reasonable inferences provided there is sufficient evidence introduced to take the inferences out of the realm of conjecture; there must be evidence that supports one theory of causation, indicating a logical sequence of cause and effect. Zalcberg failed to establish a prima facie case that Asher committed the tort of abuse of process in Michigan. In his affidavit, Asher denied that he had conspired with Yoost to file this instant action and denied that he had directed the litigation. Yoost also averred that Asher had no involvement with the initiation of the action. Zalcberg failed to establish limited personal jurisdiction over Asher under the long-arm statute because he did not produce evidence to establish a prima facie case that Asher had conspired with Yoost to initiate and direct the litigation. The fact that Asher had paid Yoost's legal fees, that during his deposition Yoost did not recall reading the complaint filed in this case, and that Yoost discussed with Asher the details of a prior Indiana litigation involving him and Zalcberg at some point did not establish a prima facie case. The circumstantial evidence presented was mere speculation and did not establish a logical sequence of cause and effect to reach the conclusion that Asher controlled the litigation through Yoost.

3. Under MCL 600.705(1), a court may exercise limited personal jurisdiction over a party for actions arising out of the transaction of any business within the state. The trial court properly held that MCL 600.705(1) could not provide a basis for limited personal jurisdiction. There was no evidence that Asher contracted for an attorney to represent Yoost in this Michigan action, and there was no prima facie evidence that Asher controlled or directed this litigation that would allow the trial court to exercise limited personal jurisdiction over Asher under MCL 600.705(1).

4. It was unnecessary to reach the due process issue because of Zalcberg's failure to establish a prima facie case.

Reversed and remanded for entry of an order granting Asher summary disposition.

1. COURTS — JURISDICTION — LIMITED PERSONAL JURISDICTION — LONG-ARM STATUTE.

A court must have personal jurisdiction over a party before it may require the party to comply with its orders; while the plaintiff bears the burden of establishing jurisdiction over the defendant, he or she need only make a prima facie showing of jurisdiction to defeat a motion for summary disposition; if the parties present conflicting affidavits, all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the presentation of contrary evidence by the moving party; to determine whether a Michigan court may exercise limited personal jurisdiction over a defendant, this Court must determine (1) whether jurisdiction is authorized by Michigan's long-arm statute and (2) whether the exercise of jurisdiction is consistent with the requirements of the Due Process Clause of the Fourteenth Amendment.

2. COURTS — JURISDICTION — LIMITED PERSONAL JURISDICTION — LONG-ARM STATUTE — CONSPIRACY — PRIMA FACIE EVIDENCE.

A Michigan court may exercise limited personal jurisdiction over an individual if a relationship exists between an individual or his or her representative and the state arising out of doing an act or causing an act to be done, or consequences to occur, in the state resulting in an action for tort; if conspiracy is alleged as the basis for jurisdiction, a conspirator not within the forum state may be subject to the jurisdiction of the forum state on the basis of the acts the coconspirator committed there; to establish a prima facie case the party may not merely allege that a conspiracy exists between the defendant and another party over whom the court has jurisdiction; rather, evidence or facts must support the allegations of conspiracy; a prima facie case may be established using reasonable inferences provided there is sufficient evidence introduced to take the inferences out of the realm of conjecture; there must be evidence that supports one theory of causation indicating a logical sequence of cause and effect (MCL 600.705[2]).

Smietanka, Buckleitner, Steffes & Gezon (by *Anne Buckleitner*) and *Jones Day* (by *June K. Ghezzi*, *Brian J. Murray*, and *Erin Shencopp*) for Hank Asher.

Burdick & Engeln, P.C. (by *Carl R. Burdick*), and *Hughes*, *Socol*, *Piers*, *Resnick & Dym, Ltd.* (by *José J. Behar*, *Juliet Berger-White*, and *Matthew J. Piers*), for Irwin C. Zalcberg.

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

PER CURIAM. Counterdefendant Hank Asher appeals by leave granted the trial court's order denying his motion for summary disposition under MCR 2.116(C)(1). He asserts that the trial court erred by ruling it that had limited jurisdiction over him under Michigan's long-arm statute, MCL 600.705(2), on the basis that defendant/counterplaintiff Irwin C. Zalcberg (Zalcberg) made a prima facie showing that Asher conspired with plaintiff, Wally Yoost, to commit the tort of abuse of process in Michigan. We reverse and remand for entry of an order granting Asher summary disposition.

I. SUMMARY OF FACTS AND PROCEEDINGS

Wally Yoost and Hank Asher are both citizens and residents of Florida. Zalcberg and defendants Patricia Caspari and Ellen Frankle are all residents of Michigan. Zalcberg is the sole shareholder and officer of Zalcberg Holdings, Inc, an Illinois corporation; he is in the business of trading equities and options from his home. Zalcberg employed Yoost from the fall of 1999 until early 2005. Yoost contends he worked as a trader and also provided estate management services for Zalcberg's wife, Sari. Zalcberg describes Yoost's employment as that of personal trainer, intern, and personal assistant. During Yoost's employment, Yoost met Patricia Caspari. They became romantically involved and began living together in 2001, in Michigan Shores,

Indiana. Caspari often visited Yoost at Zalcberg's residence and became acquainted with Zalcberg. Yoost became acquainted with Lawrence Frankle, Zalcberg's personal friend, business partner, and legal counsel. Yoost claims that he often sought legal advice from Frankle.

In 2002, Zalcberg and Sari loaned Yoost $67,000, secured by a note and mortgage executed October 29, 2002, to purchase a house on Fogarty Street in Michigan City, Indiana. Also on October 29, 2002, Caspari quitclaimed any interest in the Fogarty property to Yoost. Yoost asserts that Frankle drafted the quitclaim deed as a means of protecting Yoost's interest in the property while he cohabitated with Caspari. Yoost and Caspari subsequently resided in the house on Fogarty Street and began making improvements.

Yoost alleges that in 2003 he informed Zalcberg that he was dissatisfied with his employment. Yoost asserts that Zalcberg enticed his continued employment by releasing him from any further obligations on the Fogarty property note and mortgage. Yoost continued working for Zalcberg and stopped making payments on the note and mortgage.

In 2004, Yoost and Caspari moved to Galien, Michigan, where they lived together. They rented out the Fogarty property. Yoost worked for Zalcberg until March 2005. Zalcberg filed for a divorce from Sari, who was suffering from terminal cancer, in March 2005; the divorce was final on March 28, 2006. Zalcberg contends that Asher, his former brother-in-law, harbored ill will against him since he filed for the divorce from Sari. Yoost and Caspari's relationship also ended in December 2005. Yoost subsequently moved to Florida and worked for Asher. In August 2006, Zalcberg began foreclosure proceedings on the Fogarty property in

Indiana. Yoost defended the foreclosure action by asserting his claim that Zalcberg had forgiven the debt. Yoost also asserted other defenses, including that Zalcberg had failed to fulfill his oral promise to share certain trading profits with Yoost. See *Yoost v Zalcberg*, 925 NE2d 763 (Ind App, 2010). Yoost also attempted to assert a claim for trading profits in a suit for an accounting filed in Illinois against Zalcberg Holdings. That case was dismissed shortly after the instant case was initiated on the basis of forum non conveniens because the claim for profits concerned conduct that had occurred in Michigan and Indiana and could be joined to the already pending litigation in Indiana to which Zalcberg, the sole shareholder of Zalcberg Holdings, was a party.

Yoost filed the instant lawsuit against Caspari on April 8, 2008, alleging that she had attempted to extort a 50 percent interest in the Fogarty property by threatening to report Yoost to the IRS for not paying taxes on his income while working for Zalcberg. The complaint also alleged intentional infliction of emotional distress. After the discovery of numerous e-mails between Caspari and Zalcberg that suggested that Zalcberg and Frankle had encouraged Caspari's actions, Yoost was permitted to file an amended complaint adding Zalcberg and Frankle as defendants. By stipulation of the parties, Yoost filed a second amended complaint that substituted Ellen Frankle as the personal representative of the estate of Lawrence Frankle.

On January 28, 2009, Zalcberg filed a counterclaim in this case against Yoost and Asher alleging abuse of process and conspiracy to commit abuse of process. Zalcberg's counterclaim alleged, in part, that "Yoost and Asher agreed to join together in the concerted actions of Asher paying for and, on information and

belief, directing a series of false and fraudulent legal claims filed in Yoost's name and against Zalcberg in the Indiana litigation for ulterior purposes . . . including punishing, humiliating and embarrassing Zalcberg, extorting from him large sums of business profits," and interfering with "a proper mortgage foreclosure action." Zalcberg also alleged that Asher and Yoost had filed other lawsuits in Yoost's name in Illinois and Michigan for similar purposes and to intimidate witnesses favorable to Zalcberg and obtain discovery unavailable in Indiana. In this case, Zalcberg alleges that "Asher and Yoost, in Yoost's name," assert "false and fabricated claims and seek[] grossly overreaching and irrelevant discovery." With respect to discovery in the instant case, Zalcberg alleges that the trial court "denied [Yoost's] request to hold Zalcberg in contempt and entered a protective order denying the request for production of Zalcberg's trading and other business records." Zalcberg alleged that the abuse of process caused him "financial losses, loss of business opportunities, and the expense of defending against fraudulent claims and abusive discovery." Last, the counterclaim alleges that the actions of Asher and Yoost amounted to a civil conspiracy, resulting in the damages just described.

On May 29, 2009, Asher moved for summary disposition of Zalcberg's counterclaim pursuant to MCR 2.116(C)(1), asserting that the trial court lacked personal jurisdiction over him because he was a resident of Florida and had neither engaged in any business in Michigan nor had any qualifying contacts with the state. Asher further argued that the trial court could not exercise limited personal jurisdiction over him under Michigan's long-arm statute, MCL 600.705, and that Michigan's exercising jurisdiction over him would violate due process.

In support of his motion, Asher appended his own affidavit, which averred that he was a Florida resident, had not transacted any business in Michigan, and denied having "done or caused an act to be done, or caused consequences to occur in Michigan, resulting in an action for tort." Asher acknowledged that he had employed Yoost since 2006, that he knew of litigation between Yoost and Zalcberg, and that he had "advanced money to Yoost's counsel" in Illinois and Indiana. However, Asher averred that he had "not caused litigation in Yoost's name to be brought or consequences to occur in any state against Irwin Zalcberg" and that he had "not involved [himself] in the decisions that Yoost and his lawyers have made with regard to how to proceed in any of the litigation between Yoost, Irwin Zalcberg, and the others." Asher further averred that he "did not execute a letter of retention with Yoost's attorneys in any state" and that with respect to Yoost's legal fees, "Yoost's lawyers in Illinois and Indiana send work invoices to my staff in Florida for payment."

Zalcberg filed a response opposing the motion and submitted excerpts of Yoost's testimony from depositions in the Indiana litigation. Zalcberg also contended that Asher's affidavit failed to comply with MCR 2.119(B)(1)(c) because it did not show affirmatively that Asher, if sworn as a witness, could testify competently to the facts stated in the affidavit. The trial court denied the motion. The court found that it lacked general jurisdiction over Asher and rejected the argument that it had limited jurisdiction under MCL 600.705(1) for the "transaction of any business within the state." But the trial court ruled that it had limited jurisdiction under MCL 600.705(2), which provides limited personal jurisdiction arising out of "doing or causing an act to be done, or consequences to occur, in the state resulting in an action for tort." The court explained:

> [I]f the allegations in the complaint are true, there is no doubt that Asher caused an act to be done and consequences to occur in Michigan resulting in an action in tort, if those allegations are true that he is using this law suit for ulterior motives.
>
> Here there is some documentary evidence . . . to support the position of Zalcberg that the motion should not be granted. And that's the deposition testimony of Yoost regarding Asher's payment of legal fees under what I might describe as curious circumstances and . . . Yoost's lack of recall as to whether he even read the complaint that was filed in this case. And I believe that . . . this testimony, as well as the testimony of Yoost, that he did discuss the details of the Indiana case with Asher could support an inference that Yoost in this case is the puppet and Asher is the puppeteer.
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> Moreover, with regard to the affidavit that Asher filed, and while I'm finding that even in the face of that affidavit there would be sufficient evidence in this case to deny the motion based on what I had previously said, I also find that the affidavit is defective. . . . [MCR] 2.119(B) governs the form of the affidavit. And it must affirmatively show that if sworn as a witness . . . the affiant can competently testify to the facts set forth, and it also . . . has to be made on personal knowledge. And it does not aver that and it does not aver that he can confidently [sic] testify to the facts set forth therein. So I think technically it's deficient. But even if it weren't I would deny the motion on the basis of what I have previously said.
>
> As far as the due process . . . is concerned, the allegation and the factual support inferences drawn there from are sufficient to invoke the Michigan long arm statute as I have previously ruled for limited personal jurisdiction and also it would overcome any due process arguments.

In rendering its ruling, the trial court specifically noted that it was without prejudice because "something

might happen in the future that changes my ruling." Thereafter, Asher filed a renewed motion for summary disposition pursuant to MCR 2.116(C)(1), again arguing that the court lacked personal jurisdiction over him. Asher also asserted that Zalcberg had not stated a claim for abuse of process, MCR 2.116(C)(8). In support, Asher provided the court with a new affidavit that satisfied MCR 2.119(B) and contained all the same averments as the first affidavit. In addition, Asher also denied that he had caused or done anything resulting in a tort in Michigan and, specifically, that he had not done "the acts I am alleged to have done that gave rise to this lawsuit." Specifically, Asher denied that he had "caused or induced [Yoost] to sue anyone in Michigan. I did not cause this lawsuit to be filed."

Asher also submitted an affidavit from Yoost, which stated that Yoost "voluntarily brought the causes of action against Zalcberg and Caspari" and that "Asher did not tell me to start this lawsuit, and did not tell me to add Zalcberg as a defendant." Yoost admitted that Asher "advanced money to pay my legal expenses in this litigation." Regarding his deposition testimony concerning reviewing the complaint he filed, Yoost stated that a recent review of the complaint and amended complaint in this case had refreshed his memory and averred that "I reviewed both the Complaint and Amended Complaint before they were filed in this case."

The trial court characterized Asher's renewed motion as being one for reconsideration and denied the motion, explaining that "it merely rehashes what I ruled on before." As for Yoost's affidavit, the trial court considered it an impermissible attempt to contradict his deposition testimony. The trial court also denied Asher's motion for summary disposition under MCR

2.116(C)(8), ruling that Zalcberg had alleged a claim of abuse of process that was supported by "one act alleged in furtherance of these allegations of ill - - of ulterior motive and that is the discovery process."

On November 6, 2009, this Court granted Asher's application for leave to appeal, limited to the issues raised in the application, which were whether the trial court had erred in ruling it had limited personal jurisdiction over Asher under Michigan's long-arm statute and, if so, whether the requirements of due process were satisfied. This Court also granted Asher's motion for a stay of discovery pending resolution of this appeal.

II. STANDARD OF REVIEW

This Court reviews de novo a trial judge's decision on a motion for summary disposition. *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010). The legal question of whether a court possesses personal jurisdiction over a party is also reviewed de novo. *W H Froh, Inc v Domanski*, 252 Mich App 220, 225; 651 NW2d 470 (2002). This case also presents the legal question of whether the exercise of personal jurisdiction over a nonresident such as Asher is consistent with the notions of fair play and substantial justice required by the Due Process Clause of the Fourteenth Amendment, which we likewise review de novo. *Jeffrey v Rapid American Corp*, 448 Mich 178, 184-186; 529 NW2d 644 (1995).

The parties disagree regarding the standard of review applicable to Asher's renewed motion for summary disposition. Zalcberg notes that the trial court properly treated the renewed motion as one for reconsideration, which is reviewed for an abuse of discretion. *Woods v SLB Property Mgt LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008). "An abuse of discretion occurs when

the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). But Asher argues that because the court's jurisdiction is at issue, we must review the renewed motion de novo. *Jeffrey*, 448 Mich at 184. We agree that our review of the trial court's ultimate determination that it possessed limited personal jurisdiction over Asher is de novo.

Ordinarily, a trial court has discretion on a motion for reconsideration to decline to consider new legal theories or evidence that could have been presented when the motion was initially decided. MCR 2.119(F)(3); *Woods*, 277 Mich App at 629-630. But the trial court also has the discretion to give a litigant a "second chance" even if the motion for reconsideration presents nothing new. *Hill v City of Warren*, 276 Mich App 299, 306-307; 740 NW2d 706 (2007); *In re Moukalled Estate*, 269 Mich App 708, 714; 714 NW2d 400 (2006). In this case, the trial court initially found that Asher's affidavit was defective, but indicated that even if it were not, the court would still rule that it had limited personal jurisdiction. At the hearing on the renewed motion, the trial court again ruled that Asher's corrected affidavit was insufficient because Asher "merely rehashes what I ruled on before." Likewise, the trial court considered but rejected Yoost's affidavit, not only because it was untimely, but also because the court determined that its substance merely attempted to contradict Yoost's deposition testimony. Because the trial court considered the affidavits in making its ruling, we include them in our review de novo of the trial court's ultimate determination that it possessed limited personal jurisdiction over Asher.

Moreover, the question presented is jurisdictional and of constitutional magnitude. "[A] court is continu-

ally obliged to question sua sponte its own jurisdiction over a person, the subject matter of an action, or the limits of the relief it may afford . . . ." *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 399; 651 NW2d 756 (2002). "Before a court may obligate a party to comply with its orders, the court must have in personam jurisdiction over the party." *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 427; 633 NW2d 408 (2001). In light of the importance of the issue, to the extent that the trial court failed to consider the affidavits of Asher and Yoost in rendering its jurisdictional ruling, MCR 2.116(G)(5)—even though they were filed with a motion for reconsideration—we conclude that the trial court abused its discretion.

III. ANALYSIS

When reviewing a trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(1), the trial court and this Court consider the pleadings and documentary evidence submitted by the parties in a light most favorable to the nonmoving party. MCR 2.116(G)(5); *Oberlies*, 246 Mich App at 427. "The plaintiff bears the burden of establishing jurisdiction over the defendant, but need only make a prima facie showing of jurisdiction to defeat a motion for summary disposition." *Jeffrey*, 448 Mich at 184. The plaintiff's complaint must be accepted as true unless specifically contradicted by affidavits or other evidence submitted by the parties. *Patterson v Kleiman*, 447 Mich 429, 434 n 6; 526 NW2d 879 (1994). Thus, when allegations in the pleadings are contradicted by documentary evidence, the plaintiff may not rest on mere allegations but must produce admissible evidence of his or her prima facie case establishing jurisdiction. MCR 2.116(G)(6); *Mozdy* v *Lopez*, 197 Mich App 356, 361; 494 NW2d 866 (1992). The protocol for reviewing the jurisdic-

tional issues presented here is summarized well in *Williams v Bowman Livestock Equip Co*, 927 F2d 1128, 1130-1131 (CA 10, 1991),[1] quoting *Behagen v Amateur Basketball Ass'n*, 744 F2d 731, 733 (CA 10, 1984):

> "The plaintiff bears the burden of establishing personal jurisdiction over the defendant. Prior to trial, however, when a motion to dismiss for lack of jurisdiction is decided on the basis of affidavits and other written materials, the plaintiff need only make a prima facie showing. The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. If the parties present conflicting affidavits, all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party."

When examining whether a Michigan court may exercise limited personal jurisdiction over a defendant, this Court employs a two-step analysis. *Jeffrey*, 448 Mich at 184-185; *Domanski*, 252 Mich App at 226. "First, this Court ascertains whether jurisdiction is authorized by Michigan's long-arm statute. Second, this Court determines if the exercise of jurisdiction is consistent with the requirements of the Due Process Clause of the Fourteenth Amendment." *Electrolines, Inc v Prudential Assurance Co, Ltd*, 260 Mich App 144, 167; 677 NW2d 874 (2003) (citations omitted). Both prongs of this analysis must be satisfied for a Michigan court to properly exercise limited personal jurisdiction over a nonresident. See *Green v Wilson*, 455 Mich 342, 350-351; 565 NW2d 813 (1997) (KELLY, J.); *id*. at 361 (MALLETT, C.J.). "Long-arm statutes establish the nature, character, and types of contacts that must exist for purposes of exercising personal jurisdiction. Due pro-

[1] *Williams* and *Mozdy* are both cited by our Supreme Court in *Jeffrey*, 448 Mich at 184, when discussing the appropriate standard of review of jurisdictional issues.

cess, on the other hand, restricts permissible long-arm jurisdiction by defining the quality of contacts necessary to justify personal jurisdiction under the constitution." *Id*. at 348.

In *Mozdy*, 197 Mich App at 359, this Court stated the three-part test for determining if exercising limited personal jurisdiction comports with due process:

> First, the defendant must have purposefully availed itself of the privilege of conducting activities in Michigan, thus invoking the benefits and protections of this state's laws. Second, the cause of action must arise from the defendant's activities in the state. Third, the defendant's activities must be substantially connected with Michigan to make the exercise of jurisdiction over the defendant reasonable.

In the present case, we need not consider whether the exercise of limited personal jurisdiction over Asher comports with due process because we conclude that Zalcberg failed to establish a prima facie case against Asher that satisfied MCL 600.705. Consequently, the trial court erred by not granting Asher's motion for summary disposition under MCR 2.116(C)(1).

The trial court determined that it had limited personal jurisdiction over Asher under MCL 600.705(2), which provides:

> The existence of any of the following relationships between an individual or his agent and the state shall constitute a sufficient basis of jurisdiction to enable a court of record of this state to exercise limited personal jurisdiction over the individual and to enable the court to render personal judgments against the individual or his representative arising out of an act which creates any of the following relationships:
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> * * *

> (2) The doing or causing an act to be done, or consequences to occur, in the state resulting in an action for tort.

The trial court's ruling that Zalcberg's counterclaim satisfied MCL 600.705(2) was based on two premises: (1) Zalcberg's counterclaim alleged a prima facie case that Yoost committed the tort of abuse of process in Michigan and (2) there was evidence to support an inference that Asher controlled this litigation through Yoost, i.e., in the trial court's words, that "Yoost in this case is the puppet and Asher is the puppeteer." Our review de novo of the pleadings and evidence submitted by the parties convinces us that Zalcberg failed to establish a prima facie case that Asher committed the tort of abuse of process in Michigan. Moreover, Zalcberg failed to present evidence to establish a prima facie case that Asher directed, controlled, or conspired with Yoost regarding this litigation or its conduct.

A. CONSPIRACY AND CAUSATION

Zalcberg failed to establish a prima facie case that Asher conspired with Yoost to do an act, or otherwise caused "an act to be done, or consequences to occur," in Michigan resulting in an action for tort.[2] MCL 600.705(2).

Under the "conspiracy theory" of jurisdiction, a conspirator not within the forum state may nevertheless be subject to the jurisdiction of the forum state on the basis of the acts a coconspirator committed there. *Chrysler Corp v Fedders Corp*, 643 F2d 1229, 1236-1237 (CA 6, 1981). The rationale for this rule is that when one member of a conspiracy "inflicts an actionable

[2] We note there is no civil action for conspiracy alone; there must be an underlying actionable tort. *Earp v Detroit*, 16 Mich App 271, 275; 167 NW2d 841 (1969).

wrong in one jurisdiction, the other member should not be allowed to escape being sued there by hiding in another jurisdiction." *Stauffacher v Bennett*, 969 F2d 455, 459 (CA 7, 1992). But mere allegations that a conspiracy exists between the defendant and another over whom the court has jurisdiction are insufficient. *Id*. at 460; *Chrysler Corp*, 643 F2d at 1236-1237. Rather, evidence or facts must support the allegations of conspiracy. *Chrysler Corp*, 643 F2d at 1236-1237; *Ecclesiastical Order of the Ism of Am, Inc v Chasin*, 845 F2d 113, 116 (CA 6, 1988); *Coronet Dev Co v FSW, Inc*, 3 Mich App 364, 369; 142 NW2d 499 (1966).

In this case, Asher in his affidavits denied Zalcberg's allegations of conspiring with Yoost and also denied directing this litigation. Yoost also averred that he "voluntarily brought the causes of action against Zalcberg and Caspari" and that "Asher did not tell me to start this lawsuit, and did not tell me to add Zalcberg as a defendant."[3] Because Zalcberg's allegations that Asher conspired by Yoost or directed this lawsuit were contradicted by evidence, Zalcberg was required to produce evidence to establish a prima facie case that Asher, in fact, conspired with Yoost or otherwise directed this litigation in order to meet his burden of establishing limited personal jurisdiction under MCL 600.705(2). *Jeffrey*, 448 Mich at 184; *Mozdy*, 197 Mich at 361.

A "prima facie case" is defined in Black's Law Dictionary (5th ed) as " 'one that will entitle [a] party to recover if no evidence to contrary is offered by [the] opposite party.' " *Dep't of Environmental Quality v*

[3] Even if one paragraph of Yoost's affidavit attempted to contradict his deposition testimony, the remaining parts of the affidavit are not thereby invalidated. Further, remembering a fact at a later time does not contradict earlier lack of recall. It may, however, affect credibility.

Worth Twp, 289 Mich App 414, 419; 808 NW2d 260 (2010). Similarly, our Supreme Court has defined a prima facie case as " '[a] case made out by proper and sufficient testimony; one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced on the other side.' " *People v Licavoli*, 264 Mich 643, 653; 250 NW 520 (1933) (citations omitted). "Prima facie evidence" is defined as " '[e]vidence good and sufficient on its face . . . to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain sufficient.' " *Worth Twp*, 289 Mich App at 419, quoting Black's Law Dictionary (5th ed).

While Asher and Yoost submitted affidavits contradicting Zalcberg's claims regarding Asher's directing this litigation, factual disputes must be resolved in Zalcberg's favor on Asher's motion for summary disposition under MCR 2.116(C)(1). *Jeffrey*, 448 Mich at 184. Zalcberg need only present evidence sufficient to establish prima facie his jurisdictional claims " 'notwithstanding the contrary presentation by the moving party.' " *Williams*, 927 F2d at 1131, quoting *Behagen*, 744 F2d at 733. A party may establish a case with circumstantial evidence. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). And a prima facie case may be established using reasonable inferences provided sufficient evidence is introduced to take the inferences out of the realm of conjecture. *Berryman v Kmart Corp*, 193 Mich App 88, 92; 483 NW2d 642 (1992).

The trial court found a prima facie case for Zalcberg's jurisdictional claims on the basis of Yoost's testimony in depositions taken as part of the Indiana litigation that provided evidence of three facts: (1) Asher paid Yoost's legal fees under "curious circumstances," (2) Yoost did not recall during his deposition reading the complaint filed in

this case, and (3) Yoost at some point discussed the details of the Indiana case with Asher. These three facts either individually or combined do not provide a logical chain of inference to conclude that Asher in fact conspired with Yoost or otherwise directed this litigation. That Asher paid Yoost's legal fees does not establish that Asher exercised control over Yoost in this litigation. Asher could have done so because he liked and wanted to help Yoost or because he disliked Zalcberg. But the mere fact that Asher paid Yoost's litigation expenses does not logically lead to the conclusion that Asher controlled Yoost or the instant litigation. Yoost's poor memory or failure to read the complaint in this case, even viewed in the light most favorable to Zalcberg, does not bridge the gap to the jurisdictionally required showing that Asher controlled Yoost and through him this litigation. The fact that Yoost discussed the Indiana litigation with Asher provides even less evidence that Asher controlled this litigation through Yoost. Moreover, under Michigan's rules of professional conduct, Yoost's attorneys could not ethically have permitted Asher to control Yoost's litigation. MRPC 1.8(f) provides:

> A lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) the client consents after consultation;
>
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
>
> (3) information relating to representation of a client is protected . . . ."

In short, a gap that can only be filled with speculation exists with respect to the three facts that the trial court relied on to reach the conclusion that Asher controlled this litigation through Yoost, a conclusion that is necessary to obtain limited personal

jurisdiction over Asher. "To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences . . . , not mere speculation." *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). Explaining the difference between reasonable inference and speculation and conjecture, the *Skinner* Court, *id*., quoted *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956):

> "[A] conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating *a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence*." [Emphasis added; see also *Karbel*, 247 Mich App at 98.]

Here, multiple explanations exist for the facts the trial court relied on to assert jurisdiction. Evidence is simply lacking to establish "a logical sequence of cause and effect" to reach the conclusion that Asher controlled this litigation through Yoost to the extent that "Yoost in this case is the puppet and Asher is the puppeteer." Rather, this conclusion is reached only through speculation and conjecture, which are insufficient to establish a prima facie case for limited personal jurisdiction over Asher. *Jeffrey*, 448 Mich at 184; see *Berryman*, 193 Mich App at 92.

B. THE TRANSACTION OF ANY BUSINESS WITHIN THE STATE

In the trial court, Zalcberg asserted that the exercise of limited personal jurisdiction over Asher was also

proper under MCL 600.705(1) for actions "arising out of" the "transaction of any business within the state." The trial court rejected this basis for asserting jurisdiction because "payment of the legal fees, which may ultimately go to lawyers in Michigan who represent Yoost, is not a sufficient tie to Michigan to cause the defendant Asher to submit himself to the jurisdiction of this state." Zalcberg did not file a cross-appeal regarding the trial court's rejection of this basis for long-arm jurisdiction. When leave to appeal is granted, unless the Court directs otherwise, the appeal is limited to the issues raised in the application. MCR 7.205(D)(4); *Detroit Free Press, Inc v Southfield*, 269 Mich App 275, 290; 713 NW2d 28 (2005). Zalcberg, however, asserts that MCL 600.705(1) provides an alternative basis for affirming the trial court. See *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994). We conclude that the trial court correctly ruled that MCL 600.705(1) does not provide a basis for limited personal jurisdiction over Asher.

The word "any" within the statute has been interpreted to "include[] 'each' and 'every.' It comprehends 'the slightest.' " *Sifers v Horen*, 385 Mich 195, 199 n 2; 188 NW2d 623 (1971) (citations omitted). In *Sifers*, the Michigan plaintiff negotiated for the services of a Kentucky attorney, while the attorney was in Michigan, to bring a lawsuit in Kentucky. The plaintiff later sued the Kentucky attorney in Michigan for malpractice. The *Sifers* Court held that the negotiations in Michigan resulting in the defendant's retainer were within the meaning of the transaction of any business. *Id*. at 199.

In *Alan B McPheron, Inc v Koning*, 125 Mich App 325; 336 NW2d 474 (1983), the defendant Michigan resident sent his agent to Oklahoma to sell an airplane. When the sales negotiations broke down, the agent tried to take the

plane back to Michigan but was arrested. The defendant then hired the plaintiff, an Oklahoma attorney, to represent the defendant's agent. When the defendant failed to pay for all the legal services provided, the plaintiff obtained a default judgment against him in Oklahoma and sought to enforce the judgment in Michigan. *Id.* at 327-328. This Court held that because the defendant sought and contracted for the plaintiff's services to be performed in Oklahoma, "it is reasonable to conclude that he ought to have been prepared to travel to Oklahoma to challenge these services if he felt they were rendered improperly." *Id*. at 331. This Court opined that the Oklahoma court had properly exercised jurisdiction over the defendant under its long-arm statute, which was similar to MCL 600.705(1), and that due process was also satisfied. *Id*. at 331-334.

Sifers and *McPheron* are the main cases on which Zalcberg relies for his alternative argument that the trial court's jurisdictional ruling should be affirmed under MCL 600.705(1). We find each case clearly distinguishable from the facts as established by the evidence submitted on Asher's motion for summary disposition. In each case, a resident of one state contracted with an attorney in another state for legal services. In each case, the subsequent legal action arose out of the contract for legal services and was by or against the attorney who had performed the legal services. In this case, there is no evidence that Asher contracted for the services of any attorney to represent Yoost in Michigan. Although Asher admits making payments on Yoost's legal fees outside Michigan, Asher avers that he did not contract for the services and did not control the litigation. Additionally, Zalcberg's counterclaim is not an action between the parties to the legal services contract as in *Sifers* and *McPheron*. Finally, for the reasons stated in part III(A) of this opinion, even if this litiga-

tion constitutes the "transaction of any business within the state," there was no prima facie evidence that Asher controlled or directed the litigation to permit the trial court to exercise limited personal jurisdiction over Asher under MCL 600.705(1). Consequently, we conclude the trial court correctly ruled that this subsection did not authorize it to exercise limited personal jurisdiction over Asher.

IV. CONCLUSION

For these reasons, we conclude that the trial court erred by ruling that it could exercise limited personal jurisdiction over Asher under MCL 600.705(2). We also conclude that MCL 600.705(1) does not provide an alternative basis to affirm the trial court's jurisdictional ruling. Because Zalcberg did not establish a prima facie case for the exercise of limited personal jurisdiction over Asher under MCL 600.705, the trial court erred by not granting his motion for summary disposition under MCR 2.116(C)(1). Also, because Michigan's long-arm statute has not been satisfied, we need not consider whether the exercise of limited personal jurisdiction over Asher comports with the requirements of due process. See *Jeffrey*, 448 Mich 184-185; *Oberlies*, 246 Mich App at 427-428, 432. We therefore reverse and remand this matter for entry of an order granting Asher summary disposition. We do not retain jurisdiction. As the prevailing party, Asher may tax costs pursuant to MCR 7.219.

OWENS, P.J., and MARKEY and METER, JJ., concurred.

WOODBURY v RES-CARE PREMIER, INC

Docket No. 297819. Submitted January 11, 2012, at Lansing. Decided January 19, 2012, at 9:00 a.m. Leave to appeal granted, 493 Mich 881.

Scott and Jeanne Woodbury and Center Woods, Inc., brought an action in October 2009 in the Saginaw Circuit Court against Res-Care Premier, Inc., and Ruth Averill, alleging breach of certain building and use restrictions regarding property in the Center Woods Subdivision as a result of Averill's September 2009 sale of her property to Res-Care. Plaintiffs alleged that Averill violated the provisions requiring the noncommercial use of the property and that Center Woods be provided the right of first refusal to purchase the property. Plaintiffs requested a temporary restraining order, preliminary injunction, and permanent injunction. Res-Care responded, claiming that Center Woods had waived the right to enforce the right of first refusal, that Center Woods had no standing, and that the articles of agreement containing the restrictions were discriminatory and, therefore, invalid. Center Woods, which was incorporated as a nonprofit corporation in 1941, had been automatically dissolved under MCL 450.2922 in 1993 when it failed to file its annual report and pay the annual filing fee for a second consecutive year. On October 13, 2009, the same day it filed its action, Center Woods filed renewal-of-existence papers with the state under MCL 450.2925. The court, William A. Crane, J., granted a preliminary injunction preventing Res-Care from occupying the property. The court then granted summary disposition to plaintiffs and voided the sale between Averill and Res-Care. Res-Care moved for rehearing, reconsideration, or clarification of the judgment related to its unaddressed discrimination counterclaims. The court entered an amended judgment that expressly stated that the judgment rendered the counterclaims moot and that judgment was entered without prejudice to Res-Care's right to renew those claims. Res-Care appealed.

The Court of Appeals *held*:

1. The provision in the articles of agreement regarding the right of first refusal required notice of a proposed sale only to Center Woods, Inc. The trial court erred by holding that Averill

should have provided notice to the other homeowners or a homeowners' association.

2. There is no question that Center Woods, Inc., did not exist at the time of the sale. It is not reasonable to require persons to give notice to a nonexistent corporation on the contingent basis that at some unknown time in the future an unknown person might elect to reinstate the corporation. Simply because someone can reinstate a corporation under MCL 450.2925 does not mean that anyone will, and the law should not require people to assume otherwise. Averill had no obligation to provide notice of the pending sale to Center Woods, Inc., a nonexistent corporation at the time of the sale. The order granting summary disposition to plaintiffs is reversed and the case is remanded to the trial court for the entry of an order granting summary disposition to defendants.

Reversed and remanded.

Cobert, Shaw, Essad & Tucciarone, P.L.L.C. (by *Joshua O. Booth*), and *Shinners & Cook, P.C.* (by *Thomas A. Basil, Jr.*), for Scott and Jeanne Woodbury and Center Woods, Inc.

Miller, Canfield, Paddock and Stone, PLC (by *LeRoy L. Asher, Jr.*, *Carolyn P. Cary*, and *Joseph G. Vernon*), for Res-Care Premier, Inc.

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

PER CURIAM. In this property action, defendant Res-Care Premier, Inc., appeals as of right the trial court's grant of summary disposition to plaintiffs, Scott and Jeanne Woodbury and Center Woods, Inc., after concluding that Center Woods had the right of first refusal to purchase the property known as #2 Center Woods and that defendant Ruth Averill failed to provide sufficient notice of the sale to Center Woods, as certain building and use restrictions require. The trial court's decision thereby voided the sale between Averill and Res-Care. We reverse and remand.

I. FACTS

A. THE PARTIES

Res-Care is a state-licensed operator of adult-foster-care facilities. Its name is short for "Respect and Care," and its mission is "to assist people to reach their highest level of independence." Res-Care provides rehabilitation and residential services to individuals with mental or developmental disabilities.

Defendant Ruth Averill purchased the property commonly known as #2 Center Woods (the property) in 1991 and subsequently sold it to Res-Care on September 25, 2009. That sale is at the heart of this litigation.

Plaintiffs Scott and Jeanne Woodbury are the owners of the property commonly known as #3 Center Woods, which is next door to the property.

Plaintiff Center Woods was incorporated as a nonprofit corporation in 1941. It was automatically dissolved under MCL 450.2922 in 1993 when it failed to file its annual report and failed to pay the annual filing fee for the second consecutive year. On October 13, 2009, the same day this action was filed, Center Woods filed renewal-of-existence papers with the state of Michigan.

B. THE ARTICLES OF AGREEMENT

In 1941, articles of agreement were entered into by the owners of the properties in the Center Woods Subdivision and filed in the property records. The articles provided, in relevant part, as follows:

> NOW, THEREFORE, IT IS AGREED by and between the parties hereto that all land in Center Woods, a subdivision . . . consisting of Lots One (1) to Twelve (12), inclusive, shall be subject to the following restrictions and covenants:

These covenants are to run with the land and shall be binding on all parties and all persons claiming under them and shall remain in full force and effect until such time as they shall be modified or repealed by agreement entered into by the owners of at least seventy-five per cent (75%) of the lots contained in said plat.

If the parties hereto, or any of them, or their heirs or assigns shall violate, or attempt to violate, any of the covenants herein, it shall be lawful for any other person or persons owning any real property situated in Center Woods Subdivision to prosecute any proceedings at law or in equity against the person or persons violating, or attempting to violate, any such covenant.

Invalidation of any one of these covenants, or any part of any covenant, by judgment or court order shall in no way invalidate any of the other provisions which shall remain in full force and effect.

1. Center Woods shall be maintained as residential property only and no property shall be used for any trade, commercial, industrial, or any other use whether or not herein specified, except for single family dwellings.

* * *

12. All property owners in Center Woods shall be members of Center Woods, Inc., a non-profit corporation, organized to provide for the improvement and maintenance of Center Woods as a desirable residential community.

* * *

15. No property in Center Woods may be sold, assigned, mortgaged or conveyed to or let, leased, rented or occupied by Hewbrews, [sic] or by any persons other than those of the Caucasian (white) race.

16. No property in Center Woods shall be sold without first giving Center Woods, Inc. thirty (30) days notice thereof and first opportunity to purchase said property at a price equal to a bonafide offer.

C. THE TRANSACTION

On July 10, 2009, Averill entered into a contract with Moshen H. Zadeh for the purchase of the property for $170,000. Closing was set for August 15, 2009. Zadeh was an investor of Res-Care. On July 20, 2009, Averill sent a memo addressed to Jack Short, the head of the homeowner's association, and "Center Woods Association," which provided:

> My home is scheduled for "closing" of sale: August 14, 2009[.] And I expect to [be] moving on that date.
>
> Since I have NOT received notification of three previous sales in The Woods . . . I assume this stipulation is no longer necessary.
>
> I do not know the buyer, . . . my realtor is Mary Klein, and the buyer's realtor is Keller Wms (Flint office)[.]
>
> Thank you for all your TLC of The Woods . . . it has been a delightful place to live for eight years.

No one contacted Averill or her realtor regarding the pending sale. Zadeh was unable to obtain financing, so Res-Care decided to purchase the property on its own without Zadeh under the exact same terms as the Zadeh offer. Closing was scheduled to be on or before September 30, 2009, and actually occurred on September 25, 2009.

On October 7, 2009, Averill sent another memo to Short and Center Woods Association, but this time also addressed it to Suzanne Short and the Woodburys. The memo provided, in relevant part:

> Subject: The sale of my home was delayed until September 18th[.] I am scheduled to move Monday, October 12th.
>
> New Owner: ResCare Premier, Inc. . . . .
>
> Local Manager: Laura L. Smith . . . .

> When the identity of the buyers was revealed I talked personally with both Ron Lee and Tim Braun regarding zoning. They told me that "group homes" are exempt from the law and cannot be refused or discriminated from a neighborhood.
>
> Tim Braun has enacted a Saginaw Township registry of rental homes to keep aware of the percentage of non-owners. I have sent him the names of the people who are responsible for the property and the maximum of six residents, who will have 24[-]hour supervision. They must comply with State mandated safety measures which have been installed.
>
> During inspection, Laura emphasized that they expect to be "good neighbors", and plan to invite neighbors to an open house when they are settled. Best Wishes.

When Jeanne Woodbury received the letter, she researched Res-Care on the Internet. Concerned that the home would be occupied by "troubled youth/sex offenders," she sent an e-mail to Smith at the address provided in the second notice. Two days later, an "emergent" meeting of the homeowners in Center Woods and a board of directors meeting for Center Woods were held. Averill was not invited. At the meeting, the board was authorized to take steps to prevent "this improper use," and the board authorized Woodbury to be "a committee of one, to meet with" a real estate specialist attorney, with legal action expected to be filed "within a day or two."

On October 12, 2009, the board's counsel sent a letter to Averill claiming that she violated paragraph 16 of the articles of agreement and requesting the details of the transaction "so [Center Woods] may consider exercising its right to purchase the property." The letter also stated:

> This correspondence also confirms that subsequent to your July 20, 2009 correspondence to Jack Short on your

> previous potential sale, which did not ultimately close, you were instructed that the Building and Use Restrictions were still in effect and you were required to provide Center Woods, Inc. formal notice and the terms and conditions of the bonafide offer.

This is apparently a reference to a conversation that Short testified that he had with Averill. According to Short, Averill called him and asked "if she had to do the right of first refusal," and he told her "that if it was me and I was selling my house, I would want to make sure that everything was done properly." Averill testified that this conversation never occurred and that she never spoke with Short.

The following day, on October 13, 2009, plaintiffs filed suit against Res-Care and Averill, alleging two counts of breach of "building and use restrictions," one for the right of first refusal and one for noncommercial use, and requesting a permanent injunction preventing Res-Care from occupying the property. Plaintiffs also requested a temporary restraining order and preliminary injunction. Res-Care filed an answer that included several affirmative defenses, including that Center Woods waived the right to enforce the right of first refusal, that Center Woods's failure to maintain corporate status deprived it of standing, that the articles of agreement were clearly discriminatory and, therefore, invalid under state and federal law, and that Res-Care's use of the property was a valid residential use not in violation of any restrictions, even assuming that they were enforceable.

On November 9, 2009, the trial court held a hearing on the request for a preliminary injunction. Res-Care argued that, although it was a for-profit company, it was providing the home through a contract with the county, which rendered it essentially a not-for-profit entity. In

addition, counsel stated that the residents intending to occupy the property "have no criminal record. They have no history of violence. They have no history of sexually predatory behavior, which is apparently what's, in part, driving this." Counsel also indicated that Res-Care had provided the Woodburys with an opportunity to "sit down and meet and talk" and it had provided some information about the residents without violating their right to privacy. However, the Woodburys elected to get counsel and file suit. Counsel also noted a long history of cases that have held that group homes were not considered a commercial use of residential property.

Ultimately, the trial court granted the preliminary injunction preventing Res-Care from occupying the property. However, the trial court indicated that it would grant an expedited trial. Res-Care then filed counterclaims against plaintiffs, claiming tortious interference with a contract, abuse of process, and violations of the federal Fair Housing Act[1] and Americans with Disabilities Act.[2] Res-Care also objected to the form of the preliminary injunction order.

At the hearing on Res-Care's objections, the trial court indicated that it would set trial for January 5 and that summary disposition motions would be heard on December 21 and had to be filed by December 14. Although it is not entirely clear, it appears that the trial date related solely to plaintiffs' complaint, but there was an indication that the trial court would also consider Res-Care's motion for summary disposition on its counterclaims. An amended preliminary injunction order was entered that also included a scheduling order

[1] 42 USC 3601 *et seq*.

[2] 42 USC 12101 *et seq*.

setting forth these dates and reiterating that the trial was to address plaintiffs' complaint only.

Res-Care filed its first motion for summary disposition, alleging plaintiffs' claims failed because the "building and use restrictions" were extinguished under the marketable record title act (MRTA),[3] and because Averill was not required to provide notice to Center Woods because it was a nonexistent entity. Averill then moved for summary disposition, reiterating the MRTA and dissolution arguments from Res-Care, but also arguing that she had complied with the notice requirement. Res-Care filed a second motion for summary disposition, alleging that plaintiffs' claim regarding the right of first refusal failed because the only basis for enforcement was discriminatory and, therefore, unlawful, and that the count regarding commercial use failed because a group home is not considered a commercial use.

Plaintiffs also moved for summary disposition, arguing that Averill and Res-Care both had constructive and actual knowledge of the "building and use restrictions" and that Center Woods had acted within 30 days of when it received notice of the sale. They noted that there were some factual disputes, but contended that none of them prevented summary disposition. They argued that the lack of 30 days' notice and a failure to include a selling price rendered Averill's notice ineffective as a matter of law. They argued that the discriminatory restriction was severable and, therefore, did not automatically render the right of first refusal invalid. Finally, they argued that Center Woods was statutorily deemed to be in existence at the time of the sale and, thus, was entitled to notice.

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[3] MCL 565.101 *et seq.*

Plaintiffs also filed a combined response to defendants' three motions for summary disposition, reiterating most of the same arguments. However, they provided no evidence or argument to refute Res-Care's allegations that discriminatory intent voided the right to exercise the right of first refusal.

Res-Care filed a response to plaintiffs' motion for summary disposition and argued that the right of first refusal expired for failure to contain a definite time period and that plaintiffs had waived their right to notice because of their failure to enforce that right. Res-Care also noted that plaintiffs had failed to argue anything regarding the commercial use of the property and contended that plaintiffs had abandoned that argument. The hearing on the parties' motions took place December 22, 2009.

The trial court issued its opinion in February 2010. It began by indicating that it was not addressing any civil-rights claims, but was only addressing the enforceability of the 30-day-notice provision, the propriety of the notice given, and the related issue of Center Woods's corporate status. It concluded that the MRTA did not extinguish the "building and use restrictions" contained in the articles of agreement because they had been sufficiently rerecorded by reference in the deeds found in Averill's chain of title. It concluded that the right of first refusal had not expired and that any determination of a time period for the duration of the right would be arbitrary and capricious and that the only unreasonable time period was that suggested by defendants—the lifetime of the signatories.

The trial court acknowledged that the notice provision had not been enforced, but found that that was not an abandonment of the right, but simply proof that there were times plaintiffs elected not to exercise their

right of enforcement. The trial court concluded that the notice provided by Averill was insufficient because it was not for the sale to Res-Care, but for the proposed sale to Zadeh, and that 30 days' notice was not given. The trial court concluded that Center Woods's status as a corporation did not excuse Averill's failure to give notice, if not to the individual homeowners, then to someone involved with the day-to-day operations of Center Woods.

Finally, the trial court concluded that any discussion of defendants' discrimination claims was premature because the right of first refusal had not yet been exercised and it was possible for plaintiffs to exercise the right in a nondiscriminatory manner. The trial court set aside the sale between Res-Care and Averill and ordered that, if they renewed their agreement, they had to provide 30-days' notice to Center Woods, who would have 30 days from receipt of the notice to exercise its right of first refusal.

On March 8, 2010, the parties attended a hearing regarding outstanding issues in order to obtain a final judgment. One of the issues was whether there was an agreement that the trial court had not decided Res-Care's discrimination counterclaims because they were moot and that they could be "renewed." The trial court entered a judgment for plaintiffs pursuant to its opinion and order the same day, but did not address the counterclaims issue.

Res-Care then moved for rehearing, reconsideration, or clarification of the judgment related to its unaddressed discrimination counterclaims. On April 12, 2010, the trial court entered an amended judgment that expressly stated that the judgment rendered the counterclaims moot and that the judgment was entered

without prejudice to Res-Care's right to renew those claims. Res-Care now appeals.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Res-Care argues that the trial court erred by failing to find that Center Woods's failure to maintain its corporate status prevents it from seeking to enforce the articles of agreement. This Court reviews de novo a trial court's decision on a motion for summary disposition.[4] The facts are considered in the light most favorable to the nonmoving party.[5] This Court reviews the record and the documentary evidence but does not make findings of fact or weigh credibility.[6] This Court also reviews de novo the interpretation of statutes and the proper interpretation of legal instruments, such as deeds or contracts.[7]

B. CORPORATE STATUS

The facts related to Center Woods's corporate status are not in dispute. It failed to file annual statements and pay annual filing fees in 1992 and 1993, which automatically dissolved the corporation pursuant to MCL 450.2922. In October 2009, Center Woods reinstated itself under MCL 450.2925 before filing the instant litigation. The trial court did not make any determinations regarding the implications of Center Woods's reinstatement. Instead, it concluded:

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[4] *Driver v Naini*, 490 Mich 239, 246; 802 NW2d 311 (2011).

[5] *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

[6] *Taylor v Lenawee Co Bd of Co Rd Comm'rs*, 216 Mich App 435, 437; 549 NW2d 80 (1996).

[7] *Driver*, 490 Mich at 246; *In re Rudell Estate*, 286 Mich App 391, 402-403; 780 NW2d 884 (2009).

> Whether or not Center Woods was a corporation in good standing with the State at the time does not, in the view of the court, excuse Mrs. Averill's failure to give notice, if not to the individual residents, certainly to someone involved with the day to day operations of Center Woods. . . . As a practical matter, a right of first refusal is almost always exercised on behalf of an interested homeowner and not the association or corporation.

First, the trial court's determination that Averill ought to have notified someone other than Center Woods is without merit. The articles of agreement is a contract that must be interpreted according to its plain language.[8] "In interpreting a contract, [this Court's] obligation is to determine the intent of the contracting parties."[9] "[A]n unambiguous contractual provision is reflective of the parties' intent as a matter of law."[10] "[I]f the language of a contract is clear and unambiguous, its construction is a question of law for the court."[11]

The articles of agreement provide, "No property in Center Woods shall be sold without first giving Center Woods, Inc. thirty (30) days notice thereof and first opportunity to purchase said property at a price equal to a bonafide offer." The provision requires notice only to "Center Woods, Inc." There is no reference or requirement for notice to homeowners or a generic reference to the homeowners association. Therefore, only Center Woods, Inc., was entitled to notice, and the trial court's conclusion to the contrary was in error.

The next question, then, is whether Center Woods was entitled to notice from Averill. Here, there is no question

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[8] *In re Rudell Estate*, 286 Mich App at 402-403.

[9] *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003).

[10] *Id*.

[11] *Mich Nat'l Bank v Laskowski*, 228 Mich App 710, 714; 580 NW2d 8 (1998).

that Center Woods did not exist at the time of the sale. Center Woods does not dispute that it failed to file its annual reports and pay the required fees, so that it was automatically dissolved under MCL 450.2801(1)(f)[12] and MCL 450.2922(1).[13] "At common law, upon dissolution of a corporation, 'there is no one to serve, because, in law, a dissolved corporation is a dead person, so much so that, in the absence of statute and revival, even pending actions by or against it would abate.' "[14]

Plaintiffs contend that the result of Center Woods's reinstatement pursuant to MCL 450.2925, hours before filing the lawsuit in October 2009, was that the dissolution essentially never took place. Thus, they assert that "Res-Care's conclusion that Mrs. Averill was not required to provide notice to Center-Woods, Inc. is based on a false premise, i.e., that Center Woods, Inc. 'did not exist.' "

Res-Care argues that plaintiffs did not argue the implications of reinstatement before the trial court and that this Court should not consider them here. However, it appears that plaintiffs did argue reinstatement.

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[12] MCL 450.2801(1)(f) provides:

> A corporation may be dissolved in any of the following ways:
>
> * * *
>
> (f) Automatically, pursuant to [MCL 450.2922], for failure to file an annual report or pay the annual filing fee or a penalty added to the fee.

[13] MCL 450.2922(1) provides, in part, "If a domestic corporation neglects or refuses for 2 consecutive years to file the annual reports or pay the annual filing fee required by law, the corporation shall be automatically dissolved."

[14] *Gilliam v Hi-Temp Prod, Inc*, 260 Mich App 98, 112; 677 NW2d 856 (2003), quoting *US Truck Co v Pennsylvania Surety Corp*, 259 Mich 422, 426; 243 NW 311 (1932).

But, even if they had not, because statutory interpretation is a question of law, and the effect of the reinstatement statute could result in an affirmance of the trial court's decision on other grounds, this Court will consider the issue.[15]

MCL 450.2925 provides as follows:

> (1) A domestic corporation which has been dissolved pursuant to [MCL 450.2922(1)] . . . may renew its corporate existence . . . by filing the reports for the last 5 years or any lesser number of years in which the reports were not filed and paying the annual filing fees for all the years for which they were not paid . . . . Upon filing the reports and payment of the fees and penalties, the corporate existence . . . is renewed. . . .
>
> (2) Upon compliance with the provisions of this section, *the rights of the corporation shall be the same as through the dissolution or revocation had not taken place*, and all contracts entered into and other rights acquired during the interval shall be valid and enforceable.[16]

There are no cases that have interpreted MCL 450.2925.

Plaintiffs rely on *Bergy Bros, Inc v Zeeland Feeder Pig, Inc*,[17] which interpreted a previous version of this statute. In *Bergy Bros*, the plaintiff brought suit against the defendant corporation for money owed pursuant to deliveries of feed made by the plaintiff to the defendant's pig farm between August 1971 and September 1972.[18] The defendant's corporate charter was voided in

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[15] *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994); *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314; 565 NW2d 915 (1997).

[16] Emphasis added.

[17] *Bergy Bros, Inc v Zeeland Feeder Pig, Inc*, 415 Mich 286; 327 NW2d 305 (1982).

[18] *Id.* at 290.

May 1971 for failing to file reports and pay fees in 1969, 1970, and 1971.[19] Although the plaintiff "vigorously maintained throughout trial that it dealt only with the corporation,"[20] the plaintiff also asserted "that when the corporation failed to file its annual report and pay its franchise fee, pursuant to the statute its corporate existence was extinguished" rendering the officers and directors personally liable.[21] The Court noted that the corporate charter had been revived by the time of trial.[22]

The trial court and this Court had both held that the defendant corporation had lost even de facto existence when its charter was forfeited in 1971.[23] The Michigan Supreme Court disagreed, concluding:

> This theory is premised on the assumption that the forfeiture makes the corporation nonexistent. In Michigan, the statute providing for forfeiture of the charter must be read in light of the statute providing for retroactive reinstatement of the charter. Thus, because the charter is subject to reinstatement, this Court has said: "The corporation does not cease to exist upon its charter becoming absolutely void". *Stott v Stott Realty Co*, 288 Mich 35, 42; 284 NW 635 (1939). . . . The effect of the reinstatement statute is to make the voidance of the charter more in the nature of a suspension of corporate privileges than an absolute termination of corporate existence. . . .
>
> . . . Where, as here, the corporate charter has been reinstated pursuant to the statute, the corporation should be considered to have had at least de facto existence during the period of forfeiture, which would preclude application of the partnership theory of liability.[24]

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[19] *Id.*

[20] *Id.* at 291.

[21] *Id.*

[22] *Id.* at 294.

[23] *Id.* at 295.

[24] *Id.* at 295-296.

Stott, the case cited by the Supreme Court, involved the plaintiff shareholders filing suit alleging the corporate charter was void for failure to pay fees for two consecutive years and requesting a receiver be appointed to wind up the affairs.[25] The defendants denied that the corporation had ceased to exist, noting that the required fees had been paid since the plaintiffs had filed their suit, placing the corporation in good standing.[26] As quoted in *Bergy Bros*, the *Stott* Court noted that "[t]he corporation does not cease to exist upon its charter becoming absolutely void."[27] However, it went on:

> It still continues a body corporate and remains a legally existing corporation for certain purposes. . . .
>
> From the foregoing, it may be said that a corporation whose charter has become void may thereafter be reinstated. The voiding of the corporate charter does not work a dissolution and put an end to corporate life. While a corporation having had its charter declared void *cannot carry on corporate business for the purposes for which it is authorized* on the granting of its charter, *it still exists for certain other purposes of winding up its business and closing its affairs*. The corporation not having been dissolved and still being in existence, its corporate powers may be revived . . . .[28]

The Court continued, noting that the appellant stockholder, after the filing of the lawsuit, "attended a stockholders' meeting, voted for directors, participated in a directors' meeting, took part in an election of officers, and was himself elected vice-president" so that his own conduct recognized "the company as a functioning corporation . . . ."[29]

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[25] *Stott*, 288 Mich at 39.

[26] *Id.*

[27] *Id.* at 42.

[28] *Id.* at 42-43 (citations omitted; emphasis added).

[29] *Id.* at 48.

Neither *Stott* nor *Bergy Bros* is precisely on point. *Stott* involved a stockholder suit attempting to force the corporation to wind up where the appellant stockholder's own actions belied his belief that the corporation had ceased to exist.[30] *Bergy Bros* recognized the de facto existence of the corporation in order to avoid imposing partnership liability. This result is reasonable and logical given that the plaintiff "vigorously maintained throughout trial that it dealt only with the corporation . . . ."[31] The holding is also consistent with the language in MCL 450.2925(2) that, upon reinstatement, "all contracts entered into and other rights acquired during the interval shall be valid and enforceable." Neither case, however, provides guidance in answering the question whether a party who is required to provide notice of some event to the corporation, which has ceased to exist for 16 years, could be deemed to have failed to properly give notice on the grounds that, sometime in the future, the corporation might seek reinstatement.

It is not reasonable to require persons to give notice to a nonexistent corporation on the contingent basis that at some unknown time in the future, some unknown person might elect to reinstate the corporation. Simply because someone can reinstate a corporation under MCL 450.2925 does not mean anyone will. And the law certainly should not require people to assume otherwise. Indeed, some corporations that dissolve automatically never seek reinstatement, even when they continue to do business.[32] Others fail to seek reinstatement even when attempting to file suit in their own name.[33]

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[30] *Id*.

[31] *Bergy Bros*, 415 Mich at 291.

[32] See *United Steelworkers v Forestply Indus, Inc*, 702 F Supp 2d 798 (WD Mich, 2010); *Mich Laborers' Health Care Fund v Taddie Constr, Inc*, 119 F Supp 2d 698 (ED Mich, 2000).

[33] *Flint Cold Storage v Dep't of Treasury*, 285 Mich App 483; 776 NW2d 387 (2009).

Further, plaintiffs incorrectly assert that the homeowners' association's continued collection of monies and exercise of obligations gave it a de facto existence after dissolution. In *Flint Cold Storage v Dep't of Treasury*, this Court reiterated that corporations continue to exist beyond their date of dissolution in order to wind up their affairs, but only for a reasonable amount of time.[34] "Otherwise, a dissolved corporation would languish in perpetuity, affording no true closure or finality for the stakeholders of the dissolved entity."[35] The determination of what constitutes a reasonable time is a question of law for the courts.[36] This Court then determined that a 32-year winding-up period was unreasonable, so that the plaintiff corporation did not exist and could not maintain its lawsuit.[37] "[O]nce a dissolved corporation has finished winding up its affairs, its existence is terminated and it ceases to exist for all purposes" including to sue and be sued.[38]

The type of legal, de facto existence created by MCL 450.2925 and *Bergy Bros* is based on the idea that corporations that are reinstated pursuant to the statute should be granted the benefits of corporate status—such as no individual liability. It is reasonable to give such corporations the benefits of the contracts they entered into and whatever rights they acquired.[39] This de facto legal existence, however, is just a legal creation. It provides a retroactive *legal* existence to a corporation even though, at that moment in the past, *factually*, the corporation had no such existence. Thus, notwithstand-

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[34] *Id.* at 495-497.

[35] *Id.* at 496.

[36] *Id.* at 498.

[37] *Id.* at 498-500.

[38] *Id.* at 498.

[39] MCL 450.2925(2).

ing the fact that Center Woods's reinstatement in October 2009 created some type of legal existence for those prior 16 years, the actuality is that Center Woods did not exist when the sale between Averill and Res-Care took place. Accordingly, we conclude that Averill had no obligation to provide notice of the pending sale to Center Woods because, although it obtained a retroactive legal existence, it was, at the time of the pending sale, a nonexistent corporation.

In sum, based on the plain language of the articles of agreement, the trial court erred by holding that Averill ought to have provided notice to anyone other than the corporation. And the trial court further erred by holding that Center Woods was entitled to notice of the sale between Averill and Res-Care because Center Woods did not exist at that time. Because our resolution of this issue is dispositive, we decline to address Res-Care's remaining arguments.

We reverse the order granting summary disposition to plaintiffs and remand for entry of an order granting summary disposition to defendants. We do not retain jurisdiction.

SAWYER, P.J., and WHITBECK and M. J. KELLY, JJ., concurred.

In re KABANUK

Docket No. 301536. Submitted January 11, 2012, at Detroit. Decided January 19, 2012, at 9:05 a.m. Leave to appeal denied, 492 Mich 854.

Mary Nordstrom obtained a personal protection order (PPO) that prohibited Dawn M. Kabanuk from approaching or confronting her in a public place. Both Kabanuk and Nordstrom were at the Oakland County courthouse for another matter when they got into an altercation. The Oakland Circuit Court, Cheryl A. Matthews, J., found Kabanuk guilty of criminal contempt of court for violating the PPO. Kabanuk appealed.

The Court of Appeals *held*:

1. The discussion in *People v Freeman*, 240 Mich App 235 (2000), concerning the possible misuse of a PPO as a sword rather than a shield was dictum, but in any event, *Freeman* did not shift the focus onto the behavior of the person holding the PPO. The holder of a PPO is under no obligation to act in a certain way. Rather, the court must look only at the behavior of the individual against whom the PPO is held. Accordingly, Nordstrom's conduct was not relevant in evaluating whether Kabanuk violated the PPO. The PPO prohibited Kabanuk from approaching or confronting Nordstrom in a public place. There was competent evidence to find that Kabanuk violated the PPO by lunging toward Nordstrom with her finger pointed and verbally assaulting her. Thus, there was sufficient evidence for the trial court to find beyond a reasonable doubt that Kabanuk violated the PPO. And Kabanuk's trial counsel was not ineffective for failing to raise the *Freeman* issue. Her counsel was not required to raise a meritless defense.

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 therewith. It may, however, be admissible for other purposes. The rule applies to witnesses as well as criminal defendants. In this case, the court found that because Kabanuk's husband had been disruptive during previous proceedings, he was likely disruptive during the incident at issue, and thus was lying about the circumstances of the incident. Although violative of MRE 404(b)(1), the trial court's use of the prior acts evidence did not provide a basis for reversal because the use of the

prior acts evidence was not outcome determinative given that there was overwhelming evidence that Kabanuk violated the PPO by lunging at Nordstrom with her finger pointed while yelling.

Affirmed.

1. CONTEMPT — CRIMINAL CONTEMPT — VIOLATIONS OF PERSONAL PROTECTION ORDERS.

The holder of a personal protection order is under no obligation to act in a certain way; rather, when analyzing whether an individual is guilty of criminal contempt for violating a personal protection order, the court must look only at the behavior of that individual against whom the personal protection order is held.

2. EVIDENCE — PRIOR ACTS — WITNESSES.

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; the rule applies to witnesses as well as criminal defendants (MRE 404[b][1]).

Jessica R. Cooper, Prosecuting Attorney, and *Thomas R. Grden*, Assistant Prosecuting Attorney, for the people.

Charles P. Reisman for Dawn M. Kabanuk.

Before: JANSEN, P.J., and WILDER and K. F. KELLY, JJ.

K. F. KELLY, J. Respondent Dawn Marie Kabanuk appeals as of right following her bench trial conviction for criminal contempt after violating a personal protection order (PPO), MCL 600.2950a(23). She was sentenced to 14 days in jail. Because the behavior of a PPO respondent is the only relevant consideration in a contempt proceeding, we affirm.

I. BASIC FACTS

The matter arises out of contentious family relations regarding the custody of Dawn's 14-year-old son. Dawn

is married to Kenneth David Kabanuk who, along with Dawn, was found in criminal contempt of court following their joint bench trial.[1] The two were charged with violating PPOs that had been issued on December 17, 2009, in favor of Mary Nordstrom. Mary is married to Dawn's brother, Ronald Nordstrom. Ronald was granted guardianship over Dawn's son as a result of neglect and guardianship proceedings. Kenneth is not the boy's father, but is admittedly involved in all of the proceedings affecting his wife. The trial court judge acknowledged her familiarity with the parties and was aware that PPOs had been "flying back and forth" between the parties for quite some time.

On the day in question, Dawn and Kenneth were in court for a show-cause hearing against Ronald. Dawn and her ex-husband, Kurt Traskos, claimed that Ronald was in violation of a visitation order and had wrongfully denied visitation. Mary went to the courthouse that day with a dual purpose: she wanted to be there to support her husband and also wanted her sister, Jaya Wilson, to serve Kenneth with additional court papers on behalf of Patricia Nordstrom.[2] Both Mary and Jaya testified that they saw Dawn and Kenneth on the main floor of the court building, just after passing through security. According to Jaya, she approached Kenneth with the papers, but he refused service; she allowed the papers to drop at his feet. Mary and Jaya were later in the hall outside of the judge's courtroom where a fair number of other people had gathered for motion day. Mary and Jaya testified that as they approached the judge's courtroom, they could hear and see Kenneth speaking

[1] Kenneth has also appealed from his conviction (*In re Kenneth David Kabanuk*, Docket No. 301537). The cases were submitted together for resolution.

[2] Patricia Nordstrom is the mother of Dawn and Ronald and is Mary's mother-in-law.

very loudly with a woman. Dawn was beside him. Both testified that when Kenneth caught sight of Mary, he called her a "f***ing bitch" and screamed that he could not believe she was doing this to them after they had reached a settlement. Mary testified that he used profanity against her at least 10 times. According to Mary, she began to look around the hall for a deputy, and the woman to whom Kenneth was speaking cautioned him to settle down or she would go into the courtroom and summon a deputy. Kenneth persisted in his verbal assault and the woman disappeared into the courtroom. Mary testified that Dawn lunged forward, pointing her finger at Mary and stated, "I have one thing to say to you, you're a f***ing bitch and I hate you." The judge's law clerk, Laura McLane, testified that she heard the commotion outside of the courtroom, and an attorney reported that deputies were needed in the hallway. According to McLane, she called for the deputies and then went out into the hallway, hoping to defuse the situation, where she saw Kenneth yelling at Mary. McLane testified that she told everyone that deputies had been summoned and she suggested that Kenneth "take a walk" and pointed down the hallway.

The testimony of Dawn and Kenneth was in stark contrast to that of Mary, Jaya, and McLane. Dawn and Kenneth testified that at no time did they approach, confront, or use profanity against Mary. Rather, according to their testimony it was Mary who approached the two of them in the hallway, told them they were in violation of the PPO, and threatened to have them arrested; Kenneth merely told Mary to stop talking to them and to leave them alone. Kenneth further testified that he reminded Mary that she was in violation of a PPO they had against her and that when McLane came out into the hall and suggested that Kenneth "take a walk," they took her advice and left.

The trial court held both Dawn and Kenneth in criminal contempt of court, finding that they violated the PPOs to the extent that the PPOs prohibited them from approaching or confronting Mary in a public place. Dawn now appeals as of right.

II. SUFFICIENCY OF THE EVIDENCE

Dawn argues that there was insufficient evidence to support the trial court's finding that she violated the PPO given that Mary used the PPO as a "sword rather than a shield." We disagree.

We review a trial court's findings in a contempt proceeding for clear error, and such findings must be affirmed if there is competent evidence to support them. *In re Contempt of Henry*, 282 Mich App 656, 668; 765 NW2d 44 (2009). We may not weigh the evidence or the credibility of the witnesses in determining whether there is competent evidence to support the findings. *Id.* This Court reviews a trial court's issuance of an order of contempt for an abuse of discretion. *Id.* at 671.

Violation of a PPO may result in a finding of criminal contempt and subject a respondent to up to 93 days in jail and a fine of up to $500. MCL 600.2950a(23); MCR 3.708(H)(5)(a). The PPO at issue here prohibited Dawn from approaching or confronting Mary in a public place. There was competent evidence to find that Dawn violated the PPO by approaching or confronting Mary at the courthouse, a public place. Dawn approached or confronted Mary by lunging toward Mary and saying, "I have one thing to say to you, you're a f***ing bitch and I hate you." Although the testimony of Dawn and Kenneth contradicted the testimony of Mary and Jaya, we are not at liberty to weigh the evidence or the credibility of the witnesses in determining whether

there is competent evidence to support the findings. *Henry*, 282 Mich App at 668.

Respondent relies on *People v Freeman*, 240 Mich App 235, 237 n 1; 612 NW2d 824 (2000), for the proposition that a PPO may not be used as a "sword instead of a shield." In *Freeman*, the defendant was convicted of resisting and obstructing a police officer after officers attempted to handcuff defendant and place him under arrest for violating a PPO. *Id.* at 235-236. On appeal, the defendant argued that the evidence was insufficient to support his conviction because the prosecution failed to prove that the arrest was legal. The defendant further argued that remarks the prosecutor made had impermissibly shifted the burden of proof to him by requiring him to prove that the PPO was invalid. *Id.* at 236-237. We affirmed defendant's conviction, concluding that the information the officers obtained from the law enforcement information network provided reasonable cause for them to believe that the defendant had violated the PPO, subjecting him to immediate arrest. *Id.* We further found that the prosecutor's remarks, when considered in context, did not have the effect of impermissibly shifting the burden of proof to the defendant. *Id.* at 237. In a footnote, we added:

> Although the personal protection order itself is not at issue in this case, we express our concern raised by the facts of this case. This case illustrates the need to draft such orders carefully in order to avoid inconsistencies and confusion. Here, for example, the complainant's residence is listed in the body of the order as 38 N. Riviera Drive. The caption of the order, however, states that the complainant can be reached at 1419 Capital Avenue, # 32. The complainant was at defendant's address at 1419 Capital Avenue, # 32, when defendant was arrested for violating the order. Surely, a defendant must question the wisdom of an

> order that makes it a violation of a court order to be in his own home, particularly when the complainant has a separate residence and makes the complaint to the police while at the defendant's residence. This would appear to allow personal protection orders to be used as a sword rather than a shield, contrary to the intent of the legislation that was quite properly designed and intended to protect spouses and others from predators. When personal protection orders are allowed to be misused because of careless wording or otherwise, then the law is correspondingly undermined because it loses the respect of citizens that is important to the effective operation of our justice system. [*Id.* at 237 n 1.]

Our discussion in *Freeman* concerning the possible misuse of PPOs was dictum and is not binding on this Court. See *People v Crockran*, 292 Mich App 253, 258; 808 NW2d 499 (2011). Nevertheless, we take this opportunity to distinguish *Freeman* from the case at bar. The sword/shield analysis in *Freeman* concerned a poorly drafted PPO. *Freeman* does not, as Dawn argues, shift the focus onto the behavior of the person who holds the PPO. We clarify that one who holds a PPO is under no obligation to act in a certain way. Instead, a court must look only to the behavior of the individual against whom the PPO is held. In this case, Dawn does not argue that the PPO was carelessly worded or incorrectly entered; rather, she argues that by placing herself in the courthouse when Dawn and Kenneth were bound to be there, Mary was inviting a confrontation. We do not find Mary's conduct to be relevant in evaluating whether Dawn was in violation of the PPO. When evaluating whether there has been a violation of a PPO, the proper focus is on the behavior of the individual against whom the PPO is held, *not* the behavior of the person who holds the PPO.

The trial court accepted Mary's testimony that she was in the courthouse to support her husband at his

show-cause hearing. It also accepted Mary's testimony that that she never approached Dawn or Kenneth. Thus, the trial court's findings suggest that it did not believe Mary used the PPO as a sword. More importantly, the trial court indicated that it was "not necessarily concerned" about whether Mary and Jaya approached Kenneth and Dawn. Instead, for purposes of the contempt proceedings the relevant consideration was whether Kenneth or Dawn or both violated the PPOs. The focus was properly on their conduct outside of the courtroom that morning. There was sufficient evidence for the trial court to find beyond a reasonable doubt that Dawn violated the PPO when she lunged at Mary with her finger pointed and yelled, "I have one thing to say to you, you're a f***ing bitch and I hate you."

III. 404(b) EVIDENCE

Dawn argues that the trial court improperly relied on the fact that Kenneth had been loud and disruptive in the courtroom on prior occasions in unrelated proceedings. She claims that the trial court impermissibly relied on Kenneth's prior bad behavior in concluding that he acted in conformity therewith on the date in question, a violation of MRE 404(b)(1). Dawn failed to raise the issue in the trial court. We, therefore, review the issue for plain error. Under that standard, Dawn must show (1) that an error occurred, (2) that the error was plain, and (3) that the error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The third requirement necessitates a showing of prejudice—that the error affected the outcome of the lower court proceedings. *Id.*

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.

This Court has explained that "[t]o 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 unfair prejudice." *People v Kahley*, 277 Mich App 182, 184-185; 744 NW2d 194 (2007). Although the rule is most often invoked in connection with criminal defendants, it also applies to witnesses. *People v Rockwell*, 188 Mich App 405, 409-410; 470 NW2d 673 (1991).

In this case, no evidence of Kenneth's past bad behavior was introduced. Instead, the trial court took judicial notice of Kenneth's disruptive behavior at other hearings. The trial court essentially found that because Kenneth had been disruptive in the past, he was likely disruptive in this case, and, therefore, he was lying about the circumstances of the incident. Thus, it appears that the trial court relied on Kenneth's prior acts to conclude that he acted in conformity therewith, a violation of MRE 404(b)(1).

However, we find no basis for reversal, as we do not believe that such a consideration was outcome determinative in Dawn's case. The trial court found Mary's and Jaya's testimony to be credible, even though there were some discrepancies. The trial court noted that Jaya had never been to court on previous matters and seemed

reluctant to testify, suggesting that she was a disinterested party worthy of belief. Their testimony was also supported by the trial court's law clerk, who heard the commotion and sought to defuse the situation. Additionally, the trial court found that Kenneth was not credible for reasons other than his past behavior. Kenneth's testimony and explanations were inconsistent. He went from denying any wrongdoing to admitting that he stepped in to defend Dawn, to admitting that he should have "kept my mouth shut." Reversal is not warranted because there is no indication that the error resulted in the conviction of an innocent defendant or substantially affected the fairness of the trial. Rather, there was overwhelming evidence that Dawn violated the PPO when she lunged at Mary with her finger pointed and yelled, "I have one thing to say to you, you're a f***ing bitch and I hate you."

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Dawn next argues that her trial counsel was ineffective because he failed to assert that under *Freeman* the PPO was being improperly used as a sword rather than a shield. We disagree. Because Dawn failed to move for a *Ginther*[3] hearing, our review is limited to error apparent on the record. *People v Seals*, 285 Mich App 1, 19-20; 776 NW2d 314 (2009).

As previously discussed, we conclude that the language in *Freeman* regarding the use of a PPO as a sword is dictum and, further, confined to extremely narrow circumstances not applicable here. As such, trial counsel was not required to raise a meritless defense. *People v Rodriguez*, 212 Mich App 351, 356, 538 NW2d

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

42 (1995). Dawn fails to establish that she was denied the effective assistance of counsel.

Affirmed.

JANSEN, P.J., and WILDER, J., concurred with K. F. KELLY, J.

MALPASS v DEPARTMENT OF TREASURY

Docket Nos. 299057, 299058, and 299059. Submitted October 4, 2011, at Lansing. Decided December 6, 2011. Approved for publication January 19, 2012, at 9:10 a.m. Leave to appeal granted, 493 Mich 864.

Tad and Brenda L. Malpass (Docket No. 299057), Tracy and Brenda K. Malpass (Docket No. 299058), and Fred and Barbara Malpass (Docket No. 299059) brought separate actions in the Court of Claims, seeking a reversal of the Department of Treasury's decision to deny plaintiffs' amended individual income tax returns for the years 2001, 2002, and 2003. The actions were consolidated. Plaintiffs owned and controlled East Jordan Iron Works, Inc. (EJIW), a Michigan corporation that operated a foundry in Michigan. Plaintiffs also owned the stock of and operated Ardmore Foundry, Inc., a Michigan corporation that owned and operated a foundry and distribution center in Ardmore, Oklahoma. Both corporations were treated as subchapter S corporations for federal tax purposes. In the specified years, plaintiffs originally filed their Michigan individual income tax returns treating the corporations' respective incomes as if from separate businesses, which resulted in income from EJIW being attributed to Michigan and Ardmore's losses being attributed to the state of Oklahoma and then added back into the plaintiffs' adjusted gross income for Michigan. Plaintiffs later filed amended returns for those years. They requested refunds totaling more than $1 million, claiming that EJIW's gains could be offset with Ardmore's losses on the basis of the their assertion that EJIW and Ardmore were a unitary business. The department denied plaintiffs' amended returns, contending that the Income Tax Act, MCL 206.1 *et seq.*, does not allow the unitary-business principle to be applied to individual income tax returns and that the act did not allow plaintiffs to use a combined-filing method based on the unitary-business principle. The court, Paula J. Manderfield, J., granted plaintiffs' motion for summary disposition, finding that EJIW and Ardmore were a unitary business and concluded that although the Legislature had not explicitly referred to the unitary-business principle in the Income Tax Act, it had adopted the principle because it required all business income to be apportioned according to a statutory formula in MCL 206.115. The department appealed.

The Court of Appeals *held*:

The unitary-business principle provides that a state is allowed to tax a multistate business on the apportioned share of the multistate business it conducted in the taxing state. Under MCL 206.110(1), all taxable income of a resident individual from any source whatsoever, except that which is attributable to another state, is allocated to the state of Michigan. Under Mich Admin Code, R 206.12(4), business income attributed to Michigan and one or more other states is apportioned according to the apportionment formula in MCL 206.115. In order to apply the unitary principle, there must be some sharing or exchange of value not capable of precise identification or measurement that renders formula apportionment a reasonable taxation method. In the absence of an underlying unitary business, multistate apportionment is precluded. To determine whether a multistate business is unitary or discrete, a court must look at (1) economic realities, (2) functional integration, (3) centralized management, (4) economies of scale, and (5) substantial mutual interdependence. The Due Process and Commerce Clauses of the United States Constitution prohibit a state from imposing an income-based tax that taxes value earned outside its borders. Because the corporations were separate and legally distinct business entities, the Court of Claims erred when it concluded that EJIW and Ardmore were a unitary business and on that basis allowed them to combine the income earned from both corporations under MCL 206.115. Plaintiffs' business income came from two separate businesses and had to be apportioned at the entity level to avoid raising due process concerns and applying the Income Tax Act inconsistently. In accordance with Mich Admin Code, R 206.12(3), plaintiffs' income from Ardmore (which included losses) should have been attributed to the state in which the business was conducted: Oklahoma. As a result, the Ardmore income and attendant losses may not be allocated or apportioned to Michigan under the Income Tax Act and should have been added back to plaintiffs' adjusted gross income when calculating plaintiffs' Michigan taxes pursuant to Mich Admin Code, R 206.12(20).

Reversed.

TAXATION — INCOME TAX — MULTISTATE BUSINESSES — SEPARATE AND DISTINCT BUSINESSES — UNITARY BUSINESSES — APPORTIONMENT.

The unitary-business principle provides that a state is allowed to tax a multistate business on the apportioned share of the multistate business it conducted in the taxing state; all taxable income of a resident individual from any source whatsoever, except that which

> is attributable to another state, is allocated to the state of Michigan; business income attributed to Michigan and one or more states is apportioned according to the apportionment formula in the Income Tax Act; to apply the apportionment formula, however, there must be some sharing or exchange of value not capable of precise identification or measurement that renders formula apportionment a reasonable taxation method; to determine whether a multistate business is unitary or discrete, a court must look at (1) economic realities, (2) functional integration, (3) centralized management, (4) economies of scale, and (5) substantial mutual interdependence; in the absence of an underlying unitary business, multistate apportionment is precluded and income must be apportioned at the entity level. (MCL 206.110[1], MCL 206.115; Mich Admin Code, R 206.12).

Warner Norcross & Judd LLP (by *Jason L. Byrne*, *Stephen R. Kretschman*, and *Jeffrey W. Bracken*) for Tad and Brenda L. Malpass, Tracy and Brenda K. Malpass, and Fred and Barbara Malpass.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Bradley K. Morton* and *Heidi L. Johnson-Mehney*, Assistant Attorneys General, for the Department of Treasury.

Before: SHAPIRO, P.J., and SAAD and BECKERING, JJ.

PER CURIAM. In this consolidated appeal, the Michigan Department of Treasury (Treasury) appeals the June 9, 2010, judgment of the Court of Claims that reversed Treasury's decision to deny plaintiffs' amended individual income tax returns for the years 2001, 2002, and 2003. For the reasons set forth below, we reverse.

I. FACTS AND PROCEEDINGS

Plaintiffs own and control East Jordan Iron Works, Inc. (EJIW). EJIW is a Michigan corporation with its corporate offices, resident agent, and principal place of

business located at 301 Spring Street, East Jordan, Michigan. During the years in question, EJIW operated a foundry in East Jordan. In 1999, plaintiffs established Ardmore Foundry, Inc. Ardmore is a Michigan corporation with its resident agent located at 301 Spring Street, East Jordan. However, Ardmore's sole business is the ownership and operation of a foundry and distribution center known as EJIW-Ardmore Foundry, located in Ardmore, Oklahoma. All of Ardmore's stock is owned directly, or through trust, by members of the Malpass family.

Both EJIW and Ardmore have elected to be treated as S corporations for federal tax purposes. As the trial court stated, "This means that the two corporations do not pay federal income taxes. Instead the corporations income and/or losses are passed through to their shareholders and reported by those shareholders on their individual federal and Michigan income tax returns." In the years 2001, 2002, and 2003, plaintiffs filed their Michigan individual income tax returns "treating the corporations' business incomes as if from separate, non-unitary businesses." Accordingly, plaintiffs apportioned their business income from EJIW attributable to Michigan and included it as income on their Michigan individual income tax returns. The losses incurred by Ardmore were attributed to Oklahoma and added back into plaintiffs' adjusted gross income for Michigan individual income tax purposes.

Plaintiffs later filed amended individual income tax returns for the years 2001, 2002, and 2003. In their amended returns, plaintiffs treated EJIW and Ardmore as a unitary business and applied the Michigan apportionment factors to both companies as a unitary business. In so doing, plaintiffs sought to offset gains earned by EJIW

with losses incurred by Ardmore. Through their amended returns, plaintiffs requested refunds totaling over $1 million.

Treasury denied plaintiffs' amended returns, and plaintiffs filed three actions in the Court of Claims requesting reversal. The three cases were consolidated by stipulation of the parties. After submitting a partial stipulation of facts, Treasury moved for summary disposition and argued that Michigan's Income Tax Act (ITA), MCL 206.1 *et seq.*, does not allow the unitary-business principle to be applied to individual income tax situations. Treasury also asserted that the ITA does not allow plaintiffs to use a combined filing method based on the unitary-business principle.

Plaintiffs opposed Treasury's motion and asked the court to grant summary disposition in their favor. Plaintiffs argued that EJIW and Ardmore are a unitary business and supported the motion with an affidavit from William Lorne, treasurer of EJIW, who averred that the two companies are functionally integrated. After hearing arguments, the Court of Claims issued a written opinion and order dated November 19, 2009, granting summary disposition to plaintiffs. The Court of Claims stated that although the Legislature had not explicitly referred to the unitary-business principle in the ITA, it nonetheless adopted the principle into the act. The court based its conclusion on MCL 206.110(1), which provides, "For a resident individual . . . all taxable income from any source whatsoever, except that attributable to another state under [MCL 206.111 to MCL 206.115] and subject to [MCL 206.255], is allocated to this state." The court noted that MCL 206.111 to MCL 206.114, and MCL 206.255 were not applicable, but MCL 206.115 was. It provides, "All business income, other than income from transportation services shall be

apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is 3."

Taking MCL 206.110 and MCL 206.115 together, the court stated: "Clearly, based on the plain language set forth in Sections 110 and 115, the Michigan Legislature has adopted the unitary business principle, because it has chosen to require the apportionment of all business income according to a statutory formula." The Court of Claims further observed that the language of MCL 206.115 is so broad that it does not distinguish between unitary and nonunitary businesses. However, the court recognized that the ITA's apportionment formula could only be constitutionally applied to a unitary business. Because it ruled that plaintiffs' businesses are unitary, the court allowed apportionment and ordered Treasury to make the requested refunds.

II. DISCUSSION

This Court reviews de novo the grant or denial of a motion for summary disposition. *Int'l Business Machines v Dep't of Treasury*, 220 Mich App 83, 86; 558 NW2d 456 (1996). To the extent this appeal requires us to interpret the ITA, our review is also de novo. *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 75; 780 NW2d 753 (2010).

We hold that the Court of Claims erred when it ruled that the unitary-business principle allows plaintiffs to apportion their business income from Ardmore to Michigan.

Although the United States Constitution does not impose a single tax formula on the states, apportionment is often implemented because of the difficulties of attempting to allocate taxable income on the basis of

geographic boundaries. *Allied–Signal, Inc v Dir, Div of Taxation*, 504 US 768, 778; 112 S Ct 2251; 119 L Ed 2d 533 (1992); *Container Corp of America v Franchise Tax Bd*, 463 US 159, 164-165; 103 S Ct 2933; 77 L Ed 2d 545 (1983). Because of these difficulties, states are permitted to tax multistate businesses "on an apportionable share of the multistate business carried on in part in the taxing State." *Allied-Signal*, 504 US at 778. This is known as the "unitary business principle." *Id*. Using the unitary-business principle, Michigan has incorporated an apportionment formula into the ITA. MCL 206.110(1) provides: "For a resident individual, . . . all taxable income from any source whatsoever, except that attributable to another state under [MCL 206.111 to MCL 206.115] and subject to [MCL 206.255], is allocated to this state." As noted, MCL 206.115 provides: "All business income . . . shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is 3." "The property, payroll, and sales factors represent the percentage of the total property, payroll, or sales of the business used, paid, or made in this state." *Grunewald v Dep't of Treasury*, 104 Mich App 601, 606; 305 NW2d 269 (1981), citing MCL 206.116, MCL 206.119, and MCL 206.121.

For an individual or business to apply the unitary-business principle, there must "be some sharing or exchange of value not capable of precise identification or measurement—beyond the mere flow of funds arising out of a passive investment or a distinct business operation—which renders formula apportionment a reasonable method of taxation." *Container Corp*, 463 US at 166. In the absence of some underlying unitary business, multistate apportionment is precluded. *Holloway Sand & Gravel Co, Inc, v Dep't of Treasury*, 152

Mich App 823, 829-830; 393 NW2d 921 (1986). To determine whether a multistate business is unitary or discrete, this Court looks at (1) economic realities, (2) functional integration, (3) centralized management, (4) economies of scale, and (5) substantial mutual interdependence. *Id.* at 831.

Plaintiffs argue in this case that they are allowed to apportion their income from Ardmore and EJIW because the two corporations form a unitary business. Given Lorne's affidavit, there is no doubt that Ardmore and EJIW have many characteristics of a unitary business. See *Holloway*, 152 Mich App at 830-835. However, they remain separate and legally distinct business entities, and nothing in the ITA allows for combined-entity reporting.

The Court of Claims focused on the word "all" in MCL 206.115 and ruled that it meant that all business income, no matter what the source, must be added together and then apportioned by the apportionment factors. The problem with this approach, which the Court of Claims recognized, is that "[u]nder both the Due Process and the Commerce Clauses of the Constitution, a State may not, when imposing an income-based tax, 'tax value earned outside its borders.' " *Container Corp*, 463 US at 164 (citation omitted). Therefore, under the Court of Claims' approach, in order to comply with due process, business income may only be combined if the separate entities operate in a unitary fashion. If business income is earned from entities that do not operate in a unitary fashion, then the income must be apportioned at the entity level, with each entity analyzed separately. While this approach may be constitutionally permissible, it would cause MCL 206.115 to be applied inconsistently with respect

to different taxpayers.[1] In contrast, a consistent approach would be to apportion all business income at the entity level. That way, if the business conducts multistate activity, the income will be apportioned accordingly. If the business has no nexus to Michigan, none of that income will be attributed to Michigan because its property factor, payroll factor, and sales factor will all be zero. See *Grunewald*, 104 Mich App at 606.

Plaintiffs, however, argue that EJIW's and Ardmore's separate-entity status does not matter because they nonetheless form a unitary business. Plaintiffs rely on *Holloway* and on *Jaffe v Dep't of Treasury*, 172 Mich App 116; 431 NW2d 416 (1988), to support their position. These cases, however, are distinguishable because they did not deal with multiple-entity apportionment. Rather, they each involved a single entity trying to use the unitary-business principle to apportion income for business activities conducted in other states. *Holloway*, 152 Mich App at 826; *Jaffe*, 172 Mich App at 117.

Plaintiffs also rely on rely on *Glieberman v Dep't of Treasury*, 14 MTTR 223 (Docket No. 288104, July 11, 2003), to support their argument that the separate-entity status of EJIW and Ardmore is insignificant. In *Glieberman*, the petitioner was the sole shareholder of

[1] The difficulty appears to lie in the ability to consistently apply the unitary-business principle to legally separate entities. For example, a petitioner who holds interests in multiple separate entities could attempt, on one hand, to exclude his or her out-of-state businesses that turn a profit from inclusion and apportionment, while arguing on the other hand that the petitioner's other out-of-state businesses that post a loss should be included and apportioned to his or her advantage. Given the myriad of business organization and management options and the somewhat broad factors used in *Holloway* to determine whether to apply the unitary-business principle, it is difficult to see how the Court of Claims' approach would result in anything other than arbitrary decisions and unnecessarily protracted litigation.

Strathmore Finance Company, Inc., a qualified subchapter S corporation. *Id.* at 3. Strathmore was the parent company of Tralon Corporation, a qualified subchapter S subsidiary. *Id.* at 1, 3. Tralon Corporation earned income from two joint venture limited liability corporations (LLCs) located in Arizona and California, which was then passed up to the petitioner through Strathmore. *Id.* at 3-4. Treasury argued that the petitioner's business income from the two LLCs was apportionable to Michigan under the ITA, but the Tax Tribunal held that the income passed up from the LLCs could not be apportioned to Michigan because the LLCs did not form part of a unitary business with Tralon. *Id.* at 9-10.

Plaintiffs argue that the Tax Tribunal did not allow the separate-entity nature of the businesses in *Glieberman* to defeat the ITA's mandate to apportion business income as long the entities form part of a unitary business. Plaintiffs assert that the tribunal indicated apportionment would be required if the entities formed a unitary business, despite the fact that they were legally separate entities. *Glieberman*, however, is distinguishable because it involved a qualified subchapter S subsidiary. Unlike the businesses in *Glieberman*, Ardmore is not a qualified subchapter S subsidiary of EJIW because Ardmore's stock is not owned by EJIW, but "directly or through trusts, by members of the Malpass family." 26 USCS 1361(b)(3)(B)(i). Therefore, plaintiffs' reliance on *Glieberman* is misplaced. Despite the unitary characteristic of EJIW and Ardmore, they are separate legal entities. There is no provision in the ITA that allows individuals to combine their business income from separate businesses and then use a combined apportionment formula on the total.

This is further supported by Treasury rules. Mich Admin Code, R 206.12 provides in relevant part:

> (1) Salaries, wages, and other compensation received by a Michigan resident are allocated to Michigan.
>
> * * *
>
> (3) Income from a trade or business as defined in [Mich Admin Code] R 206.1 is allocated or apportioned to the state in which the activity takes place.
>
> (4) Business income that is attributable to Michigan and 1 or more other states shall be apportioned as provided in [MCL 206.115 to MCL 206.195].

Starting with the premise that all compensation received by a Michigan resident is allocated to Michigan, which conforms with MCL 206.110(1), Rule 206.12(3) then provides that business income is allocated or apportioned to the state in which the activity took place. Therefore, if a resident earns business income that is derived from another state, it is allocated to that state. However, if the business income is attributable to Michigan and one or more other states, Rule 206.12(4) requires that it be apportioned as calculated by the formula in MCL 206.115.

As applied to this case, plaintiffs' income from Ardmore (which includes losses) is attributed to the state in which the activity took place—Oklahoma. Mich Admin Code, R 206.12(3). Because the losses sustained by Ardmore are not attributable to Michigan, they are not allocated or apportioned to Michigan and are added back to plaintiffs' adjusted gross income. Mich Admin Code, R 206.12(20) ("Distributive income from a subchapter S corporation not allocated or apportioned to Michigan may be claimed as a subtraction from ad-

justed gross income. Conversely, losses not allocated or apportioned to Michigan shall be added to adjusted gross income.").

Plaintiffs rely on this Court's decision in *Preston v Dep't of Treasury*, 292 Mich App 728; 815 NW2d 781 (2011), to support their argument that apportionment is required. That case however, is distinguishable. In *Preston*, the plaintiff owned Life Care Affiliates II (LCA II), a Tennessee limited partnership. *Id.* at 730. LCA II was a general partner in 22 lower level partnerships that operated 27 nursing homes. *Id.* One of the lower level partnerships was Riverview Medical Investors LP (RMI), which owned two nursing homes in Michigan. *Id.* 730-731. The remainder of the partnerships had no business activity in Michigan. *Id.* at 731.

All 22 partnerships distributed gains and losses to LCA II, which in turn distributed the combined income to the plaintiff. When reporting his Michigan income, the plaintiff took the gains received from RMI and offset them with losses suffered by other partnerships. *Id.* Treasury argued that the plaintiff could not offset his Michigan income from RMI with losses incurred by other partnerships because they had no activity in Michigan. *Id.* at 732-733. This Court, however, ruled that apportionment was proper because LCA II operated the partnerships as a unitary business. *Id.* at 734-737.

Plaintiffs assert that *Preston* supports apportionment in this case. *Preston*, however, addressed partnerships, not corporations. And in *Preston*, the 22 lower level partnerships were all operated together through LCA II, which owned a 99 percent interest in the 22 partnerships. Although each of the 22 partnerships were separate entities, they were all joined by LCA II. Therefore, allowing multientity apportionment was not

an issue. Here, again, Ardmore and EJIW are separate business entities. Although they may operate in a unitary fashion, they remain legally separate.

Further, the result in *Preston* was dictated by the ITA and the Treasury regulations. Again, MCL 206.115 provides, "All business income . . . shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is 3." In *Preston*, the plaintiff's business income came from LCA II and was then apportioned in accordance with the apportionment factors. Also, Rule 206.12(16) provides:

> Distributive share items received by a partner are allocated or apportioned as follows:
>
> (a) Ordinary income is apportioned to Michigan by the partnership apportionment factors provided in [MCL 206.115 to 206.195]."

