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COURT OF APPEALS

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COURT OF APPEALS CASES

ATTORNEY GENERAL v MERCK SHARP & DOHME CORPORATION

Docket No. 292003. Submitted November 4, 2010, at Lansing. Decided March 17, 2011, at 9:00 a.m. Leave to appeal denied, 490 Mich 878.

The Attorney General, on behalf of the state of Michigan and the Department of Community Health, brought an action in the Ingham Circuit Court against Merck Sharp & Dohme Corporation, the manufacturer of the prescription pain reliever Vioxx, alleging violation of the Medicaid False Claim Act (MFCA), MCL 400.601 *et seq*., as a result of Merck's false and deceptive statements about the safety and efficacy of Vioxx. Plaintiffs claimed that if Merck had been truthful about the safety and efficacy of Vioxx, plaintiffs would not have paid all or part of the cost of Vioxx that was prescribed to Michigan Medicaid beneficiaries, and plaintiffs sought to recover those costs under the MFCA. Plaintiffs also sought recovery under a theory of unjust enrichment. Merck sought summary disposition, arguing that plaintiffs' claims constituted a products-liability action pursuant to MCL 600.2945(h) of the Revised Judicature Act (RJA) and were barred by MCL 600.2946(5), which provides that a manufacturer or seller of a drug is not liable in a products-liability action if the drug was approved for safety and efficacy by the federal Food and Drug Administration (FDA) and labeled in compliance with FDA standards at the time the drug left the control of the manufacturer or seller. The court, James R. Giddings, J., denied the motion, holding that plaintiffs' claims did not constitute a products-liability action because their claims did not require proof of a defective or unsafe product. The Court of Appeals granted Merck's application for leave to appeal.

The Court of Appeals *held*:

1. When, as here, the drug in question was approved by the FDA, the state's suit to recover Medicaid money premised on fraud by the drug company in its representations regarding the safety and efficacy of the drug is barred by MCL 600.2946(5), which exempts drug companies from liability in products-liability suits regarding FDA-approved drugs.

2. MCL 600.2945, which defines products-liability action and production, plainly provides that a plaintiff's claim is a products-

liability action subject to the immunity provision of MCL 600.2946(5) if (1) the action is based on a legal or equitable theory of liability, (2) the action is brought for the death of a person or for an injury to a person or damage to property, and (3) that loss was caused by or resulted from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling of a drug product. Elements (1) and (3) were clearly met in this action. The phrase "damage to property" is broad enough to include both physical damage to an object and injury or harm to rights or interests associated with an object, as long as the damage was caused by or results from the production of a product. Plaintiffs sought money damages for Medicaid overpayments. Money itself is a form of property. Element (2) was met because plaintiffs' claim of monetary loss based on alleged misrepresentations regarding the safety and efficacy of Vioxx constituted a claim for damage to property. Plaintiffs' allegations fell within the statutory definition of a products-liability action.

3. MCL 600.2946(5) does not limit its application to claims brought by consumers or preclude claims pursued under the MFCA or described as an action for unjust enrichment.

4. The safety and efficacy of Vioxx was central to plaintiffs' claims. Because the substance of plaintiffs' claims concerned the safety and efficacy of Vioxx and Merck's representations in that regard, and because the FDA approved the safety and efficacy of Vioxx, plaintiffs' claims were barred by MCL 600.2946(5). The trial court erred by denying Merck's motion for summary disposition.

Reversed and remanded.

FITZGERALD, J., dissenting, stated that the trial court properly determined that plaintiffs' claim under the MFCA was not a products-liability action subject to the absolute defense established by MCL 600.2946(5). When examined in the proper context of a products-liability statute, it is clear that the phrase "damage to property" in MCL 600.2945(h) means physical damage to property caused by a defective or unreasonably dangerous product. In the context of the RJA, losses based on personal injury or physical damage to property are the only actionable losses addressed under the rubric of products liability. The definition of products-liability action must be considered in the context of a suit by purchasers, users, or bystanders who suffer losses resulting from defects in a product. The damages in this case did not derive from injuries to a purchaser, user, or bystander. This case was not

a products-liability action, as defined in MCL 600.2945(h), because a suit brought for the return of Medicaid overpayments is not brought for damage to property. The trial court properly denied defendant's motion for summary disposition.

1. PRODUCTS LIABILITY — PHARMACEUTICALS — FOOD AND DRUG ADMINISTRATION APPROVAL.

An action is a products-liability action for purposes of the statute that provides immunity for products-liability claims against a manufacturer or seller of a drug that was approved for safety and efficacy by the Food and Drug Administration and labeled in compliance with Food and Drug Administration standards if (1) the action is based on a legal or equitable theory of liability, (2) the action is brought for the death of a person or for injury to a person or damage to property, and (3) that loss was caused by or resulted from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, inspection, testing, marketing, selling, advertising, packaging, or labeling of a drug product (MCL 600.2945[h] and [i], 600.2946[5]).