In *Preston*, the plaintiff was the partner, and his distributed share of income was received from LCA II and then apportioned in accordance with the partnership apportionment factors.

Unlike the plaintiff in *Preston*, plaintiffs here receive business income from two separate businesses. Therefore, they must apportion that income at the entity level. As previously discussed, allowing plaintiffs to combine all their business income from separate entities and then apportion it using the apportionment factors, or alternately requiring other similarly situated taxpayers to do so whether or not the result would be favorable to them, would raise due-process concerns and cause the ITA to be applied inconsistently.

For these reasons, we hold that the court erred by granting summary disposition to plaintiffs and incor-

rectly allowed plaintiffs to combine their business income from separate entities under MCL 206.115.

Reversed.

SHAPIRO, P.J., and SAAD and BECKERING, JJ., concurred.

PEOPLE v ALLEN

Docket No. 299267. Submitted November 8, 2011, at Detroit. Decided November 22, 2011. Approved for publication January 24, 2012, at 9:00 a.m.

Regina M. Allen pleaded guilty in the Oakland Circuit Court of attempting to commit prescription fraud, MCL 333.7407(1)(c) and 333.7407a(1). The court, Martha D. Anderson, J., sentenced her to one year of probation and ordered her to pay restitution in the amount of $5,753.88 to Blue Cross Blue Shield of Michigan. Allen appealed by delayed leave granted the court's order requiring her to pay restitution.

The Court of Appeals *held*:

Under MCL 780.766(2), a trial court does not have discretion to order a convicted defendant to pay restitution; rather, it must order the defendant to pay restitution and the amount must fully compensate any victim of the defendant's course of conduct that gave rise to the conviction. In this context, the term "victim" includes a sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical or financial harm as a result of a crime. To determine the amount of restitution, the trial court must consider the amount of the loss sustained by any victim as a result of the offense. The phrase "course of conduct" must be given a broad construction to effectuate the intent of the Legislature and the remedial purpose of the statute. In this case, Blue Cross lost the time-value of the hours that its fraud investigator spent investigating Allen's actions. The loss to Blue Cross was not the money it spent on the investigator's salary, which the company would likely have incurred anyway, but the loss of the investigator's time, which could have been spent on other matters. That loss could be measured by assigning a value to the hours that Blue Cross spent on the investigation. Accordingly, the trial court did not clearly err when it found that Blue Cross suffered direct financial harm as a result of Allen's course of criminal conduct.

Affirmed.

SENTENCES — RESTITUTION — CRIME VICTIMS — AMOUNT OF RESTITUTION — DIRECT FINANCIAL HARM — TIME SPENT INVESTIGATING THE CRIME.

A trial court does not have discretion to order a convicted defendant to pay restitution; rather, it must order the defendant to pay restitution and the amount must fully compensate any victim of the defendant's course of conduct that gave rise to the conviction; in this context, the term "victim" includes a sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical or financial harm as a result of a crime; to determine the amount of restitution, the trial court must consider the amount of the loss sustained by any victim as a result of the offense; the phrase "course of conduct" must be given a broad construction to effectuate the intent of the Legislature and the remedial purpose of the statute; the loss of time incurred by a company when an employee of the company has spent time investigating a crime committed against it instead of working on other matters may be a direct financial harm; the value of that harm can be measured by assigning a value to the time spent on the investigation (MCL 780.766, MCL 780.767[1]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, and *Thomas R. Grden* and *Marilyn J. Day*, Assistant Prosecuting Attorneys, for the people.

Kevin A. Landau for defendant.

Before: M. J. KELLY, P.J., and SAAD and O'CONNELL, JJ.

PER CURIAM. Defendant Regina Marie Allen appeals by delayed leave granted the trial court's order requiring her to pay restitution. After Allen pleaded guilty to attempting to commit prescription fraud, see MCL 333.7407(1)(c); MCL 333.7407a(1), the trial court sentenced Allen under a sentencing agreement to serve one year of probation and ordered her to pay $5,753.88 in restitution to Blue Cross Blue Shield of Michigan. The sole question on appeal is whether the trial court erred when it found that Blue Cross had suffered a loss as a result of Allen's course of criminal conduct. Because we

conclude that the trial court did not clearly err when it found that Blue Cross suffered such a loss, we affirm the trial court's order of restitution.

I. BASIC FACTS AND PROCEDURAL HISTORY

In November 2009, Allen attempted to purchase a controlled substance from a pharmacy using a fraudulent prescription. The prescription contained a legitimate Blue Cross contract number. The pharmacy alerted Blue Cross to the attempted purchase later that same month.

At the time, Allen was a customer service representative with a Blue Cross vendor, Allegra Direct. Through her employment, Allen had access to two major databases. These databases contained private information regarding Blue Cross subscribers; the information included the subscribers' contract numbers, Social Security numbers, dates of birth, home addresses, and physician records.

Nina Burnett testified at Allen's restitution hearing that she was a field investigator with Blue Cross and that her department investigates fraud. Burnett investigated Allen's attempt to purchase the controlled substance. Burnett determined that Allen used an actual Blue Cross subscriber's name on the fraudulent prescription. As a result, Burnett feared that Allen might have defrauded Blue Cross in prior incidents. Indeed, after she learned that Allen had access to protected Blue Cross information, Burnett extended the investigation to determine whether Allen misused confidential information. Burnett stated that Blue Cross had a legal obligation to investigate whether its subscribers' health information had been compromised.

Burnett investigated whether Blue Cross had paid for similar prescriptions written by the same physician

that Allen had listed on the known fraudulent prescription. As part of her investigation, Burnett met with the physician's staff, obtained video from various pharmacies, and examined signature logs. Additionally, Blue Cross's information technology department investigated Allen's use of the Blue Cross subscriber database. Burnett was not able to definitively connect Allen to any other fraudulent prescriptions.

Burnett testified that her investigation into Allen's fraudulent prescription was significantly more time-consuming and detailed than other "ordinary" investigations because Allen had access to patients' confidential information. Burnett stated that Blue Cross spent $5,738 to investigate Allen's fraud and whether she misused subscriber information. She said that she determined this amount by multiplying an hourly rate of $130.77, which was determined by dividing her department's annual budget by the number of hours the department's investigators spent investigating claims, and multiplying that by the 44 hours that she spent working on the investigation. She stated that this rate did not include the cost of assistance by other departments; therefore, the research by the information technology staff was not included in the hourly rate.

Burnett testified that she is a salaried employee and would have been paid the same amount of money without regard to Allen's attempted fraud. Burnett nevertheless stated that Blue Cross suffered a loss because the money that it spent investigating Allen's fraud could have been spent on claims or controlling premiums. Burnett explained that Blue Cross generally attempts to recoup money from the perpetrators of fraud.

The trial court ultimately determined that Blue Cross was entitled to the requested restitution and ordered Allen to pay $5,753.88 to Blue Cross as part of her sentence.

II. RESTITUTION

A. STANDARD OF REVIEW

Allen argues on appeal that the trial court erred by ordering her to pay Blue Cross for the costs associated with investigating her fraud. A trial court does not have discretion to order a convicted defendant to pay restitution; it must order the defendant to pay restitution and the amount must fully compensate the defendant's victims. See *People v Gahan*, 456 Mich 264, 270 n 6; 571 NW2d 503 (1997).[1] Whether and to what extent a loss must be compensated is a matter of statutory interpretation; and this Court reviews de novo the proper interpretation of statutes. See *People v Bemer*, 286 Mich App 26, 31; 777 NW2d 464 (2009). However, this Court reviews the findings underlying a trial court's restitution order for clear error. MCR 2.613(C). A finding is clearly erroneous if this Court is left with the definite and firm conviction that a mistake has been made. *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003).

B. ANALYSIS

Article 1, § 24 of the Michigan Constitution provides that crime victims have the "right to restitution." Const 1963, art 1, § 24. Additionally, with the Crime Victim's Rights Act, MCL 780.751 *et seq*., the Legislature required trial courts to order convicted defendants to pay restitution:

> [W]hen sentencing a defendant convicted of a crime, the

[1] It is, for that reason, inaccurate to state that trial courts have discretion to award restitution. Further, because the statute plainly requires the trial court to order "full" restitution, see MCL 780.766(2), it necessarily follows that a trial court abuses its discretion when it orders restitution other than full restitution.

> court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction . . . . [MCL 780.766(2).]

For the purposes of MCL 780.766(2), the term "victim" includes "a sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical or financial harm as a result of a crime." MCL 780.766(1). To determine the amount of restitution, "the court shall consider the amount of the loss sustained by any victim as a result of the offense." MCL 780.767(1). The term "course of conduct" must be given "a broad construction" to best effectuate the intent of the Legislature. *Gahan*, 456 Mich at 271. Further, with the Crime Victim's Rights Act, the Legislature plainly intended to shift the burden of losses arising from criminal conduct—as much as practicable—from crime victims to the perpetrators of the crimes; thus, it is "remedial in character and should be liberally construed to effectuate its intent." *See People v Gubachy*, 272 Mich App 706, 710; 728 NW2d 891 (2006).

Allen argues that Blue Cross's investigation did not amount to a financial harm because the costs would have been incurred regardless of her course of criminal conduct. She asserts that Burnett would have received the same salary and worked the same hours even in the absence of Allen's attempt to fraudulently purchase a controlled substance. Thus, Blue Cross did not suffer a loss within the meaning of the Crime Victim's Rights Act.

The evidence showed that Burnett was a salaried, full-time employee in a department dedicated to investigating fraud. Nevertheless, Burnett's department had

numerous claims to investigate and she plainly could have spent the 44 hours that she spent investigating Allen's fraud on other matters. Accordingly, Blue Cross essentially lost the time-value of the 44 hours that Burnett had to spend investigating Allen's fraud, rather than some other fraud. That is, the loss to Blue Cross was *not* Burnett's salary or the department's budget; Blue Cross would likely have incurred those costs regardless of Allen's criminal conduct. Rather, it was the loss of time that amounted to a direct financial harm, which can be measured by assigning a value to the hours spent on the investigation. Accordingly, the trial court did not clearly err when it found that Blue Cross suffered a direct financial loss as a result of Allen's course of criminal conduct. And Allen has not challenged the trial court's finding that this loss should be valued at $5,753.88.

On this record, we cannot conclude that the trial court erred when it ordered Allen to pay Blue Cross restitution in the amount of $5,753.88.

Affirmed.

M. J. KELLY, P.J., and SAAD and O'CONNELL, JJ., concurred.

GAY v SELECT SPECIALTY HOSPITAL

Docket No. 301064. Submitted October 11, 2011, at Lansing. Decided January 31, 2012, at 9:00 a.m.

Patricia Gay, personal representative of the estate of Dolores M. Wright, deceased, brought an action in the Calhoun Circuit Court against Select Specialty Hospital and Battle Creek Health System, alleging malpractice by nurses on the hospital's staff. The court, Allen L. Garbrecht, J., entered an order dismissing the claims against Battle Creek Health System. The hospital moved to strike plaintiff's proposed nursing expert, Kathleen Boggs, R.N., on the basis that Boggs did not devote a majority of her professional time to the active clinical practice of nursing or to the instruction of nursing students in an accredited health professional school or accredited residency or clinical research program in the year immediately preceding the date of the decedent's fall in the hospital. The hospital alleged that Boggs was not qualified to sign the affidavit of merit under MCL 600.2169(1)(b) and sought dismissal of the action. The court determined that Boggs did not meet the qualifications for an expert under the statute and granted the motion to strike Boggs as an expert. The court also determined that plaintiff did not timely propose an alternate expert witness and granted the hospital's motion to strike plaintiff's supplemental witness list. The court then dismissed the action on the basis that plaintiff did not have an expert to establish the standard of care. Plaintiff appealed.

The Court of Appeals *held*:

1. Although trial courts have considerable discretion in determining whether a witness is qualified to testify as an expert, trial courts must nevertheless accurately apply the law in exercising their discretion. A trial court necessarily abuses its discretion when it premises a ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.

2. The evidence concerning Boggs's qualifications was undisputed; therefore, whether Boggs met the requirements stated in MCL 600.2169(1)(b) was a matter of applying the undisputed facts to the proper interpretation of the statute.

3. The trial court determined that Boggs did not spend any

portion of her professional time in either the active clinical practice of nursing or in the instruction of nurses at an accredited health professional school or accredited residency or clinical research program despite the fact that there was plain and unrebutted evidence that Boggs engaged in both the active clinical practice of nursing and the instruction of nurses at an accredited residency or clinical research program.

4. The trial court's determination that Boggs did not spend any time in the active clinical practice of nursing was based on the fact that Boggs supervised the orientation of nurses and was not directly involved in the care of patients. In order to be engaged in an active clinical practice, a medical professional's practice must involve practice in a clinical setting, which usually means a setting where patients are treated. A professional can be involved in the treatment of patients in a variety of ways in a clinical setting without directly interacting with the patients. The fact that many nurses will physically interact with patients does not mean that a nurse who is indirectly involved in the care of patients is not engaged in the active clinical practice of nursing. The word "active" in the phrase "active clinical practice" cannot be construed to require that the professional physically interact with patients. The word "active" must be understood to mean that, as part of his or her normal professional practice at the relevant time, the professional was involved—directly or indirectly—in the care of patients in a clinical setting. The undisputed evidence showed that Boggs spent 25 percent of her professional time at the time of the occurrence at issue engaged in the active clinical practice of nursing. The trial court erred when it determined that Boggs did not spend any amount of her professional time engaged in the active clinical practice of nursing. Boggs's work in orienting nurses at the hospital amounted to the active clinical practice of nursing within the meaning of MCL 600.2169(1)(b). Therefore, the trial court's determination to the contrary must have been premised on an erroneous interpretation of the statute and was an abuse of discretion.

5. The trial court erred by determining that Boggs did not spend any of her professional time engaged in qualified instruction. Boggs testified that she spent 50 percent of her professional time teaching at the hospital for an accredited residency program. This time and the time engaged in the active clinical practice of nursing clearly constitutes more than 50 percent of her professional time and met the professional-time requirement of the statute.

6. The Legislature's statement that a professional may meet the time requirement by devoting a majority of his or her time to the instruction of students is not a requirement that the professional must actually spend a majority of his or her time instructing students. A teacher's activities preparing for class, maintaining familiarity with new and evolving professional techniques, and participating in meetings designed to further the educational process are activities devoted to the instruction of students. The trial court abused its discretion by determining that Boggs did not devote any of her time to the instruction of students.

7. Boggs met the professional-time requirement of MCL 600.2169(1)(b) and was qualified to testify. The order striking Boggs as a witness is vacated. The judgment and order dismissing the suit is reversed and the case is remanded for further proceedings.

Reversed and remanded.

WHITBECK, J., dissenting, stated that the trial court properly determined that Boggs did not meet the statutory qualifications to testify regarding the appropriate standard of care, did not err by refusing plaintiff's request to substitute Jean Hurynowicz, R.N., as plaintiff's expert witness, and did not abuse its discretion by ordering dismissal with prejudice because there was no remaining time available under the wrongful death saving period, MCL 600.5852. Working in a clinical setting merely overseeing employees who actually treat the patients is too removed from the type of experience contemplated by the statutory requirement regarding "active clinical practice." The time spent by Boggs orienting new nurses to their units did not qualify as "active clinical practice" because it did not involve the active care of patients. The 45 percent of Boggs's professional time spent instructing students in some capacity is below the requisite "majority," or more than 50 percent, necessary to satisfy the statute. The trial court's refusal to allow the substitution of Hurynowicz, an entirely new expert witness, only 50 days before trial was not an abuse of discretion. The trial court correctly recognized that plaintiff's filing of the complaint and affidavit of merit did not toll the wrongful death saving period, MCL 600.5852, and that, because the wrongful death saving period had expired, the proper remedy for plaintiff's failure to submit a conforming affidavit of merit was dismissal with prejudice. The judgment and order dismissing the action should be affirmed.

1. EVIDENCE — ERRONEOUS INTERPRETATIONS OR APPLICATIONS OF LAW — ABUSE OF DISCRETION.

A trial court necessarily abuses its discretion when it admits or excludes evidence on the basis of an erroneous interpretation or application of law.

2. NEGLIGENCE — MEDICAL MALPRACTICE — EXPERT WITNESSES — WORDS AND PHRASES — ACTIVE CLINICAL PRACTICE.

A medical professional's practice must involve practice in a clinical setting in order for the professional to be engaged in an "active clinical practice" for purposes of MCL 600.2169(1)(b); a medical professional can be involved in the treatment of patients in a variety of ways in a clinical setting without directly interacting with the patients; the word "active" means that, as part of the professional's normal professional practice at the relevant time, the professional was involved, directly or indirectly, in the care of patients in a clinical setting.

3. NEGLIGENCE — MEDICAL MALPRACTICE — NURSES — ACTIVE CLINICAL PRACTICE OF NURSING.

A nurse who supervises other nurses in a hospital is practicing nursing in a clinical setting for purposes of the professional-time requirement of MCL 600.2169(1)(b) even though he or she does not directly treat specific patients.

4. NEGLIGENCE — MEDICAL MALPRACTICE — EXPERT WITNESSES — INSTRUCTION OF STUDENTS.

A person may be qualified to testify as an expert on the standard of care in a medical-malpractice action if during the year immediately preceding the date of the occurrence that is the basis for the claim or action the person devoted a majority of his or her professional time to the instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed; time spent preparing for class, maintaining familiarity with new and evolving professional techniques, and participating in meetings designed to further the educational process is time devoted to the instruction of students (MCL 600.2169[1][b][*ii*]).

Blaske & Blaske, P.L.C. (by *Thomas H. Blaske*), for Patricia Gay.

Magdich & Associates, PC (by *Karen W. Magdich* and *Jennifer R. Anstett*), for Select Specialty Hospital.

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

M. J. KELLY, P.J. In this nursing malpractice case, Patricia Gay, as personal representative of the estate of Dolores M. Wright, deceased, appeals by right the trial court's order dismissing Gay's suit against defendant Select Specialty Hospital.[1] On appeal, the primary issue is whether the trial court erred when it determined that Gay's proposed nursing expert, Kathleen Boggs, R.N., did not meet the qualifications required of experts who propose to testify concerning the applicable standard of care. See MCL 600.2169(1). We conclude that the trial court erred when it determined that Boggs did not meet the qualifications stated under MCL 600.2169(1). Because Boggs was qualified to testify about the standard of care, the trial court further erred when it dismissed Gay's claim on the ground that Gay did not have an expert to establish the standard of care for her malpractice claim. Accordingly, we reverse and remand for further proceedings.

I. BASIC FACTS AND PROCEDURAL HISTORY

Dolores Wright was admitted to Select Specialty Hospital to treat her rheumatoid arthritis—including associated rheumatoid lung disease—in October 2003. Wright responded well to the treatments and, on Thursday, November 13, 2003, Wright learned that she would be discharged from the hospital on the following Mon-

[1] The trial court issued an order dismissing Gay's claims against defendant Battle Creek Health System in April 2009. That order is not at issue on appeal.

day. However, the next day a nurse assisted Wright to a commode, but left her unattended. When her phone rang, Wright reached for it and fell from the commode. She injured her head, fractured her shoulder, and died two days later.

In November 2008, Patricia Gay, acting as the personal representative of Dolores Wright's estate, sued the hospital. In the complaint, Gay alleged that, in order to comply with the standard of care applicable to Wright's conditions, the hospital's nursing staff had to remain by Wright's side and assist her whenever she was out of bed. As such, the nurse should not have left Wright unattended on the commode and had the nurse not done so, she could have prevented Wright's fall. Gay alleged that the fall was a direct and proximate result of the hospital's nursing staff's negligence and that the fall ultimately led to Wright's death. Gay submitted Boggs' affidavit of merit in support of the complaint. In the affidavit, Boggs averred that the nursing staff should have assessed Wright for fall-risk on each shift and, given Wright's frailty, should not have left her unattended while she used the commode.

The hospital alleged that its nursing staff was not negligent. Rather, Wright's condition had improved significantly and immediately before Wright reached for the phone, a nurse had come in and instructed her to wait for assistance.

Approximately two years later, in September 2010, the hospital moved to strike Boggs as an expert and dismiss Gay's complaint with prejudice. The hospital argued that the affidavit of merit was insufficient because Boggs was not qualified to testify as an expert. More specifically, the hospital argued that Boggs did not devote a majority of her professional time to the active clinical practice of nursing or to the instruction of

nursing students in an accredited health professional school or accredited residency or clinical research program in the year immediately preceding the fall. As such, the hospital argued that Boggs was not qualified to sign the affidavit of merit under MCL 600.2169(1)(b) and that the trial court had to dismiss the case.

After hearing oral arguments on the motions, the trial court determined that Boggs did not meet the expert qualifications stated under MCL 600.2169(1)(b). Accordingly, the trial court granted the hospital's motion to strike Boggs as an expert witness. The trial court also determined that Gay did not timely propose an alternate expert witness. Therefore, it granted the hospital's motion to strike Gay's supplemental witness list. The trial court then dismissed the case with prejudice. Gay now appeals.

II. STANDARDS OF REVIEW

"Ordinarily, the qualification of competency of expert witnesses is a matter for the discretion of the trial judge . . . ." *Siirila v Barrios*, 398 Mich 576, 591; 248 NW2d 171 (1976). By reviewing a trial court's decision concerning the admission of expert testimony under this highly deferential standard, appellate courts recognize that the trial court's assessment of the proposed expert and his or her testimony typically involves a complex balancing of various factors. See, e.g., *Daubert v Merrell Dow Pharm, Inc*, 509 US 579, 592-595; 113 S Ct 2786; 125 L Ed 2d 469 (1993) (noting that, in reviewing the admission of expert testimony, trial courts must consider a variety of factors—including being mindful of other applicable rules—to determine the evidentiary relevance and reliability of the proposed testimony). The same is true when examining a witness's qualifications; the court must weigh the witness's "knowledge, skill, experience, train-

ing, [and] education" and determine whether—on the basis of those factors—the witness is sufficiently qualified to offer expert testimony on the area at issue. MRE 702. There is always the concern that jurors will disregard their own common sense and give inordinate or dispositive weight to an expert's testimony. See *People v Peterson*, 450 Mich 349, 374; 537 NW2d 857 (1995) (noting the potential that a jury might defer to an expert's seemingly objective view of the evidence). For that reason, trial courts must—at every stage of the litigation—serve as the gatekeepers who ensure that the expert and his or her proposed testimony meet the threshold requirements. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 391 (2004). This includes determining whether the witness's expertise fits the nature of the witness's proposed testimony. *Id.* at 789.

Although trial courts have considerable discretion in determining whether a witness is qualified to testify as an expert, see *People v Whitfield*, 425 Mich 116, 123; 388 NW2d 206 (1986), trial courts must nevertheless accurately apply the law in exercising their discretion. See *Gilbert*, 470 Mich at 780 ("While the exercise of this gatekeeper role is within a court's discretion, a trial judge may neither 'abandon' this obligation nor 'perform the function inadequately.' "), quoting *Kumho Tire Co Ltd v Carmichael*, 526 US 137, 158-159; 119 S Ct 1167; 143 L Ed 2d 238 (1999) (Scalia, J., concurring); see also *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999) (noting that a trial court necessarily abuses its discretion when it premises its decision on a misapplication of law). They may not, for example, apply an "overly narrow test of qualifications" in order to preclude a witness from testifying as an expert. *Whitfield*, 425 Mich at 123. And this Court reviews de novo whether the trial court correctly selected, interpreted, and applied the law. See *Adair v Michigan*, 486 Mich

468, 477; 785 NW2d 119 (2010). Moreover, when a trial court admits or excludes evidence on the basis of an erroneous interpretation or application of law, it *necessarily* abuses its discretion. *Kidder v Ptacin*, 284 Mich App 166, 170; 771 NW2d 806 (2009); *Cooter & Gell v Hartmarx Corp*, 496 US 384, 405; 110 S Ct 2447; 110 L Ed 2d 359 (1990) (stating that a trial court necessarily abuses its discretion when it premises its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence).

III. EXPERTS AND THE APPLICABLE STANDARD OF CARE

In order to establish the malpractice claim at trial, Gay had to present evidence concerning the standard of care applicable to the nursing staff involved in Wright's care. See *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). And she could do so only through an expert's testimony. See *Gonzalez v St John Hosp & Med Ctr (On Reconsideration)*, 275 Mich App 290, 294; 739 NW2d 392 (2007). A witness must meet certain basic qualifications in order to testify as an expert. See, e.g., MRE 702. In addition, our Legislature has determined that a "person shall not give expert testimony on the appropriate standard of practice or care" in an action alleging medical malpractice unless that person meets certain requirements. One requirement is that the person must have "during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time" to either "active clinical practice" or the instruction of "students in an accredited health professional school or accredited residency or clinical research program" or both, where the active clinical practice or instruction is "in the same health profession in which the party against whom or on whose behalf the testimony is offered is

licensed . . . ." MCL 600.2169(1)(b)(*i*) and (*ii*). Finally, the party proposing to call an expert bears the burden to show that his or her expert meets these qualifications. See *Clerc v Chippewa Co War Mem Hosp*, 477 Mich 1067, 1067-1068 (2007).

Here, Gay retained Boggs to offer an expert opinion about the applicable standard of care. However, after the hospital deposed Boggs, it moved to strike her as a witness and dismiss Gay's case. The hospital argued that Boggs could not testify about the applicable standard of care because she did not meet the professional-time requirement stated under MCL 600.2169(1)(b). Specifically, the hospital presented Boggs's deposition testimony in which it claimed she admitted that she spent the majority of her professional time serving as an administrator. Moreover, because the time limit for adding witnesses had passed, the hospital argued that Gay should be precluded from adding an expert to testify regarding the applicable standard. Finally, the hospital maintained that the trial court had to dismiss Gay's suit because Gay would not be able to establish this element of her claim.

The trial court heard arguments on the hospital's motion and determined that Gay had not met her burden to show that Boggs met the professional-time requirement:

> Ah, here's the thing: I've reviewed your briefs, and I am not, ah, convinced that this witness meets the threshold requirements . . . to offer standard of care testimony. That's based on what's presented to me . . . including her affidavit. . . . The statute's clear . . . and she simply doesn't meet the requirements.
>
> As indicated, I don't think there's any argument that she [was] not actively in a clinical practice during the relevant time period, the year prior to the occurrence, and based on what's presented to me here, she was not an

> instructor of students in an accredited professional school during that period of time, either.

For that reason, the trial court granted the hospital's motion to strike Boggs as a witness. It also determined that Gay should not be permitted to add an expert witness and, because Gay would not be able to establish the applicable standard of care at trial, it also concluded that it must dismiss the case.

The evidence concerning Boggs's qualifications was undisputed. As such, whether Boggs met the requirements stated under MCL 600.2169(1)(b) was—and remains—a matter of applying the undisputed facts to the proper interpretation of that statute. Accordingly, if Boggs met the qualifications stated under MCL 600.2169(1)(b) as a matter of law, then the trial court necessarily abused its discretion when it struck her as a witness on the ground that she did not meet those requirements. *Kidder*, 284 Mich App at 170.

The trial court determined that Boggs did not spend *any* portion of her professional time in either the active clinical practice of nursing or in the instruction of nurses at an accredited health professional school or accredited residency or clinical research program. Further, the trial court made this determination despite the fact that there was plain—and unrebutted—evidence that Boggs engaged in both the active clinical practice of nursing and instructed nurses at an accredited residency or clinical research program.

A. ACTIVE CLINICAL PRACTICE

During the relevant period, Boggs served as the director of education at a hospital. Boggs testified at her deposition that she oversaw education for all support staff, which included the nursing staff. She specifically

denied that her job was a "desk job" even though there "was a lot of desk [time]." She explained: "I did all the orientation, I did all the CPR classes, I did continuing education, sat on a lot of committees, oriented nurses, new nurses to their units." Further, when asked whether she took an "active role in patient care" she stated that she did, but only "as far as I was working with the new nurses on their nursing unit." She said that her work in orienting the nurses involved 25 percent of her professional time.

Despite this testimony, the trial court determined that Boggs did not spend *any* time in the active clinical practice of nursing. The trial court apparently disregarded this aspect of Boggs's professional work because Boggs supervised the orientation of nurses and was not directly involved in the care of patients. But the Legislature did not impose any such requirement. Rather, the Legislature provided that a witness might testify as an expert if he or she spent the majority of his or her time in an "active clinical practice . . . ." Because the Legislature did not choose to define the phrase "active clinical practice," this phrase must be given its ordinary meaning. See *Wolfe-Haddad Estate v Oakland Co*, 272 Mich App 323, 325; 725 NW2d 80 (2006), citing MCL 8.3a.

The ordinary meaning of "clinical practice" is the practice of one's profession in a clinical setting. See *Random House Webster's College Dictionary* (2d ed, 1997) (defining "clinical" to mean "pertaining to a clinic" or "concerned with or based on actual observation and treatment of disease in patients rather than experimentation or theory" and defining "practice" to mean "to pursue a profession, [especially] law or medicine"). Thus, in the case of a medical professional, in order to be engaged in an active clinical practice, the profession-

al's practice must involve practice in a clinical setting, which usually means a setting where patients are treated. But this is not the equivalent of stating that the professional must directly interact with patients, which is what the trial court apparently understood when it disregarded Boggs's work overseeing the orientation of new nurses for the hospital. A medical professional can be involved in the treatment of patients in a variety of ways in a clinical setting without directly interacting with the patients. And the fact that many—if not most—nurses will physically interact with patients in the practice of their professions does not mean that a nurse who is indirectly involved in the care of patients is not engaged in the "active clinical practice" of nursing. Giving the phrase "active clinical practice" its ordinary meaning, the key question is whether Boggs was actively engaged in the profession of nursing in a clinical setting.

We also cannot agree with the dissent's conclusion that the word "active"—as used in the phrase "active clinical practice"—must be understood to impose a requirement that a nurse directly treat patients in order to be engaged in the "active clinical practice" of nursing. Although it has the sense of being "marked by or disposed to direct involvement or practical action," the adjective "active" can also mean "engaged in action or activity," or "characterized by current activity, participation, or use." *Random House Webster's College Dictionary* (2d ed, 1997). In imposing professional-time requirements on expert witnesses, the Legislature intended to address a perceived problem with full-time professional witnesses who would ostensibly testify to whatever someone paid them to testify about. See *McDougall v Schanz*, 461 Mich 15, 25 n 9; 597 NW2d 148 (1999). And, in context, it is plain that the Legislature used the word "active" to ensure that the profes-

sional's practice involved actual, day-to-day performance in a clinical setting. Accordingly, a professional who is semiretired, but who retains privileges in a clinical setting, might be said to no longer have an "active" clinical practice. Similarly, a professional who has a "clinical practice" but who leaves the day-to-day operation of the practice to partners or is otherwise uninvolved with the day-to-day practice is also not involved in an "active clinical practice." But the word "active" cannot be construed in this context to require that the professional physically interact with patients. Rather, the word "active" must be understood to mean that, as part of his or her normal professional practice at the relevant time, the professional was involved—directly or indirectly—in the care of patients in a clinical setting.

Here, Boggs testified that she spent one-quarter of her professional time orienting nurses to their units. Although the hospital did not ask Boggs to elaborate on what her orientation activities included, the act of orienting nurses within a hospital involves some degree of explaining, coordinating, and instructing nurses regarding the proper care of their patients. And explaining, coordinating, and instructing nurses about the proper care of patients in a clinical setting necessarily involves—albeit indirectly—the treatment of patients.[2] Accordingly, it was undisputed that Boggs spent 25 percent of her professional time at the time of the

[2] On this point we must disagree with the dissent: a nurse who supervises other nurses in a hospital *is* practicing nursing in a clinical setting even though he or she does not directly treat specific patients. Indeed, if the supervising nurse were negligent in the supervision or training of his or her staff and that negligence led to an injury, he or she might be liable for malpractice even though he or she never physically touched the patient. It therefore seems inapposite to state that the supervision and training of nurses at a hospital does not amount to the active clinical practice of nursing.

occurrence at issue engaged in the "active clinical practice" of nursing. See MCL 600.2169(1)(b).[3]

Even if one were to disregard the ordinary understanding of the phrase "active clinical practice," Boggs unequivocally testified that she took an active role in the care of patients while orienting nurses. Thus, even under a narrow understanding of the phrase "active clinical practice," Boggs spent some portion of this 25 percent of her professional time in active clinical practice. Moreover, common sense dictates that some portion of this percentage involved educating the nurses about their duties and the appropriate care of patients. Because Boggs averred that the hospital was accredited,[4] these educational activities should also be counted toward the professional-time requirements required under MCL 600.2169(1)(b). It is, therefore, evident that the trial court erred when it determined that Boggs did not spend *any* amount of her professional time engaged in the "active clinical practice" of nursing.

Boggs's work in orienting nurses at the hospital amounted to the active clinical practice of nursing

[3] If only the time spent administering to patients counted towards the professional-time requirements stated under MCL 600.2169(1)(b), one would be forced to consider whether any nurse could meet the requirements. Presumably, every nurse must take lunch and bathroom breaks, fill out paperwork, attend staff meetings, and otherwise participate in a variety of activities that do not involve directly administering to patients. Nevertheless, these activities are an integral part of working in a clinical setting.

[4] The hospital claims on appeal that Boggs did not actually teach in an accredited nursing residency or clinical program. However, Boggs averred that she taught at an "accredited facility" and for an "accredited clinical research program[]." When her averments are considered as a whole, she plainly stated that her teaching qualified because she taught in an accredited residency or clinical program. And, in the absence of evidence to contradict her averments at the time of the motion, the trial court clearly erred to the extent that it found that her institution was not properly accredited.

within the meaning of MCL 600.2169(1)(b). Hence, the trial court's determination that Boggs' professional work did not involve any amount of active clinical practice must have been premised on an erroneous interpretation of MCL 600.2169(1)(b). Therefore, it abused its discretion when it struck Boggs under this erroneous understanding. *Kidder*, 284 Mich App at 170.

B. THE INSTRUCTION OF STUDENTS

Similarly, the trial court erred when it determined that Boggs did not spend any of her professional time engaged in qualified instruction. A witness may be qualified to testify as an expert on the standard of care if he or she instructs "students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed . . . ." MCL 600.2169(1)(b)(*ii*). Here, Boggs testified that she spent 50 percent of her professional time teaching at the hospital, which teaching—as already noted—she averred was for an accredited residency program. This, when coupled with her time engaged in the active clinical practice of nursing, clearly constitutes more than 50 percent of her professional time and, therefore, meets the professional-time requirement stated under MCL 600.2169(1)(b). See *Kiefer v Markley*, 283 Mich App 555, 558-559; 769 NW2d 271 (2009).

Further, although Boggs later averred that she spent some portion of her time involved in administrative activities, we do not agree with the trial court's apparent conclusion that the time spent on administrative activities did not qualify as time devoted to the "instruction of students . . . ." The Legislature provided that the professional must have "devoted . . . his or her

professional time" to the "instruction of students . . . ." MCL 600.2169(1)(b)(*ii*). The Legislature's statement that the professional may meet the time requirement by devoting the majority of his or her time to the instruction of students is not the same as stating that the professional must actually spend a majority of his or her time instructing students. We sincerely doubt that any instructor spends the majority of his or her professional time in the actual instruction of students. It is commonly understood that a person who teaches—and especially with regard to persons who teach a profession—must spend significant time preparing for class, maintaining familiarity with new and evolving professional techniques, and participating in meetings designed to further the educational process. Such activities are no less "devoted" to the "instruction of students" than the time actually spent in front of the students demonstrating a procedure or lecturing about the proper standards of care. As such, when it found that Boggs did not devote any portion of her professional time to the instruction of students, the trial court plainly relied on an erroneous understanding of MCL 600.2169(1)(b). As such, it necessarily abused its discretion. *Kidder*, 284 Mich App at 170.

IV. CONCLUSION

On the basis of Boggs's testimony and averments, we conclude that Boggs spent significantly more than 50 percent of her professional time in the active clinical practice of nursing or instructing nursing students.[5]

[5] Boggs testified that she spent 50 percent of her time teaching and another 25 percent of her time in the active clinical practice of nursing. Thus, she met the more than "majority" professional-time requirement. See *Kiefer*, 283 Mich App at 558-559. We note that, even if one were to assume that Boggs only spent 35 percent of her time engaged in qualified

Because Boggs met the professional-time qualification stated under MCL 600.2169(1)(b) as a matter of law, the trial court necessarily abused its discretion when it determined that she was not qualified under that statute. *Kidder*, 284 Mich App at 170. Moreover, because Boggs can testify regarding the standard of care, the trial court erred when it determined that it had to dismiss Gay's case because Gay would not be able to establish an essential element of her claim.

For these reasons, we reverse the trial court's judgment and order dismissing the suit, vacate its October 2010 order striking Boggs as a witness in its entirety, and remand for further proceedings.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, Gay may tax her costs. MCR 7.219(A).

FITZGERALD, J., concurred with M. J. KELLY, P.J.

WHITBECK, J. (*dissenting*). In this nursing malpractice case against Select Specialty Hospital, the majority decision reverses the trial court's order dismissing the action by Patricia Gay, personal representative of the estate of Dolores M. Wright, deceased. I respectfully dissent. Unlike the majority, I believe that the trial court properly determined that plaintiff's originally proposed nursing expert, Kathleen Boggs, R.N., did not meet the requisite MCL 600.2169(1) qualifications to testify regarding the appropriate standard of care. I also believe that the trial court did not err by refusing

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teaching, when the 25 percent of her time that she testified that she spent engaged in the active clinical practice of nursing is added to that time, she still meets the professional-time requirement stated under MCL 600.2169(1)(b).

plaintiff's request to substitute Jean Hurynowicz, R.N., as plaintiff's expert witness. And, further, I believe that the trial court did not abuse its discretion by ordering dismissal with prejudice because there is no remaining time available under the wrongful death saving period.[1] Accordingly, I would affirm.

I. EXPERT'S PROFESSIONAL TIME UNDER MCL 600.2169

The salient question is whether Nurse Boggs devoted sufficient time in the active clinical practice of nursing or instruction in nursing to qualify as an expert witness under MCL 600.2169. The majority concludes that Nurse Boggs did meet the MCL 600.2169 qualifications because she "spent significantly more than 50 percent of her professional time in the active clinical practice of nursing or instructing nursing students." I disagree.

MCL 600.2169 provides, in pertinent part, as follows:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional . . . and meets the following criteria:
>
> * * *
>
> (b) . . . [*D*]*uring the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following*:
>
> (*i*) The *active clinical practice of the same health profession* in which the party against whom or on whose behalf the testimony is offered is licensed . . . .
>
> (*ii*) The *instruction of students in an accredited health professional school or accredited residency or clinical re-*

[1] MCL 600.5852.

> *search program* in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed . . . .[2]

The term "majority" in subsection (1)(b) requires a proposed medical expert to spend greater than 50 percent of his or her professional time practicing or teaching in the same health profession as the party against whom or on whose behalf the testimony is offered during the year before the alleged malpractice.[3]

Nurse Boggs testified in her deposition that from about 2000 to December 2003, she was employed as the director of education at Northlake Medical Center. In this position, she "oversaw education for the whole facility," including orienting new nurses to their units. More specifically, she testified as follows:

> *Q.* [*Counsel*]: Were you taking an active role in patient care as the director of education?
>
> *A.* [*Nurse Boggs*]: Only as far as I was working with the new nurses on their nursing unit.
>
> *Q.* And what percentage of your job as director of education was working with new nurses to orientate them to their new floors?
>
> *A.* Probably 25 percent.
>
> * * *
>
> *Q.* And that was 25 percent of your time. What was the other 75 percent of your time spent doing?
>
> *A.* Fifty percent teaching and 25 percent meetings and setting up classes.

In sum, according to Nurse Boggs's deposition testimony, she spent 25 percent of her time orienting new

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[2] Emphasis added.

[3] *Kiefer v Markley*, 283 Mich App 555, 559; 769 NW2d 271 (2009).

nurses to their assigned units, 25 percent of her time in meetings and setting up classes, and 50 percent of her time teaching. On the basis of this testimony alone, I would agree with the majority that Nurse Boggs would meet the MCL 600.2169(1)(b)(*ii*) requirement by spending greater than 50 percent of her professional time in the instruction of nursing students: she clearly testified that she spent 50 percent of her time teaching and some additional portion of her time setting up classes, which, although more akin to an administrative task, does arguably fall within the scope of "instruction of students." However, this deposition does not end the inquiry into the calculation of Nurse Boggs's time.

In her later-filed supporting affidavit, Nurse Boggs clarified:

> [I]n addition to the 25% of my professional time I spent in the active clinical practice of nursing, most of the rest, I believe 65%, of my total professional time was very much focused on the education and training of nurses in that accredited facility and in its accredited clinical research programs.

She explained that the remaining 10 percent of her time was spent performing "clerical tasks facilitating my instructional role[.]"

Thus, while continuing to claim that 25 percent of her time was spent in the active clinical practice of nursing by virtue of her orientation of new nurses, Nurse Boggs significantly amended her explanation of the remaining 75 percent of her time. More specifically, according to Nurse Boggs, of the 65 percent that she claimed was spent "focused on the education and training of nurses," she actually spent that time as follows:

> • 25 percent "teaching new issues and . . . procedures and brushing up skills and knowledge bases on all policies, practices and procedures to our nurses in an accredited classroom setting";
>
> • 10 percent "chairing the nursing policy and procedure committee, as a member of the education committee";
>
> • 10 percent "teaching nurses[,] . . . emergency medical technicians[,] and others . . . basic life support classes, providing candidate advice for advanced life support certification . . . and in continuing my own training"; and
>
> • 20 percent "as the co-chair of the policy and procedure committee of the hospital, as a member of the patient care and education committee and assisting in the preparation of the Joint Commission surveys which were the basis of our continuing accreditation."

On the basis of this additional information, I conclude that the trial court did not abuse its discretion by finding that Nurse Boggs was not qualified to testify as an expert under MCL 600.2169(1)(b).

With respect to active clinical practice, as stated, Nurse Boggs testified in her deposition and averred in her affidavit that 25 percent of her time was spent in active nursing practice by virtue of her orientation of new nurses. However, in my interpretation, I believe that Nurse Boggs's time spent orienting new nurses to their units did not qualify as "active clinical practice" because it did not involve the active care of patients.[4] That is, I believe that the key component of the phrase "active clinical practice" is the word "active," which is

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[4] See, e.g., *Hatchett v Surapaneni*, unpublished opinion per curiam of the Court of Appeals, issued November 6, 2003 (Docket No. 238714) (stating that the proposed expert witness devoted a majority of his time to active clinical practice because "about 50 percent of his professional time was spent performing research – but it was clinical research, i.e., had a significant clinical component, *including patient care and treatment*," and "about 30 percent of his time to *seeing his own clients*") (emphasis added).

defined, in pertinent part, as "3. marked by or disposed to direct involvement or practical action[;] . . . 6. characterized by current activity, participation, or use[.]"[5] Thus, in my opinion, working in a clinical setting merely overseeing employees who actually treat the patients is too removed from the type of experience contemplated by the statutory requirement.

Thus, I turn to consideration of the remaining 75 percent of Nurse Boggs's time. Again, Nurse Boggs clarified in her affidavit that, of that 75 percent, she actually spent 10 percent as chair of the nursing policy and procedure committee and 20 percent as the cochair of the policy and procedure committee of the hospital. Thus, 30 percent of that 75 percent was clearly spent on activities other than active clinical practice or teaching.

That leaves only 45 percent of Nurse Boggs's time remaining. And although this time was arguably spent on the instruction of students in some capacity (10 percent on clerical tasks facilitating her instructional role; 25 percent on teaching and "brushing up" nurses on policies, practices, and procedures; and 10 percent teaching basic life support classes), 45 percent is below the requisite "majority" of time—that is, more than 50 percent—necessary to satisfy the statute. Accordingly, I would conclude that the trial court did not abuse its discretion by striking Nurse Boggs as an expert because she was not qualified to offer expert testimony in this nursing malpractice case.

II. PROPER REMEDY

A. STANDARD OF REVIEW

Plaintiff argues that even if the trial court properly struck Nurse Boggs's testimony, it erred by dismissing

[5] *Random House Webster's College Dictionary* (2d ed, 1997), pp 13-14.

the lawsuit because other remedies—such as amendment of the affidavit of merit and substitution of Jean Hurynowicz, R.N., for Nurse Boggs, or dismissal without prejudice—were available and appropriate remedies. This Court reviews for an abuse of discretion a trial court's decision to deny amendment of witness lists.[6] This Court also reviews for an abuse of discretion a trial court's decision to dismiss an action.[7]

B. UNDERLYING FACTS

After receiving notice of the hospital's September 2010 motion to strike Nurse Boggs as an expert and dismiss plaintiff's complaint with prejudice, plaintiff retained Nurse Hurynowicz to review the pertinent documentation to determine whether the hospital's nursing staff had committed malpractice in its treatment of Wright. Nurse Hurynowicz concluded that nursing malpractice had been committed, and in October 2010, plaintiff served a supplemental witness list on the hospital.

The hospital moved to dismiss plaintiff's supplemental witness list on the ground that it was untimely filed, two years after the initial complaint had been filed and only six weeks before trial. Plaintiff responded that seeking to replace Nurse Boggs with Nurse Hurynowicz was a prudent and necessary step to avoid adjournment of the trial in the event that the trial court concluded that Nurse Boggs did not qualify as an expert. And plaintiff argued that even if the trial court refused to allow substitution of Nurse Boggs with Nurse Hurynowicz, the proper remedy would be dismissal without prejudice.

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[6] *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1992).

[7] *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995).

The hospital also filed a brief, arguing that dismissal with prejudice was the proper remedy. According to the hospital, plaintiff filed her complaint outside the applicable period of limitations, and the deficient affidavit of merit did not toll the wrongful death saving period, which expired on November 14, 2008; thus, plaintiff's case would be timebarred, and dismissal with prejudice was the only available remedy.

After hearing further oral arguments on the matter, the trial court first stated that its understanding of the pertinent caselaw led to a conclusion that whether or not a plaintiff's attorney had a reasonable belief regarding its expert's qualifications, the remedy was dismissal without prejudice. However, the trial court questioned whether the close temporal proximity to the trial nevertheless warranted dismissal with prejudice. The trial court also indicated that it was persuaded by caselaw that stated that a defective affidavit of merit does not toll the wrongful death saving period and results in dismissal with prejudice.

C. AMENDMENT AND SUBSTITUTION OF NURSE HURYNOWICZ FOR NURSE BOGGS

Plaintiff argues that the trial court erred by not allowing her to substitute Nurse Hurynowicz as her expert witness. I disagree.

I first note that plaintiff's reliance on *Dean v Tucker*[8] is misplaced because that case involved discovery sanctions rather than the failure to produce a witness qualified to testify under MCL 600.2169. Thus, the *Dean* factors are inapplicable.

With that said, I find it significant that the trial court's original scheduling order required that plaintiff

[8] *Dean v Tucker*, 182 Mich App 27, 31-33; 451 NW2d 571 (1990).

disclose all expert witnesses by August 18, 2009. That date was later extended until January 17, 2010. And a later scheduling order required that plaintiff depose all expert witnesses by August 3, 2010. Here, the trial court had discretion to decline to entertain requests beyond the time frames agreed to and set forth in a scheduling order.[9] "Were the rules not so construed, scheduling orders would quickly become meaningless."[10] This was not an extreme case warranting a finding of an abuse of discretion.[11] Indeed, I conclude that the trial court's refusal to allow the substitution of an entirely new expert witness only 50 days before trial was well within the range of principled outcomes, especially in light of its ruling that dismissal with prejudice was the proper remedy for the defective affidavit of merit.

D. DISMISSAL WITH PREJUDICE

Plaintiff argues that dismissal of the case should have been ordered without prejudice so that plaintiff could refile her cause of action within the remaining time left in the period of limitations. The hospital argues that it was proper for the trial court to dismiss plaintiff's lawsuit with prejudice because the trial court struck plaintiff's only nursing expert. Therefore, the hospital argues, plaintiff was unable to establish her prima facie case.

Plaintiff is correct that, pursuant to *Kirkaldy v Rim*,[12] the filing of a complaint and accompanying affidavit of merit tolls the applicable period of limita-

[9] *People v Grove*, 455 Mich 439, 464-465; 566 NW2d 547 (1997).

[10] *Id.* at 469.

[11] *Id.*

[12] *Kirkaldy v Rim*, 478 Mich 581, 586; 734 NW2d 201 (2007).

tions until the validity of the affidavit is successfully challenged. Thus, where an affidavit of merit is found defective, dismissal without prejudice is the proper remedy, allowing the plaintiff to refile the cause of action within whatever time still remains in the period of limitations.[13]

However, as the trial court correctly recognized, pursuant to *Ligons v Crittenton Hosp*,[14] the filing of a complaint and accompanying affidavit of merit does not toll the wrongful death saving period.[15] Thus, where the wrongful death saving period has expired, the proper remedy for a personal representative's failure to submit a conforming affidavit of merit is dismissal with prejudice.[16]

Here, it is undisputed that the alleged malpractice occurred on November 14, 2003, and therefore, the applicable two-year period of limitation[17] expired on November 14, 2005. But plaintiff did not file her complaint and affidavit of merit until November 5, 2008, almost three years after the two-year period of limitations expired. Thus, contrary to plaintiff's contentions, *Kirkaldy* is inapplicable because there is no time remaining in the limitations period in which to refile the case.

The expiration of that period of limitations did not time bar plaintiff's action, however, because under the wrongful death saving provision she had, at the latest, until November 14, 2008, to file her claim.[18] Plaintiff filed her

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[13] *Id.*

[14] *Ligons v Crittenton Hosp*, 285 Mich App 337, 354; 776 NW2d 361 (2009).

[15] MCL 600.5852.

[16] *Ligons*, 285 Mich App at 354.

[17] MCL 600.5805(6).

[18] Under the wrongful death saving provision, the personal representative of the estate of a deceased person may file an action at any time

complaint and affidavit of merit on November 5, 2008. But because under *Ligons* that filing had no tolling effect on the wrongful death saving period, there is no remaining time available under the wrongful death saving period and the successful challenge to the affidavit of merit requires dismissal with prejudice.

Accordingly, I conclude that the trial court did not abuse its discretion by ordering dismissal with prejudice.

I would affirm.

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within two years after letters of authority are issued, but no later than three years after the period of limitations has run. MCL 600.5852.

In re MOROUN

Docket No. 308053. Submitted February 2, 2012, at Detroit. Decided February 6, 2012, at 9:00 a.m. Leave to appeal denied, 491 Mich 855.

The Michigan Department of Transportation (MDOT) brought an action in the Wayne Circuit Court against the Detroit International Bridge Company (DIBC) and Safeco Insurance Company of America, alleging that DIBC had failed to construct its portion of the Ambassador Bridge Gateway Project in accordance with an agreement that had been executed between MDOT and DIBC. Safeco, as surety, had issued a performance bond supporting DIBC's portion of the project. MDOT filed two motions for partial summary disposition. MDOT first moved for a partial judgment ordering DIBC to construct a two-lane access road for the project. MDOT then moved for a partial judgment ordering DIBC to complete construction of its portion of the project in accordance with the plans attached to the performance bond. DIBC countered that the parties had only committed to a design concept and that there was no final, agreed-upon set of plans for the project. On February 1, 2010, the court, Prentis Edwards, J., granted both motions and ordered DIBC to complete construction of its portion of the project in accordance with the plans attached to the performance bond. The Court of Appeals denied DIBC's interlocutory application for leave to appeal. The Supreme Court also denied DIBC's application for leave to appeal. 486 Mich 937 (2010). In the trial court, DIBC moved for revision, clarification, and amendment of the February 1, 2010, order for specific performance. The trial court denied the motion and subsequently issued a show-cause order compelling DIBC to appear and explain why it should not be held in contempt for failing to comply with the February 1, 2010, order. After several postponements, partially resulting from DIBC's unsuccessful attempts to remove the lawsuit to federal court, the show-cause hearing was held in December 2010. On January 10, 2011, the trial court ruled that DIBC was failing to comply with the court's February 1, 2010, order and was in civil contempt. The court ordered that Dan Stamper, president of DIBC, be incarcerated until DIBC began to comply with the February 1, 2010, order. The court ordered Stamper's release later the same day after learning that DIBC had taken steps to comply with the order. In June 2011, MDOT filed an ex parte

motion for continuation of the contempt proceedings, alleging that DIBC was continuing to violate the trial court's February 1, 2010, order. The trial court issued a show-cause order, directed at Stamper and DIBC, to appear and explain why DIBC should not be held in civil contempt. Following further hearings on the matter, on November 3, 2011, the trial court issued an opinion and order holding that DIBC was, again, in civil contempt for failing to comply with the February 1, 2010, order. The court listed several options it was considering to coerce compliance and directed that "the top company officer for DIBC" and Manuel J. Moroun, a director of DIBC and its owner, DIBC Holdings, Inc., appear before the court on January 12, 2012, to address the sanctions issue. On that date, after discussing several options for sanctions, the Court stated that DIBC was best equipped to complete the project and that the key decision-makers, whom the court identified as Stamper, Moroun, and Moroun's son (the vice president of DIBC), had the responsibility to ensure DIBC's compliance. The court ordered that Moroun and Stamper be incarcerated until DIBC "fully complied" with the trial court's February 1, 2010, order or until they no longer had the power to comply with it. Moroun and Stamper appealed and moved for release pending appeal. The Court of Appeals denied the motion for release pending appeal. Stamper and Moroun then moved for peremptory reversal and a stay. The Court of Appeals denied the motion for peremptory reversal but granted, in part, the motion for stay, releasing Stamper and Moroun pending further order of the Court.

In a lead opinion by K. F. KELLY, J., and separate opinions by WILDER, P.J., and FORT HOOD, J., the Court of Appeals *held*:

1. An order finding a party in civil contempt of court is not a final order for purposes of appellate review by right. However, the right of a nonparty to appeal an adjudication of contempt cannot be questioned even in the absence of a final order. The same principle applies to individuals not personally held in contempt but sanctioned as decision-makers to enforce a company's compliance with a court order. Accordingly, the Court of Appeals had jurisdiction to hear Stamper and Moroun's appeal as an appeal by right.

2. Individuals who are officially responsible for the conduct of a corporation's affairs are required to obey a court order directed at the corporation, and they may be sanctioned if they fail to take appropriate action within their power to ensure that the corporation complies with the court order. Accordingly, Stamper and Moroun could be held accountable for failing to ensure DIBC's compliance with the trial court's order.

3. A civil contempt proceeding requires only rudimentary due process. In other words, it requires notice and an opportunity to be

heard. When contempt is committed outside the court's view, MCL 600.1711(2) permits the court to punish the contemnor by fine or imprisonment, or both, after proof of the facts charged has been made by affidavit or other method and an opportunity has been given to defend. The court must also comply with MCR 3.606(A), which, on a proper showing on ex parte motion supported by affidavits, requires that the trial court (1) order the accused person to show cause, at a reasonable time specified in the order, why that person should not be punished for the alleged misconduct or (2) issue a bench warrant for the arrest of the person. With regard to Moroun, he was a director of DIBC and his living trust held the majority of the voting shares in DIBC Holdings, which owned DIBC. He admitted that he had been informed about the project and the trial court's order regarding the project. The trial court's November 3, 2011, opinion and order finding DIBC in contempt discussed possible sanctions, including imprisonment, and directed Moroun to appear at the hearing on sanctions. Accordingly, he was provided notice that he might be sanctioned for DIBC's contempt and an opportunity to be heard on the matter. With regard to Stamper, he was listed on the show-cause order, was present throughout the contempt proceedings, actively participated in DIBC's defense, and had previously been incarcerated for DIBC's contempt. There was no dispute regarding Stamper's authority over the company and the project. Accordingly, he had notice that he might be incarcerated as a coercive sanction for DIBC's contempt and was provided an opportunity to be heard on the matter.

4. Confinement or imprisonment may be imposed whether the contempt is civil or criminal in nature. In the context of civil contempt, the term of imprisonment ceases when the contemnor complies with the court's order or no longer has the power to comply. The contemnor must be able to purge the contempt and obtain release by performing an affirmative act or duty. In other words, the contemnor must carry the keys to the prison in his or her own pocket. The commitment order must specify the act or duty.

5. The trial court's decision to use coercive measures that included incarceration was not an abuse of discretion. In this case, however, the trial court's order of imprisonment could not be upheld because the order failed to adequately identify the act or duty Stamper and Moroun had to perform to purge the contempt.

6. Contrary to the assertions of Stamper and Moroun, the trial court did not act as both an accuser and finder of fact by imposing a sanction that was not requested by MDOT. The court provided an adequate explanation of why the alternative sanctions were inadequate.

Affirmed in part, vacated in part, and remanded; judgment given immediate effect in light of pending hearing by the trial court on the status of the project.

WILDER, P.J., concurring in part and dissenting in part, agreed that the Court of Appeals had jurisdiction over the claim of appeal, but reasoned that because they were nonparties, the order sanctioning Stamper and Moroun was a final order appealable by right under MCR 7.202(6)(a)(i). The lead opinion also correctly concluded that the trial court's commitment order failed to adequately identify what actions Stamper and Moroun were required to take that would allow them to immediately purge themselves of the contempt finding made against DIBC. Stamper and Moroun, however, did not receive sufficient notice that they could personally be held in contempt and punished. The plain meaning of MCR 3.606(A)(1) requires that an individual be given direct notice to appear and show cause why he or she should not be held in contempt for specific contumacious conduct. Because such notice was not given to Stamper and Moroun in this case, the contempt sanctions imposed against them violated due process of law. Because the issue had not been previously addressed in Michigan and the panel issued three separate opinions, the judgment of the Court of Appeals should not have been given immediate effect.

FORT HOOD, J., concurring in part and dissenting in part, joined in and concurred with the lead opinion in all respects except with regard to the sanction of imprisonment and would have affirmed the trial court's decision in its entirety. Although civil contempt is primarily coercive in nature, the sanction for civil contempt may also have a punitive effect. Imprisonment for civil contempt might be forever as long as it is within the contemnor's power to comply with the court order he or she has refused to carry out. The court must use the least possible power necessary to achieve the proposed end, but the propriety of the contempt sanction is contingent on the facts and circumstances in each individual case. The commitment order was justified in this case in light of DIBC's willful, continuous, and contemptuous failure to comply with the trial court's February 1, 2010, order. Promised future compliance with prior judicial orders is a common and appropriate method of purging contempt. Stamper and Moroun had the means and knowledge to immediately purge the contempt by promises of future compliance or good-faith efforts to comply with the court's order. Thus, the trial court did not abuse its discretion by imposing an order of contempt and incarcerating them until the project was completed.

1. CONTEMPT — CIVIL CONTEMPT — APPEAL BY RIGHT — JURISDICTION — FINAL ORDER — NONPARTIES.

An order finding a party in civil contempt of court is not a final order for purposes of appellate review by right, but the right of a nonparty to appeal an adjudication of contempt cannot be questioned even in the absence of a final order; the same principle applies to individuals not personally held in contempt, but sanctioned as decision-makers to enforce a company's compliance with a court order (MCL 600.308[2]; MCR 7.202[6][a]).

2. CONTEMPT — CIVIL CONTEMPT — CORPORATIONS — OFFICERS AND AGENTS.

Individuals who are officially responsible for the conduct of a corporation's affairs are required to obey a court order directed at the corporation, and they may be sanctioned if they fail to take appropriate action within their power to ensure that the corporation complies with the court order.

3. CONTEMPT — CIVIL CONTEMPT — INDIRECT CONTEMPT — DUE PROCESS.

A civil contempt proceeding requires only rudimentary due process, i.e., notice and an opportunity to be heard; when contempt is committed outside the court's view, the court may punish the contemnor by fine or imprisonment, or both, after proof of the facts charged has been made by affidavit or other method and an opportunity has been given to defend; on a proper showing on ex parte motion supported by affidavits, the trial court must (1) order the accused person to show cause, at a reasonable time specified in the order, why that person should not be punished for the alleged misconduct or (2) issue a bench warrant for the arrest of the person (MCL 600.1711[2]; MCR 3.606[A]).

4. CONTEMPT — CIVIL CONTEMPT — SANCTIONS — CONDITIONAL IMPRISONMENT.

Confinement or imprisonment may be imposed whether the contempt is civil or criminal in nature; in the context of civil contempt, the term of imprisonment ceases when the contemnor complies with the court's order or no longer has the power to comply; the contemnor must be able to purge the contempt and obtain release by committing an affirmative act or duty, and the commitment order must specify the act or duty (MCL 600.1715[2]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Robert L. Mol*, *LuAnn Cheyne Frost*, and

Michael Dittenber, Assistant Attorneys General, for the Department of Transportation.

Kerr, Russell and Weber, PLC (by *William A. Sankbeil* and *Joanne Geha Swanson*), *Young & Susser, P.C.* (by *Rodger D. Young*), and *Domina Law Group PC LLO* (by *David A. Domina*) for Manuel J. Moroun.

Mogill, Posner & Cohen (by *Kenneth M. Mogill* and *Jill M. Schinske*) and *Domina Law Group PC LLO* (by *David A. Domina*) for Dan Stamper.

Before: WILDER, P.J., and K. F. KELLY and FORT HOOD, JJ.

K. F. KELLY, J. Appellants, Manuel J. Moroun and Dan Stamper, appeal as of right the trial court's January 12, 2012, order directing that they be imprisoned in the Wayne County jail until defendant Detroit International Bridge Company (DIBC) fully complied with the trial court's opinion and order of February 1, 2010. Moroun is a director of DIBC and Stamper is its president. Previously, on November 3, 2011, the trial court found DIBC in civil contempt for failing to comply with the February 1, 2010, order, which had been entered in the underlying lawsuit filed by plaintiff Michigan Department of Transportation (MDOT) against DIBC and Safeco Insurance Company of America.[1] We conclude that appellants' due-process rights were not violated and that the trial court was clearly acting within its inherent and statutory powers to order DIBC's key decision-makers incarcerated pend-

[1] As explained in greater detail later in this opinion, the underlying lawsuit concerns a large construction project undertaken by MDOT and DIBC. Safeco, as surety, issued a performance bond supporting DIBC's portion of the project.

ing DIBC's compliance with the trial court's February 1, 2010, order. However, the commitment order requiring full compliance cannot stand because appellants do not have the immediate ability to completely finish construction and thus "purge" DIBC of the contempt. Because the commitment order does not provide appellants with the "keys to the jailhouse," we vacate that portion of the trial court's commitment order that continues incarceration until DIBC has "fully complied" and remand the case to the trial court. On remand, the trial court shall craft an order stating with particularity what act or duty appellants must perform both to ensure that DIBC will begin and continue compliance with the court's February 1, 2010, order as well as to enable them to purge themselves of the contempt finding against DIBC. Accordingly, we affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. BASIC FACTS AND PROCEDURAL HISTORY

The underlying lawsuit arises from the Ambassador Bridge Gateway Project, which is intended to facilitate the flow of traffic between the United States and Canada over the Ambassador Bridge (the Bridge) by constructing interstate freeway connections to the Bridge. DIBC owns and operates the Bridge. Stamper is the president of DIBC and is extensively involved in the operation and construction activities at the Bridge and in the defense of this lawsuit. Moroun has a living trust that is a minority shareholder of DIBC Holdings, Inc., which, in turn, owns DIBC. Moroun is also a director on the boards for DIBC and DIBC Holdings.

In April 2004, MDOT and DIBC executed an agreement, which required DIBC to construct Part A of the project in accordance with MDOT specifications and

standards; plans and designs were attached to the contract as exhibits. DIBC was responsible for 100 percent of the costs associated with Part A, including construction and property acquisition costs. Because DIBC was unable to acquire all the property interests needed to complete Part A, the contract was amended in February 2006, whereby MDOT assumed responsibility to acquire, through the power of eminent domain if necessary, the property interests encompassed by a portion of Part A. On March 12, 2007, a performance bond was executed, which provided that DIBC and Safeco "are held and firmly bound unto" MDOT in the penal sum of $34,664,650 and that "the condition of this obligation" is that "the above named principal shall and will, well and faithfully, and fully . . . execute and perform all of the obligations contained in the attached documents identified as Exhibits A through Exhibit E, listed below." Exhibit E was described in the bond as "Plans for DIBC portion of the Ambassador Bridge/Gateway Project (Part A, DIBC portion) per MDOT/DIBC agreement as amended." In November 2007, MDOT and DIBC also executed a maintenance agreement, whereby DIBC agreed to maintain and operate certain physical features or structures located on a portion of M-85, including a truck road and related infrastructure, and a gate system. The parties also agreed that DIBC could use M-85, the I-75 exit ramp, and an access easement road in emergency situations, under certain conditions and limitations set forth in the agreement.

On June 24, 2009, MDOT filed a lawsuit against DIBC and Safeco alleging that DIBC had not performed the construction in accordance with the agreements. Among other claims, MDOT alleged that DIBC was constructing Part A according to a "Conflicting Design," a plan not approved by MDOT, the Federal

Highway Administration, or the city of Detroit, which included (1) constructing permanent tollbooths in the location where DIBC had agreed to construct an access easement drive, (2) installing facilities including automobile-fueling pumps in the location where it had agreed to construct DIBC Ramp S04, the ramp over 23rd Street for traffic to Canada, (3) installing facilities including underground fuel tanks in the location where it had agreed to construct the two-lane truck road and DIBC Ramp S05, the ramp over 23rd Street carrying truck traffic to the interstate highways, and (4) constructing Pier 19 at a location that blocks construction of the two-lane truck road from the truck plaza, as well as a "special return route" for maintenance and emergency vehicles. MDOT sought a cease-and-desist order regarding ongoing construction activities by DIBC, reimbursement for costs associated with contractual breaches of the parties' agreements, an order of specific performance to direct DIBC to engage in construction consistent with the agreement, damages incurred as a result of DIBC's actions, and any other appropriate equitable and monetary relief.

On October 29, 2009, MDOT filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10), seeking a partial judgment ordering DIBC to construct the two-lane access road for the project. Two weeks later, on November 13, 2009, MDOT filed a second motion for partial summary disposition and an order for specific performance pursuant to MCR 2.116(C)(10), seeking a partial judgment ordering DIBC to construct the necessary roads, ramps, and bridges to connect the I-75 and I-96 freeways directly to the Ambassador Bridge in accordance with the agreed-upon design for those structures. In response to these motions, DIBC essentially argued that the parties had developed a "flexible" plan, that they had merely committed to a

"design concept," and that they did not memorialize any particular plan or agreement regarding the design or construction of particular roads, structures, or improvements. DIBC submitted the affidavit of Stamper to support its assertion that there was never "an immutable, final, agreed set of plans."

On February 1, 2010, the trial court issued an opinion and order granting both motions and granting MDOT's request for specific performance. The trial court found that MDOT and DIBC had "agreed on a design for DIBC's Part A of the project," as reflected in the agreements and incorporated into the performance bond, and that DIBC had not constructed Part A according to the agreed-upon design. In doing so, the trial court rejected DIBC's arguments that it was not restricted by the contract to a particular design and that it could unilaterally substitute different access routes. The trial court further noted that "DIBC ha[d] constructed permanent structures and facilities in conflict with the designs for the easement, road and ramps." Accordingly, the trial court directed DIBC, among other things, to "remove structures that have been constructed in the path of the access road and recorded easement and complete construction of its portion of the Gateway Project in accordance with the plans attached to the Performance Bond and the Maintenance Agreement."

On February 19, 2010, DIBC filed an emergency application seeking leave to appeal the court's opinion and order granting partial summary disposition, along with motions for immediate consideration and for a stay of the order. This Court denied DIBC's interlocutory application for leave to appeal "for failure to persuade the Court of the need for immediate appellate review" and denied the motion for a stay. *Dep't of Transp v*

Detroit Int'l Bridge Co, unpublished order of the Court of Appeals, entered March 17, 2010 (Docket No. 296567).

DIBC then filed a motion in the trial court seeking revisions, clarification, and amendment of the order because the order did not address the issue of material and nonmaterial changes. DIBC claimed that MDOT's approval was not needed for nonmaterial changes. At a hearing conducted on April 23, 2010, the trial court ruled that its order was enforceable, that a timetable for the completion of construction submitted by DIBC was unsatisfactory, and that DIBC's motion for revision, clarification, and amendment was frivolous.

Four days later, the trial court issued an order to show cause, directing DIBC and Stamper to appear in court on May 10, 2010, to explain why DIBC should not be held in civil contempt for failing to comply with the terms of the February 1, 2010, opinion and order. On the same day, DIBC filed an application with the Supreme Court, as well as a motion for a stay and a motion for immediate consideration, seeking leave to appeal this Court's denial of its application for leave to appeal filed in Docket No. 296567. The Supreme Court initially granted a stay, but subsequently denied DIBC's application for leave to appeal and vacated the stay. *Dep't of Transp v Detroit Int'l Bridge Co*, 486 Mich 937 (2010).

The trial court rescheduled the show-cause hearing for June 10, 2010, and then for September 23, 2010, but as a result of DIBC's attempt to remove the lawsuit to federal district court, each hearing was adjourned. The trial court was finally able to conduct the show-cause hearing in December 2010, over the course of three days. Stamper appeared and testified at the hearing. On January 10, 2011, the trial court ruled that it was

finding by clear and unequivocal evidence that (1) DIBC was not complying with the terms and provisions of the February 1, 2010, order, (2) the failure to comply impaired the authority and impeded the functioning of the court, (3) DIBC's acts and omissions occurred outside of the presence of the court, and (4) DIBC was in civil contempt. The trial court found that the timetable submitted by DIBC, which provided a completion date in June 2013, was completely unacceptable, especially given that at least 60 to 70 percent of the work had been completed, and directed DIBC to submit a detailed timetable that would ensure full compliance with the February 1, 2010, order within one year. The trial court also directed DIBC to submit biweekly reports regarding all scheduled work and work in progress. The trial court further ordered that Stamper be imprisoned in the Wayne County jail until DIBC began to comply with the February 1, 2010, order. Stamper was released later in the day once it was reported to the trial court that DIBC was beginning to comply with the order to remove the structures.

DIBC again filed an application seeking leave to appeal the February 1, 2010, opinion and order as well as the January 10, 2011, contempt order. This Court denied DIBC's interlocutory application "for failure to persuade the Court of the need for immediate appellate review" and denied the motion for a stay. *Dep't of Transp v Detroit Int'l Bridge Co*, unpublished order of the Court of Appeals, entered March 18, 2011 (Docket No. 302330). DIBC did not seek leave to appeal in the Supreme Court.

In June 2011, MDOT filed an ex parte motion for continuation of contempt proceedings under MCR 3.606(A) because of DIBC's continuing violation of the court's February 1, 2010, opinion and order. In its

motion, MDOT claimed that DIBC had not removed any conflicting structures and had not constructed any public roads, as ordered by the court. MDOT submitted an affidavit supporting the motion. On June 13, 2011, the trial court issued a show-cause order directing Stamper and DIBC to personally appear and show cause why DIBC should not be held in civil contempt for failure to comply with the terms and provisions of the February 1, 2010, opinion and order. DIBC's resident agent was served with the order. Stamper was also personally served with the order, appeared at the hearing as directed, and provided testimony in defense of the civil contempt charge against DIBC at subsequent hearings conducted in September and October 2011.

The trial court issued an opinion and order on November 3, 2011, in which it found by clear and unequivocal evidence that DIBC was in violation of the February 1, 2010, order, and therefore ruled that DIBC was, again, in civil contempt of the court. The trial court stated that the project site plan that was illustrated in the C-1 drawing "identifies the major components" of the Gateway Agreement and that DIBC was responsible for constructing "various components" shown in the C-1 drawing, which included the S01 Bridge for outbound traffic to Canada and the "4/3 lane" road under the S01 Bridge. After describing the factual background and previous proceedings in this case, the court summarized the testimony from the hearing and then set forth the following findings of fact:

> DIBC has provided plans for construction and has constructed parts of a design that is not in agreement with the approved design. DIBC's request for a variance for the alternate design has been denied by MDOT. The proposed substitute design materially changes the approved design. The proposed construction plans leave out important parts of the approved design including the two-lane access road

and special return routes shown on the C-1 drawing and the Maintenance Agreement. Additionally, DIBC has not removed various conflicting structures that are in the path of roads shown in the approved design.

The C-1 drawing in Exhibit E to the Performance Bond required DIBC to construct a four lane road that proceeds in a southerly direction under [the] S01 [ramp] and between its piers. The C-1 drawing shows the four lanes making a turn to the west, paralleling Fort Street and then narrowing to three lanes. The as-built plans submitted by DIBC, show that piers of S01 (piers 11, 12, and 13) are in conflict with the four lane road that passes under S01. DIBC did not submit preliminary and final construction plans to MDOT for approval, prior to the start of construction of S01 as required by the Gateway Agreement. DIBC constructed a two lane road that proceeds in a southerly direction under S01 between the piers conflicting with the C-1 drawing. Cars using those two lanes may stop for fueling, stop at the duty free store or proceed to S01. Truck traffic is routed in a southwesterly direction at pier 11, through newly constructed toll booths toward a truck fueling area. The car fueling area is in the path of the 4/3 lane road shown in C-1. S01 as presently constructed, is not in compliance with the February 1, 2010 Order of this Court. Mr. [Thomas] LaCross[, an engineer serving as project manager for the Ambassador Bridge Gateway project on behalf of DIBC,] and Mr. [Michael] Anderson[, an engineer employed by a security firm representing Safeco,] acknowledged that S01 was not constructed in conformity with C-1 of Exhibit E to the Performance Bond.

DIBC has sought approval for variances, including approval for nonconforming as-built plans for S01 from MDOT; however, those requests have not been approved. DIBC has not submitted construction plans that satisfy the requirements of the plans attached to the Performance Bond and the Maintenance Agreement for the access road and the truck road. The truck road from Canada is a two lane road that carries truck traffic in a westerly direction, parallel to Fort Street. The truck road continues to the S02 Bridge to S32 to convey truck traffic onto the freeways.

> Pier 19 conflicts with the proposed truck road. Plans have not been submitted for the correction of piers 11, 12, 13 and the relocation of pier 19.

With respect to sanctions, the trial court listed options it was considering to coerce compliance with the February 1, 2010, order: (1) requiring DIBC's surety, Safeco, to take over responsibility for completing the project, (2) having MDOT or another construction company complete DIBC's portion of the project, (3) *financial sanctions or imprisonment, or both*, and (4) appointment of a receiver to stand in the place of the owner of DIBC (Moroun, according to the court) and its officers with authority to make decisions regarding the implementation of the February 1, 2010, order. The trial court indicated that it would make this sanction determination at a hearing on January 12, 2012, and directed DIBC in the interim to remove conflicting structures and perform construction in accordance with the C-1 drawing. The trial court also directed Moroun and "the top company officer for DIBC" to appear before the court on January 12, 2012, on the sanctions issue.

DIBC filed an application seeking leave to appeal the November 3, 2011, order and a motion for immediate consideration. This Court denied the interlocutory application "for failure to persuade the Court of the need for immediate appellate review" and denied the motion for a stay. *Dep't of Transp v Detroit Int'l Bridge Co*, unpublished order of the Court of Appeals, entered January 10, 2012 (Docket No. 307306).

In the meantime, Moroun filed a motion to be excused from appearing at the January 12, 2012, hearing. Moroun's motion stated that it was intended to inform the trial court that he was not the owner of DIBC and that he was not the decision-maker with respect to the Gateway Project, and further asserted:

> Mr. Moroun is not the owner of DIBC. DIBC is owned by DIBC Holdings, Inc. ("DIBC Holdings"). The Manuel J. Moroun Trust Dated March 24, 1977 As Amended and Restated on August 28, 1996 is a minority owner of DIBC Holdings. Mr. Moroun is a member of DIBC's board of directors, and he has not been a statutory officer of DIBC during any pertinent time. While Mr. Moroun has been informed about the Ambassador Bridge Gateway Project ("Gateway Project") and this Court's order regarding the Gateway Project, from the inception, authority over the Gateway Project – and subsequently this litigation – has been the responsibility of Dan Stamper, DIBC's president for over 20 years.

MDOT filed a response to the motion, asserting that Moroun should not be excused from the hearing regarding sanctions for the contempt order because he was a director and owner of DIBC Holdings, Inc., which is the sole owner of DIBC and DIBC was under the trial court's authority and jurisdiction. MDOT also asserted that Moroun and Stamper were directors of DIBC and that they constituted a majority in control of DIBC. MDOT also pointed out that Stamper had testified at the show-cause hearing that he reported to the board of directors, which included Moroun.

The parties, and appellants, along with their attorneys, appeared at the hearing conducted on January 12, 2012. In denying Moroun's motion to be excused, the trial court stated:

> In addition, the claim that Manuel Moroun has no control or authority is not supported by the record of this case. Mr. Moroun has the power, the authority to make sure that there is compliance with the February 1st, 2010 Order of this Court. The request to excuse Mr. Moroun from this hearing is therefore denied.

After discussing several options for sanctions, the trial court stated that DIBC "is best equipped to complete

the project at this time" because it has the power, the resources, and the knowledge to comply with the court's order, and that the "key decision makers," who were Manuel Moroun, Stamper, and Matthew Moroun (Manuel Moroun's son and the vice president of DIBC), had the responsibility to ensure that DIBC fully complied with the order. The trial court then directed DIBC to pay the maximum fine of $7,500 and MDOT's costs and reasonable attorney fees and directed that appellants be imprisoned in the Wayne County jail until DIBC complied with the court's February 1, 2010, order. The trial court also entered an opinion and order incorporating these rulings. In relevant part, the order provides:

> IT IS ORDERED THAT Manuel "Matty" Moroun and Dan Stamper shall be imprisoned in the Wayne County Jail until the Detroit International Bridge Company complies with the February 1, 2010 Order of this Court.
>
> IT IS ORDERED THAT the imprisonment of Manuel "Matty" Moroun and Dan Stamper shall cease when the Detroit International Bridge Company has fully complied with the February 1, 2010 Order of this Court or they no longer have the power to comply with the February 1, 2010 Order of this Court.

Finally, the trial court continued the matter to February 9, 2012, "for further review of the status of the project and the appearance of the Vice President of DIBC, Matthew Moroun."

Appellants filed a claim of appeal, along with a motion for release pending appeal. This Court denied the latter on January 12, 2012. The following day, appellants filed motions for peremptory reversal, for a stay, and for immediate consideration. This Court denied the motion for peremptory reversal, but granted, in part, the motion for a stay, releasing appellants until further order of this Court. This Court also expedited

the appeal by shortening the briefing schedule and scheduling the matter for oral argument on February 2, 2012.

II. JURISDICTION

Appellants claim that their appeal is as of right, citing MCR 7.203(A), MCR 7.204, and MCR 7.202(6)(a). MDOT asserts "this Court does *not* have jurisdiction . . . as claimed by both DIBC and its corporate officials, because the January 12, 2012 order is not a final order appealable by right." MDOT makes no further argument, however, believing that "[i]t appears this Court has treated the corporate officials' claim of appeal as an application for leave to appeal under MCR 7.203(B) the January 12, 2012 Opinion and Order, and granted it." We clarify that we have not treated this appeal as on application for leave to appeal; instead, we conclude that appellants may appeal as of right.

In this case, DIBC, a party to the underlying lawsuit, was held in *civil* contempt of court, which must be distinguished from *criminal* contempt; whereas the former is coercive, the latter is punitive. *In re Contempt of Dougherty*, 429 Mich 81, 95; 413 NW2d 393 (1987). Criminal contempt is a crime and, therefore, an order finding a party in criminal contempt of court and sanctioning the party is a final order from which the contemnor may appeal as of right. See MCL 600.308(1); MCR 7.203(A); MCR 7.202(6)(b); *In re Contempt of Dudzinski*, 257 Mich App 96, 97; 667 NW2d 68 (2003); *In re Contempt of Robertson*, 209 Mich App 433, 436; 531 NW2d 763 (1995). However, an order finding a party in civil contempt of court is not a final order for purposes of appellate review. See MCL 600.308(2); MCR 7.202(6)(a).

Civil contempt is clearly at issue in this case because the trial court sought to compel DIBC's compliance with its February 1, 2010, order. Thus, an appeal by DIBC of the civil contempt order entered on November 3, 2011, must be made by application, not as of right. However, the same is not true for the individual appellants, Moroun and Stamper, who are nonparties who have not been held in contempt but instead have been sanctioned for DIBC's contempt. Even if a final order against DIBC had been issued, appellants would not have the ability to appeal as of right under MCR 7.203(A) because they do not have party status. Thus, limiting appellants to only seeking leave to appeal by application would be tantamount to denying them the right to appellate review of the trial court's imposition of sanctions. We do not believe an individual's right to appellate review should be so constrained, especially in this context, in which the most severe sanction—incarceration—is used to coerce compliance with a trial court's order.

Under federal law, "[t]he right of a nonparty to appeal an adjudication of contempt cannot be questioned" even absent a final order. *United States Catholic Conference v Abortion Rights Mobilization, Inc*, 487 US 72, 76; 108 S Ct 2268; 101 L Ed 2d 69 (1988) (in the context of finding a witness in contempt). We have also previously treated an appeal from nonparties held in civil contempt of court as an appeal by right, though the issue was never specifically raised or discussed. See, e.g., *Droomers v Parnell*, unpublished opinion per curiam of the Court of Appeals, issued June 30, 2005 (Docket No. 253455) (nonparty officers of a corporation); *In re Radulovich*, unpublished opinion per curiam of the Court of Appeals, issued April 10, 2001 (Docket No. 210779) (attorney who represented a party in an underlying matter). Although appellants have not been

held in contempt, but sanctioned as decision-makers to enforce DBIC's compliance with the court's order, we conclude that the same principles apply. This matter is properly before us by means of a claim of appeal.

III. DUE PROCESS

Appellants contend that they were not afforded due process because they were never put on notice that they were in jeopardy of being imprisoned as a result of DIBC's civil contempt. We disagree. Whether a person has been afforded due process is a question of law that is reviewed de novo. *In re Contempt of Henry*, 282 Mich App 656, 668; 765 NW2d 44 (2009).

A trial court has inherent and statutory authority to enforce its orders. MCL 600.611; MCL 600.1711; MCL 600.1715. In civil contempt proceedings, a trial court employs its contempt power to coerce compliance with a present or future obligation, including compliance with a court order, to reimburse the complainant for costs incurred as a result of contemptuous behavior, or both. *Porter v Porter*, 285 Mich App 450, 455; 776 NW2d 377 (2009). "Civil contempt proceedings seek compliance through the imposition of sanctions of indefinite duration, terminable upon the contemnor's compliance or inability to comply." *DeGeorge v Warheit*, 276 Mich App 587, 592; 741 NW2d 384 (2007).

The trial court must carry out the proper procedures before it can issue an order holding a party or individual in contempt of court. *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 711; 624 NW2d 443 (2000). As opposed to a criminal contempt proceeding, in which some, but not all, of the due-process safeguards of an ordinary criminal trial are used, a civil contempt proceeding only requires "rudimentary" due process, i.e., "notice and an opportunity to present a defense . . . ."

Porter, 285 Mich App at 456-457; see also *Int'l Union, United Mine Workers of America v Bagwell*, 512 US 821, 831; 114 S Ct 2552; 129 L Ed 2d 642 (1994) ("Because civil contempt sanctions are viewed as nonpunitive and avoidable, fewer procedural protections for such sanctions have been required.").

Appellants assert that they are not DIBC and that "the fiction" underlying the trial court's January 12, 2012, order is that they are "tantamount to DIBC" and "stand in its place vis a vis the contempt proceedings." They also cite caselaw supporting the proposition that a corporation is a separate entity from its individual shareholders, officers, and directors. However, appellants have overlooked that a corporation can only act through its officers and agents. See *In re Kennison Sales & Engineering Co, Inc*, 363 Mich 612, 617; 110 NW2d 579 (1961), quoting *Stowe v Wolverine Metal Specialties Co*, 242 Mich 624, 628; 219 NW 714 (1928). " 'When a court acquires jurisdiction over a corporation as a party, it obtains jurisdiction over the official conduct of the corporate officers so far as the conduct may be involved in the remedy against the corporation which the court is called upon to enforce.' " *Stowe*, 242 Mich at 629, quoting *Tolleson v People's Savings Bank*, 85 Ga 171; 11 SE 599 (1890). Courts will also disregard the separate existence of corporate entities when it is "used to defeat public convenience, justify wrong, protect fraud, or defend crime . . . ." *Paul v Univ Motor Sales Co*, 283 Mich 587, 602; 278 NW 714 (1938).

Because individuals who are officially responsible for the conduct of a corporation's affairs are required to obey a court order directed at the corporation, these same individuals may be sanctioned if they fail to take appropriate action within their power to ensure that the corporation complies with the court order. *Wilson v*

United States, 221 US 361, 376; 31 S Ct 538; 55 L Ed 771 (1911). In *Wilson*, the United States Supreme Court stated:

> A command to [a] corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience, and may be punished for contempt. [*Id.*]

See also *Electrical Workers Pension Trust Fund of Local Union 58, IBEW v Gary's Electrical Serv Co*, 340 F3d 373, 380 (CA 6, 2003), and *Ex parte Chambers*, 898 SW2d 257, 260 (Tex, 1995). Accordingly, we reject appellants argument that they may not be held accountable for failing to ensure DIBC's compliance with the trial court's order.

Appellants further argue that they were not given notice to show cause why they should not be personally sanctioned, or given an opportunity to be heard, in violation of the United States and Michigan Constitutions and the notice requirements of MCL 600.l711(2) and MCR 3.606(A). When the contempt is committed outside the court's direct view (i.e., "indirect contempt"), as in this case, MCL 600.1711(2) allows a trial court to punish the contemnor by fine or imprisonment, or both, "after proof of the facts charged has been made by affidavit or other method and opportunity has been given to defend." For indirect contempt, the trial court must also comply with MCR 3.606(A), which, on a proper showing on ex parte motion supported by affidavits, requires the trial court to (1) order the accused person to show cause, at a reasonable time specified in the order, why that person should not be punished for the alleged misconduct or (2) issue a bench warrant for the arrest of the person.

Appellants' citation of *Auto Club*, 243 Mich App 697, as support for their argument that the trial court was required to name them in the show-cause order is not persuasive. *Auto Club* is distinguishable because the persons accused of contempt, the attorneys, were capable of committing the contemptuous acts on their own, whereas a corporation cannot act on its own, contemptuously or otherwise. Rather, as previously noted, a corporation can only act through its officers and agents. Appellants were responsible for ensuring DIBC's compliance with the February 1, 2010, opinion and order, regardless of whether they were parties to the underlying litigation or whether they were named in the trial court's opinion and order. The trial court held DIBC in civil contempt. The trial court found that appellants were the key decision-makers at DIBC, with the responsibility to ensure that DIBC complied with the court's order. Contrary to their claim on appeal, there is sufficient evidence in the record to support this finding.

With respect to Moroun, he represented that he is a director of DIBC and that his trust is a minority shareholder in DIBC Holdings, which owns DIBC. Moreover, Moroun does not dispute that his living trust holds the majority of voting shares in DIBC Holdings. Moroun also acknowledged that he had been informed about the Gateway Project and the court's order regarding the Gateway Project, but claimed that authority over the Gateway Project and the litigation "has been the responsibility of Dan Stamper." He did not otherwise affirmatively assert that he had no authority or responsibility over DIBC or its affairs, and any such assertion would not have been credible.

Furthermore, the November 3, 2011, opinion and order finding DIBC in contempt affirmatively discussed

the possible civil contempt sanctions, including imprisonment, and directed Moroun to appear at the sanction hearing. Moroun filed a motion to be excused from the hearing, which, from our perspective, was an attempt to avoid the possibility that he might be sanctioned for DIBC's civil contempt. Accordingly, we conclude that Moroun was provided notice that he might be sanctioned for DIBC's contempt and an opportunity to be heard on the matter.

With respect to Stamper, he was listed on the show-cause order, was present throughout the contempt hearings, and actively participated in DIBC's defense. He had also previously been imprisoned for DIBC's civil contempt in January 2011. Because there is no dispute regarding Stamper's authority over the company and the project, we conclude that he had notice that he might be incarcerated as a coercive sanction for DIBC's civil contempt and was provided an opportunity to be heard on the matter.

IV. IMPRISONMENT SANCTION

Appellants argue that their imprisonment was an improper use of the civil contempt power and was invalid as a matter of law because the trial court's order did not give them the "keys to their cell[s]." We disagree with appellants to the extent that they argue that incarceration was an improper use of the trial court's civil contempt power; however, we agree with appellants that the trial court erred by requiring their continued incarceration until DIBC "fully complied with" the February 1, 2010, order. We review a trial court's issuance of a contempt order for an abuse of discretion and the factual findings supporting the order for clear error. *Porter*, 285 Mich App at 454-455. "[R]eversal is warranted only when the trial court's decision

is outside the range of principled outcomes." *Id.* at 455. To the extent that this Court must examine questions of law related to the trial court's contempt decision, our review is de novo. See *DeGeorge*, 276 Mich App at 591. The interpretation and application of the court rules and statutes are also reviewed de novo. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).

Confinement or imprisonment may be imposed whether the contempt is civil or criminal in nature. *Borden v Borden*, 67 Mich App 45, 48; 239 NW2d 757 (1976). In the civil context, the confinement must be conditional. See MCL 600.1715.

> The critical feature that determines whether the remedy is civil or criminal in nature is not when or whether the contemnor is physically required to set foot in a jail but whether the contemnor can avoid the sentence imposed on him, or purge himself of it, by complying with the terms of the original order. [*Hicks ex rel Feiock v Feiock*, 485 US 624, 635 n 7; 108 S Ct 1423; 99 L Ed 2d 721 (1988).]

Civil contempt imposes a term of imprisonment that ceases when the contemnor complies with the court's order or when it is no longer within his or her power to comply. *Borden*, 67 Mich App at 48. MCL 600.1715 provides:

> (1) Except as otherwise provided by law, punishment for contempt may be a fine of not more than $7,500.00, or imprisonment which, except in those cases where the commitment is for the omission to perform an act or duty which is still within the power of the person to perform shall not exceed 93 days, or both, in the discretion of the court. . . .
>
> (2) If the contempt consists of the omission to perform some act or duty that is still within the power of the person to perform, *the imprisonment shall be terminated when the person performs the act or duty or no longer has the power to perform the act or duty, which shall be specified in the*

> *order of commitment*, and pays the fine, costs, and expenses of the proceedings, which shall be specified in the order of commitment. [Emphasis added.]

When the purpose of the sanction is to make a party or person comply, the trial court, in exercising its discretion, must " 'consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.' " *Dougherty*, 429 Mich at 98, quoting *United States v United Mine Workers of America*, 330 US 258, 304; 67 S Ct 677; 91 L Ed 884 (1947). Clearly, the trial court considered the effectiveness of other sanctions before choosing incarceration to coerce compliance with its order, and provided the following reasons for rejecting other alternatives that MDOT suggested:

> One of the options considered was to require DIBC's surety Safeco to take over the responsibility for completing the project. A default has been taken against Safeco. However, even without the default, Safeco as surety is liable for the responsibilities of its principle [sic] DIBC, which includes completing the project and monetary damages. On July 8, 2011, Safeco was ordered to submit a detailed plan that may be implemented to complete DIBC's portion of the Gateway Project. MDOT as well as DIBC were given an opportunity to respond to Safeco's plan. A fair review of the information submitted by the parties in response to Safeco's plan makes it clear that this project would be bogged down with further litigation in addition to needless delays if Safeco was ordered to take on the construction at this time. Requiring Safeco to take on the construction obligations of DIBC is not the best option available at this time.
>
> The use of an independent contractor to complete DIBC's portion of the project would also be challenging. There are funding considerations, oversight concerns, probable litigation, as well the contractor's need to assess

> the construction requirements which could prove to be a formidable task for a contractor new to the project. The contractor would be required to arrange for the completion of construction drawings for review and approval by MDOT. The assessment and coordination of the construction needed would require interaction with other entities resulting in further delays. The use of an independent contractor would further delay the completion of the project and would therefore not be the best option to use to complete the project.
>
> The use of a receiver would likely produce many of the same problems as those anticipated by the use of an independent contractor. At the Court's direction, the parties presented briefs discussing their positions regarding the appointment of a receiver. In addition, a hearing was conducted on December 1, 2011, at which time representatives from MDOT, DIBC, and Safeco were allowed to make oral presentations. Based on the information that has been presented, it appears that the appointment of a receiver at this time would generate a number of issues resulting in additional delays. There are funding issues that would likely bring about additional litigation and delays. There are also the concomitant problems of safeguarding the funds and coordinating construction activities. The receiver would be required to hire design consultants, develop plans for approval by MDOT and obtain bids for construction contracts. Appointing a receiver at this time would likely greatly prolong the time required for the completion of the project. The appointment of a receiver at this time would not be the best option to complete this project.

The trial court further found that DIBC had the power, resources, and knowledge to complete its portion of the project in accordance with the February 1, 2010, order and that the decision-makers of DIBC did not intend to carry out construction of its portion of the project in conformity with the February 1, 2010, order unless the court imposed "meaningful coercive measures." We cannot say that the trial court's decision to use coercive

measures, including incarceration, over other alternatives fell outside the range of principled outcomes or that the decision constituted an abuse of discretion.[2]

As previously noted, the trial court's January 12, 2012, order provides the following with respect to appellants' conditional imprisonment:

> IT IS ORDERED THAT Manuel "Matty" Moroun and Dan Stamper shall be imprisoned in the Wayne County Jail until the Detroit International Bridge Company complies with the February 1, 2010 Order of this Court.
>
> IT IS ORDERED THAT the imprisonment of Manuel "Matty" Moroun and Dan Stamper shall cease when the Detroit International Bridge Company has fully complied with the February 1, 2010 Order of this Court or they no longer have the power to comply with the February 1, 2010 Order of this Court.

Because the purpose of civil contempt is to enforce compliance with an order, rather than to punish for disobedience, the contemnor may not be incarcerated beyond the time that he or she is able to comply with the court's order. *People v Kearns*, 38 Mich App 561, 563; 196 NW2d 805 (1972), quoting *Spalter v Wayne Circuit Judge*, 35 Mich App 156, 161; 192 NW2d 347 (1971). "Civil contempt seeks to coerce compliance, to coerce [the contemnor] to do what he is able to do but refuses to do." *Borden*, 67 Mich App at 48. In other words, the contemnor "carries the keys to his prison in

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[2] While it is clear that appellants take issue with the order, nevertheless, appellants are not at liberty to disregard the order on the basis of their subjective belief that it was wrong. *Porter*, 285 Mich App 465. "A party must obey an order entered by a court with proper jurisdiction, even if the order is clearly incorrect, or the party must face the risk of being held in contempt and possibly being ordered to comply with the order at a later date." *Kirby v Mich High Sch Athletic Ass'n*, 459 Mich 23, 40; 585 NW2d 290 (1998); see also *Henry*, 282 Mich App at 680.

his own pocket." *Id*. In *Bagwell*, 512 US at 828, the Supreme Court further explained:

> The paradigmatic coercive, civil contempt sanction . . . involves confining a contemnor indefinitely until he complies with an affirmative command such as an order to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance. Imprisonment for a fixed term similarly is coercive when the contemnor is given the option of earlier release if he complies. In these circumstances, the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, and thus, carries the keys of his prison in his own pocket. [Quotation marks and citations omitted.]

We cannot uphold the trial court's commitment order when the condition for release requires DIBC to "fully" comply with the February 1, 2010, order because it failed to identify "the act or duty" that must be performed before the incarceration may be terminated. MCL 600.1715(2). While appellants might have the present ability to commence and continue construction, they do not have the present ability to actually finish the construction in accordance with the directives set forth in the February 1, 2010, opinion and order for a period of 6 to 12 months. Therefore, the condition does not permit appellants to use the keys to obtain their release until the project is completed. In other words, appellants may not immediately "avoid the sentence," or purge the contempt, by complying with the terms of the original order. *Hicks*, 485 US at 635 n 7. Our decision does not preclude further civil contempt sanctions, including imprisonment under terms similar to those imposed by the trial court in January 2011. However, we leave this decision to the discretion of the trial court. If the trial court orders further sanctions to coerce

the initiation and continuation of compliance with its February 1, 2010, order, it must do so within the confines of the caselaw and MCL 600.1715 by identifying the act or duty appellants will be required to perform in order to purge the contempt.

V. JUDICIAL DISQUALIFICATION

Finally, appellants argue that further proceedings should be held before a different judge because the judge acted as both accuser and finder of fact and has become personally embroiled in the litigation. There has been no motion to disqualify the judge; therefore, there is no ruling for us to review. See *Henry*, 282 Mich App at 679, citing MCR 2.003. We further conclude that there is no merit to appellants' position that the judge acted as an accuser and finder of fact by imposing a sanction that was not requested by MDOT. The judge provided an adequate explanation of why other alternatives would not bring about compliance with the order.

VI. CONCLUSION

Accordingly, we conclude that appellants properly appealed as of right because a nonparty individual sanctioned to enforce compliance with a civil contempt order directed at a party must be permitted to appeal even in the absence of a final order. We further conclude that appellants were afforded rudimentary due process, but the conditional confinement did not allow appellants to avoid the sentence by purging the contempt. Therefore, we affirm in part, vacate in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. In light of the trial court's scheduled February 9, 2012, hearing, we give our judgment immediate effect. MCR 7.215(F)(2).

WILDER, P.J. (*concurring in part and dissenting in part*).

I

I agree that this Court has jurisdiction of the claim of appeal filed in this action by appellants Manuel J. Moroun and Dan Stamper for the reason that, as they are nonparties to the underlying action by the Michigan Department of Transportation (MDOT) against the Detroit International Bridge Company (DIBC), the order that punished Moroun and Stamper for the civil contempt of DIBC is a final order appealable by right. MCR 7.202(6)(a)(i); *US Catholic Conference v Abortion Rights Mobilization, Inc*, 487 US 72, 76; 108 S Ct 2268; 101 L Ed 2d 69 (1988).

II

Additionally, I agree that the trial court's January 12, 2012, order did not specify with particularity what action or actions Stamper and Moroun were required to take so that they were able to immediately purge themselves of the contempt finding made by the trial court against DIBC. First, no contempt finding was made against Moroun and Stamper. Only DIBC was found in contempt. Thus, any act to be performed by Moroun and Stamper was not to purge themselves of contempt for some unstated act in defiance of the trial court's order, but instead was to purge DIBC of contempt. Second, there is considerable ambiguity with regard to what the trial court intended by requiring Moroun and Stamper to remain imprisoned until DIBC had "fully complied" with the trial court's February 1, 2010, order. In this regard, counsel for MDOT acknowledged during oral argument before this Court that it was unclear precisely what particular actions by Moroun and Stamper would satisfy the trial court's

directive that DIBC fully comply with the February 1, 2010, order. Moreover, the trial court had appointed a monitor to oversee and report on the project's progress and had also ordered DIBC to file biweekly progress reports. But, as also acknowledged by counsel for MDOT, it is unclear to what extent the trial court's review of the reports would affect its determination whether DIBC had sufficiently complied with the February 1, 2010, order, so that Moroun and Stamper could be determined to have done enough to have purged DIBC of contempt.[1] For these reasons, I agree that the commitment directive did not enable appellants "to purge the contempt and obtain [their] release by committing an affirmative act," or in other words, appellants did not carry "the keys of [their] prison in [their] own pocket[s]."[2] *Int'l Union, United Mine Workers of America v Bagwell*, 512 US 821, 828; 114 S Ct 2552; 129 L Ed 2d 642 (1994) (quotation marks and citations omitted).

III

I disagree, however, with the conclusion in the lead opinion that there was sufficient notice to Moroun and Stamper.

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[1] Having seen no order that seals any part of the court record (there might be valid reasons to seal aspects of the record, such as to protect proprietary information, or for matters of public safety or national border security, but no such finding has been made), I am unaware of the reason why these reports, reviewed and presumably considered by the trial court in its deliberations, should not be docketed in the register of actions and available in the court record transmitted to this Court pursuant to MCR 7.210(G).

[2] Pertinent to this point, during oral argument, counsel for Moroun and Stamper represented to this Court that every day from January 13, 2012, to February 1, 2012, Stamper had presented new engineering plans, from a new engineering firm, to the court-appointed monitor in an effort to comply with the trial court's February 1, 2010, order, but the monitor had refused to examine the plans.

A

There is no question that officers and agents of a corporation are bound to follow orders that are directed toward the corporation, even if those officers and agents are not named in the order itself. See *In re Kennison Sales & Engineering Co*, 363 Mich 612, 618; 110 NW2d 579 (1961); *Ex parte Chambers*, 898 SW2d 257, 260 (Tex, 1995). Thus, Stamper as president of DIBC and Moroun as a director of DIBC were bound by the orders of the trial court directing certain action by DIBC, and they were required to avoid conduct that contributed to or caused DIBC to violate the trial court's February 1, 2010, order. From the fact that the trial court ordered them incarcerated, it is clear that the trial court concluded that Moroun and Stamper did or failed to do something that contributed to or caused the contumacious conduct of DIBC.[3] However, the June 9, 2011, ex parte motion filed by MDOT, the trial court's June 13, 2011, order to show cause, and the show-cause proceedings commenced on July 7, 2011, did not identify what conduct of Moroun and Stamper contributed to or caused DIBC to be in contempt of the trial court's February 1, 2010, order. In addition, the show-cause order did not make Moroun and Stamper parties to the contumacious conduct of DIBC. I would conclude that these are due-process errors that require the trial court's sanctions against Moroun and Stamper to be vacated.

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[3] I acknowledge Moroun and Stamper's argument that if an appellate court agrees with DIBC's contention that it is not in violation of the executory contract between it and MDOT, on the basis that it agreed to a design concept for the project and never reached "an immutable, final, agreed set of plans" with MDOT, the appellate court might also conclude that DIBC's conduct was not contumacious. However, because the February 1, 2010, order was not a final order, MCR 7.202(6)(a)(i), that issue is not before us.

B

1

In a civil contempt proceeding, "rudimentary" due process is required. *Porter v Porter*, 285 Mich App 450, 456-457; 776 NW2d 377 (2009). Specifically, this requires "notice and an opportunity to present a defense, and the party seeking enforcement of the court's order bears the burden of proving by a preponderance of the evidence that the order was violated." *Id.* at 457.

MCL 600.1711(2), addressing indirect contempt, provides that "[w]hen any contempt is committed other than in the immediate view and presence of the court, the court may punish it by fine or imprisonment, or both, after proof of the facts charged has been made by affidavit or other method and opportunity has been given to defend."

MCR 3.606(A)(1), also governing contempt outside of the immediate presence of the court, provides in part that the court shall "order the *accused person* to show cause, at a reasonable time specified in the order, why *that person* should not be *punished* for the alleged misconduct." (Emphasis added.)

Accordingly,

> [i]f the contemptuous behavior occurs in front of the court, i.e., it is "direct" contempt, there is no need for a separate hearing before the court imposes any proper sanctions because "all facts necessary to a finding of contempt are within the personal knowledge of the judge." If the contemptuous conduct occurs outside the court's direct view, i.e., it is "indirect" contempt, the court must hold a hearing to determine whether the alleged contemnor actually committed contempt. This hearing must follow the procedures established in MCR 3.606 and afford some measure of due process before the court can determine whether there is sufficient evidence of contempt to warrant sanctions. [*In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 712-713; 624 NW2d 443 (2000) (citations omitted).]

2

This Court interprets court rules according to the same principles that govern the interpretation of statutes. *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011). "Our goal when interpreting and applying statutes or court rules is to give effect to the plain meaning of the text. If the text is unambiguous, we apply the language as written without construction or interpretation." *Id.* Moreover, if there is any conflict between the requirements of MCL 600.1711(2) and MCR 3.606, the court rule prevails. *In re Contempt of Henry*, 282 Mich App 656, 667; 765 NW2d 44 (2009). A trial court's substantial compliance with MCR 3.606(A)(1) is sufficient. See *People v Saffold*, 465 Mich 268, 273; 631 NW2d 320 (2001).

C

The plain and unambiguous language of MCR 3.606(A)(1) requires that, on a proper showing on an ex parte motion supported by affidavits, *the accused person* should be ordered to show cause why *that person* should not be punished for the alleged contempt. In this case, the ex parte motion, without referring to anyone in particular, asserted that "DIBC" did certain acts or failed to perform certain acts. Also, the June 13, 2011, order to show cause stated the following:

> To: Dan Stamper, President
> Detroit International Bridge Company
>
> YOU ARE ORDERED to personally appear before this Court . . . on Thursday, July 7, 2011 at 9:00 a.m. and show cause why *the Detroit International Bridge Company* should not be held in civil contempt for failure to comply with the terms and provisions of this Court's February 1, 2010 Opinion and Order. [Emphasis added.]

The show-cause order and the averments in the ex parte affidavit were insufficient to comply or substantially comply with the requirement that Moroun and Stamper be given notice that they personally could be punished because the documents pertained to DIBC's compliance with the trial court's February 1, 2010, order. Moroun's and Stamper's conduct was not mentioned in the ex parte affidavit or at the June 9, 2011, hearing pertaining to the ex parte affidavit. In addition, Moroun was not mentioned whatsoever in the show-cause order, and Stamper's identification in the order only directed him to show cause concerning DIBC's conduct. Moreover, when the show-cause proceedings commenced on July 7, 2011, the trial court did not advise Stamper that his personal conduct could be considered contumacious and was a subject of the show-cause hearings, and no statement was made on the record during the show-cause proceedings that Moroun's conduct was the subject of the hearings.[4]

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[4] See, for example, Michigan Judicial Institute (MJI), Contempt of Court Benchbook (4th ed), Appendix C, p Appx-5, a procedural checklist for conducting civil contempt proceedings, including a pretrial hearing at which the trial court is recommended to, *inter alia*:

> □ Inform the alleged contemnor of the charges.
>
> □ Inform the alleged contemnor that the charge must be proven by a preponderance of the evidence, or that evidence of the alleged contempt must be "clear and unequivocal."
>
> □ *Inform the alleged contemnor of the possible sanctions.*
>
> * * *
>
> □ Ask the alleged contemnor how he or she wishes to plead.
>
> □ Set date for trial if necessary. The alleged contemnor must be given a reasonable opportunity to prepare a defense or explanation. [Emphasis added; citations omitted.]

While these facts are not in dispute, the lead opinion overlooks these procedural defects by appearing to conclude that, because of Stamper's and Moroun's status as "key decision-makers," i.e., fiduciaries of DIBC, notice that their personal conduct and personal liberty were the subject of the show-cause hearing was obviously implied. But MCR 3.606(A)(1) does not permit constructive notice of the nature of the contempt proceedings and the alleged contumacious conduct—it requires actual notice. In my judgment, the lead opinion's interpretation of MCR 3.606(A)(1) as allowing such constructive notice runs afoul of the plain meaning of the court rule. See *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 758-759; 641 NW2d 567 (2002).

Although there is no precedent directly on point in Michigan, the rationale for interpreting MCR 3.606(A)(1) as requiring all persons subject to a show-cause order, including corporate officers and directors, to be personally notified that they could be subject to punishment for contemptuous conduct is supported by caselaw from other jurisdictions that have addressed this very question. The principle that these other jurisdictions espouse can be summed up as follows: " 'An officer of a corporation who participates in the disobedience of a court mandate is punishable for contempt *provided he has been made a party to the contumacious conduct and due notice has been given to him*.' " *In re Snider Farms, Inc*, 125 BR 993, 999 (Bankr ND Ind, 1991), quoting 17 Am Jur 2d, Contempt, § 61 (emphasis added); see also *Spuncraft, Inc v Lori Jay Mfg Co*, 47 Misc 2d 780, 781; 263 NYS2d 211 (NY Sup Ct, 1965).

In *Dole Fresh Fruit Co v United Banana Co, Inc*, 821

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F2d 106 (CA 2, 1987), the district court found three officers of the corporate defendant in civil contempt. The United States Court of Appeals for the Second Circuit reversed, holding that even though the individuals were within the scope of the underlying order, it was improper to hold the individuals in contempt when it appeared that only the corporate defendant was a party to the contempt proceedings. *Id.* at 110. The court stressed that the three individuals did not know that they were "personally" going to be held in contempt. *Id.* This factual situation is nearly identical with the situation in the present case, in which both Stamper and Moroun were never notified that they could be individually punished.[5]

Although the lead opinion does not agree, I would find that *Auto Club*, 243 Mich App 697, does support these principles. In that case, this Court reversed the trial court's finding of contempt against the defendant corporation because the corporation was not afforded notice. *Id.* at 718. The plaintiff instituted contempt proceedings against defense counsel *personally*, not the defendant corporation. *Id.* at 717. But at the conclusion of the show-cause hearing, the trial court found both the attorney *and* the corporation in contempt. *Id.* Thus, this Court concluded that the corporation was "denied

[5] The lead opinion suggests that Moroun was provided sufficient notice by virtue of the trial court's November 3, 2011, opinion and order. However, this "notice" was no notice at all. This "notice" occurred *after* the trial court had already conducted the show-cause hearing and found that DIBC was in contempt. If any such notice was to be effective, it had to occur *before* the show-cause hearing in order to allow Moroun "an opportunity to present a defense." *Porter*, 285 Mich App at 457. Indeed, without specific advance notice that the show-cause hearing might result in sanctions imposed against them, any alleged "opportunity to present a defense" available to Moroun and Stamper at the various show-cause hearings was illusory. Who would present a defense without knowing that he or she was being accused?

its right to know the substance of the charges against it." *Id.* This Court further noted:

> The contempt hearing also failed to give [the defendant corporation] notice that *it was being charged with contempt* because the trial court's order appeared to concern [the defense] attorneys as individuals. The first time it became clear that the trial court intended to hold [the corporation] in contempt was in [its] order, after the trial court had already done so. This completely denied [the corporation] an opportunity to prepare or present a defense. [*Id.* (emphasis added).]

Just as the defendant in *Auto Club* was deprived of notice because it was never notified that it could be punished for contempt, the same can be said here of Moroun and Stamper.

D

In summary, I would hold that the unambiguous plain language and meaning of MCR 3.606(A)(1) require that regardless of a person's status as a corporate officer or director of a corporation subject to a show-cause order, that officer or director is entitled to direct rather than implied notice to appear to show cause why *he or she* should not be held in contempt or punished for specified contumacious conduct. Because such notice was not provided in the instant case, I would conclude that the contempt proceedings as they pertain to Moroun and Stamper were fatally flawed as violative of due process of law, and I would vacate the contempt sanctions imposed against them.

IV

Finally, I also dissent from the panel's decision to give this Court's judgment immediate effect pursuant to MCR 7.215(F)(2). The panel has issued three au-

thored opinions concerning the necessary due process of law to be accorded to corporate officials in a show-cause proceeding against a corporation. This issue has not been directly addressed by any Michigan precedent. Under these circumstances, I believe that exceptional issuance of our judgment is unwarranted.

FORT HOOD, J. (*concurring in part and dissenting in part*). I join in and concur with the lead opinion in all respects except concerning the imprisonment sanction.[1] Because I conclude that the trial court did not abuse its discretion with regard to the propriety of the penalty for civil contempt, I would affirm the lower court's decision in its entirety.

Individuals who conspire with others to violate court orders are equally liable and subject to contempt proceedings. *ARA Chuckwagon of Detroit, Inc v Lobert*, 69 Mich App 151, 159; 244 NW2d 393 (1976). When an order is entered by the court, it must be obeyed until it is judicially vacated. *Id*. at 161. The validity of the order is determined by the courts, not the parties. *Id*. "Our jurisprudence has long recognized the inherent power of a court of record to punish, by contempt citation, a party for wilful, continuous, and contemptuous disobedience of its orders." *Id*. at 162-163.

The circuit court has the authority to punish by fine or imprisonment, or both, any neglect, violation of duty, or misconduct by "[p]arties to actions, attorneys, counselors, and all other persons for disobeying any lawful order, decree, or process of the court." MCL

[1] With regard to appellants' contention that they were unaware that they could be imprisoned for the contempt of DIBC, I would only add that a party cannot claim lack of notice when the assertion is belied by the pleadings it has filed in the case. See *DeGeorge v Warheit*, 276 Mich App 587, 592-593; 741 NW2d 384 (2007).

600.1701(g). Contempt committed outside the immediate view and presence of the court may be punished by fine or imprisonment, or both, after proof of the facts charged has been made by affidavit or other means and an opportunity to defend has been given. MCL 600.1711(2). MCL 600.1715[2] addresses the punishment of contempt:

> (1) Except as otherwise provided by law, punishment for contempt may be a fine of not more than $7,500.00, or imprisonment which, except in those cases where the commitment is for the omission to perform an act or duty which is still within the power of the person to perform shall not exceed 93 days, or both, in the discretion of the court. . . .
>
> (2) If the contempt consists of the omission to perform some act or duty that is still within the power of the person to perform, the imprisonment shall be terminated when the person performs the act or duty or no longer has the power to perform the act or duty, which shall be specified in the order of commitment, and pays the fine, costs, and expenses of the proceedings, which shall be specified in the order of commitment.

"The issuance of an order of contempt rests in the sound discretion of the trial court and is reviewed only for an abuse of discretion." *In re Contempt of Henry*, 282 Mich App 656, 671; 765 NW2d 44 (2009). "We review for an abuse of discretion a trial court's decision to hold a party or individual in contempt." *In re Contempt of*

[2] Issues involving statutory interpretation present questions of law reviewed de novo. *Klooster v City of Charlevoix*, 488 Mich 289, 295; 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, a 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.

Dudzinski, 257 Mich App 96, 99; 667 NW2d 68 (2003). The trial court's factual findings are reviewed for clear error, and questions of law are reviewed de novo. *Porter v Porter*, 285 Mich App 450, 454-455; 776 NW2d 377 (2009). "Clear error exists when this Court is left with the definite and firm conviction that a mistake was made." *Henry*, 282 Mich App at 669. "The abuse of discretion standard recognizes that there will be circumstances where there is no single correct outcome and which require us to defer to the trial court's judgment; reversal is warranted only when the trial court's decision is outside the range of principled outcomes." *Porter*, 285 Mich App at 455.

"The power to hold a party, attorney, or other person in contempt is the ultimate sanction the trial court has within its arsenal, allowing it to punish past transgressions, compel future adherence to the rules of engagement, i.e., the court rules and court orders, or compensate the complainant." *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 708; 624 NW2d 443 (2000).

> [W]e define[] contempt of court as a willful act, omission, or statement that tends to . . . impede the functioning of a court. . . . [T]he primary purpose of the contempt power is to preserve the effectiveness and sustain the power of the courts. Because the power to hold a party in contempt is so great, it carries with it the equally great responsibility to apply it judiciously and only when the contempt is clearly and unequivocally shown. [*Id*. (quotation marks and citations omitted).]

"Civil contempt proceedings seek compliance through the imposition of sanctions of indefinite duration, terminable upon the contemnor's compliance or inability to comply." *DeGeorge v Warheit*, 276 Mich App 587, 592; 741 NW2d 384 (2007). Criminal contempt, however, is designed to punish past disobedient conduct by imposing an unconditional and definite sentence. *Id*. Al-

though civil contempt is primarily coercive in nature to compel compliance by the contemnor, the civil sanction may also have a punitive effect. *Id*. Confinement or imprisonment may be imposed whether the contempt is civil or criminal in nature. *Borden v Borden*, 67 Mich App 45, 48; 239 NW2d 757 (1976).

> Civil contempt imposes a term of imprisonment which ceases when defendant complies with the court's order or when it is no longer within his power to comply. Civil contempt seeks to coerce compliance, to coerce the defendant to do what he is able to do but refuses to do. The defendant carries the keys to his prison in his own pocket. Criminal contempt, on the other hand, imposes a definite term of imprisonment as punishment for a past offense. [*Id*.]

Contempts are not necessarily wholly civil or altogether criminal because it is not always easy to classify a particular act as belonging to either class. *Gompers v Buck's Stove & Range Co*, 221 US 418, 441; 31 S Ct 492; 55 L Ed 797 (1911). The *Gompers* Court offered the following test to determine the character of the punishment and held that any indirect overlapping consequences did not alter the nature of the contempt:

> It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial, as well as punitive, and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprison-

> ment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order.
>
> * * *
>
> It is true that either form of imprisonment has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience. But such indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, or *vice versa*. [*Id*. at 441-443.]

Similarly, Michigan law provides that when conditional and coercive confinement is imposed, the contempt proceeding is civil. *Borden*, 67 Mich App at 49. Michigan statutes also hold that a "commitment to coerce performance may properly continue so long as it is within the power of the contemnor to comply with the court order." *Id*.; see also MCL 600.1715.

Furthermore, Michigan law recognizes two types of civil contempt sanctions, coercive and compensatory. *In re Contempt of Rochlin*, 186 Mich App 639, 646; 465 NW2d 388 (1990). In *United States v United Mine Workers of America*, 330 US 258, 304; 67 S Ct 677; 91 L Ed 884 (1947), the United States Supreme Court explained the underlying rationale behind the two types of civil contempt sanctions:

> Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be

> based upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent on the outcome of the basic controversy.
>
> But where the purpose is to make the defendant comply, the court's discretion is otherwise exercised. It must then consider the character and magnitude of the harm threatened by the continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired. [Citations omitted.]

The longstanding rule is that "a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy." *United States v Rylander*, 460 US 752, 756; 103 S Ct 1548; 75 L Ed 2d 521 (1983) (quotation marks and citation omitted). "Because civil contempt sanctions are viewed as nonpunitive and avoidable, fewer procedural protections for such sanctions have been required." *Int'l Union, United Mine Workers of America v Bagwell*, 512 US 821, 831; 114 S Ct 2552; 129 L Ed 2d 642 (1994). Consequently, civil contempt "may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required." *Id*. at 827. Due process does not require a full-blown evidentiary hearing, and contempt sanctions may even be imposed on the basis of uncontroverted affidavits. *United States v Ayres*, 166 F3d 991, 995 (CA 9, 1999); see also MCL 600.1711(2).

> The paradigmatic coercive, civil contempt sanction . . . involves confining a contemnor indefinitely until he complies with an affirmative command such as an order to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance. Imprisonment for a fixed term similarly is coercive when the contemnor is given the option of earlier release if he complies. In these circumstances, the contemnor is able to purge the contempt and obtain his release by committing an affirmative

> act, and thus carries the keys of his prison in his own pocket. [*Bagwell*, 512 US at 828 (quotation marks and citations omitted).]

When civil contempt occurs, the trial court has inherent and statutory authority to order conditional imprisonment. *Harvey v Lewis*, 10 Mich App 709, 717; 160 NW2d 391 (1968). "Theoretically, imprisonment for civil contempt might be *forever* so long as it is within the contemnor's power to comply with the court order he refuses to carry out[.]" *Id*. (emphasis added). The determination regarding the propriety of contempt is contingent on the facts and circumstances of the individual case. See *Spallone v United States*, 493 US 265, 267, 279-280; 110 S Ct 625; 107 L Ed 2d 644 (1990); *In re Simmons*, 248 Mich 297, 305-306; 226 NW 907 (1929); *Stowe v Wolverine Metal Specialties Co*, 242 Mich 624, 630; 219 NW 714 (1928); *Wells v Wells*, 144 Mich App 722, 732; 375 NW2d 800 (1985). When selecting the appropriate contempt sanction, the court must use the least possible power necessary to achieve the proposed end. *Spallone*, 493 US at 276. However, if the least possible contempt sanction approach fails to produce compliance within a reasonable period of time, additional sanctions may be imposed. *Id*. at 280.

Because the objective of civil contempt is to enforce compliance with the court's order rather than punishment for a refusal to obey, one held in and incarcerated for civil contempt may not be incarcerated beyond the time that he or she is able to comply with the court's order. *Spalter v Wayne Circuit Judge*, 35 Mich App 156, 161; 192 NW2d 347 (1971). "The contemnor must have the ability to comply with the court's order and the possibility of terminating his or her confinement and purging himself of contempt by complying." *Borden*, 67 Mich App at 49. "Promised future compliance with

prior judicial orders is a common and appropriate method of purging contempt. Since future compliance is the court's objective in civil contempt proceedings, an assurance of such compliance by one deemed worthy of belief is a sensible basis for terminating coercive sanctions." *Williams Int'l Corp v Smith*, 144 Mich App 257, 266; 375 NW2d 408 (1985) (citations omitted), rev'd on other grounds 429 Mich 81 (1987). The court is vested with broad discretion to determine the appropriate conditions through which the contemnor may purge the contempt. *Midlarsky v D'Urso*, 133 AD2d 616; 519 NYS2d 724 (1987). The appellate court reviews the denial of a motion to purge a contempt order for an abuse of discretion. *Consol Rail Corp v Yashinsky*, 170 F3d 591, 594 (CA 6, 1999).

Appellants contend that because the completion of the project will take approximately 9 to 12 months, they do not have the ability to "immediately" purge the contempt and, therefore, do not have the keys to their jail cell. Appellants further contend that the trial court was obligated to impose the least restrictive sanction to compel compliance. Curiously, appellants fail to identify the least restrictive sanction or impetus that would prompt them into action on behalf of DIBC.[3]

As indicated, the propriety of the contempt sanction is contingent on the facts and circumstances in each individual case, and although the least restrictive sanction should be imposed, a graduated penalty is appro-

[3] Our order granting a stay of the lower court's decision only applied to appellants' imprisonment, and there was no stay of the payment of fines or the ordered completion of the Ambassador Bridge Gateway Project in accordance with the February 1, 2010, order of the trial court. When questioned at oral argument about the progress with regard to the remainder of the trial court's order, counsel for appellants answered that there was the mere filing of the claim of appeal. During rebuttal, cocounsel asserted that they had submitted plans, but they were refused.

priate when necessary. See *Spallone*, 493 US at 276, 280; *Wells*, 144 Mich App at 732. The trial court is granted the broad discretion to determine the appropriate conditions through which the contemnor may purge the contempt. *Midlarsky*, 133 AD2d at 617. Pursuant to Michigan caselaw, full compliance with the contempt order is not necessarily required; rather, a promise of future compliance or a good-faith attempt may be sufficient to purge the contempt. *Williams Int'l Corp*, 144 Mich App at 266.

In the present case, the facts and circumstances justified the order of confinement pending completion of the Ambassador Bridge Gateway Project. The extensive and lengthy record demonstrates that the trial court ordered completion of the project. Rather than comply with the trial court's order, DIBC filed multiple claims of appeal, and the case was removed to federal court on two occasions. DIBC did not obtain any relief from the trial court's order,[4] but nonetheless failed to comply with that order. Unable to obtain compliance, the trial court held a contempt hearing during which Stamper testified. The trial court determined that civil coercive sanctions were necessary to ensure compliance, and Stamper, as president of DIBC, was ordered imprisoned but was released within a short time when DIBC restarted work on the project. However, since then, DIBC has not complied with the trial court's order. This order has not been declared invalid, and, consequently, the trial court has inherent contempt power to punish the willful, continuous, and contemptuous disobedience of the order. *ARA Chuckwagon*, 69

[4] The federal court concluded that DIBC had engaged in "the most creative schemes and maneuvers to delay compliance with a court order." *Mason and Dixon Lines, Inc v Steudle*, 761 F Supp 2d 611, 628 (ED Mich, 2011) (quotation marks and citation omitted).

Mich App at 162-163. Although the court has the obligation to consider the least restrictive penalty, in the present case, the court graduated its punishment in light of the history of delay and noncompliance. Under the circumstances, I cannot conclude that ordering the contempt sanction until completion of the project constituted an abuse of discretion.

Furthermore, the contention that appellants are without the means or the knowledge to immediately purge the contempt is without merit. The design of coercive civil contempt sanctions is to achieve compliance, to force the contemnor to do what he or she refuses to do. *Borden*, 67 Mich App at 48. "Civil contempt proceedings seek compliance through the imposition of sanctions of *indefinite* duration, terminable upon the contemnor's compliance or inability to comply." *DeGeorge*, 276 Mich App at 592 (emphasis added). "The power to hold a party, attorney, or other person in contempt is the ultimate sanction the trial court has within its arsenal, allowing it to punish past transgressions, compel future adherence to the rules of engagement, i.e., the court rules and court orders, or compensate the complainant." *Auto Club*, 243 Mich App at 708. DIBC's conduct rose to the height of contempt. According to the factual findings of the trial court, it not only failed to comply with the trial court's order, but engaged in a process designed to render the project stagnant. This comes at a great cost to MDOT as well as the local community where the construction commenced, and the trial court must be entitled to use the ultimate sanction within its arsenal. *Id*. However, appellants have the right to move the trial court to purge the contempt, *Spalter*, 35 Mich App at 166, and can be released before the full completion by promises of future compliance or good faith efforts, *Williams Int'l Corp*, 144 Mich App at 266. In light of the fact that

appellants can purge the contempt before the full completion of the project, I cannot conclude that the trial court's decision regarding the imprisonment constituted an abuse of discretion.

I would affirm the lower court's order in its entirety.

COALITION FOR A SAFER DETROIT v DETROIT CITY CLERK

Docket No. 300516. Submitted August 10, 2011, at Detroit. Decided February 9, 2012, at 9:00 a.m. Leave to appeal denied, 491 Mich 932.

Coalition for a Safer Detroit brought an action in the Wayne Circuit Court seeking a writ of mandamus directing the Detroit City Clerk and the Detroit Election Commission to place a proposed amendment to § 38 of the 1997 Detroit City Code on the city of Detroit's November 2, 2010, ballot. The coalition had filed signed initiative petitions with the city clerk to place the proposed amendment on the ballot. The proposed amendment would have provided that none of the Detroit ordinances prohibiting the possession, sale, and offer for sale or distribution of a controlled substance would apply to the use or possession of less than 1 ounce of marijuana on private property by a person who has attained the age of 21 years. The city clerk verified that the petitions contained sufficient valid signatures, but the Detroit City Council chose to not enact the proposed amendment and forwarded it to the Detroit Election Commission, which requested the city's law department to determine whether the proposed amendment was a valid initiative under Michigan law. On the basis of that department's opinion, the election commission voted to not place the initiative on the ballot, and the coalition sought the writ of mandamus. Defendants moved for summary disposition, which the court, Michael F. Sapala, J., denied, concluding that the clerk had discretion to determine whether the proposed amendment was contrary to state law, that it was in fact contrary to state law, and that the clerk therefore had no legal duty to place it on the ballot. The coalition appealed.

The Court of Appeals *held*:

1. Under the Detroit Charter, state law applies to the conduct and canvass of city elections. The city clerk must verify the signatures of an initiative petition as required by MCL 117.25 of the Home Rule Cities Act and then submit the proposed amendment to the city electors at the next regular municipal or general state election, MCL 117.25(3). Under the charter, the city clerk must then report to the city council with regard to his or her canvass of the signatures, after which the city council must either enact

the proposed ordinance or submit it to the voters. Defendants did not have authority under state law or city ordinance to request the city's legal department to assess whether the proposed amendment, if passed, would conflict with Michigan's controlled substance laws. They did not have discretion to review the substance or effect of the proposal. Because the city clerk certified the petitions as having the requisite number of qualified signatures, the city clerk and the election commission had a clear legal duty to perform the ministerial act of placing the initiative on the ballot, and the coalition had a clear legal right to the performance of the duty. There was no other legal remedy available to the coalition when defendants improperly exercised their discretion and declined to place the proposed amendment on the ballot. The trial court abused its discretion by failing to grant the coalition's request for mandamus.

2. Although there are very rare cases in which there is a clear and unmistakable conflict between an initiative and a state law necessitating prior court intervention, a substantive challenge to a proposed initiative is generally improper until after the law is enacted. Courts should not render hypothetical opinions about proposed amendments that may never become law because it interferes with the legislative process.

Reversed and remanded for further proceedings.

MARKEY, P.J., dissenting, would have affirmed the trial court's order granting summary disposition in favor of defendants, concluding that the coalition had failed to demonstrate that defendants had a clear legal duty to certify a ballot question to adopt a city ordinance that was clearly contrary to state law. She reasoned that under Const 1963, art 7, § 22, the city council was precluded from enacting an ordinance that was in direct conflict with Michigan's controlled substance statutes. The city of Detroit did not have the constitutional authority to adopt such an ordinance, and it was not within the reserved right of initiative provided for in Const 1963, art 2, § 9. Judge MARKEY would have held that the trial court did not abuse its discretion by denying the coalition's petition for a writ of mandamus.

1. MANDAMUS — EVIDENCE — BURDEN OF PROOF.

A writ of mandamus is an extraordinary remedy that will only be issued if (1) the party seeking the writ has a clear legal right to the performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the requested act, (3) the act is ministerial, and (4) no other remedy exists that might achieve the

same result; the party seeking mandamus has the burden of establishing that the official in question has a clear duty to perform the act.

2. COURTS — HYPOTHETICAL OPINIONS — PROPOSED INITIATIVES — CONFLICT WITH STATE LAWS — ELECTIONS.

It is generally improper to challenge a proposed initiative until after the law is enacted; although there are very rare cases in which there is a clear and unmistakable conflict between an initiative and a state law necessitating prior court intervention, courts should generally not render hypothetical opinions about proposed amendments.

Honigman Miller Schwartz and Cohn LLP (by *Timothy Sawyer Knowlton*) for Coalition for a Safer Detroit.

Krystal A. Crittendon, Corporation Counsel, and *Sheri L. Whyte*, *Dennis A. Mazurek*, and *Tonja R. Long*, Assistant Corporation Counsel, for the Detroit City Clerk and the Detroit Election Commission.

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

SAAD, J. Plaintiff appeals the trial court's order that denied its request for a writ of mandamus and granted defendants' motion for summary disposition. For the reasons set forth below, we reverse and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEEDINGS

On May 5, 2010, plaintiff filed signed initiative petitions with the Detroit City Clerk to place on the November 2, 2010, ballot a proposed amendment to § 38 of the 1997 Detroit City Code.[1] Section 38 addresses controlled substances and contains the following relevant provisions:

[1] While Detroit recently enacted a new city code, effective January 1, 2012, we note that the initiative petition in this case involved an amendment of the 1997 Detroit City Code.

> 38-11-2. Possession, sale, etc., prohibited generally.
>
> It shall be unlawful for any person to possess, sell, offer for sale, distribute, administer, dispense, prescribe or give away any controlled substance for which the unlawful possession, sale, offer for sale, distribution, administration, dispensation, prescription, or giving away is punishable by imprisonment for not more than one (1) year under any of the provisions contained within Part 74 of the Michigan Public Health Code, being MCL 333.7401 through MCL 333.7461; MSA 14.15(7401) through 14.15(7461), provided, that this division shall not be construed to prohibit the possession, sale, offer for sale, distribution, administration, dispensation, or prescription of any controlled substance, or its derivative, in accordance with this division.
>
> * * *
>
> Sec. 38-11-7. Penalties.
>
> (a) Any person who shall be convicted of violating any provision of this division shall be deemed guilty of a misdemeanor and shall be punished by a fine not to exceed five hundred dollars ($500.00), or by imprisonment not to exceed ninety (90) days, or by both in the discretion of the court.
>
> (b) Each day a violation continues shall be considered a separate offense and may be punished accordingly.

The proposed amendment set forth in the initiative would have added § 38-11-50 to the code, which would provide: "None of the provisions of this article shall apply to the use or possession of less than 1 ounce of marihuana, on private property, by a person who has attained the age of 21 years."

The city clerk reported that the petitions contained sufficient valid signatures. When the signature requirement had been met and verified, the 1997 Detroit City Charter permitted the city council to enact the ordinance proposed by the petition or, if it failed to do so, to

submit the proposed code amendment to the voters. 1997 Detroit Charter, art 12, § 12-107. The city council did not vote on the proposed amendment, and the matter was forwarded to the Detroit City Election Commission. The election commission asked the Detroit Law Department to provide an opinion about whether the proposed amendment was a valid initiative under Michigan law.

An attorney with the law department drafted a legal memorandum in which she concluded that the initiative conflicted with a state law that prohibits the use and possession of marijuana and that a city may not enact an ordinance that conflicts with state law. As a result the initiative would have been advisory in nature and, under Michigan law, an advisory or "symbolic" initiative may not be placed on the ballot. On August 9, 2010, the election commission voted to not place the initiative on the ballot.

Plaintiff filed a complaint for mandamus requesting the circuit court to order defendants to place the proposed amendment on the ballot. The court denied the writ of mandamus and granted defendants' motion for summary disposition under MCR 2.116(C)(8). The court ruled that the clerk had the discretion to determine whether the proposed amendment was contrary to state law. The court also agreed that the proposed amendment was contrary to state law and that the clerk therefore had no legal duty to place the initiative on the ballot.

II. ANALYSIS

A. BURDEN OF PROOF AND STANDARD OF REVIEW

A writ of mandamus is an extraordinary remedy that will only be issued if "(1) the party seeking the writ has

a clear legal right to the performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result." *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 284; 761 NW2d 210 (2008). The party seeking mandamus has the burden of establishing that the official in question has a clear legal duty to perform. *Burger King Corp v Detroit*, 33 Mich App 382, 384; 189 NW2d 797 (1971).

We review for an abuse of discretion a circuit court's decision on a request for mandamus. *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 438; 722 NW2d 243 (2006). However, we review de novo the first two elements required for issuance of a writ of mandamus—that defendants have a clear legal duty to perform, and plaintiffs have a clear legal right to performance of the act requested—as questions of law. *Tuggle v Mich Dep't of State Police*, 269 Mich App 657, 667; 712 NW2d 750 (2006). We also review de novo a trial court's decision on a motion for summary disposition. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). MCR 2.116(C)(8) tests whether a claimant has failed to state a cognizable claim. For purposes of a motion for summary disposition under MCR 2.116(C)(8), this Court accepts all well-pleaded factual allegations as true, and construes them in a light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

B. DISCUSSION

Plaintiff argues that because its petitions had the required number of qualified signatures, the statutory requirements governing initiative proposals were satisfied and, therefore, that the trial court erred by uphold-

ing defendants' decision to not place the proposed amendment on the ballot. Plaintiff also does not agree that the proposed amendment is contrary to state law.

Article 3, § 3-104 of the 1997 Detroit Charter provides that, "[e]xcept as otherwise provided by this Charter or ordinance, state law applies to . . . the conduct and canvass of city elections." With regard to initiatives, the Home Rule Cities Act, MCL 117.1 *et seq*., provides:

> Each city may provide in its charter for 1 or more of the following:
>
> * * *
>
> (g) The initiative and referendum on all matters within the scope of the powers of that city and the recall of city officials. [MCL 117.4i(g).]

The act also sets forth the following with regard to the handling of local elections in MCL 117.25:

> (1) An initiatory petition authorized by this act shall be addressed to and filed with the city clerk. The petition shall state what body, organization, or person is primarily interested in and responsible for the circulation of the petition and the securing of the amendment. Each sheet of the petition shall be verified by the affidavit of the person who obtained the signatures to the petition. The petition shall be signed by at least 5% of the qualified and registered electors of the municipality. Each signer of the petition shall also write, immediately after his or her signature, the date of signing and his or her street address. A signature obtained more than 1 year before the filing of the petition with the city clerk shall not be counted. The petition is subject to the requirements of [MCL 117.25a].
>
> (2) A person who willfully affixes another's signature, or subscribes and swears to a verification that is false in any material particular, is guilty of perjury. A person who takes the oath of another to the petition not knowing him or her

> to be the same person he or she represents himself or herself to be or knowing that the petition or any part of it is false or fraudulent in any material particular, or who falsely represents that the proposed amendment is proposed by persons other than the true sponsors, is guilty of a felony and is liable for the same punishment as provided for perjury.
>
> (3) Upon receipt of the petition, the city clerk shall canvass it to ascertain if it is signed by the requisite number of registered electors. For the purpose of determining the validity of the petition, the city clerk may check any doubtful signatures against the registration records of the city. Within 45 days from the date of the filing of the petition, the city clerk shall certify the sufficiency or insufficiency of the petition. If the petition contains the requisite number of signatures of registered electors, the clerk shall submit the proposed amendment to the electors of the city at the next regular municipal or general state election held in the city which shall occur not less than 90 days following the filing of the petition.

Article 12 of the 1997 Detroit Charter governs initiatives and referendums in Detroit and provides, in relevant part:

> **12-104. Duties of the City Clerk**.
>
> The petitions shall be filed with the city clerk. The clerk shall, within ten (10) days, canvass the signatures thereon to determine their sufficiency and make a report of the result to the city council. Any signature on an initiative petition obtained more than six (6) months before the filing of the petition with the clerk shall not be counted.
>
> * * *
>
> **12-107. Procedure**.
>
> Upon the report of the clerk that the initiative or referendum petitions are sufficient, and filed within the time limits provided by this Charter, the city may within thirty (30) days:

1. In the case of an initiative petition, enact the ordinance proposed by the petition; or

2. In the case of a referendum petition, repeal the ordinance to which the petition refers.

If the city fails to enact or repeal the measure, the measure shall be submitted to the voters.

12-108. Submission to Voters.

If a measure must be submitted to the voters, it shall be submitted:

1. In the case of initiative, at the next election in the city, or, in the discretion of the city council, at a special election; and

2. In the case of referendum, at the next election in the city occurring not sooner than seventy (70) days after the city council's determination not to repeal the measure, or, in the discretion of the city council, at a special election.

Except as otherwise required by law, the result of any initiative or referendum election shall be determined by . . . a majority of the voters voting on the question.

We agree with plaintiff that it was not within the scope of defendants' authority to assess the substance of the petition or to determine whether, if passed, it would conflict with state law. The duties of the city clerk are clearly stated in both MCL 117.25 and the Detroit City Charter. After the clerk canvasses the petitions to determine if they contain the requisite number of qualified signatures, MCL 117.25(3) provides that the clerk "shall submit the proposed amendment to the electors of the city at the next regular municipal or general state election held in the city which shall occur not less than 90 days following the filing of the petition."[2] The charter then requires the clerk to report to

[2] This Court has held that a clerk's authority extends to a determination of whether the petition facially complies with MCL 117.25(1) and (2). *Herp v Lansing City Clerk*, 164 Mich App 150, 159; 416 NW2d 367 (1987).

the city council with regard to his or her canvass of the signatures, and it gives the city council the opportunity to pass the ordinance as proposed or to submit the initiative to the voters in the next election. 1997 Detroit Charter, art 12, § 12-107. Despite the additional opportunity for the city council to simply adopt the proposed amendment, nothing in either the charter or the statute indicates that defendants have the discretion to review the substance or effect of the proposal itself.

On the basis of the clear language in the statute and charter, it was a ministerial act for defendants to place the initiative petition on the ballot once the clerk determined that the petitions contained the required number of qualified signatures. Because the clerk certified the petitions as having the requisite number of qualified signatures, defendants had a clear legal duty to place the initiative on the ballot and plaintiff had a clear legal right to the performance of that duty. Further, no other legal remedy was available when defendants declined to place the proposed amendment on the ballot through an exercise of discretion that is not permitted by law. Accordingly, we hold that the trial court abused its discretion by failing to enter an order of mandamus because plaintiff satisfied the elements necessary for mandamus relief. *Citizens Protecting Michigan's Constitution*, 280 Mich App at 284.

We further hold that the trial court erred when it addressed the question of whether the proposed ordinance conflicts with state law when it decided the summary disposition motion. A preelection determination of the validity of a ballot initiative substantially interferes with the legislative function, and our courts have repeatedly held that a substantive challenge to a

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However, unlike *Herp*, this case does not involve a challenge under either subsection or a challenge to the form of the petition.

proposed initiative is improper until *after* the law is enacted. *Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 493; 688 NW2d 538 (2004); *Senior Accountants, Analysts & Appraisers Ass'n v Detroit*, 218 Mich App 263, 270 n 5; 553 NW2d 679 (1996); *Hamilton v Secretary of State*, 212 Mich 31, 34; 179 NW 553 (1920). We recognize that in the very rare case in which there is a clear and unmistakable conflict between an initiative and state law, the Constitution, or the city charter itself, or when an "initiative petition does not meet the constitutional prerequisites for acceptance," a court may find it necessary to intervene in the initiative process. *Citizens Protecting Michigan's Constitution*, 280 Mich App at 276-277, 291; *Detroit v Detroit City Clerk*, 98 Mich App 136, 139; 296 NW2d 207 (1980). But because the judicial branch should rarely interfere with the legislative process, such cases should be, and are, rare and this is not such a case.

To support their position, defendants cite *People v Llewellyn*, 401 Mich 314, 322 n 4; 257 NW2d 902 (1977), for the proposition that an ordinance conflicts with and is preempted by state law if it permits what state law forbids. We take no position on whether a court could come to this conclusion if this proposed ordinance was passed and then challenged. We also take no position on the wisdom of the petition or speculate about any actions that may or may not be taken if and when the proposed amendment is enacted. Simply stated, before it becomes law, any judgment on the merits of such a claim would be an academic discussion about a hypothetical set of facts. Our courts should not render hypothetical opinions about matters that may never become law.

Moreover, we note here that the question of a potential conflict between city and state law is complex,

particularly when the language of the proposed ordinance does not appear to invalidate or interfere with the enforcement of state and federal laws prohibiting the use or possession of marijuana. The proposed amendment appears to only provide that the use or possession of less than one ounce of marijuana on private property by a person 21 or older will not also be punished *under the Detroit ordinances*. And though plaintiff's objective in supporting this initiative may well be to take yet another incremental step toward legalizing marijuana in Michigan, and though the intended effect of the ordinance may be to discourage arrests for the possession or use of small amounts of marijuana, this issue is not properly before us. We do note, however, that under MCL 764.15 it remains the case that local police officers may arrest a person for the commission of a state felony or misdemeanor and, under the Detroit City Charter, it is the *obligation* of the Detroit Police Department to "enforce laws of the state and the nation" as well as "the ordinances of the city." 1997 Detroit Charter, art 7, § 7-1101. Thus, the proposal, on its face, does not appear to change the fact that all persons under Michigan's jurisdiction remain subject to the drug laws contained in the Public Health Code that criminalize the use and possession of marijuana. MCL 333.7403(2)(d) and MCL 333.7404(2)(d).[3]

Plaintiff established the requirements for a writ of mandamus, and the trial court abused its discretion by

[3] We also observe that defendants' arguments with regard to an alleged conflict with state law appear to apply equally to the initiative permitting the use or possession of marijuana and paraphernalia by a person "under the direction, prescription, supervision, or guidance of a physician or other licensed medical professional." Detroit City Code, §§ 38-11-9 and 38-11-32. Those amendments of the code were passed by initiative in 2004, despite the fact that Michigan's medical marijuana act was not passed on a statewide basis until 2008.

failing to grant the writ. It was outside defendants' authority to consider the substance and effect of the initiative, and defendants had a clear legal duty to place the matter on the ballot once the clerk verified that the petition had the requisite number of qualified signatures. Plaintiff had a clear legal right to the placement of the initiative on the ballot, and plaintiff had no other remedy that would achieve the same result. Again, we emphasize that judicial preelection determinations regarding the legality of ballot proposals are disfavored as an undue interference with the legislative process—including the initiative process, the most direct form for citizens to pass laws. And when, as here, the question of whether the ballot proposal conflicts with state law is a complex, close question of law, clearly the judiciary should let the legislative process proceed.

Accordingly, we reverse and remand this case to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

GLEICHER, J., concurred with SAAD, J.

MARKEY, P.J. (*dissenting*). I respectfully dissent. It is plaintiff that seeks judicial interference with the political legislative process. I agree with the trial court that plaintiff failed to meet its burden of proof to establish that defendants had a clear legal duty to certify a ballot question to adopt a city ordinance that is clearly contrary to state law. For this reason, I would affirm.

The issuance of a writ of mandamus is an extraordinary remedy, and whether it issues is within the discretion of the court. *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 284; 761 NW2d 210 (2008); *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 438; 722 NW2d 243 (2006). "The

plaintiff bears the burden of demonstrating entitlement to the extraordinary remedy of a writ of mandamus." *Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 492; 688 NW2d 538 (2004). The party seeking a writ of mandamus must establish that it (1) "has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result." *Citizens Protecting Michigan's Constitution*, 280 Mich App at 284. The discretionary writ of mandamus "cannot be invoked to accomplish [an] illegal purpose, even though the officer against whom it is invoked is charged with an express duty under [a] statute." *Cheboygan Co Bd of Supervisors v Mentor Twp Supervisor*, 94 Mich 386, 388; 54 NW 169 (1892).

The majority reasons that defendants may not review the substance of the ballot initiative to ensure its compliance with state law but must, instead, after verifying the sufficiency of the requisite signatures and the failure of the city council to adopt the initiative, perform the ministerial act of placing the proposal on the ballot. The majority also applies the doctrine of ripeness, announced in *Hamilton v Secretary of State*, 212 Mich 31; 179 NW 553 (1920), and followed in subsequent cases, to conclude "that a substantive challenge to a proposed initiative is improper until *after* the law is enacted." *Ante* at 371-372. I disagree.

Since *Marbury v Madison*, 5 US (1 Cranch) 137, 177; 2 L Ed 60 (1803), it has been the province of the judiciary in the United States to "to say what the law is." Thus, under our system of government with three coequal branches, "interpreting the law has been one of the defining aspects of judicial power." *In re Complaint*

of Rovas Against SBC Mich, 482 Mich 90, 98; 754 NW2d 259 (2008). Yet all public officers in this state from each branch of government must take the same oath. Const 1963, art 11, § 1 provides in part:

> All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of . . . . . according to the best of my ability.

The oath emphasizes that apart from the United States Constitution, the Michigan Constitution is the supreme law that must guide "legislative, executive and judicial" officers to "faithfully discharge the duties of [their] office."

The supremacy of Michigan's Constitution in matters relating to the right of initiative was recently recognized by this Court in *Citizens Protecting Michigan's Constitution*, 280 Mich App 273. The issue presented in that case was whether an initiative petition filed pursuant to Const 1963, art 12, § 2, to amend the Michigan Constitution in a multitude of ways could be placed on the ballot or whether the proposed amendments were so multifarious as to constitute a "general revision" and required compliance with the procedures for a constitutional convention, Const 1963, art 12, § 3. This Court held that the latter constitutional provision applied and issued a writ of mandamus precluding defendants from submitting the initiative petition to the electors. *Citizens Protecting Michigan's Constitution*, 280 Mich App at 277, 308. Relying on several Michigan Supreme Court cases, including *Michigan United Conservation Clubs v Secretary of State* (*After Remand*), 464 Mich 359, 365-366; 630 NW2d 297

(2001), *Michigan United Conservation Clubs v Secretary of State*, 463 Mich 1009 (2001), *City of Jackson v Comm'r of Revenue*, 316 Mich 694, 711; 26 NW2d 569 (1947), and *Scott v Secretary of State*, 202 Mich 629, 643; 168 NW 709 (1918), this Court concluded that whether an initiative proposal meets Michigan's constitutional prerequisites for submission to the electors presents a "threshold determination" that is ripe for decision before the initiative proposal is submitted to the voters. *Citizens Protecting Michigan's Constitution*, 280 Mich App at 282-291. An initiative petition "will not meet the constitutional prerequisites for acceptance if the constitutional power of initiative does not extend to the proposal at issue." *Id*. at 291.

The rights of initiative and referendum are reserved to the people by Const 1963, art 2, § 9, which states, in pertinent part with respect to this case:

> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum. *The power of initiative extends only to laws which the legislature may enact under this constitution*. [Emphasis added.]

In my opinion, the emphasized sentence imposes a substantive limit on the right of initiative.[1] Moreover,

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[1] For the reasons discussed in this opinion, I disagree with this Court's decision in *Ferency v Bd of State Canvassers*, 198 Mich App 271; 497 NW2d 233 (1993), which held that the substantive limitation of Const 1963, art 2, § 9 was not ripe for review before an election is held. *Ferency*, 198 Mich App at 274, held that whether an initiative petition was subject to preelection review under Const 1963, art 2, § 9 was controlled by *Hamilton*, 212 Mich 31. But *Hamilton* interpreted Const 1908, art 17, § 2, regarding amending the constitution, which did not contain the substantive limit contained in Const 1963, art 2, § 9. See *Hamilton*, 212 Mich at 35-36; cf. Const 1908, art 5, § 1 and *Auto Club of Mich Comm for Lower Rates Now v Secretary of State (On Remand)*, 195 Mich App 613, 616-619; 491 NW2d 269 (1992). *Ferency* also held that the authority to

consideration must be given to the fact that the initiative petition at issue in this case proposes to amend a Detroit ordinance. Cities and other municipalities of this state are creatures of this state's sovereignty and possess only the power and authority granted by the Michigan Constitution and state statutes. *Sinas v City of Lansing*, 382 Mich 407, 411; 170 NW2d 23 (1969). Consequently, another constitutional provision limits the adoption of ordinances by Detroit's legislative body. Specifically, Const 1963, art 7, § 22 provides that a city or village "shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law." In *People v Llewellyn*, 401 Mich 314, 322; 257 NW2d 902 (1977), our Supreme Court provided clear guidance on the limits Const 1963, art 7, § 22 imposes on the authority of a city legislature to adopt ordinances that conflict with state law. "Under Const 1963, art 7, § 22, a Michigan municipality's power to adopt resolutions and ordinances relating to municipal concerns is " 'subject to the constitution and law.' " *Llewellyn*, 401 Mich at 321. Moreover,

> [a] municipality is precluded from enacting an ordinance if 1) the ordinance is in direct conflict with the state statutory scheme, or 2) if the state statutory scheme pre-empts the ordinance by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation. [*Id*. at 322.]

A direct conflict exists when an ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits. *Id.* at 322 n 4.

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engage in constitutional review "lies solely with the judiciary." *Ferency*, 198 Mich App at 273-274. Even if this is so, judicial review in the grand tradition of *Marbury v Madison* is occurring now. See *Citizens Protecting Michigan's Constitution*, 280 Mich App at 291.

Except within the strict confines of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., the use and possession of marijuana is prohibited by Michigan's Public Health Code, MCL 333.1101 *et seq*. See MCL 333.7404(2)(d) (prohibiting use of marijuana); MCL 333.7403(2)(d) (prohibiting possession of marijuana); and MCL 333.7401(1) and (2)(d) (prohibiting the manufacture, creation, delivery, or possession with intent to manufacture, create, or deliver marijuana). Thus, because the proposed ordinance would permit "the use or possession of less than 1 ounce of marihuana, on private property, by a person who has attained the age of 21 years," without compliance with the MMMA, there is a patent, direct conflict between the proposed ordinance and state statute. *Llewellyn*, 401 Mich at 322 n 4. The proposed ordinance would be preempted by state statute if passed by the voters, and it is not within its constitutional authority under Const 1963, art 7, § 22 for the Detroit legislative body to adopt this ordinance. *Llewellyn*, 401 Mich at 319-320. Consequently, the initiative petition here does not satisfy the constitutional prerequisite of coming within the right of initiative under Const 1963, art 2, § 9. *Citizens Protecting Michigan's Constitution*, 280 Mich App at 291.

The majority opines that "the question of a potential conflict between city and state law is complex, particularly when the language of the proposed ordinance does not appear to invalidate or interfere with the enforcement of state and federal laws prohibiting the use or possession of marijuana." *Ante* at 372-373. While I agree that a local ordinance cannot "invalidate or interfere with the enforcement of state and federal laws," this is not the test announced in *Llewellyn* to determine whether a city or village exceeds its authority under Const 1963, art 7, § 22. Applying the correct test, I conclude, as did the trial court, that the initiative

proposal here sought the adoption of an ordinance that directly conflicted with state law. Consequently, it was not within the constitutional authority of the city of Detroit to adopt such an ordinance. *Id*.; see also *Llewellyn*, 401 Mich at 321-322, n 4. As such, the proposed ordinance amendment was not within the reserved right of initiative provided for in Const 1963, art 2, § 9. See *Citizens Protecting Michigan's Constitution*, 280 Mich App at 291.

Finally, as noted initially, it is the plaintiff's burden to establish not only that it has a clear legal right to performance of the specific duty sought, but also that the defendant has the clear legal duty to perform the act requested. *Id*. at 284. Plaintiff in this case failed to meet its burden of proof with respect to either of these requirements. I would hold that the trial court did not abuse its discretion by denying plaintiff's complaint for a writ of mandamus to compel the placing of this initiative before the electors because its purpose—and admittedly so—was to adopt an amendment to Detroit's ordinances that clearly conflicted with state law and, thus, sought to accomplish an illegal purpose. *Cheboygan Co Bd of Supervisors*, 94 Mich at 388.

I would affirm.

THURMAN v CITY OF PONTIAC

Docket No. 300396. Submitted January 11, 2012, at Detroit. Decided January 19, 2012. Approved for publication February 14, 2012, at 9:00 a.m.

Patrick Thurman brought a negligence action in the Oakland Circuit Court against the city of Pontiac for injuries sustained when he tripped and fell on an allegedly defective public sidewalk. Thurman notified the city of his injuries within 120 days as required by MCL 691.1404(1) and identified the accident location as "35 Huron, Pontiac, Michigan." The city moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that because Thurman did not sufficiently identify the exact location of his alleged injury, as required by MCL 691.1404(1), it was entitled to judgment as a matter of law on the basis of governmental immunity. The court, Rudy J. Nichols, J., accepted additional photographic evidence of the accident site from Thurman and denied the motion, concluding that Thurman's notice was more than adequate and had identified the location sufficiently to enable the city to identify the location. The city appealed.

The Court of Appeals *held*:

The circuit court erred by denying the city's motion for summary disposition on the basis of governmental immunity. Under the highway exception to governmental immunity, MCL 691.1402(1), a governmental agency with jurisdiction over a particular highway has a duty to maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. This includes the duty to maintain sidewalks. MCL 691.1401(e). Under MCL 691.1404(1), a plaintiff must notify the governmental defendant of his or her claim in a timely manner in order for the highway exception to apply. While the notice need not be in any particular form, it must be provided within 120 days of the plaintiff's injuries and specify the exact location and nature of the defect, the injury sustained, and the names of witnesses known at the time by the claimant. To qualify, the notice must specify details such as the corner of the intersection at which the alleged defect is located as well the side of the road on which it is located. Thurman's notice that the injury occurred at "35 Huron, Pontiac,

Michigan" did not provide adequate notice of the location of the defect because it did not specify whether it was at 35 West Huron or 35 East Huron Street, both of which were addresses in the city, or whether it was located on the north or south side of the road. The court also erred by considering the photographs submitted by Thurman as part of his notice because they were submitted after the city filed its motion for summary disposition, which was more than 120 days after the injury and therefore should not have been considered as part of the notice even though the untimely submission did not prejudice the city.

Reversed and remanded for entry of a judgment in favor of the city.

GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — NOTICE OF CLAIMS — EXACT LOCATION OF ACCIDENT.

Under the highway exception to governmental immunity, a governmental agency with jurisdiction over a particular highway has a duty to maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel; this includes the duty to maintain sidewalks; a plaintiff alleging an injury from the agency's failure to do so must notify the governmental defendant of his or her claim in a timely manner in order for the highway exception to apply; while the notice need not be in any particular form, it must be provided within 120 days of the plaintiff's injuries and specify the exact location and nature of the defect, the injury sustained, and the names of witnesses known at the time; to qualify, the notice must specify details such as the corner of the intersection at which the alleged defect is located as well the side of the road on which it is located (MCL 691.1401[e]; MCL 691.1402[1]; MCL 691.1404[1]).

Varjabedian Attorneys, P.C. (by *Christopher S. Varjabedian* and *Anthony Vitucci, Jr.*), for Patrick Thurman.

Johnston, Sztykiel, Hunt, Goldstein, Fitzgibbons & Clifford, P.C. (by *Eric S. Goldstein*), for the city of Pontiac.

Before: JANSEN, P.J., and WILDER and K. F. KELLY, JJ.

PER CURIAM. Defendant, the city of Pontiac (the City), appeals by right the circuit court's denial of its motion

for summary disposition brought pursuant to MCR 2.116(C)(7) on the basis of governmental immunity.[1] We reverse and remand for entry of judgment in favor of the City.

On March 3, 2010, plaintiff was walking in the City when he fell on a public sidewalk, sustaining injuries to his left leg. Plaintiff alleged that he had tripped on a portion of the sidewalk that was cracked or uneven. On April 15, 2010, plaintiff notified the City in writing that he had tripped on an allegedly defective sidewalk while "walking east on Huron Street" and that his injury had occurred at "35 Huron, Pontiac, Michigan."

On May 28, 2010, plaintiff commenced a negligence action in the Oakland Circuit Court, claiming that the City had failed to maintain the sidewalk in reasonable repair and that the sidewalk was unsafe for public travel. The City moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiff had failed to comply with MCL 691.1404(1) because his notice was not sufficiently detailed. In particular, the City argued that the words "35 Huron, Pontiac, Michigan" did not sufficiently identify the *exact location* of plaintiff's alleged injury. The City claimed that the language of the notice was ambiguous because there was both a 35 West Huron Street and a 35 East Huron Street. Accordingly, the City argued, it was entitled to judgment as a matter of law on the ground of governmental immunity.

On August 30, 2010, plaintiff responded to the City's motion for summary disposition. Plaintiff maintained that he had fully complied with MCL 691.1404(1) and that his notice had been sufficiently specific. Plaintiff

[1] The denial of a motion for summary disposition brought pursuant to MCR 2.116(C)(7) on the basis of governmental immunity is appealable by right. MCR 7.203(A)(1); MCR 7.202(6)(a)(v).

also submitted several photographs of the sidewalk, street, and buildings in the location of his fall. Plaintiff argued that the photographs made clear that he had fallen in the area of 35 *West* Huron Street.

In reply, the City reiterated its position that plaintiff's description of the location of his fall was deficient. The City further argued that the circuit court should not consider the late-filed photographic evidence because it was not submitted with plaintiff's original notice.

At oral argument, the circuit court observed that although there is both a 35 West Huron Street and a 35 East Huron Street in the city of Pontiac, "plaintiff's notice did still identify the location sufficiently so as to enable [the City] to identify the location . . . ." The court determined that plaintiff's notice provided the City "more than adequate notice" and that "plaintiff did identify the exact location of [his] injury." On September 22, 2010, the circuit court entered an order denying the City's motion for summary disposition for the reasons stated on the record.

The grant or denial of a motion for summary disposition is reviewed de novo. *McLean v McElhaney*, 289 Mich App 592, 596; 798 NW2d 29 (2010). "Similarly, the applicability of governmental immunity is a question of law that this Court reviews de novo." *Id*. A plaintiff who asserts a claim against a governmental agency " 'must plead in avoidance of governmental immunity' " by "stat[ing] a claim that fits within a statutory exception . . . ." *Kendricks v Rehfield*, 270 Mich App 679, 681; 716 NW2d 623 (2006) (citation omitted).

"[T]he immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000).

Under the highway exception to governmental immunity, a governmental agency with jurisdiction over a particular highway has a duty to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1). This includes sidewalks. MCL 691.1401(e). However, before the highway exception can apply, the plaintiff must timely notify the governmental defendant of his or her claim in accordance with MCL 691.1404(1). *Plunkett v Dep't of Transp*, 286 Mich App 168, 176; 779 NW2d 263 (2009). The notice provided under MCL 691.1404(1) need not be in any particular form, *id*., but must be provided within 120 days of the plaintiff's injury, MCL 691.1404(1); *Burise v City of Pontiac*, 282 Mich App 646, 654; 766 NW2d 311 (2009). The notice must also "specify the *exact location* and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant." MCL 691.1404(1) (emphasis added).

In *Smith v City of Warren*, 11 Mich App 449, 452-453; 161 NW2d 412 (1968), the plaintiff notified the governmental defendant that she had been injured as the result of an alleged defect in the roadway at " 'Thirteen Mile and Hoover, near the address of 11480 Thirteen Mile Road.' " This Court held that the plaintiff's notice was not sufficiently detailed and did not specify the exact location of the alleged defect because it did not mention that the defect in question was actually on the south side of Thirteen Mile Road and approximately 40 yards away from the stated address. *Id*. Similarly, in *Dempsey v Detroit*, 4 Mich App 150, 151; 144 NW2d 684 (1966), an elderly plaintiff was injured after she fell on an allegedly defective sidewalk. Before filing suit, the plaintiff notified the governmental defendant merely that the defect was located at " 'Adams and Woodward.' " *Id*. Relying on *Barribeau v Detroit*, 147

Mich 119, 124-126; 110 NW 512 (1907), the *Dempsey* Court held that the plaintiff's notice was insufficient as a matter of law because it did not specify at which of the four corners of the intersection the alleged defect was located. *Dempsey*, 4 Mich App at 151-152.

Turning to the instant case, plaintiff's notice merely stated that the alleged defect in the City's sidewalk was located at "35 Huron, Pontiac, Michigan." Plaintiff's notice did not specify whether the alleged defect was located at 35 West Huron Street or 35 East Huron Street, both of which are actual addresses in the city of Pontiac. See *Jakupovic v City of Hamtramck*, 489 Mich 939 (2011). Nor did plaintiff's notice specify whether the alleged defect was located on the north side or south side of Huron Street. *Smith*, 11 Mich App at 452-453. We conclude that the circuit court erred by denying the City's motion for summary disposition because plaintiff's notice to the City did not "specify the exact location . . . of the defect" within the meaning of MCL 691.1404(1). See *id.*; *Dempsey*, 4 Mich App at 151-152. Nor was the photographic evidence provided by plaintiff in response to the City's motion for summary disposition sufficient to cure the otherwise insufficient notice. The photographs were submitted more than 120 days after plaintiff's injury, and it was therefore improper for the circuit court to consider them as part of plaintiff's notice. MCL 691.1404(1); *Burise*, 282 Mich App at 654. This is true even if the untimely submission of the photographs did not prejudice the City in any way. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007).

Because plaintiff's notice did not specify the *exact location* of the alleged defect within the meaning of MCL 691.1404(1), the notice was insufficient, plaintiff was not entitled to proceed against the City under the

highway exception, and the City was entitled to governmental immunity as a matter of law. The circuit court erred by denying the City's motion for summary disposition brought pursuant to MCR 2.116(C)(7). We accordingly reverse the circuit court's denial of the City's motion for summary disposition and remand for entry of judgment in favor of the City consistent with this opinion.

Reversed and remanded for entry of judgment in favor of the City. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, a public question having been involved.

JANSEN, P.J., and WILDER and K. F. KELLY, JJ., concurred.

PEOPLE v RYAN

Docket No. 301787. Submitted January 4, 2012, at Lansing. Decided February 14, 2012, at 9:05 a.m. Leave to appeal denied, 493 Mich 865.

Sean Michael Ryan was convicted by a jury in the Saginaw Circuit Court of seven counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (CSC-1), for committing various acts of sexual penetration involving his daughter. The convictions were supported by both the victim's testimony and defendant's confession. Defendant had moved to suppress his confession before trial, arguing that it was involuntary and that his waiver of his rights under *Miranda v Arizona*, 384 US 436 (1966), was not knowing, intelligent, and voluntary. The court, Janet M. Boes, J., denied the motion and following defendant's convictions sentenced him to 25 to 50 years' imprisonment for each of the seven CSC-1 convictions. The sentences were to be served concurrently with the exception of those for two of the counts, which were to be served consecutively. Relying on MCL 750.520b(3), the court determined that it had discretion to make the two sentences consecutive because the distinct sexual penetrations associated with those counts arose out of the same transaction. Defendant appealed, arguing that the trial court erred by denying the motion to suppress his confession and imposing consecutive sentences for the two CSC-1 convictions.

The Court of Appeals *held*:

1. The voluntariness of a confession is assessed by considering the totality of the surrounding circumstances to determine whether the confession was freely and voluntarily made. A confession is voluntary if it is the product of an essentially free and unconstrained choice by its maker and the accused's will has not been overborne or his or her capacity for self-determination criminally impaired. To determine whether a statement is voluntary a court should consider various factors, including the age of the accused; his or her lack of education or intelligence level; his or her prior experience with the police or lack thereof; the repeated and prolonged nature of the questioning; the length of detention before the accused gave the statement in question; the lack of any advice to the accused of his or her constitutional rights; whether there was an unnecessary delay in bringing the accused in front of

a magistrate before he or she gave the confession; whether the accused was injured, intoxicated, drugged, or in poor health; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether he or she was threatened with abuse.

2. The same analysis applies to the voluntariness of a *Miranda* waiver. A defendant's waiver of his or her *Miranda* rights is voluntary if there is an absence of police coercion. A waiver of *Miranda* rights must be voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.

3. The trial court properly held that defendant's confession was voluntary. Defendant's claim of involuntariness, which was predicated on pain, lack of medications and medical care, threats regarding his wife's parental rights, and alleged promises of leniency if he confessed, was supported solely by his own testimony and expressly contradicted by police testimony. The trial court's determination that the police officers were more credible was entitled to deference. Although defendant may have lacked access to pain medications and complained of pain earlier in the day to a polygraph examiner who declined to conduct a polygraph test, defendant had never indicated during the recorded interview that he was in pain or in need of medical attention. The confession was not the result of intimidation, coercion or deception, and it was freely and voluntarily made under the totality of the circumstances.

4. Concurrent sentencing is the norm in Michigan, and consecutive sentences may be imposed only if specifically authorized by statute. A court has discretion under MCL 750.520b(3) to impose a term of imprisonment for a first-degree criminal sexual conduct conviction that is to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction. Sentences are imposed separately for each count of a crime on which a defendant is convicted, including counts arising from the same transaction and regardless of whether the length of the sentences are identical. Thus, the language "any other criminal offense" in MCL 750.520b(3) means a different sentencing offense and can encompass additional violations of the same CSC-1 statute. The court did not err by imposing consecutive sentences for the two counts that involved two acts of sexual penetration that were part of the same transaction. They were distinct offenses involving different acts of penetration, and each could independently support a separate prison term. The two counts, which involved an act of vaginal

intercourse immediately followed by the act of fellatio, arose out of the same transaction because they grew out of a continuous time sequence, sprang one from the other, and had a connective relationship that was more than incidental.

5. The issues raised *in propria persona* by defendant are rejected because his arguments had no support whatsoever in the existing record, mischaracterized the record, were devoid of legal merit, failed to establish prejudice, or provided no rational basis for reversal.

Affirmed.

1. CRIMINAL LAW — CONFESSIONS — EVIDENCE — VOLUNTARINESS — TOTALITY OF THE CIRCUMSTANCES.

To determine whether a confession is voluntary, the court must consider the totality of the surrounding circumstances to determine whether it was freely and voluntarily made; a confession is voluntary if it is the product of an essentially free and unconstrained choice by its maker and the accused's will has not been overborne or his or her capacity for self-determination criminally impaired; a court should consider various factors, including the age of the accused; his or her lack of education or intelligence level; his or her prior experience with the police or lack thereof; the repeated and prolonged nature of the questioning; the length of detention before the accused gave the statement in question; the lack of any advice to the accused of his or her constitutional rights; whether there was an unnecessary delay in bringing the accused in front of a magistrate before he or she gave the confession; whether the accused was injured, intoxicated, drugged, or in poor health; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether he or she was threatened with abuse.

2. CRIMINAL LAW — INTERROGATIONS — *MIRANDA* RIGHTS — WAIVER — VOLUNTARINESS.

A defendant's waiver of his or her rights under *Miranda v Arizona*, 384 US 436 (1966), is voluntary if there is an absence of police coercion; the waiver of the *Miranda* rights must have been the product of a free and deliberate choice rather than intimidation, coercion, or deception.

3. SENTENCES — CONSECUTIVE SENTENCING — FIRST-DEGREE CRIMINAL SEXUAL CONDUCT.

A court may impose a term of imprisonment for a conviction of first-degree criminal sexual conduct (CSC-1) that is to be served

> consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction; the language "any other criminal offense" means a different offense and can encompass additional violations of the same CSC-1 statute (MCL 750.520b[3]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Michael D. Thomas*, Prosecuting Attorney, and *Randy L. Price*, Assistant Prosecuting Attorney, for the people.

Patrick K. Ehlmann for defendant.

Before: MURPHY, C.J., and FITZGERALD and METER, JJ.

MURPHY, C.J. Defendant was charged with nine counts of first-degree criminal sexual conduct (CSC-1), MCL 750.520b(1)(a) (victim under age 13), arising out of various acts of sexual penetration involving his daughter. Following a jury trial, defendant was convicted of seven counts of CSC-1, with the jury acquitting defendant on the first count in the felony information and the trial court granting a directed verdict on the information's second count. The victim's testimony and defendant's confession fully supported the convictions. Defendant was sentenced to 25 to 50 years' imprisonment for each of the seven CSC-1 convictions. MCL 750.520b(2)(b) mandated a 25-year minimum sentence. The trial court ordered that the prison sentences be served concurrently, except for the sentence on count 9, which was to be served consecutively to the sentence on count 3. The trial court found that the sexual penetrations associated with counts 3 (fellatio) and 9 (vaginal intercourse) arose out of the same transaction and that imposition of consecutive sentences was thus permissible under MCL 750.520b(3). Defendant was therefore effectively sentenced to a minimum prison term of 50 years. On appeal, defendant

challenges the consecutive sentences imposed by the trial court, argues that the court erred by denying a motion to suppress his confession, and sets forth a litany of other arguments in support of reversal in a Standard 4 brief.[1] We conclude that the trial court correctly interpreted and applied MCL 750.520b(3) with respect to consecutive sentencing, that the court did not err by denying defendant's motion to suppress his confession, and that the remainder of defendant's appellate arguments lack merit. Accordingly, we affirm the convictions and sentences.

I. FACTS

On March 1, 2010, the police were notified by local school personnel that a student had made allegations that her father, defendant, had sexually abused her on various occasions. The police met with defendant at the school, then transported him to the police department for questioning. Meanwhile, a detective took the victim to a local abuse and neglect center for purposes of a forensic interview. At the police department, defendant signed a form indicating that he understood and waived his *Miranda*[2] rights. He provided the police with the addresses of four properties that he owned, and defendant consented to a search of those locations.

In an initial police interview on March 1, defendant denied ever having sexual contact with his daughter. The interview was recorded, but a computer failure or human error resulted in the data or recording being

[1] Administrative Order No. 2004-6 adopted the minimum standards for indigent criminal appellate defense services proposed by the Appellate Defender Commission. A Standard 4 brief refers to a brief filed by the defendant *in propria persona* in which he or she raises issues on appeal against the advice of counsel.

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

lost. Defendant was then transported to the county jail. The next day, March 2, detectives went to the county jail with the intention of interviewing defendant once again. However, the detectives decided not to interview defendant because he complained of a lack of sleep. Defendant was again interviewed by police on March 3, 2010, and the interview was recorded and played for the jury. During the interview, defendant confessed to engaging in numerous instances of sexual contact and penetration with his daughter, including vaginal and anal intercourse, as well as fellatio and cunnilingus.[3] The trial court denied defendant's pretrial motion to suppress the confession, which we shall address in more detail later.

The victim testified that she was 12 years old at the time of trial and that she had stopped living with her mother and went to live with her father in 2009 at a house in Saginaw that he shared with his wife (the victim's stepmother) and the victim's two half-brothers. The victim indicated that her stepmother went to Mississippi for a wedding sometime in June 2009, leaving defendant to care for her and her brothers. Shortly after her stepmother left, defendant called the victim into his bedroom and demanded that she remove all of her clothing. She testified that defendant put his penis in her vagina and thereafter placed his penis in her mouth, leading to ejaculation. The victim was 11 years old at the time. The act of vaginal intercourse and the act of fellatio in this first episode or transaction

[3] We note that on March 3, 2010, there were actually two interviews of defendant by police. A detective conducted an initial interview in which defendant allegedly confessed to sexually abusing his daughter; however, while this interview was successfully videotaped, the volume for the audio was turned down, so the recording was silent. The detective discovered the problem and then conducted a second interview, which was successfully recorded and played for the jury.

gave rise to counts 3 and 9 of the information charging CSC-1. Defendant's daughter testified that he continued to engage in various acts of sexual contact and penetration with her after the initial incident and that the sexual abuse occurred numerous times at the various properties owned by defendant.

The victim stated that on February 28, 2010, her stepmother and brothers were gone from the house and defendant wanted her to remove her clothing, but she refused and climbed under her bed. She testified that defendant took his belt off and started swinging it under the bed, striking her once on the leg. The next day at school the victim told the school counselor about the sexual abuse.

Defendant took the stand and denied any sexual contact with his daughter, suggesting that she had made it all up in an effort to return to her mother out of state. Defendant testified that his confession was false and resulted from being deprived of medical attention and his pain medications as well as threats that his sons would be taken away from his wife and put in foster care.

Defendant was convicted and sentenced on seven counts of CSC-1 as indicated. He appeals as of right.

II. ANALYSIS

A. MOTION TO SUPPRESS CONFESSION

Defendant first argues that the trial court erred by denying the motion to suppress his confession because the confession was involuntary and the waiver of his *Miranda* rights was not knowing, intelligent, and voluntary. Defendant claims that he had suffered a severe injury in the past and was disabled, necessitating an array of medications to manage his pain. Defendant

asserts that the police deprived him of his pain medications and proper medical care and also suggested that his wife could lose custody of their two sons because of the allegations. Defendant contends that he confessed because the police led him to believe that he would receive his pain medications and appropriate medical care and that his wife would be in a better position regarding the children if defendant gave a confession. Defendant notes that he was in extreme pain at the time of the confession.

The trial court conducted a *Walker*[4] hearing on defendant's motion to suppress, taking testimony from defendant and a number of police officers. The trial court found that defendant's testimony about pain or concern for his wife's parental rights was not credible. The court, having viewed a DVD of the confession, observed that defendant never complained of pain during the interview, that he entered the interview room, sat, and manipulated his bag of tobacco in an apparently pain-free manner, that his hands were not shaking as he drank from a cup, and that his speech was coherent. The court noted that defendant gave direct and specific answers to questions and provided details about interactions with his daughter, including information on times, places, and surrounding circumstances. The trial court also found that defendant's testimony concerning his mental state was contradicted by the officers' testimony about defendant's appearance and demeanor. The court found the officers' testimony to be credible.

We initially note that the nature and substance of defendant's argument is focused on the voluntariness of the confession and perhaps the voluntariness of the *Miranda* waiver, but not on whether the *Miranda*

[4] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

waiver was knowing and intelligent. Accordingly, our attention will be fixated on the question of voluntariness. "This Court reviews de novo the question of voluntariness." *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005). Deference is given, however, to the trial court's assessment of the credibility of the witnesses and the weight accorded to the evidence. *Id.* at 708. The trial court's factual findings are subject to reversal only if clearly erroneous, meaning that this Court is left with a firm and definite conviction that a mistake has been made. *Id.*

In *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988), our Supreme Court set forth the applicable analysis that governs a determination whether a confession was voluntary:

> The test of voluntariness should be whether, considering the totality of all the surrounding circumstances, the confession is "the product of an essentially free and unconstrained choice by its maker," or whether the accused's "will has been overborne and his capacity for self-determination critically impaired . . ." The line of demarcation "is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession."
>
> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the

> accused was physically abused; and whether the suspect was threatened with abuse.
>
> The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. [Citations omitted.]

The legal analysis is essentially the same with respect to examining the "voluntary" prong of a *Miranda* waiver. In *People v Daoud*, 462 Mich 621, 635; 614 NW2d 152 (2000), the Supreme Court explained:

> Determining whether a waiver of *Miranda* rights was voluntary involves the same inquiry as in the due process context. . . . [T]here is "no reason to require more in the way of a voluntariness inquiry in the *Miranda* waiver context than in the Fourteenth Amendment confession context." Thus, whether a waiver of *Miranda* rights is voluntary depends on the absence of police coercion. . . . " '[T]he relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception . . . .' " [Citations omitted.]

Defendant was interviewed on March 1 and 3, 2010, and the record reflects that the police declined to interview him on March 2 because he complained of a lack of sleep. Defendant indicated that the first interview lasted a couple of hours. He was advised of and waived his *Miranda* rights before the first interview. In regard to the interviews on March 3, 2010, defendant admitted that he received breaks in the interview process. Furthermore, on March 3, the interviewing detective obtained confirmation from defendant that he had previously been advised of and waived his *Miranda* rights. The detective also explained to defendant that his *Miranda* rights still applied, and defendant expressed, once again, that he understood

his *Miranda* rights before launching into his confession. Defendant's claim of involuntariness predicated on pain, lack of medications and medical care, and threats regarding his wife's parental rights was supported solely by his testimony. Police officers testified that they offered defendant food, drink, cigarettes, and regular bathroom breaks. Although defendant may have lacked access to pain medications for approximately two days and complained of pain earlier in the day to a polygraph examiner who declined to conduct a polygraph test, he never once indicated or suggested during the recorded interview that he was in pain or in need of medical attention. The trial court observed that defendant appeared pain-free and at ease during the interview.

Defendant's testimony concerning alleged promises of prosecutorial leniency, medical care, and continued parental rights with respect to defendant's wife if he confessed was flatly contradicted by police testimony. The trial court's assessment of the weight of the evidence and its determination that the officers were credible witnesses and that defendant lacked credibility fall within the trial court's purview and are entitled to deference, not second-guessing by us when we did not hear and observe the witnesses. We hold that defendant's confession was freely and voluntarily made under the totality of the circumstances; it was the product of an essentially free and unconstrained choice by defendant. Defendant's will was not overborne, nor was his capacity for self-determination critically impaired. The record reflects that the confession was not the result of intimidation, coercion, or deception. Reversal is unwarranted.

B. CONSECUTIVE SENTENCING

Defendant argues that the trial court erred by imposing consecutive sentences on two of the CSC-1 convic-

tions under MCL 750.520b(3), which provides that a "court *may* order a term of imprisonment imposed under this section [the CSC-1 statute] to be served consecutively to any term of imprisonment imposed for *any other criminal offense arising from the same transaction*."[5] (Emphasis added.) Defendant argues that the phrase "any other criminal offense" is ambiguous. He asserts that it could be interpreted as encompassing all criminal offenses other than the crime of CSC-1 or that it could be interpreted, consistently with the trial court's construction, as encompassing all criminal offenses except for the particular underlying count of CSC-1, thereby allowing consideration of separate and additional counts of CSC-1. Defendant points out that the same phrase or similar language has been used by the Legislature in various statutes in the Michigan Penal Code, e.g., MCL 750.110a(8) (home invasion)[6] and MCL 750.529a(3) (carjacking),[7] yet it is unlikely, defendant posits, that multiple convictions of any one of these offenses—for example, home invasion—could ever arise from the same transaction. Therefore, according to defendant, use of the phrase "any other criminal offense" or similar language necessarily reflects the Legislature's intent to encompass offenses other than the offense covered by the statute that provides for the consecutive sentencing. Accordingly, MCL 750.520b(3) was intended to allow for consecutive

[5] MCL 750.520b was amended in 2006, adding subsection (3). See 2006 PA 169.

[6] MCL 750.110a(8) provides that a "court may order a term of imprisonment imposed for home invasion in the first degree to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction."

[7] MCL 750.529a(3) provides that "[a] sentence imposed for a violation of this section may be imposed to run consecutively to any other sentence imposed for a conviction that arises out of the same transaction."

sentences only when the "other criminal offense" was not CSC-1 but was a different offense altogether. In further support of this proposition, defendant notes that the word "other," as commonly understood and defined, refers to something different or distinct in kind. Finally, defendant maintains that CSC-1 is already punishable by life or any term of years and that the fact of multiple sexual penetrations arising out of a sentencing offense is a factor that is taken into account by the sentencing guidelines under MCL 777.41—offense variable 11 (OV-11)—so that resort to consecutive sentencing is unnecessary to impose a lengthy prison term under circumstances involving multiple penetrations occurring within the same transaction.

This Court reviews de novo questions of statutory construction. *People v Flick*, 487 Mich 1, 8-9; 790 NW2d 295 (2010). This appeal requires us to construe MCL 750.520b(3). In *Flick*, 487 Mich at 10-11, the Michigan Supreme Court recited the well-established principles that govern our interpretation of a statute:

> The overriding goal of statutory interpretation is to ascertain and give effect to the Legislature's intent. The touchstone of legislative intent is the statute's language. The words of a statute provide the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning and the overall context in which they are used. An undefined statutory word or phrase must be accorded its plain and ordinary meaning, unless the undefined word or phrase is a "term of art" with a unique legal meaning. When we interpret the Michigan Penal Code, we do so according to the fair import of the terms, to promote justice and to effect the objects of the law. [Citations, alterations, and quotation marks omitted.]

When an undefined statutory term has been the subject of judicial interpretation, we presume that the Legislature used the particular term in a manner con-

sistent with the prior construction. *McCormick v Carrier*, 487 Mich 180, 192; 795 NW2d 517 (2010), quoting *People v Powell*, 280 Mich 699, 703; 274 NW 372 (1937). We must avoid an interpretation that renders any part of a statute surplusage or nugatory. *Zwiers v Growney*, 286 Mich App 38, 44; 778 NW2d 81 (2009). "A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

In Michigan, "concurrent sentencing is the norm," and a "consecutive sentence may be imposed only if specifically authorized by statute." *People v Brown*, 220 Mich App 680, 682; 560 NW2d 80 (1996). MCL 750.520b(3) certainly authorizes a court to impose a CSC-1 sentence that runs consecutively to a sentence imposed for another criminal offense arising from the same transaction, but the question is whether it does so in the context of two CSC-1 convictions.[8]

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[8] As recognized by the trial court and the parties, MCL 750.520b(3) does not mandate consecutive sentencing. Rather, it provides that a court "may" impose consecutive sentences, making the decision discretionary. A sentencing court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). We ultimately hold in this case that consecutive sentences may be imposed relative to the two CSC-1 convictions at issue without offending MCL 750.520b(3), and we further hold that the trial court did not abuse its discretion by actually imposing consecutive sentences. The 50-year minimum term of imprisonment that results from the consecutive sentencing is proportionate to the offenses and the offender; the victim suffered horrific abuse at the hands of her father. *People v Milbourn*, 435 Mich 630, 650; 461 NW2d 1 (1990). We also note that "where a defendant receives consecutive sentences and neither sentence exceeds the maximum punishment allowed, the aggregate of the sentences will not be disproportionate under . . . *Milbourn*[.]" *People v Miles*, 454 Mich 90, 95; 559 NW2d 299 (1997), citing and finding persuasive *People v Warner*, 190 Mich App 734; 476 NW2d 660 (1991).

Initially, we address the issue of whether the CSC-1 convictions on counts 3 and 9 arose from the same transaction, as found by the trial court. The jury instructions and the jury verdict form itself expressly provided that count 3 pertained to an alleged act of fellatio that occurred during the first incident on Hancock Street in June 2009 and that count 9 concerned an alleged act of vaginal intercourse that also occurred during the first incident on Hancock Street in June 2009. The jury convicted defendant on both of these counts. The victim's testimony supported the verdicts and indicated that defendant, on an evening in June 2009, first engaged in vaginal intercourse with the victim and then proceeded to engage in fellatio with her before ejaculating.

The term "same transaction" is not statutorily defined; however, it has developed a unique legal meaning. Accordingly, it is appropriate to examine judicial interpretations of the terminology. *Flick*, 487 Mich at 11; *McCormick*, 487 Mich at 192; *Powell*, 280 Mich at 703. Two or more separate criminal offenses can occur within the "same transaction." *People v Nutt*, 469 Mich 565, 578 n 15; 677 NW2d 1 (2004) (" 'It is not of unfrequent occurrence, that the same individual, at the same time, and in the same transaction, commits two or more distinct crimes . . . .' ") (citation omitted). To find otherwise would be nonsensical, as consecutive sentencing provisions such as MCL 750.520b(3), MCL 750.110a(8), and MCL 750.529a(3) would be rendered meaningless. In the double-jeopardy context, our Supreme Court in *People v Sturgis*, 427 Mich 392, 401; 397 NW2 783 (1986), alluding to the same-transaction test, stated that the test in part required the joining of charges that "grew out of a continuous time sequence." Although *Nutt*, 469 Mich at 568, subsequently rejected the same-transaction test in favor of the same-elements

test for purposes of defining the term "same offense" in our Constitution as part of a double-jeopardy analysis, the *Sturgis* Court's definition that touched on the meaning of "same transaction" remains viable and useful in the context of simply defining the term "same offense."

Additionally, in *People v Johnson*, 474 Mich 96; 712 NW2d 703 (2006), the Court construed analogous statutory language that concerned acts "arising out of the sentencing offense," as that phrase is used in MCL 777.41(2)(a). MCL 777.41 governs the scoring of OV-11 under the legislative sentencing guidelines. The *Johnson* Court held:

> [W]e have previously defined "arising out of" to suggest a causal connection between two events of a sort that is more than incidental. We continue to believe that this sets forth the most reasonable definition of "arising out of." Something that "aris[es] out of," or springs from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen. [*Johnson*, 474 Mich at 101.]

The evidence in this case reflected that the sexual penetrations forming counts 3 and 9 grew out of a continuous time sequence in which the act of vaginal intercourse was immediately followed by the act of fellatio. These two particular sexual penetrations sprang one from the other and had a connective relationship that was more than incidental. Accordingly, counts 3 and 9 arose from the same transaction. We find further support for this conclusion in *People v Ochotski*, 115 Mich 601; 73 NW 889 (1898), in which there was evidence that the defendant had committed an unprovoked assault on a neighbor and, after disabling the neighbor, proceeded to assault the neighbor's wife, who had arrived on the scene. The defendant was acquitted

by a jury of assaulting his neighbor, but was later tried and convicted of assaulting the neighbor's wife. The Court, rejecting a double-jeopardy argument, noted that "[t]here is a difference between one volition and one transaction." *Id.* at 610. The Court stated that the victims were struck and injured by different blows, that "in one transaction a man may commit distinct offenses," and that the assaults were part of "the same transaction." *Id.* Similarly, in the case at bar, while the two volitional acts of sexual penetration constituted distinct offenses, they were part of the same transaction. As in *Ochotski*, there was no relevant disruption in time or in the flow of events between the two distinct offenses.

Next, we examine the phrase "any other criminal offense," as used in MCL 750.520b(3). Again, MCL 750.520b(3) provides that a "court may order a term of imprisonment imposed under this section [for CSC-1] to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction." Defendant maintains that the "other" criminal offense cannot be the crime of CSC-1 in general, i.e., any and all other CSC-1 offenses are barred from consideration, regardless of the fact that a second CSC-1 offense constitutes a separate and distinct count. Therefore, according to defendant, a CSC-1 sentence can only be imposed consecutively to a non-CSC-1 sentence if the associated offenses arose out of the same transaction. We disagree, as this interpretation is inconsistent with the plain and unambiguous language of the statute. The phrase "any other criminal offense" necessarily invites a comparison between two criminal offenses, which, given the use of the word "other," must be different offenses, not the same one. The key to the proper interpretation of the statute, as we view it, is determining how broadly or narrowly to

construe the term "criminal offense." Reference to a "criminal offense" could pertain solely to a *type* of crime as identified by its label or moniker, e.g., CSC-1, armed robbery, and home invasion, or it could relate to a particular count of any given type of crime. Thus, we must discern whether the Legislature, in using the phrase "any other criminal offense," intended for sentencing courts to focus on and make distinctions between types of crimes—CSC-1 and non-CSC-1 crimes—or between individual counts.

The language and sentence structure of MCL 750.520b(3) dictate that criminal offenses, when being examined to determine whether they are the same or different for purposes of consecutive sentencing, be viewed in relationship to the "term[s] of imprisonment imposed" thereon or, in other words, in relationship to their sentences. The distinction between "a term of imprisonment imposed under [MCL 750.520b]" and the "term of imprisonment imposed for any other criminal offense" necessarily embodies or includes a distinction predicated on the *sentences* imposed. Therefore, the phrase "any other criminal offense" means a different sentencing offense, and offenses, for purposes of sentencing, are always reduced or broken down into individual counts. Sentences or terms of imprisonment are imposed for each count of a crime on which a defendant is convicted, including counts arising from the same transaction. Each count in an information constitutes a separate crime. *People v Taurianen*, 102 Mich App 17, 30; 300 NW2d 720 (1980); see also *People v Vaughn*, 409 Mich 463, 465; 295 NW2d 354 (1980) (" 'Each count in an indictment is regarded as if it was a separate indictment.' ") (citation omitted). A crime such as CSC-1 can be committed in myriad ways and give rise to multiple counts arising from the same transaction, leading to sentences on each count. While sentences on multiple

counts of any crime may be imposed to run concurrently, and although the length of those sentences may be identical, they are still separately imposed sentences for each and every count.

A fair import of the language in MCL 750.520b(3) is that the trial court had the discretion to impose a term of imprisonment for defendant's act of engaging in vaginal intercourse with the victim—CSC-1, count 9—to be served consecutively to the term of imprisonment imposed for defendant's act of engaging in fellatio with the victim—CSC-1, count 3—as count 3 was a different or distinct criminal offense, given that it was not the same act as the act of vaginal intercourse that formed the basis of count 9. While the two counts are both CSC-1 offenses, they are distinct in the sense that they pertained to different acts of sexual penetration and could independently support imposition of a term of imprisonment; they stand on their own as criminal offenses. Count 3 constitutes "any other criminal offense" when viewed in relationship to, or in conjunction with, count 9. The Legislature's use of the word "any" is all-encompassing and does not permit us to exclude from consideration other CSC-1 offenses upon which a term of imprisonment was imposed.[9]

We find support for our holding in *People v Morris*, 450 Mich 316; 537 NW2d 842 (1995). The Court in *Morris* interpreted the consecutive sentencing provision in MCL 333.7401(3), which provides that "[a] term of imprisonment imposed under subsection (2)(a) [a controlled-substance crime] may be imposed to run

[9] Although the Legislature may have generally contemplated imposition of a consecutive sentence under MCL 750.520b(3), if a CSC-1 and a non-CSC-1 offense were committed during the same transaction, the statute as written does not so limit its scope. We must construe the statute as written.

consecutively with any term of imprisonment imposed for the commission of *another felony*." (Emphasis added.) In *Morris*, our Supreme Court construed an earlier version of this statutory provision that had comparable language, except that consecutive sentencing was mandatory. *Morris*, 450 Mich at 319-320. The Court held:

> In light of the absence of words of limitation in the statute, and because of the lack of evidence that there was a legislative intent to limit the scope of the term "another felony" in § 7401(3), we hold that the term includes any felony for which the defendant has been sentenced either before or simultaneously with the controlled substance felony enumerated in § 7401(3) for which a defendant is currently being sentenced. This represents the most sensible and reasonable interpretation of "another felony" in light of the intent of the law to deter the commission of controlled substance offenses through the imposition of consecutive sentences. The phrase applies to felonies that violate any provision of the controlled substances act, *including additional violations of the same controlled substance provision as that for which the defendant is being sentenced or any other felony*. Sentences imposed in the same sentencing proceeding are assumed, for the purposes of § 7401(3), to be imposed simultaneously. Where any of the felonies for which a defendant is being sentenced in the same proceeding are covered by the mandatory consecutive sentencing provision of § 7401(3), the sentence for that felony must be imposed to run consecutively to the term of imprisonment imposed for other, nonenumerated felonies. [*Id.* at 337 (emphasis added).]