2. PRODUCTS LIABILITY — MONETARY LOSSES — WORDS AND PHRASES — DAMAGE TO PROPERTY.

The phrase "damage to property" in the statute defining a products-liability action is broad enough to include both physical damage to an object and injury or harm to rights or interests associated with an object, as long as the damage was caused by or results from the production of the product; money itself is a form of property; a claim of monetary loss based on alleged misrepresentations regarding the safety and efficacy of a drug constitutes a claim for damage to property for purposes of the statute that provides immunity for products-liability claims against a manufacturer or seller of a drug that was approved for safety and efficacy by the Food and Drug Administration and labeled in compliance with Food and Drug Administration standards (MCL 600.2945[h], 600.2946[5]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Mark Matus*, Assistant Attorney General, for plaintiffs.

Honigman Miller Schwartz and Cohn LLP (by *Andrew S. Doctoroff*), *Skadden, Arps, Slate, Meagher & Flom LLP* (by *John H. Beisner*), and *O'Melveny &*

Myers LLP (by *Brian C. Anderson*, *Matthew M. Shors*, and *Rebecca S. Bjork*) for defendant.

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

SAAD, J. Defendant, Merck Sharp & Dohme Corporation, appeals by leave granted the trial court's order that denied its motion for summary disposition. For the reasons set forth below, we reverse and remand for further proceedings.

I. NATURE OF THE CASE

Michigan's Attorney General claims that because Merck misrepresented the safety and efficacy of its prescription pain reliever Vioxx in its marketing and because Michigan reimbursed providers who prescribed or dispensed Vioxx, Michigan would not have incurred such expenses but for Merck's fraudulent activity. The state now claims a right to recover these sums under the Medicaid False Claim Act (MFCA), MCL 400.601 *et seq*., but Merck counters that Michigan's Legislature immunized it from liability in suits that seek to adjudicate a drug's safety when the federal Food and Drug Administration (FDA) has approved the drug. The Attorney General maintains that the statute only exempts drugmakers in traditional products-liability actions in which an end user of the drug, i.e., a consumer, is injured by the ingestion of the drug. Merck argues that, regardless of the label that the Attorney General gives this lawsuit, the claims and ultimate right to recovery center on the safety and efficacy of a drug that the FDA has approved and the immunity statute, therefore, bars the claims.

Michigan's immunity statute is the only one of its kind in the United States, and the claims made by the parties raise an issue of first impression under Michi-

gan law. We hold that when, as here, the drug in question was approved by the FDA, the state's suit to recover Medicaid money premised on fraud by the drug company in its representations regarding the safety and efficacy of the drug is barred by MCL 600.2946(5), which exempts drug companies from products-liability suits regarding FDA-approved drugs.[1]

II. FACTS AND PROCEEDINGS

Merck is the manufacturer of the prescription pain reliever Vioxx. In May 1999, the FDA approved Vioxx for the treatment of osteoarthritis, the management of acute pain in adults, and the treatment of primary dysmenorrhea. Subsequent clinical trials and independent studies showed an increased risk of heart attack in persons who used Vioxx. In 2004, Merck voluntarily removed Vioxx from the market.[2]

On August 21, 2008, the Michigan Attorney General filed this action under the MFCA and alleged that Merck made false and deceptive statements about the safety and efficacy of Vioxx. Plaintiffs relied on § 7 of the MFCA, which provides, in pertinent part:

> (1) A person shall not make or present or cause to be made or presented to an employee or officer of this state a claim under the social welfare act, 1939 PA 280, MCL 400.1 to 400.119b, upon or against the state, knowing the claim to be false.

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[1] To assert a claim under the MFCA against a pharmaceutical company that has undertaken the rigorous and required process to obtain FDA approval for a prescription drug appears to be an interpretation of the act not intended by the Legislature, but in light of our ruling that the Attorney General's suit is barred by MCL 600.2946(5), we need not address this issue of first impression under Michigan law.

[2] A plethora of lawsuits followed the removal of Vioxx from the market, resulting in billions of dollars in settlements and jury awards under various legal theories.

> (2) A person shall not make or present or cause to be made or presented a claim under the social welfare act, 1939 PA 280, MCL 400.1 to 400.119b, that he or she knows falsely represents that the goods or services for which the claim is made were medically necessary in accordance with professionally accepted standards. [MCL 400.607(1) and (2).]