For purposes of our particular issue and analysis, we view no discernible difference between the phrases "another felony" and "any other criminal offense," other than the "felony" aspect of the former phrase. Consistently with *Morris*, the phrase "any other criminal offense" can encompass additional violations of the same CSC-1 statute. Again, the *Morris* Court emphasized that

> [a]bsent a convincing indication that the Legislature meant the term ["another felony"] to be interpreted in a limited manner, . . . a broad definition of "another felony" provides the most sensible and reasonable interpretation of the legislative expression embodied in the statute, in view of the subject matter of the law and the goal of consecutive sentencing. [*Id*. at 327-328.]

We find that this logic applies equally to MCL 750.520b(3).

The purpose of consecutive-sentencing statutes is to deter persons from committing multiple crimes by removing the security of concurrent sentencing. *People v Phillips*, 217 Mich App 489, 499; 552 NW2d 487 (1996); see also *People v Denio*, 454 Mich 691, 703; 564 NW2d 13 (1997) (noting that consecutive sentences enhance punishment for the purpose of deterring certain criminal behavior). We find it undeniable that the Legislature, by adding MCL 750.520b(3), intended to empower sentencing courts by authorizing the imposition of lengthy prison terms by way of consecutive sentencing when a defendant committed a non-CSC-1 criminal offense and chose to additionally commit a CSC-1 offense during the same transaction. The Legislature intended to remove the security of concurrent sentencing and provide for real and substantial consequences as part of an effort to deter the commission of CSC-1 in transactions involving the commission of non-CSC-1 offenses. We see no reason for concluding that the Legislature did not intend to extend this goal to cases in which multiple CSC-1 offenses are committed during the same transaction. For example, if a defendant sexually victimized two persons in the same transaction, the defendant would likely face a sentence comparable to a sentence for sexually assaulting only one victim absent the prospect of consecutive sentences. Even when there is only one victim, a multiplicity of

sexual penetrations in a single transaction would typically heighten the level of egregiousness associated with the defendant's conduct, but the additional conduct or penetrations would effectively be protected by the security of concurrent sentencing if consecutive sentencing were prohibited. While it may be argued that a defendant who commits a great number of CSC-1 offenses against a single victim all in separate transactions over time is more deserving of consecutive sentencing than, for example, a defendant who commits two or more penetrations against a victim in the same transaction, MCL 750.520b(3) provides a sentencing court with the discretion to not employ consecutive sentencing if not appropriate under the circumstances. Moreover, it is not for us to determine who is more deserving of a consecutive sentence relative to the enactment of sentencing statutes and general policy; that is the Legislature's arena.

Because we have concluded that the plain and unambiguous language of the statute supported the imposition of consecutive sentences, it is unnecessary to address the various arguments posed by defendant that entail looking outside of the statutory language itself on the basis of defendant's mistaken proposition that the statute is ambiguous. We hold that the trial court correctly interpreted and applied MCL 750.520b(3) and did not abuse its discretion when it imposed consecutive sentences.

C. STANDARD 4 BRIEF

Defendant submitted a brief pursuant to Administrative Order No. 2004-6, Standard 4, in which he presents myriad issues, arguing that the prosecutor engaged in misconduct, that the trial court erred by failing to provide substitute counsel, that his arrest was unlaw-

ful, that the court made numerous evidentiary errors, and that counsel was ineffective in several instances. We have carefully scrutinized defendant's arguments and thoroughly reviewed the record. We find it unnecessary to address defendant's arguments in any detail because the arguments have no support whatsoever in the existing record, grossly and nonsensically mischaracterize the record, are wholly devoid of legal merit, fail to establish the existence of prejudice, or otherwise provide no rational basis for reversal.

III. CONCLUSION

We hold that the trial court did not err by denying defendant's motion to suppress his confession. We additionally conclude that the trial court had the authority under MCL 750.520b(3) to impose consecutive sentences with respect to the CSC-1 convictions on counts 3 and 9 and that the court did not abuse its discretion by imposing the consecutive sentences. Finally, we hold that the arguments in defendant's Standard 4 brief do not warrant reversal.

Affirmed.

FITZGERALD and METER, JJ., concurred with MURPHY, C.J.

PEOPLE v GOMEZ

Docket No. 302485. Submitted February 8, 2012, at Grand Rapids. Decided February 14, 2012, at 9:10 a.m. Leave to appeal sought.

Isaac A. Gomez, a Mexican citizen who had spent most of his life in the United States as a permanent resident, pleaded no contest in the Branch Circuit Court to possession with the intent to deliver less than 5 kilograms of marijuana. Several years later, the Department of Homeland Security notified Gomez that the conviction rendered him subject to automatic deportation. Gomez subsequently moved for relief from the judgment, asserting that his defense counsel had failed to advise him that the plea would affect his immigration status. Gomez, citing *Padilla v Kentucky*, 559 US ___; 130 S Ct 1473 (2010), asserted that this failure rendered his counsel ineffective and asked the court to set aside his conviction. The court, Patrick W. O'Grady, J., denied the motion for relief. Gomez appealed.

The Court of Appeals *held*:

1. A conviction becomes final after the time for direct appeal has expired. Once a conviction is final, a defendant is entitled to relief only if a retroactive change in the law altered the validity of his or her conviction. A new rule of federal criminal procedure generally cannot be applied retroactively to alter a final judgment. A procedural rule is new unless it is dictated by precedent existing at the time the defendant's conviction became final. In *Padilla*, the United States Supreme Court held that a criminal defense attorney must advise a defendant of the effects of a plea on his or her immigration status. *Padilla* established a new procedural rule. A new rule is not retroactive unless one of two exceptions applies: (1) the rule places certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe or (2) it requires the observance of procedures implicit in the concept of ordered liberty. The new rule in *Padilla* does not regulate private conduct, nor is the rule so implicit in the structure of criminal proceedings that retroactivity is mandated. Thus, the rule is not retroactive under federal law.

2. A state may accord broader effect to a new rule of criminal procedure than federal retroactivity jurisprudence accords. Retro-

active application of the requirement that a defendant be advised of the effects of a plea on his or her immigration status would conflict with Michigan precedent regarding the necessity of that advice, however. Further, in determining whether to apply a rule retroactively under Michigan law, a court should consider the purpose of the new rule, the general reliance on the old rule, and the effect of retroactive application of the new rule on the administration of justice. Consideration of these factors precludes retroactive application of the *Padilla* rule. The trial court properly denied relief from the judgment.

Affirmed.

CRIMINAL LAW — CRIMINAL PROCEDURE — EFFECTIVE ASSISTANCE OF COUNSEL — ADVICE REGARDING EFFECTS OF PLEA ON IMMIGRATION STATUS — RETROACTIVITY — FINALITY OF CONVICTIONS.

The United States Supreme Court's decision in *Padilla v Kentucky*, 559 US ___; 130 S Ct 1473 (2010), holding that a criminal defense attorney must advise a defendant of the effects of a plea on the defendant's immigration status, does not apply retroactively to cases in which a defendant's conviction became final before *Padilla* was decided; a conviction becomes final when the time for a direct appeal expires.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, *Terri A. Norris*, Prosecuting Attorney, and *John S. Pallas*, Assistant Attorney General, for the people.

Speaker Law Firm, PLLC (by *Liisa R. Speaker*), for Isaac A. Gomez.

Before: SAWYER, P.J., and O'CONNELL and RONAYNE KRAUSE, JJ.

O'CONNELL, J. Defendant appeals by leave granted the trial court's order denying his motion for relief from the judgment. The issue on appeal is whether *Padilla v Kentucky*, 559 US ___; 130 S Ct 1473; 176 L Ed 2d 284 (2010), applies retroactively to allow defendant to avoid the potential immigration consequences of his plea-

based conviction. We hold that the new rule of criminal procedure announced in *Padilla* has prospective application only. Accordingly, we affirm the trial court's order.

I. FACTS AND PROCEDURAL HISTORY

Defendant, a citizen of Mexico, has lived much of his life in the United States as a permanent resident. In 2001, the Branch County prosecutor charged defendant with two controlled substance offenses under MCL 333.7401 and with possession of a firearm during the commission of a felony under MCL 750.227b. Defendant ultimately entered a no-contest plea to the charge of possession with intent to deliver less than 5 kilograms of marijuana, MCL 333.7401(1) and (2)(d)(*iii*). At sentencing, the trial court stated to defendant, "[H]aving gone through the presentence report, you certainly have demonstrated otherwise in your life that you are an intelligent, hard working individual. And it's unfortunate that you are standing here under these circumstances. Hopefully this will be a single aberration in your otherwise blemish-less life." The court sentenced defendant to 120 days' imprisonment, with work release permitted. Defendant served a 24-month probation term and was discharged in 2005.

Four years later, the federal Department of Homeland Security notified defendant that his conviction rendered him subject to deportation. The following year, the United States Supreme Court issued the *Padilla* decision, which held that criminal defense counsel must advise a defendant when a guilty plea will render the defendant subject to automatic deportation. *Padilla*, 559 US at ___; 130 S Ct at 1478. Shortly after the Supreme Court issued *Padilla*, defendant moved for relief from the judgment in the trial court. Defendant

asserted that neither defense counsel nor the trial court ever asked him about his immigration or citizenship status. He further asserted that if he had been told that his plea would affect his immigration status, he would not have entered the plea and would instead have gone to trial on the charges. He argued that his counsel was ineffective under *Padilla* and that the trial court should set aside his conviction.

The trial court denied defendant's motion for relief. The court determined that nothing in the *Padilla* decision required retroactive application of the new rule regarding advice about immigration consequences. The court further determined that "[t]o retroactively apply the Padilla ruling and cause all cases to be later dismissed due to no longer having State's evidence or to have to recreate such investigation is not the intent of the Padilla decision."

II. ANALYSIS

A. STANDARD OF REVIEW

The issue whether a United States Supreme Court decision applies retroactively presents a question of law that we review de novo. *People v Maxson*, 482 Mich 385, 387; 759 NW2d 817 (2008). We review for an abuse of discretion the trial court's ultimate ruling on a motion for relief from a judgment. *People v Swain*, 288 Mich App 609, 628; 794 NW2d 92 (2010).

B. RETROACTIVITY UNDER FEDERAL LAW

Defendant's conviction became final when the time for a direct appeal expired, which was several years before the Supreme Court issued *Padilla*. See *Beard v Banks*, 542 US 406, 411; 124 S Ct 2504; 159 L Ed 2d 494 (2004) (stating that convictions are final when the

availability of direct appeal has been exhausted and the time for filing a petition for a writ of certiorari has expired). Given that his conviction is final, defendant is entitled to relief only if a retroactive change in the law has altered the validity of his or her conviction. See generally MCR 6.500 *et seq*. To determine whether a retroactive change can alter a conviction, the federal courts use the analysis described in *Teague v Lane*, 489 US 288; 109 S Ct 1060; 103 L Ed 2d 334 (1989). Under *Teague*, a new rule of criminal procedure generally cannot be applied retroactively to alter a final judgment. *Id*. at 310. Accordingly, the first step in the *Teague* analysis is to determine whether the rule at issue constitutes a new rule. *Maxson*, 482 Mich at 388. A procedural rule is new unless it is "*dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 US at 301 (emphasis added).

The federal circuits are split regarding whether *Padilla* announced a new rule.[1] The United States Court of Appeals for the Sixth Circuit has not ruled on the issue, but has denied relief from a judgment in a *Padilla* challenge on the ground that the defendant failed to establish prejudice. *Pilla v United States*, 668 F3d 368, 373 (CA 6, 2012).[2] An examination of the *Padilla* decision itself, however, indicates that neither the bench nor the bar could have forecast that the pre-

[1] Compare *United States v Hong*, 671 F3d 1147, 1148, 1156 (2011) (*Padilla* announced a new rule), and *Chaidez v United States*, 655 F3d 684, 694 (CA 7, 2011) (same) (petition for certiorari filed December 23, 2011), with *United States v Orocio*, 645 F3d 630, 641 (CA 3, 2011) (*Padilla* stated an old rule and is retroactive).

[2] At least one district court in the Sixth Circuit has determined that *Padilla* did not create a new rule and is retroactive. *United States v Reid*, 2011 WL 3417235, *4 (SD Ohio, August 4, 2011) (Docket No. 1:97-CR-94).

Padilla precedent dictated an advisement of the immigration consequences of a guilty plea. The two concurring justices used pellucid phrasing to characterize the new rule, terming the rule a "dramatic departure," a "major upheaval," and a "dramatic expansion of the scope of criminal defense counsel's duties . . . ." *Padilla*, 559 US at ___; 130 S Ct at 1488, 1491, 1492. The Tenth Circuit aptly described the concurring and dissenting justices' views:

> In a concurrence, Justice Alito (joined by Chief Justice Roberts) stated "the Court's decision marks a major upheaval in Sixth Amendment law" and noted the majority failed to cite any precedent for the premise that a defense counsel's failure to provide advice concerning the immigration consequences of a criminal conviction violated a defendant's right to counsel. *Padilla*, 130 S. Ct. at 1491 (Alito, J., concurring in judgment); *see also id.* at 1488 (noting the majority's "dramatic departure from precedent"); *id.* at 1491 ("[T]he Court's view has been rejected by every Federal Court of Appeals to have considered the issue thus far."); *id.* at 1492 ("The majority seeks to downplay its dramatic expansion of the scope of criminal defense counsel's duties under the Sixth Amendment.").
>
> Similarly, Justice Scalia in a dissent (joined by Justice Thomas), argued the Sixth Amendment right to counsel does not extend to "advice about the collateral consequences of conviction" and that the Court, until *Padilla*, had limited the Sixth Amendment to advice directly related to defense against criminal prosecutions. *Id.* at 1494-95 (Scalia, J., dissenting); *see also id.* at 1495 ("There is no basis in text or in principle to extend the constitutionally required advice regarding guilty pleas beyond those matters germane to the criminal prosecution at hand."). [*United States v Hong*, 671 F3d 1147, 1154-1155 (2011).]

The Seventh Circuit determined that the disagreement among the justices demonstrated that *Padilla* established a new rule (otherwise, the justices would have reached some accord on the basic principle). *Chaidez v United States*, 655 F3d 684, 689-690 (CA 7, 2011).[3]

Given the narrow margin among our nation's Supreme Court justices on this issue, the federal retroactivity analysis indicates that *Padilla* established a new procedural rule. This new rule is not retroactive unless one of two exceptions to nonretroactivity applies: (1) the rule "places certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe" or (2) the rule "requires the observance of those procedures that . . . are implicit in the concept of ordered liberty." *Teague*, 489 US at 307 (quotation marks and citations omitted); see also *Maxson*, 482 Mich at 388.

Neither of the two exceptions applies here. The requirement that criminal defense counsel advise defendants of immigration consequences does not regulate private conduct, nor is the requirement so implicit in the structure of criminal proceedings that retroactivity is mandated. Accord *Hong*, 671 F3d at 1158-1159. Rather, the requirement applies to a subset of criminal defendants who might wish to consider immigration consequences as part of the many variables they will assess when deciding whether to enter a plea. There-

[3] The *Padilla* majority did not identify definitive precedent establishing that effective representation required immigration advice. Rather, the *Padilla* majority stated, "For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea." *Padilla*, 559 US at ___; 130 S Ct at 1485. In our view, professional norms do not amount to precedent that dictates a result within the meaning of *Teague*.

fore, we conclude that federal precedent does not require retroactive application of the new *Padilla* rule.

C. RETROACTIVITY UNDER MICHIGAN LAW

Despite the lack of retroactivity under the federal analysis, this Court could nonetheless apply *Padilla* retroactively in this case. "A state may accord broader effect to a new rule of criminal procedure than federal retroactivity jurisprudence accords." *Maxson*, 482 Mich at 392. We decline to broaden the applicability of *Padilla* for two reasons. First, the pre-*Padilla* Michigan precedent expressly stated that "a failure by counsel to give immigration advice does *not* render [defense counsel's] representation constitutionally ineffective." *People v Davidovich*, 463 Mich 446, 453; 618 NW2d 579 (2000) (emphasis added). To apply *Padilla* retroactively would be to allow any offender to negate an earlier acknowledgement of guilt merely by asserting a potential immigration issue. Nothing in Michigan caselaw allows withdrawal of guilty pleas on this basis.

Second, the Michigan retroactivity analysis mandates that *Padilla* be applied prospectively only. Three factors govern the Michigan retroactivity analysis: " '(1) the purpose of the new rules; (2) the general reliance on the old rule[;] and (3) the effect of retroactive application of the new rule on the administration of justice.' " *Maxson*, 482 Mich at 393, quoting *People v Sexton*, 458 Mich 43, 60-61; 580 NW2d 404 (1998) (alteration in original). In *Maxson*, our Supreme Court held that these factors precluded retroactive application of a new procedural rule that affected appeals from guilty pleas. *Id*. at 393-399. Like the rule held to be prospective in *Maxson*, the *Padilla* rule cannot reasonably be deemed to require retroactive application.

III. CONCLUSION

In sum, we hold that both the federal analysis and the Michigan analysis require that the new rule of criminal procedure announced in *Padilla* be applied prospectively only. Accordingly, the trial court was within its discretion in denying defendant's motion for relief from the judgment.

Affirmed.

SAWYER, P.J., and RONAYNE KRAUSE, J., concurred with O'CONNELL, J.

KALAJ v KHAN

Docket No. 298852. Submitted September 7, 2011, at Detroit. Decided February 14, 2012, at 9:20 a.m. Leave to appeal denied, 491 Mich 946.

Sander and Alida Kalaj brought a medical malpractice action in the Oakland Circuit Court against Syed Khan, M.D., and Basha Diagnostics, P.C., alleging that when Khan reviewed x-rays taken of Sander at Basha Diagnostics (the Basha x-rays), he negligently failed to observe that Sander had suffered a cervical fracture. Plaintiffs' complaint was supported with an affidavit of merit by diagnostic radiologist Stuart Mirvis, M.D., who averred that he had reviewed plaintiffs' notice of intent and Sander's medical records, including the Basha x-rays, and that it was his opinion that Khan was negligent. It was subsequently discovered that the x-rays Mirvis had believed to be those taken at Basha Diagnostics were not the Basha x-rays, but instead were x-rays taken several days later by Sander's chiropractor. The Basha x-rays could not be located by any party. Defendants moved to strike plaintiffs' affidavit of merit, asserting that because Mirvis had not reviewed the Basha x-rays, he could not opine that Khan had misinterpreted them. Plaintiffs countered that the remaining records Mirvis reviewed provided an adequate foundation for the affidavit of merit. The court, John J. McDonald, J., granted the motion to strike and dismissed plaintiffs' complaint without prejudice, finding that without the Basha x-rays, testimony by Mirvis that defendants were professionally negligent would be speculative. Plaintiffs moved for reconsideration, supporting the motion with a new affidavit from Mirvis averring that he did not need the Basha x-rays to determine that Khan had negligently failed to diagnose Sander's cervical fracture. The court denied the motion. Plaintiffs appealed.

The Court of Appeals *held*:

MCL 600.2912d(1) only requires that a health professional review the notice of intent and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice. It is sufficient for the health professional to indicate that he or she reviewed the records provided by the plaintiff's counsel and that in light of those records, the health professional is willing and able to opine with respect to the defendant's negligence consistently with the elements set forth in the statute. Thus, Mirvis was not

required to review the Basha x-rays. Accordingly, the affidavit of merit Mirvis provided was not deficient unless the absence of the Basha x-rays precluded him from opining that defendants breached the applicable standard of care. Mirvis averred, to the contrary, that even absent review of the x-rays, it was his opinion that defendants had breached the applicable standard of care. Thus, the affidavit of merit met the statutory requirements and should not have been struck. Moreover, while the absence of the Basha x-rays might affect the weight and credibility of the expert testimony concerning whether defendants committed medical malpractice, the absence of the x-rays did not render that expert testimony inadmissible. A plaintiff may establish the elements of medical malpractice with circumstantial proof that enables reasonable inferences. The trial court abused its discretion when it misconstrued the requirements of MCL 600.2912d.

Reversed and remanded.

NEGLIGENCE — MEDICAL MALPRACTICE — AFFIDAVITS OF MERIT — REQUIREMENTS — REVIEW OF MEDICAL RECORDS.

A health professional providing an affidavit of merit in a medical malpractice action must review the plaintiff's notice of intent and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice; it is sufficient for the health professional to indicate that he or she reviewed the records provided by the plaintiff's counsel and that in light of those records, the health professional is willing and able to opine with respect to the defendant's negligence consistently with the elements set forth in the statute governing affidavits of merit (MCL 600.2912d).

McKeen & Associates, P.C. (by *Brian J. McKeen*, *Jody L. Aaron*, and *Ramona C. Howard*), for plaintiffs.

Brian J. Doren, PLC (by *Brian J. Doren*), for defendants.

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

BORRELLO, J. Plaintiffs appeal as of right the February 19, 2010, trial court order granting defendants' motion to strike plaintiffs' affidavit of merit and dismissing

plaintiffs' complaint without prejudice in this action alleging medical malpractice. For the reasons set forth in this opinion, we reverse and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEEDINGS BELOW

Plaintiff Sander Kalaj[1] injured his head and neck in a diving accident in July 2006. On July 31, 2006, plaintiff's treating physician referred him to defendant Basha Diagnostics, P.C., for cervical-spine x-rays. Defendant Syed Mahmood Ali Khan, M.D., a diagnostic radiologist, reviewed plaintiff's x-rays, and concluded that they were negative for a spinal fracture. Eight days later, on August 8, 2006, plaintiff, complaining of worsening symptoms, was treated by Dr. Gregory Cesul, a chiropractor. Cesul also took a set of cervical-spine x-rays, which he opined to be "consistent with a C5 fracture." Cesul referred plaintiff to William Beaumont Hospital for further evaluation and a neurosurgical consultation. Additional x-rays and a CT scan performed at Beaumont showed that plaintiff had suffered a C5 fracture. The results of an MRI demonstrated "a C5 tear drop fracture with foraminal narrowing and mass effect on the spinal cord."

Plaintiffs filed the instant medical malpractice action against defendants in January 2009, premised on the failure to properly diagnose the spinal fracture on or about July 31, 2006. In support of their complaint, plaintiffs provided an affidavit of merit from diagnostic radiologist Stuart Mirvis, M.D., who averred that he had reviewed plaintiffs' notice of intent and medical records from William Beaumont

[1] From this point onward, Sander Kalaj will be referred to simply as "plaintiff," while both named plaintiffs will be referred to jointly as "plaintiffs."

Hospital and "**Basha Diagnostics — C-Spine Films 8.31.06**"[2] and that in light of these records, it was his opinion that Khan had been negligent in several ways, including by failing to "[s]uspect, observe and diagnose the existence of a tear drop fracture." During the course of discovery, however, it was revealed that the x-rays Mirvis believed to be the cervical-spine films taken at Basha Diagnostics and interpreted by Khan on July 31, 2006 (the "Basha films"), were not the Basha films, but instead were the films taken by Cesul on August 8, 2006.[3] The Basha films were signed out from Basha Diagnostics by plaintiff's treating physician on August 9, 2006, and they have not been located by any party to this dispute.

Defendants moved to strike plaintiffs' affidavit of merit on the basis that the x-rays Mirvis reviewed were not the Basha films and that without having reviewed the Basha films, it was impossible for Mirvis to opine that Khan misinterpreted them. Therefore, defendants asserted, Mirvis's affidavit lacked the appropriate foundation for any opinion that Khan was professionally negligent in failing to diagnose plaintiff's cervical spine fracture on July 31, 2006. Plaintiffs asserted in response that there were sufficient records available that Mirvis had reviewed. Plaintiffs contended that these records provided adequate foundation for Mirvis's affidavit of merit even in the absence of the Basha films. More specifically, plaintiffs argued that considering the nature of the injury and the progression of plaintiff's symptoms, the subsequent films

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[2] Mirvis's reference to "8.31.06," appears to be a typographical error; the date intended by Mirvis was July 31, 2006.

[3] It appears from the record that the films Mirvis reviewed were produced in response to plaintiffs' request for a copy of plaintiff's medical records and that they were received in a Basha Diagnostics envelope. Plaintiffs state in their brief to this Court that these films are the films taken by plaintiff's chiropractor on August 8, 2006. Defendants do not suggest otherwise.

taken of plaintiff's neck in close temporal proximity to the Basha films—which clearly demonstrate a C5 fracture—provide sufficient basis for Mirvis's opinion that defendants were professionally negligent by failing to diagnose plaintiff's fracture. After a brief hearing, the trial court granted defendants' motion to strike and dismissed plaintiffs' complaint without prejudice, finding that without the opportunity to review the Basha films, testimony by Mirvis that defendants were professionally negligent by failing to diagnose the fracture would be "pure speculation" and "[w]e can't have a jury guess."

Plaintiffs moved for reconsideration, again asserting that given their temporal proximity to the Basha films, the subsequent x-rays, MRI, and CT scan of plaintiff's neck showed sufficient evidence of a fracture to provide an adequate foundation for Mirvis's affidavit, especially in the context of the nature, and worsening, of plaintiff's symptoms in the relevant time frame. In support of their motion, plaintiffs provided the trial court with an affidavit from Mirvis averring that he did not need to review the Basha films to determine that Khan had been negligent by failing to diagnose plaintiff's cervical fracture and that in light of plaintiff's symptoms and the medical records supplied to him, he could conclude "within a reasonable degree of medical probability there was evidence of the C5 fracture that would have been discovered by a reasonable and prudent radiologist under same or similar circumstances" as those presented to Khan at Basha Diagnostics on July 31, 2006. The trial court denied plaintiffs' motion.

II. ANALYSIS

Plaintiffs argue on appeal that the trial court erred by striking the affidavit of merit and dismissing their complaint because while Mirvis might not have re-

viewed the Basha films as originally believed, his affidavit of merit meets the requirements of MCL 600.2912d. Plaintiffs assert that, under the circumstances presented in this case, Mirvis reviewed sufficient records to provide an adequate foundation for the opinions expressed in his affidavit. Plaintiffs note that Mirvis explicitly stated in his revised affidavit that the absence of the Basha films did not change his opinion with regard to Khan's deficient treatment of plaintiff. Plaintiffs further assert that the fact that Mirvis did not have the opportunity to review the missing Basha films goes to the weight and credibility, and not the admissibility, of his testimony.

This Court reviews for an abuse of discretion a trial court's decision to grant a motion to strike an affidavit. *Brown v Hayes*, 270 Mich App 491, 494; 716 NW2d 13, rev'd in part on other grounds 477 Mich 966 (2006); *Belle Isle Grille Corp v Detroit*, 256 Mich App 463, 469; 666 NW2d 271 (2003). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Additionally, " '[w]here the trial court misapprehends the law to be applied, an abuse of discretion occurs.' " *Jackson v Detroit Med Ctr*, 278 Mich App 532, 543; 753 NW2d 635 (2008), quoting *Bynum v ESAB Group, Inc*, 467 Mich 280, 283; 651 NW2d 383 (2002). However, to the extent that resolution of this appeal depends on the interpretation of MCL 600.2912d, our review is de novo. *Grossman v Brown*, 470 Mich 593, 598; 685 NW2d 198 (2004). When interpreting a statute,

> the paramount rule is that we must effect the intent of the Legislature. Statutory language is read according to its ordinary and generally accepted meaning. If the statute's language is plain and unambiguous, we assume the Legis-

> lature intended its plain meaning; therefore, we enforce the statute as written and follow the plain meaning of the statutory language. [*Id*.]

As our Supreme Court explained in *Ligons v Crittenton Hosp*, 490 Mich 61, 70-71; 803 NW2d 271 (2011), "MCL 600.2912d was enacted in 1986 and amended in 1993 as an element of broad tort reforms established by the Legislature. In part, the legislation placed 'enhanced responsibilities' on medical malpractice plaintiffs." MCL 600.2912d(1) requires that

> the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under [MCL 600.2169]. *The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice* and shall contain a statement of each of the following:
>
> (a) The applicable standard of practice or care.
>
> (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
>
> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
>
> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice. [Emphasis added.]

"The failure to include any of the required information renders the affidavit of merit insufficient." *Ligons*, 490 Mich at 77.

The parties do not dispute that plaintiffs' counsel reasonably believed Mirvis to be qualified as an expert

witness. Nor is there any dispute that Mirvis reviewed the notice of intent and all medical records supplied to him by plaintiff's counsel. Furthermore, his affidavit of merit includes all the statutorily required elements listed in MCL 600.2912d(a) through (d). Indeed, defendants do not assert, and the trial court did not find, that Mirvis's affidavit fails to meet any of the statutorily required elements for a valid affidavit of merit. Rather, defendants assert, and the trial court essentially concluded, that the otherwise valid affidavit of merit must be disregarded because Mirvis mistakenly believed he had reviewed the Basha films. However, by its plain language, MCL 600.2912d(1) requires only "that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice." There is no specific requirement concerning *which* hospital or medical provider's records must have been reviewed in order for the expert to ascertain a breach of the standard of care. Nor does the statute require that the health professional even identify the medical records he or she has reviewed. It is sufficient, under the plain language of the statute, for the expert to indicate that he or she has reviewed the records provided by the plaintiff's counsel and that in light of those records, the expert is willing and able to opine with respect to the defendant's negligence consistently with the elements set forth in the statute. Thus, Mirvis was not required to review the Basha films at all; that he mistakenly identified films provided to him as being the Basha films likewise does not render the affidavit of merit deficient under the statute unless the absence of those films precludes him from opining that defendants breached the applicable standard of care by failing to diagnose plaintiff's spinal fracture on July 31, 2006. In that case, it would be up to Mirvis to indicate that his

opinion, as set forth in the affidavit of merit, was no longer supported. He has not done so. Instead Mirvis continues to aver that, even absent a review of the missing Basha films, it is his professional opinion that defendants breached the standard of care in their treatment of plaintiff. Nothing more is required at this initial stage of litigation. MCL 600.2912d.

The trial court dismissed plaintiffs' action on the basis that, absent the Basha films, any testimony offered by Mirvis would be "pure speculation." Such an assertion by the trial court was itself speculation concerning the evidence that would be disclosed during discovery and presented by plaintiffs at trial. Under the plain language of MCL 600.2912d, whether the assertions in the affidavit of merit are ultimately proved to be true is not at issue when evaluating whether the affidavit complies with MCL 600.2912d. Rather, at issue is whether, on its face, the affidavit of merit complies with the requirements set forth in the statute. "To rule otherwise would allow for battles to erupt or minitrials to take place merely over the issue concerning the validity of an affidavit or merit, necessitating production of [documents] and the taking of testimony. We do not believe that the Legislature intended that a trial court conduct [such] proceedings to determine" the validity of an affidavit of merit. *Sturgis Bank & Trust Co v Hillsdale Community Health Ctr*, 268 Mich App 484, 493; 708 NW2d 453 (2005). The requirements set forth in MCL 600.2912d are premised on a legislative recognition that until the civil action has been commenced, no discovery is available to the plaintiff. Thus, the plaintiff is left to the records and information available to him or her in formulating the affidavit of merit. Accordingly, the evaluation to be made at this initial stage of the proceedings, as opposed to the evaluation of expert testimony at trial, is simply

whether the affidavit of merit contains each of the elements set forth in MCL 600.2912d. See *Sturgis Bank & Trust*, 268 Mich App at 493-494, citing *Grossman*, 470 Mich at 598-600.

Moreover, it is not true, as a matter of law, that plaintiffs cannot establish that Khan was negligent in his treatment of plaintiff without the Basha films. From the presence and progression of plaintiff's symptoms and the allegedly plainly evident fracture on films taken a mere eight days after Khan interpreted the Basha films, Mirvis can opine that defendants breached the standard of care by failing to diagnose plaintiff's cervical fracture on July 31, 2006. To establish a cause of action for medical malpractice, a plaintiff must establish four elements: (1) the appropriate standard of care governing the defendant's conduct at the time of the purported negligence, (2) that the defendant breached that standard of care, (3) that the plaintiff was injured, and (4) that the plaintiff's injuries were the proximate result of the defendant's breach of the applicable standard of care. *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). Expert testimony is required to establish the standard of care and a breach of that standard, *Decker v Rochowiak*, 287 Mich App 666, 685; 791 NW2d 507 (2010), as well as causation, *Teal v Prasad*, 283 Mich App 384, 394; 772 NW2d 57 (2009). While there "must be facts in evidence to support the opinion testimony of an expert," *id*. at 395 (quotation marks and citations omitted), circumstantial proof that enables reasonable inferences is sufficient, *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). Applying these fundamental evidentiary principles here, while the absence of the Basha films may affect the weight and credibility afforded to expert testimony concerning whether defendants committed malpractice by failing to diagnose plaintiff's cervical spine fracture

on July 31, 2006, the absence of those films does not render that expert testimony inadmissible. Consequently, dismissal of plaintiffs' complaint constituted legal error.

The trial court committed legal error when it misconstrued the requirements set forth in MCL 600.2912d. Accordingly, an abuse of discretion occurred. See *Jackson*, 278 Mich App at 543. Therefore, we reverse and remand this matter for reinstatement of plaintiffs' complaint and further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiffs, being the prevailing parties, may tax costs pursuant to MCR 7.219.

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

BRONSON METHODIST HOSPITAL v
AUTO-OWNERS INSURANCE COMPANY

BRONSON METHODIST HOSPITAL v
HOME-OWNERS INSURANCE COMPANY

Docket Nos. 300566 and 300567. Submitted December 14, 2011, at Grand Rapids. Decided February 16, 2012, at 9:00 a.m. Leave to appeal denied, 493 Mich 880.

Bronson Methodist Hospital brought separate actions in the Kalamazoo Circuit Court against Home-Owners Insurance Company and Auto-Owners Insurance Company, respectively, after each defendant had failed to pay plaintiff for surgical implant products billed to the companies' insureds following their treatment at the hospital for injuries suffered in automobile accidents. Defendants had requested invoices showing the cost to the hospital of those surgical implant products, but the hospital had refused to provide the information. The hospital sought to recover the unpaid amounts, statutory interest, and attorney fees under the no-fault motor vehicle insurance act, MCL 500.3101 *et seq*. The actions were consolidated. The court, Alexander C. Lipsey, J., denied defendants' discovery request seeking, in part, information regarding the wholesale cost to the hospital of the surgical implant products. The court granted summary disposition in favor of the hospital and awarded it penalty interest, but denied the request for attorney fees. Both defendants appealed separately the denial of the discovery requests and the granting of summary disposition in favor of the hospital. The hospital cross-appealed the denial of its request for attorney fees. The appeals were consolidated.

The Court of Appeals *held*:

1. In accordance with defendants' clear statutory right and obligation to question the reasonableness of the charges, the no-fault act permits defendants to discover the wholesale cost to plaintiff of the surgical implant products for which the insureds were charged when determining whether plaintiff's charges for the products are reasonable under the act.

2. Defendants' ability to assess the reasonableness of provider charges is not limited to a comparison of customary charges among

similar providers. The no-fault act contemplates that, as occurred in these cases, insurers will assess the reasonableness of a provider's charges, paying that portion deemed reasonable, with the provider having the prerogative to then challenge the insurer's decision not to pay the entire charge submitted by filing suit. Once an action is filed, the provider has the burden of proving the reasonableness of its charges by a preponderance of the evidence. Thus, defendants were permitted to consider the cost to plaintiff of providing treatment to the insureds and not merely the cost of treatment as billed by the provider when evaluating the reasonableness of the charges submitted for payment. This ruling was limited, however, to the sort of durable medical-supply products at issue in this case, which are billed separately and distinctly from other treatment services and require little or no handling or storage by a provider. The surgical implant products at issue in this case were standalone items that could be easily quantified. Therefore, plaintiff must come forward with evidence to convince a jury that the charges for the durable medical equipment were reasonable.

3. Plaintiff's actual cost for the surgical implant products would throw some light on the reasonableness of plaintiff's charges to the insureds. The trial court should have compelled plaintiff to provide that information. Plaintiff's actual cost for the products would not be dispositive on the issue whether its charges to the insureds were reasonable; however, the actual cost of the products would be a piece of the overall collage of factors affecting the reasonableness of plaintiff's charges. The reasonableness of the charges was a question of fact for the jury to determine, and the jury can only make such a determination if it has been provided all relevant and probative evidence. The trial court erred when it denied defendants' motion to compel discovery. Because of the error, summary disposition in plaintiff's favor was prematurely and improvidently granted. Plaintiff wholly failed to provide the trial court with some basis for concluding that its charges were reasonable and that there was no factual issue for trial. A provider's customary charges are not necessarily reasonable and the mere fact that a provider believes its charges to be reasonable does not make it so.

4. MCL 500.3148(1) provides for an award of reasonable attorney fees when an insurer unreasonably withholds benefits. A refusal to pay or a delay in payment by an insurer is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty. The determinative factor for an award of attorney fees when an insurer

withholds benefits is not whether the insurer ultimately is held responsible for the benefits, but whether its initial refusal to pay was unreasonable. The trial court did not abuse its discretion by declining to award plaintiff attorney fees on the basis that defendants' refusal to pay was based on a legitimate question of statutory construction. Because insurers have a duty under the no-fault act to audit and challenge the reasonableness of charges submitted for payment, defendants were required to assess the reasonableness of plaintiff's charges for the surgical implant products. Defendants' actions in paying only the undisputed portions of the bills were reasonable under the circumstances, and the attorney-fee penalty provision of the act was thus not triggered. The portion of the trial court's order granting plaintiff summary disposition was reversed and the portion of the order denying plaintiff's request for attorney fees was affirmed.

Affirmed in part, reversed in part, and remanded.

INSURANCE — NO-FAULT — INSURER'S DUTY TO QUESTION REASONABLENESS OF PROVIDER'S CHARGES — DURABLE MEDICAL SUPPLY PRODUCTS.

The no-fault act permits insurers to discover the wholesale cost to the provider of durable medical-supply products, such as surgical implant products, that are billed separately and distinctly from other treatment services and that require little or no handling or storage by a provider for purposes of determining whether the provider's charges for the products to insureds are reasonable under the act; the provider's actual cost of the products is not dispositive on the issue whether the provider's charges are reasonable, but is a factor that affects the reasonableness of the charges (MCL 500.3101 *et seq*.).

Miller Johnson (by *Richard E. Hillary, II*, and *Joseph J. Gavin*) for plaintiff.

Kuiper Orlebeke PC (by *Jack L. Hoffman*) for defendants.

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

PER CURIAM. Defendants, Home-Owners Insurance Company and Auto-Owners Insurance Company, appeal as of right a trial court order granting summary dispo-

sition in favor of plaintiff, Bronson Methodist Hospital, pursuant to MCR 2.116(C)(10) in these consolidated cases concerning the reasonableness of charges for surgical implant products billed by plaintiff to defendants' insureds under the no-fault insurance act, MCL 500.3101 *et seq*. Plaintiff cross-appeals that portion of the trial court's order denying its motion for attorney fees under MCL 500.3148. We consolidated the appeals and affirm in part, reverse in part, and remand. We conclude that, in accordance with defendants' clear statutory right and obligation to question the reasonableness of the charges, the no-fault act permits defendants to discover the wholesale cost to plaintiff of the surgical implant products for which the insureds were charged. Therefore, the trial court erred when it denied defendants' prior motion to compel discovery. Because of the error denying discovery, summary disposition was granted prematurely. We also stress that the ultimate burden of proof regarding the reasonableness of the charges rests with the provider. Finally, we conclude that the attorney-fee penalty provision of the no-fault act was not triggered.

I. BASIC FACTS AND PROCEDURAL HISTORY

These consolidated appeals arise from disputes over the reasonableness of plaintiff's charges for surgical implant products provided to defendants' insureds, Gavin Powell and Hector Serrano-Ruiz, each of whom were treated at plaintiff hospital after suffering serious injuries in separate and unrelated automobile accidents. At issue is whether defendants were entitled to information pertaining to the cost of the surgical implant products to plaintiff when defendants were determining whether the charges billed to defendants' insureds for those surgical implant products were

"reasonable" under the no-fault act and, accordingly, whether that information was discoverable during the course of litigation over the charges.

Powell was injured on July 2, 2009, when the vehicle he was driving struck a tree. Serrano-Ruiz was injured on July 17, 2009, when the motorcycle he was driving was struck by another vehicle. Both Powell and Serrano-Ruiz suffered broken bones that were treated with surgical implant products, including screws and plates. Plaintiff's charges for the medical treatment afforded to Powell totaled $242,941.09, of which $61,237.50 was for "supply/implant" products; plaintiff's total charges for Serrano-Ruiz's medical treatment were $143,477.76, of which $28,800 was for "supply/implant" products. Auto-Owners is responsible for payment of the insurance benefits for Powell's medical treatment; Home-Owners is responsible for payment of the insurance benefits for Serrano-Ruiz's medical treatment. Plaintiff provided defendants with uniform billing forms, itemized statements, and medical records identifying the medical treatment provided to Powell and Serrano-Ruiz, respectively. Defendants timely paid the portion of plaintiff's bills for all charges other than for the surgical implant products used to treat the two men. Defendants requested invoices showing the cost to plaintiff of those surgical implant products. Plaintiff refused to provide this information. Defendants did not pay the charges within the allotted statutory period, resulting in plaintiff's filing the instant actions to recover the unpaid amounts, together with statutory interest and attorney fees.

Home-Owners admitted that it did not pay the $28,800 charge for surgical implant products and denied that such payment was due and owing on the basis that plaintiff had failed to provide reasonable proof of

the fact and amount of the loss and failed to comply with MCL 500.3158(2) by refusing to provide copies of the invoices showing the cost to plaintiff of the items billed as "supply implants." Home-Owners claimed that, without such information, it was unable to make a determination regarding the reasonableness of the charges for the implants. Similarly, Auto-Owners admitted that it did not pay $61,237.50 for surgical implants because Auto-Owners believed that plaintiff had failed to provide sufficient documentation regarding the cost of treatment as required by MCL 500.3158(2) and failed to provide reasonable proof of the fact and amount of loss as required by MCL 500.3142 by refusing to provide copies of purchase invoices showing the cost to plaintiff of the items billed as "Supply/Implants in the amount of $61,237.50."

Defendants submitted discovery requests seeking information regarding the wholesale cost to plaintiff of the surgical implant products at issue, plaintiff's "total revenue and operating expenses and the 'cost-to-charge ratio' which is derived from these numbers," the percentages of plaintiff's patients that are uninsured or covered by no-fault insurance, the average annual increase in plaintiff's charges over the last five years, and any billing manuals or guidelines used to prepare itemized charges or other billing documents. Plaintiff objected to defendants' discovery requests, arguing that the information sought was irrelevant to the claims asserted in plaintiff's complaints and that defendants were not entitled to the information sought because the information regarding "costs of treatment" to which defendants were entitled under MCL 500.3158(2) pertained to the cost to the "injured person" of the medical care and treatment that person received, i.e., the charges incurred by the patient at plaintiff's hospital.

Defendants later moved to compel discovery, asserting that the information sought was relevant to their determination whether the charges billed were reasonable under the no-fault act. Pursuant to MCL 500.3158(2), plaintiff was required to provide insurers with information relating to the cost of treatment of the injured person, which, defendants argued, included the wholesale cost to the provider of the surgical implant products for which the insured was charged. Defendants also asserted that MCR 2.302 required that plaintiff produce the requested information because the information was relevant to the factual question whether plaintiff's charges for the surgical implant products were "reasonable" within the meaning of the no-fault act. Defendants noted that they paid plaintiff a substantial portion of the total charges billed in each case and that the unpaid portions of plaintiff's bills related solely to charges for the surgical implant products for which defendants sought, and plaintiff refused to provide, underlying cost information. Defendants further asserted that whether plaintiff's charges are "reasonable" and whether plaintiff provided "reasonable proof" of the fact and amount of loss as required by the act are determinations to be made by the finder of fact and were issues to which the requested materials were relevant and discoverable.

Plaintiff opposed defendants' motions, again asserting that defendants were not entitled to the information sought. Plaintiff also moved for summary disposition under MCR 2.116(C)(9) on the basis that defendants had abdicated their duty to process the balance of plaintiff's claims in accordance with the no-fault act and were, instead, seeking to use the discovery process to obtain information that they were not entitled to obtain under the no-fault act: plaintiff's underlying—and often confidential—proprietary-cost data. Plaintiff

asserted that defendants could not merely refuse to process the claims; rather, defendants were required to fully process plaintiff's claims by adopting a method for assessing the reasonableness of those claims. Further, plaintiff argued that the information about the "costs of treatment" that it was required to provide under MCL 500.3158(2) pertained to the cost of treatment to the injured person, not the cost to the provider for providing the treatment.

At the hearing on the motions, defendants reiterated their position that the no-fault act required them to determine whether the charges assessed were reasonable and that MCL 500.3158(2) entitled them to documentation regarding the cost to plaintiff of the surgical implant products in order to make that determination. Defendants argued that by failing to provide that information, plaintiff had not met its burden of providing reasonable proof of loss under the act so as to entitle it to payment for the surgical implant products. In response, plaintiff argued that by submitting a uniform billing form, an itemized statement, and the patient's medical records, it had met its burden in each case to provide defendants with reasonable proof of the amount of the loss under MCL 500.3142 and that, thereafter, defendants failed to evaluate the claims, pay what they believed to be reasonable, and deny what they believed to be excessive. Plaintiff argued that defendants were required to conduct an investigation to determine whether the charges were reasonable by comparing costs among providers "similarly located geographically" for the products at issue. Plaintiff also asserted that allowing insurers to obtain providers' cost data would undermine the goals and objectives of the no-fault act and would cause that reparation system to come to a grinding halt. Plaintiff reiterated that all it is required to do is put the insurer on notice of the charges

and the services provided to the insured and that, once it does so, the insurer then has the obligation to go out and use whatever resources it has at its disposal to evaluate the reasonableness of the charges.

The trial court concluded that the no-fault statute did not require plaintiff to provide its cost of surgical implant products and denied the discovery request. The trial court afforded defendants the opportunity to amend their answers to include allegations that plaintiff's charges were unreasonable. Following the court's ruling, defendants, through their audit consultant, CorVel Corporation, estimated a price at which the surgical implant products had been purchased and, on the basis of those estimates, paid plaintiff $34,701.02 of the outstanding $61,237.50 charges related to Powell's treatment and $21,612.65 of the outstanding $28,800 charges related to Serrano-Ruiz's treatment. The payments were "calculated on a basis of cost of the product to the hospital plus 50%." As a result of the additional payments, the balances remaining in dispute were $26,536.48 for Powell's treatment and $7,187.35 for Serrano-Ruiz's treatment. Defendants amended their answers to plaintiff's complaints accordingly, to specifically deny the reasonableness of the outstanding charges for surgical implant products.

Plaintiff again moved for summary disposition, this time under MCR 2.116(C)(10), asserting that defendants' method for determining whether the charges for the surgical implant products were reasonable was, itself, unreasonable as a matter of law. Plaintiff argued that calculating the reasonable rate of reimbursement on the basis of 1½ times the average wholesale implant cost, provided to defendants by a third-party auditing entity, was itself arbitrary and unreasonable as a matter of law under this Court's decision in *Advocacy Org for*

Patients & Providers v Auto Club Ins Ass'n, 257 Mich App 365, 370; 670 NW2d 569 (2003) (*AOPP*), aff'd 472 Mich 91 (2005). Plaintiff described defendants' method as mere guesswork. As it had previously, plaintiff argued that the only relevant consideration under the no-fault act is the amount of the provider's charges for medical services, and not the provider's cost of providing those services. The trial court granted plaintiff's motion for summary disposition, including penalty interest, but denied plaintiff's request for attorney fees because defendants' legal position was "based primarily on testing the legal waters, as opposed to testing the patience of this Court or the Plaintiff." Defendants now appeal as of right. Plaintiff cross-appeals that portion of the order that denied its request for attorney fees.

II. STANDARDS OF REVIEW

This Court reviews for an abuse of discretion a trial court's ruling on a motion to compel discovery. *Cabrera v Ekema*, 265 Mich App 402, 406; 695 NW2d 78 (2005).

We review de novo a trial court's decision on a motion for summary disposition, reviewing the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party must specifically identify the matters that have no disputed factual issues, and it has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); MCR 2.116(G)(4); *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). The

party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed material fact exists. MCR 2.116(G)(4); *Coblentz*, 475 Mich at 569. The existence of a disputed fact must be established by substantively admissible evidence, although the evidence need not be in admissible form. MCR 2.116(G)(6); *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

We review de novo questions of statutory construction. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). 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). In so doing, the Court must 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). It is axiomatic that the words contained in the statute provide the most reliable evidence of the Legislature's intent. *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 163; 744 NW2d 184 (2007). The Legislature is presumed to have intended the meaning it plainly expressed, and clear statutory language must be enforced as written. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007); *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007). If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. *Lash*, 479 Mich at 187; *Rose Hill Ctr, Inc v Holly Twp*, 224 Mich

App 28, 32; 568 NW2d 332 (1997). Only if a statute is ambiguous is judicial construction permitted. *Detroit City Council v Detroit Mayor*, 283 Mich App 442, 449; 770 NW2d 117 (2009).

Finally, we review for an abuse of discretion a trial court's decision whether to award attorney fees under the no-fault act. *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). "The trial court's decision about whether the insurer acted reasonably involves a mixed question of law and fact. What constitutes reasonableness is a question of law, but whether [a] defendant's denial of benefits is reasonable under the particular facts of the case is a question of fact." *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008). This Court reviews a trial court's factual findings for clear error. *Id.* A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id*.

III. ANALYSIS

A. IS THE COST OF PROVIDING MEDICAL SERVICES AND PRODUCTS DISCOVERABLE UNDER MCL 500.3158(2), MCL 500.3159, AND MCR 2.302?

The primary issue on appeal is whether defendants are permitted by the no-fault act to discover the wholesale cost to plaintiff of surgical implant products used in treating defendants' insureds when determining whether plaintiff's charges for those surgical implant products are reasonable under the act. We conclude that, in accordance with defendants' clear statutory right and obligation to question the reasonableness of the charges, the no-fault act permits defendants to

discover the wholesale cost to plaintiff of the surgical implant products for which the insureds were charged. We also stress that the ultimate burden of proof regarding the reasonableness of the charges rests with the provider.

The Michigan court rules establish " 'an open, broad discovery policy . . . .' " *Cabrera*, 265 Mich App at 407 (citation omitted); MCR 2.302. Discovery is permitted for any relevant matter, unless privileged. *Cabrera*, 265 Mich App at 407. However, "a trial court should also protect the interests of the party opposing discovery so as not to subject that party to excessive, abusive, or irrelevant discovery requests." *Id*.

The no-fault act provides for a system of mandatory no-fault automobile insurance, which requires Michigan drivers to purchase personal protection insurance. MCL 500.3101 *et seq*. "Under personal protection insurance[,] an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of [chapter 31 of the Insurance Code]." MCL 500.3105(1). MCL 500.3107(1)(a) provides that personal protection insurance benefits are payable for "[a]llowable expenses consisting of all *reasonable charges* incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." (Emphasis added.) Though "reasonable" is not defined, MCL 500.3157 instructs:

> A physician, hospital, clinic or other person or institution lawfully rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance, and a person or institution providing rehabilitative occupational training following the injury, *may charge a reasonable amount for the products, services and accommodations rendered*. The charge shall not exceed the

> amount the person or institution customarily charges for like products, services and accommodations in cases not involving insurance. [Emphasis added.]

MCL 500.3158(2) further requires that

> [a] physician, hospital, clinic or other medical institution providing, before or after an accidental bodily injury upon which a claim for personal protection insurance benefits is based, any product, service or accommodation in relation to that or any other injury, or in relation to a condition claimed to be connected with that or any other injury, if requested to do so by the insurer against whom the claim has been made, (a) *shall furnish forthwith a written report of the* history, condition, treatment and dates and *costs of treatment of the injured person* and (b) shall produce forthwith and permit inspection and copying of its records regarding the history, condition, treatment and dates and costs of treatment. [Emphasis added.]

Finally, MCL 500.3159 provides:

> In a *dispute regarding an insurer's right to discovery of facts about an injured person's* earnings or about his history, condition, treatment and dates and *costs of treatment*, a court may enter an order for the discovery. The order may be made only on motion for good cause shown and upon notice to all persons having an interest, and shall specify the time, place, manner, conditions and scope of the discovery. A court, in order to protect against annoyance, embarrassment or oppression, as justice requires, may enter an order refusing discovery or specifying conditions of discovery and may order payments of costs and expenses of the proceeding, including reasonable fees for the appearance of attorneys at the proceedings, as justice requires. [Emphasis added.]

Because benefits are payable as losses accrue, benefits are considered overdue "if not paid within 30 days after *an insurer receives reasonable proof of the fact and of the amount of loss sustained*." MCL 500.3142(2) (emphasis added). Similarly, "if the court finds that the insurer

unreasonably refused to pay the claim or unreasonably delayed in making proper payment," attorney fees shall be a charged against the insurer in addition to the benefits recovered. MCL 500.3148(1).

Defendants argue that the cost to the providers of the products used in treating an insured is an appropriate consideration in determining whether the charge for those products is reasonable and that the trial court erred by construing the phrase "costs of treatment" in MCL 500.3158(2) as referring only to the charges of the health-care providers in their own billing to the patients and not to documentation of the cost to the providers of the products and materials used in that treatment.

In contrast, plaintiff argues that the cost of the surgical implant products, whether actual or estimated, was not a permissible consideration in determining whether plaintiff's charges were reasonable and that defendants' method is equivalent to a fee schedule, which is not authorized under the act; rather, the act contemplates only a "charge-to-charge" comparison. Plaintiff believes that defendants were limited to comparing plaintiff's charges to those of other similar providers of the same services.

The trial court concluded that defendants were not permitted to consider either plaintiff's cost for the surgical implant products or the average cost of those products to providers generally, as calculated by a third-party auditor. Instead, defendants were restricted to comparing plaintiff's charges with the charges of other similar providers of these products. We believe the trial court erred by so concluding.

Both parties rely on our holding in *AOPP*, 257 Mich App 365. At issue in that case was

> whether, under the language of the [no-fault] act, defendant insurance companies are required to pay the full amount charged as long as the charge constitutes a "customary" one, or if defendants are entitled to independently review and audit the medical costs charged to their insureds to determine whether a particular charge is "reasonable." [*AOPP*, 257 Mich App at 372.]

Citing both MCL 500.3157 and MCL 500.3107, we noted that the amount an insurer is obligated to pay to a health-care provider is limited to "a reasonable amount." *AOPP*, 257 Mich App at 374. We held:

> Under this statutory scheme, an insurer is not liable for any medical expense that is not both reasonable and necessary. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 93-94; 535 NW2d 529 (1995), quoting *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 49-50; 457 NW2d 637 (1990). The reasonableness of the charge is an explicit and necessary element of a claimant's recovery against an insurer, and, accordingly, the burden of proof on this issue lies with the plaintiff. *Id.* "Where a plaintiff is unable to show that a particular, reasonable expense has been incurred for a reasonably necessary product and service, there can be no finding of a breach of the insurer's duty to pay that expense, and thus no finding of liability with regard to that expense." *Nasser*, [435 Mich] at 50.
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> As the United States Court of Appeals for the Sixth Circuit recognized, these statutory provisions leave open the questions of (1) what constitutes a reasonable charge, (2) who decides what is a reasonable charge, and (3) what criteria may be used to determine what is reasonable. See *Advocacy Organization for Patients & Providers (AOPP) v Auto Club Ins Ass'n*, 176 F3d 315, 320 (CA 6, 1999). [*Id.* at 374-375.]

We rejected the provider's claim that insurers must pay all reasonable necessary medical expenses incurred for accidental bodily injuries as long as the charges did not exceed the amount the provider customarily charged for

comparable services to patients *without* insurance. *Id.* at 375. While MCL 500.3157 specifically sets forth that a provider's charge "shall not exceed the amount the person or institution customarily charges for like products, services and accommodations in cases not involving insurance," the language of the statute did not define what was "reasonable"; rather, the language simply placed a maximum on what a provider could charge in no-fault cases. "Thus, although § 3157 limits what can be charged, nowhere in that section does the Legislature indicate that a 'customary' charge is necessarily a 'reasonable' charge that must be reimbursed in full by the insurer." *AOPP*, 257 Mich App at 376 (emphasis omitted). Such a finding would be contrary to the purpose of the no-fault act. We noted:

> In fact, this Court in *McGill* [*v Auto Ass'n of Mich*, 207 Mich App 402; 526 NW2d 12 (1994)] discussed at length the policy considerations underlying the act in rejecting the plaintiffs' argument that the defendant insurers were required to pay the full amount of medical expenses billed by health-care providers:
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> "It is to be recalled that the public policy of this state is that 'the existence of no-fault insurance shall not increase the cost of health care.' Indeed, '[t]he no-fault act was as concerned with the rising cost of health care as it was with providing an efficient system of automobile insurance.' To that end, the plain and ordinary language of § 3107 requiring no-fault insurance carriers to pay no more than reasonable medical expenses, clearly evinces the Legislature's intent to 'place a check on health care providers who have "no incentive to keep the doctor bill at a minimum." '
>
> "For the above reasons, we reject plaintiffs' argument that, pursuant to the no-fault act, defendants are obligated to pay the entire amount of plaintiffs' medical bills. *Such an interpretation would require insurance companies to accept health care providers' unilateral decisions regarding what constitutes reasonable medical expenses, effectively*

> *eliminating insurance companies' cost-policing function as contemplated by the no-fault act. This result would directly conflict with the Legislature's purpose in enacting the no-fault system in general and § 3107 in particular. '*[*I*]*t is clear that the Legislature did not intend for no-fault insurers to pay all claims submitted without reviewing the claims for lack of coverage, excessiveness, or fraud.' "* [*Id.* at 407-408 (citations omitted; emphasis added).] [*AOPP*, 257 Mich App at 377-378.]

Thus, insurers are *required* to challenge the reasonableness of charges, and providers should expect no less. *Id.* at 378-379.

In concluding that insurers were only obligated to pay benefits for reasonable charges, we acknowledged that what was "reasonable" had yet to be defined. "[C]onsequently, insurers must determine in each instance whether a charge is reasonable in light of the service or product provided." *Id.* at 379. Ultimately, the determination of what is a reasonable charge is for the trier of fact. *Id.* In a footnote, we acknowledged that the case had policy ramifications, but that those should not be overstated:

> We believe both sides overstate the effects of either side prevailing. Under the statute, plaintiffs necessarily make the initial determination of reasonableness by charging the insured for the services. Once plaintiffs charge the insured, the insurer then makes its own determination regarding what is reasonable and pays that amount to plaintiffs. Although, as plaintiffs argue, the cost-benefit analysis may cause fewer legal actions over the disputed amount, the fact-finder will ultimately decide what is reasonable. Whether this procedure is the best is a matter for the Legislature. [*Id.* at 379 n 4 (citations omitted).]

Naturally, "[p]laintiffs may challenge defendants' failure to fully reimburse them for medical bills as a violation of the act, but they have the burden of

establishing the reasonableness of the charges in order to impose liability on the insurer," and "[t]he question whether expenses are reasonable and reasonably necessary is generally one of fact for the jury . . . ." *Id.* at 380. Thus, "[i]f plaintiffs disagree with a defendant's assessment of reasonableness, they have the right to contest the amount of such payment and must prove by a preponderance of the evidence that the expenses were both reasonable and necessary." *Id.*[1]

While *AOPP* supports an insurer's practice of determining the reasonableness of a provider's charges for surgical implant products by comparing those charges to the amounts charged for those products by other, similar providers, *AOPP* does not suggest that this is the *only* permissible approach under the act. In *AOPP*, we specifically declined to "delineate the permissible factors" that defendants may consider when determining whether a charge is reasonable, while specifically rejecting the notion that providers are permitted to "unilaterally determine the 'reasonable' charge to be paid by the insurer" by way of their customary charges or that the act should be interpreted in a manner that effectively eliminates the cost-policing function of insurance companies as contemplated by the no-fault act. *Id.* at 377, 379. To limit assessing the reasonableness of provider charges solely to a comparison of such charges among similar providers would be to leave the determi-

[1] Following our decision in *AOPP*, our Supreme Court granted the providers' application for leave to appeal, directing that "defendants are to explain in detail the computations they use in determining whether a particular charge meets the '80th percentile test.' " *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 470 Mich 881 (2004). Thereafter, the Supreme Court affirmed the case in a memorandum opinion and concurring opinions for the reason that "we agree with the Court of Appeals resolution of this issue . . . ." *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91, 95; 693 NW2d 358 (2005).

nation of reasonableness solely in the hands of providers, as a collective group, and would abrogate the cost-policing function of no-fault insurers, contrary to the intention of the Legislature. Accordingly, defendants' ability to assess the reasonableness of provider charges is not limited to a comparison of customary charges among similar providers. Rather, the act contemplates that, as happened here, insurers will assess the reasonableness of a provider's charges, paying that portion deemed reasonable, with the provider having the prerogative to then challenge the insurer's decision not to pay the entire charge submitted by filing suit. Once an action is filed, the provider has the burden of proving by a preponderance of the evidence the reasonableness of its charges. *Id.* at 379-380. The parties are free to introduce evidence to the fact-finder regarding the reasonableness of plaintiff's charges. Plaintiff is free to argue that its charges are in line with those of other similar providers for the surgical implant products at issue here, and defendants may respond by asserting that plaintiff's markup over the average wholesale cost of those products renders the charges excessive. But ultimately, the burden of proof is on the provider to show how and why the charges are reasonable.

In keeping with the insurer's obligation to determine the reasonableness of a provider's charges, we believe that defendants were entitled to discover the wholesale cost of the surgical implant products for which the insureds were charged. The no-fault act, MCL 500.3158(2), permits defendants to discover plaintiff's "costs of treatment *of* the injured person," not the "costs of treatment *to* the injured person," which presumably are plaintiff's customary charges. (Emphasis added.) Accordingly, defendants are permitted to consider the cost *to plaintiff* of providing that treatment

and not merely the cost of treatment as billed by the provider to the injured person when evaluating the reasonableness of the charges submitted for payment. We recognize that permitting insurers access to a provider's cost information could open the door to nearly unlimited inquiry into the business operations of a provider, including into such concerns as employee wages and benefits. However, we explicitly limit our ruling to the sort of durable medical-supply products at issue here, which are billed separately and distinctly from other treatment services and which defendants represent (and plaintiff has not disputed) require little or no handling or storage by a provider. The surgical implant products here are standalone items that can be easily quantified. Plaintiff must come forward with evidence to convince a jury that the charges for the durable medical equipment were reasonable.

We find further support in our recent opinion in *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651; 819 NW2d 28 (2011). At issue in that case was the reasonable rate for family-provided attendant-care services under MCL 500.3107(1)(a). The plaintiff believed that agency rates constituted a material and probative measure of the general value of attendant-care services, whereas the insurance company claimed that agency rates were irrelevant to establish the reasonable rate for care provided by an unlicensed family member. Instead, the insurance company argued, the reasonable rate should have been based on a similar worker's wage, which would not include an agency's overhead and additional expenses not related to the worker's wages. *Hardrick*, 294 Mich App at 664-665. We held that, while rates charged by an agency to provide attendant-care services were not *dispositive* of the reasonable rate chargeable by a relative caregiver, they were certainly a relevant consideration for the jury in deciding what was

a "reasonable rate." *Id.* at 666. Concluding that the trial court properly rejected the insurance company's attempt to exclude the evidence, we explained:

> 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 [the] 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. 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. [*Id.* at 669 (citation omitted).]

Similarly, in this case, plaintiff's actual cost for surgical implant products is but one piece of information that a jury might find relevant in determining whether plaintiff's charges were reasonable. *Hardrick* stresses what we have already discussed at length—the jury is charged with the responsibility of determining the reasonableness of plaintiff's charges. Because actual costs to plaintiff would most certainly "throw some light on" the reasonableness of the charges, the trial court should have compelled plaintiff to provide the information.

Hardrick also confirms the notion that a hospital's itemized bills and records do not, standing alone, satisfy the "reasonableness" requirement. We analogized a "charge" to an attorney's bill for services. When an

attorney seeks a court order for payment of a "reasonable attorney fee," he or she may not simply provide a bill, but must also demonstrate that the bill is reasonable by showing more than his or her actual "wage." *Id.* at 673-674. We explained:

> 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, [the expert witness] 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. [The insurance company] correctly notes that the jury should hear such evidence to more fully and accurately calculate a reasonable rate for the services rendered.
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> * * *
>
> . . . Limiting a family member's "reasonable charge" to a wage ignores . . . 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.
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> * * *
>
> None of the evidence proffered by [either party], 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 [the] parents for the services they provide. [*Id.* at 675-678 (citation omitted).]

Similarly, plaintiff's actual cost for the surgical implant products is not dispositive on the issue whether its charges were reasonable; however, the actual cost of the durable medical equipment is certainly a piece of the overall "collage of factors affecting the reasonable rate" of plaintiff's charges. Again, it cannot be overstated that, when factually disputed, the reasonableness of the charges is a question of fact for the jury to determine. The jury can only make such a determination if it has been provided with all relevant and probative evidence.

Accordingly, given our conclusion that defendants were entitled to discover the actual cost of the surgical implant products to plaintiff under MCL 500.3158 and MCL 500.3159, the trial court erred when it denied defendants' motion to compel discovery. Because of the error, it follows that summary disposition in plaintiff's favor was prematurely and improvidently granted, as discussed hereinafter.

B. DID THE TRIAL COURT ERR BY GRANTING PLAINTIFF SUMMARY DISPOSITION?

Defendants argue that, considering the cost data presented by defendants, which is a permissible consideration under the no-fault act in determining reasonableness, and considering plaintiff's lack of admissible evidence supporting the reasonableness of its charges, a rational fact-finder could conclude that plaintiff's charges for surgical implant products were not reasonable and, therefore, summary disposition in plaintiff's favor was not warranted. We agree.

Plaintiff sought summary disposition on the basis that defendants' method of determining that plaintiff's charges for the surgical implant products were excessive was arbitrary and unreasonable. Plaintiff did not proffer anything to support its assertion that its

charges were reasonable, nor did it offer any evidence regarding how its charges compared with those of similar providers of the same products. Instead, plaintiff claimed that when it established and submitted its charges to defendants it necessarily made the determination regarding the reasonableness of those charges, thus shifting the burden to defendants to employ a reasonable method to challenge the validity of plaintiff's charges. Thus, plaintiff argued, defendants had the burden of legitimately auditing plaintiff's charges under the no-fault act and, when they failed to do so, they failed to create a triable issue for the jury. We disagree.

Plaintiff's position is at odds with established caselaw. The burden of proof on the reasonableness of its fees lies with plaintiff. *Hofmann*, 211 Mich App at 93-94, quoting *Nasser*, 435 Mich at 49-50. "[I]t is the insurance company that has the right to deny a claim (or part of a claim) for unreasonableness under § 3107. The *insured* then has the burden to prove that the charges are in fact reasonable." *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 18; 795 NW2d 101 (2009). Moreover, as the moving party, plaintiff bore the burden of establishing the absence of any genuine issue of material fact in the first instance. MCR 2.116(G)(4); *Coblentz*, 475 Mich at 569. Plaintiff had to provide the trial court with some basis for concluding that its charges were reasonable and that there was no factual issue for trial, despite defendants' arguments otherwise. Plaintiff wholly failed to do this. Considering that this Court has explicitly held that a provider's customary charges are not necessarily reasonable, *AOPP*, 257 Mich App at 377, the mere fact that plaintiff believed its charges to be reasonable does not make it so. Accordingly, there was no basis for the trial court to conclude

that plaintiff's charges were necessarily reasonable under the no-fault act. Hence, summary disposition was improvidently granted.

C. DID THE TRIAL COURT ERR BY REFUSING TO AWARD ATTORNEY FEES UNDER MCL 500.3148?

In its cross-appeal, plaintiff argues that the trial court clearly erred by failing to award plaintiff its attorney fees after defendants refused to pay for the surgical implant products. We disagree.

The no-fault act provides for an award of reasonable attorney fees when an insurer unreasonably withholds benefits. MCL 500.3148(1). Our Supreme Court has held:

> MCL 500.3148(1) establishes two prerequisites for the award of attorney fees. First, the benefits must be overdue, meaning "not paid within 30 days after [the] insurer receives reasonable proof of the fact and of the amount of loss sustained." MCL 500.3142(2). Second, in postjudgment proceedings, the trial court must find that the insurer "unreasonably refused to pay the claim or unreasonably delayed in making proper payment." MCL 500.3148(1). Therefore, assigning the words in MCL 500.3142 and MCL 500.3148 their common and ordinary meaning, "attorney fees are payable only on overdue benefits for which the insurer has unreasonably refused to pay or unreasonably delayed in paying." *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 485; 673 NW2d 739 (2003) (emphasis omitted). [*Moore*, 482 Mich at 517.]

"The purpose of the no-fault act's attorney-fee penalty provision is to ensure prompt payment to the insured." *Ross v Auto Club Group*, 481 Mich 1, 11; 748 NW2d 552 (2008). Therefore, when an insurer refuses or delays payment of personal protection insurance benefits, it has the burden of justifying its refusal or delay under MCL 500.3148(1). *Ross*, 481 Mich at 11.

When benefits initially denied or delayed are later determined to be payable, "a rebuttable presumption arises that places the burden on the insurer to justify the refusal or delay." *Attard v Citizens Ins Co of America*, 237 Mich App 311, 317; 602 NW2d 633 (1999). However, a refusal to pay or a delay in payment "is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty." *Id*. The determinative factor "is not whether the insurer ultimately is held responsible for benefits, but whether its initial refusal to pay was unreasonable." *Ross*, 481 Mich at 11.

Defendants asserted in the trial court, as they do here, that the refusal to pay the full amount of plaintiff's charges for surgical implant products was based on both a legitimate question of statutory construction and factual uncertainty regarding the reasonableness of those charges. The trial court determined that defendants' conduct was based on a legitimate question of statutory construction. We agree and conclude that the trial court did not abuse its discretion by declining to award plaintiff attorney fees.

As discussed earlier in this opinion, an insurer is not foreclosed from assessing the reasonableness of a provider's charges merely because those charges are the provider's customary charges; rather, insurers have a duty under the act to " 'audit and challenge the reasonableness' " of charges submitted for payment. *AOPP*, 257 Mich App at 378, quoting *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 582 n 3; 543 NW2d 42 (1995). Thus, defendants were required to assess the reasonableness of plaintiff's charges for surgical implant products. In *AOPP*, this Court found it unnecessary to "delineate the permissible factors for determining what is 'reasonable' . . . ." *AOPP*, 257 Mich App at 379.

Consequently, at the time defendants received plaintiff's billings, the permissible factors available for defendants' consideration in evaluating the reasonableness of the charges for surgical implant products submitted by plaintiff remained undefined by either the no-fault act or the caselaw interpreting and construing it. Defendants requested that plaintiff provide information regarding the wholesale cost of these durable medical products for consideration in determining whether plaintiff's charges to defendants' insureds for those products were reasonable. Considering that MCL 500.3158(2) requires that, upon defendants' request, plaintiff provide defendants with "a written report of the . . . costs of treatment of the injured person" and that plaintiffs "produce forthwith and permit inspection and copying of its records regarding . . . costs of treatment," and considering further a complete absence of caselaw construing this phrase, the trial court did not clearly err by concluding that defendants' denial of full payment was premised on a legitimate question of statutory construction. "[A]n insurer's initial refusal to pay benefits under Michigan's no-fault insurance statutes can be deemed reasonable even though it is later determined that the insurer was required to pay those benefits." *Moore*, 482 Mich at 525. Even if it is later established that defendants are obligated to pay the full amount of plaintiff's charges, we believe that defendants' actions thus far in paying only the undisputed portions of the bills were reasonable under the circumstances and that the attorney-fee penalty provision of the no-fault act was not triggered.

Because we conclude that the no-fault act permits defendants to discover the wholesale cost to plaintiff of the surgical implant products for which the insureds were charged, we reverse that portion of the trial court's order that granted plaintiff summary disposition, af-

firm that portion of the trial court's order that denied plaintiff's request for attorneys fees, and remand for further proceedings. We do not retain jurisdiction.

HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ., concurred.

NEVILLE v NEVILLE

Docket Nos. 294461 and 302946. Submitted February 7, 2012, at Detroit. Decided February 16, 2012, at 9:05 a.m.

Defendant, Mark T. Neville, moved in the Wayne Circuit Court to clarify and amend the 1995 qualified domestic relations order (QDRO) entered in accordance with the terms of his and plaintiff Kathy Kay Neville's 1994 divorce judgment, arguing that the administrator of his employer's retirement plan had construed the QDRO in a manner that would give more benefits to plaintiff than provided for in the divorce judgment and that the QDRO itself did not conform to the terms of the judgment. In August 2009, the court, Connie Marie Kelley, J., determined that defendant's motion had been improperly brought under MCR 2.612(C)(1)(a) and (f) because the QDRO was not an appealable judgment, treated his motion as a request to amend the QDRO to be consistent with the divorce judgment, and granted the motion. The court thereafter amended the QDRO in March 2010. Plaintiff applied for leave to appeal the August 2009 decision (Docket No. 294461), which the Court of Appeals denied. In lieu of granting plaintiff's application for leave to appeal, the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 488 Mich 899 (2010). Plaintiff also appealed by delayed leave granted the March 2010 order amending the QDRO (Docket No. 302946), and the cases were consolidated.

The Court of Appeals *held*:

1. Under the language of MCL 552.101(4) that was in effect at the time of the parties' 1994 divorce, a divorce judgment was required to conclusively determine all the rights of the husband and wife in any pension, annuity, or retirement benefits. A QDRO entered in accordance with the terms of a divorce judgment is part of the property settlement. The trial court erred by treating the QDRO as a separate order and regarding defendant's motion as one to amend that QDRO rather than as a motion for relief from the judgment under MCR 2.612(C)(1)(a) and (f) because the final divorce judgment encompassed both the 1994 divorce judgment and the 1995 QDRO as a whole. The terms of the parties' property

settlement were not conclusively established by the divorce judgment because it mandated entry of a QDRO.

2. A court may relieve a party from a final judgment, order, or proceeding on the basis of mistake, inadvertence, surprise, or excusable neglect or any other reason justifying relief from operation of the judgment under MCR 2.612(C)(1)(a) and (f). However, under MCR 2.612(C)(2), the motion must be made within a reasonable time, and for the grounds stated in MCR 2.612 (C)(1)(a), within one year after the judgment, order, or proceeding was entered or taken. Defendant's motion, which he filed more than 14 years after entry of the final divorce judgment, was time-barred under MCR 2.612(C)(2) to the extent he sought substantive changes through entry of an amended QDRO.

3. The treatment and distribution of pension benefits may vary. When the division of pension benefits is established by the terms of parties' property settlement, the trial court must determine the parties' intent as manifested in their agreement through application of principles of contract construction. However, when the contract language in a divorce judgment is unambiguous, it must be applied as written. The trial court erred by finding that the property-settlement provisions in the 1994 divorce judgment controlled distribution of the pension benefits in issue and by concluding that it limited plaintiff's survivorship benefits to a proportionate interest based on years of the marriage. Because the divorce judgment encompassed both the divorce judgment and the QDRO, the trial court erred by assuming that there was a conflict between the two documents rather than recognizing that the parties were free to modify the terms of their property settlement in the divorce judgment through mutual assent and that any changes to those provisions as reflected in the 1995 QDRO were controlling.

4. A single method for valuing a pension plan is not required, even when the division of the pension plan is to be determined by the trial court rather than by agreement of the parties. If the parties agree in the divorce judgment on how the pension plan is to be divided, the court must determine the parties' intent through application of the principles of contract construction. Because the parties were free to modify the terms of their property settlement when approving the QDRO, the trial court erred by developing a formula for plaintiff's share of defendant's retirement benefits that differed from the formula set forth in the QDRO.

Decision granting defendant's motion to amend in Docket No. 294461 reversed; amended QDRO in Docket No. 302946 vacated and original QDRO reinstated.

1. MOTIONS AND ORDERS — RELIEF FROM FINAL JUDGMENT — MISTAKE, INADVERTENCE, SURPRISE, OR EXCUSABLE NEGLECT.

A court may relieve a party from a final judgment, order, or proceeding on the basis of mistake, inadvertence, surprise, or excusable neglect or any other reason justifying relief from operation of the judgment; the motion must be made within a reasonable time, and for the grounds stated in MCR 2.612(C)(1)(a), within one year after the judgment, order, or proceeding was entered or taken (MCR 2.612[C][1][a] and [f], [C][2]).

2. DIVORCE — PROPERTY SETTLEMENT — QUALIFIED DOMESTIC RELATIONS ORDERS.

A qualified domestic relations order executed in accordance with the terms of a divorce judgment is part of the property settlement and must be treated as part of the final divorce judgment.

Judith A. Curtis for Kathy Kay Neville.

Daniel P. Marsh for Mark T. Neville.

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

PER CURIAM. In Docket No. 294461, plaintiff appeals the trial court's August 12, 2009, opinion and order granting defendant's motion to clarify and amend a qualified domestic relations order (QDRO) that was previously entered on March 14, 1995. This Court originally denied plaintiff's application for leave to appeal, *Neville v Neville*, unpublished order of the Court of Appeals, entered February 16, 2010 (Docket No. 294461), but our Supreme Court subsequently remanded the case to this Court for consideration as on leave granted, *Neville v Neville*, 488 Mich 899 (2010). In Docket No. 302946, plaintiff appeals by delayed leave granted the trial court's March 11, 2010, amended QDRO. This Court consolidated the two appeals. In Docket No. 294461, we reverse the trial court's August 12, 2009, decision granting defendant's motion to amend the March 14, 1995, QDRO. In Docket No. 302946, we vacate the March 11, 2010, amended QDRO and reinstate

the March 14, 1995, QDRO without prejudice to the trial court's authority to amend the latter order to carry out the parties' intent as expressed in their agreement.

The parties were married in March 1978. On November 14, 1994, the trial court entered a default divorce judgment, which provided in pertinent part:

> IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff is awarded one half of the present value of the general retirement pension through Defendant's employer. A Qualified Domestic Relations Order shall enter. Plaintiff shall be entitled to a percentage based upon years worked during the marriage over (16.5 years) total years worked. Value shall be based upon contributory, noncontributory and supplemental, if applicable. The Plaintiff shall be deemed "surviving spouse" for pre and post benefit purposes.

A QDRO was later entered on March 14, 1995, which provided in pertinent part:

> IT IS HEREBY ORDERED AND ADJUDGED that pension benefits, contributory, non-contributory, and supplemental, otherwise payable to the Participant, MARK T. NEVILLE, under his pension plan(s) with Ford Motor Company, specifically including the Ford Motor Company General Retirement Plan shall be apportioned as follows:
>
> A. The amount payable to the Alternate Payee with respect to all pension benefits, contributory, non-contributory, and supplemental, shall be the amount otherwise payable to such Participant pursuant to the Plan(s) multiplied by 50% and multiplied by a fraction the numerator of which is the number of years of service of such Participant under such Plan(s) during the marriage, namely, 16 years, 6 months, and the denominator of which is the total number of years of service of such Participant under the Plan(s). Years of service shall mean years and any fractional year used in computing the particular benefit.

* * *

> C. The Alternate Payee shall be entitled to pre and post retirement survivorship retirement benefits and shall be treated as the surviving spouse under the Plan(s), accordingly, in the event of the death of the Participant either before or after commencement of retirement benefits, payment shall be made to the Alternate Payee as provide in the Plan for the surviving spouse.

The March 14, 1995, QDRO also provided that "modifications of this Order shall be allowable for purposes of carrying out the intent of the parties."

In April 2009, defendant moved for clarification and amendment of the QDRO, relying in part on MCR 2.612(C)(1)(a) and (f). The motion alleged that an administrator of his employer's retirement plan had construed the QDRO in a manner that would provide more benefits to plaintiff than provided for in the divorce judgment (specifically a portion of defendant's early-retirement incentives and surviving-spouse benefits earned by defendant after the divorce). On August 12, 2009, the trial court treated defendant's motion as a request to amend the March 14, 1995, QDRO to be consistent with the divorce judgment and granted the motion. The court thereafter entered an amended QDRO on March 11, 2010, to correct what it determined to be inconsistencies between the original divorce judgment and the March 14, 1995, QDRO with respect to plaintiff's right to share in defendant's retirement benefits. The amended QDRO treated the original March 14, 1995, QDRO as a *nunc pro tunc* order entered as part of the November 14, 1994, divorce judgment.

When entering the order, the trial court determined that the March 14, 1995, QDRO improperly expanded benefits provided for in the divorce judgment by referring to more than one plan, and not just the general retirement plan. The trial court also expressed concern

that the phrase "all pension benefits" in the March 14, 1995, QDRO suggested that it included benefits not contemplated by the divorce judgment, such as early-retirement benefits. In addition, the trial court was concerned that defendant's exercise of early-retirement incentives might reduce the pension benefit that plaintiff would be entitled to under the terms of the divorce judgment if pension funds were used for the payment. On March 11, 2010, the trial court fashioned an amended QDRO to account for this possibility and adopted a formula for determining plaintiff's share of pension benefits that did not consider retirement benefits accrued by defendant after the date of the divorce. The trial court also limited plaintiff's survivorship rights to "a fraction of all pre-retirement survivor benefits . . . ."

Our Supreme Court's remand order concerning the trial court's August 12, 2009, opinion and order granting defendant's motion to amend the March 14, 1995, QDRO directs this Court to consider the following questions:

> [W]hether the trial court correctly held that the parties' November 14, 1994, divorce judgment limited the plaintiff's survivorship benefit to a proportionate interest based on years of marriage, that the divorce judgment conflicted with the 1995 qualified domestic relations order (QDRO) agreed upon by the parties, that the terms of the divorce judgment should control over the terms of the QDRO, and that the defendant's motion to have the QDRO amended was not time-barred. [*Neville*, 488 Mich at 899.]

Although plaintiff asserts that the Supreme Court's questions in Docket No. 294461 only involve the survivorship benefit, we conclude that with the exception of the first question, which is directed specifically at the methodology for determining the survivorship benefit, the remaining questions are also pertinent to plaintiff's

appeal in Docket No. 302946 regarding the formula adopted by the trial court to determine other benefits. Therefore, we shall consider these questions as they relate to both appeals.

We review de novo the trial court's decision interpreting the November 14, 1994, divorce judgment and the March 14, 1995, QDRO. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 460; 750 NW2d 615 (2008). To the extent that the judgment and the QDRO were entered pursuant to the parties' agreement, questions involving the interpretation of the agreement, including whether any language is ambiguous, are also reviewed de novo because judgments entered pursuant to the agreement of parties are in the nature of a contract. *Reed v Reed*, 265 Mich App 131, 141; 693 NW2d 825 (2005); *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994). In addition, we review de novo as a question of law issues involving a trial court's interpretation and application of court rules or statutes. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009); *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

We first address plaintiff's challenge to the timeliness of defendant's motion for clarification and amendment of the March 14, 1995, QDRO (and the Supreme Court's directive that we consider whether defendant's motion to have the QDRO amended was not time-barred.) As authority for the motion, defendant cited MCR 2.612(C)(1)(a) and (f), which provide that a court may relieve a party from a "final judgment, order, or proceeding" on the basis of "[m]istake, inadvertence, surprise, or excusable neglect" or "[a]ny other reason justifying relief from the operation of the judgment." MCR 2.612(C)(2) provides that "[t]he motion must be made within a reasonable time, and, for the grounds

stated in subrules (C)(1)(a), (b), and (c), within one year after the judgment, order, or proceeding was entered or taken."

The trial court determined that MCR 2.612(C) was inapplicable to defendant's motion in its entirety because he was "not seeking relief from the [divorce judgment]. On the contrary, Defendant is requesting that the QDRO be amended to be consistent with the [divorce judgment]." Citing *Lee v Lee*, unpublished opinion per curiam of the Court of Appeals, issued April 8, 2004 (Docket No. 246183), the trial court also held that because the QDRO did not conform to the judgment of divorce, the QDRO was invalid. However, at the time the divorce judgment was entered, MCL 552.101(4) required that a divorce judgment determine all rights of the husband and wife in "[a]ny pension, annuity, or retirement benefits." In *Mixon v Mixon*, 237 Mich App 159, 166; 602 NW2d 406 (1999), this Court construed the statute as requiring that pension rights be decided conclusively. Consistently with this obligation, entry of a QDRO was explicitly required by the terms of the November 14, 1994, divorce judgment. As such, the trial court should have treated the March 14, 1995, QDRO as *part of* the divorce judgment when ruling on defendant's motion. *Id.* at 166-167. Instead, the trial court erroneously treated the QDRO as a completely separate order, thus dismissing the application of MCR 2.612 to defendant's motion as a whole.[1]

[1] The trial court further erred by giving the March 14, 1995, QDRO *nunc pro tunc* effect when entering the amended QDRO on March 11, 2010. "An entry nunc pro tunc is proper to supply an omission in the record of action really had, but omitted through inadvertence or mistake." *Shifferd v Gholston*, 184 Mich App 240, 243; 457 NW2d 58 (1990). Its purpose is not to supply omitted action of a trial court. *Freeman v Wayne Probate Judge*, 230 Mich 455, 460; 203 NW 158 (1925). There is nothing in the record to indicate that the March 14, 1995, QDRO was

The trial court's reliance on *Lee* was misplaced because unpublished decisions are not precedentially binding under the rules of stare decisis. MCR 7.215(C)(1). While an unpublished decision may be considered for its persuasive reasoning, *Beyer v Verizon North, Inc*, 270 Mich App 424, 430-431; 715 NW2d 328 (2006), the decision in *Lee* is not persuasive as applied to this case because it did not substantively treat a QDRO as part of the divorce judgment. Rather, relying on *Quade v Quade*, 238 Mich App 222, 224, 226; 604 NW2d 778 (1999), and *Roth v Roth*, 201 Mich App 563; 506 NW2d 900 (1993), the *Lee* Court concluded that separate and distinct components of a pension plan must be specifically included in a divorce judgment in order to be included in a QDRO. And the two cases relied on by the *Lee* Court are also factually distinguishable.

This case is factually distinguishable from *Roth*, 201 Mich App at 564-565, because the 1983 divorce judgment in that case did not contain any provision requiring entry of a QDRO. Rather, the plaintiff moved in 1990 for entry of a separate QDRO and to add certain pension rights because of a change in the law. *Id.* at 565. The facts in *Quade* were similar to those in this case to the extent that the divorce judgment in *Quade* provided for a transfer of pension rights by way of a QDRO. But unlike this case, there was no indication in *Quade* that the parties reached an agreement regarding the terms of a QDRO. Rather, the trial court refused to enter a QDRO that contained language that differed from the divorce judgment. *Quade*, 238 Mich App at 223-224. This Court further determined that the divorce judg-

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entered as a *nunc pro tunc* order, effective as of the date of the divorce judgment, and the purpose of the QDRO was not to supply an omitted action. Rather, the QDRO was a subsequent consensual order expressly required by the divorce judgment.

ment contained a waiver provision whereby each party waived any interest in any individual retirement account, pension, or profit-sharing plan except as specifically provided therein. *Id.* at 226.

The divorce judgment in this case does not contain the type of waiver language used in *Quade*. There is also no evidence that the March 14, 1995, QDRO was a contested order as opposed to a consensual one. Keeping in mind the requirement that a divorce judgment conclusively determine the parties' rights, *Mixon*, 237 Mich App at 166, we conclude that the March 14, 1995, QDRO must be treated as part of the property settlement in the divorce judgment. Cf. *Thornton v Thornton*, 277 Mich App 453, 457-458; 746 NW2d 627 (2007) (holding that a QDRO executed contemporaneously with a divorce judgment and required by the terms of the judgment must be considered part of the property settlement). The QDRO and the divorce judgment are thus two parts of a whole. Because MCR 2.612 applies to relief from final judgment or orders and the March 14, 1995, QDRO is properly treated as part of the final divorce judgment, we conclude that the trial court erred by determining that MCR 2.612(C) did not apply to defendant's request for substantive changes to the March 14, 1995, QDRO to make it consistent with the property-settlement provisions contained in the November 14, 1994, divorce judgment.

This is not to say that the trial court could not *interpret and clarify* the parties' agreement without considering MCR 2.612. It may do so provided it does not *change* the parties' substantive rights as reflected in the parties' agreement. See *Bers v Bers*, 161 Mich App 457, 464; 411 NW2d 732 (1987). In order to determine the parties' agreement, a court must consider all of its terms, including any modifications agreed

to by the parties. See *Forge v Smith*, 458 Mich 198, 207; 580 NW2d 876 (1998) (noting that when one writing refers to another instrument for additional terms, the two writings should be read together), and *Adell Broadcasting Corp v Apex Media Sales, Inc*, 269 Mich App 6, 11; 708 NW2d 778 (2005) (stating that contracting parties may modify their contract through mutual assent). Because the trial court failed to construe as a whole the terms of the parties' agreement, which consisted of the property settlement terms in the divorce judgment and the March 14, 1995, QDRO that was made part of the judgment, its conclusion that MCR 2.612 did not apply to defendant's motion was affected by an error of law.

As a matter of law, we conclude that MCR 2.612 was applicable to defendant's motion to the extent that defendant sought, and the trial court granted, relief in the form of substantive modifications to the provisions of the parties' agreement. Because defendant has neither argued nor otherwise established on appeal that his motion—brought more than 14 years after entry of both the November 14, 1994, divorce judgment and the March 14, 1995, QDRO—could be considered timely under MCR 2.612(C)(2), we hold that the motion was time-barred to the extent that it sought substantive changes through entry of an amended QDRO. See *Thornton*, 277 Mich App at 454-455, 458 (holding that the defendant's 2005 motion to amend a QDRO entered in 1993 was untimely and unreasonable to the extent that it could be interpreted as a motion for relief from the judgment under MCR 2.612). This Court, however, will not reverse when a trial court reaches the right result for a wrong reason. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 508-509; 741 NW2d 539 (2007). Therefore, we turn to the remaining questions before us regarding survivorship and other retirement benefits to

determine if plaintiff has demonstrated that her substantive rights have been affected.

With regard to the trial court's decision that the divorce judgment limited plaintiff's survivorship benefit to a proportionate interest based on years of marriage, we agree with plaintiff that the judgment contains no such limitation. The treatment and distribution of pension benefits may vary. *Pickering v Pickering*, 268 Mich App 1, 8; 706 NW2d 835 (2005). The property settlement in this case provides only that "[t]he plaintiff shall be deemed 'surviving spouse' for pre and post benefit purposes." Because the contract language is unambiguous, we must apply it as written. *Coates*, 276 Mich App at 503; *Reed*, 265 Mich App at 141, 147-148.

This construction of the divorce judgment is consistent with the March 14, 1995, QDRO agreed upon by the parties, except that the QDRO specifies that plaintiff is to be treated as "the surviving spouse under the Plan(s)." Improperly assuming the existence of some substantive conflict between the November 14, 1994, divorce judgment and the March 14, 1995, QDRO with respect to survivorship benefits, the trial court erred by finding that the terms of the November 14, 1994, divorce judgment were controlling. As discussed previously, the March 14, 1995, QDRO is properly treated as part of the final divorce judgment. Given that the parties were free to modify the terms of their November 1994 property settlement through mutual assent, any changes to those property-settlement provisions as reflected in the March 1995 QDRO are controlling. *Adell Broadcasting*, 269 Mich App at 11. Because the trial court's August 12, 2009, decision modifying plaintiff's survivorship benefits under the March 14, 1995, QDRO affected plaintiff's substantive rights and defendant's motion was untimely under MCR 2.612(C), we reverse the trial court's decision.

With respect to plaintiff's challenge in Docket No. 302946 to the formula crafted by the trial court to determine her share of defendant's other retirement benefits, we note that no one method for valuing a pension plan is required in a divorce action, even when the division of the pension plan is to be determined by the trial court rather than by agreement of the parties. *Heike v Heike*, 198 Mich App 289, 292; 497 NW2d 220 (1993). When, as in this case, the division is established by agreement of the parties, a court's task is to determine the parties' intent as manifested in their agreement through application of principles of contact construction. *Coates*, 276 Mich App at 503; *Gramer*, 207 Mich App at 125.

The November 14, 1994, divorce judgment purports to use a "present value" method of valuation for defendant's "general retirement pension" and awards plaintiff 1/2 of the present value of that pension. This language suggests a methodology that would reduce potential pension benefits to their present value and distribute them immediately. See *Boyd v Boyd*, 116 Mich App 774, 782; 323 NW2d 553 (1982); see also *Burkey v Burkey (On Rehearing)*, 189 Mich App 72, 77; 471 NW2d 631 (1991) (defining "present value" as "essentially the amount of money a person must receive today in order to provide the same benefit which he is scheduled to receive later").

At the same time, the November 14, 1994, divorce judgment provides little direction on how to determine present value or the distribution. It specifies that "value" is to be based on "contributory, noncontributory and supplemental, if applicable," but fails to specify the applicable period for accumulating these value factors or whether they could be based on future accumulations. The judgment entitles plaintiff to a

"percentage based upon years worked during the marriage (16.5 years) over total years worked," but fails to specify what factor the percentage is applied to for purposes of determining her payment.

In addition, the parties' agreement that a QDRO would be entered at a subsequent date was inconsistent with any intent for immediate distribution because it would allow plaintiff to receive defendant's pension benefits as an alternate payee under the Employee Retirement Income Security Act. 29 USC 1056(d). As discussed previously, the requirement that a QDRO be subsequently entered also establishes that the November 14, 1994, divorce judgment did not conclusively establish the terms of the property division.[2] *Mixon*, 237 Mich App at 166. Because the parties were free to modify the terms of their property settlement when approving the March 14, 1995, QDRO, *Adell Broadcasting*, 269 Mich App at 11, we conclude that the trial court erred by crafting a formula for plaintiff's share of defendant's retirement benefits that differed from that QDRO. Because the trial court's error changed the parties' substantive rights and defendant's motion was untimely under MCR 2.612(C), we vacate the trial court's March 11, 2010, amended QDRO and reinstate the March 14, 1995, QDRO, without prejudice to the trial court's authority to make nonsubstantive amendments to the March 14, 1995, QDRO for the purpose of carrying out the parties' intent.