Vioxx had been prescribed to Medicaid beneficiaries from 1999 until 2004, when it was taken off the market. Plaintiffs alleged that, as early as 2000, Merck knew that Vioxx was associated with an increased risk of heart attack and Merck concealed or misrepresented the scientific data from clinical trials that demonstrated this risk. Plaintiffs asserted that if Merck had been truthful about the safety and efficacy of Vioxx, they would not have paid all or part of the cost of Vioxx prescribed to Michigan Medicaid beneficiaries, which cost them more than $20 million. Plaintiffs also sought recovery under a theory of unjust enrichment.

Merck moved for summary disposition pursuant to MCR 2.116(C)(8) and argued that plaintiffs' claims constitute a "product liability action" pursuant to MCL 600.2945(h)[3] and are therefore barred by MCL 600.2946(5),[4] which provides that a manufacturer or seller of a drug is not liable in a "product liability

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[3] MCL 600.2945(h) states: " 'Product liability action' means an action based on a legal or equitable theory of liability brought for the death of a person or for injury to a person or damage to property caused by or resulting from the production of a product."

[4] MCL 600.2946(5) states, in pertinent part:

> In a product liability action against a manufacturer or seller, a product that is a drug is not defective or unreasonably dangerous, and the manufacturer or seller is not liable, if the drug was approved for safety and efficacy by the United States food and drug administration, and the drug and its labeling were in compliance with the United States food and drug administration's approval at the time the drug left the control of the manufacturer or seller.

action" if the drug was approved for safety and efficacy by the FDA and labeled in compliance with FDA standards. Merck relied on *Duronio v Merck & Co, Inc*, unpublished opinion per curiam of the Court of Appeals, issued June 13, 2006 (Docket No. 267003), in which this Court affirmed a trial court's grant of summary disposition in favor of Merck in a similar case. In *Duronio*, the plaintiff asserted a fraud claim and a violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*., on the basis of allegations that Merck misrepresented or concealed the risks associated with Vioxx.

Here, the trial court denied Merck's motion for summary disposition. The court disagreed in part with the *Duronio* panel's interpretation of the phrase "products-liability action." The court ruled that plaintiffs' claims do not constitute a products-liability action because, unlike a products-liability action, plaintiffs' claims under the MFCA and their theory of unjust enrichment do not require proof of a defective or unsafe product. The court also examined the legislative intent underlying MCL 600.2946(5) and concluded that the Legislature did not intend to foreclose actions under the MFCA.

III. ANALYSIS

Merck argues that this is a products-liability lawsuit, which is barred under MCL 600.2946(5). Merck maintains that the trial court erred by construing "product liability action" by considering legislative intent and public policy concerns instead of the plain language of MCL 600.2945(h) and this Court's interpretation of it in *Duronio*. Merck argues that the statute defines "product liability action" broadly enough to encompass plaintiffs' claims. Merck also contends that even if

public-policy implications are relevant, the trial court erred in its analysis. MCL 600.2946(5) does not bar all claims against pharmaceutical manufacturers in the hypothetical situations posed by the court. Claims involving ineffective drugs, or the ineffective performance of drugs, would be permitted as long as the safety of the drugs was not implicated. Merck also argues that allowing plaintiffs' claims to proceed would subvert the legislative intent by leaving pharmaceutical manufacturers exposed to high-stakes litigation, while shielding them from smaller claims brought by individuals such as the *Duronio* plaintiff. Merck contends that the trial court improperly focused on the labels of plaintiffs' claims, rather than their substance.

Plaintiffs distinguish their case from a products-liability action, which they describe as a specialized branch of tort law involving the sale of defective products to individual consumers or end users. Plaintiffs argue that their case differs because they seek reimbursement for money paid by a third party that never bought or used the product. Plaintiffs maintain that the immunity granted by statute does not expand the traditional scope of products-liability litigation beyond consumers who sue manufacturers. Plaintiffs also argue that *Duronio* is not controlling and that the Court should focus on the different purposes of the MFCA and the products-liability statute.

This Court reviews a trial court's grant of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the basis of the pleadings alone. *Id*. at 119-120. The motion is properly granted if the claim is so unenforceable as a matter of law that no factual development could possibly justify recovery. *Id*. at 119. This Court also reviews

de novo as a question of law the interpretation and application of a statute. *Health Care Ass'n Workers Compensation Fund v Dir of the Bureau of Worker's Compensation*, 265 Mich App 236, 243; 694 NW2d 761 (2005).

In 1995, the Legislature amended MCL 600.2946 to provide immunity for products-liability claims against a manufacturer or seller of a drug that was approved for safety and efficacy by the FDA and labeled in compliance with FDA standards.[5] MCL 600.2946(5); *Taylor v Gate Pharm*, 468 Mich 1, 6-7; 658 NW2d 127 (2003). MCL 600.2946(5) states, in pertinent part:

> In a product liability action against a manufacturer or seller, a product that is a drug is not defective or unreasonably dangerous, and the manufacturer or seller is not liable, if the drug was approved for safety and efficacy by the United States food and drug administration, and the drug and its labeling were in compliance with the United States food and drug administration's approval at the time the drug left the control of the manufacturer or seller.