In Docket No. 294461, we reverse the trial court's decision granting defendant's motion to amend, and in

[2] Under 29 USC 1056, the plan administrator must also approve the QDRO. Once the plan administrator determines that a domestic relations order meets the qualifications set forth in 29 USC 1056(d)(3)(C) and (D), benefits must be paid in accordance with the QDRO. See *Brown v Continental Airlines, Inc*, 647 F3d 221, 224 (CA 5, 2011), and 29 USC 1056(d)(3)(A).

Docket No. 302946 we vacate the trial court's March 11, 2010, amended QDRO and reinstate the March 14, 1995, QDRO.

SERVITTO, P.J., and TALBOT and K. F. KELLY, JJ., concurred.

FERRERO v WALTON TOWNSHIP

Docket No. 302221. Submitted January 12, 2012, at Lansing. Decided February 23, 2012, at 9:00 a.m.

Rhonda Ferrero paid property taxes on her home in 2008 and, when filing her 2008 state income tax return in 2009, claimed a homestead property tax credit pursuant to MCL 206.520. Because Ferrero had no state income tax liability, the amount of the credit against her property taxes paid could not be returned to her as a reduction in her income tax. Therefore, pursuant to the mandates of MCL 206.520(1), the sum was paid to her, without interest, after she filed her 2008 income tax return in 2009. In 2009, Ferrero filed an application with the Walton Township Board of Review, requesting an exemption from property taxes under MCL 211.7u on the basis of poverty. The board of review denied the request. The board of review considered Ferrero's 2008 homestead property tax credit to be income, and when that income was added to the social security disability income Ferrero received, Ferrero's total income exceeded the maximum amount for her to be eligible for the exemption. Ferrero filed a petition for review in the Michigan Tax Tribunal, Small Claims Division, seeking a determination that Walton Township had improperly treated the money petitioner received in 2009 pursuant to MCL 206.520(1) as income for purposes of her qualification for the property tax exemption under MCL 211.7u. The Tax Tribunal affirmed the decision of the Walton Township Board of Review. Ferrero appealed.

The Court of Appeals *held*:

A tax refund is not income because a refund returns money to the taxpayer that need not have been paid. It is not an independent payment to the taxpayer. The tax credit involved in this case plainly functioned as a refund. The homestead property tax credit does not confer income, nor is it a program to transfer new money to individuals. The credit's function is to rebate a portion of the property taxes a person has already paid. Because the money received by plaintiff through the property tax credit was a tax refund and refunds are not considered income, the Tax Tribunal should not have counted this money toward petitioner's income.

When properly calculated, petitioner's income fell below the amount that would make her ineligible for the tax exemption.

Reversed and remanded.

OWENS, J., dissenting, stated that the homestead property tax credit is not a tax refund; rather, it is a refundable tax credit. Unlike a tax refund, for which the taxpayer has already overpaid or incorrectly paid the tax with his or her own money and is simply reclaiming the money that was erroneously paid out, a refundable tax credit pays a taxpayer from state funds a sum equal to a portion of, in this case, property taxes that were properly paid. As such, the homestead property tax credit is an age- and means-tested program to distribute money to recipients on the basis of their need and is not a refund of taxes incorrectly paid. Thus, the homestead property tax credit is income for purposes of calculating eligibility for the poverty exemption under MCL 211.7u. The judgment and order of the Tax Tribunal should have been affirmed.

1. TAXATION — TAX REFUNDS — TAX CREDITS — INCOME.

A tax refund is not income because a refund returns money to a taxpayer that need not have been paid; a tax refund is not an independent payment to a taxpayer; although there is a distinction between a tax refund and a tax credit, a tax credit can function like a tax refund in some cases; the homestead property tax credit does not confer income and is not a program that transfers new money to individuals; rather, it is intended to rebate a portion of the property taxes a person has already paid (MCL 206.520[3]).

2. TAXATION — HOMESTEAD PROPERTY TAX CREDIT — PROPERTY TAX EXEMPTIONS — POVERTY — INCOME.

When a person's homestead property tax credit exceeds the person's tax liability for the tax year or if there is no tax liability for the tax year, the amount of the credit not used as an offset against the tax liability must, after examination and review, be approved for payment, without interest, to the person; that payment is not counted as income for purposes of determining the person's qualification for an exemption from property taxes on the basis of poverty (MCL 205.520[3]; MCL 211.7u[1]).

Michigan State University College of Law Tax Clinic (by *Michele L. Halloran* and *Bridgette M. Austin*) for petitioner.

Fahey Schultz Burzych Rhodes PLC (by *William K. Fahey*) for respondent.

Before: BECKERING, P.J., and OWENS and SHAPIRO, JJ.

SHAPIRO, J. The single issue presented in this case is whether monies petitioner received in 2009 pursuant to MCL 206.520 should be counted as income for the purposes of her qualification for an exemption under MCL 211.7u for property taxes in 2009. Petitioner appeals as of right the decision of the Michigan Tax Tribunal (MTT) that the monies received should be treated as income for purposes of MCL 211.7u. We reverse and remand because monies received pursuant to MCL 206.520 are a rebate of property taxes paid and not income for purposes of MCL 211.7u.

I. BACKGROUND

Petitioner, 63 years old, has been permanently disabled since 1998. She owns a home and in 2008 paid property taxes. When filing her 2008 state income tax return in early 2009, petitioner claimed a homestead property tax credit pursuant to MCL 206.520. It is not disputed that her 2008 property taxes were paid and that she qualified to receive the homestead tax credit for 2008 pursuant to MCL 206.520. Because petitioner had no state income tax liability, the amount of the credit against her property taxes paid could not be returned to her as a reduction in her income tax. Pursuant to the mandates of subsection (3) of MCL 206.520, therefore, the sum, after examination and review, was paid to her, without interest, after she filed her 2008 income tax return in 2009.[1]

[1] MCL 206.520(3) provides that

In 2009, petitioner requested an exemption from property taxes under MCL 211.7u, which provides that persons with income below a defined poverty level during the relevant year are exempt from having to pay that year's property taxes. In order to qualify for the exemption for respondent Walton Township, the property owner's income must have been no more than $10,400.

For the 2009 tax year, petitioner received $9,732 in social security disability income. Thus, if her other income exceeded $668, she would be ineligible for the exemption. If it did not exceed $668, she would qualify for the exemption.[2] The Walton Township Board of Review (the Board) denied her application for the exemption because it considered her 2008 homestead property tax credit as income that, when added to her social security disability income, placed her above the $10,400 limit. Petitioner appealed the denial in the Michigan Tax Tribunal, Small Claims Division, which affirmed the Board's denial.

II. STANDARD OF REVIEW

> "In the absence of fraud, review of a decision by the Tax Tribunal is limited to determining whether the tribunal erred in applying the law or adopted a wrong principle; its factual findings are conclusive if supported by competent,

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> [i]f the credit claimed under this section . . . exceeds the tax liability for the tax year or if there is no tax liability for the tax year, the amount of the claim not used as an offset against the tax liability shall, after examination and review, be approved for payment, without interest, to the claimant. In determining the amount of the payment under this subsection, withholdings and other credits shall be used first to offset any tax liabilities.

[2] Plaintiff also received $564 in food-stamp assistance. However, it is not disputed that food-stamp assistance does not qualify as income for purposes of the exemption.

material, and substantial evidence on the whole record." *Mich Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 476; 518 NW2d 808 (1994).

Issues of statutory interpretation are questions of law that are reviewed de novo. *Brown v Detroit Mayor*, 478 Mich 589, 593; 734 NW2d 514 (2007). The primary goal of statutory interpretation is to give effect to the Legislature's intent, focusing first on the statute's plain language. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). "The words of a statute provide 'the most reliable evidence of its intent . . . .' " *Id.*, quoting *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981). When construing a statute, a court must read it as a whole. *People v Jackson*, 487 Mich 783, 791; 790 NW2d 340 (2010). [*Klooster v City of Charlevoix*, 488 Mich 289, 295-296; 795 NW2d 578 (2011).]

III. ANALYSIS

The homestead property tax exemption for persons unable to pay because of poverty is governed by MCL 211.7u, which provides, in pertinent part:

(1) The principal residence of persons who, in the judgment of the supervisor and board of review, by reason of poverty, are unable to contribute toward the public charges is eligible for exemption in whole or in part from taxation under this act. This section does not apply to the property of a corporation.

While State Tax Commission (STC) bulletins are not binding,[3] the STC has defined income as including wages and salaries, net receipts from self-employment, regular payments from social security or public assistance, alimony, pensions, scholarships, and dividends and interest. STC Bulletin No. 5 of 1995, Poverty

[3] *Moshier v Whitewater Twp*, 277 Mich App 403, 408 n 2; 745 NW2d 523 (2007).

Exemptions Under MCL 211.7[u], New Requirements, January 23, 1995.[4]

A tax refund is not income because a refund returns money to the taxpayer that need not have been paid; it is not an independent payment to the taxpayer. Although there is a distinction between a tax refund and a tax credit, a tax credit can function like a tax refund in some cases. *Universal Oil Prod Co v Campbell*, 181 F2d 451, 478 (CA 7, 1950) (concluding that "tax credits . . . do amount to refunds of the taxes . . . paid").[5]

The tax credit involved here plainly functions as a refund. As held in *Butcher v Dep't of Treasury*, 425 Mich 262, 275; 389 NW2d 412 (1986), "[u]nlike the federal government, the state is not exempting certain property taxes from the base of the tax; rather, it is refunding them." The *Butcher* Court further explained that "[t]he property tax 'credit' . . . is in effect a *property tax rebate* that employs the income tax as a vehicle for its reconciliation. Therefore, Const 1963, art 9, § 7, which is concerned only with income taxes, is inapplicable to what is *clearly a property tax rebate*." *Id.* at 276 (emphasis added); see also *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 344; 806 NW2d 683 (2011).

The homestead property tax credit does not confer income, nor is it a program to transfer new monies to individuals; rather, as *Butcher* makes clear, it functions

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[4] A new bulletin on this topic was released in 2010. STC Bulletin No. 7 of 2010, Poverty Exemption, May 24, 2010. Its definition of income is consistent with the 1995 bulletin.

[5] The hearing referee's proposed opinion cites page 5 of Bulletin No. 5 of 1995 as the sole authority for its holding that "Petitioner's homestead property *tax refund* credit shall be counted as available income." (Emphasis added.) Page 5 of the bulletin contains no such statement, however. Indeed, the bulletin actually states, on page 6, that "[i]ncome does not include . . . [t]ax refunds . . . ."

to rebate a portion of the property taxes a person has already paid. This is easily seen in the context of a taxpayer whose income tax liability exceeds the amount of the homestead credit for which the taxpayer qualifies. In such a case, the taxpayer does not receive a refund check; rather, the taxpayer receives a rebate in the form of an equivalent reduction in the amount of income tax due. The amount of money received and the basis on which it is received is identical whether it is received as a reduction in the income taxes due or a payment of the amount of the rebate that exceeds the individual's income tax liability.

Because the $1,093 received by petitioner through the property tax credit was in fact a tax refund and refunds are not considered income, the MTT should not have counted this money toward petitioner's income.[6] When petitioner's income is properly calculated, it falls below the threshold amount that would make her ineligible for the poverty exemption.

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

BECKERING, P.J., concurred with SHAPIRO, J.

OWENS, J. (*dissenting*). I respectfully dissent from the majority's opinion stating that the Michigan Tax Tri-

[6] The hearing referee's proposed opinion and judgment (which the MTT adopted) noted that there was evidence that petitioner had other unreported income. However, that evidence was disputed, and the findings of fact set forth by the referee plainly do not include any finding that petitioner actually received unreported income or, if so, how much. The MTT's final opinion bases its ruling solely on its conclusion that "when adding Petitioner's 2008 property tax credit to Petitioner's 2009 Social Security income, Petitioner's annual household income exceeds the $10,400 threshold established by Respondent." MTT Final Opinion and Judgment, ¶ 4, p 3. We decline to uphold the MTT's ruling on the basis of disputed allegations, the evidence of which the MTT itself did not find convincing enough to include in its official findings of fact.

bunal (MTT) erred when it concluded that the money received from a property tax credit under Michigan's homestead property tax credit, MCL 206.520(1), should be treated as income for purposes of petitioner's qualification for a poverty exemption from property taxes. I agree with the decision of the MTT and would affirm the denial of petitioner's poverty exemption.

In reviewing a decision of the MTT, we consider " 'whether the tribunal erred in applying the law or adopted a wrong principle.' " *Klooster v City of Charlevoix*, 488 Mich 289, 295; 795 NW2d 578 (2011) (citation omitted). Findings of fact are taken as final as long as they are supported by more than a scintilla of evidence. *Fairplains Twp v Montcalm Co Bd of Comm'rs*, 214 Mich App 365, 372; 542 NW2d 897 (1995). Resolution of this appeal involves a question of statutory interpretation, which we review de novo. *Klooster*, 488 Mich at 295.

"In general, tax [exemption] statutes must be strictly construed in favor of the taxing authority." *Mich United Conservation Clubs v Lansing Twp*, 423 Mich 661, 664; 378 NW2d 737 (1985). With regard to interpreting statutory 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, . . . 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[.] . . . In other words, . . . taxation is

> the rule, and exemption the exception . . . . 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 . . . .' " [*Stege v Dep't of Treasury*, 252 Mich App 183, 189; 651 NW2d 164 (2002), quoting *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), quoting 2 Cooley, Taxation (4th ed), § 672, p 1403.]

The property tax exemption for persons unable to pay because of poverty is governed by MCL 211.7u, which provides, in relevant part:

> (1) The principal residence of persons who, in the judgment of the supervisor and board of review, by reason of poverty, are unable to contribute toward the public charges is eligible for exemption in whole or in part from taxation under this act. . . .
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> (2) To be eligible for exemption under this section, a person shall do all of the following on an annual basis:
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> * * *
>
> (e) Meet the federal poverty guidelines updated annually in the federal register . . . or alternative guidelines adopted by the governing body of the local assessing unit provided the alternative guidelines do not provide income eligibility requirements less than the federal guidelines.
>
> * * *
>
> (4) The governing body of the local assessing unit shall determine and make available to the public the policy and guidelines the local assessing unit uses for the granting of exemptions under this section. The guidelines shall include but not be limited to the specific income and asset levels of the claimant and total household income and assets.

Under the homestead property tax credit, MCL 206.520(1), "[s]ubject to the limitations and the definitions in this chapter, a claimant may claim against the tax due under this act for the tax year a credit for the property taxes on the taxpayer's homestead deductible for federal income tax purposes . . . ." MCL 206.520(3) allows the credit to be paid directly to the taxpayer if the credit exceeds the taxpayer's tax liability. *Butcher v Dep't of Treasury*, 141 Mich App 116, 122; 366 NW2d 15 (1984).

The homestead property tax credit is not a "tax refund" under MCL 205.30, which states, in part:

> (1) The department shall credit or refund an overpayment of taxes; taxes, penalties, and interest erroneously assessed and collected; and taxes, penalties, and interest that are found unjustly assessed, excessive in amount, or wrongfully collected with interest at the rate calculated under [MCL 205.23] for deficiencies in tax payment.

Respondent characterizes the homestead property tax credit as a "tax refund." Were this an actual tax refund, this money would not be used to calculate petitioner's income because it would merely be a return of petitioner's own money that had been improperly paid to the state.

However, the homestead property tax credit is not a "tax refund"; rather, it is a "refundable tax credit." Unlike a tax refund, for which the taxpayer has already overpaid or incorrectly paid the tax with his or her own money and is simply reclaiming the money that was erroneously paid out, a refundable tax credit pays a taxpayer from state funds a sum equal to a portion of, in this case, property taxes that were properly paid to a local government. As such, the homestead property tax credit is an age- and means-tested program to distribute money to recipients on the basis of their need, as

determined by the formulas in MCL 206.522, in order to ameliorate the burden of their homestead property taxes and is not a refund of taxes incorrectly paid. Thus, the homestead property tax credit is income for purposes of calculating eligibility for the poverty exemption under MCL 211.7u.

In sum, I would conclude that the MTT did not err by upholding respondent's denial of petitioner's request for a poverty exemption. Petitioner's income was properly calculated by including money she received from the Michigan homestead property tax credit.

I would affirm.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA v CENTRAL MICHIGAN UNIVERSITY TRUSTEES

Docket No. 299785. Submitted November 2, 2011, at Lansing. Decided February 28, 2012, at 9:00 a.m.

The International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and UAW Local 6888 filed an action in the Isabella Circuit Court against the Central Michigan University (CMU) Trustees and the Central Michigan University President, challenging policies and procedures regarding university employees' candidacy for public office. The trustees had adopted a policy regarding the political candidacy of employees in December 2008, and the president had issued a draft of proposed procedures implementing the candidacy policy in March 2009. As the collective-bargaining representative for office professional employees at CMU, plaintiffs filed the complaint on behalf of their members employed by the university, arguing that the candidacy policy and proposed procedures violated the Political Activities by Public Employees Act, MCL 15.401 through MCL 15.407. The court, Paul H. Chamberlain, J., denied plaintiffs' motion for summary disposition and their request for declaratory and injunctive relief. It granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(5) (lack of standing), concluding that the union members lacked standing to sue because no employee had suffered a particular injury because no employee had attempted to become a candidate since the candidacy policy was implemented. The court also granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(10) (no genuine issue of material fact), concluding that the candidacy policy and draft procedures did not violate the act because they only regulated political activities that interfered with work responsibilities and did not regulate political content, activity, or the views of employees. Plaintiffs appealed and defendants cross-appealed, but the cross-appeal was dismissed by stipulation of the parties after oral argument.

The Court of Appeals *held*:

1. The purpose of a declaratory judgment is to enable the parties to obtain adjudication of rights before an actual injury occurs, to settle a matter before it ripens into a violation of the law or a breach of contract, or to avoid multiplicity of actions by affording a remedy for declaring in expedient action the rights and obligations of all litigants. Standing to seek a declaratory judgment exists whenever a litigant meets the requirements of MCR 2.605. When a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve legal rights, there is an actual controversy and a declaratory judgment may be issued under MCR 2.605(A)(1), and in those cases courts are not precluded from reaching issues before actual injuries or losses have occurred. To establish an "actual controversy" under the rule, a plaintiff must plead and prove facts that demonstrate an adverse interest necessitating the sharpening of the issues raised.

2. The trial court correctly determined that plaintiffs did not have standing to challenge the draft procedures relating to the candidacy policy because they were in draft form and had not been implemented. Any challenge would therefore have been speculative and hypothetical. However, the trial court erred by concluding that plaintiffs lacked standing to challenge the candidacy policy even though no university employee had attempted to become a candidate since its adoption. Plaintiffs presented an actual controversy regarding the scope of the university employee's rights under the act and the legitimacy of the candidacy policy. The university employees had a special and substantial interest that was different from that of the public at large in ensuring that defendants' policies did not violate their statutory rights under the act.

3. MCL 15.403 and MCL 15.404 permit a public employee to engage in partisan political activity except during those hours when that person is being compensated for the performance of that person's duties as a public employee. A public employer may regulate and even prohibit off-duty activity that adversely interferes with job performance, but the public employer may not completely curtail an employee's off-hours activity as a matter of policy simply because that activity may conceivably interfere with job performance; rather, it may only deal with the adequacy of job performance on a case-by-case basis. The trial court properly determined that the candidacy policy did not violate the act. It regulated only an employee's work and not his or her activities outside work. Under the policy, an employee must consult with university officials regarding any candidacy,

but only to ensure that the employee's work responsibilities will not be affected. Defendants had the authority to regulate on-duty political activity or deal with unsatisfactory job performance attributable to off-duty political activity. The trial court properly denied the declaratory and injunctive relief plaintiffs sought.

Affirmed in part and reversed in part.

1. ACTIONS — STANDING — DECLARATORY JUDGMENTS.

The purpose of a declaratory judgment is to enable the parties to obtain adjudication of rights before an actual injury occurs, to settle a matter before it ripens into a violation of the law or a breach of contract, or to avoid multiplicity of actions by affording a remedy for declaring in expedient action the rights and obligations of all litigants; standing to seek a declaratory judgment exists whenever a litigant meets the requirements of MCR 2.605; when a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve legal rights, there is an actual controversy and a declaratory judgment may be issued under MCR 2.605(A)(1), and in those cases courts are not precluded from reaching issues before actual injuries or losses have occurred; to establish an "actual controversy" under the rule, a plaintiff must plead and prove facts that demonstrate an adverse interest necessitating the sharpening of the issues raised.

2. PUBLIC EMPLOYEES — POLITICAL ACTIVITY — RESTRICTIONS DURING WORK.

A public employee may engage in partisan political activity except during those hours when that person is being compensated for the performance of that person's duties as a public employee; a public employer may regulate and even prohibit off-duty activity that adversely interferes with job performance, but a public employer may not completely curtail an employee's off-hours activity as a matter of policy simply because the activity may conceivably interfere with job performance; rather it may only deal with the adequacy of job performance on a case-by-case basis.

Ava R. Barbour for plaintiffs.

Vercruysse Murray & Calzone, PC (by *Robert M. Vercruysse* and *Gary S. Fealk*), for defendants.

Before: WHITBECK, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM. Plaintiffs, the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and UAW Local 6888 (collectively, the Union), appeal the circuit court order granting summary disposition in favor of defendants, Central Michigan University Trustees and Central Michigan University President (collectively, the CMU officials), under MCR 2.116(C)(10) and MCR 2.116(C)(5).[1] The Union is the collective-bargaining representative for office professional employees of Central Michigan University (the University or CMU), and it filed a complaint on behalf of its members who are employed by the University. The trial court found that the CMU officials' policy and procedures regarding university employees' candidacies for public office did not violate the Political Activities by Public Employees Act (the Act)[2] and that the Union's members suffered no particularized injury as a result of the policy and procedures. We reverse in part and affirm in part.

I. FACTS

On December 4, 2008, the CMU Board of Trustees adopted the political candidacy of employees policy (candidacy policy), which provides, in part:

> Employees who seek public office of any kind must do so on their own time. They must be clear in their statements of candidacy that they are not speaking on behalf of Central Michigan University, and they must do everything reasonably within their control to assure that there is no public misperception on this point. They may not use any university

[1] The CMU officials also filed a cross-appeal. However, the parties agreed to dismiss those claims after oral argument.

[2] MCL 15.401 through MCL 15.407.

resources of whatever kind in furtherance of campaign activity; nor may the university or its employees use any university resources to assist, oppose or influence their campaign.

Any employee of the university who becomes a candidate for nomination and/or election to any federal, state, county, or local office, whether it be part-time or full-time, paid or unpaid, is required, upon filing for candidacy, to present to the applicable personnel office (either Human Resources or Faculty Personnel Services) a statement from her/his supervisor and the applicable vice president or the provost (or president with respect to members of the president's division) of CMU attesting that appropriate arrangements have been made to ensure that their candidacy in no way will interfere with the full performance of their university work and that their candidacy will pose no conflict with professional standards or ethics.

Further, any employee of the university, who is elected or appointed to any public office, shall present to the appropriate CMU personnel office, within twenty (20) work days after having been elected or appointed, a statement from her/his supervisor and the applicable vice president or the provost (or president with respect to members of the president's division) of CMU attesting that appropriate arrangements have been made to ensure that the duties associated with the public office in no way will interfere with the full performance of their university work and that those duties pose no conflict of interest with respect to CMU employment. If the duties associated with the public office will interfere with the full performance of the employee's university work, or do pose a conflict of interest, then an alternate relationship with the university must be arranged, which may include a change from full-time university status to that of part-time, an unpaid leave of absence, or termination of employment. Reasonable alternatives short of termination must be explored. Leaves of absence for long periods of time, or requests for subsequent or sequential leaves, will be considered and approved upon presentation of a compelling advantage to the university.

The candidacy policy also includes an introductory paragraph encouraging employees' public service and emphasizing the importance of separating any public service from their university work.

On March 15, 2009, the president of CMU issued a draft of procedures and guidelines (draft procedures) pertaining to the candidacy policy. The draft procedures required employees to discuss their desire to be a candidate for office with their supervisor and applicable vice president at least 60 days before filing for candidacy. The draft procedures further provided that the vice president or provost must be convinced that no substantial conflict of interest or conflict of commitment would be involved in becoming a candidate. The vice president or provost also had to gain the president's support before issuing a statement to the relevant personnel office. The draft procedures similarly required an elected or appointed employee to discuss with his or her supervisor and applicable vice president or provost, within 20 days of election or appointment, how the employee's election or appointment would not interfere with normal work responsibilities. The vice president or provost had to be convinced that there was no substantial conflict of commitment or conflict of interest and also gain the president's support before issuing a statement to the relevant personnel office. The draft procedures further provided that if the vice president or provost was not convinced that there was no conflict of interest or conflict of commitment, the employee could suggest an alternative or reduced work assignment or take an unpaid leave of absence to eliminate any conflict. The draft procedures stated that any employee who did not follow the procedures was subject to discipline, including discharge.

The Union filed suit, seeking declaratory and injunctive relief preventing the CMU officials from applying the candidacy policy and the draft procedures. The Union alleged that the candidacy policy and draft procedures placed requirements and conditions on employees that violated their rights to run for office under the Act. Both parties moved for summary disposition.

The Union argued that the Act barred the CMU officials from interfering with university employees' off-duty political conduct and that the candidacy policy placed conditions on employees' ability to run for office when there was no conflict with work. The CMU officials responded that the candidacy policy properly regulated employees' work conduct and was consistent with the Act.

The CMU officials argued that there was no case for the trial court to decide because the University had not applied the candidacy policy to any employees. The Union responded that they did not lack standing because there was an actual controversy given that the candidacy policy threatened to harm employees represented by the Union.

The trial court granted the CMU officials' motion for summary disposition according to MCR 2.116(C)(10) (no genuine issue of material fact) and MCR 2.116(C)(5) (lack of standing to sue). With respect to MCR 2.116(C)(10), the trial court concluded that the candidacy policy and draft procedures did not violate the Act because they were a permissible mechanism to ensure that university employees adhered to the Act by regulating only political activities that interfered with work. The trial court also found that the CMU officials did not regulate political content, activity, or views of employees and provided discipline only for violating the candidacy policy and the procedures. With respect to MCR

2.116(C)(5), the trial court concluded that the Union's members had suffered no particular injury because the candidacy policy adhered to the Act and because no one had attempted to become a candidate since the University implemented the candidacy policy. The trial court also denied the Union's motion for summary disposition and denied its request for declaratory and injunctive relief.

The Union now appeals.

II. MCR 2.116(C)(5)

A. STANDARD OF REVIEW

The Union argues that the trial court erred by granting summary disposition in favor of the CMU officials under MCR 2.116(C)(5) on the basis of lack of standing to sue. " 'In reviewing a motion for summary disposition pursuant to MCR 2.116(C)(5), this Court must consider the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties.' "[3] This Court reviews de novo a trial court's determination on a motion for summary disposition[4] as well as the legal question of whether a party has standing to sue.[5]

B. LEGAL STANDARDS

The trial court found that the Union's members suffered no injury because none of the Union's members had attempted to become a candidate for public office since the University implemented the candidacy

[3] *Aichele v Hodge*, 259 Mich App 146, 152; 673 NW2d 452 (2003) (citation omitted).

[4] *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004).

[5] *Manuel v Gill*, 481 Mich 637, 642-643; 753 NW2d 48 (2008).

policy and because the University had not implemented the draft procedures. The trial court concluded that it was unlikely to redress any speculative injury because it found that the policy was legal. In so holding, the trial court relied on the principles set forth in *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*[6] and *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*.[7] However, two days before the trial court's opinion, the Michigan Supreme Court held in *Lansing Sch Ed Ass'n v Lansing Bd of Ed*[8] that the doctrine relied on in those cases "lacks a basis in the Michigan Constitution and is inconsistent with Michigan's historical approach to standing."

The Supreme Court held:

> Michigan standing jurisprudence should be restored to a limited, prudential doctrine that is consistent with Michigan's longstanding historical approach to standing. Under this approach, a litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.[9]

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[6] *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 628-629; 684 NW2d 800 (2004).

[7] *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280, 294-295; 737 NW2d 447 (2007).

[8] *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 352-353; 792 NW2d 686 (2010).

[9] *Id*. at 372.

In so stating, the Supreme Court overruled *Nat'l Wildlife Federation* and its progeny. Therefore, under the current approach, it is sufficient to establish standing to seek a declaratory judgment when a litigant meets the requirements of MCR 2.605.[10]

MCR 2.605(A)(1) provides:

> In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.

MCR 2.605 does not limit or expand the subject-matter jurisdiction of the courts, but instead incorporates the doctrines of standing, ripeness, and mootness.[11] An "actual controversy" under MCR 2.605(A)(1) exists when a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve legal rights. The requirement prevents a court from deciding hypothetical issues.[12] However, by granting declaratory relief in order to guide or direct future conduct, courts are not precluded from reaching issues before actual injuries or losses have occurred.[13] The essential requirement of an "actual controversy" under the rule is that the plaintiff pleads and proves facts that demonstrate an " 'adverse interest necessitating the sharpening of the issues raised.' "[14]

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[10] *Id.*

[11] *MOSES, Inc v SEMCOG*, 270 Mich App 401, 416; 716 NW2d 278 (2006).

[12] *Associated Builders & Contractors v Dir of Consumer & Indus Servs*, 472 Mich 117, 126; 693 NW2d 374 (2005), overruled on other grounds in *Lansing Sch Ed Ass'n*, 487 Mich 349.

[13] *Huntington Woods v Detroit*, 279 Mich App 603, 616; 761 NW2d 127 (2008); *Lake Angelus v Aeronautics Comm*, 260 Mich App 371, 376-377; 676 NW2d 642 (2004).

[14] *Associated Builders & Contractors*, 472 Mich at 126.

C. APPLYING THE LEGAL STANDARDS

At the outset, we conclude that the trial court was correct by determining that the Union did not have standing to the extent that it challenged the *draft procedures*. Guidance on the future implications of the draft procedures would be speculative and hypothetical because those procedures were still in draft form and the University had not yet implemented them.

Turning to the candidacy policy, it is true that the Union's members had suffered no injury because no university employee had attempted to become a candidate since the University adopted the policy in December 2008.[15] However, applying MCR 2.605, we conclude that the Union has standing to pursue its claims for declaratory and injunctive relief because it presented an actual controversy regarding the scope of the university employees' rights under the Act and the legitimacy of the candidacy policy. To hold otherwise would be inconsistent with the purpose of a declaratory judgment, which is

> to enable the parties to obtain adjudication of rights *before an actual injury occurs*, to settle a matter *before it ripens into a violation of the law* or a breach of contract, or to avoid multiplicity of actions by *affording a remedy for declaring in expedient action the rights and obligations of all litigants*.[16]

There is an actual controversy between the parties because the CMU officials promulgated a policy that is allegedly at odds with a state statute. And although no

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[15] *MOSES*, 270 Mich App at 414 (providing that organizations have standing to bring suit in the interest of their members when those members would have standing as individual plaintiffs).

[16] *Rose v State Farm Mut Auto Ins Co*, 274 Mich App 291, 294; 732 NW2d 160 (2006) (emphasis added).

university employee has yet sought to run for office, it is appropriate for the Union to seek an adjudication of its members' rights and responsibilities before the candidacy policy causes actual injury or ripens into a violation of the law by interfering with the employees' ability to engage in off-duty political activity.

Moreover, applying the principles announced in *Lansing Sch Ed Ass'n*, the Union has standing because the university employees have a special and substantial interest in ensuring that the CMU officials' policies do not violate their statutory rights under the Act, and that interest is different from any rights or interests of the public at large.[17]

Thus, we conclude that the trial court erred by finding that the Union had not presented an actual controversy and by determining that the Union did not have standing to seek declaratory and injunctive relief regarding the university employees' rights under the candidacy policy.

III. MCR 2.116(C)(10)

A. STANDARD OF REVIEW

The Union argues that the trial court erred by granting the CMU officials' motion for summary disposition pursuant to MCR 2.116(C)(10). When reviewing a motion brought under MCR 2.116(C)(10), the court considers the affidavits, depositions, pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party.[18] Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving

[17] *Lansing Schools Ed Ass'n*, 487 Mich at 372.

[18] *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002).

party is entitled to judgment as a matter of law.[19] This Court reviews de novo a trial court's determination on a motion for summary disposition.[20]

B. LEGAL STANDARDS

MCL 15.403 of the Act provides, in relevant part:

> (1) An employee of a political subdivision of the state may:
>
> * * *
>
> (c) Become a candidate for nomination and election to any state elective office, or any district, county, city, village, township, school district, or other local elective office without first obtaining a leave of absence from his employment. If the person becomes a candidate for elective office within the unit of government or school district in which he is employed, unless contrary to a collective bargaining agreement the employer may require the person to request and take a leave of absence without pay when he complies with the candidacy filing requirements, or 60 days before any election relating to that position, whichever date is closer to the election.
>
> (d) Engage in other political activities on behalf of a candidate or issue in connection with partisan or nonpartisan elections.

The activities permitted in MCL 15.403 "shall not be actively engaged in by a public employee during those hours when that person is being compensated for the performance of that person's duties as a public employee."[21]

The language of the Act is unambiguous.[22] A public employee may engage in partisan political activity ex-

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[19] *Id.*

[20] *Ormsby*, 471 Mich at 52.

[21] MCL 15.404.

[22] *Mich State AFL-CIO v Civil Serv Comm*, 455 Mich 720, 734; 566 NW2d 258 (1997).

cept "during those hours when that person is being compensated for the performance of that person's duties as a public employee."[23]

C. APPLYING THE LEGAL STANDARDS

Given our conclusion that the Union did not have standing to challenge the draft procedures, we need not address the Union's claims regarding the implications of those procedures. Thus, we focus our analysis on the legitimacy of the candidacy policy.

The Union argues that the candidacy policy violated the Act because it interferes with its members' ability to engage in political activities during nonwork hours. More specifically, the Union asserts that the candidacy policy violates the Act because it requires an employee to provide advance notice and engage in advance discussion with two levels of superiors when seeking to participate in political office. Those superiors must then attest that the political activity will not present a conflict of interest or interfere with employment. The candidacy policy further provides that failure to demonstrate that political candidacy activities will not interfere with university activities could affect the employee's job status.

The Michigan Supreme Court has recognized a public employer's

> power to regulate and even prohibit off-duty activity which is found to interfere with job performance.
>
> That power does not extend, however, to the blanket prohibition of off-duty activities, political or otherwise, as a matter of policy simply because such activities may conceivably interfere with satisfactory job performance. What an employee does during his off-duty hours is not of proper

[23] MCL 15.404; see also *Mich State AFL-CIO*, 455 Mich at 734.

> concern to the [public employer] unless and until it is shown to adversely affect job performance. Even then the [public employer's] authority is not to curtail the off-hours activity, it is to deal with the adequacy of job performance. Certainly, it is within contemplation that off-duty political involvement may adversely affect a [public] employee's performance at work. If and when it does, the [public employer] is empowered to deal with such circumstances on a case-by-case basis.[24]

But public employers may not regulate the off-duty political activity of their employees in any way that preemptively conflicts with the Act.[25]

The trial court found that the candidacy policy did not violate the Act because it does "not restrict an employee's rights to engage in political activity and do[es] not hinge in any way on the political content or position an employee purports, nor do[es] [it] provide a blanket ban on an employee's off-duty political activity." We agree. The candidacy policy only regulates an employee's work and not an employee's activities outside of work. It does require consultation with the CMU officials regarding an employee's political candidacy, but this is to ensure that an employee's work responsibilities will not be affected. The CMU officials are empowered to deal with circumstances in which off-work political involvement may adversely affect an employee's performance at work.[26] The CMU officials have the authority to regulate "on-duty political activity or deal with unsatisfactory job performance attributable to off-duty political activity or any other cause on a case-by-case basis."[27] The state may regulate the

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[24] *Council No 11 AFSCME v Civil Serv Comm*, 408 Mich 385, 407; 292 NW2d 442 (1980) (citations omitted).

[25] *Id.* at 408.

[26] *Id.* at 407.

[27] *Id.* at 409.

off-duty political activities of public employees when those activities interfere with job performance.[28]

The candidacy policy specifically requires that "appropriate arrangements have been made to ensure that their candidacy in no way will interfere with the full performance of their university work and that their candidacy will pose no conflict with professional standards or ethics." The candidacy policy does not curtail activities outside work and does not potentially curtail any work responsibility that was affected by activity outside work. The assurances that the policy requires are not whether or how an employee will seek political office. Rather, the assurances are that this activity will not interfere with work. Additionally, any discipline or leave of absence that a candidate/employee could be assessed would be in response to political activities at work, rather than off-duty political pursuits. An employer may prohibit political activity during work hours when the employer compensates the employee and that compensation is for the performance of the employee's duties as a public employee.[29] It was therefore permissible for the CMU officials to regulate the Union members' work environment, and the trial court did not err in its findings.

Because the trial courts' properly determined that the CMU officials' candidacy policy did not violate the Act, it correctly denied declaratory and injunctive relief.

We reverse in part and affirm in part. We do not retain jurisdiction.

WHITBECK, P.J., and MURRAY and DONOFRIO, JJ., concurred.

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[28] *Mich State AFL-CIO*, 455 Mich at 733.

[29] *Id.* at 734.

36th DISTRICT COURT v MICHIGAN AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES COUNCIL 25, LOCAL 917

Docket No. 298271. Submitted January 4, 2012, at Detroit. Decided February 28, 2012, at 9:05 a.m. Reversed in part, 493 Mich 879.

The 36th District Court brought an action in the Wayne Circuit Court against the Michigan American Federation of State, County & Municipal Employees Council 25, Local 917 (AFSCME Local 917), seeking to vacate an arbitrator's award that determined that certain grievances were arbitrable under the terms of a collective-bargaining agreement (CBA) and challenging the arbitrator's decision that the district court did not have just cause for not reappointing four court officers and that those officers were to be reinstated to their former positions. The district court and AFSCME Local 917 were parties to a CBA that was in effect from June 30, 2003, through June 30, 2006. The CBA was to remain in effect for consecutive yearly periods after that date unless either party gave written notice of its desire to modify, amend, or terminate the contract 90 days before the end date, which the district court did. Two court officers, Bobby Jones and Carlton Carter, were not reappointed to their positions by the chief judge in 2004, while two other court officers, Richard Weatherly and Roderick Holley, were not reappointed to their positions in 2007. In an earlier action in this matter, AFSCME Local 917 had moved to compel the district court to arbitrate the termination of employment of the four individuals in accordance with the CBA. The circuit court, Jeanne Stempien, J., entered an order requiring that an arbitration hearing be held. The arbitrator ultimately rendered two decisions. The arbitrator first determined that the grievances were arbitrable and then, after concluding the district court did not have just cause for not reappointing the four court officers, ordered that each grievant be reinstated to his former position with back pay from the date he was not reappointed. Following those decisions by the arbitrator, the district court filed this action to vacate the arbitrator's decisions and awards, arguing that they violated MCR 3.106(C) and that the awards exceeded the arbitrator's contractual authority under the CBA. It further argued that the CBA did not apply to the grievances of Weatherly and Holley because their claims accrued in 2007, after the

CBA had expired. The circuit court determined that the claims raised by AFSCME Local 917 were arbitrable and granted its motion for summary disposition. The district court appealed.

The Court of Appeals *held*:

1. Whether a contract to arbitrate exists and the enforceability of its terms is a judicial question that cannot be decided by an arbitrator. The parties must provide clear and unmistakable evidence in a contract that they agreed to remove the arbitrability issue from the court's jurisdiction. The trial court erred by ruling that the arbitrator had the authority to decide whether the CBA had terminated. A court, not an arbitrator, must decide whether a contract that contains a contractual duty to arbitrate has been terminated or is still in effect and thus mandates arbitration. The CBA did not contain clear and unmistakable language granting the arbitrator authority to determine the issue of arbitrability. Although the court erred by not deciding this issue, it could nonetheless be decided on appeal.

2. A notice to terminate a contract must be clear and explicit. A notice of modification is not a notice of termination and does not operate to terminate the CBA. A notice that refers to an intent to both modify and terminate a contract, without specifying which, is ambiguous and does not operate to terminate or modify the contract. The district court's letter indicating an intent to modify, amend, or terminate the agreement was ambiguous and did not terminate the agreement. Accordingly, the contract automatically extended for one more year on June 30, 2006, and the issues raised by all four grievants were subject to arbitration under the terms of the CBA.

3. Review of an arbitrator's decision is limited. A court may not review an arbitrator's factual findings but may review whether the arbitrator acted within the scope of his or her contractual authority or made an error of law that clearly appears on the face of the award. The trial court did not err by determining that the disputed issue of what constituted disciplinary action was within the terms of the CBA. The arbitrator had the authority to determine whether disciplinary action taken under the CBA included reappointment decisions because it involved an issue of contract interpretation and the CBA had not expressly excluded reappointment decisions from arbitration.

4. The judicial branch is constitutionally accountable for individuals who provide court services. The chief judge of a district court retains a measure of supervision over the duties

performed by court officers to ensure the sound administration of justice within the judicial district. Under MCR 3.106(C), court officers are appointed by the chief judge for a term of not more than two years. The rule does not preclude a chief judge from agreeing to use a just-cause standard for making reappointment decisions. The CBA required that all employment decisions would be subject to a just-cause standard. The arbitrator's decision that required the chief judge to use a just-cause standard of review when making reappointment decisions did not contravene a controlling principle of law because the court rule does not state what standard, if any, should apply to the reappointment decision. The arbitrator's decision was not contrary to law because he construed the CBA in harmony with MCR 3.106. However, the arbitrator exceeded his contractual authority by requiring that each of the four grievants be reinstated and reappointed to their former positions of court officer because under MCR 3.106(C), only the chief judge has authority to make appointment or reappointment decisions.

Affirmed in part, vacated in part, and remanded to the circuit court with directions to remand the matter to the arbitrator for a determination of an appropriate remedy.

1. ARBITRATION — COLLECTIVE BARGAINING — EXISTENCE AND TERMINATION OF AGREEMENT — JUDICIAL REVIEW.

Whether a contract to arbitrate exists or has terminated, and the enforceability of its terms, are judicial questions that cannot be decided by an arbitrator; the parties must provide clear and unmistakable evidence in a contract that they agreed to remove the arbitrability issue from the court's jurisdiction.

2. LABOR RELATIONS — COLLECTIVE BARGAINING — TERMINATION OF AGREEMENT — NOTICE.

A notice to terminate a collective-bargaining agreement must be clear and explicit; a notice of a desire to modify the collective-bargaining agreement is not a notice of termination and does not operate to terminate the contract; a notice that refers to an intent to both modify and terminate a contract, without specifying which, is ambiguous and does not operate to terminate or modify the contract; an ambiguous notice of an intent to modify, amend, or terminate a collective-bargaining agreement does not terminate the agreement.

3. ARBITRATION — COLLECTIVE BARGAINING — JUDICIAL REVIEW OF ARBITRATION AWARDS.

An individual's right to arbitrate must be based on a viable contractual right to arbitration, and review of an arbitrator's decision is

> limited; a court may not review an arbitrator's factual findings but may review whether the arbitrator acted within the scope of his or her contractual authority or made an error of law that clearly appears on the face of the award.

Kotz, Sangster, Wysocki & Berg, P.C. (by *Matthew S. Derby* and *Heather Gelfand Ptasznik*), for plaintiff.

Miller Cohen, P.L.C. (by *Robert D. Fetter* and *Austin W. Garrett*), for defendant.

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

MURRAY, P.J. Plaintiff, the 36th District Court, appeals as of right from an order granting a motion for summary disposition filed by defendant, Michigan American Federation of State, County and Municipal Employees (AFSCME) Council 25, Local 917, with respect to the 36th District Court's request to vacate an arbitration award. We affirm in part, vacate in part, and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

The 36th District Court and AFSCME Local 917 were parties to a collective-bargaining agreement (CBA) that applied to court officers and had a term of June 30, 2003-June 30, 2006. This case arises from the decision of the 36th District Court chief judge to not reappoint four individuals as court officers. Two of the individuals, Bobby Jones and Carlton Carter, were not reappointed in 2004. The other two individuals, Richard Weatherly and Roderick Holley, were not reappointed in 2007.

Each of the four individuals challenged the termination of his employment by filing (at different times) grievances and demands for arbitration. With respect to

the expiration of the CBA, Article 27 provided that it would be effective until June 30, 2006, but also stated:

> This Agreement shall continue in effect for consecutive yearly periods after June 30, 2006, unless notice is given, in writing, by either the Union or the Employer, to the other party at least ninety (90) days prior to June 30, 2006, or any anniversary date thereafter, of its desire to modify, amend or terminate this Agreement.
>
> If such notice is given, this Agreement shall be open to modification, amendment or termination, as such notice may indicate on June 30, 2006, or the subsequent anniversary date, as the case may be.

The 36th District Court had given notice 90 days before June 30, 2006, indicating a desire to modify, amend or terminate the agreement, and so took the position that the grievances were not subject to any arbitration agreement since the CBA had expired under Article 27. Additionally, it was and is the position of the 36th District Court that the appointment of court officers is governed by MCR 3.106, which provides that court officers are to be appointed by the chief judge of a court for terms not to exceed two years.

A. BACKGROUND FACTS FROM THE 2007 WAYNE CIRCUIT COURT CASE

In 2007, AFSCME Local 917 filed an action against the 36th District Court in the Wayne Circuit Court, seeking to compel the 36th District Court to arbitrate the termination of the employment of the four individuals in accordance with the CBA. On June 12, 2008, the circuit court entered an order requiring that an arbitration hearing be held within 60 days. The 36th District Court appealed that order, which was assigned Docket No. 286432 in this Court.

While the appeal in Docket No. 286432 was still pending, the arbitrator rendered two decisions. In his first decision the arbitrator determined that the grievances were arbitrable, while in the second decision issued six months later, the arbitrator determined that the 36th District Court did not have just cause for terminating, or more precisely for not reappointing, the four grievants. Each grievant was to be reinstated to his former position and receive back pay effective from the date of termination or nonreappointment.

In August 2009, the 36th District Court filed a motion to remand in Docket No. 286432, requesting that the case be remanded to the trial court for a judicial decision on the issue of arbitrability. This Court granted the motion and ordered that the two lower court cases (the second case is discussed immediately below) be consolidated. *AFSCME v 36th Dist Court*, unpublished order of the Court of Appeals, entered September 2, 2009 (Docket No. 286432).

B. THE INSTANT CASE

Before the motion to remand was filed in the prior case, the 36th District Court filed this action to vacate the arbitration decisions and awards on the ground that they violated the law and public policy as set forth in MCR 3.106, that the awards exceeded the arbitrator's contractual authority, and that the awards did not draw their essence from the CBA. The 36th District Court also alleged that the CBA did not apply to the grievances of Weatherly and Holley because their claims accrued after the CBA expired.

AFSCME Local 917 eventually moved for summary disposition on the ground that the disputed grievances were arbitrable, and also sought to enforce the arbitration awards. Less than a month later, the 36th District

Court moved to vacate the arbitration decisions and awards or, alternatively, for an evidentiary hearing to determine the issue of arbitrability. After a hearing and the filing of supplemental briefs the trial court determined in a written opinion and order that the claims raised by AFSCME Local 917 were arbitrable and granted its motion for summary disposition. This case is now before us on an appeal of right.

II. STANDARD OF REVIEW

We review de novo a trial court's ruling on a motion for summary disposition. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Although the trial court did not specify the particular subrule of MCR 2.116(C) under which it granted the motion for summary disposition, review is appropriate under MCR 2.116(C)(10) because the parties relied on evidence outside the pleadings. *Spiek v Dep't of Transp*, 456 Mich 331, 338; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) should be granted only if the submitted evidence fails to establish a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424-425; 751 NW2d 8 (2008).

We also review de novo a trial court's decision to enforce, vacate, or modify an arbitration award. *Ann Arbor v AFSCME Local 369*, 284 Mich App 126, 144; 771 NW2d 843 (2009). Labor arbitration falls within the realm of the common law, *id.*, where judicial review of an arbitration decision is limited, *City of Ferndale v Florence Cement Co*, 269 Mich App 452, 460; 712 NW2d 522 (2006). A court may not review an arbitrator's factual findings, *Ann Arbor*, 284 Mich App at 144; *Lenawee Co Sheriff v Police Officers Labor Council*, 239 Mich App 111, 118; 607 NW2d 742 (1999), but may

review whether the arbitrator acted within the scope of his or her contractual authority, *Lenawee Co Sheriff*, 239 Mich App 118. A court may also review an arbitrator's award for an error of law that clearly appears on the face of the award or in the reasons stated by the arbitrator for the decision. *DAIIE v Gavin*, 416 Mich 407, 441-443; 331 NW2d 418 (1982). The error must be "so material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise." *Id.* at 443. "[A]rbitrators can fairly be said to exceed their power whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law." *Id.* at 434.[1]

III. CONTRACT PERIOD OF THE CBA

Although the 36th District Court argues that the trial court failed to decide on remand whether the grievances were arbitrable, i.e., whether the CBA expired before the chief judge declined to reappoint Weatherly and Holley in 2007, the record belies this assertion.[2] The trial court unquestionably complied with the remand order, and clearly decided the arbitrability issue. The 36th District Court's real beef is the rationale utilized by the trial court, which we shall now examine.

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[1] There is an exception to the substantial judicial deference given to arbitration awards. As we stated in *Gogebic Med Care Facility v AFSCME Local 992*, 209 Mich App 693, 697; 531 NW2d 728 (1995), "[a]s an exception to the general rule of judicial deference, we have recognized that a court may refuse to enforce an arbitrator's decision when it is contrary to public policy." However, the 36th District Court does not argue that the arbitration award reinstating the grievants violates the public policy of MCR 3.106.

[2] We state the obvious in noting that this issue only pertains to Weatherly and Holley, as Jones and Carter were not reappointed during the term of the CBA and filed their demands for arbitration in 2005.

An individual's right to arbitrate must be based on a viable contractual right to arbitration. *Ottawa Co v Jaklinski*, 423 Mich 1, 13; 377 NW2d 668 (1985). "The existence of a contract to arbitrate and the enforceability of its terms is a judicial question which cannot be decided by an arbitrator." *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 99; 323 NW2d 1 (1982). Absent a binding contract, the parties cannot be required to arbitrate issues that arise between them. *Florence Cement*, 269 Mich App at 460; *AFSCME Council 25 v Wayne Co*, 290 Mich App 348, 350; 810 NW2d 53 (2010).[3]

The parties never disputed that the CBA contained an arbitration provision for grievances. Indeed, Article 8, § 1 of the CBA specifies:

> In the event differences should arise between the Employer and the Union *during the term of this Agreement as to the interpretation and application of any of its provisions*, the parties shall act in good faith to promptly resolve such differences in accordance with the following procedure. [Emphasis added.]

Article 8, § 10 provides for arbitration to resolve

> unresolved grievances *which relate to the interpretation, application, or enforcement of any specific Article and Section of this Agreement*, or any written Supplementary Agreement, which have been fully processed through the last step of the Grievance Procedure as herein provided may be submitted to arbitration . . . . [Emphasis added.]

The material question instead is whether the term of the CBA had ended, and therefore no contract to arbitrate existed, when court officers Weatherly and

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[3] Although some issues do survive expiration of a collective-bargaining agreement, the right to only be terminated for just cause does not extend beyond the life of the contract. *Jaklinski*, 423 Mich at 27.

Holley were not reappointed in 2007. As noted earlier, Article 27 of the CBA provides:

> This Agreement shall become effective and binding on date of signing and remain in full force and effect until June 30, 2006.
>
> This Agreement shall continue in effect for consecutive yearly periods after June 30, 2006, unless notice is given, in writing, by either the Union or the Employer, to the other party at least ninety (90) days prior to June 30, 2006, or any anniversary date thereafter, of its desire to modify, amend or terminate this Agreement.
>
> If such notice is given, this Agreement shall be open to modification, amendment or termination, as such notice may indicate on June 30, 2006, or the subsequent anniversary date, as the case may be.[4]

In concluding that whether the CBA was terminated by the 36th District Court's March 1, 2006, letter was arbitratable, the trial court relied on the unpublished decision in *Int'l Ass'n of Bridge Workers Local No 44 v J & N Steel & Erection Co, Inc*, 8 Fed Appx 381 (CA 6, 2001), which held that it is for the arbitrator, not the court, to decide whether a contract has been terminated. We are by no means bound to follow federal caselaw interpreting a federal law similar in language to our state law, but we can look to it for guidance. *Murad v Prof & Admin Union Local 1979*, 239 Mich App 538, 542; 609 NW2d 588 (2000). Although the Sixth Circuit case relied on by the trial court and AFSCME Local 917 is an unpublished decision, there are many published decisions from the federal circuit courts of appeal that hold the same as did the *J & N Steel* court, including

[4] Provisions like Article 27, that contain an automatic renewal of the contract period if certain notice is not given with a prescribed time, are generally referred to as an "evergreen clause." *Vulcan Materials Co v Atofina Chems Inc*, 355 F Supp 2d 1214, 1240 (D Kan, 2005).

the Sixth Circuit in *Teamsters Local Union No 89 v Kroger Co*, 617 F3d 899, 906-907 (CA 6, 2010).

Indeed, numerous federal courts have concluded that when the contract contains a broad arbitration clause it is for the arbitrator, not the court, to decide whether a termination provision in a contract applies or has been properly invoked. See, e.g., *Brotherhood of Teamsters & Auto Truck Drivers Local 70 v Interstate Distrib Co*, 832 F2d 507, 511 (CA 9, 1987) ("When the collective bargaining agreement contains a broad arbitration clause, the question whether a particular act or failure to act effectively serves to terminate the agreement is to be resolved by an arbitrator."); *Acequip Ltd v American Engineering Corp*, 315 F3d 151, 155-156 (CA 2, 2003); *Unite Here Local 217 v Sage Hospitality Resources*, 642 F3d 255, 259-260 (CA 1, 2011). And, more specific to this case, at least one court has held that it is for the arbitrator to decide whether the employer's notice to terminate the contract complied with the notice of termination provision within the contract. *Rochdale Village, Inc v Pub Serv Employees Union, Local No 80*, 605 F2d 1290, 1295-1296 (CA 2, 1979); see, also, *Montgomery Mailers' Union No 127 v Advertiser Co*, 827 F2d 709, 713 (CA 11, 1987).

The rationale of these cases seems to be that because how a particular clause (like a termination clause) is to be interpreted and applied typically falls within the broad language of an arbitration clause, arbitrators must decide these issues. For example, in *Interstate Distrib*, 832 F2d at 512, the court held that the effect the parties' letters had under the termination clause was an issue of contract interpretation to be decided by the arbitrator:

> In the present case, Interstate sent a letter to the union requesting modification of the agreement. It contends that

> under the agreement this request served to terminate the contract between the parties as of the end of March. A week later, the Union stated that it, too, was willing to "open" the contract, apparently for negotiations. In June, the company again wrote the union, this time saying that it was withdrawing recognition. The parties are in agreement as to the facts. They disagree only as to the meaning and effect of the exchange of letters—as to whether it served to terminate the contract or merely provided an opportunity for renewed bargaining. It is not our role to pass on the merits of the parties' respective positions regarding the meaning and effect of the letters under their collective bargaining agreement.

Likewise, in *Sage Hospitality Resources*, 642 F3d at 259-261, the First Circuit held that the meaning of a duration clause in the contract is manifestly a matter of interpretation for the arbitrator, particularly when the arbitration clause is broad. In general, an arbitration provision that covers all disputes pertaining to the application and interpretation of a contract is considered broad in scope, while an arbitration clause limited to the issues it covers, like one that is limited to only resolving employee grievances, is considered narrow in scope. *New England Cleaning Servs*, *Inc v Servs Employees Int'l Union Local 254, AFL-CIO*, 199 F3d 537, 541 (CA 1, 1999).

However, as the United States Court of Appeals for the Eleventh Circuit recognized in discussing this generally supported rule, not all federal courts are in harmony on this issue. In *Advertiser Co*, 827 F2d at 713, the court cited many of the cases noted above, but also cited the Sixth Circuit decision in *Office & Prof Employees Int'l Union, Local 42 v United Auto, Aerospace & Agricultural Implement Workers of America*, 524 F2d 1316 (CA 6, 1975), as taking a contrary position. One of the issues in that case was "whether the district judge should have submitted to the arbitrator the determina-

tion whether the collective bargaining agreement had been terminated by the notice." *Office & Prof Employees*, 524 F2d at 1316. Though there are no facts telling us the details of the dispute, the court held that "[c]learly, it was for the district judge, not the arbitrator, to decide whether the contract had terminated." *Id*.

Similarly, in an earlier decision, *Local Union No 998 Int'l Union, United Auto, Aircraft & Agricultural Implement Workers of America v B & T Metals Co*, 315 F2d 432 (CA 6, 1963),[5] the Sixth Circuit reversed a district court's order compelling arbitration. In that case the employer sent a termination letter pursuant to a termination clause like the one involved in this case, and the contract end date came and went without a new contract. *Id*. at 434-435. Eventually a new contract was agreed to, but several grievances were filed regarding issues that arose during the intervening time between the two contracts. *Id*. at 435. The employer refused to arbitrate on the ground that no contract existed at the time, and the union argued that whether the contract actually expired was a matter for arbitration. *Id*. The district court agreed with the union, but the Sixth Circuit reversed. In doing so, the court recognized that if the agreement terminated according to its terms, and was not kept alive by the actions of the parties, then neither party had an obligation to arbitrate any matter arising after the contract ended. *Id*. at 435-436. Importantly, the court also opined that in principle there was no difference between a court deciding if a contract existed based on facts existing at its execution or subsequent thereto, as the question under either sce-

[5] *B & T Metals* was decided after the United States Supreme Court's "*Steelworker's* trilogy" that articulated the strong presumption in favor of arbitration and a deferential review of arbitration decisions. *B & T Metals*, 315 F2d at 436.

nario remains whether a contract exists between the parties requiring arbitration:

> In accordance with the foregoing rule, appellee's right to arbitrate the claimed grievances in the present case depends upon the existence of a contract so providing. Whether such a contract exists is a question, which, in our opinion under the authorities above cited, must be decided by the Court before any authority is conferred upon the arbitrator. Clearly, this is the rule in a case where the challenge is directed to the validity of the contract in its inception, and no question of the renewal or extension of the contract is involved.
>
> *We are of the opinion that the basic question is not changed by the fact that the question of the existence of the contract at the time when the grievances occurred depends upon facts occurring subsequent to the original execution of the contract instead of upon facts existing at the time of the execution of the contract. In either case the same legal question is presented, namely, whether at the time of the claimed grievances there was a valid bargaining agreement in existence, which existence is necessary in order for an employee or the Union to compel arbitration.* [*Id*. at 436 (emphasis added).]

Accord *Moldovan v Great Atlantic & Pacific Tea Co*, *Inc*, 790 F2d 894, 896-897 (CA 3, 1986) (noting that it is always a judicial question whether a collective-bargaining contract exists).

This brings us to Michigan law. Although there are no cases right on point, for several reasons we hold that whether a contract has been terminated—and therefore no longer exists, eliminating the contractual duty to arbitrate—is a question for the court, not the arbitrator. The first reason supporting this conclusion is the broad proposition under Michigan law that it is for the court, not an arbitrator, to decide if a contract to arbitrate exists. *Arrow Overall Supply*, 414 Mich at 99 ("The existence of a contract to arbitrate and the enforceabil-

ity of its terms is a judicial question which cannot be decided by an arbitrator."); *Jaklinski*, 423 Mich at 25; *Florence Cement*, 269 Mich App at 458 ("The existence of an arbitration agreement and the enforceability of its terms are judicial questions for the court, not the arbitrators."). This case raises that same fundamental issue; namely, is there still a contract that exists between the parties that requires arbitration of their disputes. This is a threshold question that our courts have always considered to be within the sole province of the judiciary, and no exceptions to this rule have been recognized by our courts.

Second, like the Sixth Circuit in *B & T Metals*, 315 F2d at 435, we reject a rationale that allows the judiciary to decide whether a contract came into existence because of some fundamental deficiency on the front end (i.e., during contract formation), but precludes a court from deciding whether by its terms the contract expired. The only difference between the two scenarios is that in determining whether a contract has terminated the court will have to construe a provision of a contract that had been agreed to by the parties. But this is also true when deciding if a matter falls within the provisions of an arbitration clause, and in that instance a court has to review the words agreed to by the parties and determine their meaning. Yet our courts have always held that whether a particular grievance falls within an arbitration clause is a question for the court. *Port Huron Area Sch Dist v Port Huron Ed Ass'n*, 426 Mich 143, 162-163; 393 NW2d 811 (1986); see also *AFSCME Council 25*, 290 Mich App at 352-354.

Our decision in *Highland Park v Mich Law Enforcement Union, Teamsters Local No 129*, 148 Mich App 821; 385 NW2d 701 (1986), supports the notion that courts must to a limited extent review provisions of a

contract in deciding the initial arbitrability issue. In *Highland Park* a collective-bargaining agreement between the parties expired on June 30, 1982. In August of that year the union filed a grievance over the appointments made after expiration of the contract. *Id*. at 823. The employer argued that the grievances were not arbitrable, but the union contended that the terms of the expired contract still governed the parties' conduct. An arbitrator ruled in favor of the union on the merits of the grievances, but the circuit court vacated the award. *Id*. On appeal the union argued that the trial court had gone beyond its limited scope of review in ruling that the arbitration provision did not extend beyond the expiration of the contract. This Court disagreed, holding that the court must consider to some extent the contract terms in deciding whether a contract to arbitrate still exists:

> The instant grievances were clearly based upon events which occurred after the collective bargaining agreement was terminated on June 30, 1982 (*i.e.*, the reorganization of the police department on July 1, 1982, and the appointment of six officers on August 5, 1982). Although the grievances would have been arbitrable had they arisen *during* the life of the agreement, under the terms of the agreement they are not arbitrable after expiration. See, *e.g.*, *General Warehousemen & Employees Union Local No 636 v J C Penney Co*, 484 F Supp 130 (WD Pa, 1980). Because the grievances were not arbitrable, the circuit court properly vacated the arbitration award.
>
> We recognize that the circuit court construed the arbitration provision contained in the collective bargaining agreement. This was necessary, however, to determine the initial question of arbitrability.
>
> In *Ottawa County v Jaklinski*, *supra*, the Supreme Court reaffirmed that the question of arbitrability is for the courts. The court additionally recognized that the parties may agree to extend beyond contract expiration certain

> substantive or procedural rights and "may explicitly agree that accrued and vested rights and the right to arbitrate concerning them also extinguish at contract termination". 423 Mich 24. *Thus, the Supreme Court recognized that, as a prerequisite to deciding the question of arbitrability, a court must, on occasion, determine whether the parties have agreed to terminate arbitration rights upon the expiration of the collective bargaining agreement.* As the circuit court in the instant case was confronted with this question, we cannot say that it exceeded the permissible scope of review. [*Id*. at 825-826 (emphasis added).]

Third, in order to remove a nonprocedural arbitrability[6] issue from the court's jurisdiction, parties must provide "clear and unmistakable evidence" that they agreed to do so. *First Options of Chicago, Inc v Kaplan*, 514 US 938, 944; 115 S Ct 1920; 131 L Ed 2d 985 (1995). This holding from *First Options* was premised upon the principle, deeply embedded in Michigan law, that arbitration is a matter of contract and that no party can be forced to arbitrate when they did not agree to do so. *Id.* at 944-945. In explaining why there must be clear and unmistakable evidence of the party's agreement to allow an arbitrator to rule on arbitrability, the Court stated:

> Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so. *AT&T Technologies,* [*Inc v Communications Workers of America*, 475 US 643, 649; 106 S Ct 1415; 89 L Ed 2d 648 (1986)]; see [*United States Steelworkers v*] *Warrior & Gulf* [*Navigation Co*, 363

[6] Procedural arbitrability refers to defenses to arbitration such as timeliness, waiver, etc., and, on those issues (which are not present in this case), "Michigan law . . . provides that arbitrators, rather than courts, should decide the application of such potential defenses to arbitration as contractual limitation periods, statutes of limitation, and the doctrine of laches." *Amtower v William C Roney & Co (On Remand)*, 232 Mich App 226, 233; 590 NW2d 580 (1998).

US 574, 583 n 7; 80 S Ct 1347; 4 L Ed 2d 1409 (1960)]. In this manner the law treats silence or ambiguity about the question "*who* (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question "*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement"—for in respect to this latter question the law reverses the presumption. See *Mitsubishi Motors* [*Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614, 626; 105 S Ct 3346; 87 L Ed 2d 444 (1985)] (' "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration" ') (quoting *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 [103 S Ct 927; 74 L Ed 2d 765] (1983)); *Warrior & Gulf* [363 US at 582-583].

But, this difference in treatment is understandable. The latter question arises when the parties have a contract that provides for arbitration of some issues. In such circumstances, the parties likely gave at least some thought to the scope of arbitration. And, given the law's permissive policies in respect to arbitration, see, *e.g., Mitsubishi Motors*, [473 US at 626], one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter. See [1] Domke [, Commercial Arbitration] § 12.02, p. 156 [(rev ed, supp 1993)] (issues will be deemed arbitrable unless "it is clear that the arbitration clause has not included" them). *On the other hand, the former question—the "who (primarily) should decide arbitrability" question—is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers.* Cf. Cox, Reflections Upon Labor Arbitration, 72 Harv.L.Rev. 1482, 1508-1509 (1959), cited in *Warrior & Gulf*, 363 US, at 583, n. 7, 80 S.Ct., at 1353, n. 7. *And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not*

> *an arbitrator, would decide. Ibid.* See generally *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-220 [105 S Ct 1238; 84 L Ed 2d 158] (1985) (Arbitration Act's basic purpose is to "ensure judicial enforcement of privately made agreements to arbitrate"). [*Id.* at 944-945 (emphasis added).]

The rationale of *First Options* should apply with equal force in Michigan, for as we have noted, Michigan law has long provided that arbitration is purely a matter of contract between the parties, and because of that no one can be compelled to arbitrate an issue unless it was agreed upon. *Florence Cement*, 269 Mich App at 460; *AFSCME Council 25*, 290 Mich App at 350. And, since Michigan law requires a court to decide this initial question of arbitrability, *Arrow Overall Supply*, 414 Mich at 99, if the parties desire the opposite result, i.e. the arbitrator deciding the issue, the parties must explicitly so provide in the contract.[7]

In light of the foregoing, we hold that the trial court erred in ruling that the arbitrator should decide whether the contract had terminated, for that question is no more than whether a contract to arbitrate exists, which is a question to be decided by the courts. *Microchip Technology Inc v US Philips Corp*, 367 F3d 1350,

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[7] At least two federal circuit courts of appeal have limited *First Options* to the commercial arbitration setting, see *Abram Landau Real Estate v Benova*, 123 F3d 69, 73-74 (CA 2, 1997), and *United Brotherhood of Carpenters & Joiners of America, Local No 1780 v Desert Palace, Inc*, 94 F3d 1308, 1311 (CA 9, 1996). However, several other courts have applied *First Options* to labor arbitration issues, see *Aircraft Braking Sys Corp v Local 856, UAW*, 97 F3d 155, 160-161 (CA 6, 1996); *Peabody Holding Co, LLC v United Mine Workers of America Int'l Union*, 665 F3d 96, 104-105 (CA 4, 2012), and for good reason. The *First Options* court relied heavily on both traditional labor law cases (like *Steelworkers*), see *PaineWebber Inc v Elahi*, 87 F3d 589, 594 n 6 (CA 1, 1996) (noting that fact), and traditional contract principles that have always applied to traditional labor law arbitration issues, see *First Options*, 514 US at 942-945.

1357-1358 (CA Fed, 2004). And, in order to have the arbitrator decide this initial question of arbitrability, the parties must have expressed an agreement to do so through "clear and unmistakable" language, and a generally broad arbitration provision like the one in this case does not suffice. *Lebanon Chem Corp v United Farmers Plant Food Inc*, 179 F3d 1095, 1100 (CA 8, 1999).

This error, however, has no real impact on this case.[8] Although the trial court should have decided the issue of arbitrability, we can do so now. In doing so we conclude, as did a prior panel of this Court in an appeal involving an identical letter of termination issued by the same employer under an identical termination clause, that the notice was insufficient to prevent the automatic continuation of the agreement. As stated in *36th Dist Court v AFSCME Local 3308*, unpublished opinion per curiam of the Court of Appeals, issued June 24, 2010 (Docket No. 291643), pp 2-3:

> The first paragraph of article 50 must be understood in light of the second paragraph that explicitly states the effect of providing notice. "If such notice is given, this Agreement *shall be open* to . . . ." The second paragraph indicates that the 90-day notice is required to preserve the right to modify, amend, or terminate the agreement on June 30, 2006, or a subsequent anniversary date. The 90-day notice of the "desire to modify, amend or terminate" the agreement is not itself effective as a modification, amendment, or termination of the CBA. Rather, the CBA in this case contemplates some additional action. Plaintiff does not point to any further action it took to terminate the agreement. An affidavit from defendant's staff representative states that plaintiff "has never communicated in

[8] We may affirm a trial court's decision even if we do not fully agree with its reasoning. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

writing that it has terminated the collective bargaining agreement." Therefore, the March 1, 2006, letter did not terminate the CBA because it only referenced an *intent* to modify, amend, or terminate.

Furthermore, plaintiff's contention that the March 1 letter resulted in termination of the CBA ignores the ambiguity of the language in the letter. The letter referenced plaintiff's intent to "modify, amend or terminate all or parts of the Labor Agreement . . . ." "A notice to terminate must be clear and explicit. . . . A notice of modification is not a notice of termination and does not affect termination of the contract." *Chattanooga Mailers Union Local No 92 v Chattanooga News-Free Press Co*, 524 F2d 1305, 1312 (CA 6, 1975) (internal citations and quotation marks omitted), overruled on other grounds in *Bacashihua v United States Postal Service*, 859 F2d 402, 404 (CA 6, 1988); see also *Office & Professional Employers Int'l Union, Local 42, AFL-CIO v United Automobile, Aerospace & Agricultural Implement Workers of America, Westside Local No 174, UAW*, 524 F2d 1316, 1317 (CA 6, 1975), and *Laborers Pension Trust Fund Detroit and Vicinity v Interior Exterior Specialists Constr Group, Inc*, 479 F Supp 2d 674, 684 (ED Mich, 2007). When a party provides a notice that refers to an intent to both modify and terminate without specifying which one, "the ambiguity of the notice destroys its effectiveness for any purpose . . . ." See *Gen Electric Co v Int'l Union United Automobile, Aircraft & Agricultural Implement Workers of America (UAW-CIO)*, 93 Ohio App 139, 147; 108 NE2d 211 (1952). In *Gen Electric*, a pre-printed notice form stated, "This is a 60-day notice to you that we propose to (modify) (terminate) our collective bargaining contract," with an unfulfilled directive to "(Strike out one)" (quotation marks omitted). *Id*. at 144. The Ohio Court of Appeals explained:

"They could not terminate and modify the same contract at the same time by the same notice. However, it seems, according to the defendants' testimony and contention, they attempted by the notice served upon the plaintiff to do just that, but in attempting to do both, they did neither." [*Id*. at 147.]

> In the present case, plaintiff's notice indicated an intent to "modify, amend or terminate all or parts of the Labor Agreement . . . ." The expression of an intent to modify the CBA is just as strong as the expression of an intent to terminate the agreement. Even disregarding the second paragraph of article 50, the notice is too ambiguous to be effective as a notice of intent to terminate the agreement.

For these same reasons, we hold that the March 1, 2006 letter did not terminate the contract, and therefore the contract automatically extended for one more year. As such, the issues raised in the Weatherly and Holley grievances, as well as those in the Jones and Carter grievances, were properly subject to arbitration.

Because of this holding, our review of the arbitrator's decision is limited. Because fact-finding is quintessentially an arbitrator function, review of these facts falls outside our judicial review. *Ann Arbor*, 284 Mich App at 144. To the extent that the 36th District Court argues that the arbitrator exceeded his authority in resolving this issue, as was explained in *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991), "an allegation that the arbitrators have exceeded their powers must be carefully evaluated in order to assure that this claim is not used as a ruse to induce the court to review the merits of the arbitrators' decision."

IV. REAPPOINTMENT DECISIONS

The 36th District Court raises various additional arguments concerning the arbitrability of the chief judge's decision to not reappoint each of the four grievants. In particular, the 36th District Court argues that reappointment decisions are not subject to the disciplinary procedures in Article 12, § 1(A), which specifies that "[d]isciplinary action including discharge

shall be imposed only for just cause," and that even if they are subject to that provision, it could not be enforced because it would violate MCR 3.106.

Addressing first the argument concerning the arbitrability of the reappointment decisions, we find no error in the trial court's determination that the question whether disciplinary action under Article 12 would include reappointment decisions was arbitrable because it involved an issue of contract interpretation. Here, the CBA does not exclude reappointment decisions from arbitration, and Article 8 of the CBA provides that differences between the parties "as to the interpretation and application of any of [the CBA] provisions" be submitted to arbitration. Because the disputed issue concerning what constitutes disciplinary action was arguably within the arbitration agreement, and the dispute was not expressly exempted from arbitration by the terms of the CBA, the trial court did not err in determining that it was arbitrable. *In re Nestorovski Estate*, 283 Mich App 177, 202; 769 NW2d 720 (2009).[9] Consequently, whether a nonrenewal of an appointment constitutes loss of employment, or a discharge for purposes of a discharge-for-cause provision, is an arbitrable issue because it is a matter of contract interpretation that the parties authorized the arbitrator to decide. *Monroe Co Sheriff v Fraternal Order of Police, Lodge 113*, 136 Mich App 709, 717; 357 NW2d 744 (1984).

The 36th District Court's reliance on *Lanting v Jenison Pub Sch*, 103 Mich App 165, 175; 302 NW2d 631 (1981), is misplaced because the contract language in this case is distinguishable from the contract language at issue in *Lanting*, which contained an explicit

[9] Appendix B to the CBA does not alter this conclusion. Although that document shows an intent to bargain over what to do with court officers who are not reappointed, it says nothing about what standard applies to the reappointment decision.

agreement to "exclude from arbitration matters covered under the teachers' tenure act, *i.e.*, the nonrenewal of the contracts of probationary teachers."

Turning now to the 36th District Court's argument that application of the CBA to reappointment decisions violates MCR 3.106, we limit our review to whether the arbitrator's decision contravenes controlling principles of law. *DAIIE*, 416 Mich at 434, 443. We apply rules of statutory construction when construing a court rule. *Lawrence M Clarke, Inc v Richco Constr, Inc*, 489 Mich 265, 272; 803 NW2d 151 (2011). Therefore, in construing a court rule, a court may not read into the rule what is not within the Supreme Court's intent as derived from the language of the rule. *AFSCME v Detroit*, 468 Mich 388, 400; 662 NW2d 695 (2003). In conducting this review, we find no basis for concluding that the arbitrator's interpretation of the CBA to require that the chief judge use a just-cause standard when making reappointment decisions contravenes MCR 3.106(C). That rule provides:

> Court officers may be appointed by a court for a term not to exceed 2 years.
>
> (1) The appointment shall be made by the chief judge. Two or more chief judges may jointly appoint court officers for their respective courts.
>
> (2) The appointing court must specify the nature of the court officer's employment relationship at the time of appointment.
>
> (3) The appointing court must maintain a copy of each court officer's application, as required by the State Court Administrative Office.
>
> (4) The State Court Administrative Office shall develop a procedure for the appointment and supervision of court officers, including a model application form. Considerations shall include, but are not limited to, an applicant's character, experience, and references. [MCR 3.106(C).]

While MCR 3.106(C) provides that a chief judge may appoint a court officer for "a term not to exceed 2 years," nothing in MCR 3.106 precludes a chief judge from agreeing to use just cause as a criterion for making reappointment decisions. And, that is precisely what occurred here. That is, in negotiating and signing the CBA, the chief judge agreed that all employment decisions would be subject to a just-cause standard. Because the court rule does not state what, if any, standard should apply in the reappointment decision, the arbitrator's decision was not contrary to the court rule. Because the CBA can be construed in harmony with MCR 3.106, and the arbitrator did so in this case, the trial court correctly concluded that the arbitrator's decision is not contrary to law.[10] As recognized in *AFSCME Council 25 v Wayne Co*, 292 Mich App 68, 88 n 6; 811 NW2d 4 (2011), the judicial branch's constitutional accountability for court operations does not mean that a court can refuse to honor a collective-bargaining agreement that it has voluntarily entered into under the public employment relations act (PERA), MCL 423.201 *et seq*.

We do, however, find merit to the 36th District Court's argument that the *remedy* ordered by the arbitrator should be modified.

> When parties agree to submit a matter to arbitration, they invest the arbitrator with sufficient discretion to resolve their dispute in a manner which is appropriate under the circumstances. Where the collective bargaining

[10] We note that the record does not indicate that the chief judge's reappointment decisions involved any plan to eliminate court officer positions. It is apparent that the just-cause standard for a disciplinary action under the CBA would not apply to a reduction in the number of court officer positions. Therefore, we limit our holding to circumstances that do not involve the elimination of a court officer position, but rather only whether a particular individual should be reappointed to fill the position.

> agreement is silent as to permissible remedies, an arbitrator does not add to the obligations contractually assumed by the parties by fashioning a remedy which is appropriate under the circumstances. *Wayne Co Bd of Comm'rs v National Union of Police Officers*, 75 Mich App 375, 381; 254 NW2d 896 (1977), lv den 401 Mich 817 (1977). [*Mich Ass'n of Police v City of Pontiac*, 177 Mich App 752, 760; 442 NW2d 773 (1989).]

The CBA does address possible remedies, and provides in pertinent part:

> Arbitrators shall be without authority to *require* the Employer to delegate, alienate, or relinquish any powers, duties, responsibilities, obligations, or discretions *which by State Law* or State Constitution *the Employer cannot* delegate, alienate, or relinquish or pay any funds other than back wages. [Emphasis added.]

The arbitrator's award requiring that each of the four grievants be "reinstated to their former position of court officer" requires the chief judge to "re-appoint" the grievants to perform all duties in their former positions, and in issuing that award the arbitrator exceeded his contractual authority. By court rule, only the chief judge has the authority to make appointment or reappointment decisions under MCR 3.106(C). Thus, although the court rule is silent about what (if any) standard is to apply to a reappointment decision, it affirmatively states that only the chief judge shall make the appointment decisions. In addition, as indicated previously, the judicial branch is constitutionally accountable for individuals who provide court services. *AFSCME Council 25*, 292 Mich App at 97. The presiding or chief judge of a district court retains a measure of supervision over the duties performed by court officers to ensure the sound administration of justice within the judicial district. *Menken v 31st Dist Court*, 179 Mich App 379, 381-382; 445 NW2d 527 (1989).

Because the CBA in this case does not abrogate the chief judge's authority to appoint or reappoint court officers in the first instance—and in fact affirmatively provides that the arbitrator cannot, through his award, require the employer to relinquish any responsibility that by state law or the constitution cannot be relinquished—the arbitrator exceeded his jurisdiction by requiring the chief judge to reappoint the grievants to their former positions. Cf. *Monroe Co Sheriff*, 136 Mich App at 720 (collective-bargaining agreement did not abrogate sheriff's statutory authority to determine which deputies should have law enforcement duties). Therefore, we vacate the trial court's order in part and remand for the trial court to modify its summary disposition order to provide that the arbitration award cannot be enforced as it infringes on the chief judge's authority to appoint or reappoint court officers under MCR 3.106.

Finally, our conclusion does not require us to determine whether the PERA controls over the court rule. Instead, the terms of the CBA itself limit the remedial authority of the arbitrator, and those limitations bring into play the commands of MCR 3.106. Consequently, both the PERA and the court rule are being enforced by our decision today.

Affirmed in part, vacated in part, and remanded to the circuit court, which shall remand the matter to the arbitrator for a determination of the appropriate remedy consistent with the holding of this Court. No costs, a question of public importance being involved. MCR 7.219(A). We do not retain jurisdiction.

TALBOT and SERVITTO, JJ., concurred with MURRAY, P.J.

PEOPLE v GLENN

Docket No. 302293. Submitted January 12, 2012, at Lansing. Decided February 28, 2012, at 9:10 a.m. Leave to appeal granted, 491 Mich 934.

Devon D. Glenn, Jr., was convicted in the Jackson Circuit Court following his pleas of guilty of armed robbery and felonious assault and was sentenced by the court, John G. McBain, J., to 18 to 30 years' and 18 to 48 months' imprisonment for the respective convictions. The Court of Appeals granted defendant's delayed application for leave to appeal that alleged that the trial court erred by assessing 50 points for offense variable (OV) 7, MCL 777.37 (aggravated physical abuse).

The Court of Appeals *held*:

1. Fifty points must be assessed for OV 7 if a victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense. Defendant's conduct did not meet the definition of "sadism" because no evidence showed that the victims were subjected to extreme or prolonged pain or humiliation. No evidence showed that the victims were subjected to torture or excessive brutality by defendant.

2. A defendant's conduct may be found to have been designed to substantially increase the fear and anxiety a victim suffered during the offense only if the conduct was designed to cause copious or plentiful amounts of additional fear. Circumstances inherently present in the crime must be discounted for purposes of scoring OV 7. Because the use of a weapon is inherent in a felonious assault, the presence of a weapon and the use of a certain amount of force or intimidation during a felonious assault must be discounted for purposes of OV 7. All such crimes against a person involve the infliction of a certain amount of fear and anxiety. OV 7 is designed to respond to particularly heinous instances in which the defendant acted to increase that fear by a substantial or considerable amount. Although defendant may have used more violence than would be strictly necessary to complete an armed robbery, it cannot be said that defendant's conduct was designed to substantially increase the victims' fear and anxiety beyond the

fear and anxiety that occurs in most armed robberies. The trial court erred by assessing 50 points for OV 7.

Sentences vacated and case remanded for resentencing.

1. SENTENCES — OFFENSE VARIABLE 7 — WORDS AND PHRASES — SADISM — TORTURE — EXCESSIVE BRUTALITY.

"Sadism" for purposes of scoring offense variable 7 (aggravated physical abuse) is conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification; "torture" is the act of inflicting excruciating pain, as punishment or revenge, as a means of getting a confession or information, or for sheer cruelty; "excessive brutality" is savagery or cruelty beyond even the usual brutality of a crime (MCL 777.37).

2. SENTENCES — OFFENSE VARIABLE 7 — CONDUCT SUBSTANTIALLY INCREASING VICTIM'S FEAR AND ANXIETY.

A defendant's conduct may be found to have substantially increased the victim's fear and anxiety for purposes of scoring offense variable 7 (aggravated physical abuse) only if the conduct was designed to cause copious or plentiful amounts of additional fear beyond the fear and anxiety that are an inherent part of the crime; circumstances inherently present in the crime must be discounted for purposes of scoring the offense variable (MCL 777.37).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Henry C. Zavislak*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

Linda D. Ashford, *P.C.* (by *Linda D. Ashford*), for defendant.

Before: BECKERING, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM. We granted defendant's delayed application for leave to appeal the sentences of imprisonment for 18 to 30 years and 18 to 48 months imposed following his plea-based convictions of armed robbery, MCL 750.529, and felonious assault, MCL 750.82, respectively. The only question is whether the trial court properly assessed 50

points for offense variable (OV) 7, MCL 777.37 (aggravated physical abuse). Fifty points can be assessed under OV 7 for "sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered . . . ." MCL 777.37(1)(a). The prosecution does not contend that defendant's actions amounted to sadism, torture, or excessive brutality and instead contends that defendant's conduct was designed to substantially increase the fear and anxiety a victim suffered.

Defendant's conduct was reprehensible, and his actions were undoubtedly designed to cause fear and anxiety in his victims, as is the conduct in all armed robberies. However, because OV 7, by its own terms, is to be scored at 50 points only for conduct "designed to substantially increase the fear and anxiety" of a victim, we conclude that zero points should have been assessed for OV 7. We therefore vacate defendant's sentences and remand for resentencing.

I. FACTS

Defendant robbed a gas station/party store. He entered the gas station carrying an airsoft[1] shotgun that appeared to be an actual sawed-off shotgun. When defendant entered the store, he struck a clerk on the left side of the head with the butt of the gun, knocking him to the ground. Defendant directed the clerks to move behind the counter and open the store's cash register and safe. Defendant took the money, hit the other clerk on the head with the butt of the airsoft gun, and fled the premises. Neither victim suffered serious physical injuries, and neither required medical care.

[1] An airsoft gun fires small plastic BBs using compressed air as the propellant and is used as a weapon in recreational mock-combat games. See *Yao v State*, 953 NE2d 1236, 1238-1239 (Ind App, 2011).

Defendant pleaded guilty to charges of armed robbery and felonious assault.[2] At sentencing, the trial court, over defendant's objection, assessed 50 points for OV 7, MCL 777.37. The sentencing guidelines recommended a minimum sentence in the range of 126 to 210 months for armed robbery. If OV 7 had been scored at zero points, the guidelines would have recommended a minimum sentence in the range of 81 to 135 months.[3]

II. ANALYSIS

This Court reviews a trial court's scoring of the sentencing guidelines to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score. *People v Lechleitner*, 291 Mich App 56, 62; 804 NW2d 345 (2010). To the extent that a scoring issue calls for statutory interpretation, review is de novo. *Id.*

MCL 777.37(1)(a) provides that 50 points must be assessed for OV 7 if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." Defendant argues that the trial court erred by assessing 50 points for OV 7 because his conduct did not fall within the statute.

"Sadism" is defined by the statute as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). Defendant's conduct does not meet the definition of "sadism"

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[2] The charge of felonious assault resulted from an incident that occurred while defendant and a codefendant fled from the gas station and the codefendant pointed the shotgun at the occupant of a vehicle.

[3] On the count of felonious assault, a score of zero points for OV 7 would result in a recommended minimum-sentence range of 2 to 17 months instead of 5 to 23 months.

because no evidence showed that the victims were subjected to extreme or prolonged pain or humiliation. No evidence showed that the victims were subjected to torture. "Torture" is not defined by statute; therefore, this Court may consult a dictionary to determine its ordinary meaning. *People v Peals*, 476 Mich 636, 641; 720 NW2d 196 (2006). *Random House Webster's College Dictionary* (2d ed, 1997) defines "torture" as "the act of inflicting excruciating pain, as punishment or revenge, as a means of getting a confession or information, or for sheer cruelty." No evidence showed that defendant inflicted excruciating pain on the victims.

Similarly, there is no evidence that defendant used excessive brutality. "Excessive" and "brutality" are not defined in MCL 777.37. *Random House Webster's College Dictionary* (2d ed, 1997) defines "excessive" as "going beyond the usual, necessary, or proper limit or degree[.]" "Brutality" is defined as "the quality of being brutal[.]" *Id*. "Brutal," in turn, is defined as "savage; cruel; inhuman" or "harsh; severe[.]" *Id*. Thus, excessive brutality means savagery or cruelty beyond even the "usual" brutality of a crime. Defendant struck each victim once in the head, but there is no evidence that either clerk was injured. This behavior, while certainly illegal and reprehensible, was not savage or inhuman in comparison with behavior that has occurred during other armed robberies or felonious assaults.

The prosecution argues, however, that defendant's conduct was "designed to substantially increase the fear and anxiety a victim suffered during the offense." "Substantial" means "of ample or considerable amount, quantity, size, etc." *Id*. "Ample," in turn, is defined as "plentiful[;] . . . liberal; copious[.]" *Id*. Therefore, defendant's conduct would have substantially increased the victims' fear only if the conduct was designed to

cause copious or plentiful amounts of additional fear. Further, "[w]hen construing a series of terms . . . we are guided by the principle 'that words grouped in a list should be given related meaning.' " *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 533; 697 NW2d 895 (2005) (citation omitted).[4] That is, while the term at issue must have a meaning independent of "sadism," "torture," and "excessive brutality," it should nonetheless be construed to cover similarly egregious conduct. The conclusion that the Legislature intended OV 7 to apply only in egregious cases is also supported by the fact that assessing 50 points under OV 7, on its own, is enough to raise an offender's OV level to III, considerably increasing a criminal's minimum-sentence range. Moreover, an overly broad reading of the term at issue would obviate the need for the other terms in the list. We must " 'avoid an interpretation that would render any part of the statute surplusage or nugatory.' " *Griffith*, 472 Mich at 533-534, quoting *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). In *People v Hunt*, 290 Mich App 317, 324-325; 810 NW2d 588 (2010), this Court undertook a survey of the OV 7 caselaw, which demonstrates the types of conduct "designed to substantially increase" victims' fear and anxiety:

> Cases upholding scores of 50 points for OV 7 are distinguishable because they involve specific acts of sadism, torture, or excessively brutal acts by the defendant. In *People v Wilson*, 265 Mich App 386, 396–398; 695 NW2d 351 (2005), the defendant was convicted of assault with intent to commit great bodily harm less than murder after inflicting a prolonged and severe beating that left lasting

[4] This rule is derived from the principle of *noscitur a sociis*, which holds that " 'the meaning of statutory language, plain or not, depends on context.' " *Griffith*, 472 Mich at 533, quoting *King v St Vincent's Hosp*, 502 US 215, 221; 112 S Ct 570; 116 L Ed 2d 578 (1991).

> and serious effects. The defendant in that case choked the victim a number of times, cut her, dragged her, and kicked her in the head. After her hospital stay, the victim was in a wheelchair for three weeks and used a cane for another three weeks. In another case in which 50 points were assessed for OV 7, the defendant was convicted of kidnapping, felonious assault, and felony-firearm after he held the victim at gunpoint for nine hours, made her look down the barrel of a gun, repeatedly threatened to kill her and himself, and asked her what her son would feel like when he saw yellow crime tape around his mother's house. *People v Mattoon*, 271 Mich App 275, 276; 721 NW2d 269 (2006), and *People v Mattoon*, unpublished opinion per curiam of the Court of Appeals, issued October 18, 2007 (Docket No. 272549) (after remand). Similarly, in *People v Hornsby*, 251 Mich App 462, 468-469; 650 NW2d 700 (2002), the defendant pointed a gun at the victim, cocked it, and repeatedly threatened the victim and others in a store. In *People v Kegler*, 268 Mich App 187, 189-190; 706 NW2d 744 (2005), the defendant removed the victim's clothes, assisted with carrying him naked outside, and admitted that she wanted to humiliate him by leaving him outside naked. In *People v James*, 267 Mich App 675, 680; 705 NW2d 724 (2005), the defendant repeatedly stomped on the victim's face and chest and deprived the victim of oxygen for several minutes, causing him to sustain brain damage and become comatose. And in *People v Horn*, 279 Mich App 31, 46-48; 755 NW2d 212 (2008), the defendant terrorized and abused his wife with recurring and escalating acts of violence, including threatening to kill her. [Emphasis omitted.]

Further, circumstances inherently present in the crime must be discounted for purposes of scoring an OV. *Id.* at 326. For example, "[t]ransportation to a place of greater danger is appropriately scored under OV 8 [MCL 777.38], but must be given a score of zero points when . . . the sentencing offense is kidnapping." *Id.* Armed robbery requires the use of a dangerous weapon during a robbery. MCL 750.529. A robbery occurs when, in the course of a larceny, the defendant "uses force or

violence against any person who is present, or . . . assaults or puts the person in fear . . . ." MCL 750.530(1). As noted by the *Hunt* Court, the use of a weapon is inherent in a felonious assault. See *Hunt*, 290 Mich App at 326; MCL 750.82(1). Therefore, the presence of a weapon and the use of a certain amount of force or intimidation must be discounted for purposes of OV 7. All such crimes against a person involve the infliction of a certain amount of fear and anxiety. OV 7 is designed to respond to particularly heinous instances in which the criminal acted to increase that fear by a substantial or considerable amount.

While defendant may have used more violence than would be strictly necessary to complete an armed robbery, it cannot be said that his conduct was "designed to substantially increase the fear and anxiety" beyond the fear and anxiety that occurs in most armed robberies. The plain language of OV 7 reveals that it was meant to be scored in particularly egregious cases involving torture, brutality, or similar conduct designed to *substantially* increase the victim's fear, not in every case in which some fear-producing action beyond the bare minimum necessary to commit the crime was undertaken.

The trial court erred by assessing 50 points for OV 7. Defendant is entitled to resentencing because the proper guidelines score results in a different recommended minimum-sentence range. *People v Francisco*, 474 Mich 82, 89-90; 711 NW2d 44 (2006).

Vacated and remanded for resentencing. We do not retain jurisdiction.

BECKERING, P.J., and OWENS and SHAPIRO, JJ., concurred.

PEOPLE v MUNGO (ON SECOND REMAND)

Docket No. 269250. Submitted October 21, 2011, at Lansing. Decided March 6, 2012, at 9:00 a.m. Leave to appeal denied, 492 Mich 867.

Michael W. Mungo was charged in the Washtenaw Circuit Court with unlawfully carrying a concealed weapon. In 2005, a police officer had found a gun under the driver's seat of defendant's automobile during a search conducted after the officer made a routine traffic stop and had arrested defendant's passenger on outstanding warrants for traffic offenses. The court, David S. Swartz, J., granted defendant's motion to suppress evidence of the gun and quashed the information. The prosecution appealed, and the Court of Appeals, WHITBECK, C.J., and TALBOT and ZAHRA, JJ., reversed and remanded, applying *New York v Belton*, 453 US 454 (1981), which held that when a police officer has made a lawful custodial arrest of the occupant of an automobile, the officer may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile. The Court of Appeals held that a police officer may search an automobile incident to a passenger's arrest even when before the search there was no probable cause to believe that the automobile contained contraband or that the driver and owner of the automobile had engaged in unlawful activity and that the search was therefore constitutionally permissible. *People v Mungo*, 277 Mich App 577 (2008) (*Mungo I*). Defendant's application for leave to appeal was held in abeyance by the Michigan Supreme Court pending the decision of the United States Supreme Court in *Arizona v Gant*, 556 US 332 (2009). Following the decision in *Gant*, which significantly limited the application of *Belton* by holding that the police may not search a vehicle incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle, the Michigan Supreme Court, in lieu of granting leave to appeal, vacated the judgment in *Mungo I* and remanded the case to the Court of Appeals for reconsideration in light of *Gant*. *People v Mungo*, 483 Mich 1091 (2009). On remand, the Court of Appeals, WHITBECK, P.J., and TALBOT and ZAHRA, JJ., determined that *Gant* had retroactive effect and applied it to the case. The Court of Appeals affirmed the circuit court's suppression of the evidence on the basis of *Gant*, concluding that the search of the automobile without a warrant was unreasonable and in violation of the Fourth Amendment. *People*

v Mungo (On Remand), 288 Mich App 167 (2010) (*Mungo II*). The Michigan Supreme Court granted the prosecution's application for leave to appeal. *People v Mungo*, 488 Mich 920 (2010). The Michigan Supreme Court then held the appeal in abeyance pending the decision of the United States Supreme Court in *Davis v United States*, 564 US ___; 131 S Ct 2419; 180 L Ed 2d 285 (2011). *People v Mungo*, 795 NW2d 156 (Mich, 2011). After the United States Supreme Court decided *Davis*, holding that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule and therefore the fruit of such searches is not to be suppressed, the Michigan Supreme Court vacated its previous order that granted leave to appeal, vacated the judgment in *Mungo II*, and remanded the case to the Court of Appeals for reconsideration in light of *Davis*. *People v Mungo*, 490 Mich 870 (2011).

On second remand, the Court of Appeals *held*:

1. It cannot be disputed that the search of defendant's automobile was unconstitutional under *Gant* because the officer had arrested defendant's passenger and secured him in the back seat of a police vehicle before the officer searched defendant's automobile.

2. At the time of the search, *Belton* was binding precedent. It was objectively reasonable for the police to rely on *Belton* to authorize the search.

3. There is no basis for defendant's implicit suggestion that *Belton* was limited to vehicle searches incident to an arrest of the driver of a vehicle. *Belton* stated that its holding was to apply to the arrest of any occupant of the vehicle, making no distinction between the driver and the passengers.

4. At the time of the search, the arrest of defendant's passenger allowed the police to search the vehicle under the binding precedent of *Belton* and the police officer had a good-faith basis to rely on *Belton*. Because the search was constitutional under existing law at the time of the search, *Davis* provides that the exclusionary rule need not apply. The good-faith exception to the exclusionary rule applies. The circuit court should not have suppressed the evidence and quashed the information.

Reversed and remanded.

SEARCHES AND SEIZURES — EVIDENCE — EXCLUSIONARY RULE — GOOD-FAITH EXCEPTION TO EXCLUSIONARY RULE — RELIANCE ON BINDING PRECEDENT.

The good-faith exception to the exclusionary rule applies when the police conduct a search in compliance with binding appellate precedent that is later overruled; searches conducted in objectively

reasonable reliance on binding appellate precedent are not subject to the exclusionary rule and the fruit of the searches need not be suppressed.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Brian L. Mackie*, Prosecuting Attorney, and *Mark Kneisel*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Brandy Y. Robinson*) for defendant.

ON SECOND REMAND

Before: WHITBECK, P.J., and TALBOT and OWENS, JJ.

PER CURIAM.

I. OVERVIEW

This case is before this Court for the third time for reconsideration in light of *Davis v United States*.[1] This case has a tortuous and monstrously complex procedural history stretching out behind it. We believe that it helps, in framing the issue, to summarize that history in something approaching plain English. For ease of reference, we have delineated each of the three stages of this case sequentially and numerically; that is, *Mungo I*,[2] *Mungo II*,[3] and *Mungo III*.[4]

Initially, the circuit court suppressed the evidence: a gun for which defendant Michael Mungo did not hold a

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[1] *Davis v United States*, 564 US ___; 131 S Ct 2419; 180 L Ed 2d 285 (2011).

[2] *People v Mungo*, 277 Mich App 577; 747 NW2d 875 (2008) (*Mungo I*), vacated and remanded 483 Mich 1091 (2009).

[3] *People v Mungo (On Remand), 288 Mich App 167; 792 NW2d 763 (2010) (Mungo II), vacated and remanded 490 Mich 870 (2011).*

[4] *People v Mungo*, 490 Mich 870 (2011) (*Mungo III*).

concealed weapons permit, which the police found when they searched Mungo's car, incident to the arrest of Mungo's passenger in that car.[5] The prosecution appealed that decision, and in *Mungo I*, we applied *New York v Belton*,[6] a United States Supreme Court case, and held that the search was constitutionally permissible. We reached this conclusion even though the search was incident to the *passenger's* arrest and even "where before the search there was no probable cause to believe that the car contained contraband or that the driver and owner of the car had engaged in any unlawful activity."[7]

But in *Mungo II*, we were required by the Michigan Supreme Court[8] to reconsider our decision in light of *Arizona v Gant*.[9] *Gant* was a United States Supreme Court case that postdated and significantly limited the application of *Belton*. We determined that *Gant* had retroactive effect and then applied it to the facts of this case.[10] We affirmed the circuit court's suppression of the evidence. We concluded that, on the basis of *Gant*, the search of Mungo's car without a warrant was unreasonable and in violation of the Fourth Amendment.[11] Quite obviously, absent the United States Supreme Court's holding in *Gant*, we would have reached the opposite conclusion and reversed the circuit court's suppression of the evidence.

Mungo II, however, was not to be the end of the story. The Michigan Supreme Court granted[12] the prosecu-

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[5] See *Mungo I*, 277 Mich App at 578.

[6] *New York v Belton*, 453 US 454; 101 S Ct 2860; 69 L Ed 2d 768 (1981).

[7] *Mungo I*, 277 Mich App at 578.

[8] *People v Mungo*, 483 Mich 1091 (2009).

[9] *Arizona v Gant*, 556 US 332; 129 S Ct 1710; 173 L Ed 2d 485 (2009).

[10] *Mungo II*, 288 Mich App at 182-183.

[11] *Id.*

[12] *People v Mungo*, 488 Mich 920 (2010).

tion's application for leave to appeal our ruling in *Mungo II*. The Michigan Supreme Court then held that appeal in abeyance pending a decision in *Davis*.[13] *Davis* postdated *Gant*, and held that searches conducted in objectively reasonable reliance on binding appellate precedent are *not* subject to the exclusionary rule and therefore the fruit of such searches is *not* to be suppressed.[14] After the United States Supreme Court decided *Davis*, the Michigan Supreme Court vacated its previous order that granted leave to appeal, vacated our judgment in *Mungo II*, and again remanded this case to us for reconsideration "in light of *Davis*."[15]

So, the question before us, in the simplest possible terms, is this: in light of *Davis*, did the police search Mungo's car in objectively reasonable reliance on binding appellate precedent, namely the precedent that *Belton* established? We hold that the police did conduct the search in objectively reasonable reliance on binding appellate precedent. We therefore reverse the circuit court's exclusion of the gun evidence and remand for further proceedings.

II. FACTS

A. *MUNGO I*

This Court set forth the facts of Mungo's June 23, 2005 arrest in our first opinion, *Mungo I*, as follows:

> Washtenaw County Sheriff's Deputy Ryan Stuck lawfully initiated a traffic stop of a car driven by defendant. Mark Dixon was the sole passenger in the car. Upon request, defendant produced the vehicle registration and proof of insurance. Deputy Stuck also requested the occupants' driv-

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[13] *People v Mungo*, 795 NW2d 156 (Mich, 2011).

[14] *Davis*, 564 US at ___; 131 S Ct at 2423-2424.

[15] *Mungo III*, 490 Mich 870.

er's licenses and ran Law Enforcement Information Network (LEIN) checks on both Dixon and defendant. Deputy Stuck found that Dixon had two outstanding warrants issued for failing to appear in court to answer traffic-violation charges. Deputy Stuck arrested Dixon, asked his dispatcher to send another officer to assist him, and secured Dixon in the backseat of his squad car. Deputy Stuck directed defendant to step out of his car and conducted a pat-down search. Thereafter, Deputy Stuck searched defendant's car and found an unloaded gun in a case underneath the driver's seat and ammunition in the glove compartment. Deputy Stuck asked defendant to produce a permit to carry a concealed weapon. However, defendant produced only a permit to purchase a firearm. Defendant's LEIN check did not reveal that he had been issued a concealed-weapons permit. Deputy Stuck arrested defendant for unlawfully carrying a concealed weapon.

In the circuit court, defendant moved to quash the information and suppress evidence of the gun. The prosecutor relied on *New York v Belton*, 453 US 454; 101 S Ct 2860; 69 L Ed 2d 768 (1981), to argue that the arrest of any person in a car justifies a search of the passenger compartment of that car. The prosecutors argued that the search that led to the discovery of the gun was constitutionally permissible because Dixon, a passenger in defendant's car, was lawfully arrested. Defendant relied on *State v Bradshaw*, 99 SW3d 73 (Mo App, 2003), a case in which a divided panel of the Missouri Court of Appeals distinguished *Belton* and held that police officers cannot lawfully search a driver's vehicle following the arrest of a passenger where the passenger was safely arrested and there was no reasonable suspicion that the driver possessed unlawful items.

The circuit court distinguished *Belton* and followed *Bradshaw*. The circuit court concluded that defendant was not under arrest at the time Deputy Stuck searched his car. The circuit court further concluded that defendant had a protected privacy interest in his car. The circuit court held that there was no probable cause to arrest defendant and, therefore, the search of his car was not constitutionally permissible.[16]

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[16] *Mungo I*, 277 Mich App at 578-580.

The prosecution appealed the circuit court's decision. In an opinion authored by then Judge ZAHRA, this Court reversed and remanded. We applied *Belton*, in which the United States Supreme Court held "that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."[17] We concluded that the facts fit within *Belton* and that "a police officer may search a car incident to a passenger's arrest where before the search there was no probable cause to believe that the car contained contraband or that the driver and owner of the car had engaged in any unlawful activity."[18]

B. *MUNGO II*

Mungo then sought leave to appeal in the Michigan Supreme Court. After holding the application in abeyance, the Michigan Supreme Court, in lieu of granting leave to appeal, vacated this Court's decision in *Mungo I* and remanded for this Court's reconsideration in light of *Gant*. In *Gant*, the vehicle's occupant was handcuffed and locked in a patrol car when the police searched the vehicle.[19] The United States Supreme Court distinguished *Belton*, in which four unsecured occupants were arrested and posed both a risk to the officer's safety and a risk of loss of evidence.[20] *Gant* held that the police may not search a vehicle "incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle."[21]

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[17] *Belton*, 453 US at 460.

[18] *Mungo I*, 277 Mich App at 578.

[19] *Gant*, 556 US at 336.

[20] *Id.* at 344; see *Belton*, 453 US at 456.

[21] *Gant*, 556 US at 335.

On remand, in light of *Gant*, this Court affirmed the trial court's suppression of the gun evidence.[22] In *Mungo II*, we held that *Gant* applies retroactively and required the suppression of the evidence obtained from the unconstitutional search of defendant's vehicle.[23] In applying *Gant* to the facts of this case, we stated:

> Deputy Stuck placed Dixon under arrest after discovering that Dixon had two outstanding warrants for traffic violations. The officer secured Dixon in the backseat of the police vehicle. The officer searched the vehicle only after an additional police unit had arrived and defendant had been secured in the backseat of that police vehicle. Defendant was not under arrest at the time the search occurred, and Deputy Stuck searched defendant's vehicle incident to Dixon's arrest. Neither defendant nor Dixon would have been able to reach into the passenger compartment of defendant's vehicle when the search occurred; thus, concern for officer safety was not at issue. See *Gant*, 556 US at [337-338]; 129 S Ct at 1716. Further, because Dixon was placed under arrest for traffic violations, there would have been no reasonable basis for the officer to conclude that evidence of those offenses could be found in a search of defendant's vehicle. See *id*. at [343-344]; 129 S Ct at 1719; *Thornton* [*v United States*, 541 US 615, 632; 124 S Ct 2127; 158 L Ed 2d 905 (2004)] (Scalia, J., concurring in the judgment). Thus, we conclude that Deputy Stuck's warrantless search of defendant's car was unreasonable and in violation of the Fourth Amendment. See *Gant*, 556 US at [350-351]; 129 S Ct at 1723-1724.[24]

C. *MUNGO III*

The prosecution sought leave to appeal in the Michigan Supreme Court. After granting leave and then holding the case in abeyance, the Court vacated its previous order that granted leave to appeal, vacated

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[22] *Mungo II*, 288 Mich App at 170, 184.

[23] *Id.* at 182-183.

[24] *Id.* at 175.

this Court's opinion in *Mungo II*, and remanded the case to this Court for reconsideration,[25] this time in light of *Davis*. *Davis* considered the application of the exclusionary rule and its good-faith exception to vehicle searches incident to arrests of recent occupants that were conducted before the new rule was announced in *Gant*.[26] The United States Supreme Court held in *Davis* "that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule."[27]

III. STANDARD OF REVIEW

This Court "review[s] de novo whether the Fourth Amendment was violated and whether an exclusionary rule applies."[28] If a ruling on a motion to suppress evidence "involves an interpretation of the law or the application of a constitutional standard to uncontested facts," appellate review is de novo.[29]

IV. THE PARTIES' POSITIONS

A. THE PROSECUTION'S POSITION

The prosecution argues that Deputy Stuck's search of Mungo's vehicle was permissible under *Belton* and that *Davis* held that the exclusionary rule need not apply to evidence obtained by the police who in good faith relied on existing caselaw. The prosecution notes that the Michigan Supreme Court initially granted leave to appeal in *Mungo II* only on the issue

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[25] *Mungo III, 490 Mich 870.*

[26] *Davis*, 564 US at ___; 131 S Ct at 2428-2429.

[27] *Id.* at ___; 131 S Ct at 2423-2424.

[28] *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009).

[29] *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).

whether a good-faith exception to the exclusionary rule should apply to evidence seized pursuant to a pre-*Gant* search that was permissible under *Belton*. The prosecution asserts that the Michigan Supreme Court did not grant leave to appeal on any other issue, including whether the search was valid under *Belton*. The prosecution maintains that by granting leave to appeal on the first issue only, the Michigan Supreme Court implicitly determined that the search was valid under *Belton*.

The prosecution also argues that *Mungo I* did not announce a new rule or create an exception to *Belton*; it merely interpreted and applied *Belton* to the facts of the case and recognized that the bright-line rule of *Belton* was not limited to an arrest of the driver. The prosecution further argues that *Mungo II* assumed, without deciding, that a good-faith exception to the exclusionary rule can be based on Michigan caselaw, which *Davis* expressly permits. The prosecution disagrees with *Mungo II*'s characterization of *Mungo I* as announcing a new rule of law by extending *Belton* or applying it in a new context of a vehicle search incident to a passenger's arrest.

According to the prosecution, therefore, this Court concluded in *Mungo I* that the facts of this case fit "precisely" within *Belton* and that the application of *Belton* was not limited only to searches incident to an arrest of the driver. The prosecution maintains that, as in *Davis*, the exclusionary rule should not apply to evidence seized in an unconstitutional search before *Gant* was decided because suppression would not further the purpose of the exclusionary rule to deter police misconduct. The prosecution argues that the police searched Mungo's car in objectively reasonable reliance on *Belton*, which allowed a search incident to an arrest of an occupant of the vehicle.

B. MUNGO'S POSITION

Mungo argues that *Davis* does not undermine this Court's analysis in *Mungo II* because, unlike the situation in *Davis*, Deputy Stuck did not reasonably rely on binding, settled precedent in conducting the search of Mungo's car. Mungo relies on then Judge ZAHRA's statement in *Mungo II* that the facts of this case present an issue of first impression and therefore the good-faith exception does not apply.

In making this argument, Mungo acknowledges *Davis*'s holding that the good-faith exception to the exclusionary rule applies when the police act in reasonable reliance on settled precedent that the United States Supreme Court later overrules. But Mungo maintains that *Davis* did not address whether the exclusionary rule applies when the police act in reliance on precedent that is not clear or settled at the time of the challenged search, circumstances that Mungo argues existed in this case.

Mungo contends that *Belton* was not settled law because no Michigan decision had applied *Belton* to a vehicle search incident to a *passenger's* arrest. Mungo argues that *Mungo II* correctly held that the good-faith exception to the exclusionary rule does not apply in this case and that *Davis* does not compel a different result.

V. ANALYSIS

A. *DAVIS*

This case turns on *Davis*, and so we consider it first. *Davis* arose in the context of the new rule announced in *Gant* regarding the constitutionality of vehicle searches incident to arrests of recent occupants. The issue in *Davis* was whether the good-faith exception to the exclusionary rule applies "when the police conduct a

search in compliance with binding precedent that is later overruled."[30] The United States Supreme Court held: "Because suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety, we hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule."[31]

The vehicle search at issue in *Davis* occurred two years before the United States Supreme Court decided *Gant*.[32] In *Davis*, police officers stopped the vehicle in which the defendant was a passenger.[33] The driver was intoxicated, and the defendant gave a false name to the police.[34] The police arrested both the driver and the defendant, handcuffed them, and secured them in separate patrol cars.[35] The police then searched the vehicle and found a revolver in the defendant's jacket pocket.[36] The defendant was a convicted felon and was prohibited from possessing a firearm.[37] The defendant moved to suppress evidence of the gun.[38] The district court denied the motion, and the defendant was convicted of one count of possession of a firearm by a convicted felon.[39]

While the defendant's appeal was pending in the United States Court of Appeals for the Eleventh Cir-

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[30] *Davis*, 564 US at ___; 131 S Ct at 2423.

[31] *Id.* at ___; 131 S Ct at 2423-2424.

[32] *Id.* at ___; 131 S Ct at 2425.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at ___; 131 S Ct at 2425-2426, citing 18 USC 922(g)(1).

[38] *Davis*, 564 US at ___; 131 S Ct at 2426.

[39] *Id.*

cuit, the United States Supreme Court decided *Gant*.[40] Thus, on appeal, the Eleventh Circuit applied *Gant* and held that the vehicle search incident to the defendant's arrest violated his Fourth Amendment rights. However, it declined to apply the exclusionary rule, reasoning that penalizing the arresting officer for following binding appellate precedent would not deter Fourth Amendment violations.[41] Therefore, the Eleventh Circuit affirmed the defendant's conviction.[42]

On appeal, the United States Supreme Court clarified that *Gant* applied retroactively to Davis's case because the direct appeal of his conviction was still pending when *Gant* was decided.[43] However, the issue was not the retroactivity of *Gant*, but the appropriate remedy for a Fourth Amendment violation that predated *Gant*:

> When this Court announced its decision in *Gant*, Davis's conviction had not yet become final on direct review. *Gant* therefore applies retroactively to this case. Davis may invoke its newly announced rule of substantive Fourth Amendment law as a basis for seeking relief. The question, then, becomes one of remedy, and on that issue Davis seeks application of the exclusionary rule. But exclusion of evidence does not automatically follow from the fact that a Fourth Amendment violation occurred. The remedy is subject to exceptions and applies only where its "purpose is effectively advanced."[44]

The United States Supreme Court noted that it was not disputed that the police search in *Davis* was valid under the Eleventh Circuit's accepted interpretation

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[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* at ___; 131 S Ct at 2431.

[44] *Id.* (citations omitted).

and application of *Belton*, which many courts viewed as "authoriz[ing] automobile searches incident to arrests of recent occupants, regardless of whether the arrestee in any particular case was within reaching distance of the vehicle at the time of the search."[45] "Like most courts, the Eleventh Circuit had long read *Belton* to establish a bright-line rule authorizing substantially contemporaneous vehicle searches incident to arrests of recent occupants."[46]

The United States Supreme Court then proceeded to consider application of the exclusionary rule in light of the officers' compliance with then existing caselaw:

> The question in this case is whether to apply the exclusionary rule when the police conduct a search in objectively reasonable reliance on binding judicial precedent. At the time of the search at issue here, we had not yet decided [*Gant*] . . . . Although the search turned out to be unconstitutional under *Gant*, all agree that the officers' conduct was in strict compliance with then-binding Circuit law and was not culpable in any way.[47]

The Court determined that the exclusionary rule does not apply in situations in which the police followed established precedent:

> Under our exclusionary-rule precedents, this acknowledged absence of police culpability dooms Davis's claim. Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield "meaningfu[l]" deterrence, and culpable enough to be "worth the price paid by the justice system." The conduct of the officers here was neither of these things. The officers who conducted the search did not violate Davis's Fourth Amendment rights

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[45] *Id.* at ___; 131 S Ct at 2424.

[46] *Id.* at ___; 131 S Ct at 2426, citing *United States v Gonzalez*, 71 F3d 819, 822, 824-827 (CA 11, 1996).

[47] *Davis*, 564 US at ___; 131 S Ct at 2428.

> deliberately, recklessly, or with gross negligence. Nor does this case involve any "recurring or systemic negligence" on the part of law enforcement. The police acted in strict compliance with binding precedent, and their behavior was not wrongful. Unless the exclusionary rule is to become a strict-liability regime, it can have no application in this case.[48]

The Court reasoned that excluding the evidence in the case before it would yield no "meaningful" deterrence:

> About all that exclusion would deter in this case is conscientious police work. Responsible law-enforcement officers will take care to learn "what is required of them" under Fourth Amendment precedent and will conform their conduct to these rules. But by the same token, when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no more than " 'ac[t] as a reasonable officer would and should act' " under the circumstances. The deterrent effect of exclusion in such a case can only be to discourage the officer from " 'do[ing] his duty.' "[49]

The *Davis* Court concluded:

> That is not the kind of deterrence the exclusionary rule seeks to foster. We have stated before, and we reaffirm today, that the harsh sanction of exclusion "should not be applied to deter objectively reasonable law enforcement activity." Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule.[50]

The United States Supreme Court reviewed the history of the exclusionary rule and its parameters and

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[48] *Id.* at ___; 131 S Ct at 2428-2429 (citations omitted).

[49] *Id.* at ___; 131 S Ct at 2429 (citations omitted).

[50] *Id*. (citation omitted).

the good-faith exception that was first recognized in *United States v Leon*.[51] The Court concluded that the evidence found during the unconstitutional search was not subject to the exclusionary rule because the police officers reasonably relied on existing caselaw precedent when conducting their search:

> Davis did not secure a decision overturning a Supreme Court precedent; the police in his case reasonably relied on binding Circuit precedent. See *United States v. Gonzalez*, 71 F.3d 819 [(CA 11, 1996)]. That sort of blameless police conduct, we hold, comes within the good-faith exception and is not properly subject to the exclusionary rule.
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> It is one thing for the criminal "to go free because the constable has blundered." *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (Cardozo, J.). It is quite another to set the criminal free because the constable has scrupulously adhered to governing law. Excluding evidence in such cases deters no police misconduct and imposes substantial social costs. We therefore hold that when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply.[52]

B. APPLYING *DAVIS*

In Michigan, even before the United States Supreme Court decided *Davis*, this Court recognized that the good-faith exception to the exclusionary rule applies to pre-*Gant* searches that were conducted in reasonable reliance on *Belton*. In *People v Short*,[53] this Court held

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[51] *Id.* at ___; 131 S Ct at 2426-2428; see *United States v Leon*, 468 US 897; 104 S Ct 3405; 82 L Ed 2d 677 (1984).

[52] *Davis*, 564 US at ___; 131 S Ct at 2434.

[53] *People v Short*, 289 Mich App 538, 551-552; 797 NW2d 665 (2010) (citation omitted).

that the good-faith exception to the exclusionary rule applies to a permissible *Belton* search conducted before the *Gant* decision:

> [A]t the time [the officer] conducted the search, our courts adhered to the nearly universally accepted reading of *Belton* that an officer may search a vehicle incident to a lawful arrest. Law enforcement officers are entitled to, and indeed must, rely on court decisions that define appropriate police conduct, and it is illogical to impose "the extreme sanction of exclusion" when a clear rule of conduct is later abrogated by the Supreme Court. Accordingly, though the well-settled interpretation of *Belton* was changed by *Gant*, because it was objectively reasonable for [the officer] to have relied on that precedent, the good-faith exception to the exclusionary rule applies and the trial court correctly denied [the] defendant's motion to suppress.

Here, it cannot be disputed that the search of Mungo's car was unconstitutional under *Gant*. The police had arrested Mungo's passenger, Dixon, and secured him in the back of a squad car before Deputy Stuck searched Mungo's vehicle. Again, the question is whether Deputy Stuck reasonably relied on the established rule in *Belton*, so that the good-faith exception to the exclusionary rule applies, as in *Davis*.

Mungo argues that the search of his vehicle was not permissible under *Belton* because Michigan courts had never before applied *Belton* to permit a vehicle search incident to an arrest when the arrestee was a *passenger*, rather than the driver. He relies on statements in *Mungo II* that this is an issue of first impression because *Mungo I* was "the first published case in Michigan to address the applicability and extension of *Belton* to a vehicle search solely incident to a passenger's arrest."[54]

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[54] *Mungo II*, 288 Mich App at 184.

First, we note that *Mungo I* and *Mungo II* are not controlling authorities. " '[A] Court of Appeals opinion that has been vacated by the majority of the Supreme Court without an expression of approval or disapproval of this Court's reasoning is not precedentially binding.' "[55] Because the Michigan Supreme Court vacated *Mungo I* and *Mungo II*, they have no precedential value.

Second, at the time of the search in this case, *Belton* was binding precedent, and, therefore, reliance on *Belton* by the police to authorize the search of defendant's car was objectively reasonable. Michigan had followed the *Belton* rule since 1983, when this Court first applied *Belton* in *People v Miller (On Remand)*.[56] And even if no Michigan decision had applied *Belton* in the context of a search incident to a *passenger's* arrest, the broad holding of *Belton* itself permitted the search.

Third, there is no basis for Mungo's implicit suggestion that *Belton* was limited to vehicle searches incident to an arrest of the *driver* of a vehicle. To the contrary, the defendant in *Belton* was a *passenger* in the car that the police searched.[57] The four occupants of the car were arrested, and no distinction was made between the driver and the passengers. *Belton* articulated that its holding was to apply to the arrest of any occupant of the vehicle: "[W]e hold that when a policeman has made a lawful custodial arrest of the *occupant* of an automobile,

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[55] *People v Giovannini*, 271 Mich App 409, 414; 722 NW2d 237 (2006), quoting *People v Akins*, 259 Mich App 545, 550 n 8; 675 NW2d 863 (2003).

[56] *People v Miller (On Remand)*, 128 Mich App 298, 302; 340 NW2d 858 (1983).

[57] See *Belton*, 453 US at 462 ("The jacket was located inside the passenger compartment of the car in which the respondent had been a passenger just before he was arrested.").

he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."[58]

Notably, in *Mungo I*, this Court considered the scope of *Belton*. We rejected Mungo's attempt to distinguish *Belton* from this case on the basis that it was the passenger, not the driver, who was arrested and incident to whose arrest the search was conducted:

> We find no merit in defendant's argument that *Belton* is distinguishable from the present case and ought not be applied under these circumstances. . . . [A]s noted by Justice Rehnquist in *Belton*, *supra* at 463 (Rehnquist, J., concurring), the majority did not rest its decision on the automobile exception [to the warrant requirement]. Instead, the Supreme Court elected to premise its decision in *Belton* on the search-incident-to-an-arrest exception. In doing so, the Supreme Court carefully crafted its opinion. In its statement of facts, the Supreme Court indicated that "[t]here were four men in the car, one of whom was Roger Belton, the respondent in this case." *Belton*, *supra* at 455. Significantly, the Supreme Court did not premise its holding in *Belton* on the arrest of the driver of the car, Belton, or any other passenger. Rather, the Supreme Court set forth the concisely worded rule: "[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Belton*, *supra* at 460.[59]

This is precisely what occurred in this case. Deputy Stuck made an arrest of Dixon, an occupant of the vehicle owned and operated by defendant. Conse-

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[58] *Id*. at 460 (emphasis added). See also *Short*, 289 Mich App at 542-543, quoting *Gant*, 556 US at 341 ("Under *Belton* and its progeny, it was lawful for an officer to search a vehicle 'incident to the arrest of a *recent occupant* even if there is no possibility the arrestee could gain access to the vehicle at the time of the search.' ") (emphasis added).

[59] *Mungo I*, 277 Mich App at 587-588.

quently, Deputy Stuck was constitutionally permitted to conduct a search of the passenger compartment of defendant's car.[60]

VI. CONCLUSION

There is no dispute that Dixon was a recent occupant of Mungo's vehicle. Therefore, at the time of the search, his arrest allowed the police to search the car under *Belton*, and Deputy Stuck had a good-faith basis to rely on *Belton*. There is no evidence of police misconduct or an intentional violation of Mungo's Fourth Amendment rights. Because the well-established bright-line rule in *Belton* authorized a search incident to an arrest of a recent occupant of a vehicle, without regard to whether the occupant was the driver or a passenger, Deputy Stuck's search of Mungo's car after Dixon's arrest was permissible under *Belton*. *Davis* holds that under such circumstances, the exclusionary rule need not apply. Because the search was constitutional under existing law at the time of the search, *Davis* compels the same result here. We therefore conclude that the good-faith exception to the exclusionary rule applies and that the circuit court should not have suppressed the evidence pertaining to the gun that Deputy Stuck discovered in his search of Mungo's car and quashed the information.

We reverse and remand. We do not retain jurisdiction.

WHITBECK, P.J., and TALBOT and OWENS, JJ., concurred.

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[60] *Id.*

GAGNON v GLOWACKI

Docket No. 303449. Submitted January 11, 2012, at Detroit. Decided March 6, 2012, at 9:05 a.m. Leave to appeal denied, 491 Mich 949.

Randi Gagnon filed a motion in the Wayne Circuit Court seeking to change the domicile of her and Gary Glowacki's minor child from Plymouth, Michigan to Windsor, Ontario. The parties, who were never married, were awarded joint legal and joint physical custody of the minor child following his birth in 2005. The child primarily resided with Gagnon, with Glowacki having significant parenting time that he exercised on a consistent basis. Glowacki also exercised additional parenting time as much as possible, brought the child lunch, and took him out to eat and on vacations. Gagnon had been unemployed since the end of 2009, but had attempted to attend classes at different times. Because she lacked access to transportation, Gagnon had limited her job search to areas within walking distance of her deceased grandmother's home where she resided, but had received no offers or call-backs. Gagnon's mother, who owned the house in which Gagnon lived, expressed an intent to sell the house because she could not afford to continue paying the mortgage. Gagnon relied on child support and public assistance to provide for herself and the minor child. Gagnon filed a motion to move to Windsor because she had a job offer there, her family still lived there, and she would have access to family cars and available daycare by her mother. The circuit court, Eric William Cholack, J., granted the motion, finding that while an established custodial environment existed with both parents, it would not be affected by the move if Glowacki was given an additional weekend of parenting time each month and allowed to maintain his Tuesday and Thursday parenting time and if Gagnon was responsible for driving the child across the Canadian-American border. Glowacki appealed.

The Court of Appeals *held*:

1. A party to a custody order who requests a change of domicile has the burden of establishing by a preponderance of the evidence that the change is warranted. When a custody order prohibits a parent from changing the minor child's legal

residence to a different state without the court's permission (for changes in domicile analysis, Canada is considered another state), the court must consider the factors in MCL 722.31(4) when making a decision. The court must consider whether the change in legal residence has the capacity to improve the quality of life for both the child and the relocating parent, the degree to which each parent has complied with the parenting-time aspect of the custody order and the extent to which the planned domicile change was inspired by that parent's desire to defeat or frustrate the parenting-time schedule, the degree to which the parenting-time schedule could be modified if the domicile change request was granted to preserve and foster the parental relationship between the child and each parent, the degree to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation, and whether any domestic violence is involved. An increase in a relocating parent's earning potential may improve a child's quality of life. Gagnon proved by a preponderance of the evidence that moving the child to Windsor was warranted, and the trial court's findings were not against the great weight of the evidence. The move had the capacity to improve the minor child's quality of life because Gagnon would have immediate employment, a support system, access to transportation, and free daycare by her family. Although weekday parenting may be more difficult for Glowacki after the move, increasing his weekend parenting time would provide a realistic opportunity to preserve and foster the parental relationship because the number of hours of parenting time remained essentially the same.

2. If a trial court grants a change of domicile it must determine whether there will be a change in the established custodial environment. If it results in a change in the custodial environment, the relocating parent must prove by clear and convincing evidence that the change is in the minor child's best interest. It is possible to have a change of domicile without a corresponding change in the established custodial environment. However, a change in established custodial environment will occur if it would turn a party into a weekend-only parent. The trial court's conclusion that the move would not change the established custodial environment was not against the great weight of the evidence. Glowacki was given an additional weekend each month and was allowed to maintain his current parenting time if desired, with Gagnon ordered to transport the child across the border for weekday visits. The potential loss of a weekday overnight and school-time lunches would not destroy

the established custodial environment. The trial court's finding that the extra weekend of parenting time each month would offset the lack of any weekday parenting if weekday visits became too difficult to continue was erroneous because such a change would alter the established custodial environment by making him a weekend-only parent. However, because the trial court made it clear that it expected the weekday parenting to continue, its conclusion that the move would not alter the established custodial environment was not against the great weight of the evidence.

3. The trial court was not required to determine whether the moving party proved by a preponderance of the evidence that the move was in the best interest of the minor child. A best-interest analysis under MCL 722.23 is not required when a movant has proven by a preponderance of the evidence that a change of domicile is warranted under MCL 722.31 and the relocation would not alter any established custodial environment. MCL 722.31(4) is a specific statute that applies to requests for a change of domicile of the minor child, and if the Legislature had wanted the best-interest factors of MCL 722.23 to be applied to the analysis of this issue they would have been referred to specifically.

Affirmed.

JANSEN, P.J., concurring in part and dissenting in part, concurred with the majority's conclusion that the circuit court did not err with regard to its evaluation of the change-of-residence factors of MCL 722.31(4) and its determination that plaintiff had met her burden of establishing by a preponderance of the evidence that the move to Windsor, Ontario was warranted. Judge JANSEN would have held, however, that the circuit court's determination that the move to Windsor would not alter the child's established custodial environment was against the great weight of the evidence because the reality of the time involved with crossing the Canadian-American border would most likely render Glowacki a weekend-only parent.

1. PARENT AND CHILD — CHILD CUSTODY — CHANGES OF CHILD'S DOMICILE OR RESIDENCE.

A party to a custody order who requests a change of domicile has the burden of establishing by a preponderance of the evidence that the change is warranted; when a custody order prohibits a parent from changing the minor child's legal residence to a different state without the court's permission, the court must consider the factors in MCL 722.31(4) when making a decision;

Canada is considered another state for changes in domicile analysis; under MCL 722.31(4) the court must consider whether the change in legal residence has the capacity to improve the quality of life for both the child and the relocating parent, the degree to which each parent has complied with the parenting-time aspect of the custody order and the extent to which the planned domicile change was inspired by that parent's desire to defeat or frustrate the parenting-time schedule, the degree to which the parenting-time schedule could be modified if the domicile change request was granted to preserve and foster the parental relationship between the child and each parent, the degree to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation, and whether any domestic violence is involved; an increase in a relocating parent's earning potential may improve a child's quality of life.

2. PARENT AND CHILD — CHILD CUSTODY — CHANGES OF CHILD'S DOMICILE OR RESIDENCE — CHANGE IN ESTABLISHED CUSTODIAL ENVIRONMENT DETERMINATION.

If a trial court grants a change of domicile it must determine whether there will be a change in the established custodial environment; if the change of domicile results in a change in the custodial environment, the relocating parent must prove by clear and convincing evidence that the change is in the minor child's best interest; it is possible to have a change of domicile without a corresponding change in the established custodial environment; however, a change in established custodial environment will occur if it would turn a party into a weekend-only parent.

3. CHILD CUSTODY — CHANGES OF CHILD'S DOMICILE OR RESIDENCE — BEST-INTEREST FACTORS NOT APPLICABLE.

A best-interest analysis under MCL 722.23 is not required when a movant has proven by a preponderance of the evidence that a change of domicile is warranted under MCL 722.31 and the relocation would not alter any established custodial environment; MCL 722.31(4) is a specific statute that applies to requests for a change of domicile of the minor child, and if the Legislature had wanted the best-interest factors of MCL 722.23 to be applied to the analysis of this issue they would have been referred to specifically.

Plunkett Cooney (by *Robert G. Kamenec*) for Randi Gagnon.

Gentry Law Offices, P.C. (by *Kevin S. Gentry*), for Gary Glowacki.

Before: JANSEN, P.J., and WILDER and K. F. KELLY, JJ.

WILDER, J. Defendant appeals as of right the trial court's order granting plaintiff's request to change the domicile of their minor child from Michigan to Windsor, Ontario. We affirm.

I. BASIC FACTS

Plaintiff and defendant never married and had a son together, who was born on September 19, 2005. Around the time that the child was born, plaintiff and defendant stopped dating. Since birth, the child has lived with plaintiff in her grandmother's home in Plymouth. Defendant lives approximately 11½ miles away in Farmington Hills and is married. He and his wife have a child of their own, who was born in June 2010.

A court order awarded plaintiff and defendant joint legal and joint physical custody of their child. The order provided that the child would primarily reside with plaintiff, with defendant having parenting time every Tuesday and Thursday evening and alternate weekends. Additionally, defendant received an overnight with the child every other Thursday night.

Plaintiff worked as an assistant in a latch-key program in the Plymouth-Canton School district from 2003 until 2006, when she decided to quit because she determined that the cost of providing child care for her son was almost as much as her income. Plaintiff then became a nanny for her friend's children until the end

of 2009, which allowed her to take care of her son at the same time. During this time, plaintiff attempted to further her education by attending a paramedic class on Saturdays. Defendant would watch and care for their son while plaintiff was in class. Eventually, plaintiff quit to take care of her grandmother, who was in failing health.[1] In August 2007, plaintiff's car was repossessed because she could not afford to keep current with the payments. In 2009, she began to attend classes at a community college to study criminal justice. However, just a few months later, plaintiff lacked the means to get to the school because her friend would no longer allow her use of the friend's car. Consequently, plaintiff stopped attending the classes.

Plaintiff has tried to find other jobs in Michigan within walking distance of her home. Because of her desire to be home when the child was home, she limited her work availability to every other weekend and 12:30 p.m. to 3:30 p.m. Monday through Friday, when the child would either be with defendant or at preschool. Plaintiff did not receive any offers or call-backs.

Because of her lack of employment, plaintiff was relying on child support and public assistance from the state in the form of a bridge card. Because the monthly mortgage payment was $918 she could not continue to afford to live in her grandmother's home. After plaintiff's grandmother passed away, title in the home went to plaintiff's mother, who assumed the existing mortgage. Plaintiff was paying a portion of the mortgage ($500) each month to her mother. More recently, plaintiff has not been able to afford the $500, so her mother has been paying the full mortgage amount. Plaintiff's mother testified that she is unable to

[1] At some point later, not specified in the record, plaintiff's grandmother passed away.

continue paying the mortgage each month and that her intention is to sell the house.

Defendant is employed as a supervisor of the service department for an armored transport company and exercises additional parenting time as much as possible, bringing the child lunch, taking the child to McDonald's, and going on vacations. Defendant and the child talk on the phone two or three times per day, with the child initiating many of the calls. Defendant did the majority of transporting the child to preschool with his wife helping occasionally. Defendant also has been taking the child to ice skating classes on Tuesday evenings, during his parenting time. And defendant testified that he and the child have an "extremely strong" relationship and that their bond is "unbreakable." Even plaintiff testified that the child "idolizes his father like a superhero. He loves his father." Plaintiff added that the child looks to defendant for guidance and discipline in his day-to-day life when the child is with him.

Because of plaintiff's lack of access to transportation, defendant has always done all of the driving to and from Plymouth for his parenting time. It takes approximately 15 minutes to drive from his home in Farmington Hills to plaintiff's home in Plymouth. Defendant also has taken the child to all of his doctor appointments and dentist appointments.

Plaintiff desires to move to Windsor, where she grew up and her entire family still resides. Plaintiff also testified that she would gain access to a car because her mother and her mother's husband[2] have four cars between them.[3] Furthermore, plaintiff has a job offer to work as a waitress at The Penalty Box, which is a

[2] Plaintiff's parents are divorced but still both reside in Windsor.

[3] Plaintiff's mother testified that she would only allow plaintiff to have access to a vehicle if she lived in Windsor.

restaurant in Windsor where her mother also works. The job would be for 25 to 30 hours per week making approximately $18 per hour, including tips. Plaintiff's mother would be available to care for the child while plaintiff was at work or school because she would quit her job if necessary. Plaintiff plans to live with her father in his three-bedroom house for a few weeks until she is able to rent an apartment on her own. Additionally, plaintiff plans for the child to attend St. Maria Goretti Catholic Elementary School, which is located near the home of her father.

On August 30, 2010, plaintiff filed a motion to change the domicile of the child from Plymouth to Windsor. After conducting a hearing, the trial court granted the motion. In its order dated February 8, 2011, it found that plaintiff successfully established by a preponderance of the evidence that the move was warranted. It also found that an established custodial environment existed with both parents and that the established custodial environment would not be affected with the move "if Defendant were given an additional weekend each month and were allowed to maintain his Tuesday and Thursday parenting time sessions if desired." Because it found no change in the established custodial environment, the trial court found it unnecessary to consider any best-interest factors. The trial court also ordered plaintiff to drop off and pick up the child in Detroit for parenting time with defendant.

II. CHANGE OF DOMICILE: MCL 722.31

Defendant first contends that the trial court erred by addressing the change in legal residence factors set forth in MCL 722.31(4) from the perspective of plaintiff, rather than the child, and by improperly crediting some

of plaintiff's factual claims. Defendant also suggests that other factual findings of the trial court were erroneous. We disagree.

We review a decision on a petition to change the domicile of a minor child for an abuse of discretion. *Brown v Loveman*, 260 Mich App 576, 600; 680 NW2d 432 (2004). We review the trial court's findings in applying the MCL 722.31 factors under the great weight of the evidence standard. *Id.* "Under this standard, we may not substitute our judgment on questions of fact unless the facts clearly preponderate in the opposite direction." *McKimmy v Melling*, 291 Mich App 577, 581; 805 NW2d 615 (2011).

Under MCL 722.31(1) "a parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued" without court approval. Before allowing a change of legal residence, a court must consider the following factors in MCL 722.31(4):

> (a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.
>
> (b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.
>
> (c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child

and each parent; and whether each parent is likely to comply with the modification.

(d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.

(e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

"The party requesting the change of domicile has the burden of establishing by a preponderance of the evidence that the change is warranted." *McKimmy*, 291 Mich App at 582. In addition, MCL 722.31(4) requires that the trial court consider the factors "with the child as the primary focus in the court's deliberations."

On its face, MCL 722.31 is only applicable when a parent attempts to change the domicile of a child to a location that is over 100 miles away. However, when a child's custody is governed by a court order that prohibits the child from moving to another state without the permission of the court, as is the case here, regardless of the distance involved if the proposed residence change involves leaving the state, then the factors under MCL 722.31(4) are the proper criteria for the court to consider.[4] See *Mogle v Scriver*, 241 Mich App 192, 202-203; 614 NW2d 696 (2000).

With regard to MCL 722.31(4)(a), capacity to improve the quality of life for both the child and the relocating parent, the trial court found that the move would provide plaintiff with immediate employment, a support system, access to transportation, and free daycare by her family. The move would also make it more likely that plaintiff would "secure a steady income, return to school and pursue a brighter future. This could have a positive spillover effect on [the child]." The

[4] The parties do not dispute the application of MCL 722.31(4).

trial court also found insufficient evidence that the child would be harmed educationally by the move.

This Court has stated that "[i]t is well established that the relocating parent's increased earning potential may improve a child's quality of life." *Rittershaus v Rittershaus*, 273 Mich App 462, 466; 730 NW2d 262 (2007). Thus, the trial court's finding in this case that improvement in plaintiff's income would have a spill-over effect on the child is not an improper application of the law. In addition, the finding is not against the great weight of the evidence. There was evidence that plaintiff was unemployed, did not have a vehicle, and relied on defendant's child support payments and assistance from the state of Michigan for her income. In Windsor, however, she had a job offer, access to a vehicle, and free childcare available. While, as defendant contends, the child may not have suffered from a lack of transportation or basic necessities while in Michigan, the trial court's finding that the move had the *capacity* to improve his quality of life was not against the great weight of the evidence.

The trial court's finding that the move would not detrimentally affect the child's education was also not against the great weight of evidence. First and foremost, the evidence comparing the Plymouth-Canton schools with the Windsor schools was not entirely relevant because even if the motion to change domicile was denied, plaintiff stated she would be moving out of the Plymouth home and there was no guarantee that she would remain in the Plymouth-Canton School District. Additionally, because Michigan and Ontario use different "proficiency standards" when evaluating their schools, the statistics presented were of "limited use." Defendant is correct when he states that the standard is whether the move has the capacity to *improve* the

plaintiff's and the child's life. However, the fact that the trial court found this particular fact neutral does not preclude a finding that the move *overall* had the capacity to improve their lives.

Finally, defendant's argument that plaintiff and her mother created the alleged crisis so that plaintiff could move to Windsor and make defendant a weekend parent ultimately involves credibility determinations, and this Court must defer to the trial court on issues of credibility. *Mogle*, 241 Mich App at 201. The trial court was free to believe the testimony of plaintiff and her mother regarding plaintiff's employment opportunities, the availability for plaintiff to use her mother's extra vehicle, her mother's inability to provide childcare in Michigan, and the need to sell the Plymouth residence. Therefore, when evaluating all of the above facts, we conclude that the trial court's finding that the move did have the capacity to improve the quality of life of both plaintiff and the child was not against the great weight of evidence.

With regard to MCL 722.31(4)(b), the trial court found that plaintiff's move was not inspired by a desire to deny defendant parenting time. The trial court found that plaintiff has frequently given defendant more parenting time than required by the court order, consented to additional parenting time in the summer, is willing to give defendant an extra weekend or overnight per month, and is willing to transport the child across the border for parenting time.

Although weekday parenting time may be more difficult after the move, the trial court's finding that plaintiff did not intend to frustrate defendant's parenting time is also not against the great weight of the evidence. Plaintiff offered defendant an additional weekend per month and offered to transport the child

across the border for parenting time. Moreover, as previously noted, there was testimony in the record that the plaintiff's family and friends were in Windsor, plaintiff would have access to transportation in Windsor, plaintiff would have employment in Windsor, and plaintiff would have access to free childcare in Windsor. This factor also involves a credibility determination, on which we must defer to the trial court. *Id.*

With regard to MCL 722.31(4)(c), the trial court found that providing defendant with an additional weekend of parenting time per month, even if weekday parenting time was negatively affected, could provide an adequate basis for preserving and fostering the parental relationship between defendant and the child. The trial court concluded that this could give defendant additional extended time, which could foster an even closer parent-child relationship. In addition, the trial court found that the parties' history of cooperation regarding parenting time suggested that they would comply with the modified order. Moreover, the trial court found that plaintiff agreed to subject herself to the jurisdiction of the court while in Canada, and as such the trial court would be able to ensure compliance with its orders. See *Brausch v Brausch*, 283 Mich App 339, 354; 770 NW2d 72 (2009).

For this factor, our inquiry is "whether the proposed parenting-time schedule provides 'a realistic opportunity to preserve and foster the parental relationship previously enjoyed' by the nonrelocating parent." *McKimmy*, 291 Mich App at 584, quoting *Mogle*, 241 Mich App at 204. Furthermore, "the visitation plan need not be equal to the prior visitation plan in all respects." *Brown*, 260 Mich App at 603.

The trial court's finding that the new parenting time schedule would provide an adequate basis for preserv-

ing and fostering the parent-child relationship is not against the great weight of the evidence. The parenting time schedule after the move is essentially the same as the parenting time schedule before the move, with defendant given an extra weekend per month.

The trial court found that factors (d) and (e) were not applicable. Neither plaintiff nor defendant disputes these findings on appeal, and we do not find that the findings were against the great weight of evidence.

After evaluating all the above factors, the trial court determined that plaintiff met her burden of establishing by a preponderance of the evidence that moving the child to Windsor was warranted. This ultimate finding is not against the great weight of evidence. In short, the capacity of the move to improve both plaintiff's and the child's lives was not outweighed by any possible negative ramifications associated with the move.

III. ESTABLISHED CUSTODIAL ENVIRONMENT

Defendant next contends that the trial court erred by finding that the move would not change the established custodial environment with defendant and, therefore, failed to determine whether plaintiff proved by clear and convincing evidence that the move was in the best interest of the child. We disagree.

After granting a change of domicile, the trial court must determine whether there will be a change in the established custodial environment and, if so, determine whether the relocating parent can prove, by clear and convincing evidence, that the change is in the child's best interest.[5] *Id.* at 591.

According to MCL 722.27(1)(c),

[5] MCL 722.23 provides:

[t]he custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship should also be considered.

As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

In *Brown*, this Court noted that it is possible to have a change of domicile without changing the established custodial environment. *Id.* at 596.

The parties do not dispute that an established custodial environment existed with both plaintiff and defendant. The trial court's finding that the move would not change the established custodial environment was not against the great weight of the evidence.

The trial court found that the established custodial environment with both parents would not change if defendant was given an additional weekend per month and was allowed to maintain his current parenting time if desired. The trial court further found that, even if defendant decided to no longer exercise Thursday overnights, defendant would have the same number of overnights per month as he does now (six). In addition, if defendant stopped weekday parenting time, the extra time that defendant would receive for the additional weekend (48 hours) is almost equivalent to the maximum number of weekday hours that defendant currently exercises (58 hours). Finally, the court found that with advance planning, defendant would also be able to continue to attend school-related events.

In this case, the new parenting-time schedule was essentially the same, with defendant being given an additional weekend per month. Defendant's argument stresses that plaintiff's move is more than a mere 17-mile move because it crosses international borders. Specifically, defendant argues that because of the inherent extra time needed for him to make such border crossings, his weekday parenting time will be so adversely affected that he may have to opt out of them for the benefit of the child. Defendant notes that if the move results in him becoming a weekend-only dad, then the established custodial environment the child has

with him would necessarily be affected. This argument has some merit; however, the trial court ordered plaintiff to transport the child across the border to facilitate the weekday parenting time. Thus, on the face of it, the bulk of defendant's concerns about diminished weekday parenting time are not warranted. While the move to Windsor likely means the end of spontaneous lunches during the week and Thursday overnights with defendant,[6] defendant still can have the Tuesday/Thursday evening parenting time. The loss of the weekday overnight and the lunches is insufficient to destroy the established custodial environment between the child and defendant. Therefore, the trial court finding that the established custodial environment would not change if defendant was given an extra weekend per month and continued to maintain his current parenting time was not against the great weight of the evidence. If the child continued to see his father on weekdays and an extra weekend per month, he would continue to look to his father for guidance, discipline, necessities, and comfort. See MCL 722.27(1)(c).

However, the trial court's finding that the extra weekend per month of parenting time would offset the lack of any weekday parenting time if weekday visits became too difficult to continue, is erroneous. On the contrary, if the move were to render defendant a weekend-only parent, a change in the established custodial environment would result. *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008). But this particular finding was not central to the trial court's ultimate conclusion. The trial court's order made it

[6] We acknowledge that the extra time involved with morning rush hour and crossing the international border would likely require the child to wake up unreasonably early to timely arrive at school on Friday, thereby making weekday overnights difficult.

clear that defendant would maintain his weekday parenting time. At another part of the opinion, the trial court found that plaintiff and defendant were likely to comply with a modified order. Thus, defendant is not made a weekend parent by the terms of the order, and the trial court's finding that the move would not change the established custodial environment was not against the great weight of the evidence.

IV. CHILD'S BEST INTERESTS

Because there would be no change in the established custodial environment, the trial court was not required to determine whether plaintiff proved by clear and convincing evidence that the move was in the best interest of the child. See *Brown*, 260 Mich App at 590-591. However, defendant contends that, even if there was no change in the established custodial environment, the trial court was required to consider whether the move was in the best interest of the child, but at the lower preponderance of the evidence standard. We disagree.

Defendant's reliance on *Pierron v Pierron*, 486 Mich 81; 782 NW2d 480 (2010), is misplaced. *Pierron* did not specifically address a change of domicile under MCL 722.31. Instead, the *Pierron* Court was confronted with a situation where the parents, who had joint legal custody, could not agree regarding an important decision that affected the welfare of the child, specifically a change in the children's school.[7] In such instances, the court is responsible for resolving the issue in the child's best interests. MCL 722.25; *Pierron*, 486 Mich at 85. In *Pierron*, the plaintiff-father, the defendant-mother, and

[7] MCL 722.26a(7)(b) provides that the parents in a joint-custody setting "shall share decision-making authority as to the important decisions affecting the welfare of the child."

the children lived in Grosse Pointe Woods, with the children residing with the mother. The defendant later moved to Howell, which was 60 miles away,[8] and tried to enroll their children in Howell schools. The plaintiff objected to the children changing school districts and moved to have the courts decide the issue. The Supreme Court concluded that because the change would not modify the established custodial environment, the defendant did not have to prove by clear and convincing evidence that the change was in the best interests of the children. Rather, the Court stated that the "defendant is required to prove by a preponderance of the evidence that the proposed change of schools would be in the best interests of the children, using the best-interest factors identified in MCL 722.23." *Pierron*, 486 Mich at 89-90. In the present case, defendant invites us to extend this requirement to all change of domicile cases under MCL 722.31, when there also is no change to the established custodial environment. We decline the invitation.

This Court has repeatedly held that if a movant can establish that a relocation of domicile under MCL 722.31 is warranted by a preponderance of the evidence *and* the relocation would not alter any established custodial environment, then no best-interest analysis is necessary. *Spires v Bergman*, 276 Mich App 432, 437 n 1; 741 NW2d 523 (2007) ("Only when the parents share joint physical custody and the proposed change of domicile would also constitute a change in the child's established custodial environment is it also necessary to evaluate whether the change of domicile would be in the child's best interest."); *Rittershaus*, 273 Mich App at 470-471 ("We reiterate that the trial court is not required to consider the best-interest factors until it first determines that the modification actually changes the

[8] Thus, MCL 722.31 was not applicable.

children's established custodial environment."); *Brown*, 260 Mich App at 598 n 7 (stating that only when "the relocation would result in a change in parenting time so great as to necessarily change the established custodial environment that an inquiry into the best interest factors is necessary."). Nowhere in *Pierron* did the Court explicitly overrule or modify any of this Court's prior published opinions.

Thus, *Pierron* differed from the present case in that it did not involve a change of domicile analysis under MCL 722.31(4) but, rather, focused on the general procedure put in place to resolve an impasse when parents cannot decide on important decisions affecting the welfare of the child. *Pierron*, 486 Mich at 85, citing MCL 722.25(1) and *Lombardo v Lombardo*, 202 Mich App 151, 159; 507 NW2d 788 (1993).[9] We find that the situation presented in a change of domicile case under MCL 722.31 is distinguishable from the situation where two parents cannot agree on an important decision affecting a child's welfare. In the former, the decision involves more than the child—it also necessarily affects the relocating parent directly. Furthermore, MCL 722.31 is a specific statute that outlines the requirements necessary to grant a change of domicile. Conversely, the general provision of MCL 722.25 explicitly refers to the "best interests of the child." But as our Supreme Court has stated, " '[W]here a statute contains a general provision and a specific provision, the specific provision controls.' " *Duffy v Mich Dep't of*

[9] It is important to note that *Spires*, *Rittershaus*, and *Brown* all held that no best-interest analysis was necessary if the established custodial environment was not being altered even though they all had the benefit of this Court's earlier opinion in *Lombardo*, which stated that "a trial court must determine the best interests of the child in resolving disputes concerning 'important decisions affecting the welfare of the child' that arise between joint custodial parents." *Lombardo*, 202 Mich App at 160.

Natural Resources, 490 Mich 198, 215; 805 NW2d 399 (2011) (citation omitted). If the Legislature intended for the best-interest factors of MCL 722.21 to be evaluated in a change of domicile case, it easily could have done so. Instead, it limited the analysis to the factors enumerated in MCL 722.31(4).

V. CONCLUSION

We conclude that the trial court did not abuse its discretion when it granted plaintiff's motion to change the child's domicile to Windsor. Furthermore, the court did not err when it concluded that the established custodial environment would not be affected. As a result, the trial court was not required to determine if defendant proved by a preponderance of the evidence that the move was in the best interests of the child.

Affirmed.

K. F. KELLY, J., concurred with WILDER, J.

JANSEN, P.J. (*concurring in part and dissenting in part*). I concur with the majority's conclusion that the circuit court did not err with regard to its evaluation of the change-of-residence factors of MCL 722.31(4), or its determination that plaintiff met her burden of establishing by a preponderance of the evidence that the move to Windsor, Ontario was warranted. I respectfully dissent, however, from the majority's conclusion that the circuit court properly determined that the move to Windsor would not alter the child's established custodial environment.

The circuit court correctly determined that an established custodial environment existed with both parents in this case. See *Berger v Berger*, 277 Mich App 700, 707; 747 NW2d 336 (2008) (noting that "[a]n estab-

lished custodial environment may exist with both parents where a child looks to both the mother and the father for guidance, discipline, the necessities of life, and parental comfort"). I fully acknowledge that "[i]t is possible to have a change of domicile . . . without disturbing the established custodial environment." *Brown v Loveman*, 260 Mich App 576, 596; 680 NW2d 432 (2004); see also *Pierron v Pierron*, 282 Mich App 222, 249-250; 765 NW2d 345 (2009), aff'd 486 Mich 81 (2010); *DeGrow v DeGrow*, 112 Mich App 260, 267; 315 NW2d 915 (1982). However, on the facts of this case, I conclude that the move to Windsor, Ontario would change the child's established custodial environment and that the circuit court erred by determining that it would not.

Defendant has been closely involved in the child's upbringing since the child was born in 2005. Along with plaintiff, defendant has joint legal and physical custody of the child. The record evidence establishes that defendant consistently exercises his full complement of parenting time and spends additional time with the child whenever possible. Defendant spends time with the child both during the week and on weekends. In addition to defendant's regularly scheduled parenting time, he frequently brings the child lunch, has taken the child on vacations, and talks to the child on the telephone two or three times per day. Further, defendant is responsible for the vast majority of the child's transportation needs, and takes the child to all of his medical and dental appointments. Even plaintiff admits that defendant has an extremely close relationship with the child and that the child looks to defendant for guidance and discipline in his day-to-day life.

The majority concludes that plaintiff's move to Windsor with the child would not destroy defendant's strong

relationship with the child and would not render defendant a "weekend" parent. Consequently, according to the majority, the circuit court correctly determined that the move to Windsor would not affect the child's established custodial environment with defendant. I must respectfully disagree.

I realize that Canada is to be treated as a "state" for purposes of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq.*, that Canada is a signatory to the Hague Convention on Child Abduction, and that Canada "has adopted specific and far-reaching legislation protecting the rights of noncustodial parents, including those who are not Canadian citizens." *Brausch v Brausch*, 283 Mich App 339, 354; 770 NW2d 77 (2009); see also MCL 722.1105; *Atchison v Atchison*, 256 Mich App 531, 536-537; 664 NW2d 249 (2003). But I nevertheless believe that one parent's act of moving to a *foreign country* with a minor child is both quantitatively and qualitatively different than the scenario presented by a mere interstate move with a minor child within the United States. Traveling from one state to another is relatively simple; it does not require a passport or any special papers, and does not subject the traveler to potentially lengthy stops or searches at the border between the states. Indeed, the United States Constitution implicitly guarantees the right to interstate travel, "a right that has been firmly established and repeatedly recognized." *United States v Guest*, 383 US 745, 757; 86 S Ct 1170; 16 L Ed 2d 239 (1966); see also *Griffin v Breckenridge*, 403 US 88, 105-106; 91 S Ct 1790; 29 L Ed 2d 338 (1971). By contrast, the freedom to travel outside the United States, including to and from Canada, is clearly accorded less stature than the right to interstate travel. *Califano v Aznavorian*, 439 US 170, 176-177; 99 S Ct 471; 58 L Ed 2d 435 (1978); *Haig v Agee*, 453 US 280, 306-307; 101 S Ct 2766; 69 L

Ed 2d 640 (1981). Particularly in today's post-9/11 world, the act of traveling to or from a foreign country, even if only Canada, has become a much more complicated, burdensome, and time-consuming prospect.

I realize that plaintiff has agreed to bring the child into the United States for defendant's parenting time so that defendant, himself, does not have to face the burdens of traveling to Canada to see the child. However, I still believe that plaintiff's international move with the child poses substantial difficulties for defendant. The circuit court determined that despite plaintiff's move to Windsor with the child, defendant would still be able to spend time and interact with the child on a regular basis. The circuit court further observed that, even though defendant might lose his overnight visits with the child during the week, this could be remedied by granting defendant an additional weekend of parenting time each month. But unlike a move to Ohio or Indiana, it strikes me that plaintiff's move to Canada will have the potential of significantly obstructing defendant's weekday visitation schedule. Neither the parties nor the circuit court can know for certain whether plaintiff will be able to bring the child to Michigan for all scheduled parenting time with defendant. For instance, what will happen if plaintiff must wait to cross the international border with the child or, worse yet, if the border is closed completely? While such questions are not germane in the context of interstate moves, they are certainly relevant in the context of international moves. In short, I agree with defendant that the unpredictable and time-consuming nature of crossing the international border may ultimately affect his weekday parenting-time schedule so greatly that he will have to opt out of weekday visitation altogether on certain occasions. Unlike the majority, I conclude that such a scenario would effectively relegate defendant to the role

of a weekend-only parent, thereby altering the child's established custodial environment with defendant. *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008).

On the facts before us, I conclude that plaintiff's move to Windsor with the child would alter the established custodial environment that currently exists with defendant. I believe that the circuit court's finding to the contrary was clearly against the great weight of the evidence. MCL 722.28; *Berger*, 277 Mich App at 705.

Once a circuit court has granted a party permission to remove a minor child from the state, and assuming that the party's move would effectively alter the child's established custodial environment, the court must undertake an analysis of the best-interest factors set forth in MCL 722.23 to determine whether the party can prove by clear and convincing evidence that the removal and consequent change in the established custodial environment will be in the child's best interests. *Brown*, 260 Mich App at 583. In the instant case, the circuit court granted plaintiff's request for permission to remove the child to Windsor. Moreover, as I have already explained, I believe that such a move would alter the child's established custodial environment with defendant. Accordingly, in my opinion, the circuit court should have undertaken an analysis of the best-interest factors to determine whether the move to Windsor and consequent change in the established custodial environment was in the child's best interests. *Id*. I would reverse the circuit court's determination that the move to Windsor will not affect the child's established custodial environment and remand this matter to the circuit court for a best-interests determination in accordance with *Brown* and MCL 722.23.

PEOPLE v TAVERNIER

Docket No. 302678. Submitted January 5, 2012, at Detroit. Decided January 26, 2012. Approved for publication March 6, 2012, at 9:10 a.m. Application for leave to appeal dismissed, 492 Mich 859.

William S. Tavernier was convicted following a bench trial in the Wayne Circuit Court, Daniel A. Hathaway, J., of carrying a concealed weapon, possession of a firearm by a felon, possession of a firearm during the commission of a felony, operating a motor vehicle while intoxicated and with an occupant under 16 years old, and possession of marijuana. Defendant appealed, alleging that the court had erred when it denied his motion to suppress evidence that was discovered after the police officer stopped defendant's vehicle because he thought defendant might be driving while intoxicated, placed defendant in the back seat of a police vehicle, determined that defendant was under arrest, and searched the vehicle. The motion was based on *Arizona v Gant*, 556 US 332 (2009), which held that the police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe that the vehicle contains evidence of the offense of arrest. Defendant alleged that the court erred by determining that the officer had a reasonable belief that the vehicle might contain evidence that defendant had been driving while under the influence of drugs, "the offense of arrest."

The Court of Appeals *held*:

The facts known to the police officer at the time of the search, coupled with the officer's common sense, based on his experience, training, and the totality of the circumstances, were sufficient for the trial court to conclude that it was reasonable for the officer to believe that the vehicle might contain evidence of driving under the influence of drugs, "the offense of arrest." The search of the vehicle did not violate the *Gant* exception to the Fourth Amendment's warrant requirement. The trial court did not clearly err as a result of its factual findings and did not err by denying defendant's motion to suppress the evidence.

Affirmed.

SEARCHES AND SEIZURES — MOTOR VEHICLES — SEARCH FOLLOWING RECENT OCCUPANT'S ARREST.

The police may search a vehicle without a warrant incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe that the vehicle contains evidence of the offense of arrest; a trial court, in determining reasonableness, must consider whether the facts known to the officer at the time of the stop would warrant an officer of reasonable caution to suspect criminal activity; the officer's conclusion must be drawn from reasonable inferences based on the facts in light of the officer's training and experience; the reasonableness of an officer's suspicion is determined case by case on the basis of the totality of all the facts and circumstances; those circumstances must be viewed as understood and interpreted by law enforcement officers, not legal scholars, and deference should be given to the experience of the law enforcement officers and their assessments of criminal modes and patterns.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, and *Timothy A. Baughman*, Chief of Research, Training, and Appeals, for the people.

William W. Swor for defendant.

Before: DONOFRIO, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM. Defendant appeals as of right his convictions following a bench trial of carrying a concealed weapon, MCL 750.227, possession of a firearm by a felon, MCL 750.224f, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, operating a motor vehicle while intoxicated and with an occupant under the age of 16, MCL 257.625(7)(a)(*i*), and possession of marijuana, MCL 333.7403(2)(d). He was sentenced to two years' incarceration for the felony-firearm conviction to be served consecutively to three years' probation for the other convictions. We affirm.

On appeal, defendant contends that the trial court erred when it denied his motion to suppress evidence based on *Arizona v Gant*, 556 US 332, 343-344; 129 S Ct 1710; 173 L Ed 2d 485 (2009). We disagree. This Court reviews a trial court's findings of fact at a suppression hearing for clear error and reviews de novo its ultimate decision on a motion to suppress the evidence. *People v Hyde*, 285 Mich App 428, 438; 775 NW2d 833 (2009); *People v Mullen*, 282 Mich App 14, 21; 762 NW2d 170 (2008). Whether the exclusionary rule should be applied to a violation of the Fourth Amendment is a question of law reviewed de novo. *People v Custer*, 465 Mich 319, 326; 630 NW2d 870 (2001).

In *New York v Belton*, 453 US 454, 460; 101 S Ct 2860; 69 L Ed 2d 768 (1981), the United States Supreme Court held that when an officer lawfully arrests "the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile" as well as the "contents of any containers found within the passenger compartment . . . . However, in *Gant*, 556 US at 343, quoting *Thornton v United States*, 541 US 615, 632; 124 S Ct 2127; 158 L Ed 2d 905 (2004) (Scalia, J., concurring in the judgment), the Court held: "[W]e also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.' " The *Gant* Court further explained:

> Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unrea-

> sonable unless police obtain a warrant or show that another exception to the warrant requirement applies. [*Gant*, 556 US at 351.]

Several cases, including *Gant*, provide guidance in determining reasonableness. In *Terry v Ohio*, 392 US 1, 21-22; 88 S Ct 1868; 20 L Ed 2d 889 (1968), the Court stated that in determining reasonableness, the trial court must consider whether the facts known to the officer at the time of the stop would warrant a reasonably prudent person to suspect criminal activity. An officer's conclusion must be drawn from reasonable inferences based on the facts in light of his training and experience. *Id.* at 27. "The reasonableness of an officer's suspicion is determined case by case on the basis of the totality of all the facts and circumstances." *People v LoCicero (After Remand)*, 453 Mich 496, 501-502; 556 NW2d 498 (1996). "[T]hose circumstances must be viewed 'as understood and interpreted by law enforcement officers, not legal scholars . . . .' " *People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001), quoting *People v Nelson*, 443 Mich 626, 632; 505 NW2d 266 (1993). The United States Supreme Court has said that deference should be given to the experience of law enforcement officers and their assessments of criminal modes and patterns. *United States v Arvizu*, 534 US 266, 273; 122 S Ct 744; 151 L Ed 2d 740 (2002).

The *Gant* Court did not expressly define the meaning of the phrase "reasonable to believe," nor did it expound on when it is reasonable for an officer to believe that the passenger compartment of a vehicle might contain evidence of the crime for which the vehicle's occupant was arrested, but it did provide strong clues regarding what is reasonable. The Court said that the offenses of arrest in *Belton* (unlawful possession of marijuana) and *Thornton* (unlawful possession of marijuana and crack

cocaine) supplied "a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein." *Gant*, 556 US at 344. The Court also gave examples of offenses for which there is no reason to believe that evidence relevant to the crime of arrest would be found in the vehicle, such as civil infractions and driving without a valid license. *Id.* at 343-344. *Gant* also specifically stated that "the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein." *Id*. at 344.

The legality of the search in this case was based on the second prong of the *Gant* holding, that "it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id.* at 347, 351. Upon review de novo, we conclude that the trial court's factual findings were consistent with the testimony and other evidence in the record.[1] Before his search of defendant's vehicle, the arresting officer had information from another police officer that defendant was driving erratically and was possibly driving while intoxicated. When the officer activated his overhead lights to indicate to defendant to stop his vehicle, defendant's vehicle ran over a curb before it stopped. When the officer conducted the field sobriety tests, defendant acted confused and was not able to complete the tasks. Defendant told the officer that he had recently had surgery. The officer placed defendant in the police car. Although he was not handcuffed at the time, defendant was not able to get out of the police car. Then, the officer received information from defendant's brother that defendant was taking OxyContin for pain. On the basis of the totality of the

[1] The video of the arrest and search was not supplied to this Court. However, we conclude that the evidence in the record is sufficient to address and answer this question.

circumstances and his common sense in light of his training and experience, the police officer decided that defendant was under arrest and to search defendant's vehicle. The officer stated two reasons why he searched the vehicle: (1) "he was under arrest I was going to impound his vehicle . . . [and] [i]nventory it," and (2) "I was also looking for some sort of narcotic or maybe his pain medication that might have been in the vehicle. . . . Something that would show me why he was driving so badly."

In deciding defendant's motion to suppress evidence, the trial court determined that the officer had

> a sufficient reasonable suspicion based upon all those factors for him to conduct a search to determine whether there was any narcotics or prescription bottles that might have been in the vehicle that would further support his determination that there was–the Defendant had been in fact driving while impaired by drugs.

We hold that the facts known to the police officer at the time of the search, coupled with his common sense, based on his experience, training, and the totality of the circumstances, were sufficient for the trial court to conclude that it was reasonable to believe that the vehicle might contain evidence of driving under the influence of drugs, "the offense of arrest." The search of defendant's vehicle did not violate the *Gant* exception to the Fourth Amendment. The court did not clearly err in its factual findings. Upon review de novo, we hold that the trial court did not err by denying defendant's motion to suppress the evidence found during the search of his vehicle.

Affirmed.

DONOFRIO, P.J., and STEPHENS and RONAYNE KRAUSE, JJ., concurred.

HOUSTON v GOVERNOR

Docket Nos. 308724 and 308725. Submitted February 29, 2012, at Lansing. Decided March 7, 2012, at 9:00 a.m. Reversed, 491 Mich 876.

Frank Houston, Edna Freier, Christy Jenson, and others filed an action in the Ingham Circuit Court against the Governor and the Oakland County Board of Commissioners challenging the constitutionality of 2011 PA 280, which amended provisions of MCL 46.401, MCL 46.402, and MCL 46.403. The act reduced the number of commissioners that a county with a population greater than 50,000 may have and provided for reapportionment in counties that were not in compliance with the newly reduced level of commissioners. In addition, the act changed the membership of the apportionment commission for certain counties. The amendments in effect reduced only the size of the Oakland County Board of Commissioners and required it to adopt a reapportionment plan for districts from which its members were elected. The court, William E. Collette, J., ruled that the act was unconstitutional and granted summary disposition in favor of plaintiffs. The court concluded that 2011 PA 280 was a local act that the Legislature had failed to enact in compliance with Const 1963, art 4, § 29; that it amounted to an unfunded mandate enacted in violation of the Headlee Amendment, Const 1963, art 9, § 29; and that it would not allow a proper opportunity for judicial review of the required new apportionment before the next election. The Oakland County Board of Commissioners (Docket No. 308724) and the Governor (Docket No. 308725) appealed.

The Court of Appeals *held*:

1. Const 1963, art 4, § 29 prohibits the Legislature from enacting a local or special act when a general act could be applicable. When a local or special act is passed, it may not take effect until 2/3 of each house and a majority of the electors voting in the district affected approve it. Courts examine the substance of the act rather than its form when evaluating whether it is a local or special act. If a statute cannot apply to other units of government, it is not a general act. Moreover, when a statute can affect only one municipality within a specific time frame, the existence of practically

impossible scenarios by which the statute can apply to other municipalities does not remove the statute from being considered an unconstitutional local act. The circuit court properly determined that 2011 PA 280 violated Const 1963, art 4, § 29. The 30-day apportionment requirement in MCL 46.401(2) applied only to counties that were not in compliance with the act on the very day the act became effective, specifically, only to Oakland County. The act was therefore a local law because it was directed at, and applied only to, Oakland County.

2. Courts must uphold the constitutionality of an act to the greatest extent possible, and an entire act will not be invalidated if an offending provision can be severed from the act. The circuit court erred by invalidating 2011 PA 280 in its entirety. Because the first sentence of MCL 46.401(2), as amended by 2011 PA 280, which sets forth the procedure for reducing the number of commissioners if a county has more commissioners than allowed, constituted a local act that violated Const 1963, art 4, § 29, that sentence had to be struck from the act, but the remainder of the act was a valid statute of general application.

3. It was unnecessary to address the alternative bases offered by the circuit court for concluding that the act was unconstitutional.

Affirmed in part, reversed in part, and remanded for entry of an order invalidating the first sentence of MCL 46.401(2) but upholding the constitutionality of the remainder of the act.

METER, P.J., concurring in part and dissenting in part, would have held that 2011 PA 280 was constitutional in its entirety and reversed the circuit court's decision. Judge METER concluded that 2011 PA 280 was a general law because all counties are subject to the requirements of the act. In addition, he would have held that the circuit court erred by concluding that the act violated the Headlee Amendment and by holding that the act unconstitutionally deprived Oakland County electors of the right to seek judicial review of the reapportionment required by the act.

Sachs Waldman (by *Mary Ellen Gurewitz*) for Frank Houston, Edna Freier, Christy Jenson, Loretta Coleman, Jim Nash, David Richards, and Eric Coleman.

Honigman Miller Schwartz & Cohn LLP (by *John D. Pirich* and *Andrea L. Hansen*) for the Oakland County Board of Commissioners.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Ann M. Sherman* and *Christina M. Grossi*, Assistant Attorneys General, for the Governor.

Before: METER, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

M. J. KELLY, J. This case involves plaintiffs' challenge to the constitutionality of 2011 PA 280 (Public Act 280). The circuit court determined that Public Act 280 is unconstitutional and granted summary disposition in favor of plaintiff. The Oakland County Board of Commissioners appealed that order by right in Docket No. 308724, and the Governor appealed the same order by right in Docket No. 308725. We conclude that Public Act 280 contains a provision that constitutes a local act. Because the Legislature enacted Public Act 280 without complying with the requirements of Const 1963, art 4, § 29, that provision of the act is unconstitutional. Accordingly, while we agree with the circuit court's conclusion that a portion of Public Act 280 is unconstitutional, we do not agree that the whole act is therefore also unconstitutional. For that reason, we affirm in part, reverse in part, and remand this case to the circuit court.

I. FACTUAL BACKGROUND

After the 2010 decennial census, but before the enactment of Public Act 280, the apportionment commission for Oakland County adopted a reapportionment plan for the Oakland County Board of Commissioners. The apportionment commission adopted the plan consistently with the statutory scheme applicable to the apportionment of county boards of commission-

ers. See MCL 46.401 *et seq*. Thereafter, the Legislature enacted Public Act 280, which the Governor signed on December 19, 2011.

With Public Act 280, the Legislature amended key provisions of MCL 46.401, MCL 46.402, and MCL 46.403. The Legislature amended MCL 46.401(1) to reduce the maximum number of commissioners that a county may have from 35 to 21. It also amended MCL 46.401 to include a new subsection, MCL 46.401(2), which provides for reapportionment in counties that were not in compliance with the newly reduced level of commissioners:

> If a county is not in compliance with [MCL 46.402] on the effective date of the amendatory act that added this subsection, the county apportionment commission of that county shall, within 30 days of the effective date of the amendatory act that added this subsection, apportion the county in compliance with [MCL 46.402]. For subsequent apportionments in a county that is apportioned under this subsection, the county apportionment commission of that county shall comply with the provisions of subsection (1).

In addition, the Legislature amended MCL 46.403(1) to change the membership of the apportionment commission for certain counties: "In a county with a population of 1,000,000 or more that has adopted an optional unified form of county government under 1973 PA 139, MCL 45.551 to 45.573, with an elected county executive, the county apportionment commission shall be the county board of commissioners."

The practical effect of these amendments was to reduce the Oakland County Board of Commissioners—and only the Oakland County Board of Commissioners—from 35 to 21 members and require the Oakland County Board of Commissioners to adopt a reapportionment plan for the districts from which its members will be elected.

The circuit court examined Public Act 280 and determined that it was unconstitutional on three grounds: it determined that Public Act 280 was a local act and that the Legislature had failed to enact it in compliance with Const 1963, art 4, § 29; that it amounted to an unfunded mandate enacted in violation of the Headlee Amendment, see Const 1963, art 9, § 29; and that it would not allow a proper opportunity for judicial review of the required new apportionment. As more fully explained below, we agree that Public Act 280 is unconstitutional in part because it is a local act that was enacted in contravention of Const 1963, art 4, § 29.

II. ANALYSIS

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). Similarly, this Court reviews de novo whether an act was enacted in violation of Michigan's Constitution. See *Taxpayers of Mich Against Casinos v Michigan*, 471 Mich 306, 317-318; 685 NW2d 221 (2004). This Court presumes that a statute is "constitutional unless its unconstitutionality is clearly apparent." *McDougall v Schanz*, 461 Mich 15, 24; 597 NW2d 148 (1999).

B. LOCAL ACTS

Since the adoption of Michigan's 1908 Constitution, see Const 1908, art 5, § 30, there has been a provision limiting the Legislature's authority to enact local or special acts. With Const 1963, art 4, § 29, the people of this state provided that the Legislature "shall pass no local or special act in any case where a general act can

be made applicable" and, when the Legislature elects to pass a local or special act, the act shall not take effect "until approved by two-thirds of the members elected to and serving in each house and by a majority of the electors voting thereon in the district affected." The people adopted this limitation in order to prevent the Legislature's " 'pernicious practice' " of passing local acts, which amounted to " 'a direct and unwarranted interference in purely local affairs and an invasion of the principles of local self-government.' " *Advisory Opinion on Constitutionality of 1975 PA 301*, 400 Mich 270, 286; 254 NW2d 528 (1977), quoting *Attorney General ex rel Dingeman v Lacy*, 180 Mich 329, 337-338; 146 NW 871 (1914). This practice led to abuse because the " 'representatives from unaffected districts were usually complaisant, and agreed to its enactment without the exercise of that intelligence and judgment which all legislation is entitled to receive . . . .' " *Advisory Opinion*, 400 Mich at 286.

When evaluating whether an act is a local or special act, courts will examine the substance of the act rather than its form. *Rohan v Detroit Racing Ass'n*, 314 Mich 326, 349; 22 NW2d 433 (1946). Further, the fact that an act contains limitations—such as a population threshold—that appear to target a single municipality does not remove the act from general application if it is possible that another municipality or county might someday qualify for inclusion:

> The probability or improbability of other counties or cities reaching the statutory standard of population is not the test of a general law. In the above cases the acts were sustained as general upon the hypothesis that other municipalities would attain the provided population. By the same token, it must be assumed here that other counties will [meet the criteria.] Unless the act works under such conditions, it is a local, not

> a general act. [*City of Dearborn v Wayne Co Bd of Supervisors*, 275 Mich 151, 157; 266 NW 304 (1936).]

"However, where the statute cannot apply to other units of government, that is fatal to its status as a general act." *Michigan v Wayne Co Clerk*, 466 Mich 640, 643; 648 NW2d 202 (2002).

In holding Public Act 280 to constitute an unconstitutional local act, the circuit court emphasized that on its effective date Public Act 280 will only affect Oakland County—Oakland County alone will lose commissioners and be required to undertake a second apportionment within 30 days of the act's effective date. To the extent that Public Act 280 requires reapportionment within 30 days of its enactment, we agree with the circuit court's conclusion that it is a local act. In this regard, we conclude that our Supreme Court's decision in *Wayne County Clerk* is dispositive.

In *Wayne County Clerk*, the Legislature enacted a public act that would have required the city of Detroit to place a proposal on the August 6, 2002, election ballot to change an at-large system of electing its city council to a single-member district plan of organization. *Wayne County Clerk*, 466 Mich at 641. The statute at issue in *Wayne County Clerk* did not mention Detroit by name. *Id*. at 642. Rather, it "purport[ed] to apply to any city with a population of more than 750,000 that has a nine-member at-large elected city council." *Id.* However, only Detroit met that population requirement. *Id*.

Our Supreme Court first recognized that population-based statutes "have been upheld against claims that they constitute local acts where it is possible that other municipalities or counties can qualify for inclusion if their populations change." *Id.* Nevertheless, the Court held that the statute at issue did not qualify as a general act because, even if another city reached the population

threshold of 750,000 and had a nine-member at-large council, the statute would not apply because of the requirement that the proposition appear on the August 6, 2002 ballot. Because there would not be a census before that date, no other city could meet the population requirement. *Id.* at 643. Accordingly, our Supreme Court concluded that the statute did not validly direct placement of the proposition on the August 6, 2002, ballot because it was not passed by a $^2/_3$ vote of the Legislature as required by Const 1963, art 4, § 29. In other words, the statute at issue in *Wayne County Clerk* was unconstitutional because it was an improperly adopted local act. *Id.* at 643-644.

As in *Wayne County Clerk*, it is manifest that Public Act 280 is—at least in part—directed at a single locality: Oakland County. Oakland County alone would be required to reduce the number of members on its county board of commissioners and undertake a second reapportionment of its county board of commissioners within 30 days of the effective date of the act. Moreover, as in *Wayne County Clerk*, there is no realistically possible way in which any other locality could be affected by these requirements within that 30-day time frame.

Defendants attempt to refute this fact by imagining hypothetical situations in which other counties could enlarge the number of members on their county commissions and adopt new forms of county governance so as to become subject to the requirement of Public Act 280 that they reduce the size of their county commissions and undertake reapportionment. But defendants' attempts do not alter the fact that the first sentence of MCL 46.401(2), as amended by 2011 PA 280, will invariably apply only to Oakland County. It is implicit in the *Wayne County Clerk* holding that when a statute can affect only one municipality within a specific time

frame, *practically* impossible scenarios should not remove the statute from being considered an unconstitutional local act. Particularly, our Supreme Court considered it decisive that no other city could qualify under the statute "because there will be no new census before that date [August 6, 2002]." *Wayne Co Clerk*, 466 Mich at 643. Obviously, the statute at issue in *Wayne County Clerk* was passed before the August 6, 2002, election date that it implicated. And, at least in theory, one might imagine a scenario in which Congress required a new census to have been conducted in the interval between the passage of the statute at issue and the August 6, 2002, election. After all, US Const, art I, § 2, cl 3 does not preclude Congress from providing for a census to be conducted more frequently. But our Supreme Court did not adopt a test premised on such imaginings; rather, the Court recognized the practical reality that there would be no new census before August 6, 2002. We likewise decline defendants' invitation to consider strained and unrealistic scenarios in order to uphold the constitutionality of what is manifestly a local act.

For similar reasons, we must respectfully disagree with our dissenting colleague. The dissent notes that 1966 PA 261 had a similar 30-day provision for reapportionment, but the key difference here is that the other criterion in 1966 PA 261—namely the statement that it applied to counties with a population under 75,000—clearly rendered that apportionment requirement applicable to multiple counties. In contrast, because it applies only to counties that are not in compliance with the act *on the very day* that the act becomes effective, the 30-day apportionment requirement in Public Act 280 will plainly apply to only one county: Oakland County. MCL 46.401(2), as amended by 2011

PA 280.[1] Indeed, under the act's terms, even if every other county suddenly and miraculously became noncompliant on the day after the act became effective, those counties—unlike Oakland County—would not have to reduce their commissioners and reapportion until the time set for "subsequent apportionments," which can only mean the next decennial census. *Id.* Accordingly, we must conclude that the 30-day reapportionment requirement was intended to target Oakland County alone—and that makes it a local act.

C. SEVERABILITY

Although we agree with the circuit court's conclusion that Public Act 280 is unconstitutional to the extent that it targets Oakland County alone, we do not agree that the remaining portions of the act constitute an impermissible local act. Because we must uphold the constitutionality of the act to the greatest extent possible, we will not invalidate the entire act if the offending provisions can be severed from the act. *Avis Rent-A-Car Sys, Inc v City of Romulus*, 400 Mich 337, 348-349; 254 NW2d 555 (1977). Because it is undisputed that it was not enacted in compliance with Const 1963, art 4, § 29, we hold that the first sentence of MCL 46.401(2), as amended by 2011 PA 280,[2] is uncon-

[1] This Court will not uphold an act as a general act when it is plain that the requirements are a "manifest subterfuge" designed to limit its application to only one locality. *Avis Rent-A-Car Sys, Inc v City of Romulus*, 400 Mich 337, 345 n 7; 254 NW2d 555 (1977) (noting that an act with a population requirement that does not provide for the inclusion of other localities as they reach the population requirement is a local act).

[2] This sentence reads: "If a county is not in compliance with [MCL 46.402] on the effective date of the amendatory act that added this subsection, the county apportionment commission of that county shall, within 30 days of the effective date of the amendatory act that added this

stitutional and should be struck from the act. In all other respects, Public Act 280 is a valid statute of general application.

III. CONCLUSION

For these reasons, we affirm the circuit court's grant of summary disposition with respect to the unconstitutionality of the first sentence of MCL 46.401, as amended by 2011 PA 280, as an improperly enacted local act. However, we do not agree that the remaining provisions of the act are invalid on the same basis; those provisions are sufficiently general to have been passed without meeting the requirements of Const 1963, art 4, § 29. Moreover, given our resolution of this issue, we need not address the alternate bases proffered by the circuit court for concluding that 2011 PA 280 is unconstitutional. The practical effect of our decision today is to permit Oakland County to retain its current level of commissioners and its current apportionment until after the next decennial census.[3] As such, the trial court's concerns about an unfunded mandate and the lack of judicial oversight of the reapportionment process are no longer of concern. Therefore, we conclude that the circuit court erred to the extent that it invalidated the entire act as unconstitutional. For these reasons, we affirm the circuit court's order in part, reverse it in part, and remand for entry of an order

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subsection, apportion the county in compliance with [MCL 46.402]." MCL 46.402, as amended by 2011 PA 280.

[3] The remaining provision of MCL 46.401(2), as amended by 2011 PA 280, states: "For subsequent apportionments in a county that is apportioned under this subsection, the county apportionment commission of that county shall comply with the provisions of subsection (1)." Thus, Oakland County will not have to comply with amended MCL 46.401, which incorporates amended MCL 46.402, until the next reapportionment.

invalidating the offending sentence of the act, but otherwise upholding the constitutionality of the act.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Because there were important issues of public concern, we order that no party may tax its costs. MCR 7.219(A).

RONAYNE KRAUSE, J., concurred with M. J. KELLY, J.

METER, P.J. (*concurring in part and dissenting in part*). Because I believe that 2011 PA 280 is constitutional in its entirety, I respectfully dissent from the part of the majority opinion that invalidates the first sentence of MCL 46.401(2). I would reverse the decision of the circuit court and uphold the act as written.

In concluding that the first sentence of MCL 46.401(2), as amended by 2011 PA 280, is unconstitutional as an improperly adopted local law, the majority finds dispositive *Michigan v Wayne Co Clerk*, 466 Mich 640; 648 NW2d 202 (2002). The statute at issue in that case applied to a city with a population of 750,000 or more with a city council composed of nine at-large council members. *Id*. at 642. Only Detroit met the criteria and thus was required to place a particular question on the ballot at the August 6, 2002, general election. *Id*. The Supreme Court, in deciding whether the statute was a general or local act, stated:

> In this case, the statute plainly fails to qualify as a general act. Even if another city reaches a population of 750,000, and has a nine-member at-large council, [2002 PA] 432 would not apply because of its requirement that the proposition appear on the ballot at the August 6, 2002, election. No other city can meet that requirement because there will be no new census before that date. [*Id*. at 643.]

MCL 46.401, as amended by 2011 PA 280, provides:

> (1) Within 60 days after the publication of the latest United States official decennial census figures, the county apportionment commission in each county of this state shall apportion the county into not less than 5 nor more than 21 county commissioner districts as nearly of equal population as is practicable and within the limitations of [MCL 46.402].
>
> (2) If a county is not in compliance with [MCL 46.402] on the effective date of the amendatory act that added this subsection, the county apportionment commission of that county shall, within 30 days of the effective date of the amendatory act that added this subsection, apportion the county in compliance with [MCL 46.402]. For subsequent apportionments in a county that is apportioned under this subsection, the county apportionment commission of that county shall comply with the provisions of subsection (1).

MCL 46.402, as amended by 2011 PA 280, provides:

County Population	Number of Commissioners
Under 5,001	Not more than 7
5,001 to 10,000	Not more than 10
10,001 to 50,000	Not more than 15
Over 50,000	Not more than 21

MCL 46.403(1), as amended by 2011 PA 280, states:

> Except as otherwise provided in this subsection, the county apportionment commission shall consist of the county clerk, the county treasurer, the prosecuting attorney, and the statutory county chairperson of each of the 2 political parties receiving the greatest number of votes cast for the office of secretary of state in the last preceding general election. If a county does not have a statutory chairperson of a political party, the 2 additional members shall be a party representative from each of the 2 political parties receiving the greatest number of votes cast for the office of secretary of state in the last preceding general

> election and appointed by the chairperson of the state central committee for each of the political parties. In a county with a population of 1,000,000 or more that has adopted an optional unified form of county government under 1973 PA 139, MCL 45.551 to 45.573, with an elected county executive, the county apportionment commission shall be the county board of commissioners. The clerk shall convene the apportionment commission and they shall adopt their rules of procedure. A majority of the members of the apportionment commission shall be a quorum sufficient to conduct its business. All action of the apportionment commission shall be by majority vote of the commission.

There is a fundamental difference between the statute at issue in *Wayne County Clerk* and 2011 PA 280. The crux of the statute as discussed in *Wayne County Clerk* was the requirement that a certain question be placed on the ballot on August 6, 2002. *Wayne Co Clerk*, 466 Mich at 642. Because of this temporal limitation, it was not possible for a city other than Detroit to be subject to the requirement of the statute. *Id*. at 642-643. All counties, by contrast, are subject to the requirements of 2011 PA 280. As stated by the Oakland County Board of Commissioners on appeal: "The [number] of allowable commissioners applies immediately to every county with a population over 50,000, which includes multiple counties, not just Oakland County. There are at least 35 counties that this limitation will apply to upon the effective date, and it will continue to apply to every county that ever reaches 50,000 in the future." While the ballot requirement in *Wayne County Clerk* applied only to Detroit, the limitation on commissioners at issue here *applies to multiple counties*. It is a general law, not a local law.[1]

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[1] Even if I were to focus on the action of "reduction" in determining whether the act, or whether the first sentence of MCL 46.402(2), is

The circuit court focused, as does the majority, on the procedural requirement stating that

> [i]f a county is not in compliance with [MCL 46.402] on the effective date of the amendatory act that added this subsection, the county apportionment commission of that county shall, within 30 days of the effective date of the amendatory act that added this subsection, apportion the county in compliance with [MCL 46.402].

A similar 30-day requirement was included in the county apportionment act as originally enacted. 1966 PA 261.[2] The act stated, in part:

> In counties under 75,000, upon the effective date of this act, the boards of supervisors of such counties shall have not to exceed 30 days into [sic] which to apportion their county into supervisor districts in accordance with the provisions of this act. If at the expiration of the time as set forth in this section a board of supervisors has not so apportioned itself, the county apportionment commission shall proceed to apportion the county under the provisions of this act. [MCL 46.401, as added by 1966 PA 261.]

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general or local—i.e., even if I were to conclude that a "reduction" of commissioners by multiple counties must be necessary in order for the act or the sentence to be a general law—it would be possible for a county such as Wayne to modify its charter before the effective date of 2011 PA 280 to have more than 21 commissioners and thus be required to undertake a "reduction." Unlike the majority, I do not find this possibility akin to the possibility of a new census occurring in *Wayne County Clerk*. In *Wayne County Clerk*, the act in question was passed in 2002, with an effective date of June 6, 2002. See 2002 PA 432. It was fundamentally impossible that a time-consuming new census could have been completed before the August 6, 2002, election referred to in the act. See *Wayne Co Clerk*, 466 Mich at 643.

[2] I include this information not to imply, misleadingly, that the 30-day provision in 1966 PA 261 applied to only one county but instead to illustrate that in enacting 2011 PA 280 the Legislature was following a template, including an immediate compliance provision, set forth years ago for the county apportionment act.

In *Kizer v Livingston Co Bd of Comm'rs*, 38 Mich App 239, 246; 195 NW2d 884 (1972), the Court analyzed the county apportionment act and considered whether the 30-day period that allowed for self-apportionment applied only to the time immediately following the enactment of the statute or whether it applied after each census. The Court concluded that the 30-day period was a single exception allowing for self-apportionment for 30 days after enactment of the statute. *Id*. at 256. In *In re Apportionment of Tuscola Co Bd of Comm'rs 2001*, 466 Mich 78, 84 n 6; 644 NW2d 44 (2002), the Michigan Supreme Court expressed "concerns" about the holding in *Kizer* but declined to resolve the issue anew. 2011 PA 280 sets forth a clearer directive with regard to the 30-day compliance period following the effective date of the act. I cannot conclude that the inclusion of a compliance provision for the period immediately following the effective date of the act somehow transforms this general act, or a part of this general act, into a local act that must be voided. As noted in *Chamski v Wayne Co Bd of Auditors*, 288 Mich 238, 258; 284 NW 711 (1939), statutes should be construed, if possible, to give full effect to every provision.

Chamski is a somewhat analogous case. In *Chamski*, the Michigan Supreme Court considered whether a statute that related to the selection and number of probate judges and that contained certain population classifications was a general act or an invalid local act. *Id*. at 253, 257. Although the Court did not provide a particularly detailed analysis concerning the applicability of the law to various counties, it did conclude that because "[t]he act in question provides a specific method for its application to other counties as they acquire greater population," it came within the rule specifying that an act applying to only one city or

county may nonetheless be valid as a general act if it could, in the future, apply to others. *Id*. at 256-257. The Court also stated:

> It is contended by plaintiff the "open end" provided in the act is closed by operation of two clauses contained therein, one that:
>
> "A selection as herein provided shall be made within fifteen days of the effective date of this act;"
>
> and the other:
>
> "*Provided,* That any county that has failed to elect an additional probate judge, or judges, under this section, prior to July one, nineteen hundred thirty-two, shall be not entitled to elect any additional judge, or judges, under the provisions of this section." [*Id*. at 257.]

The Court stated that "[i]f the legislature had intended the above clauses to prevent inclusion of counties subsequently acquiring the required population, it would not have provided a method for such inclusion" and that "[t]he clauses pointed out were to promote speedy action on the part of counties having the required population." *Id*. at 257-258. The Court held the act in question constitutional. *Id*. at 258.

Although I conclude above that the 21-commissioner limit at issue in the present case clearly applies to multiple counties *already*, 2011 PA 280 also provides a mechanism for counties to be reevaluated in the future to ensure that they comply with the various commissioner limits. There must be a certain reapportionment within 30 days of the effective date of 2011 PA 280, but 2011 PA 280 also provides a mechanism for reapportionments in the future. As such, 2011 PA 280 as a whole falls within the general parameters of the *Chamski* holding and is constitutional.