In interpreting this provision, our Supreme Court in *Taylor* stated that "the Legislature has determined that a drug manufacturer or seller that has *properly obtained FDA approval* of a drug product *has acted sufficiently prudently so that no tort liability may lie*." *Taylor*, 468 Mich at 7 (emphasis added).

The central issue is whether plaintiffs' claims constitute a "product liability action" within the meaning of MCL 600.2946(5). Plaintiffs assert that it is not, but a court is not bound by a party's choice of labels. *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). Rather, we determine the gravamen of

[5] There is no dispute that the FDA approved Vioxx and its labeling before the drugs left Merck's control.

a party's claim by reviewing the entire claim, and a party cannot avoid dismissal of a cause of action by artful pleading. *Maiden*, 461 Mich at 135. MCL 600.2945 defines "product liability action" and "production" as follows:

> (h) "Product liability action" means an action based on a legal or equitable theory of liability brought for the death of a person or for injury to a person or damage to property caused by or resulting from the production of a product.
>
> (i) "Production" means manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling. [MCL 600.2945(h) and (i).]

As this Court explained in *McElhaney v Harper-Hutzel Hosp*, 269 Mich App 488, 493; 711 NW2d 795 (2006),

> [t]he primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. The first step is to examine the plain language of the statute itself. The Legislature is presumed to have intended the meaning it plainly expressed. If the statutory language is clear and unambiguous, appellate courts presume that the Legislature intended the meaning plainly expressed, and further judicial construction is not permitted. [Citations omitted.]

Pursuant to the plain language of the statute, the claims asserted by the Attorney General constitute a "product liability action" subject to the immunity provision of MCL 600.2946(5) if (1) the action is based on a legal or equitable theory of liability, (2) the action is brought for the death of a person or for an injury to a person or damage to property, and (3) that loss was caused by or resulted from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, inspection, testing,

listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling of a product.

Here, it is clear that elements (1) and (3) are met. Plaintiffs' action is clearly based on a legal or equitable theory of liability. Plaintiffs allege that Merck is liable for violating MCL 400.607 of the MFCA and under the equitable principle of unjust enrichment. Further, plaintiffs allege that their loss was caused by the marketing and advertising of Vioxx. Plaintiffs claim that Merck made deceptive statements about the *safety and efficacy* of Vioxx and that they would not have paid all or part of the cost of Vioxx prescribed to Michigan Medicaid beneficiaries had Merck not made the allegedly false and deceptive statements. Moreover, plaintiffs specifically allege that these deceptive statements came in the form of marketing and advertising.

With regard to the second element, the question is whether plaintiffs' claims were brought for the death of a person or for injury to a person or damage to property. Plaintiffs have made no allegation of a death or physical injury to a person, but seek money damages for alleged "Medicaid overpayments wrongfully received by Defendant." There is no published authority interpreting MCL 600.2946(5) in this context. However, generally, " '[a] person whose property is diminished by a payment of money wrongfully induced is injured in his property.' " *Reiter v Sonotone Corp*, 442 US 330, 340; 99 S Ct 2326; 60 L Ed 2d 931 (1979), quoting *Chattanooga Foundry & Pipe Works v City of Atlanta*, 203 US 390, 396; 27 S Ct 65; 51 L Ed 241 (1906) (city induced to pay more than the value of the item received). We also find persuasive the analysis in the unpublished opinion in *Duronio*.[6] In *Duronio*, the plaintiff sought money dam-

[6] Unpublished cases are not binding on this Court, MCR 7.215(C)(1), but we may view them as persuasive when there is limited caselaw on the

ages for the purchase price of Vioxx and costs related to expenses for a medical consultation recommended by the FDA and Merck in connection with Merck's voluntary withdrawal of Vioxx from the market. *Duronio*, unpub op at 1-2. The plaintiff alleged fraud and violation of the MCPA, claiming "that Merck disseminated information to the general public that concealed or downplayed potential cardiovascular risks and falsely implied that Vioxx provided superior pain relief to over-the-counter medications, and that Merck's pharmaceutical representatives misled prescribing physicians regarding the safety of Vioxx for their patients." *Id*. at 1.

The trial court granted Merck's motion for summary disposition in *Duronio* and ruled that, in substance, the plaintiff's claim was a products-liability claim, as defined in MCL 600.2945(h), and therefore Merck was immune from suit under MCL 600.2946(5). *Duronio*, unpub op at 2. This Court affirmed and agreed that the plaintiff's claim was a products-liability action within the meaning and scope of MCL 600.2945(h). The panel specifically ruled that the plaintiff's claim for money damages was based on a theory of liability "for 'damage to property' caused by or resulting from the production" of Vioxx:

> Because plaintiff did not allege any injury to his person, the trial court could only find a legal or equitable theory falling within the scope of MCL 600.2945(h) if plaintiff's action could be characterized as one for "damage to property" caused by or resulting from the production of Vioxx. . . .
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> * * *
>
> MCL 600.2945(h) does not use the word "damages," but rather requires an "action based on a legal or equitable

issue, *Dyball v Lennox*, 260 Mich App 698, 705 n 1; 680 NW2d 522 (2004).

> theory of liability brought for the death of a person or for injury to a person *or damage to property* caused by or resulting from the production of a product." Examined in context, we reject plaintiff's claim that "damage to property" only encompasses physical damage to property. The phrase is broad enough to include both physical damage to an object and injury or harm to rights or interests associated with an object, so long as the damage is caused by or results from the production of the product. . . .
>
> The fact that the alleged injury in this case is in the form of monetary loss does not preclude application of MCL 600.2945(h). Money itself is a form of property, *Garr*[*a*]*s v Bekiares*, 315 Mich 141, 148-149; 23 NW2d 239 (1946), and a consumer's expenditure of money for overvalued goods can constitute an injury to property. [*Duronio*, unpub op at 4-5.]

In addition to holding that the plaintiff's claim for reimbursement was a claim for damage to property, the *Duronio* panel looked beyond the plaintiff's "fraud" label for his claim and ruled that "the safety and efficacy of Vioxx [was] essential to his monetary loss claim." *Id*. at 6. Therefore, the plaintiff's claim was barred under MCL 600.2946(5):

> [P]laintiff presented the claim as arising from misrepresentations and omissions, and denied that the alleged concealed risks of using Vioxx ever materialized for him, but it is clear that the safety and efficacy of Vioxx is essential to his monetary loss claim.
>
> Because plaintiff brought the claim for damage to property (money) caused by or resulting from the production (marketing, selling, advertising, packaging, or labeling) of Vioxx, plaintiff's pleaded common-law fraud claim for a refund of the cost of purchasing Vioxx is, in substance, a product liability action within the meaning of MCL 600.2945(h). Assuming for purposes of our review that plaintiff's request to have Merck pay for a medical consultation is actionable in tort, plaintiff's alleged loss of a right or interest in money to obtain a medical consultation constitutes damage to property within the

> meaning of MCL 600.2945(h). Any additional claim for lost income or expenses to obtain the medical consultation is merely a pecuniary loss flowing from that injury. *Citizens for Pretrial Justice v Goldfarb*, 415 Mich 255, 268; 327 NW2d 910 (1982).
>
> The trial court properly determined that plaintiff's common-law fraud claim is, in substance, a product liability action subject to the absolute defense established by MCL 600.2946(5). [*Duronio*, unpub op at 6.][7]

We hold that plaintiffs' allegations fall within the statutory definition of "product liability action" because plaintiffs have asserted legal and equitable theories of liability for damage to property resulting from the production of a product. MCL 600.2945(h). Pursuant to the ordinary meaning of the phrase as examined by this Court in *Duronio*, plaintiffs' claim of monetary loss based on alleged misrepresentations regarding the safety and efficacy of Vioxx constitutes a claim for "damage to property."

We agree with Merck that nothing in the statute limits its application to claims brought by consumers and that the statute in no way precludes a claim pursued under the MFCA or described as an action for unjust enrichment. Again, by its own terms, MCL 600.2946(5) applies to actions "based on a legal or equitable theory of liability," which includes the claims at issue here. If the plain language of the statute results in an outcome that the Legislature now deems improper, it is for the Legislature, not this Court, to narrow the application of the statute by amending or redrafting its terms.

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[7] The Court in *Duronio* did not decide whether the plaintiff's MCPA claim was also a products-liability action and therefore also barred by the immunity provision in MCL 600.2946(5). *Duronio*, unpub op at 7. Rather, this Court ruled that the trial court correctly dismissed the plaintiff's MCPA claim because an exemption within the MCPA statute applied, MCL 445.904(1)(a). *Id*.

Like the plaintiff's allegations in *Duronio*, plaintiffs' claims here are indisputably based on Merck's representations about the safety and efficacy of Vioxx. Although a claim under the MFCA does not require proof of an unsafe product, in this case the safety and efficacy of Vioxx is central to plaintiffs' claims, as plaintiffs' counsel acknowledged at oral argument. Viewing the complaint in its entirety, the substance of plaintiffs' claims concerns the safety and efficacy of Merck's drug and Merck's representations in that regard. Because the FDA approved the safety and efficacy of Vioxx, plaintiffs' claims are barred by MCL 600.2946(5).

For these reasons, we hold that the trial court erred when it failed to apply the plain language of MCL 600.2945(h) and MCL 600.2946(5). Further, because plaintiffs' lawsuit constitutes a "product liability action" under the controlling statutory language, Merck is not liable under the terms of the statute and the trial court erred by denying Merck's motion for summary disposition.