MCL 46.403(1), as amended by 2011 PA 280, provides that "[i]n a county with a population of 1,000,000 or more that has adopted an optional unified form of county government under 1973 PA 139, MCL 45.551 to 45.573, with an elected county executive, the county apportionment commission shall be the county board of commissioners." This provision, too, is a general law, not a local law. As again aptly stated by the Oakland County Board of Commissioners on appeal, the requirement

> concerning the composition of the county apportionment commission applies to each and every county that ever meets the three stated requirements and there is no time limitation for doing so. Because multiple counties could easily achieve this result,[3] certainly by the next census, 2011 PA 280 easily passes the 'test' for a general law . . . .

Wayne County Clerk and *Chamski* are applicable to MCL 46.403, as amended by 2011 PA 280, and indicate that this section is constitutional.

I conclude that the circuit court erred by ruling that 2011 PA 280 is unconstitutional as an improperly enacted local act. My conclusion is informed in part by the axiom that "[s]tatutes . . . must be construed in a constitutional manner if possible." *Gora v City of Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998). As noted in *City of Owosso v Pouillon*, 254 Mich App 210, 213; 657 NW2d 538 (2002), "[s]tatutes are presumed to be constitutional unless their unconstitutionality is clearly apparent." I find no clearly apparent unconstitutionality in assessing whether any part of 2011 PA 280 constitutes a local act.

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[3] By upholding MCL 46.403, the majority implicitly concludes that multiple counties could achieve this result, but it simultaneously concludes that it will be impossible for a county such as Wayne to enlarge its number of commissioners before the effective date of 2011 PA 280.

I also conclude that the circuit court erred by deeming 2011 PA 280 unconstitutional as a violation of the Headlee Amendment, Const 1963, art 9, § 29. The Headlee Amendment provides, in relevant part:

> The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs. [Const 1963, art 9, § 29.]

By the plain language of the Headlee Amendment, the state is only required to reimburse a locality for "any necessary increased costs" of a new activity or service or an increase in the level of an activity or service required by a new law adopted by our Legislature. Perhaps the reapportionment of the Oakland County Board of Commissioners required by 2011 PA 280 could be considered a "new activity" because it requires a second or replacement reapportionment in accordance with the new requirements for county commissions adopted by the act. I will assume as much, without actually deciding the issue. Nevertheless, reasonably considered, 2011 PA 280 does not impose "any necessary increased costs" on Oakland County. Considering the aggregate effect of the reapportionment, it is beyond any reasonable question that the cost reduction to Oakland County for county commissioner salaries resulting from the reduction of the Oakland County Board of Commissioners from 35 to 21 members will far outweigh the relatively minimal cost of the reapportionment.

At least implicitly, the circuit court's conclusion to the contrary depends on considering the costs of the initial and mechanical aspects of the reapportionment process for Oakland County under 2011 PA 280 as a distinct activity in isolation from the savings flowing to the county from the reduction in size of the county commission under that reapportionment. I simply do not believe that is a reasonable analysis. The overall activity required of Oakland County by 2011 PA 280 is to reduce the membership of its county commission from 35 to 21 members and carry out redistricting as provided for in the act to achieve that requirement. It was unreasonable for the circuit court to disaggregate the minimal costs associated with the redistricting from the substantial savings that will be achieved by that redistricting in considering the costs of this new activity.[4] Indeed, the " 'Headlee [Amendment], at its core, is intended to prevent attempts by the Legislature "to shift responsibility for services to the local government . . . in order to save the money it would have had to use to provide the services itself." ' " *Owczarek v Michigan*, 276 Mich App 602, 611; 742 NW2d 380 (2007), quoting *Adair v Michigan*, 470 Mich 105, 112; 680 NW2d 386 (2004), quoting *Judicial Attorneys Ass'n v Michigan*, 460 Mich 590, 602-603; 597 NW2d 113 (1999). It is plain that this purpose would not be served by regarding a redistricting requirement that neither shifts state government services onto a locality nor increases aggregate costs to that

[4] To use an analogy, if a new state law required localities to send certain notices via e-mail that had previously been required by state law to be sent via ordinary mail through the postal service with a resulting cost savings to the localities from substantially reduced postage expenses, it would be absurd to regard any initial cost to the localities from buying the necessary software for the e-mail system as a distinct new activity for which the state would have to reimburse the localities under the Headlee Amendment.

locality as involving increased costs for which the state must reimburse the locality.

I also reject the circuit court's conclusion that 2011 PA 280 unconstitutionally deprives Oakland County electors of a right to seek judicial review of the reapportionment required by the act. The circuit court's entire analysis of this issue was predicated on the act's not allowing an elector the full 30-day period provided for by MCL 46.406 to seek review in this Court of a plan for reapportionment of a county commission.[5] However, MCL 46.406 is merely a *statutory* provision, not a constitutional one. The circuit court cited nothing to establish that there is a *constitutional* right to a 30-day period for an elector to seek judicial review of a county commission reapportionment plan, and I am confident that no constitutional provision has been interpreted to provide such a specific time requirement. Moreover, it appears undisputed that Oakland County has adopted resolutions providing for the reapportionment process to be completed by April 27, 2012, which would still provide significant time for judicial review before the May 15, 2012, filing deadline for candidates for the August 2012 primary election. In any event, any claim of a constitutional deprivation of a right to judicial review by 2011 PA 280 would not be ripe until and unless circumstances actually arise in which an elector seeks such review of an actual reapportionment plan and then contends that there is inadequate time for

[5] MCL 46.406 states:

> Any registered voter of the county within 30 days after the filing of the plan for his county may petition the court of appeals to review such plan to determine if the plan meets the requirements of the laws of this state. Any findings of the court of appeals may be appealed to the supreme court of the state as provided by law.

proper judicial review. See *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 282; 761 NW2d 210, aff'd on other grounds 482 Mich 960 (2008) (noting that a claim is not ripe "if it rests upon contingent future events that may not occur as anticipated, or may not occur at all").

I would reverse in its entirety the circuit court's finding of unconstitutionality.

WESTFIELD INSURANCE COMPANY v KEN'S SERVICE

Docket No. 300941. Submitted January 11, 2012, at Lansing. Decided March 8, 2012, at 9:00 a.m. Leave to appeal denied, 493 Mich 880.

Mark Robbins was injured during the performance of his duties as a tow truck operator for Ken's Service when a vehicle sideswiped the tow truck and hit Robbins while Robbins was outside the tow truck and operating the control levers positioned on the driver's side of the vehicle in order to extract a vehicle from a ditch. The insurer of the vehicle that hit Robbins agreed to tender the full limits of its policy to settle the claim. Robbins sought additional compensation from Westfield Insurance Company, Ken's Service's insurer, under the underinsured motorist coverage provided in the Westfield policy. Westfield refused to pay on the basis of its determination that Robbins had not been "occupying" the tow truck at the time of the accident. Westfield's policy provided for underinsured coverage for an "insured" and defined an insured, in part, to include anyone "occupying" a covered vehicle. The policy defined "occupying" to mean "in, upon, getting in, on, out or off." Westfield then brought an action in the Antrim Circuit Court for a determination of its obligations to Ken's Service and Robbins under its insurance contract. The court, Philip E. Rodgers, Jr., J., denied a motion for summary disposition by Ken's Service and Robbins and granted Westfield's cross-motion for summary disposition. The court interpreted the contract to mean that Robbins could prevail only if he could demonstrate that he was occupying the vehicle by being "upon" it when he was struck. The court determined that coverage depended on a person's connectedness with the activity of being a driver or passenger of the vehicle and if the person's activity or physical contact was incidental to being a driver or passenger the person was "occupying" the vehicle and therefore insured. The court stated that physical contact with the vehicle alone was not relevant and that the dispositive issue was whether Robbins's actions were the natural and probable result of being a driver or passenger. The court concluded that because Robbins was operating the vehicle as a towing machine when he was struck, his use was unrelated to being a driver or passenger of the truck and Robbins was not covered under the policy. Ken's Service and Robbins appealed.

The Court of Appeals *held*:

Although a person does not need to be physically inside a vehicle to be "upon" it, physical contact with the vehicle by itself does not establish that the person was upon the vehicle so as to be "occupying" the vehicle. A person must be on or up and on a vehicle in order to be "upon" it. At the time of the accident, Robbins was not getting in the tow truck, nor was he getting in, on, out, or off the tow truck. The trial court did not err by concluding that Robbins was not occupying the vehicle when he sustained bodily injury.

Affirmed.

M. J. KELLY, J., dissenting, stated that the unrebutted affidavit of Robbins indicates that he was leaning on the tow truck for balance and support at the time he was struck. The definition of "on" in the *Random House Webster's College Dictionary* (1997) is "so as to be or remain supported by or suspended from." Therefore, Robbins was "on" or "upon" and thus "occupying" the tow truck in accordance with the policy's definition of "occupying" and coverage should have been afforded him. The trial court should have granted summary disposition in favor of Ken's Service and Robbins.

INSURANCE — NO-FAULT — POLICIES — WORDS AND PHRASES — UPON — OCCUPYING.

A person's physical contact with an insured vehicle does not by itself establish that the person was "upon" the vehicle so as to be "occupying" the vehicle when the relevant no-fault insurance policy defines "occupying" as "in, upon, getting in, on, out or off"; one must be on or up and on a vehicle in order to be "upon" it.

Collins, Einhorn, Farrell & Ulanoff, P.C. (by *Deborah A. Hebert*), for plaintiff.

Dingeman, Dancer & Christopherson, P.L.C. (by *Nathan P. Miller* and *Mark R. Dancer*), for defendants.

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

WHITBECK, J. In this declaratory judgment action involving underinsured motorist coverage, the circuit court granted summary disposition pursuant to MCR

2.116(C)(10) for plaintiff, Westfield Insurance Company. Defendants, Ken's Service and Mark Robbins, appeal as a matter of right. On appeal, they assert that the trial court erred by misinterpreting the language in the insurance contract to deny them coverage. We affirm.

I. BASIC FACTS

On December 19, 2009, defendant Ken's Service, a tow truck company, dispatched one of its employees, Mark Robbins, to assist a police officer, Roderick Vessey, in removing his vehicle from a ditch on US-131. When he arrived at the scene, Robbins got out of the tow truck and connected the tow cables to the police vehicle. While he was operating the control levers positioned on the driver's side of the tow truck, another driver, Ashley See, sideswiped the tow truck and collided with Robbins. Robbins suffered substantial injuries, including a broken right arm and a protruding break of the right tibia/fibula. Robbins represents that he is "crippled for life."

Harold Ingersoll owned the car that Ashley See was driving. Ingersoll's insurance company, Auto-Owners Insurance Company, agreed to tender the full $100,000 limits of the policy to settle the claim. However, Robbins sought additional compensation from Westfield Insurance, Ken's Service's insurer, based on underinsured motorist coverage obtained for the tow truck. Ken's Service had underinsured motorist coverage in the amount of $1,000,000. The uninsured/underinsured motorist endorsement to the Westfield Insurance policy provided for underinsured coverage for the "insured," which the policy defined, in relevant part, to include "[a]nyone [besides the named insured or a family mem-

ber] 'occupying' a covered 'auto' . . . ." Further, the endorsement defined "occupying" to mean "in, upon, getting in, on, out or off."

Westfield Insurance refused to pay on the basis of its determination that Robbins was not "occupying" the vehicle at the time of the accident. Westfield Insurance then commenced this action for a determination of its obligations to Ken's Service and Robbins under the insurance contract.

Ken's Service and Robbins moved for summary disposition. They claimed that Robbins was leaning on the tow truck for balance and support when See struck him and that this occurred while he was operating the towing controls, which were located on the driver's side of the truck. Ken's Service and Robbins asserted that Westfield Insurance owed Robbins additional compensation because his injuries greatly exceeded the negligent driver's $100,000 policy limit, and Robbins was an "insured" under the terms of the underinsured motorist endorsement to the policy because he was "occupying" the insured vehicle by leaning "upon" it.

Westfield Insurance responded, arguing that Robbins was not occupying the tow truck when See struck him. Westfield Insurance asserted that Robbins clearly had both feet on the ground and had been outside the truck for several minutes when he was hit and injured. Westfield Insurance claimed that the term "upon" can only be properly interpreted in the context of the word "occupying." Westfield Insurance maintained that Robbins's physical contact with the truck needed to be "in the context" of being physically inside the truck, that his actions were not "in the context" of being an occupant, and that he therefore was not insured under the policy.

The trial court interpreted the contract to mean that Robbins could only prevail if he could demonstrate that he was "occupying" the vehicle by being "upon" it when he was struck. The trial court focused on the word "occupying" and determined that coverage depended on a person's connectedness with the activity of being a driver or passenger of the vehicle. According to the trial court, if the activity or physical contact was incidental to being a driver or passenger, then the person was occupying the vehicle and therefore would be insured. The trial court said that physical contact with the vehicle alone was not relevant. According to the trial court, the dispositive issue was whether Robbins's actions were the natural and probable result of being a driver or passenger. Thus, on the basis of the fact that Robbins was operating the vehicle as a towing machine when he was struck, the trial court concluded that his use was unrelated to being a driver or passenger of the truck. Accordingly, the trial court ruled that Robbins was not covered under the policy.

Ken's Service and Robbins now appeal.

II. INTERPRETATION OF THE CONTRACT LANGUAGE

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's grant of summary disposition.[1] The moving party must specifically identify the alleged undisputed factual issues and support his or her position with documentary evidence.[2] The nonmoving party then has the burden to produce

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[1] *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

[2] MCR 2.116(G)(3)(b) and (4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

admissible evidence to establish disputed facts.[3] The court must consider all the documentary evidence in the light most favorable to the nonmoving party.[4] Further, this Court reviews de novo a trial court's interpretation of contractual language.[5]

B. APPLICABLE LEGAL PRINCIPLES

Courts treat insurance contracts no differently than any other contract. Accordingly, we should give contractual language that is clear and unambiguous full effect according to its plain meaning unless it violates the law or is in contravention of public policy.[6] A court cannot infer the parties' "reasonable expectations" in order to rewrite a clear and unambiguous contract.[7] Even if the contractual language is poorly worded, it is not ambiguous if it " 'fairly admits of but one interpretation[.]' "[8]

The Michigan Supreme Court interpreted the identical contractual language at issue in this case in *Rednour v Hastings Mut Ins Co*.[9] In *Rednour*, an oncoming vehicle struck the plaintiff while he was changing a flat tire on the insured vehicle.[10] The plaintiff was approximately six inches away from the insured

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[3] *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 663; 697 NW2d 180 (2005).

[4] MCR 2.116(G)(5); *Maiden*, 461 Mich at 120.

[5] *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

[6] *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003).

[7] *Id*. at 59-62.

[8] *Nankervis v Auto-Owners Ins Co*, 198 Mich App 262, 265; 497 NW2d 573 (1993), quoting *Raska v Farm Bureau Mut Ins Co of Mich*, 412 Mich 355, 362; 314 NW2d 440 (1982).

[9] *Rednour v Hastings Mut Ins Co*, 468 Mich 241; 661 NW2d 562 (2003).

[10] *Id.* at 242.

vehicle when the other car struck him.[11] He had loosened the lug nuts on the wheel and was moving toward the rear of the vehicle when the other car struck him.[12] The plaintiff claimed that he was an insured entitled to no-fault benefits because he was "occupying" the vehicle, as both the no-fault act and the language of the policy defined that word. Specifically, the plaintiff argued that he was " 'upon' " the vehicle because he was knocked into the insured vehicle and pinned between the two vehicles during the collision.[13]

The Michigan Supreme Court noted in *Rednour* that its prior decision in *Rohlman v Hawkeye-Security Ins Co (Rohlman I)*[14] had interpreted the meaning of "occupant" under the no-fault statute.[15] The *Rohlman I* Court declared that a person could not be an "occupant" under the no-fault act unless they were "physically inside" the vehicle when struck.[16] However, since the language of the policy broadly defined "occupying" as "in, upon, getting in, on, out or off" the insured vehicle, the *Rohlman I* Court remanded the case for this Court to consider whether the plaintiff's conduct fell under the broader definition of "occupying" stated in the policy.[17] On remand, in *Rohlman II*, this Court noted that physical contact with the insured person is required in order to be "upon" the vehicle, although the person need not be completely physically supported by the vehicle.[18]

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[11] *Id.*

[12] *Id.*

[13] *Id.* at 249.

[14] *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 522, 531; 502 NW2d 310 (1993) (*Rohlman I*), citing MCL 500.3111.

[15] *Rednour*, 468 Mich at 246-247.

[16] *Rohlman I*, 442 Mich at 532; see *Rednour*, 468 Mich at 247.

[17] *Rohlman I*, 442 Mich at 522 n 1, 528 n 8, 535.

[18] *Rohlman v Hawkeye-Security Ins Co (On Remand)*, 207 Mich App 344, 357; 526 NW2d 183 (1994) (*Rohlman II*) (noting that a child could be "on" a scooter by having one foot on it and another on the ground).

While the *Rednour* Court agreed with the *Rohlman II* statement that a person did not need to be physically inside the vehicle to be "upon" it, it nevertheless held that physical contact alone is insufficient to show that "the person was 'upon' the vehicle so as to be 'occupying' the vehicle."[19] Accordingly, the Court stated:

> Plaintiff was not "occupying" the vehicle under the policy definition of that term. He was outside the vehicle, approximately six inches away from it. He was not in the vehicle, nor was he getting in, on, out, or off the vehicle when he was injured.
>
> Plaintiff suggests that he was "upon" the car because he was pinned against it after being struck. Physical contact by itself does not, however, establish that a person is "upon" a vehicle such that the person is "occupying" the vehicle. The relevant dictionary definitions . . . clarify that one must be *on* or *up and on* a vehicle in order to be "upon" it. We reject the dicta in *Rohlman II* that suggests physical contact alone may be sufficient to show that the person was "upon" the vehicle so as to be "occupying" the vehicle.[20]

C. APPLYING THE LEGAL PRINCIPLES

Here, the parties focused on the word "upon" and the meaning of that word. In *Rednour*, the Supreme Court interpreted the meaning of "upon" to mean "*on* or *up and on*." Robbins alleged that he was "upon" the truck because he had both hands on it and was leaning against the tow truck for balance and support at the moment of impact. But, as the Michigan Supreme Court stated in *Rednour*, "physical contact alone may [not] be sufficient to show that the person was 'upon' the vehicle so as to be 'occupying' the vehicle."[21] At the time of

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[19] *Rednour*, 468 Mich at 250.

[20] *Id.* at 249-250.

[21] *Id.* at 250.

impact, Robbins was not in the vehicle, nor was he getting in, on, out, or off the vehicle. In fact, Robbins had been out of the vehicle for several minutes and was operating the towing controls of the truck. Thus, we conclude that the trial court did not err by concluding that Robbins was not "occupying" the vehicle when he sustained bodily injury.

We affirm.

SAWYER, P.J., concurred with WHITBECK, J.

M. J. KELLY, J. (*dissenting*). Because I believe that the trial court erred in its interpretation of the word "upon" in the subject underinsured motorist insurance policy, I would reverse its decision to grant summary disposition in favor of plaintiff, Westfield Insurance Company, and instead grant summary disposition in favor of defendants, Ken's Service and Mark Robbins. Therefore, I must respectfully dissent.

Robbins worked for Ken's Service as a tow truck driver. On the evening of the accident, Robbins was sent to tow a police vehicle out of a ditch. After pulling his tow truck to the shoulder of the highway, Robbins activated the emergency lights, got out of the tow truck, hooked cables to the police cruiser, and walked back to the truck's bed. He then began the process of pulling the police vehicle from the ditch by activating the levers on a control panel located on the driver's side of the truck. He averred in an unrebutted affidavit that he was leaning on the tow truck for balance and support with both his hands touching the truck; his right hand was on the control panel, and with the left he grasped the truck's railing. It was then that a passing motorist struck him and caused him serious injuries.

At issue is Robbins's entitlement to underinsured motorist coverage under Westfield's policy insuring the tow truck. Under the policy, an "insured" is entitled to uninsured or undersinsured motorist coverage resulting from "bodily injury" caused by "an accident." The policy provides that, if the named insured is an individual, the insureds are the "Named Insured and any 'family members' " as well as anyone "else 'occupying' a covered 'auto' or a temporary substitute for a covered 'auto.' "[1] Thereafter, the policy defines "occupying" as "in, upon, getting in, on, out or off." We are asked to determine whether, under the definitions that Westfield provided in its insurance policy, Robbins was "upon" the tow truck at the time of the accident.

As noted by the majority, our Supreme Court has interpreted this identical language. See *Rednour v Hastings Mut Ins Co*, 468 Mich 241; 661 NW2d 562 (2003). In *Rednour*, the plaintiff was struck by an oncoming vehicle while changing a flat tire on the insured vehicle. *Id.* at 242. The plaintiff was approximately six inches away from the insured vehicle when he was struck by the other car. He had loosened the lug nuts on the wheel and was moving toward the rear of the vehicle when he was hit. *Id.* The plaintiff claimed that he was an insured entitled to no-fault benefits because he was "occupying" the vehicle, as defined by both the no-fault act and the language of the policy. He argued that he was "upon" the vehicle because he was

[1] Though not fully developed in the circuit court, Ken's Service—a business—was listed by the Westfield policy as "An Individual" with the result being that his family members, who presumably did not drive this large, commercial tow truck, would have been covered for these injuries regardless of whether they were "upon" the vehicle and yet Robbins, the employee who actually drove the tow truck on a regular basis and as part of his employment duties, was not. This is not an issue before us on appeal but remains a conundrum.

pinned between the two vehicles during the collision. *Id.* at 249. The Court noted that it had already interpreted the meaning of "occupant" under the no-fault statute and declared that a person could not be an "occupant" *under the no-fault act* unless they were " 'physically inside' " the vehicle when struck. See *id.* at 247, citing *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 531-532; 502 NW2d 310 (1993) (*Rohlman I*). However, because the language of the policy in its case, like the policy here, broadly defined "occupying" as " 'in, upon, getting in, on, out or off' " the insured vehicle, *Rohlman I*, 442 Mich at 528 n 8, the Court in *Rohlman I* remanded the matter to this Court to consider whether the plaintiff's conduct fell under the broader definition of "occupying" stated in the policy. *Id.* at 535.

On remand, this Court noted that physical contact with the insured vehicle is required to be "upon" the vehicle, although the person need not be completely physically supported by the vehicle. *Rohlman v Hawkeye-Security Ins Co (On Remand)*, 207 Mich App 334, 357; 526 NW2d 183 (1994) (*Rohlman II*) (noting that a child could be "on" a scooter by having one foot on it and another on the ground). While the *Rednour* Court agreed with the *Rohlman II* statement that a person did not need to be physically inside the vehicle to be "upon" it, the Court nevertheless held that physical contact alone is insufficient to show that "the person was 'upon' the vehicle so as to be 'occupying' the vehicle." *Rednour*, 468 Mich at 250. The Court explained: "The relevant dictionary definitions . . . clarify that one must be *on* or *up and on* a vehicle in order to be 'upon' it." *Id.*

More recently still, this Court analyzed the identical contractual language in *Bledsoe v Auto Owners Ins Co*

(On Remand), unpublished opinion per curiam of the Court of Appeals, issued December 4, 2003 (Docket No. 236735). There the plaintiff's foot was run over by a truck while he was stopped at a toll booth to pay the toll. While he was leaning on the insured vehicle and bending over to locate some dropped change, the truck attempted to pass him and ran over his foot. *Id.* at 2. This Court noted that the insurance policy provided greater coverage than that guaranteed under the no-fault act. *Id.* After distinguishing *Rednour*, the Court in *Bledsoe* concluded that the plaintiff was insured because he was "upon" the truck:

> In the instant case, plaintiff testified that he was balancing himself with one hand *on the step of the insured truck* when the accident occurred. Even under the *Rednour* . . . Court's restricted definitions, plaintiff was, according to his testimony, "upon" the truck at the time of the accident. We believe that a commonsense interpretation of the term "upon" leads to this conclusion. Moreover, the Supreme Court in *Rednour* . . . indicated (1) that one must be "on" a vehicle to be "upon" it and (2) that a dictionary is an appropriate reference tool in giving meaning to the terms at issue here. See [*Rednour*, 468 Mich at 250]. *Random House Webster's College Dictionary* (1997) lists the following as the first definition of "on": "so as to be or remain supported by or suspended from." Plaintiff testified that he was balancing himself with one hand on the step of the truck when the accident occurred. If the factfinder were to believe plaintiff's testimony, then (1) plaintiff clearly was being "supported by" the truck, (2) he therefore was "occupying" the vehicle under the terms of the Auto Owners' policy, and (3) the parked vehicle exclusion in [the] policy does not apply. The trial court properly denied summary disposition to Auto Owners with respect to the issue of PIP [personal protection insurance] benefits. [*Id.* at 3.]

Although not binding precedent, I find this reasoning persuasive. Robbins's unrebutted affidavit indicates

that he was leaning on the tow truck for balance and support at the time he was struck by the passing automobile. Therefore, like the plaintiff in *Bledsoe*, he was "on" ("supported by") or "upon" and thus "occupying" the vehicle in accordance with the policy. And because there is no evidence to rebut that Robbins was being supported by the vehicle, the trial court should have granted summary disposition in favor of defendants.

If Westfield wanted a more restrictive definition for "occupying," it could have chosen to insert a different definition into its policy. As it is, the words it chose were "in, upon, getting in, on, out or off." And, because the definition of "on" is "so as to be or remain supported by or suspended from," Robbins plainly demonstrated that he comes within the policy's definition of "occupying" and coverage should have been afforded him.

For this reason, I respectfully dissent.

PEOPLE v ELLIOTT

Docket No. 301645. Submitted January 12, 2012, at Lansing. Decided March 8, 2012, at 9:05 a.m. Leave to appeal granted, 491 Mich 938.

Samuel Lee Elliott was convicted by a jury in the Jackson Circuit Court of armed robbery, MCL 750.529. A man had entered a gas station, told the attendant he had a gun, and demanded the store's money. Elliott was arrested the following day on the basis of his brother's identification and was interrogated after he was informed of his rights pursuant to *Miranda v Arizona*, 384 US 436 (1966). The police interrogation ended after he invoked his right to counsel. Three days later, while still in jail, Elliott confessed to a parole officer when questioned about the robbery in conjunction with being served with parole-violation charges. The parole officer did not advise Elliott of his *Miranda* rights beforehand. Defense counsel moved to suppress the confession, which the court, Thomas D. Wilson, J., denied, concluding that the parole officer had not acted as a law enforcement official when questioning Elliott. Following his conviction and sentencing, Elliott appealed.

The Court of Appeals *held*:

1. The right against self-incrimination is guaranteed by both the United States and the Michigan Constitutions, US Const, Am V; Const 1963, art 1, § 17, and the protection against compelled self-incrimination is construed the same for the Michigan Constitution as its federal counterpart. When a criminal defendant is subject to a custodial interrogation, before any questioning the defendant must be advised of the rights set forth in *Miranda*, which include the right to the presence of an attorney. 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 constitutes a custodial interrogation. A defendant is in custody if a reasonable person in the defendant's situation would believe that he or she was not free to leave and if the relevant environment was inherently coercive. Statements an accused made during a custodial interrogation are inadmissible unless the accused knowingly, voluntarily, and intelligently waived his or her rights.

2. Elliott invoked his Fifth Amendment right to counsel when he requested an attorney while being interrogated by the police, and law enforcement officials were not constitutionally permitted to initiate further custodial interrogation outside the presence of his counsel. The parole officer's discussion with Elliott in the jail's library three days later regarding parole-violation charges constituted custodial interrogation because a reasonable person in Elliott's situation would not believe he or she was free to leave and the environment was inherently coercive. The parole officer's questioning constituted interrogation because her questions were reasonably likely to elicit an incriminating response from Elliott.

3. Constitutional protections apply only to governmental action. *Miranda* protections apply not only to custodial interrogation by law enforcement officials, but also to those by persons acting in concert with or at the request of the police. The trial court did not clearly err when it concluded that the parole officer did not act in concert with or at the request of the police. While the parole officer reviewed the police report before interviewing Elliott, there was no evidence that the interview was at the request of the police or in collaboration with their investigation.

4. When a defendant is not informed of his or her *Miranda* rights, statements elicited by a law enforcement official during a custodial interrogation are not admissible because of the inherently compelling pressures that undermine the individual's will to resist and to compel the defendant to speak. Parolees and probationers are under heavy psychological pressure to answer the questions of their supervising officers when they would not otherwise do so freely. The parolee-parole officer relationship is adversarial because the parole officer is an agent of the state, whose questions must be answered to avoid parole revocation. Moreover, a parole officer is more likely to elicit incriminating statements from a parolee with whom he or she has formed a relationship than a police interrogator would be. When a parole officer subjects a parolee to a custodial interrogation, there is always the possibility that the questioning will lead to a criminal prosecution. Thus, a parole officer is a law enforcement official for purposes of *Miranda.* Statements made by a parolee to a parole officer during a custodial interrogation are inadmissible in a subsequent trial if the parolee invoked his or her right to counsel before questioning began. The trial court erred by denying Elliott's motion to suppress his confession because he had invoked his right to counsel during an earlier police interrogation and he was still in custody when he was interviewed by and confessed to his parole officer.

5. The trial court's failure to suppress Elliott's statements to his parole officer was not harmless error beyond a reasonable doubt because there was a reasonable possibility that those statements might have contributed to his conviction.

Reversed and remanded for a new trial.

1. CONSTITUTIONAL LAW — SELF-INCRIMINATION — CUSTODIAL INTERROGATION — *MIRANDA* WARNINGS.

When a criminal defendant is subject to a custodial interrogation, before any questioning he or she must be advised of the rights set forth in *Miranda v Arizona*, 384 US 436 (1966), which includes the right to the presence of an attorney; 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 constitutes a custodial interrogation; a defendant is in custody if a reasonable person in the defendant's situation would believe that he or she was not free to leave and if the relevant environment was inherently coercive; statements an accused made during a custodial interrogation are inadmissible unless the accused knowingly, voluntarily, and intelligently waived his or her rights (US Const, Am V; Const 1963, art 1, § 17).

2. CONSTITUTIONAL LAW — SELF-INCRIMINATION — *MIRANDA* WARNINGS — GOVERNMENTAL ACTION.

The protections of *Miranda v Arizona*, 384 US 436 (1966), apply not only to custodial interrogations by law enforcement officials, but also to those by persons acting in concert with or at the request of the police (US Const, Am V; Const 1963, art 1, § 17).

3. CONSTITUTIONAL LAW — SELF-INCRIMINATION — *MIRANDA* WARNINGS — CUSTODIAL INTERROGATION — PAROLE OFFICERS.

A parole officer is a law enforcement official for purposes of the safeguards set forth in *Miranda v Arizona*, 384 US 436 (1966); statements made by a parolee to a parole officer during a custodial interrogation are inadmissible in a subsequent trial if the parolee invoked his or her right to counsel before questioning began (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*, Chief Appellate Attorney, for the people.

Patrick K. Ehlmann for defendant.

Before: BECKERING, P.J., and OWENS and SHAPIRO, JJ.

BECKERING, P.J. Defendant, Samuel Lee Elliott, appeals as of right his conviction by a jury of armed robbery, MCL 750.529. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 15 to 30 years' imprisonment.

The police arrested defendant for violating his parole after receiving information that he had committed a robbery. The police advised defendant of his *Miranda*[1] rights and interrogated him. Defendant ultimately invoked his right to counsel, and the interrogation ended. Three days later, a parole officer served defendant with parole-violation charges while defendant was still in jail. The parole officer did not advise defendant of his *Miranda* rights before asking him for his statement regarding the robbery charge. Defendant told the parole officer that he had committed the robbery. Defendant's confession to the parole officer was admitted during his trial, after which he was convicted of the charged offense. At issue in this case is whether the trial court erred when it denied defendant's motion to suppress his statements to the parole officer and, if so, whether the error was harmless. We reverse and remand for a new trial.

I. FACTS AND PROCEDURAL HISTORY

On June 16, 2010, a man entered an Admiral gas station at about 3:15 a.m. and asked the cashier for a pack of Marlboro Reds cigarettes. The man then told the cashier that he had a gun and that the cashier needed to give him the money from the register. The man wore a University of Michigan fleece pullover

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

and a University of Michigan hat. The cashier noticed what appeared to be a handgun protruding from the waistband of the man's shorts. The cashier gave the man the pack of cigarettes and $157 from the register, including a marked $2 bill. The man then left the gas station.

The next day, defendant's brother contacted the police and told them that defendant had robbed the gas station. The police arrested defendant later that day for violating his parole and took him to the Jackson County Jail. The police then searched the residence where defendant was staying and obtained a hat and fleece pullover purportedly belonging to defendant that matched those worn by the robber. On June 18, 2010, detectives went to the jail, advised defendant of his *Miranda* rights, and interrogated him about the robbery. Defendant answered several questions, stated that he did not rob the gas station, and then invoked his right to an attorney, at which point the interrogation ended.

On June 21, 2010, Cheryl Evans, a parole officer, went to the jail to "serve [defendant] parole violation charges and get his statement" regarding the robbery. Before meeting with defendant, Evans received the police report and spoke with Detective Ed Smith about the fact that defendant was a suspect for the armed robbery of the gas station. A deputy escorted defendant from his jail cell to the jail library, where Evans interviewed him. Evans did not read defendant his *Miranda* rights. Evans served defendant with his parole-violation charges relating to the robbery and asked defendant for his statement regarding the robbery. According to Evans, defendant told her that he had robbed the gas station. After the interview, Evans called Smith and informed him that defendant had confessed to the

robbery. On June 24, 2010, defendant was arraigned on the charge of armed robbery.

On the first day of trial, but before jury selection, defendant moved to suppress the statements that he had made to Evans on June 21, 2010. Defense counsel stated that "the main issue" with respect to the motion was whether a parole officer constitutes a law enforcement officer for Fifth Amendment purposes. Defense counsel argued as follows, in pertinent part:

> My argument, Judge, is that un-Mirandized statements obtained by Cheryl Evans, a parole agent, in the jail is an inherently coercive custodial condition, which is envisioned by *Miranda*. And that's the type of situation where . . . in order for the statements to come in as evidence . . . you need to have advised the suspect of his *Miranda* warnings and his right to counsel and everything that comes along with it.
>
> * * *
>
> . . . I believe that Cheryl Evans was acting as an agent of the government. There's a special relationship between her and Sam Elliott and, to make it even worse, it was in the jail. He was under arrest; he'd been there since the seventeenth.
>
> * * *
>
> Now, I know that the police advised him of his rights back on the eighteenth in this case, three days before. But he invoked his rights then and I don't think you can keep coming back. . . . Once you invoke your rights, questioning must stop. It did here, but then [Evans] came back, and I don't think you can come back again and start re-questioning where there has been an invocation of your constitutional right to counsel.

The prosecutor emphasized that under this Court's decision in *People v Littlejohn*, unpublished opinion

per curiam of the Court of Appeals, issued September 11, 1998 (Docket No. 195286), a parole officer is not a law enforcement officer for purposes of *Miranda*. The prosecutor argued that defendant's statements to Evans were admissible because Evans was not working in concert with the police, but was interviewing defendant as a parole officer. Smith then testified about the nature of his conversation with Evans before she interviewed defendant: "The gist of our conversation was [Evans] asked . . . whether or not there was anything she could not bring up during her conversation with [defendant] and I told her no, that he had invoked his rights and I would not be speaking with him again." Smith testified that this was the only conversation he had with Evans about the case before Evans interviewed defendant. Smith further testified that he was not aware of any other officers talking to Evans about the case or asking Evans to try and obtain information from defendant.

The trial court stated that the *Miranda* issue before it was "very unclear from the precedent that's out there." "There's a patchwork of law out there. There's nothing definitive on this position." The trial court then analyzed the motion to suppress under *Littlejohn* and concluded that defendant's statements to Evans were admissible:

> Looking at *People v Littlejohn*, Number 195286, although it's not a . . . published case, it does state that:
>
> "The parole officer testified she was not a police officer or a certified law enforcement officer . . . . Said she was acting independently from the police and that her only reason for speaking to the defendant was to advise him of the parole violation charges, to advise him of his rights for a preliminary hearing on those charges, and to determine if

> he would agree to waive the hearing. Under these circumstances, we conclude that the parole officer was not a law enforcement official."
>
> And that's really the main question: is a parole officer acting in this capacity, not in concert with the law enforcement -- a law enforcement official.
>
> * * *
>
> Based on the guidance from *People v Littlejohn* and the circumstances outlined within that case, the Court's going to find that the parole officer was not acting in concert and the testimony I've heard here and the stipulated facts was not acting in concert with the police. She was there to advise [defendant] of the charges. The information she obtained previously was to understand what was going on so that she could advise [defendant] of the parole violation charges. And, under these circumstances, she was not . . . a law enforcement official and, therefore, the confession will come in. The statements made . . . to her will come in.

Evans testified at trial that defendant confessed to committing the robbery. Following his conviction, the trial court sentenced defendant as a fourth-offense habitual offender to 15 to 30 years' imprisonment.[2] Defendant now appeals as of right.

II. SUPPRESSION OF STATEMENTS TO PAROLE OFFICER

Defendant argues that the trial court erred when it denied his motion to suppress his statements to Evans because as a parole officer, Evans was a law enforcement officer for purposes of *Miranda* who subjected him to a custodial interrogation after he had invoked his right to counsel three days earlier. We agree.

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[2] The trial court later entered an amended judgment of sentence, indicating that defendant's sentence was to run consecutively to his preexisting sentences related to the parole violations.

A. STANDARD OF REVIEW

When we review a trial court's factual findings with respect to a motion to suppress, we defer to the trial court unless the court's findings are clearly erroneous. *People v Herndon*, 246 Mich App 371, 395; 633 NW2d 376 (2001). A finding is clearly erroneous if this Court is "left with a definite and firm conviction that a mistake has been made." *People v Muro*, 197 Mich App 745, 747; 496 NW2d 401 (1993). We review de novo a trial court's ultimate decision on a motion to suppress. *People v Lapworth*, 273 Mich App 424, 426; 730 NW2d 258 (2006).

B. *MIRANDA* AND CUSTODIAL INTERROGATION

The right against self-incrimination is guaranteed by both the United States and the Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 17. "[T]he protection against compelled self-incrimination in the Michigan Constitution [is] construed the same as its federal counterpart." *People v Bender*, 452 Mich 594, 637; 551 NW2d 71 (1996) (BOYLE, J., dissenting). In *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966), the United States Supreme Court established "procedural safeguards . . . to secure the privilege against self-incrimination." Under *Miranda*, when a criminal defendant is subjected to a custodial interrogation, the defendant must be warned before any questioning that he or she has "a right to remain silent, that any statement [the defendant] does make may be used as evidence against him [or her], and that [the defendant] has a right to the presence of an attorney, either retained or appointed." *Id*. A "custodial interrogation" is defined as "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." *Id.* When determining whether a defendant was "in custody," courts consider both whether a reasonable person in the defendant's situation would believe that he or she was free to leave and "whether the relevant environment present[ed] the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Howes v Fields*, 565 US ___; 132 S Ct 1181, 1189-1190; 182 L Ed 2d 17 (2012). "Interrogation refers to express questioning and to any words or actions on the part of police that the police should know are reasonably likely to elicit an incriminating response from the subject." *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997). Statements of an accused made during a custodial interrogation are inadmissible unless the accused knowingly, voluntarily, and intelligently waived his or her Fifth Amendment rights. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005); see also *Miranda*, 384 US at 444-445.

"[T]he Fifth Amendment right to counsel is a corollary to the amendment's stated right against self-incrimination and to due process." *People v Marsack*, 231 Mich App 364, 372-373; 586 NW2d 234 (1998). "The right to counsel found in the Fifth Amendment is designed to counteract the inherently compelling pressures of custodial interrogation . . . and to secure a person's privilege against self-incrimination by allowing a suspect to elect to converse with the police only through counsel." *People v Williams*, 244 Mich App 533, 539; 624 NW2d 575 (2001) (citations and quotation marks omitted). "In *Edwards v Arizona*, 451 US 477, 484; 101 S Ct 1880; 68 L Ed 2d 378 (1981), the United States Supreme Court established the bright-line rule that an accused, having expressed a desire to deal with the police only through counsel, may not be subject to further interrogation by the authorities until counsel

has been made available unless the accused initiates further communication." *People v McRae*, 469 Mich 704, 715; 678 NW2d 425 (2004); see also *Marsack*, 231 Mich App at 374 ("The procedural safeguards for the Fifth Amendment adopted in *Miranda* . . . require that the police discontinue the questioning of a suspect when a request for counsel is made."); *Miranda*, 384 US at 444-445 ("If . . . [the defendant] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.").

In this case, it is not disputed that defendant's June 18, 2010, police interrogation constituted a custodial interrogation under *Miranda*. While defendant was under arrest, detectives questioned him about the robbery for which he was a suspect. See *Miranda*, 384 US at 444. Thus, defendant had a Fifth Amendment right to have counsel present during this interrogation. *Id*. at 444-445; see also *Tierney*, 266 Mich App at 710 ("A criminal defendant has a constitutional right to counsel during interrogation."). It is not disputed that defendant requested an attorney during this interrogation. By requesting an attorney, defendant invoked his Fifth Amendment right to counsel. See *Fare v Michael C*, 442 US 707, 719; 99 S Ct 2560; 61 L Ed 2d 197 (1979) ("[T]he Court fashioned in *Miranda* the rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease."). Defendant having invoked his right to counsel, law enforcement officers were not constitutionally permitted to initiate further custodial interrogation outside the presence of counsel. *Miranda*, 384 US at 444-445; *McRae*, 469 Mich at 715.

On June 21, 2010, Evans went to the jail to serve defendant with parole-violation charges, question de-

fendant about the robbery, and obtain defendant's "statement." By this time, defendant had been in jail for three days. A deputy escorted defendant from his jail cell to the jail's library for the meeting. During the questioning, Evans obtained incriminating statements from defendant. Evans never advised defendant of his *Miranda* rights, his attorney was not present during the meeting, and the record does not indicate that an attorney had even been made available to defendant. Given these facts, a reasonable person in defendant's situation would have believed that he or she was not free to leave, and the environment presented "the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Howes*, 565 US at ___; 132 S Ct at 1189-1190. Like the defendants in *Miranda*, defendant was suspected of committing a crime, arrested, and questioned while he was in jail—an environment unfamiliar to defendant—several days after his arrest about the crime for which he was arrested. See *Miranda*, 384 US at 456-457, 491-497. Thus, defendant was in custody at the time of his meeting with Evans.[3] See *Howes*, 565 US at ___; 132 S Ct at 1189-1190. Furthermore, Evans's express questioning of defendant about the robbery in an attempt to obtain defendant's statement

[3] We note that the present case is distinguishable from *Howes* because the defendant in that case was questioned by authorities while he was serving a jail sentence, i.e., while he was living in jail. *Howes*, 565 US at ___; 132 S Ct at 1185, 1193. Moreover, the defendant was questioned about a crime unrelated to his incarceration. *Id.* at ___; 132 S Ct at 1185. In contrast, the authorities did not question defendant in the present case while he was serving a jail sentence; rather, defendant was questioned shortly after he was arrested, and the questioning focused on the reason for his arrest. Thus, unlike the defendant in *Howes*, defendant in this case was not questioned in "familiar surroundings" but was "cut off from his normal life and companions" by an arrest and "abruptly transported" to a "police-dominated atmosphere" for questioning. *Id.* at ___; 132 S Ct at 1190-1191. The "inherently compelling pressures" that were lacking in *Howes* were present here. *Id.* at ___; 132 S Ct at 1191.

constituted an interrogation because her questions were reasonably likely to elicit an incriminating response from defendant. See *Raper*, 222 Mich App at 479.

Therefore, Evans subjected defendant to a custodial interrogation. And, to the extent that Evans was a law enforcement officer under *Miranda*, her questioning of defendant violated defendant's Fifth Amendment rights. See *Edwards*, 451 US at 485 ("We . . . emphasize that it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.").

C. *MIRANDA*'S APPLICATION TO PAROLE OFFICERS

"[C]onstitutional protections apply only to governmental action." See *People v Anderson*, 209 Mich App 527, 533; 531 NW2d 780 (1995). While the *Miranda* Court opined that *Miranda*'s constitutional safeguards apply whenever a law enforcement officer initiates a custodial interrogation, *Miranda*, 384 US at 444, the Court's subsequent decisions illustrate that *Miranda* is not limited to custodial interrogation performed by law enforcement officers who are police officers. See, e.g., *Estelle v Smith*, 451 US 454, 468-469; 101 S Ct 1866; 68 L Ed 2d 359 (1981) (holding that *Miranda* applies to psychiatrist during court-ordered psychiatric inquiry); *Mathis v United States*, 391 US 1, 4; 88 S Ct 1503; 20 L Ed 2d 381 (1968) (holding that *Miranda* applies to internal revenue agents conducting tax investigations). Moreover, this Court has held that *Miranda* safeguards apply to a person who is "acting in concert with or at the request of the police." *Anderson*, 209 Mich App at 533; see also *People v Grevious*, 119 Mich App 403, 407; 327 NW2d 72 (1982) ("It is also clear that [*Miranda*] warnings may be required even though the interrogator

is not technically a police officer but rather someone acting with or at the request of police authority.").

The trial court in the present case concluded that defendant's statements to Evans were admissible for two reasons: (1) Evans was not acting in concert with or at the request of the police and (2) a parole officer, such as Evans, is not a law enforcement officer for *Miranda* purposes.

We conclude that the trial court did not clearly err when it determined that Evans did not act in concert with or at the request of the police. See *Herndon*, 246 Mich App at 395. Evans testified that her purpose for interviewing defendant was to serve defendant with his parole-violation charges and obtain his statement regarding the robbery. Evans also testified that she received the police report of the robbery and spoke to a detective about the robbery before conducting her interview. Smith testified that he spoke to Evans before she interviewed defendant, and the record does not indicate that any other police officer spoke with Evans about the case before she interviewed defendant. Nothing in the record indicates that Evans interviewed defendant at the request of the police or in collaboration with their investigation. Thus, we are not left with a "definite and firm conviction" that the trial court erred by finding that Evans did not act in concert with or at the request of the police. See *Muro*, 197 Mich App at 747.

However, notwithstanding the trial court's finding that Evans was not acting in concert with or at the request of the police, the question remains whether Evans was a law enforcement officer under *Miranda* as a matter of law given her status as a parole officer and therefore precluded from interrogating defendant after he invoked his right to counsel.

In *Minnesota v Murphy*, 465 US 420; 104 S Ct 1136; 79 L Ed 2d 409 (1984), the United States Supreme Court addressed the admissibility under the Fifth Amendment of statements made to a probation officer. The defendant in *Murphy* had arranged a meeting with his probation officer at the officer's office. *Id.* at 423. During the meeting, the defendant made incriminating statements to the probation officer, who then secured an arrest and detention order for the defendant. *Id.* at 424. The Supreme Court held that the defendant's incriminating statements to the probation officer were admissible even though the probation officer did not comply with *Miranda*. *Id.* at 430-433. The Court explicitly based its holding on the fact that the defendant was not in custody when the probation officer questioned him because "there was no formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Id.* at 430 (quotation marks and citations omitted). According to the Court, the probation interview was "arranged by appointment at a mutually convenient time" and did not take place in "an unfamiliar atmosphere" or "an interrogation environment." *Id.* at 433. Furthermore, the defendant "was not physically restrained and could have left the" interview at any time. *Id.* Importantly, however, the Court noted that its constitutional inquiry would have been different had the defendant been in custody at the time of the interview:

> We emphasize that [the defendant] was not under arrest and that he was free to leave at the end of the meeting. *A different question would be presented if he had been interviewed by his probation officer while being held in police custody or by the police themselves in a custodial setting.* [*Id.* at 429 n 5 (emphasis added).]

The case now before this Court presents the exact different question to which the *Murphy* Court alluded.

The Michigan Supreme Court has not addressed the application of *Miranda* to parole officers. However, this Court has specifically addressed the issue, albeit through unpublished opinions. See *People v Stokes*, unpublished opinion per curiam of the Court of Appeals, issued July 17, 2007 (Docket No. 269345); *Littlejohn*, unpub op at 1-2.

In *Littlejohn*, the trial court admitted into evidence statements that the defendant made to a parole officer who did not advise the defendant of his *Miranda* rights before an interview. *Littlejohn*, unpub op at 1-2. On appeal, this Court affirmed the trial court's admission of the statements for two reasons. *Id.* at 2. First, the *Littlejohn* Court concluded that the parole officer did not subject the defendant to an interrogation because the defendant's statements were "volunteered" and "not the result of questioning or of behavior calculated to elicit an incriminating response." *Id.* Second, the Court concluded that the parole officer "was not a law enforcement official" and "was acting independently from the police" solely "to advise [the defendant] of parole violation charges, to advise him of his right to a preliminary hearing on those charges, and to determine if he would agree to waive the hearing." *Id.*

Similarly, in *Stokes* this Court upheld the admission of statements that a defendant made to a parole officer who did not advise the defendant of his *Miranda* rights before an interview. *Stokes*, unpub op at 4-5. Relying on our previous decision in *Anderson*, 209 Mich App at 533, the *Stokes* Court emphasized 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 4, quoting *Anderson*, 209 Mich App at 533. The *Stokes* Court concluded that the "defendant's parole

officer was not a police officer conducting a custodial interrogation." *Stokes*, unpub op at 4. Furthermore, the Court opined that the parole officer had acted independently from the police and spoke to the defendant solely to advise him of parole-violation charges and his right to a preliminary hearing and to determine whether the defendant would waive the hearing. *Id.* at 4-5.

We note, however, that while this Court's decisions in *Littlejohn* and *Stokes* are persuasive authority for our constitutional inquiry, they are not precedentially binding on this Court under the rule of stare decisis. MCR 7.215(C)(1); see also *People v Green*, 260 Mich App 710, 720 n 5; 680 NW2d 477 (2004). Moreover, we recognize that while decisions of the federal circuit courts of appeals are also not precedentially binding on this Court, see *People v Oliver*, 170 Mich App 38, 47-49; 427 NW2d 898 (1988), our decisions in *Littlejohn* and *Stokes* conflict with various federal circuits that have addressed the application of *Miranda* to parole and probation officers. See, e.g., *United States v Newton*, 369 F3d 659, 663-664, 679-680 (CA 2, 2004) (applying *Miranda* safeguards to questions of a parole officer to a defendant); *United States v Andaverde*, 64 F3d 1305, 1310-1311 (CA 9, 1995) (holding that custodial statements made to probation officers are subject to the same *Miranda* analysis as statements made to law enforcement officers); *United States v Bland*, 908 F2d 471, 473-474 (CA 9, 1990) (ordering a new trial for a defendant because a parole officer's *Miranda* warning was inadequate); *United States v Deaton*, 468 F2d 541, 544 (CA 5, 1972) (stating that a parole officer must give *Miranda* warnings during a custodial interrogation of a parolee).

In *Deaton*, for example, the defendant's parole officer testified at the defendant's trial about incriminating

statements made to him by the defendant in response to "direct interrogation by the parole officer when [the defendant] was in custody" and "without the officer having given [the defendant] the warnings required by *Miranda*." *Deaton*, 468 F2d at 544. The United States Court of Appeals for the Fifth Circuit held that the defendant's statements to his parole officer were inadmissible at trial as the parole officer had not advised the defendant of his *Miranda* rights. *Id*. As a basis for its holding, the *Deaton* court explained that "[a] parolee is under heavy psychological pressure to answer inquiries made by his parole officer, perhaps even greater than when the interrogation is by an enforcement officer." *Id*.

In addition to these federal circuits, there is persuasive authority from various state appellate courts holding that *Miranda* applies to parole and probation officers. See, e.g., *State v Willis*, 64 Wash App 634, 639-640; 825 P2d 357 (1992) (community corrections officers); *State v Sargent*, 111 Wash 2d 641, 652-653; 762 P2d 1127 (1988) (probation officers); *State v Roberts*, 32 Ohio St 3d 225, 231; 513 NE2d 720 (1987) (probation officers); *Marrs v State*, 53 Md App 230, 235; 452 A2d 992 (1982) (probation officers); *State v Magby*, 113 Ariz 345, 348-349; 554 P2d 1272 (1976) (probation officers); *State v Gallagher*, 38 Ohio St 2d 291, 296-297; 313 NE2d 396 (1974), vacated on other grounds 425 US 257 (1976), reinstated on remand 46 Ohio St 2d 225 (1976) (parole officers); *State v Williams*, 486 SW2d 468, 473-474 (Mo, 1972) (parole officers); *State v Lekas*, 201 Kan 579, 584-588; 442 P2d 11 (1968) (parole officers).

In *Marrs*, police officers arrested the defendant on trespassing charges. *Marrs*, 53 Md App at 231-232. In the presence of two police officers, the defendant's

probation officer questioned the defendant in a police vehicle and also at the police station regarding an arson that had occurred about one year earlier. *Id.* According to the probation officer, he questioned the defendant so that he could "make a proper recommendation as to whether [the defendant's] bail bond and probation should be revoked" and "at no time gave [the defendant] *Miranda* warnings." *Id.* at 232. The defendant initially denied involvement in the arson, but after requesting that the police officers leave, he admitted to his probation officer that he was involved in the arson. *Id.* The defendant's statement to the probation officer was admitted into evidence at his trial for arson, and the defendant was convicted. *Id.* The Maryland Court of Special Appeals held that the defendant's statement to his probation officer was not admissible at trial because the defendant had not been advised of his *Miranda* rights. *Id.* at 235. The court opined that the probation officer's motivation for questioning the defendant was immaterial as long as the probation officer's conduct was likely to elicit an incriminating statement. According to the court, if questioning constituted an interrogation under *Miranda*, the questioning " '*does not become something else* because the interrogator's main purpose is [something other] than the procuring of incriminating statements, even though self-incrimination may be foreseen as a windfall.' " *Id.* at 235-236 (citation omitted). The court focused on the relationship between probation officers and probationers when determining that *Miranda* safeguards applied:

> It seems to us that an accused, whose essential obligation it is to "report to" and "answer questions posed by a probation officer," *United States v. Rea*, 678 F.2d 382 (2nd Cir.1982), is under even heavier psychological pressure to answer questions put by his probation officer, a figure of

> both authority and trust. A probationer, who often talks to his supervising officer as a counselor and confidante, might very well assume that any statements made by him are in some way confidential thus bringing into play the mandates of *Miranda.* [*Id.* at 233.]

In *Roberts*, the Ohio Supreme Court similarly considered the relationship between probation officers and probationers before holding that a probation officer must give *Miranda* warnings before questioning an in-custody probationer. See *Roberts*, 32 Ohio St 3d at 231. After discussing the reasoning of the *Marrs* court, the *Roberts* court emphasized that there is a "deceptive effect engendered by the in-custody questioning of a probationer by his probation officer." *Id.* at 230. In explaining the potential for abuse in the probationer-probation officer relationship, the court quoted Justice Thurgood Marshall's dissent in *Murphy*. *Id.* Justice Marshall opined:

> It is true, as the majority points out, that the discussion between a probation officer and a probationer is likely to be less coercive and intimidating than a discussion between a police officer and a suspect in custody. *Ante*, at 1144, 1145 [*Murphy*, 465 US at 433]. But it is precisely in that fact that the danger lies. In contrast to the inherently adversarial relationship between a suspect and a policeman, the relationship between a probationer and the officer to whom he reports is likely to incorporate elements of confidentiality, even friendship. Indeed, many probation officers deliberately cultivate such bonds with their charges. The point should not be overstated; undoubtedly, few probationers are entirely blind to the fact that their probation officers are 'peace officer[s], . . . allied, to a greater or lesser extent, with [their] fellow peace officers.' *Fare v. Michael C.*, 442 U.S. 707, 720, 99 S.Ct. 2560, 2569, 61 L.Ed.2d 197 (1979). On the other hand, many probationers develop "relationship[s] of trust and confidence" with their officers. *Id.*, at 722 []. Through abuse of that trust, a probation officer can elicit admissions from a probationer that the probationer

> would be unlikely to make to a hostile police interrogator. [*Murphy*, 465 US at 459-460 (Marshall, J., dissenting).]

Although we are mindful of this Court's previous unpublished decisions in *Stokes* and *Littlejohn* that do not apply *Miranda* to parole officers, we are persuaded that the better rule is that articulated by the *Deaton*, *Marrs*, and *Roberts* courts and adhered to by the other jurisdictions listed.

The rationale for the suppression of statements elicited during a custodial interrogation by a law enforcement officer who does not adhere to *Miranda* is to "combat" the "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda*, 384 US at 467; see also *Williams*, 244 Mich App at 539. Such "inherently compelling pressures" exist in the relationship between a parolee and a parole officer. Indeed, this Court has recognized that "both parolees and probationers are under heavy psychological pressure to answer inquiries made by their supervising officers." *People v Faulkner*, 90 Mich App 520, 524; 282 NW2d 377 (1979) (quotation marks and citations omitted). This heavy psychological pressure exists because of the unique relationship between a parolee and parole officer.

On the one hand, the parolee-parole officer relationship often becomes a relationship of trust and confidence, as does the probationer-probation officer relationship addressed by Justice Marshall in *Murphy*. See *Murphy*, 465 US at 459-460 (Marshall, J., dissenting). As a parolee develops trust and begins to confide in a parole officer, the parole officer is more likely to elicit from the parolee incriminating statements that the parolee would likely not make to a police interrogator.

On the other hand, the parolee-parole officer relationship is adversarial. A parole officer is an agent of the state. Generally, as a condition of parole, a parolee is obligated to report to and answer his or her parole officer's questions to avoid the revocation of parole. See generally *Faulkner*, 90 Mich App at 524-525 (noting that the director of a half-way house was required to give *Miranda* warnings before interrogating the defendant when the defendant was not free to refuse to answer the director's questions). If a parole officer has reasonable grounds to believe that a parolee has violated the conditions of his or her parole, MCL 791.239 provides the officer with statutory authority to arrest the parolee. Cf. *Anderson*, 209 Mich App at 534 (holding that a South Carolina juvenile corrections officer supervisor was not required to give *Miranda* warnings to the defendant before he confessed to involvement in two shootings because the officer did not have authority to arrest or detain). Thus, when a parole officer questions an in-custody parolee in a circumstance that is likely to elicit an incriminating response, the parolee is "assuredly . . . faced with a phase of the adversary system and . . . not in the presence of [a] perso[n] acting solely in his interest." See *Estelle*, 451 US at 467 (quotation marks and citation omitted). In *Estelle*, such adversarial questioning necessitated the use of *Miranda* safeguards by a court-ordered psychiatrist who examined a defendant and ultimately testified during the penalty phase of the defendant's trial:

> That [defendant] was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney, is immaterial. When [the psychiatrist] went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of

> [defendant's] future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting. *During the psychiatric evaluation,* [*defendant*] *assuredly was "faced with a phase of the adversary system" and was "not in the presence of* [*a*] *perso*[*n*] acting solely in his interest."
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> * * *
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> . . . Because [defendant] did not voluntarily consent to the pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to [the psychiatrist] to establish his future dangerousness. If, upon being adequately warned, [defendant] had indicated that he would not answer [the psychiatrist's] questions, the validly ordered competency examination nevertheless could have proceeded upon the condition that the results would be applied solely for that purpose. [*Estelle*, 451 US at 467-468 (citation omitted; emphasis added) (italicized alterations in original).]

Furthermore, when a parole officer subjects a parolee to a custodial interrogation, there is always the possibility that the parole officer's questioning will lead to a criminal prosecution. The existence of such a possibility, the Supreme Court held, necessitated the use of *Miranda* safeguards by an internal revenue agent:

> It is true that a 'routine tax investigation' may be initiated for the purpose of a civil action rather than criminal prosecution. . . . But tax investigations frequently lead to criminal prosecutions, just as the one here did. . . . And, as the investigating revenue agent was compelled to admit, *there was always the possibility during his investigation that his work would end up in a criminal prosecution*. We reject the contention that tax investigations are immune from the Miranda requirements for warnings to be given a person in custody. [*Mathis*, 391 US at 4 (emphasis added).]

Accordingly, given the heavy psychological pressure on a parolee to respond to a parole officer's questions the parolee would not otherwise do so freely, see *Miranda*, 384 US at 467; *Faulkner*, 90 Mich App at 524; *Deaton*, 468 F2d at 544, we hold that a parole officer is a law enforcement officer for purposes of *Miranda*. Statements made by a parolee to a parole officer during a custodial interrogation are inadmissible in a subsequent trial if the parolee invoked the right to counsel before questioning.[4] Therefore, we conclude that the statements defendant made to Evans while he was in custody were inadmissible at trial and that the trial court erred by denying defendant's motion to suppress.

D. HARMLESS ERROR

A preserved constitutional error occurring during the presentation of the case to a jury, i.e., a nonstructural error, is not grounds for reversal if the error was harmless. *People v Miller*, 482 Mich 540, 559; 759 NW2d 850 (2008); *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994). A preserved constitutional error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *People v Hyde*, 285 Mich App 428, 447; 775 NW2d 833 (2009) (quotation marks and citations omitted). "There must be no 'reasonable possibility that the evidence complained of might have contributed to the conviction.' " *Id.*, quoting

[4] We emphasize that we do not address whether the statements would be admissible in a subsequent parole revocation hearing. We note, however, that the Supreme Court has stated that "the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations." *Morrissey v Brewer*, 408 US 471, 480; 92 S Ct 2593; 33 L Ed 2d 484 (1972); see also *People v Hardenbrook*, 68 Mich App 640, 644-646; 243 NW2d 705 (1976).

Anderson, 446 Mich at 406; see also *Chapman v California*, 386 US 18, 23; 87 S Ct 824; 17 L Ed 2d 705 (1967).

In addition to eliciting Evans's inadmissible testimony, the prosecution presented evidence that defendant smoked Marlboro cigarettes, which was the brand of cigarettes that the robber told the cashier to give him. Defendant's brother testified that defendant returned home on the night of the robbery wearing clothes that matched the description of the clothes worn by the robber and with $152. The $152 included a $2 bill, which corresponded to the money that the robber stole from the gas station. Defendant's brother reported defendant to the police. Moreover, the prosecution presented evidence that defendant frequently wore a University of Michigan fleece pullover and a University of Michigan hat that matched the description of the pullover and hat worn by the robber.

Notwithstanding this evidence of defendant's guilt, there remains a "reasonable possibility" that defendant's statements to Evans "might have contributed to the conviction." See *Anderson*, 446 Mich at 406 (quotation marks and citation omitted). The gas-station cashier was unable to identify defendant as the robber. Although defendant's brother testified against him, the defense introduced evidence of the brother's prior convictions both to impeach the brother and also as a basis for arguing that the brother committed the robbery and falsely accused defendant. Moreover, in both his opening and closing statements, the prosecutor emphasized the importance of Evans's testimony regarding defendant's incriminating statements. In his opening statement, the prosecutor said, "[M]ost importantly, you will hear that the Defendant confessed to someone that he did this armed robbery." And in his closing argument,

the prosecutor described Evans as "probably the most crucial" witness. The prosecutor's statements underscore the importance of defendant's incriminating statements in the prosecution's case and demonstrate a reasonable possibility that defendant's incriminating statements might have contributed to his conviction. See *id*.

Accordingly, we conclude that the trial court's failure to suppress defendant's statements to Evans was not harmless error beyond a reasonable doubt. Therefore, we reverse defendant's conviction and remand for a new trial.

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

OWENS and SHAPIRO, JJ., concurred with BECKERING, P.J.

HOFFMAN v BARRETT (ON REMAND)

Docket No. 289011. Submitted November 15, 2011, at Lansing. Decided March 8, 2012, at 9:10 a.m. Leave to appeal denied, 493 Mich 925.

Beth Hoffman was appointed personal representative of the estate of Edgar Brown, deceased, on July 27, 2001. Hoffman provided defendants, Peter Barrett, M.D., and Battle Creek Health Systems, a notice of intent to file a medical malpractice action on March 3, 2003, and filed the action on October 16, 2003. On August 27, 2004, the court, James C. Kingsley, J., granted summary disposition in favor of defendants because, at the time, the Court of Appeals had held in *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503 (2006) (*Mullins I*), that the Supreme Court's decision in *Waltz v Wyse*, 469 Mich 642 (2004), applied retroactively. Under the retroactive application of *Waltz*, plaintiff's action had been filed after the wrongful death saving period had expired. The Court of Appeals, METER, P.J., and K. F. KELLY and FORT HOOD, JJ., affirmed the trial court's determination in an unpublished opinion per curiam, issued May 22, 2007 (Docket No. 258982). The Supreme Court held plaintiff's application for leave to appeal in abeyance pending the outcome of an appeal in the Supreme Court of the *Mullins* action. The Supreme Court subsequently reversed the judgment of the Court of Appeals in *Mullins*, concluding that *Waltz* "does not apply to any causes of action filed after *Omelenchuk v City of Warren*, 461 Mich 567 (2000), was decided in which the saving period expired, i.e., two years had elapsed since the personal representative was appointed, sometime between the date that *Omelenchuk* was decided and within 182 days after *Waltz* was decided. All other causes of action are controlled by *Waltz*." *Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007) (*Mullins II*). Subsequently, the Supreme Court, in lieu of granting plaintiff's application for leave to appeal in this case, reversed the judgment of the Court of Appeals and remanded the case to the trial court for the entry of an order denying defendants' motion for summary disposition and for further proceedings. 480 Mich 981 (2007) (*Hoffman I*). On remand in the trial court, Battle Creek Health Systems was dismissed as a defendant. Barrett moved for summary disposition, asserting that plaintiff's notice of intent and affidavit of merit were deficient. Plaintiff conceded that the

affidavit of merit was defective. The trial court found the notice of intent to be adequate and granted summary disposition without prejudice in favor of Barrett. Barrett appealed, contending that the dismissal should have been with prejudice. The Court of Appeals, DAVIS, P.J., and DONOFRIO and STEPHENS, JJ., affirmed, 288 Mich App 536 (2010) (*Hoffman II*), holding that the trial court properly determined that plaintiff's notice of intent was sufficient when read as a whole. The two-year statutory limitations period had already expired and could not thereafter be tolled when the suit was filed on October 16, 2003. The saving period of MCL 600.5852, which provides an additional two years for filing after the appointment of a personal representative, would have expired on July 27, 2003, if it had not been tolled by the application of *Mullins II*. Because *Mullins II* applied, plaintiff's notice of intent, which was filed on March 3, 2003, and was valid, tolled the running of the saving period and the action was timely filed. The Court of Appeals noted in *Hoffman II* that *Waltz* did not apply because this case was filed after *Omelenchuk* was decided and the saving period expired within 182 days after *Waltz* was decided. The Court stated that before the decision in *Waltz*, the saving period was understood to be tolled by filing a notice of intent exactly the same way in which the period of limitations would be tolled. Because *Waltz* did not apply but *Omelenchuk* did, plaintiff's filing of the notice of intent tolled the saving period. The Court further noted that the filing of a complaint and an affidavit of merit, even a defective one, tolls the limitations period until the affidavit of merit is successfully challenged. The *Hoffman II* Court reasoned that the filing of the notice of intent tolled the saving period for 182 days, but there were in addition 146 days remaining in the saving period at that time. When the suit was filed, there remained 101 days within which plaintiff could have filed. Because plaintiff still had this time available upon the successful challenge to the affidavit of merit, the trial court's dismissal was properly without prejudice. Finally, the Court of Appeals held in *Hoffman II* that plaintiff's expert was qualified to sign the affidavit of merit because, although Barrett is a board-certified general surgeon and a board-certified thoracic surgeon and plaintiff's expert is only board-certified in general surgery, the claims against Barrett, when viewed on the basis of the affidavit of merit, do not appear to require any specialized testimony pertaining to thoracic surgery. Barrett sought leave to appeal in the Supreme Court, which held the application in abeyance pending, in part, the decision in *Ligons v Crittenton Hosp*, 490 Mich 61 (2011), which held that a medical malpractice action must be dismissed with prejudice if a defective affidavit of merit is filed after the expiration of both the statutory limitations

period and the saving period. Following its decision in *Ligons*, the Supreme Court, in lieu of granting Barrett's application for leave to appeal, vacated the Court of Appeals' opinion in *Hoffman II* and remanded the case to the Court of Appeals for reconsideration in light of *Ligons*. 490 Mich 890 (2011).

On remand, the Court of Appeals *held*:

1. Key to the Supreme Court's decision in *Ligons* was the applicability of *Waltz*, in which the Court determined that MCL 600.5856 tolls only statutes of limitation or repose and does not toll the wrongful death saving period provided in MCL 600.5852. Because *Waltz* is inapplicable in the present case, *Ligons* does not affect the previous decision of the Court of Appeals in *Hoffman II* that plaintiff's filing of her notice of intent tolled the saving period and the filing of her complaint and affidavit of merit would have tolled the running of the additional time provided under the saving provision. Because there remained time within which plaintiff could refile her suit, the trial court properly dismissed the action without prejudice.

2. In reviewing the sufficiency of a notice of intent, the entire notice must be read and considered as a whole, rather than piecemeal. The information in the notice need only be detailed enough to allow the potential defendant to understand the claimed basis of the impending malpractice action and need only be set forth with the same level of specificity as would be required of allegations in a complaint or other pleading in order to give fair notice.

3. A plain reading of plaintiff's notice of intent as a whole does not leave the reader guessing about how the decedent died as a proximate result of Barrett's alleged inaction. All the required information is plainly apparent from reading the notice of intent as a whole. Although the notice of intent could have been better, it was sufficient.

4. MCL 600.2912d(1) and MCL 600.2169 provide that a plaintiff must file an affidavit of merit signed by a physician who counsel reasonably believes specializes in the same specialty as the defendant physician, including a reasonable belief that the expert holds a board certification identical to that of the defendant physician, if the defendant physician is so certified. However, because irrelevant testimony is generally inadmissible, the plaintiff's expert need only specialize or be certified in subfields relevant to the expert's intended testimony. Therefore, a plaintiff's expert need only match the specialty engaged in by the defendant physician during the course of the alleged malpractice and, if the defendant physician is board-certified in that specialty, the plain-

tiff's expert must also have a board certification in that specialty. The mere fact that a defendant has a specialty that the plaintiff's expert lacks does not automatically disqualify the plaintiff's expert from properly signing the plaintiff's affidavit of merit.

5. Plaintiff's expert was qualified to sign the affidavit of merit. Although Barrett is a board-certified general surgeon and a board-certified thoracic surgeon and plaintiff's expert is only board certified in general surgery, the claims against Barrett, when viewed on the basis of the affidavit of merit, do not appear to require any specialized testimony pertaining to thoracic surgery.

Affirmed.

Charfoos & Christensen, P.C. (by *David R. Parker*, *J. Douglas Peters*, and *Ann K. Mandt*), for Beth Hoffman.

Aardema, Whitelaw & Sears-Ewald, PLLC (by *Dolores Sears-Ewald* and *Timothy P. Buchalski*), for Peter Barrett, M.D.

ON REMAND

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

PER CURIAM. This case is before us on remand from our Supreme Court for reconsideration in light of *Ligons v Crittenton Hosp*, 490 Mich 61; 803 NW2d 271 (2011) (*Ligons II*), in which the Court held that a medical malpractice action must be dismissed with prejudice if a defective affidavit of merit (AOM) is filed after the expiration of both the statutory limitations period and the saving period. *Hoffman v Barrett*, 490 Mich 890 (2011). Key to the Court's decision in *Ligons* was the applicability of *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), in which the Court determined that MCL 600.5856 tolls only statutes of limitations or repose and does not toll the wrongful death saving period provided in MCL 600.5852. See *Ligons II*, 490 Mich at 74-76, 89-90. Because *Waltz* is inapplicable in

the present case, as our Supreme Court previously determined,[1] *Ligons II* does not affect our previous decision, and we again affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case is before this Court for the third time. In *Hoffman v Barrett*, 288 Mich App 536, 538-539; 794 NW2d 67 (2010) (*Hoffman II*), vacated 490 Mich 890 (2011), we set forth the pertinent facts and procedural history:

> The decedent, Edgar Brown, fell from the roof of his house onto a cement driveway on January 13, 2001, and he was taken to the emergency room at Battle Creek Health Systems[1] (BCHS). Defendant, Dr. Peter Barrett, was assigned to care for the decedent. The decedent's treatment entailed, among other things, insertion of a chest tube to reinflate a lung. He was discharged from BCHS and returned to his home on January 24, 2001. The decedent developed problems at home the next day. Emergency medical services were summoned, and the decedent went into full arrest in the ambulance. He was pronounced dead at the hospital.
>
> This matter has been before this Court previously, in Docket No. 258982. Plaintiff was appointed personal representative on July 27, 2001. Plaintiff provided defendants[2] with a notice of intent to sue, pursuant to MCL 600.2912b(1), on March 3, 2003. Plaintiff commenced the instant suit on October 16, 2003. On August 27, 2004, the trial court granted a prior summary disposition motion in favor of defendants because, at the time, this Court had held that our Supreme Court's decision in *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), applied retroactively. *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503; 722 NW2d 666 (2006) (*Mullins I*), rev'd *Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007) (*Mullins II*). Under a

[1] See *Hoffman v Barrett*, 480 Mich 981 (2007) (*Hoffman I*); *Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007) (*Mullins II*).

retroactive application of *Waltz*, plaintiff's suit had been filed after the wrongful death saving period had expired. The Court of Appeals affirmed the trial court's determination. *Hoffman v Barrett*, unpublished opinion per curiam of the Court of Appeals, issued May 22, 2007 (Docket No. 258982). Plaintiff applied for leave to appeal in our Supreme Court, which held the application for leave to appeal in abeyance pending the outcome of the appeal in *Mullins*. After *Mullins II* was decided, our Supreme Court, in lieu of granting leave to appeal, reversed the judgment of the Court Appeals and remanded the case to the trial court for the entry of an order denying defendants' motion for summary disposition and for further proceedings. *Hoffman v Barrett*, 480 Mich 981 (2007) [*Hoffman I*].[3]

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[1] Battle Creek Health Systems was originally a named defendant, but was dismissed before the summary disposition order at issue in this appeal.

[2] Battle Creek Health Systems was still a defendant at the time of the prior appeal.

[3] In *Mullins II*, our Supreme Court held that *Waltz* did not apply to any actions filed after the decision in *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), and before 182 days after the decision in *Waltz*. *Omelenchuk* was decided on March 28, 2000, and *Waltz* was decided on April 14, 2004; the date 182 days later would be October 13, 2004. This matter was filed between those dates, so *Waltz* does not apply.

On remand, defendant Dr. Barrett again moved for summary disposition, arguing that plaintiff's notice of intent to file suit and AOM were deficient. The trial court determined that the notice of intent was adequate, and plaintiff conceded that her AOM was defective. The trial court dismissed this case without prejudice. On appeal, defendant argues that the trial court should have dismissed this action *with* prejudice.

II. EFFECT OF *LIGONS II* ON *HOFFMAN II*

Defendant argues that dismissal with prejudice was required because there was no time remaining for plaintiff to timely refile her lawsuit. In *Hoffman II*, this Court disagreed and determined that, because *Waltz* is inapplicable, plaintiff's filing of her notice of intent tolled the saving period. This Court stated, in relevant part, in *Hoffman II*, 288 Mich App at 540-543:

> The malpractice presumably happened on or before January 24, 2001. There is a two-year statutory limitations period, and an additional possible three years under the "saving provision." The limitations period is tolled if a complaint is filed with a defective affidavit of merit, but the saving period is not. The limitations period would have expired on, at the latest, January 24, 2003. Suit was filed on October 16, 2003, so the limitations period had already expired and could not thereafter be tolled. The saving period, MCL 600.5852, provides an additional two years after the appointment of a personal representative; plaintiff was appointed personal representative on July 27, 2001, so the saving period would have expired on July 27, 2003, see, generally, *Ligons v Crittenton Hosp*, 285 Mich App 337, 351-355; 776 NW2d 361 (2009) [*Ligons I*],[5] if it had not been tolled by the application of *Mullins II*. Because *Mullins II* applies, plaintiff's notice of intent, which was filed on March 3, 2003, and which we conclude is valid, tolled the running of the saving period. This action was therefore timely filed.
>
> * * *
>
> [A]s observed, this case was filed after *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), was decided, and the saving period expired before 182 days after *Waltz* was decided. Therefore, *Waltz* does not apply to this case. *Mullins II*, 480 Mich at 948. Before the decision in *Waltz*, the saving period was understood to be tolled by filing a notice of intent exactly the same way in which the

period of limitations would be tolled. *Waltz*, 469 Mich at 653-654 . . . . Because *Waltz* does not apply, but *Omelenchuk* does, plaintiff's filing of the notice of intent tolled the saving period. As we discuss, the trial court correctly found the notice of intent to be sufficient, so dismissal without prejudice was proper.

Plaintiff conceded that the affidavit of merit was defective. Nevertheless, filing a complaint and an affidavit of merit—even a defective one—tolls the limitations period until the affidavit is successfully challenged. *Kirkaldy v Rim*, 478 Mich 581, 585-586; 734 NW2d 201 (2007). . . . Filing the notice of intent on March 3, 2003, tolled the saving period for 182 days, but there were in addition 146 days remaining in the saving period at that time. When this suit was filed on October 16, 2003, there remained 101 days within which plaintiff could have filed. Plaintiff still had this time available upon the successful challenge to the affidavit of merit, and therefore dismissal was properly without prejudice.

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[5] While we cite this case for several legal propositions conveniently summarized therein, we offer no opinion as to the correctness of *Ligons* [*I*]. *Ligons* [*I*] is not controlling in this matter because the action in *Ligons* [*I*] was filed on April 7, 2006, which, unlike the filing in the instant matter, was more than 182 days after *Waltz* was decided. Therefore, *Waltz* was applicable in *Ligons* [*I*] but is not applicable here. See footnote 3 of this opinion.*

On July 29, 2011, our Supreme Court decided *Ligons II*, in which it determined that dismissal with prejudice was required in circumstances similar to the instant case. In that case, the plaintiff filed two AOMs, both of which were defective. *Ligons II*, 490 Mich at 77-79. He failed to commence his lawsuit within the limitations period, but filed his complaint and accompanying AOMs within the saving period provided by MCL 600.5852. *Id.* at 89. Because the AOMs were defective, however, and

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*See *supra* at 654—REPORTER.

the plaintiff was unable to amend the AOMs retroactively, dismissal with prejudice was required. *Id.* at 79-90. The *Ligons II* Court stated:

> Although the timely filing of a defective AOM tolls the limitations period until a court finds the AOM defective, an AOM filed during a saving period after the limitations period has expired tolls nothing, as the limitations period has run and *the saving period may not be tolled*. In this case, because the limitations period had run before the complaint was filed, plaintiff cannot amend his defective AOMs retroactively. Given that the saving period has expired, plaintiff's case had to be dismissed with prejudice. [*Id.* at 90 (emphasis added).]

As the emphasized language in the preceding paragraph indicates, *Waltz* was applicable in *Ligons*. Thus, pursuant to *Waltz*, the plaintiff's filing of the AOMs did not toll the saving period. *Ligons II*, 490 Mich at 74-76, 89-90. In this case, however, *Waltz* is not applicable. *Hoffman I*, 480 Mich at 981; *Mullins II*, 480 Mich at 948. Accordingly, as stated previously in *Hoffman II*, 288 Mich App at 542, plaintiff's filing of her notice of intent tolled the saving period and the filing of her complaint and AOM would have tolled the running of the additional time provided under the saving provision. Because there remained time within which plaintiff could refile her suit, the trial court properly dismissed the action without prejudice.

III. REMAINING ISSUES

Defendant also argues that plaintiff's notice of intent was insufficient and contends that plaintiff's expert was not qualified to sign the AOM or offer standard-of-care testimony against him. Because *Ligons II* does not implicate those issues, and our Supreme Court vacated this Court's entire opinion in *Hoffman II*, we adopt

verbatim our previous analysis of those issues in *Hoffman II*, 288 Mich App at 543-551:

> Defendant next argues that the notice of intent was insufficient because it failed to contain a statement explaining the manner in which defendant's alleged breach of the standard of care resulted in plaintiff's decedent's injuries.[6] We agree with the trial court that the notice of intent could have been better, but was sufficient.
>
> Under MCL 600.2912b, commencement of a medical malpractice claim requires a plaintiff to provide an advance "notice of intent" to the intended defendant; that notice must provide certain specific pieces of information, although no particular format is required. *Ligons* [*I*], 285 Mich App at 343. The information in the notice of intent must be provided in good faith, but it need not eventually be proven to be completely accurate. *Boodt v Borgess Med Ctr*, 481 Mich 558, 561; 751 NW2d 44 (2008). Furthermore, the information need only be detailed enough to "allow the potential defendants to understand the claimed basis of the impending malpractice action," particularly given that it is being provided before discovery would ordinarily have begun. *Roberts v Mecosta Co Gen Hosp* (*After Remand*), 470 Mich 679, 691, 692 n 7; 684 NW2d 711 (2004). A bare statement that the alleged negligence caused the harm is insufficient, *Boodt*, 481 Mich at 560, but the entire notice must be read and considered as a whole, rather than piecemeal, *Ligons* [*I*], 285 Mich App at 344.
>
> Plaintiff's notice of intent provided,[7] in relevant part, as follows:
>
> "SECTION 2912b NOTICE OF INTENT TO FILE CLAIM
>
> "RE: EDGAR BROWN, DECEASED
>
> "This Notice is intended to apply to the following healthcare professionals, entities and/or facilities as well as their employees or agents, actual or ostensible, who were involved in the evaluation, care and/or treatment of EDGAR BROWN, DECEASED.

"DR. PETER BARRETT, BATTLE CREEK HEALTH SYSTEMS, AND ANY AND ALL PROFESSIONAL CORPORATIONS AND ALL AGENTS AND EMPLOYEES, ACTUAL OR OSTENSIBLE, THEREOF.

"I. FACTUAL BASIS OF THE CLAIM

"On January 13, 2001, Edgar Brown fell from a ladder and was brought to Battle Creek Health Systems Emergency Room. He was found to have multiple rib fractures and a right pneumothorax.[8] Dr. Peter Barrett was assigned to care for Mr. Brown and he was admitted to the hospital.

"A chest tube was inserted and was removed on January 19, 2001. Mr. Brown developed an ileus[9] and a nasogastric tube[10] was inserted. Between the time of his admission and his discharge, Mr. Brown continued to have diminished breath sounds. His last chest x-ray was taken on January 20, 2001 and his last abdominal x-ray was taken on January 19, 2001. Mr. Brown was discharged home on January 24, 2001. He had a distended abdomen and was still having difficulty breathing.

"Within 24 hours of discharge, Mr. Brown became short of breath while talking, his abdomen remained distended and his daughter called for an ambulance. Mr. Brown went into full arrest in the ambulance. The cause of death was determined to be complications of multiple injuries from [sic]. On autopsy, Mr. Brown was found to have right pulmonary atelectasis[11] and right empyema/pleuritis,[12] as well as an intestinal ileus.[13]

"II. APPLICABLE STANDARD OF PRACTICE OR CARE ALLEGED

"A reasonable and prudent physician and/or hospital staff would have:

"a. Monitored a patient such as Mr. Brown carefully and regularly, including, but not limited to, having performed full diagnostic tests such as regular chest x-rays and abdominal films when the patient was exhibiting pulmonary and gastrointestinal problems.

"b. Performed full physical examinations of a patient in circumstances such as Edgar Brown['s], including respiratory and abdominal assessments on a regular basis.

"c. Adequately assessed and intervened for respiratory compromise in a patient such as Edgar Brown.

"d. Refrained from discharging a patient such as Edgar Brown without having performed a complete, full and adequate assessment, including all diagnostic tests to make sure that his pulmonary status and gastrointestinal status were stable.

"e. Refrained from discharging a patient in the condition of Edgar Brown.

"f. Refrained from discharging a patient such as Edgar Brown without appropriate home care follow-up and equipment, including, but not limited to, oxygen.

"g. Provided appropriate treatment for a patient such as Edgar Brown who obviously, while in the hospital, continued to have respiratory distress and gastrointestinal problems.

"III. THE MANNER IN WHICH IT IS CLAIMED THAT THE STANDARDS OF PRACTICE OR CARE WERE BREACHED

"The defendant physician and/or hospital staff did not:

"a. Monitor a patient such as Mr. Brown carefully and regularly, including, but not limited to, perform full diagnostic tests such as regular chest x-rays and abdominal films when the patient was exhibiting pulmonary and gastrointestinal problems.

"b. Perform full physical examinations of a patient in circumstances such as Edgar Brown['s], including respiratory and abdominal assessments on a regular basis.

"c. Adequately assess and intervene for respiratory compromise in a patient such as Edgar Brown.

"d. Refrain from discharging a patient such as Edgar Brown without having performed a complete, full and adequate assessment, including all diagnostic tests to make

sure that his pulmonary status and gastrointestinal status were stable.

"e. Refrain from discharging a patient in the condition of Edgar Brown.

"f. Refrain from discharging a patient such as Edgar Brown without appropriate home care follow-up and equipment, including, but not limited to, oxygen.

"g. Provide appropriate treatment for a patient such as Edgar Brown who obviously, while in the hospital, continuing [sic] to have respiratory distress and gastrointestinal problems.

"IV. THE ACTION THAT SHOULD HAVE BEEN TAKEN TO ACHIEVE COMPLIANCE WITH THE STANDARD OF PRACTICE OR CARE

"A reasonable and prudent physician and/or hospital staff should have:

"a. Monitored a patient such as Mr. Brown carefully and regularly, including, but not limited to, having performed full diagnostic tests such as regular chest x-rays and abdominal films when the patient was exhibiting pulmonary and gastrointestinal problems.

"b. Performed full physical examinations of a patient in circumstances such as Edgar Brown, including respiratory and abdominal assessments on a regular basis.

"c. Adequately assessed and intervened for respiratory compromise in a patient such as Edgar Brown.

"d. Refrained from discharging a patient such as Edgar Brown without having performed a complete, full and adequate assessment, including all diagnostic tests to make sure that his pulmonary status and gastrointestinal status were stable.

"e. Refrained from discharging a patient in the condition of Edgar Brown.

"f. Refrained from discharging a patient such as Edgar Brown without appropriate home care follow-up and equipment, including, but not limited to, oxygen.

"g. Provided appropriate treatment for a patient such as Edgar Brown who obviously, while in the hospital, continued to have respiratory distress and gastrointestinal problems.

"V. THE MANNER IN WHICH THE BREACH WAS THE PROXIMATE CAUSE OF CLAIMED INJURY

"As a proximate result of the defendants' conduct, Edgar Brown died prematurely from his injuries."

When the final statement is viewed *in isolation*, it does in fact amount to no more than a bare statement that the alleged negligence caused the decedent's injuries. However, the proper way to review the notice of intent is as a whole, rather than viewing one part in isolation. *Ligons* [*I*], 285 Mich App at 344. Significantly, a notice of intent is insufficient if it "*only* provides notice or *only* provides 'a statement.' It must do both." *Esselman* [*v Garden City Hosp*, 284 Mich App 209, 220; 772 NW2d 438 (2009)]. The required notification need only to be set forth with the same level of specificity as "would be required of allegations in a complaint or other pleading: [the statement] must only give fair notice to the other party." *Id.* at 219.

As was the situation in *Esselman*, the statement here is not sufficient to provide the requisite notice all by itself, but it is also not a tautology. See *id.* at 217. A plain reading of plaintiff's notice of intent *as a whole* does not leave the reader guessing about how the decedent died as a proximate result of defendant's alleged inaction, at least when some of the technical medical terms are explained. The decedent, while under defendant's care, was suffering from readily diagnosable life-threatening conditions that inevitably became fatal because defendant simply failed to do anything about those conditions. The manner in which the breach of the standard of care proximately caused the harm is just that simple and straightforward: defendant did not investigate the significance of the decedent's symptoms and did not discover or properly deal with the causes of those symptoms, and because those causes are fatal if not

dealt with, the decedent died. All the required information is plainly apparent from reading the notice of intent as a whole.

Defendant finally argues that plaintiff's expert was not qualified to sign the affidavit of merit or render standard-of-care testimony against him.[14] Defendant bases this argument on the fact that he is a board-certified general surgeon and a board-certified thoracic surgeon, whereas plaintiff's expert is only board-certified in general surgery. We decline to address whether plaintiff's expert is qualified to render standard-of-care testimony at trial, such considerations being premature at the affidavit-of-merit stage of proceedings. *Grossman v Brown*, 470 Mich 593, 600; 685 NW2d 198 (2004). We conclude that plaintiff's expert was qualified to sign the affidavit of merit.

Pursuant to MCL 600.2912d(1) and MCL 600.2169, a plaintiff must "file an affidavit of merit signed by a physician who counsel reasonably believes specializes in the same specialty as the defendant physician," including a reasonable belief that the expert holds an identical board certification as the defendant physician, if the defendant physician is so certified. *Grossman*, 470 Mich at 596. Dr. Barrett is board-certified by the American Board of Thoracic Surgery, which defines its specialty as "the operative, perioperative, and surgical critical care of patients with acquired and congenital pathologic conditions within the chest," including the heart, lungs, airways, and chest injuries.[15] Plaintiff's expert is not.

However, "not *all* specialties and board certificates must match." *Woodard v Custer*, 476 Mich 545, 558; 719 NW2d 842 (2006). Because irrelevant testimony is generally inadmissible, *id.* at 568-572, the plaintiff's expert need only specialize or be certified in subfields relevant to the expert's intended testimony, *id.* at 559. Therefore, a plaintiff's expert need only match "the specialty engaged in by the defendant physician during the course of the alleged malpractice, and, if the defendant physician is board certified in that specialty, the plaintiff's expert must also be board certified in that specialty." *Id.* at 560; see also *Gonzalez v St John Hosp & Med Ctr* (*On Reconsideration*),

275 Mich App 290, 302-303; 739 NW2d 392 (2007). The mere fact that defendant has a specialty that plaintiff's expert lacks does not automatically disqualify plaintiff's expert from properly signing plaintiff's affidavit of merit.

Defendant's position seems superficially meritorious, because the decedent did suffer injuries to his ribs, the decedent was later determined to have a collapsed lung, and the pleural cavity, from which 850 milliters[16] [sic] of brown pus was removed, surrounds the lungs. A significant portion of the decedent's injuries were indeed located in a part of the body that would fall in the "thoracic" category. However, the decedent was also found to have a lacerated spleen, a necrotic[17] gallbladder, a necrotic liver, intestinal ileus, and acalculous cholecystitis.[18] Clearly, a significant portion of the decedent's injuries did *not* fall under the thoracic category. Moreover, the obvious import of the affidavit of merit is not that defendant failed to do anything particularly relevant to thoracic surgery or medicine, but that defendant failed *generally* to treat the decedent properly.

At least on the basis of the affidavit of merit, the claims against defendant do not appear to require any specialized testimony pertaining to thoracic surgery. Therefore, plaintiff's expert was qualified to sign the affidavit of merit.

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[6] Defendant also argues that the notice of intent failed to separate the standards of care applicable to the different defendants, but because there were only two named defendants, one of which is no longer a party, and because the only articulated failures pertain to Dr. Barrett, we do not believe that the notice is deficient on this basis.

[7] We have added footnotes explaining medical terms used. These definitions have been culled from *Stedman's Medical Dictionary* (26th ed); 1 Schmidt, *Attorneys' Dictionary of Medicine* (2000 rev); and <http://emedicine.medscape.com> (accessed May 5, 2010).

[8] Abnormal presence of air inside the pleural cavity, which is the membrane-lined cavity in the thorax surrounding the lungs.

[9] An obstruction or blockage of the intestine or bowel.

[10] A tube inserted into the stomach through the nose, used for feeding or for removing fluids.

[11] A collapsed lung.

[12] Empyema is an accumulation of pus in the body cavity. Pleuritis is an inflammation of the lining around the lungs.

[13] Again, an obstruction or blockage of the intestine.

[14] This issue is moot in the instant appeal, given plaintiff's concession that the affidavit of merit was otherwise defective, but we address the matter because it will become relevant upon plaintiff's refiling the action.

[15] <http://www.abts.org/sections/Definition_of_Thorac/index.html> (accessed May 5, 2010).

[16] Slightly less than $3^{2}/_{3}$ cups.

[17] Necrosis refers to localized death of cells or tissue because of injury or disease, rather than as a result of natural causes.

[18] Cholecystitis is an inflammation of the gallbladder; "acalculous" refers to the absence of stones. Acalculous cholecystitis apparently has a relatively high mortality rate and is commonly observed in patients who have suffered trauma.

Affirmed.

DONOFRIO, P.J., and K. F. KELLY and STEPHENS, JJ., concurred.

KBD & ASSOCIATES, INC v GREAT LAKES FOAM TECHNOLOGIES, INC

Docket No. 303044. Submitted March 6, 2012, at Lansing. Decided March 15, 2012, at 9:00 a.m.

KBD & Associates, Inc. filed an action in the Jackson Circuit Court against Great Lakes Foam Technologies, Inc., claiming that Great Lakes Foam had breached the parties' commission contract when it failed to pay KBD's owner, Roger Lyons, a commission for sales that occurred after Great Lakes Foam terminated its business relationship with Lyons. Lyons approached Great Lakes Foam in 2005 to determine whether it was interested in manufacturing foam seat cushions for Isringhausen, Inc. Great Lakes Foam agreed, and Lyons was paid a 5 percent commission on all sales to Isringhausen. Great Lakes Foam was contacted by Isringhausen in April 2009 and informed that Lyons was banned from their facility and that it would no longer deal with Lyons as a sales representative. Great Lakes Foam thereafter informed Lyons that it was terminating their business relationship. Although Great Lakes Foam continued to sell foam parts to Isringhausen through March 2010, it did not pay any commissions to Lyons for the sales occurring after his termination. Lyons argued that he was entitled to posttermination sales commissions on the basis that he was the procuring cause of Great Lakes Foam's sales to Isringhausen. The parties filed cross-motions for summary disposition. The court, Chad C. Schmucker, J., originally denied Lyons's motion and granted summary disposition in favor of Great Lakes Foam, but then granted KBD's motion for reconsideration. The court determined that there was a question of fact about whether the Isringhausen business would have continued without future account servicing from a representative once Lyons was terminated. Following a bench trial, the court entered judgment in favor of Great Lakes Foam, finding that Lyons was not entitled to the commissions because the agreement required him to perform significant account servicing and he committed the first material breach of the commission contract when he was banned from Isringhausen's premises. KBD appealed.

The Court of Appeals *held*:

1. Sales agents are entitled to posttermination commissions for sales they procured during their time with a former employer, regardless of whether they concluded and completed the sale. The procuring-cause doctrine applies when the parties have a contract governing the payment of sales commissions but the contract is silent regarding the payment of posttermination commissions. The basic principle behind the procuring-cause doctrine is the notion of fair dealing. Thus, if the principal cancels the authority of the agent, the agent would still be able to recover the commission if the agent was the procuring cause. In this case, the customer (Isringhausen) canceled Lyons's authority, not Great Lakes Foam. Lyons's services were terminated as an attempt by Great Lakes Foam to retain Isringhausen as its client, not an attempt to avoid payment of Lyons's commission. Accordingly, the rationale underpinning the procuring-cause doctrine was not applicable to the facts of this case.