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

SAWYER, P.J., concurred with SAAD, J.

FITZGERALD, J. (*dissenting*). I respectfully dissent. In my view, the trial court properly determined that plaintiffs' claim under the Medicaid False Claim Act (MFCA), MCL 400.601 *et seq.*, as pleaded, is not a products-liability action subject to the absolute defense established by MCL 600.2946(5). Consequently, the trial court properly declined to grant summary disposition in favor of defendant, Merck Sharpe & Dohme Corporation.

Defendant's motion for summary disposition was brought pursuant to MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and is limited to the pleadings alone. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) may be granted only when the claims alleged are " 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.' " *Id*. at 119 (citation omitted). When deciding a motion brought under this subrule, a court considers only the pleadings. MCR 2.116(G)(5); *Maiden*, 461 Mich at 119-120.

Defendant is the manufacturer of the prescription pain reliever Vioxx, which was approved by the Food and Drug Administration (FDA) in May 1999 for the treatment of osteoarthritis, the management of acute pain in adults, and the treatment of primary dysmenorrhea. Subsequent clinical trials and independent studies conducted *after* Vioxx was approved by the FDA showed that patients using Vioxx had four or five times as many heart attacks as patients using the over-the-counter pain reliever Aleve. In 2004, defendant voluntarily removed Vioxx from the market.

On August 21, 2008, plaintiffs brought this action under the MFCA.[1] The gist of plaintiffs' complaint is

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[1] Plaintiffs relied on § 7 of the MFCA, which provides, in pertinent part:

> (1) A person shall not make or present or cause to be made or presented to an employee or officer of this state a claim under the social welfare act, 1939 PA 280, MCL 400.1 to 400.119b, upon or against the state, knowing the claim to be false.
>
> (2) A person shall not make or present or cause to be made or presented a claim under the social welfare act, 1939 PA 280, MCL

that defendant fraudulently induced the state of Michigan to cover Vioxx under Medicaid by failing to adequately disclose its risks.[2] Plaintiffs alleged that defendant learned through clinical trials as early as 2000 that Vioxx posed a risk of heart attacks and other adverse cardiovascular events and that defendant did not disclose this knowledge to the public. They also alleged that defendant used a marketing campaign to maximize the sale of Vioxx and, in the course of doing so, attempted to minimize the safety risks of Vioxx and overstate its efficacy. Plaintiffs averred that if defendant had been truthful about the safety and efficacy of Vioxx, the state would not have paid all or part of the $20 million cost of Vioxx prescribed to Michigan Medicaid beneficiaries.

Defendant moved for summary disposition and asserted that plaintiffs' MFCA claim was, in truth, a products-liability claim that attempted to avoid the absolute defense of MCL 600.2946(5).[3] MCL 600.2946(5) immunizes manufacturers and sellers of an FDA-approved drug from liability in a products-liability action if the drug complied with FDA standards and labeling when it left the manufacturer's or seller's

> 400.1 to 400.119b, that he or she knows falsely represents that the goods or services for which the claim is made were medically necessary in accordance with professionally accepted standards. [MCL 400.607(1) and (2).]

[2] Plaintiffs' complaint also included a claim of unjust enrichment.

[3] Defendant relied on *Duronio v Merck & Co, Inc*, unpublished opinion per curiam of the Court of Appeals, issued June 13, 2006 (Docket No. 267003), in which a panel of this Court affirmed a trial court's grant of summary disposition in favor of defendant in a similar case. In *Duronio*, the plaintiff asserted a fraud claim and a violation of the Michigan Consumer Protection Act, MCL 445.901 *et seq*., on the basis of allegations that the defendant misrepresented or concealed the risks associated with Vioxx.

control.[4] *Taylor v Gate Pharm*, 468 Mich 1, 6-7; 658 NW2d 127 (2003). The trial court denied the motion. The court concluded that plaintiffs' claim did not constitute a products-liability action because it did not require proof of a defective or unsafe product. The trial court also concluded that the Legislature did not intend for MCL 600.2946(5) to foreclose actions under the MFCA.

Defendant argues on appeal that, despite plaintiffs' labeling of its cause of action as a claim under the MFCA, plaintiffs' claim is a products-liability action as defined in MCL 600.2945(h) and used in MCL 600.2946(5).[5]

MCL 600.2946(5) states, in pertinent part:

> In a product liability action against a manufacturer or seller, a product that is a drug is not defective or unreasonably dangerous, and the manufacturer or seller is not liable, if the drug was approved for safety and efficacy by the United States food and drug administration, and the drug and its labeling were in compliance with the United States food and drug administration's approval at the time the drug left the control of the manufacturer or seller.

In interpreting this provision, our Supreme Court has stated, "[T]he Legislature has determined that a drug manufacturer or seller that has properly obtained FDA approval of a drug product has acted sufficiently prudently so that no tort liability may lie." *Taylor*, 468 Mich at 7. In other words, a drug that has obtained FDA

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[4] An exception to the absolute defense exists in situations involving fraud or bribery in dealings with the FDA. See MCL 600.2946(5)(a) and (b).

[5] Notably, defendant has not asked this court to resolve the question whether defendant's actions concerning its introduction and continued sale of Vioxx could be deemed sufficient to state a cause of action for a violation of the MFCA.

approval is "not defective or unreasonably dangerous" for purposes of a products-liability action.

MCL 600.2945 defines "product liability action" and "production" as follows:

> (h) "Product liability action" means an action based on a legal or equitable theory of liability brought for the death of a person or for injury to a person or damage to property caused by or resulting from the production of a product.
>
> (i) "Production" means manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling.

Thus, plaintiffs' claim is a "product liability action" subject to the absolute defense of MCL 600.2946(5) if (1) the action is based on a legal or equitable theory of liability, (2) the action is brought for the death of a person or for an injury to a person or damage to property, and (3) that loss was caused by or resulted from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling of a product.

The point of contention is whether plaintiffs' claim was "brought for the death of a person or for injury to a person or damage to property . . . ." Plaintiffs are seeking money damages "representing Medicaid overpayments wrongfully received by Defendant" as a result of defendant's allegedly fraudulent conduct that occurred *after* the FDA's approval of Vioxx. To treat this case as a products-liability action would require a finding that plaintiffs' claim for money wrongfully paid was brought for *damage to property*.

In order to determine whether plaintiffs' claim was brought for "damage to property" pursuant to MCL 600.2945(h), this Court must interpret this phrase. "The fair and natural import of the provision governs, *considering the subject matter of the entire statute*." *People v McGraw*, 484 Mich 120, 124; 771 NW2d 655 (2009) (emphasis added). When examined in the proper context of a products-liability statute, it is clear that "damage to property" means *physical* damage to property caused by a defective or unreasonably dangerous product.

"Products liability is the name currently given to the area of the law involving the *liability* of those who supply goods or products for the use of others to *purchasers, users, and bystanders* for losses of various kinds *resulting from so-called defects in those products*." Prosser & Keeton, Torts (5th ed), § 95, p 677 (emphasis added). Indeed, the language in MCL 600.2946(5) refers to a products-liability action and defines when a drug is not "defective or unreasonably dangerous" for purposes of that action. Products liability includes multiple theories of recovery and types of losses. Prosser & Keeton, p 678, lists five different categories of losses:

> (1) personal injuries, (2) physical harm to tangible things, other than the assembled product such as an automobile, a helicopter, or an industrial machine of some kind, (3) physical harm to or destruction of the assembled product purchased by the first purchaser for use, (4) physical harm to or destruction of a product that was constructed with or repaired with the use of the target seller's component part, and (5) direct economic loss resulting from the purchase of the inferior product, and indirect consequential loss, such as loss of profits, resulting from the unfitness of the product adequately to serve the purchaser's purposes, such as when a plastic pipe pur-

> chased for an irrigation system on a golf course is unsatisfactory and requires replacement.

The first four types of losses are based on personal injuries or physical damage to property. The fifth type is based on purely economic loss. Under Michigan jurisprudence, disputes involving economic loss relating to a transaction in goods are generally subject to article 2 of the Uniform Commercial Code, MCL 440.1101 *et seq*., rather than the Revised Judicature act (RJA). See *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512; 486 NW2d 612 (1992). The Court in *Neibarger* explained the rationale:

> The economic loss doctrine, simply stated, provides that " '[w]here a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only "economic" losses.' " This doctrine hinges on a distinction drawn between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts. [*Id*. at 520-521 (citations omitted).]

Thus, in the context of the RJA, losses based on personal injury or physical damage to property are the only actionable losses addressed under the rubric of products liability. Again, this is consistent with damages for harm caused by a defective or unsafe product.

If damage to property is given a broad interpretation, like that in *Duronio*, the statute would provide a manufacturer or seller of drugs immunity to claims for losses that are different from the four types of losses listed above and not contemplated by the Legislature. The definition of products-liability action must be considered in the context of a suit by purchasers, users, or

bystanders who suffer losses resulting from defects in a product. Prosser & Keeton, p 677. The damages in this case do not derive from injuries to a purchaser, user, or bystander.[6] Our Supreme Court has explained that products liability "derive[d] either from a duty imposed by law or from policy considerations which allocate the risk of dangerous and unsafe products to the manufacturer and seller rather than the *consumer*." *Neibarger*, 439 Mich at 523 (emphasis added). Here, every section of the statute is written in the context of a suit by a purchaser, user, or bystander. Indeed, the definitions of "misuse" and "sophisticated user" in the MFCA make it clear that the potential plaintiff in a products-liability action is the user of the product. See MCL 600.2945(e) and (j).