2. A court must look to the parties' contract when analyzing a claim for posttermination commissions. When the terms of a contract are contested, the finder of fact determines its actual terms. However, a sales agent who commits the first substantial breach of a commission contract is not entitled to recover posttermination commissions. If account servicing was a term of the contract, then Lyons's ban from Isringhausen's plant constituted a breach of the parties' contract because Lyons would not have been able to perform his servicing obligations. The circuit court properly determined that summary disposition was inappropriate because there was a question of fact regarding the terms of the parties' commission contract, specifically whether, and if so to what extent, the contract required Lyons to service the account.

3. The decision to admit evidence is within the court's discretion and will not be disturbed on appeal absent an abuse of that discretion. A court's decision whether to impose discovery sanctions is also reviewed for an abuse of discretion. Plaintiff failed to move to compel the production of posttermination e-mails between Isringhausen and Great Lakes Foam. Therefore, an order to compel production was never entered pursuant to MCR 2.313(A), and sanctions for failure to produce the e-mails could not be imposed under MCR 2.313(B)(2). Contrary to KBD's argument, deposition testimony regarding the e-mails provided notice of their existence. Even if it was error to admit the posttermination e-mails, it was harmless because the circuit court's ultimate decision on whether account servicing was part of the commission contract was based primarily on Lyons's own testimony.

4. The law of the case doctrine provides that a ruling by an appellate court on a particular case binds the appellate court and all lower tribunals with respect to that issue. However, a trial court has unrestricted discretion to review its previous decisions, and the law of the case doctrine does not preclude a trial court from reversing its prior decision. Because there had been no ruling by an appellate court in this case, the circuit court had authority to grant KBD's motion for reconsideration and reverse its prior decision granting summary disposition in favor of Great Lakes Foam.

5. The circuit court's judgment did not contravene its order granting KBD's motion for reconsideration. In its initial order granting summary disposition in favor of Great Lakes Foam, the circuit court determined that Lyons's account-servicing obligations were significant enough to render the procuring-causes doctrine inapplicable because Lyons committed the first material breach when he was banned from Isringhausen's plant. However, when the court granted KBD's motion for reconsideration, it never determined that the procuring-cause doctrine was applicable; rather, the circuit court determined that there was an issue of fact regarding Lyons's service obligation, thus making summary disposition inappropriate.

6. The circuit court's findings on the issue of Lyons's account-servicing obligations under the terms of the commission contract were not against the great weight of the evidence.

Affirmed.

1. AGENCY — PRINCIPAL AND AGENT — SALES COMMISSIONS — PROCURING-CAUSE DOCTRINE.

Sales agents are entitled to posttermination commissions for sales they procured during their time with a former employer, regardless of whether they concluded and completed the sale; the procuring-cause doctrine applies when the parties have a contract governing the payment of sales commissions but the contract is silent regarding the payment of posttermination commissions; the basic principle behind the procuring-cause doctrine is the notion of fair dealing; if the principal cancels the authority of the agent, the agent is still able to recover the commission if the agent was the procuring cause.

2. AGENCY — PRINCIPAL AND AGENT — POSTTERMINATION SALES COMMISSIONS — BREACH OF COMMISSION CONTRACT.

A court must look to the parties' contract when analyzing a claim for posttermination commissions; when the terms of a contract are

contested, the finder of fact determines its actual terms; a sales agent who commits the first substantial breach of a commission contract is not entitled to recover posttermination commissions; a substantial breach occurs when the sales representative is unable to fulfill its account-servicing obligations under the contract because the customer banned the sales representative from its premises or otherwise refused to deal with the principal's agent.

3. COURTS — SUBSEQUENT REVERSALS — LAW OF THE CASE DOCTRINE.

The law of the case doctrine provides that a ruling by an appellate court on a particular case binds the appellate court and all lower tribunals with respect to that issue; the doctrine does not prevent a trial court from exercising its unrestricted discretion to review its prior decision to correct an error.

Couzens, Lansky, Fealk, Ellis, Roeder & Lazar, P.C. (by *Phillip L. Sternberg*), for KBD & Associates, Inc.

Warner Norcross & Judd, LLP (by *James Moskal*), for Great Lakes Foam Technologies, Inc.

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

DONOFRIO, J. Plaintiff appeals as of right the circuit court's judgment in favor of defendant following a bench trial. Because the court properly denied plaintiff's motion for summary disposition, it did not err by admitting evidence of posttermination communications at trial, its judgment did not contravene the great weight of the evidence, and it did not misinterpret the procuring-cause doctrine, we affirm.

Plaintiff is a manufacturer's representative firm owned and operated by Roger Lyons. Its sole function is to serve as a sales representative to various companies. Defendant manufactures and supplies foam and foam-padded products. In approximately 1997 Lyons approached defendant's primary owner, William MacCready, regarding the possibility of defendant manufacturing a foam armrest to

sell to a company named Findlay Industries. MacCready agreed to manufacture the armrests and paid Lyons a five percent commission on armrest sales. According to MacCready, the commission was based on Lyons managing the account because MacCready had no personnel to perform that function. The agreement was not reduced to writing and lasted for one or two years until Findlay Industries went out of business.

In 2005, Lyons again approached MacCready and inquired whether MacCready was interested in manufacturing foam seat cushions for Isringhausen, Inc. MacCready agreed to the deal and paid Lyons a five percent commission on all sales to Isringhausen. Again, the agreement was not reduced to writing, but Lyons and MacCready both claimed that the deal was intended to be a continuation of the armrest agreement.

Defendant produced between 25 and 30 different parts for Isringhausen (the 2005 project). According to Lyons, once production on the 2005 project began, his servicing obligations were minimal, and he spent most of his time attempting to obtain new business for defendant from Isringhausen and other companies. MacCready maintained, however, that Lyons's commission was contingent on his performance of account manager functions and that Lyons's account-servicing responsibilities were significant.

On April 3, 2009, Tim Packer, defendant's coowner and general manager, received an e-mail from an Isringhausen employee informing him that Isringhausen would no longer allow Lyons to represent defendant. The e-mail stated that Isringhausen no longer wished to deal with Lyons "in the future effective immediately" and indicated that all future correspondence would be between Isringhausen's and defendant's personnel di-

rectly. The e-mail further stated that Lyons was not to contact Isringhausen for any reason whatsoever and that if defendant found this unacceptable, Isringhausen would make arrangements to locate a different foam supplier. Consequently, Packer and MacCready informed Lyons that they were terminating their relationship with him. Although defendant eventually lost the Isringhausen account, it continued to sell parts to Isringhausen through March 2010, generating approximately $1.4 million in sales between the time that Lyons was terminated and the time that the sales were discontinued. Defendant did not pay any sales commissions to Lyons after his termination.

Thereafter, plaintiff filed suit against defendant for breach of the parties' commission contract. Plaintiff alleged that it had fulfilled its obligations under the contract and that Lyons was responsible for procuring all of defendant's sales to Isringhausen. Plaintiff further alleged that Lyons was entitled to a five percent commission on all of defendant's sales to Isringhausen that occurred after Lyons's termination.

The parties filed cross-motions for summary disposition pursuant to MCR 2.116(C)(10). Lyons argued that he was entitled to posttermination sales commissions because he was the procuring cause of defendant's sales to Isringhausen. Defendant, on the other hand, argued that the procuring-cause doctrine was inapplicable because Lyons was responsible for a significant amount of account servicing, which he was unable to perform after Isringhausen banned him from its premises. Defendant also argued that the doctrine was inapplicable because Lyons committed a material breach of contract when he was banned from Isringhausen's premises.

Initially, the trial court denied Lyons's motion and granted summary disposition in favor of defendant. The

court determined that Lyons's servicing responsibilities were significant enough to render the procuring-cause doctrine inapplicable. The trial court also determined that the doctrine was inapplicable because Lyons committed the first material breach of contract by getting himself banned from Isringhausen's premises. Thereafter, Lyons moved for reconsideration, which the trial court granted. The trial court reasoned that, viewing the facts in the light most favorable to plaintiff, there was a question of fact regarding whether the posttermination orders "would have come in anyway," despite that Lyons was no longer servicing the account. The trial court further stated that even though it determined that Lyons had committed the first breach, "the first breach only becomes significant if there were customer service requirements."

The case proceeded to a two-day bench trial, following which the trial court entered a judgment in defendant's favor. The court concluded that the commission agreement required Lyons to perform significant account servicing, which, although not a full-time job, was significant enough that defendant had to replace Lyons. The trial court further concluded that because of Lyons's significant service obligations, he committed the first material breach when he was banned from Isringhausen's premises.

Plaintiff first argues that the trial court erroneously denied its motion for summary disposition because defendant failed to produce evidence of significant account servicing that defendant was required to perform after Lyons's termination. 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). Under MCR 2.116(C)(10), summary disposition may be granted when "there is no genuine

issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." When deciding a motion under (C)(10), the court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

"The law in Michigan is that sales agents are entitled to post-termination commissions for sales they procured during their time at the former employer." *Stubl v T A Sys, Inc*, 984 F Supp 1075, 1095 (ED Mich, 1997). In *Reed v Kurdziel*, 352 Mich 287, 294-295; 89 NW2d 479 (1958), the seminal case in Michigan discussing the procuring-cause doctrine, our Supreme Court stated:

> It would appear that underlying all the decisions is the basic principle of fair dealing, preventing a principal from unfairly taking the benefit of the agent's or broker's services without compensation and imposing upon the principal, regardless of the type of agency or contract, liability to the agent or broker for commissions for sales upon which the agent or broker was the procuring cause, notwithstanding the sales made have been consummated by the principal himself or some other agent. In Michigan, as well as in most jurisdictions, the agent is entitled to recover his commission whether or not he has personally concluded and completed the sale, it being sufficient if his efforts were the procuring cause of the sale. In Michigan the rule goes further to provide if the authority of the agent has been cancelled by the principal, the agent would nevertheless be permitted to recover the commission if the agent was the procuring cause. [Citations omitted.]

The procuring-cause doctrine applies when the parties have a contract governing the payment of sales commissions, but the contract is silent regarding the payment of posttermination commissions. See *id.*

Plaintiff argues that Lyons was entitled to posttermination commissions because the uncontested evidence showed that he was the procuring cause of defendant's sales to Isringhausen. Plaintiff contends that at the time of Lyons's termination there was no work left to be performed with respect to the 2005 project other than minor ministerial tasks. Plaintiff further contends that the trial court erroneously relied on *Roberts Assoc, Inc v Blazer Int'l Corp*, 741 F Supp 650, 655 (ED Mich, 1990), a nonbinding, federal decision in which that court stated:

> If subsequent purchase orders are submitted by a customer which involve no additional servicing or negotiation, then the salesman securing the original account may well be entitled to commissions on those sales. Of course, in the usual case each subsequent order will require some further customer services and under those circumstances the agent securing the previous order will have no claim for additional commissions. It is a question of fact for the jury whether subsequent purchases were effectuated by additional customer services or were made solely on the force of the original representations.

Plaintiff asserts that *Roberts* does not accurately describe the procuring-cause doctrine because the mere fact that *some* further customer servicing is required does not justify termination of commissions. Plaintiff appears to argue that when additional posttermination servicing is required, the court must balance the agent's pretermination efforts against the principal's posttermination efforts to determine if the agent is still the procuring cause of the sale. Applying this balancing test, plaintiff asserts that he was entitled to summary disposition because defendant failed to produce evidence that it provided significant posttermination account servicing.

The basic principle behind the procuring-cause doctrine is the notion of fair dealing. *Reed*, 352 Mich at 294. It is unfair to allow a principal to terminate an agent and avoid paying commissions on sales that the agent procured. Thus, "if the authority of the agent has been cancelled by the principal, the agent would nevertheless be permitted to recover the commission if the agent was the procuring cause." *Id*. at 295. Here, Lyons's authority was not canceled by the principal. Rather, Isringhausen, the customer, canceled Lyons's authority. Moreover, defendant's termination of Lyons was an attempt to retain its customer and not an attempt to avoid paying Lyons's commission. Under these circumstances, the principles underpinning the procuring-cause doctrine are simply inapplicable.

In addition, summary disposition was inappropriate because the parties disputed the terms of the commissions contract. When analyzing a claim for posttermination commissions, the first step is to look at the parties' contract. *Reed*, 352 Mich at 294. Contrary to plaintiff's argument, defendant presented evidence of the servicing efforts it provided to Isringhausen after Lyons's termination. Both MacCready and Packer testified during their depositions that Lyons was hired to be a full-service account manager and that Lyons's commission was contingent on his management of the account. Packer explained that "[m]anaging an account could entail many things, working with an engineering department, working with the quality department, working with the purchasing department, having the pulse of your customer, making sure the customer is happy." In contrast, Lyons testified that his commission was not contingent on servicing the account. Lyons acknowledged that he considered certain account-servicing tasks to be his responsibility; however, he maintained that those tasks were infrequent and had

no impact on his commission. "Generally, when the terms of a contract are contested, the actual terms of the contract are to be determined by the jury . . . ." *Butterfield v Metal Flow Corp*, 185 Mich App 630, 636-637; 462 NW2d 815 (1990).

The servicing requirements of the parties' contract are important because they pertain to the issue of breach. A sales agent who commits the first substantial breach of a commissions contract is not entitled to recover posttermination commissions. See *Butterfield*, 185 Mich App at 637. If account servicing was a term of the contract, which the parties dispute, then being banned from Isringhausen's premises was a breach of the parties' contract because Lyons could no longer perform his servicing obligation. Depending on the significance of the servicing requirements, Lyons's ban could be considered a substantial breach of contract, in which case defendant would not be required to continue performing under the contract. See *id.* Thus, the trial court properly determined that summary disposition was inappropriate.

Plaintiff next argues that the trial court erred by allowing Packer to testify about e-mail communications that Packer had with representatives at Isringhausen after Lyons's termination. Plaintiff contends that the trial court should have excluded Packer's testimony because the e-mails were never produced during discovery. Plaintiff preserved this issue for our review by objecting to the admission of Packer's testimony on the same basis that it now asserts on appeal. See *Klapp v United Ins Group Agency, Inc (On Remand)*, 259 Mich App 467, 475; 674 NW2d 736 (2003). The decision to admit evidence is within the trial court's discretion and will not be disturbed on appeal absent an abuse of discretion. *Edry v Adelman*, 486 Mich 634, 639; 786

NW2d 567 (2010). We also review for an abuse of discretion a trial court's decision whether to impose discovery sanctions. *McDonald v Grand Traverse Co Election Comm*, 255 Mich App 674, 697; 662 NW2d 804 (2003). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Edry*, 486 Mich at 639.

Pursuant to MCR 2.313(A), a party may move for an order compelling discovery. MCR 2.313(B)(2) sets forth various mechanisms by which a trial court may enforce a discovery order and sanction disobedient parties. MCR 2.313(B)(2) applies, however, only "[i]f a party . . . fails to obey an order to provide or permit discovery . . . ." Because plaintiff did not file a motion to compel production of the posttermination e-mails, the trial court never entered an order compelling their production.

Plaintiff argues that it had no opportunity to file a motion to compel discovery because it was unaware that the posttermination e-mails existed. A review of Packer's deposition testimony, however, shows otherwise. During his deposition, plaintiff's counsel questioned Packer at length regarding e-mails that had been exchanged after Lyons's termination and specifically asked whether such e-mails had been produced. Packer responded, "I produced a lot of e-mails and they were—I didn't differentiate as far as I recollect between before and after. You asked for all e-mails involved with the customer and I gave them to you as far as I recollect." Plaintiff's counsel further questioned Packer regarding posttermination e-mails, and Packer testified that such communications had occurred. Counsel asked Packer to produce the e-mails if he had not already done so, and Packer agreed to do so. Because Packer admitted that posttermination e-mails had been exchanged, plaintiff

was aware of their existence. Therefore, the record does not support plaintiff's contention that it was unaware that the e-mail communications existed. Because plaintiff was aware of the communications, it could have filed a motion to compel their production.

In any event, even if the trial court erred by admitting Packer's testimony, the error does not warrant reversal. Error requiring reversal may not be predicated on an evidentiary ruling unless a substantial right of the party was affected. MRE 103(a); *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). The trial court based its decision primarily on Lyons's testimony rather than on Packer's. Regarding whether the 2005 project was "on autopilot," the trial court stated, "I didn't think some of Mr. Packer's testimony was well enough documented to be convincing, but quite frankly I thought Mr. Lyons' testimony was . . . ." The court continued:

> I mean—I mean his—your own deposition testimony and testimony here about different things that you did with pricing, even some of the liaison with this . . . this PPAP, I mean the visits, the—the—the trip reports, these don't suggest to me, you know, an autopilot contract that things are just coming in if it's on autopilot.

Thus, even if the trial court erred by admitting Packer's testimony regarding posttermination e-mail communications, any error was harmless given the court's reliance on Lyons's testimony, which it found more convincing.

Plaintiff next argues that the trial court's judgment was against the great weight of the evidence because it was contrary to the court's determination that the procuring-cause doctrine was applicable, which plaintiff asserts the court determined in its ruling on plaintiff's motion for reconsideration. Plaintiff contends that the

trial court's "about face" regarding the applicability of the procuring-cause doctrine contravened the "law of the case." "Whether the law of the case doctrine applies is a question of law that we review de novo." *Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010). Further, under the great weight of the evidence standard, we defer to the trial court's findings of fact, which we will affirm unless the evidence clearly preponderates in the opposite direction. *McIntosh v McIntosh*, 282 Mich App 471, 474; 768 NW2d 325 (2009).

Plaintiff's argument is somewhat difficult to understand. It appears that plaintiff is arguing that because the procuring-cause doctrine applies only when a contract is silent regarding posttermination sales commissions, and the trial court determined pretrial that the procuring-cause doctrine was applicable, it must have determined that the parties' contract was silent regarding posttermination commissions. Plaintiff contends that the trial court's subsequent determination that Lyons was entitled to a five percent commission only if he serviced the account contravened the court's previous ruling because it showed that the parties had reached an agreement regarding posttermination sales commissions.

The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000). There was no ruling by an appellate court in this case. Rather, the trial court granted plaintiff's motion for reconsideration and reversed its previous decision granting summary disposition for defendant. "[A] trial court has unrestricted discretion to review its previous decision," and "the law of the case doctrine [does] not preclude [a] trial court

from reversing its prior decision." *Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 52-53; 698 NW2d 900 (2005). Therefore, the law of the case doctrine is inapplicable.

In addition, plaintiff's argument that the trial court's judgment contravened its order granting plaintiff's motion for reconsideration lacks merit. In its initial order granting summary disposition in defendant's favor, the trial court determined that Lyons's servicing obligations were significant enough to render the procuring-cause doctrine inapplicable. The court also determined that the doctrine was inapplicable because Lyons committed the first material breach given the significance of his servicing obligations. Contrary to plaintiff's argument, in its decision granting plaintiff's motion for reconsideration, the trial court never determined that the procuring-cause doctrine was applicable to the facts of this case. Rather, the court simply determined that there was an issue of fact regarding Lyons's servicing obligations. Moreover, the court determined that a question of fact existed regarding the issue of breach because the breach became significant only if Lyons's servicing obligations were significant. Therefore, the trial court's judgment did not contravene its order granting plaintiff's motion for reconsideration.

Further, the trial court's findings were not against the great weight of the evidence. The court concluded, based on Lyons's own testimony, that Lyons was required to perform significant account servicing. Lyons testified that his involvement in the 2005 project was minimal, but he acknowledged that he worked with Isringhausen on pricing issues and was part of defendant's negotiation team, though he did not have authority to set prices. Lyons also dealt with some quality issues on behalf of defendant. He testified that at the time of his termination he went to

Isringhausen's premises once a week. He maintained that although the majority of his time there was spent on new projects, about 25 percent of his time was dedicated to the 2005 project.

In addition to Lyons's testimony, the trial court relied on several e-mails that Lyons sent to defendant, which defendant characterized as trip logs. The e-mails generally discussed Lyons's trips to Isringhausen and summarized the issues with which he had dealt when he was there. Several e-mails related to pricing discussions that Lyons had with Isringhausen personnel. Lyons had also discussed with Isringhausen personnel the implementation of a cost reduction plan, quality issues, tooling repairs, and the preproduction part-approval process.

From this evidence, the trial court concluded that Lyons was required to perform significant account servicing. The trial court reasoned, in pertinent part:

> The—I think the key is, you know, we've talked about is, was this sort of something that was on autopilot where there are just some—some de minimous [sic] or ministerial customer service obligations. I didn't think some of Mr. Packer's testimony was well enough documented to be convincing, but quite frankly I thought Mr. Lyons' testimony was—I thought these were—that there were more—certainly way more than de minimous [sic] or—or ministerial work. I mean—I mean his—your own deposition testimony and testimony here about different things that you did with pricing, even some of the liaison with this . . . this PPAP, I mean the visits, the—the—the trip reports, these don't suggest to me, you know, an autopilot contract that things are just coming in if it's on autopilot. And some of the trip report stuff was related to new business. But—and I'm—I'm trying to—that's what makes it harder.
>
> If—if it was no—if this was your only dealings with Isringhausen and this was the only contract there's overwhelming time spent there. You had other business with Isringhausen. You had the new business, which is—is not

part of this. But even taking those off I'm—I'm convinced that there was—there was some significant customer service obligations.

They weren't, you know, every week like in the one case, you know, going and checking the shelves, how much needs to be done, but they were periodically things with pricing and this that [sic] came up that were significant. I don't think it . . . took a full time person to replace you by any means. But I think it was certainly more than—than an hour a week on average if you look at what happened from the time this—you know, not count this—this start up time. Even if you disregard, you know, the . . . 2005, but from the—from those years on with the changes that came about in this and your own description of it, I thought there . . . were significant account manager responsibilities.

Now were these just sort of volunteer things to sort of keep the customer happy to show that you were attentive and—and, you know, just doing it in your own regard without being required to, but I don't think that's what it was. I think you were—I think this was part of your—of your agreement to provide account service responsibilities. They were—they would vary from time to time how much they were. It—if it was just sort of a volunteer thing I wouldn't—these trip reports I mean I'd say, this—I'm not required to do this, just send me my five percent check, I'm not going to send you these reports. There's certainly some evidence that that was expected of you.

When that's expected that you're going to do this and it's of some significance, way less than full time, that's why I think this is sort of a—of a windfall. I mean it doesn't mean—you know, I'm not saying that they—everything that—I mean Isringhausen did this on their own that they banned you. And they're not blaming them for that. I think it turned out to be a windfall for them because I don't think it took nearly as much to replace you and to—to fill in these things as—as you would have earned.

But I think they had to replace you with someone. Someone had to take over this. It wasn't—I don't think it was, you know, ninety five percent of Mr. Packer's time, but

> if it was fifteen or twenty percent I think that is sufficient. It isn't required to be a full time job. To me it is just far more from your own testimony more than de minimous [sic] or—or ministerial.
>
> * * *
>
> And then when you get banned I think that is—I think that is a breach of the agreement. I think that was a first breach. I think it takes it out of the context of simply an autopilot procuring cause. This was—there were responsibilities with this. You can no longer do those.

The trial court's findings were not against the great weight of the evidence.

Finally, plaintiff argues that the trial court misinterpreted the procuring-cause doctrine by focusing on duties that Lyons performed before his termination, instead of focusing on the servicing obligations that defendant was required to perform after Lyons's termination. Plaintiff's argument lacks merit. The trial court did not misinterpret the procuring-cause doctrine. Rather, it heard testimony and admitted evidence regarding Lyons's servicing obligations because such testimony was relevant to the obligations that defendant was required to perform after Lyons's termination. As previously discussed, the evidence did not clearly preponderate against the trial court's finding that Lyons was required to perform significant servicing obligations in order to receive his five percent commission. Accordingly, plaintiff's argument lacks merit.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

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

McCOIG MATERIALS, LLC v GALUI CONSTRUCTION, INC

Docket No. 301599. Submitted February 15, 2012, at Detroit. Decided March 15, 2012, at 9:05 a.m.

McCoig Materials, LLC, brought an action in the Macomb Circuit Court against Galui Construction, Inc., and Ohio Casualty Insurance Company (which provided a performance bond), seeking to recover for Galui's alleged breach of contract and to collect on the performance bond for Galui's purported failure to pay for concrete ordered from McCoig and delivered to Galui under the terms of an open-account contract between McCoig and Galui. The contract required Galui to notify McCoig in writing of any defect in materials or nonconformity to specifications within 15 days from receipt of the materials and of any yield complaints within 48 hours after receipt, and required any action to be brought within one year of the delivery of the materials. Between August 5, 2008, and September 18, 2008, McCoig furnished concrete to Galui for work performed on a project in the city of Center Line. Galui did not notify McCoig of any defects and did not file a lawsuit within one year after the materials were supplied. Between November 1, 2008, and December 3, 2008, McCoig delivered concrete to Galui for work on a project in the city of Warren. Galui allegedly failed to pay for the concrete supplied for the Warren project. On April 1, 2010, McCoig filed this action seeking to compel payment of the balance due for the Warren project. On April 30, 2010, Galui filed an answer, affirmative defenses, and a counterclaim. In its affirmative defenses Galui asserted that it was entitled to offsets, backcharges, and costs incurred to correct defective concrete provided by McCoig. Galui's counterclaim asserted breach of contract and breach of warranty arising from allegedly defective concrete materials furnished for the Center Line project. McCoig moved for summary disposition of Galui's counterclaim, relying on the one-year limitations period in the contract, and for summary disposition with regard to its complaint, alleging that there were no disputed issues of material fact. The court, Donald G. Miller, J., entered an order dismissing Galui's counterclaim and denying summary disposition with regard to McCoig's complaint without prejudice. McCoig again moved for summary disposition, asserting that there was no genuine issue of material fact regarding Galui's

obligation to pay for the materials for the Warren project, noting that Galui accepted the goods without objection. Galui responded, contending that there were genuine issues of material fact regarding the outstanding balance, but not raising an issue regarding any alleged defective concrete. The court denied the motion, stating that the dismissal of Galui's counterclaim did not preclude Galui from asserting its potential costs to replace the defective concrete on the Center Line project as a defense to McCoig's claim for breach of contract on the Warren project. The court stated that Galui's ability to assert recoupment as a defense necessarily created a question of fact regarding the balance due McCoig. McCoig moved for reconsideration, challenging the court's decision to raise sua sponte the defense of recoupment and alleging that the doctrine of recoupment did not apply because it only applied to debts arising from the same transaction. The court denied the motion for reconsideration, stating that because Galui ordered materials for both projects under a single contract, recoupment applied. The court stated that the mere fact that Galui had separate contracts with Warren and Center Line for the projects did not transform McCoig's delivery of materials to Galui under one contract into separate contracts with Galui. The court held that the failure to plead recoupment as an affirmative defense could be cured by amendment, and deemed Galui and Ohio Casualty to have so amended their affirmative defenses. The Court of Appeals granted McCoig's application for leave to appeal.

The Court of Appeals *held*:

1. A claim for recoupment must be premised on the same contract or transaction. The categorization of the parties' agreement as a single contract or an open account is not determinative. The claim for recoupment by the defendant must be premised on the same transaction raised in the plaintiff's complaint, and the defendant must prove that the plaintiff is in breach of the contract from which the defendant seeks recoupment. When a defendant accepts goods or construction without timely objection or reservation, the defendant is barred from raising the recoupment defense.

2. The trial court erred by denying McCoig's second motion for summary disposition by raising sua sponte the recoupment defense. The plain language of the contract reveals that, although it is an open-account contract, the transactions were to be treated as discrete events or separate transactions. Galui did not timely raise an objection to the materials provided in the Center Line project and the contract set forth a one-year period of limitations. Additional deliveries did not extend the limitations period. It would render nugatory the provision of the contract containing a 15-day

requirement regarding notice of defects if Galui was permitted to raise the issue of any alleged defects in the Center Line project in this litigation involving the Warren project. The purpose of recoupment, to prevent a multiplicity of suits, would not be served because any issues regarding the alleged defects in the Center Line project would rely on separate and distinct evidence. The trial court erred by denying McCoig's second motion for summary disposition on the basis of recoupment. The order denying the second motion for summary disposition is reversed and the case is remanded to the trial court for further proceedings

Reversed and remanded.

CONTRACTS — BREACHES OF CONTRACT — RECOUPMENT.

A claim for recoupment must be premised on the same contract or transaction; the categorization of the parties' agreement as a single contract or an open account is not determinative; the claim must be premised on the same transaction raised in the plaintiff's complaint and the defendant must prove that the plaintiff is in breach of the contract from which the defendant seeks recoupment; the defendant is barred from raising the recoupment defense when the defendant accepts goods or construction without timely objection or reservation; once a party accepts a particular phase of construction, it cannot utilize the defense of recoupment.

Finkel Whitefield Selik (by *David E. Sims* and *Daniel G. LeVan*) for McCoig Materials, LLC.

Frasco Caponigro Wineman & Scheible, PLLC (by *J. Christian Hauser* and *Jonathan D. Ordower*), for Galui Construction, Inc., and Ohio Casualty Insurance Company.

Before: SAAD, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM. In this action alleging breach of contract, plaintiff, McCoig Materials, LLC, appeals by leave granted the trial court's order denying its second motion for summary disposition. The trial court denied this motion for summary disposition and plaintiff's motion for reconsideration, holding that defendant,

Galui Construction, Inc.,[1] was entitled to raise the affirmative defense of recoupment. We reverse and remand for proceedings consistent with this opinion.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff filed this litigation to recover for defendant's alleged breach of contract and to collect on the performance bond (provided by Ohio Casualty Insurance Company) for defendant's purported failure to pay for concrete ordered and delivered pursuant to an open-account contract. Plaintiff operates a business manufacturing and selling concrete materials for use in construction projects. Plaintiff receives orders from specific customers for an exact amount of concrete material to be delivered to a particular job site. Plaintiff's employees deliver the concrete to the job site in accordance with the purchaser's instructions. After the material is delivered to the job site, the employee gives a delivery ticket to the purchaser and provides a carbon copy of the delivery ticket to plaintiff's accounting department. After obtaining the delivery ticket, the accounting department creates an invoice for all materials delivered that day and mails the purchaser the invoice. At the end of each month, a statement of account is created that delineates all charges for materials, payments by the purchaser, and any credits issued.

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[1] Plaintiff also named as a defendant the provider of the performance bond, Ohio Casualty Insurance Company. However, Ohio Casualty's liability would be as the bond provider and, accordingly, throughout this opinion, "defendant" refers to Galui Construction only. In addition, plaintiff's initial motion for summary disposition sought, in part, dismissal of Galui Construction's counterclaim. The trial court dismissed the counterclaim, and it is not an issue in this appeal. Thus, for ease of reference, we will refer to McCoig Materials only as "plaintiff" and Galui Construction only as "defendant."

Defendant performs concrete construction work. On February 7, 2007, plaintiff entered into a contract with defendant for the sale of concrete materials on a revolving basis. The contract provided that the goods were furnished to defendant on an open-account basis, but if defendant failed to pay, the account would be modified to require cash on delivery until the account was made current. The contract between the parties provided, in relevant part:

> This is a contract to obtain materials on open account from . . . McCoig Materials, LLC ("McCoig"). Buyer understands and expressly acknowledges that it is executing this Agreement with McCoig for the purchase of concrete materials on open account (McCoig shall be referred to as a *Seller* throughout this Agreement). . . .
>
> * * *
>
> 7. **Defects/Limitation of Liability:** Notice of any defect in materials or nonconformity to specifications shall be made in writing within 15 days from receipt of such materials, after which any such claim for such defect or nonconformity shall be deemed waived, except that yield complaints must be made in writing no later than 48 hours after receipt of materials. Seller's liability for such defective or nonconforming materials shall be limited, under any theory of law, to their replacement or refund of the purchase price. Seller shall have the right to inspect and satisfy itself as to the validity of any such claims. Seller shall have no responsibility for damage or shortage of any materials unless such damage or shortage is noted on the delivery ticket and materials claimed to be damaged are held and made available for Seller's inspection. IN THE CASE OF ALL CLAIMS MADE AGAINST SELLER, INCLUDING BUT NOT LIMITED TO CLAIMS FOR FAILURE OR DELAY IN DELIVERY, SELLER SHALL IN NO EVENT BE LIABLE FOR ANY LOSS [SIC] PROFITS, SPECIAL OR CONSEQUENTIAL DAMAGES. NO ACTION, REGARDLESS OF FORM, ARISING OUT OF THE

> TRANSACTIONS UNDER THIS AGREEMENT MAY BE BROUGHT BY BUYER MORE THAN ONE YEAR AFTER THE MATERIALS SUPPLIED PURSUANT TO ANY ORDER UNDER THIS AGREEMENT HAVE BEEN DELIVERED.
>
> SELLER DISCLAIMS ANY AND ALL WARRANTIES, WHETHER EXPRESSED OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTY OF MECHANTABILIYT [SIC] OR FITNESS FOR A PARTICULAR PURPOSE, EXCEPT AS OTHERWISE PROVIDED HEREIN UNLESS MADE SPECIFICALLY IN WRITING, SIGNED BY AN OFFICER OF SELLER, AND ATTACHED TO AND MADE PART OF THIS CONTRACT.

Between August 5, 2008, and September 18, 2008, plaintiff furnished concrete to defendant for work performed on a project in the city of Center Line. Pursuant to the terms of the contract, defendant was required to notify plaintiff of any defects within 15 days from receipt. Defendant did not timely notify plaintiff of any defects regarding the concrete used in the Center Line project, and it did not file a lawsuit within one year after the materials were supplied. Between November 1, 2008, and December 3, 2008, plaintiff delivered concrete to defendant for repair work in the city of Warren. Defendant allegedly failed to pay for the goods supplied for the city of Warren project. On April 1, 2010, plaintiff filed this litigation to compel payment, asserting that a balance of $51,837.93 was due and owing for the deliveries for defendant's Warren project.

On April 30, 2010, defendant filed an answer, affirmative defenses, and a counterclaim in response to plaintiff's complaint. In its affirmative defenses, defendant asserted that it was entitled to offsets, backcharges, and costs incurred by defendant to correct defective concrete provided by plaintiff. Defendant's

counterclaim asserted breach of contract and breach of warranty by plaintiff arising from the defective concrete materials furnished for the city of Center Line project.[2]

On July 23, 2010, plaintiff moved for summary disposition of defendant's counterclaim pursuant to MCR 2.116(C)(7), relying on the one-year limitations period set forth in the February 7, 2007 contract between the parties. Plaintiff also moved for summary disposition of its complaint under MCR 2.116(C)(10), contending that there was no genuine issue of material fact regarding the terms of the agreement, the concrete was delivered as promised, and defendant failed to pay the money owed without justification. On August 24, 2010, defendant filed a brief in opposition to the motion under MCR 2.116(C)(10), alleging that there were disputed issues of material fact regarding the quality of the concrete supplied by plaintiff and the amount due and owing in light of plaintiff's misapplication of payments. On September 8, 2010, the trial court entered an order dismissing defendant's counterclaim and denying plaintiff's motion for summary disposition of its complaint without prejudice.

On October 7, 2010, plaintiff filed its second motion for summary disposition pursuant to MCR 2.116(C)(10), asserting that there was no genuine issue of material fact regarding defendant's obligation to pay plaintiff for materials sold in connection with the Warren project. Plaintiff also alleged that defendant was obligated to pay the contract price because it accepted

[2] On October 20, 2009, the city of Center Line sent defendant a list of work items that needed to be corrected. Despite this notice from the city, defendant did not file its own lawsuit against plaintiff at that time. Rather, defendant only raised the issue of defects in response to plaintiff's complaint for breach of contract.

the goods at issue without objection. On October 25, 2010, defendant filed a brief in opposition to this motion, contending that there were genuine issues of material fact regarding any outstanding balance as well as the propriety of the interest charges. In this brief, defendant did not raise an issue regarding any alleged defective concrete.

On November 9, 2010, the trial court issued an opinion and order denying plaintiff's second motion for summary disposition. The trial court rejected defendant's challenge to the balance due and the argument that plaintiff misapplied payments. Nonetheless, the trial court denied plaintiff's motion, holding that defendant could recoup potential costs it suffered as a result of defective concrete plaintiff supplied for the Center Line project:

> Significantly, the dismissal of defendant Galui Construction's counterclaim does not preclude it from asserting its potential costs to replace the defective concrete on the Center Line project as a defense to plaintiff's claim for breach of contract on the Warren project. See *Mudge v Macomb County*, 458 Mich 87, 106-107; 580 NW2d 845 (1998) ("plaintiff will not be permitted to insist upon the statute of limitations as a bar to such a defense when he is seeking to enforce payment of that which is due him under the contract out of which the defendant's claim for recoupment arises").
>
> Defendant Galui Construction's ability to assert recoupment as a defense necessarily creates a question of fact as to any balance due plaintiff.

On November 29, 2010, plaintiff moved for reconsideration of the summary disposition ruling, challenging the trial court's decision to raise sua sponte the defense of recoupment, an issue not raised or briefed by defendant. In light of the trial court's dismissal of defendant's counterclaim, the only remaining issue in the

case involved the misapplication of payments. Plaintiff alleged that the doctrine of recoupment did not apply because it only applied to debts arising from the same transaction. Defendant contested the quality of the concrete supplied for the city of Center Line project, and plaintiff's complaint challenged the payments made for the city of Warren project.

On December 9, 2010, the trial court issued an opinion and order denying plaintiff's motion for reconsideration. The trial court held, in relevant part:

> Plaintiff's argument regarding the misapplication of recoupment in avoidance of the statute of limitations under *Mudge v Macomb County*, 458 Mich 87, 106-107; 580 NW2d 845 (1998) lacks merit.
>
> Significantly, plaintiff's motions for summary disposition evidence but a *single* Contract for Materials on Open Account with defendant Galui Construction. Indeed, as explained by Julie Moran's [McCoig Materials' credit manager] affidavit submitted in support of plaintiff's second motion for summary disposition, defendant Galui Construction "ordered concrete materials on account in connection with various projects", including the Warren and Center Line projects, "[i]n accordance with that agreement". Consequently, as defendant Galui Construction ordered materials for both projects under a single contract, recoupment does apply.
>
> The mere fact that Galui Construction had separate contracts with Warren and Center Line for the projects does not transform plaintiff's delivery of materials under one contract to defendant Galui Construction into separate contracts with defendant Galui Construction. Indeed, the separate deliveries of materials are but a continuing transaction under the one contract. Hence, plaintiff's reliance on the Contractor's Bond for Public Buildings or Works Act, MCL 129.201 *et seq*., and Construction Lien Act, MCL 570.1101 *et seq*., is distinguishable.
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> * * *

> Finally, any failure to plead recoupment as an affirmative defense can be cured by amendment. MCR 2.111(F)(3). Defendants Galui Construction and Ohio Casualty Insurance are deemed to have so amended their affirmative defenses.

We granted plaintiff's application for leave to appeal.[3]

II. STANDARD OF REVIEW

A trial court's ruling on a motion for summary disposition presents a question of law subject to review de novo. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 317; 783 NW2d 695 (2010). Summary disposition pursuant to MCR 2.116(C)(10) is proper when there is no genuine issue 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). The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate that a genuine issue of disputed fact exists for trial. *Id*. The nonmoving party may not rely on mere allegations or denials in the pleadings. *Id*. Affidavits, depositions, and documentary evidence offered in support of, and in opposition to, the motion are considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). A trial court's ruling regarding a motion for reconsideration is reviewed for an abuse of discretion. *In re Moukalled Estate*, 269 Mich App 708, 713; 714 NW2d 400 (2006). However, when the issue involves a question of law, the ruling is reviewed de novo. *Id*.

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[3] *McCoig Materials LLC v Galui Constr Inc*, unpublished order of the Court of Appeals, entered January 5, 2011 (Docket No. 301599).

III. ANALYSIS

Plaintiff alleges that the trial court erred by applying recoupment to an open-account contract when the projects at issue constituted discrete transactions. We agree.

A. APPLICABLE LAW

"The essential elements of a contract are parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation." *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). Issues regarding the proper interpretation of a contract or the legal effect of a contractual clause are reviewed de novo. *Fodale v Waste Mgt of Mich, Inc*, 271 Mich App 11, 16-17; 718 NW2d 827 (2006). When interpreting a contract, the examining court must ascertain the intent of the parties by evaluating the language of the contract in accordance with its plain and ordinary meaning. *In re Egbert R Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). If the language of the contract is clear and unambiguous, it must be enforced as written. *Id*. A contract is unambiguous, even if inartfully worded or clumsily arranged, when it fairly admits of but one interpretation. *Holmes v Holmes*, 281 Mich App 575, 594; 760 NW2d 300 (2008). Every word, phrase, and clause in a contract must be given effect, and contract interpretation that would render any part of the contract surplusage or nugatory must be avoided. *Woodington v Shokoohi*, 288 Mich App 352, 374; 792 NW2d 63 (2010).

"Recoupment is, in effect, a counterclaim or cross action for damages." *Smith v Erla*, 317 Mich 109, 112; 26 NW2d 728 (1947). Recoupment is also an affirmative defense that must be properly pleaded. *Ladd v Reed*,

320 Mich 167, 171; 30 NW2d 822 (1948). The defense of recoupment is applicable to "claims arising out of the same contract or transaction." *Id*. (citations omitted). The defendant bears the burden of proving that the plaintiff breached the contract from which the defendant seeks a setoff or recoupment. *Oakland Metal Stamping Co v Forest Indus, Inc*, 352 Mich 119, 125; 89 NW2d 503 (1958).

In *Mudge v Macomb Co*, 458 Mich 87, 106-107; 580 NW2d 845 (1998), the Supreme Court addressed the application of recoupment:

> The defense of recoupment refers to a defendant's right, in the same action, "to cut down the plaintiff's demand, either because the plaintiff has not complied with some cross obligation of the contract on which he or she sues or because the plaintiff has violated some legal duty in the making or performance of that contract." 20 Am Jur 2d, Counterclaim, Recoupment, etc., § 5, p 231. Recoupment is "a doctrine of an intrinsically defensive nature founded upon an equitable reason, inhering in the same transaction, why the plaintiff's claim in equity and good conscience should be reduced." *Pennsylvania R Co v Miller*, 124 F2d 160, 162 (CA 5, 1941).
>
> As explained in *Warner v Sullivan*, 249 Mich 469, 471; 229 NW 484 (1930):
>
> "Recoupment is a creature of the common law. It presents to the court an equitable reason why the amount payable to the plaintiff should be reduced, and *the plaintiff will not be permitted to insist upon the statute of limitations as a bar to such a defense* when he is seeking to enforce payment of that which is due him under the contract out of which the defendant's claim for recoupment arises." [Emphasis added in *Mudge*.]

The expiration of a limitations period does not prevent the defendant from raising a recoupment defense as long as the plaintiff's action is timely. *Id*. at 107.

Recoupment decreases the plaintiff's recovery by reducing any judgment in its favor by any claim the defendant may have to damages arising out of the same contract or transaction. *Morehouse v Baker*, 48 Mich 335, 339; 12 NW 170 (1882). The purpose of recoupment is to prevent a multiplicity of suits. *Id*. "But where the cases are such that the issue upon the counter-claim would be distinct from that on the plaintiff's demand and rest upon distinct evidence, the reasons for permitting recoupment have little or no force, for 'the nearer the controversy is to being single and distinct, the more likely is the jury to deal with it with full intelligence and justice.' " *Id*. (citation omitted). Recoupment is only applicable to the discharge of the plaintiff's claim; it cannot be utilized to "establish a demand for which the defendant can take judgment." *Id*. at 340.

A party cannot accept a particular phase of construction without prompt objection and then raise the recoupment defense. *Wallich Ice Machine Co v Hanewald*, 275 Mich 607, 615; 267 NW 748 (1936). The fact that the underlying contract is an open account does not constitute an entitlement to raise the recoupment defense to all transactions between the parties:

> It is a familiar rule that any damages may be recouped for which a cause of action growing out of the same transaction lies at the time of pleading. Plaintiff cannot defeat a right to recoup on a contract which he must prove in order to recover, by including other items with it in his declaration and making a general claim for balance due on the whole under an open account. [*Holser v Skae*, 169 Mich 484, 488; 135 NW 260 (1912).]

In *Wallich Ice Machine Co*, 275 Mich at 609, the defendant purchased a refrigeration plant from the plaintiff corporation in 1930. The purchase price was payable in installments within 12 months. The defen-

dant defaulted on the payments and executed a series of notes for the unpaid portion with the last one payable in 1932. When the plaintiff did not receive the principal sum, it filed suit in 1934. *Id*. The defendant raised the issue of recoupment to offset the amount due and owing to the plaintiff, specifically asserting that the condition of the plant and the refrigeration equipment was not as promised. The Supreme Court rejected the recoupment defense, holding that acceptance of a particular phase of construction without prompt objection barred the defense:

> After having knowingly accepted this phase of the construction or installation and having failed to make anything like a reasonably prompt objection thereto, it is now too late for defendant to assert this particular item of recoupment. It savors too much of an afterthought.
>
> As hereinbefore noted, defendant also attempts to assert as recoupment loss of meats placed in the refrigerating plant to the amount of approximately $200. Here again defendant is decidedly tardy in urging this claim against plaintiff. The record is devoid of testimony that he made any claim for damage of this character to plaintiff prior to framing his defense to this suit. [*Id*. at 615 (citations omitted).]

Additionally, in *Peerless Woolen Mills v Chicago Garment Co*, 347 Mich 326, 327; 79 NW2d 500 (1956), the plaintiff agreed in 1950 to deliver merchandise to the defendant pursuant to a $5,000 extension of credit. Merchandise was shipped on six occasions, but the defendant failed to make payments or render sufficient funds for three of the shipments. The plaintiff refused to send further shipments and notified the defendant that the contract was cancelled. *Id*. at 327-328. In response to the lawsuit to collect the outstanding sums for the deliveries made pursuant to the 1950 contract, the defendant alleged that there had been shortages in

the merchandise that had been delivered pursuant to a 1949 contract between the parties. *Id*. at 328. The Supreme Court rejected the claim for recoupment premised on the claimed shortages:

> [T]he claim now presented does not arise out of the subject matter of plaintiff's action, and may not properly be made the basis of a counterclaim. It amounts merely to an unliquidated claim for damages alleged to have been sustained in a wholly independent transaction. Had defendant sought to maintain an action for damages . . . based on alleged failure on plaintiff's part to fully perform the 1949 agreement, it could not have prevailed under the generally accepted rule, there being no proof or claim of fraud or mistake.
>
> . . . "Payment in full, without reservation, of an account for goods purchased, precludes the buyer from subsequently asserting that the goods were not merchantable, or that he was entitled to a credit for a shortage in packages or for expense of cartage." [*Id*. at 333.]

Accordingly, Michigan caselaw holds that a claim for recoupment must be premised on the same contract or *transaction*. The categorization of the parties' agreement as a single contract or an open account is not determinative.[4] Rather, the claim for recoupment by the defendant must be premised on the same transaction raised in the plaintiff's complaint, and the defendant must prove that the plaintiff is in breach of the contract from which the defendant seeks recoupment. *Oakland Metal Stamping Co*, 352 Mich at 125; *Morehouse*, 48 Mich at 340. When a defendant accepts goods or construction without timely objection or reservation, the

[4] The trial court also erred by relying on the statement by plaintiff's employee that there was only one contract. The duty to interpret and apply the law is allocated to the courts, and the statement of a witness is not dispostive. See *Hottmann v Hottmann*, 226 Mich App 171, 179-180; 572 NW2d 259 (1997).

defendant is barred from raising the recoupment defense. *Wallich Ice Machine Co*, 275 Mich at 615. This transactional approach to the defense of recoupment is consistent with federal law:

> Furthermore, not all cases in which claim and counterclaim arise from the same contract are appropriate for recoupment. Where the contract itself contemplates the business to be transacted as discrete and independent units, even claims predicated on a single contract will be ineligible for recoupment. [*Malinowski v New York State Dep't of Labor*, 156 F3d 131, 135 (CA 2, 1998).]

B. RECOUPMENT DEFENSE

In the present case, we conclude that the trial court erred by denying plaintiff's second motion for summary disposition by raising sua sponte the recoupment defense. A review of the plain language of the contract at issue revealed that, although an open-account contract, the transactions were treated as discrete events or separate transactions. Defendant was required to raise yield complaints within 48 hours after receipt and defects or nonconformance issues within 15 days of receipt. According to the plain language of the contract, any litigation had to be commenced within one year after delivery. Defendant did not timely raise an objection to the materials provided in the Center Line project. Once a party accepts a particular phase of construction, it cannot utilize the defense of recoupment. *Wallich Ice Machine Co*, 275 Mich at 615; *Morehouse*, 48 Mich at 339. The plain language of the contract set forth a one-year period of limitations. *In re Egbert R Smith Trust*, 480 Mich at 24. Additional deliveries did not extend this limitations period. Furthermore, there was a 15-day requirement regarding notice of defects. If defendant was permitted to raise the issue of any alleged defects in the Center Line project in

the litigation involving the Warren project, it would render the limitation provisions of the contract nugatory. *Woodington*, 288 Mich App at 374-375. Furthermore, the purpose of recoupment, to prevent multiplicity of suits, would not be served because any issues regarding the alleged defects in the Center Line project would rely upon separate and distinct evidence. *Morehouse*, 48 Mich at 339. Accordingly, the trial court erred by denying plaintiff's motion for summary disposition on the basis of recoupment. In light of this holding, we do not address plaintiff's issue regarding discovery.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, as the prevailing party, may tax costs. MCR 7.219.

SAAD, P.J., and K. F. KELLY and M. J. KELLY, JJ., concurred.

LAMKIN v ENGRAM

Docket No. 303008. Submitted March 13, 2012, at Detroit. Decided March 15, 2012, at 9:10 a.m.

Mary Ann Lamkin filed petitions in the Livingston Circuit Court for personal protection orders (PPOs) against Daniel Engram for what Lamkin deemed to be harassing behavior. The parties were neighbors. Engram and his family and visitors used an easement through Lamkin's property. Lamkin filed Supreme Court Administrative Office Forms CC 377 (petition for personal protection order against stalking, nondomestic) and CC 380 (personal protection order, nondomestic). Although Lamkin did not request an ex parte order on either petition form, she maintained that the court clerk refused to process the petitions unless they were treated as ex parte requests. The court, David J. Reader, J., denied her petition without holding a hearing on the facts alleged or interviewing Lamkin even though she had not requested ex parte relief on either form. Lamkin moved for relief from the judgment or reconsideration and specifically requested that a hearing on the petitions be scheduled. Judge Reader thereafter disqualified himself, and the case was reassigned to Judge Carol Hackett Garagiola, who denied Lamkin's motion, again without a hearing or Lamkin's being interviewed. Lamkin filed an additional motion for reconsideration and requested a hearing or interview. Judge Garagiola also denied that motion, concluding that Lamkin had failed to present a palpable error warranting a different disposition. Lamkin appealed.

The Court of Appeals *held*:

MCL 600.2950a(1) governs PPOs for nondomestic matters. A petitioner may seek a PPO to enjoin conduct prohibited under MCL 750.411h, 750.411i, or 750.411s. Unless a petitioner specifically requests an ex parte order or the circuit court refuses to enter an ex parte order and the petitioner does not subsequently request a hearing, MCR 3.705(B)(1)(a) requires the court to hold a hearing or interview the petitioner when considering a petition for a PPO. The court rule requires the court to consider the testimony, documents, and other evidence proffered to determine whether a respondent engaged in the proscribed conduct. A petitioner seeking a PPO bears

the burden of proving reasonable cause for its issuance. When the basis for a PPO petition is a violation of MCL 750.411h, as here, the petitioner must demonstrate that the respondent engaged in behavior that constituted stalking. The circuit court erred by treating Lamkin's petitions as ex parte requests and dismissing them without a hearing or an interview, both of which she repeatedly requested.

Vacated and remanded for further proceedings.

INJUNCTIONS — PERSONAL PROTECTION ORDERS — REQUIREMENTS — HEARINGS.

A petitioner may seek a personal protection order under MCL 600.2950a(1) to enjoin conduct prohibited under MCL 750.411h, 750.411i, or 750.411s; unless a petitioner specifically requests an ex parte order or the circuit court refuses to enter an ex parte order and the petitioner subsequently does not request a hearing, MCR 3.705(B)(1)(a) requires the court to hold a hearing or interview the petitioner when considering a petition for a personal protection order; the petitioner bears the burden of proof, but the court rule requires the court to consider the testimony, documents, and other evidence proffered to determine whether the respondent engaged in the proscribed conduct.

Godwin Legal Services, PLC (by *Shaun Godwin*), for Mary Ann Lamkin.

Before: WHITBECK, P.J., and JANSEN and K. F. KELLY, JJ.

K. F. KELLY, J. Petitioner, Mary Ann Lamkin, appeals as of right an order denying her petition for a personal protection order (PPO) against respondent, Daniel Engram. We conclude that the circuit court committed reversible error when it dismissed Lamkin's petition without first interviewing Lamkin or conducting a hearing as required by MCR 3.705. We therefore vacate the circuit court's dismissal and remand for further proceedings.

I. BASIC FACTS

Lamkin and Engram are neighbors with an obviously contentious relationship. Engram's family and visitors

make frequent use of an easement through Lamkin's property. Lamkin sought a PPO against Engram for what she deemed harassing behavior. To that end, on January 11, 2011, Lamkin filled out State Court Administrative Office (SCAO) Form CC 377, titled "Petition for Personal Protection Order Against Stalking (Non Domestic)," as well as SCAO Form CC 380, titled "Personal Protection Order (Non Domestic)."[1] The petitions alleged that on January 10, 2011, Engram's daughter was "honking and playing loud music across full length of Lamkin property." It also alleged that on February 14, 2009, Engram was involved in an accident on Lamkin's property, causing $1,700 worth of damage and that he left the scene of the accident.

Lamkin's petitions also referred to an "attachment," which Lamkin has included as an exhibit on appeal.[2] The attached document details numerous instances of alleged harassment including (1) speeding by Engram and his family across Lamkin's property, (2) Engram's accident on Lamkin's property and the resulting damage, (3) harassing honking of car horns and blaring music by Engram's daughter and her friends while driving on Lamkin's property, (4) littering on Lamkin's property, (5) use of unlicensed, unauthorized all-terrain

[1] In addition to the petition for a personal protection order against Engram, Lamkin filed 10 other petitions for PPOs against Engram's family members and other neighbors. Lamkin's husband, Steve Lamkin, also filed 9 petitions against neighbors.

[2] The attachment is not found within the lower court record. While a party may not expand the record on appeal, *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002), we do not believe that plaintiff is attempting to present evidence not presented before the trial court. Given the numerous PPOs that were sought and the numerous references Lamkin makes to the attachment, we believe that it was simply misfiled in the lower court. As such, we will consider plaintiff's attachment on appeal. Appellee has not filed a brief on appeal or challenged the attachment in any way.

vehicles on Lamkin's property, (6) unauthorized pedestrian use of Lamkin's property, (7) pet defecation on Lamkin's property, (8) malicious destruction and theft of Lamkin's private property, such as property markers and a mailbox, and (9) the making of false statements about Lamkin to a judge.

Both Form CC 377 and CC 380 provide the opportunity to request that a PPO be entered ex parte. Section 6 of CC 377 allows a petitioner to mark a box next to the following language: "I request an ex parte order because immediate and irreparable injury, loss, or damage will occur between now and a hearing or because notice itself will cause irreparable injury, loss, or damage before the order can be entered." Lamkin did not request an ex parte order on Form CC 377. Form CC 380 also has an "ex parte" box to check if a petitioner is requesting the immediate issuance of a PPO without notice to a respondent. Lamkin did not check the "ex parte" box on Form CC 380 either. In spite of the fact that there was no request on either petition, Lamkin maintains that the court clerk refused to process the petitions unless they were treated as ex parte requests.

On January 12, 2011, Family Court Judge David J. Reader denied Lamkin's petitions in an order titled "Order Denying Ex Parte Personal Protection Order," even though ex parte relief had not been requested. The order stated that "[t]here is insufficient statutory basis stated in the petition, and the case should be dismissed." The order also indicated that the "[t]he case is dismissed and file closed." No hearing was held, nor was Lamkin interviewed by the trial court. The standard order form provided:

> ***NOTE:* IF YOU DESIRE A HEARING IN FRONT OF A JUDGE, YOU MUST PETITION FOR SUCH A HEARING WITHIN 21 DAYS OR THIS ORDER BE-**

COMES FINAL. THE OPPOSITE PARTY MUST BE NOTIFIED OF THE HEARING. THE COUNTY CLERK WILL ASSIST YOU WITH FORMS.

Two days later, on January 14, 2011, Lamkin moved the circuit court for relief from the judgment or for reconsideration. Lamkin argued that she never intended to apply for an ex parte order and always wanted to have a hearing held on the matter. In her motion, she specifically requested that the court schedule a hearing on her petitions. Thereafter, Lamkin retained legal counsel.

On February 3, 2011, Judge Reader entered an order disqualifying himself and reassigning the case to Judge Carol Hackett Garagiola. On February 18, 2011, Judge Garagiola entered an order denying Lamkin's motion for relief from the judgment or reconsideration. Again, no hearing was held and Lamkin was not interviewed. In dismissing the motion, Judge Garagiola determined that Judge Reader had the authority to dismiss the petitions without a hearing and that Lamkin's claims (that she should not have been required to indicate that she wanted an ex parte motion) were immaterial and irrelevant to the dismissal of the petitions.

Through counsel, Lamkin again moved for reconsideration, arguing that she had attempted to request a hearing when she applied for the PPOs. Lamkin maintained that the clerk would not accept Lamkin's petitions unless she indicated on the form that she was requesting an ex parte hearing. Lamkin also argued that Judge Reader had not conducted an interview with Lamkin and did not inform Lamkin that she could request a hearing if she did so within 21 days. Lamkin argued that the failure to follow the proper Michigan Court Rules denied her the court's adequate consideration of her petitions. Lamkin again requested either a hearing or an interview.

On March 11, 2011, Judge Garagiola entered an order denying Lamkin's motion for reconsideration, concluding that Lamkin had failed to present a palpable error warranting a different disposition. Lamkin now appeals as of right.

II. ANALYSIS

Lamkin petitioned for the PPOs under the statutory authority of MCL 600.2950a. MCL 600.2950a(1) addresses the issuance of PPOs for nondomestic matters and provides, in relevant part:

> [A]n individual may petition the family division of circuit court to enter a personal protection order to restrain or enjoin an individual from engaging in conduct that is prohibited under section 411h, 411i, or 411s of the Michigan penal code, 1931 PA 328, MCL 750.411h, 750.411i, and 750.411s. Relief under this subsection shall not be granted unless the petition alleges facts that constitute stalking as defined in section 411h or 411i, or conduct that is prohibited under section 411s, of the Michigan penal code, 1931 PA 328, MCL 750.411h, 750.411i, and 750.411s.

The petitioner for a PPO bears the burden of proof. *Kampf v Kampf*, 237 Mich App 377, 385-386; 603 NW2d 295 (1999). Lamkin based her claim on a violation of MCL 750.411h. Therefore, to obtain a PPO under MCL 600.2950a(1), Lamkin had to demonstrate that Engram engaged in behavior that constituted "stalking." "Stalking" is defined in MCL 750.411h(d) as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." To show "harassment," Lamkin needed to establish "repeated or

continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose." MCL 750.411h(c). MCL 750.411h(e) provides a nonexhaustive list of activities that constitute "unconsented contact:"

> (*i*) Following or appearing within the sight of that individual.
>
> (*ii*) Approaching or confronting that individual in a public place or on private property.
>
> (*iii*) Appearing at that individual's workplace or residence.
>
> (*iv*) Entering onto or remaining on property owned, leased, or occupied by that individual.
>
> (*v*) Contacting that individual by telephone.
>
> (*vi*) Sending mail or electronic communications to that individual.
>
> (*vii*) Placing an object on, or delivering an object to, property owned, leased, or occupied by that individual.

Lamkin argues that because she was not interviewed by the trial court or afforded a hearing, she was denied the opportunity to explain how Engram's conduct constituted harassment under MCL 750.411h(c), which was in violation of MCR 3.705. We agree. Lamkin's claim requires interpretation of MCR 3.705. The interpretation and application of court rules present questions of law to be reviewed de novo using the principles of statutory interpretation. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009).

While the circuit court may not have abused its discretion by denying Lamkin's petitions on the facts stated therein, we conclude that the circuit court erred

by dismissing the petitions without interviewing Lamkin or holding a hearing. MCR 3.705 provides, in relevant part:

> (A) Ex Parte Orders.
>
> (1) The court must rule on a request for an ex parte order within 24 hours of the filing of the petition.
>
> (2) If it clearly appears from specific facts shown by verified complaint, written petition, or affidavit that the petitioner is entitled to the relief sought, an ex parte order shall be granted if immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will itself precipitate adverse action before a personal protection order can be issued. In a proceeding under MCL 600.2950a, the court must state in writing the specific reasons for issuance of the order. A permanent record or memorandum must be made of any nonwritten evidence, argument, or other representations made in support of issuance of an ex parte order.
>
> * * *
>
> (5) If the court refuses to grant an ex parte order, it shall state the reasons in writing and shall advise the petitioner of the right to request a hearing as provided in subrule (B). If the petitioner does not request a hearing within 21 days of entry of the order, the order denying the petition is final. The court shall not be required to give such notice if the court determines after interviewing the petitioner that the petitioner's claims are sufficiently without merit that the action should be dismissed without a hearing.
>
> (B) Hearings.
>
> (1) The court *shall schedule a hearing* as soon as possible in the following instances, *unless it determines after interviewing the petitioner* that the claims are sufficiently without merit that the action should be dismissed without a hearing:
>
> (a) the petition does not request an ex parte order; or

> (b) the court refuses to enter an ex parte order and the petitioner subsequently requests a hearing.
>
> * * *
>
> (6) At the conclusion of the hearing the court must state the reasons for granting or denying a personal protection order on the record and enter an appropriate order. In addition, the court must state the reasons for denying a personal protection order in writing, and, in a proceeding under MCL 600.2950a, the court must state in writing the specific reasons for issuance of the order. [Emphasis added.]

Court rules are interpreted using the same principles that govern statutory interpretation. *Wilcoxon v Wayne Co Neighborhood Legal Servs*, 252 Mich App 549, 553; 652 NW2d 851 (2002). The Court gives the language of court rules their "plain and ordinary meaning." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 458; 733 NW2d 766 (2006). "If the language poses no ambiguity, this Court need not look outside the rule or construe it, but need only enforce the rule as written." *Id.* "Shall" indicates a mandatory provision. *In re Credit Acceptance Corp*, 273 Mich App 594, 600; 733 NW2d 65 (2007). The only circumstance in which the circuit court is not required to conduct a hearing is if, after conducting an intervew, the court determines that the petitioner's claims are without merit. MCR 3.705(A)(5).

Lamkin maintains that she did not request ex parte PPOs; rather, she wanted and expected to receive a hearing on the matter or, at a minimum, an "interview" with the circuit court. This was her right. MCR 3.705(B)(1)(a). However, for whatever reason, the court treated Lamkin's petitions as ex parte requests. Before the court could simply deny the petitions, it was required to interview Lamkin or hold a hearing. *Id*. The lower court record offers no indication that Lamkin was

interviewed concerning the merits of her claim. Lamkin then had the right to request a hearing within 21 days of the denial. Lamkin repeatedly invoked her right to a hearing:

> • On January 13, 2011, Lamkin filed a "Motion for Relief From Order," specifically requesting that the court "allow a hearing pursuant to a request for hearing requested by the Lamkin's [sic] on all of the their [sic] submitted petitions for personal protection orders."
>
> • On January 14, 2011, Lamkin filed a "Motion for Relief From Judgment Order or in the Alternative a Motion for Reconsideration," again requesting that the court "allow a hearing pursuant to a request for a hearing requested by the Lamkin's [sic] on all of the their [sic] submitted petitions for personal protection orders."
>
> • On March 2, 2001, and through counsel, Lamkin filed a "Motion for Reconsideration of Order Denying Petitioner's January 14, 2011, 'Motion for Relief from Judgment or in the Alternative a Motion for Reconsideration,' " requesting that the court "schedule any appropriate hearings or interviews as required by court rules."

We take issue not with the notice provided Lamkin regarding her right to schedule a hearing, but with the repeated denials of Lamkin's clear requests.

We also note that the circuit court's actions in this case were in contravention of its own internal rules governing PPOs. A petitioner seeking a PPO in Livingston County must sign a "**VERIFICATION/ACKNOWLEDGMENT OF INSTRUCTIONS FOR FILING A PPO PETITION**," which includes the following explanation:

> The box on the petition asking for an ex-parte order must be checked in order for the Court to review a request for an immediate PPO. If the ex-parte box is not checked a hearing before the judge will have to be set and both the petitioner and respondent are noticed to appear.

Also, in relevant part, the instructions to complete Form CC 377 provide:

> **Follow these steps if you have NOT requested an ex parte order on Form CC 375 or CC 377. If you already filled out the petition and the judge refused to issue an ex parte order, go to step 3.**
>
> **1. Fill out the forms that apply to your situation** using the instructions on the forms.
>
> **2. File the Petition forms with the circuit court clerk.**
>
> Take the forms to the circuit court clerk in the county where you live. Bring 3 sets of statements from witnesses and supporting documents if you have any. The circuit court clerk will finish filling out the form, will attach your written statements and supporting documents to the proper copies, and will return copies of the form to you. **Do not lose these copies.**
>
> **3. Ask for a hearing.**
>
> Ask the clerk to schedule a hearing. The clerk will give you a Notice of Hearing (Form CC 381) to fill out. The clerk will tell you if there are any other things you must do to schedule the hearing. The clerk will give you copies of this form and a blank Form CC 376 or CC 380.

Again, a petitioner seeking a PPO bears the burden of proving reasonable cause for the issuance of a PPO. *Kampf*, 237 Mich App at 385-386. When making that determination, the circuit court is not limited to the four corners of the petition itself; rather, it must consider the testimony, documents, and other evidence proffered to determine whether a respondent engaged in harassing conduct. MCL 600.2950a. Nothing in the statute or court rule suggests that the circuit court is limited to considering the incidents alleged in the PPO petition. Instead, our court rules specifically *require* the circuit court to go beyond the PPO petition and either interview the petitioner or provide an evidentiary hearing.

Because neither of these procedures was followed, the matter must be remanded. In remanding this matter, we take no position on the merits of Lamkin's petitions.

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

WHITBECK, P.J., and JANSEN, J., concurred with K. F. KELLY, J.

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 April 5, 2012:

CHESSER v RADISSON PLAZA HOTEL AT KALAMAZOO CENTER, Docket No. 299776. The Court orders that the motion for reconsideration is granted, and this Court's opinion issued February 14, 2012, is hereby vacated. A new opinion will be issued.*

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* New opinion issued on April 19, 2012, as an unpublished opinion per curiam (Docket No. 299776)—REPORTER.

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ing issues before actual injuries or losses have occurred; to establish an "actual controversy" under the rule, a plaintiff must plead and prove facts that demonstrate an adverse interest necessitating the sharpening of the issues raised. *Ferrero v Walton Twp*, 295 Mich App 475.

terms of a contract are contested, the finder of fact determines its actual terms; a sales agent who commits the first substantial breach of a commission contract is not entitled to recover posttermination commissions; a substantial breach occurs when the sales representative is unable to fulfill its account-servicing obligations under the contract because the customer banned the sales representative from its premises or otherwise refused to deal with the principal's agent. *KBD & Associates, Inc v Great Lakes Foam Technologies, Inc*, 295 Mich App 666.

viable contractual right to arbitration, and review of an arbitrator's decision is limited; a court may not review an arbitrator's factual findings but may review whether the arbitrator acted within the scope of his or her contractual authority or made an error of law that clearly appears on the face of the award. *36th Dist Court v Michigan American Federation of State, County & Municipal Employees Council 25, Local 917*, 295 Mich App 502.

applied to the analysis of this issue they would have been referred to specifically. *Gagnon v Glowacki*, 295 Mich App 557.

CONSTITUTIONAL LAW

See, also, CRIMINAL LAW 2
SEARCHES AND SEIZURES 1, 2

FAIR AND JUST TREATMENT IN INVESTIGATION

1. Under the Michigan Constitution, the right of all individuals, firms, corporations, and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings may not be infringed; an "investigation" is the act or process of investigating, or the condition of being investigated; to "investigate" is to search or examine into the particulars of, or examine in detail; the passive collection of information by the state from voluntary bidders for a state contract as part of a preliminary information gathering process does not constitute an investigation (Const 1963, art 1, § 17). *Groves v Dep't of Corrections*, 295 Mich App 1.

SELF-INCRIMINATION

2. When a criminal defendant is subject to a custodial interrogation, before any questioning he or she must be advised of the rights set forth in *Miranda v Arizona*, 384 US 436 (1966), which includes the right to the presence of an attorney; 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 constitutes a custodial interrogation; a defendant is in custody if a reasonable person in the defendant's situation would believe that he or she was not free to leave and if the relevant environment was inherently coercive; statements an accused made during a custodial interrogation are inadmissible unless the accused knowingly, voluntarily, and intelligently waived

his or her rights (US Const, Am V; Const 1963, art 1, § 17). *People v Elliott*, 295 Mich App 623.

3. The protections of *Miranda v Arizona*, 384 US 436 (1966), apply not only to custodial interrogations by law enforcement officials, but also to those by persons acting in concert with or at the request of the police (US Const, Am V; Const 1963, art 1, § 17). *People v Elliott*, 295 Mich App 623.
4. A parole officer is a law enforcement official for purposes of the safeguards set forth in *Miranda v Arizona*, 384 US 436 (1966); statements made by a parolee to a parole officer during a custodial interrogation are inadmissible in a subsequent trial if the parolee invoked his or her right to counsel before questioning began (US Const, Am V; Const 1963, art 1, § 17). *People v Elliott*, 295 Mich App 623.

STATUTES

5. A statute is void for vagueness if it does not provide fair notice of the proscribed conduct, is so indefinite as to confer on the trier of fact unstructured and unlimited discretion to decide when an offense has been committed, or is overbroad and impinges on protected First Amendment rights. *People v Douglas*, 295 Mich App 129.
6. A statute may not be voided for conferring unstructured and unlimited discretion on the fact-finder unless the wording of the statute itself is vague; the wording of a statute is not vague if it sufficiently provides people of ordinary intelligence with notice of what conduct the statute prohibits; a statute that clearly and plainly sets forth the elements that the prosecution must prove does not confer unstructured and unlimited discretion on the fact-finder. *People v Douglas*, 295 Mich App 129.
7. The statutory requirement that all recordings distributed or possessed for the purpose of distribution bear the manufacturer's name and address applies only to cases in which a person has commercially distributed a recording or possessed a recording for commercial distribution (MCL 752.1052[1][d]; 752.1053). *People v Douglas*, 295 Mich App 129.

CONSTITUTIONALITY OF STATUTES—*See*

STATUTES 1

CONTEMPT

CIVIL CONTEMPT

1. An order finding a party in civil contempt of court is not a final order for purposes of appellate review by right, but the right of a nonparty to appeal an adjudication of contempt cannot be questioned even in the absence of a final order; the same principle applies to individuals not personally held in contempt, but sanctioned as decision-makers to enforce a company's compliance with a court order (MCL 600.308[2]; MCR 7.202[6][a]). *In re Moroun*, 295 Mich App 312.
2. Individuals who are officially responsible for the conduct of a corporation's affairs are required to obey a court order directed at the corporation, and they may be sanctioned if they fail to take appropriate action within their power to ensure that the corporation complies with the court order. *In re Moroun*, 295 Mich App 312.
3. A civil contempt proceeding requires only rudimentary due process, i.e., notice and an opportunity to be heard; when contempt is committed outside the court's view, the court may punish the contemnor by fine or imprisonment, or both, after proof of the facts charged has been made by affidavit or other method and an opportunity has been given to defend; on a proper showing on ex parte motion supported by affidavits, the trial court must (1) order the accused person to show cause, at a reasonable time specified in the order, why that person should not be punished for the alleged misconduct or (2) issue a bench warrant for the arrest of the person (MCL 600.1711[2]; MCR 3.606[A]). *In re Moroun*, 295 Mich App 312.
4. Confinement or imprisonment may be imposed whether the contempt is civil or criminal in nature; in the context of civil contempt, the term of imprisonment ceases when the contemnor complies with the court's order or no longer has the power to comply; the contemnor must be able to purge the contempt and obtain release by committing an affirmative act or duty, and the commitment order must specify the act or duty (MCL 600.1715[2]). *In re Moroun*, 295 Mich App 312.

CRIMINAL CONTEMPT

5. The holder of a personal protection order is under no obligation to act in a certain way; rather, when analyz-

ing whether an individual is guilty of criminal contempt for violating a personal protection order, the court must look only at the behavior of that individual against whom the personal protection order is held. *In re Kabanuk*, 295 Mich App 252.

CONTRABAND—*See*

PRISONS AND PRISONERS 1, 2

SEARCHES AND SEIZURES 3

CONTRACTS

See, also, INSURANCE 3

BREACHES OF CONTRACT

1. A claim for recoupment must be premised on the same contract or transaction; the categorization of the parties' agreement as a single contract or an open account is not determinative; the claim must be premised on the same transaction raised in the plaintiff's complaint and the defendant must prove that the plaintiff is in breach of the contract from which the defendant seeks recoupment; the defendant is barred from raising the recoupment defense when the defendant accepts goods or construction without timely objection or reservation; once a party accepts a particular phase of construction, it cannot utilize the defense of recoupment. *McCoig Materials, LLC v Galui Construction, Inc*, 295 Mich App 684.

CORPORATIONS

See, also, CONTEMPT 2

VENUE 1, 2

DISSOLUTION

1. *Woodbury v Res-Care Premier, Inc*, 295 Mich App 232.

CORRECTING ERRORS IN PRIOR DECISIONS—*See*

COURTS 4

CORRECTIONAL FACILITIES—*See*

PRISONS AND PRISONERS 1, 2

COURTS

HYPOTHETICAL OPINIONS

1. It is generally improper to challenge a proposed initia-

tive until after the law is enacted; although there are very rare cases in which there is a clear and unmistakable conflict between an initiative and a state law necessitating prior court intervention, courts should generally not render hypothetical opinions about proposed amendments. *Coalition for a Safer Detroit v Detroit City Clerk*, 295 Mich App 362.

JURISDICTION

2. A court must have personal jurisdiction over a party before it may require the party to comply with its orders; while the plaintiff bears the burden of establishing jurisdiction over the defendant, he or she need only make a prima face showing of jurisdiction to defeat a motion for summary disposition; if the parties present conflicting affidavits, all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the presentation of contrary evidence by the moving party; to determine whether a Michigan court may exercise limited personal jurisdiction over a defendant, this Court must determine (1) whether jurisdiction is authorized by Michigan's long-arm statute and (2) whether the exercise of jurisdiction is consistent with the requirements of the Due Process Clause of the Fourteenth Amendment. *Yoost v Caspari*, 295 Mich App 209.

3. A Michigan court may exercise limited personal jurisdiction over an individual if a relationship exists between an individual or his or her representative and the state arising out of doing an act or causing an act to be done, or consequences to occur, in the state resulting in an action for tort; if conspiracy is alleged as the basis for jurisdiction, a conspirator not within the forum state may be subject to the jurisdiction of the forum state on the basis of the acts the coconspirator committed there; to establish a prima facie case the party may not merely allege that a conspiracy exists between the defendant and another party over whom the court has jurisdiction; rather, evidence or facts must support the allegations of conspiracy; a prima facie case may be established using reasonable inferences provided there is sufficient evidence introduced to take the inferences out of the realm of conjecture; there must be evidence that supports one

theory of causation indicating a logical sequence of cause and effect (MCL 600.705[2]). *Yoost v Caspari*, 295 Mich App 209.

SUBSEQUENT REVERSALS

4. The law of the case doctrine provides that a ruling by an appellate court on a particular case binds the appellate court and all lower tribunals with respect to that issue; the doctrine does not prevent a trial court from exercising its unrestricted discretion to review its prior decision to correct an error. *KBD & Associates, Inc v Great Lakes Foam Technologies, Inc*, 295 Mich App 666.

CREDITS—*See*

TAXATION 3

CRIME VICTIMS—*See*

SENTENCES 4

CRIMINAL CONTEMPT—*See*

CONTEMPT 5

CRIMINAL LAW

See, also, LARCENY 1

PRISONS AND PRISONERS 1, 2

CONFESSIONS

1. To determine whether a confession is voluntary, the court must consider the totality of the surrounding circumstances to determine whether it was freely and voluntarily made; a confession is voluntary if it is the product of an essentially free and unconstrained choice by its maker and the accused's will has not been overborne or his or her capacity for self-determination criminally impaired; a court should consider various factors, including the age of the accused; his or her lack of education or intelligence level; his or her prior experience with the police or lack thereof; the repeated and prolonged nature of the questioning; the length of detention before the accused gave the statement in question; the lack of any advice to the accused of his or her constitutional rights; whether there was an unnecessary delay in bringing the accused in front of a magistrate before he or she gave the confession; whether the accused was injured, intoxicated, drugged,

or in poor health; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether he or she was threatened with abuse. *People v Ryan*, 295 Mich App 388.

CRIMINAL SEXUAL CONDUCT

2. To convict a defendant of first-degree criminal sexual conduct for penetration under circumstances involving any other felony, the prosecution must prove that (1) sexual penetration occurred and (2) it occurred under circumstances involving the commission of any other felony; there must be a direct relationship between the felony and the penetration; the Legislature intended that the circumstances involving the commission of the other felony directly impact a victim, or recipient, of the sexual penetration, and when construed in that manner, the statute is not unconstitutionally vague; however, the statute unconstitutionally invites arbitrary and abusive enforcement when it is applied to situations in which engaging in consensual legal sexual penetration is elevated to first-degree criminal sexual conduct solely because a minor was present and the "victim" of the sexual penetration was not impacted by the other felony (MCL 750.520b[1][c]). *People v Lockett*, 295 Mich App 165.

DISSEMINATION OF SEXUALLY EXPLICIT MATTER TO A MINOR

3. A person is guilty of disseminating sexually explicit matter to a minor if that person knowingly exhibits to a minor a sexually explicit performance that is harmful to minors; for the purpose of the offense of disseminating sexually explicit matter to a minor, to "disseminate" is to sell, lend, give, exhibit, show, or allow to examine; and to "exhibit" is to present a performance; a "sexually explicit performance" is a motion picture, video game, exhibition, show, representation, or other presentation that, in whole or in part, depicts nudity, sexual excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse; therefore, a person commits the offense of disseminating sexually explicit matter to a minor if he or she knowingly exhibits to a minor a depiction of nudity, sexual excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse which is harmful to minors (MCL 722.675[1][b]). *People v Lockett*, 295 Mich App 165.

EFFECTIVE ASSISTANCE OF COUNSEL

4. The United States Supreme Court's decision in *Padilla v Kentucky*, 559 US ___; 130 S Ct 1473 (2010), holding that a criminal defense attorney must advise a defendant of the effects of a plea on the defendant's immigration status, does not apply retroactively to cases in which a defendant's conviction became final before *Padilla* was decided; a conviction becomes final when the time for a direct appeal expires. *People v Gomez*, 295 Mich App 411.

INTERROGATIONS

5. A defendant's waiver of his or her rights under Miranda v Arizona, 384 US 436 (1966), is voluntary if there is an absence of police coercion; the waiver of the Miranda rights must have been the product of a free and deliberate choice rather than intimidation, coercion, or deception. *People v Ryan*, 295 Mich App 388.

LESSER INCLUDED OFFENSES

6. A necessarily included lesser offense is an offense whose elements are subsumed within the elements of a greater offense; when evaluating whether an offense is a lesser included offense, the crimes are to be analyzed with an eye toward how the crimes were actually charged; if the elements at issue are subsumed within the charged offense, the crime is a necessarily included lesser offense; when a conviction for a greater offense is reversed on grounds affecting only the greater offense, an appellate court may remand for entry of judgments of conviction on necessarily included lesser offenses; when a jury cannot convict a defendant of first-degree criminal sexual conduct without finding that the defendant disseminated sexually explicit matter to a minor, the latter offense is a necessarily included lesser offense (MCL 722.675[1][b], MCL 750.520b[1][c]). *People v Lockett*, 295 Mich App 165.

established custodial environment of a child without clear and convincing evidence that it is in the best interest of the child; the court must determine whether there is an established custodial environment with either or both of the parties before making its original custody determination (MCL 722.27[1][c]). *Kessler v Kessler*, 295 Mich App 54.

2. A trial court rendering a custody decision must state on the record its factual findings and conclusions regarding each of the statutory factors for determining a child's best interests; these findings and conclusions need not explicitly address every aspect of a given factor or consider every piece of evidence entered and argument raised by the parties (MCL 722.23). *Kessler v Kessler*, 295 Mich App 54.

PROPERTY SETTLEMENT

3. A qualified domestic relations order executed in accordance with the terms of a divorce judgment is part of the property settlement and must be treated as part of the final divorce judgment. *Neville v Neville*, 295 Mich App 460.

EVIDENCE

See, also, CRIMINAL LAW 1

SEARCHES AND SEIZURES 1, 2

ERRONEOUS INTERPRETATIONS OR APPLICATIONS OF LAW

1. A trial court necessarily abuses its discretion when it admits or excludes evidence on the basis of an erroneous interpretation or application of law. *Gay v Select Specialty Hospital*, 295 Mich App 284.

PRIOR ACTS

2. 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; the rule applies to wit-

billed separately and distinctly from other treatment services and that require little or no handling or storage by a provider for purposes of determining whether the provider's charges for the products to insureds are reasonable under the act; the provider's actual cost of the products is not dispositive on the issue whether the provider's charges are reasonable, but is a factor that affects the reasonableness of the charges (MCL 500.3101 *et seq.*). *Bronson Methodist Hospital v Auto-Owners Ins Co*, 295 Mich App 431.

3. A person's physical contact with an insured vehicle does not by itself establish that the person was "upon" the vehicle so as to be "occupying" the vehicle when the relevant no-fault insurance policy defines "occupying" as "in, upon, getting in, on, out or off"; one must be on or up and on a vehicle in order to be "upon" it. *Westfield Insurance Company v Ken's Service*, 295 Mich App 610.

MORTGAGES

BREACH OF COVENANTS

1. A single purpose entity (SPE) is an entity formed concurrently with or immediately before the subject transaction that is unlikely to become insolvent as a result of its own activities and that is adequately insulated from the consequences of any related party's insolvency; if remaining solvent is part of the SPE covenants in a mortgage or loan document, an entity's insolvency breaches that covenant and may trigger provisions making a mortgage or loan fully recourse. *Wells Fargo Bank, NA v Cherryland Mall Ltd Partnership*, 295 Mich App 99.

FORECLOSURES BY ADVERTISEMENT

2. Foreclosure generally extinguishes a mortgage, and mortgages are nonrecourse absent an agreement to the contrary; a deficiency action for money owed under a mortgage following foreclosure by sale is permissible, however, if the note provides that the loan was a recourse loan. *Wells Fargo Bank, NA v Cherryland Mall Ltd Partnership*, 295 Mich App 99.
3. The right to foreclose by advertisement is conferred by statute, and strict compliance with the statutory provisions is required; if the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title must have existed before the date of sale evidencing the assignment of the mortgage to the party foreclosing the mortgage; the statute makes no exception for mortgage interests acquired by operation of law (MCL 600.3204[3]). *Kim v JPMorgan Chase Bank, NA*, 295 Mich App 200.

PRIORITY OF LIENS

4. Equitable subrogation may be used when a senior mortgagee discharges its mortgage of record and contemporaneously takes and records a replacement mortgage, so that the lending mortgagee may retain its seniority as against intervening lienholders; however, the lending mortgagee seeking subrogation must be the same lender that held the original mortgage before the intervening interests arose, or a bona fide successor in interest to the original lender, and the application of equitable subrogation is subject to a careful examination of the equities and of any poten-

tial prejudice to the intervening lienholders. *CitiMortgage, Inc v Mortgage Electronic Registration Systems, Inc*, 295 Mich App 72.

5. The "mere volunteer" rule, which provides that equitable subrogation may not be extended to a party that is a mere volunteer who pays the mortgage but has no interest in the land, does not apply when the new mortgagee and the original mortgagee are the same. *CitiMortgage, Inc v Mortgage Electronic Registration Systems, Inc*, 295 Mich App 72.

MOTIONS AND ORDERS

RELIEF FROM FINAL JUDGMENTS

1. A court may relieve a party from a final judgment, order, or proceeding on the basis of mistake, inadvertence, surprise, or excusable neglect or any other reason justifying relief from operation of the judgment; the motion must be made within a reasonable time, and for the grounds stated in MCR 2.612 (C)(1)(a), within one year after the judgment, order, or proceeding was entered or taken (MCR 2.612[C][1][a] and [f], [2]). *Neville v Neville*, 295 Mich App 460.

MOTOR-VEHICLE EXCEPTION—*See*

GOVERNMENTAL IMMUNITY 2

MOTOR VEHICLE SEARCHES—*See*

SEARCHES AND SEIZURES 1, 2

MOTOR VEHICLES—*See*

INSURANCE 3

MOTOR VEHICLES AND TRAILERS—*See*

LARCENY 1

MULTISTATE BUSINESSES—*See*

TAXATION 2

MUNICIPAL CORPORATIONS—*See*

COURTS 1

NECESSARILY INCLUDED OFFENSES—*See*

CRIMINAL LAW 6

NEGLIGENCE

COMPARATIVE NEGLIGENCE

1. *Alfieri v Bertorelli*, 295 Mich App 189.

MEDICAL MALPRACTICE

2. A medical professional's practice must involve practice in a clinical setting in order for the professional to be engaged in an "active clinical practice" for purposes of MCL 600.2169(1)(b); a medical professional can be involved in the treatment of patients in a variety of ways in a clinical setting without directly interacting with the patients; the word "active" means that, as part of the professional's normal professional practice at the relevant time, the professional was involved, directly or indirectly, in the care of patients in a clinical setting. *Gay v Select Specialty Hospital*, 295 Mich App 284.
3. A nurse who supervises other nurses in a hospital is practicing nursing in a clinical setting for purposes of the professional-time requirement of MCL 600.2169(1)(b) even though he or she does not directly treat specific patients. *Gay v Select Specialty Hospital*, 295 Mich App 284.
4. A person may be qualified to testify as an expert on the standard of care in a medical-malpractice action if during the year immediately preceding the date of the occurrence that is the basis for the claim or action the person devoted a majority of his or her professional time to the instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed; time spent preparing for class, maintaining familiarity with new and evolving professional techniques, and participating in meetings designed to further the educational process is time devoted to the instruction of students (MCL 600.2169[1][b][*ii*]). *Gay v Select Specialty Hospital*, 295 Mich App 284.
5. A health professional providing an affidavit of merit in a medical malpractice action must review the plaintiff's notice of intent and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice; it is sufficient for the health professional to indicate that he or she reviewed

consider whether the change in legal residence has the capacity to improve the quality of life for both the child and the relocating parent, the degree to which each parent has complied with the parenting-time aspect of the custody order and the extent to which the planned domicile change was inspired by that parent's desire to defeat or frustrate the parenting-time schedule, the degree to which the parenting-time schedule could be modified if the domicile change request was granted to preserve and foster the parental relationship between the child and each parent, the degree to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation, and whether any domestic violence is involved; an increase in a relocating parent's earning potential may improve a child's quality of life. *Gagnon v Glowacki*, 295 Mich App 557.

2. If a trial court grants a change of domicile it must determine whether there will be a change in the established custodial environment; if the change of domicile results in a change in the custodial environment, the relocating parent must prove by clear and convincing evidence that the change is in the minor child's best interest; it is possible to have a change of domicile without a corresponding change in the established custodial environment; however, a change in established custodial environment will occur if it would turn a party into a weekend-only parent. *Gagnon v Glowacki*, 295 Mich App 557.

FACTORS (b), (d), (e), (h), AND (j) FOR CHILD'S BEST INTERESTS

3. *Kessler v Kessler*, 295 Mich App 54.

the jurisdiction of the Department of Corrections who has not been released on parole or discharged; release on parole requires release into the community; a parolee confined in a intermediate facility has not been released on parole and, therefore, is a prisoner for the purpose of the prohibition against providing cellular telephones to prisoners (MCL 800.281a[g], MCL 800.283a). *People v Armisted*, 295 Mich App 32.

2. A person may not sell, give, or furnish, or aid in the selling, giving, or furnishing of, a cellular telephone or other wireless communication device to a prisoner in a correctional facility, or dispose of a cellular telephone or other wireless communication device in or on the grounds of a correctional facility; the term "correctional facility" includes a state prison; a "state prison" is any facility operated by the Department of Corrections to confine or involuntarily restrain persons committed to its jurisdiction; it is the purpose for which a facility is used, and not its label, that determines its essential character as a state prison; a secure intermediate facility operated by the Department of Corrections from which the inmates cannot not leave without permission is a state prison for the purpose of the prohibition against providing cellular telephones to prisoners (MCL 800.281a[e], MCL 800.283a). *People v Armisted*, 295 Mich App 32.

sionary rule and the fruit of the searches need not be suppressed. *People v Mungo (On Second Remand)*, 295 Mich App 537.

2. The police may search a vehicle without a warrant incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe that the vehicle contains evidence of the offense of arrest; a trial court, in determining reasonableness, must consider whether the facts known to the officer at the time of the stop would warrant an officer of reasonable caution to suspect criminal activity; the officer's conclusion must be drawn from reasonable inferences based on the facts in light of the officer's training and experience; the reasonableness of an officer's suspicion is determined case by case on the basis of the totality of all the facts and circumstances; those circumstances must be viewed as understood and interpreted by law enforcement officers, not legal scholars, and deference should be given to the experience of the law enforcement officers and their assessments of criminal modes and patterns. *People v Tavernier*, 295 Mich App 582.

WEAPONS

3. A criminal defendant is entitled to the return of property seized in connection with his or her case after the case is concluded unless there is a lawful reason to deny its return; a police department's return of noncontraband firearms to a defendant's designee does not violate MCL 750.224f(2). *People v Minch*, 295 Mich App 92.

SELF-INCRIMINATION—*See*

CONSTITUTIONAL LAW 2, 3, 4

CRIMINAL LAW 1, 5

SELLER'S AGENTS—*See*

FRAUD 3

SENTENCES

CONSECUTIVE SENTENCING

1. A court may impose a term of imprisonment for a conviction of first-degree criminal sexual conduct (CSC-1) that is to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction; the language "any

other criminal offense" means a different offense and can encompass additional violations of the same CSC-1 statute (MCL 750.520b[3]). *People v Ryan*, 295 Mich App 388.

OFFENSE VARIABLE 7

2. "Sadism" for purposes of scoring offense variable 7 (aggravated physical abuse) is conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification; "torture" is the act of inflicting excruciating pain, as punishment or revenge, as a means of getting a confession or information, or for sheer cruelty; "excessive brutality" is savagery or cruelty beyond even the usual brutality of a crime (MCL 777.37). *People v Glenn*, 295 Mich App 529.

3. A defendant's conduct may be found to have substantially increased the victim's fear and anxiety for purposes of scoring offense variable 7 (aggravated physical abuse) only if the conduct was designed to cause copious or plentiful amounts of additional fear beyond the fear and anxiety that are an inherent part of the crime; circumstances inherently present in the crime must be discounted for purposes of scoring the offense variable (MCL 777.37). *People v Glenn*, 295 Mich App 529.

RESTITUTION

4. A trial court does not have discretion to order a convicted defendant to pay restitution; rather, it must order the defendant to pay restitution and the amount must fully compensate any victim of the defendant's course of conduct that gave rise to the conviction; in this context, the term "victim" includes a sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical or financial harm as a result of a crime; to determine the amount of restitution, the trial court must consider the amount of the loss sustained by any victim as a result of the offense; the phrase "course of conduct" must be given a broad construction to effectuate the intent of the Legislature and the remedial purpose of the statute; the loss of time incurred by a company when an employee of the company has spent time investigating a crime committed against it instead of working on other matters may be a direct financial harm; the value of that harm can be measured by assigning a value to the time spent

the person's tax liability for the tax year or if there is no tax liability for the tax year, the amount of the credit not used as an offset against the tax liability must, after examination and review, be approved for payment, without interest, to the person; that payment is not counted as income for purposes of determining the person's qualification for an exemption from property taxes on the basis of poverty (MCL 205.520[3]; MCL 211.7u[1]). *Ferrero v Walton Twp*, 295 Mich App 475.

INCOME TAX

2. The unitary-business principle provides that a state is allowed to tax a multistate business on the apportioned share of the multistate business it conducted in the taxing state; all taxable income of a resident individual from any source whatsoever, except that which is attributable to another state, is allocated to the state of Michigan; business income attributed to Michigan and one or more states is apportioned according to the apportionment formula in the Income Tax Act; to apply the apportionment formula, however, there must be some sharing or exchange of value not capable of precise identification or measurement that renders formula apportionment a reasonable taxation method; to determine whether a multistate business is unitary or discrete, a court must look at (1) economic realities, (2) functional integration, (3) centralized management, (4) economies of scale, and (5) substantial mutual interdependence; in the absence of an underlying unitary business, multistate apportionment is precluded and income must be apportioned at the entity level. (MCL 206.110[1], MCL 206.115; Mich Admin Code, R 206.12). *Malpass v Dep't of Treasury*, 295 Mich App 263.

TAX REFUNDS

3. A tax refund is not income because a refund returns money to a taxpayer that need not have been paid; a tax refund is not an independent payment to a taxpayer; although there is a distinction between a tax refund and a tax credit, a tax credit can function like a tax refund in some cases; the homestead property tax credit does not confer income and is not a program that transfers new money to individuals; rather, it is intended to rebate a portion of the property taxes a person has already paid (MCL 206.520[3]). *Ferrero v Walton Twp*, 295 Mich App 475.

VENUE

CORPORATIONS

1. Under MCL 600.1621(a), venue is proper in the county in which (1) a defendant resides, (2) a defendant has a place of business, (3) a defendant conducts business, or (4) the registered office of a defendant corporation is located; there must be a true business connection between the defendant and the selected venue in order for venue to proper; for purposes of determining venue, conducting business does not include the performance of acts merely incidental to the business in which the defendant is ordinarily engaged; venue lies in the county where the defendant conducts its usual and customary business, and the activity must be of such a nature as to localize the business and make it an operation within the county. *Hills & Dales General Hospital v Pantig*, 295 Mich App 14.
2. In Michigan, a corporation is an entity distinct and separate from its owners even when it is owned by a single individual; under MCL 600.1621(a), ownership of a percentage interest in a separate enterprise, without more, does not qualify as "conducting business" for purposes of establishing venue; in the context of establishing venue, the conduct of a separate entity may not be attributed to another entity through its percentage ownership interest. *Hills & Dales General Hospital v Pantig*, 295 Mich App 14.

VICTIMS OF CRIME—*See*

SENTENCES 3, 4

VIOLATIONS OF PERSONAL PROTECTIONS ORDERS—*See*

CONTEMPT 5

VOID FOR VAGUENESS—*See*

CONSTITUTIONAL LAW 5, 6

VOLUNTARINESS OF CONFESSIONS—*See*

CRIMINAL LAW 1

VOLUNTARINESS OF *MIRANDA* WAIVERS—*See*

CRIMINAL LAW 5