On the basis of the foregoing, "damage to property" is properly interpreted as *physical damage* to property resulting from a defective or unreasonably dangerous product. As such, the present case is not a products-liability action, as defined in MCL 600.2945(h), because a suit brought for the return of Medicaid overpayments is not "brought for . . . damage to property . . . ." Accordingly, I would conclude that the trial court properly denied defendant's motion for summary disposition.

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[6] The damages arise from an injury to Michigan's Medicaid program and represent the amount of money allegedly wrongfully paid to defendant.

SHERRY v EAST SUBURBAN FOOTBALL LEAGUE

Docket No. 295792. Submitted March 1, 2011, at Detroit. Decided March 17, 2011, at 9:05 a.m.

Jessicca Sherry, a minor, by her next friend, Renee Sherry, brought an action in the Macomb Circuit Court against the East Suburban Football League (ESFL), the Macomb Youth Football Club (MYFC), Julie Lange, Stephanie Vallie, and others, seeking damages for injuries sustained while performing a stunt at a camp for cheerleaders of the ESFL. At the time the injury occurred, plaintiff cheered on the junior varsity cheerleading team for the Macomb Mustangs, a team organized through the MYFC, a nonprofit organization and franchise member of the ESFL. Vallie was the cheer coordinator for the Macomb Mustangs and Lange served as coach for the junior varsity cheerleading team. Defendants moved for summary disposition, contending that because there was no evidence that defendants were grossly negligent or engaged in reckless misconduct they could not be held liable for plaintiff's injuries. The court, Donald G. Miller, J., granted the motion. Plaintiff appealed, contending that the court erred by applying the reckless-misconduct standard and should have applied an ordinary-negligence standard.

The Court of Appeals *held*:

1. The gross-negligence standard applies in cases involving coaches of publicly sponsored athletic teams who are entitled to governmental immunity. The reckless-misconduct standard applies in cases alleging negligence on the part of coparticipants in recreational activities, including when a coach is acting as a coparticipant. The ordinary-negligence standard of care applies in cases alleging negligence on the part of nonparticipating coaches and organizations involved in privately sponsored recreational activities. The trial court erred by holding that the reckless-misconduct standard, rather than the ordinary-negligence standard, applied in this case involving nonparticipating coaches and organizations and privately sponsored recreational activities.

2. Genuine issues of material fact existed regarding whether defendants exercised ordinary care under the circumstances. Viewing the evidence in the light most favorable to plaintiff, it

cannot be said as a matter of law that defendants provided proper supervision or that plaintiff's injuries were unforeseeable. It cannot be concluded as a matter of law that defendants did not cause plaintiff's damages. Summary disposition was improperly granted and the order granting summary disposition must be reversed.

3. The trial court did not abuse its discretion by refusing to consider the affidavit of plaintiff's expert witness that was not notarized.

4. Because the trial court erred by granting summary disposition in favor of defendants and did not rule on plaintiff's motion in limine regarding alleged discovery abuses, the trial court must consider the motion in limine on remand.

5. The trial court did not err by refusing to enter a judgment in favor of plaintiff under MCR 2.116(I)(2) because genuine issues of material fact remain regarding whether defendants failed to exercise the appropriate level of care to ensure plaintiff's safety.

Reversed and remanded.

1. ACTIONS — PERSONAL INJURY — NEGLIGENCE — RECREATIONAL ACTIVITIES — STANDARD OF CARE.

The gross-negligence standard of care applies in cases alleging negligence involving coaches of publicly sponsored athletic teams who are entitled to governmental immunity; the reckless-misconduct standard applies in cases alleging negligence on the part of coparticipants in recreational activities, including when a coach is acting as a coparticipant; the ordinary-negligence standard applies in cases alleging negligence on the part of nonparticipating coaches and organizations involved in privately sponsored recreational activities.

2. NEGLIGENCE — PRIMA FACIE CASE — FORESEEABILITY.

A prima facie case of negligence requires the establishment of four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages; in ordinary negligence cases, whether the defendant has breached a duty of care owed to the plaintiff is dependent on foreseeability; the question is whether the defendant's action or inaction created a risk of harm to the plaintiff and whether the resulting harm was foreseeable.

3. AFFIDAVITS — NOTARIZATION.

An affidavit lacking notarization is invalid and need not be considered by a trial court.

The Erskine Law Group, P.C. (by *Scott M. Erskine*), for Jessicca Sherry.

Garan Lucow Miller, P.C. (by *Caryn A. Gordon*), for the East Suburban Football League, the Macomb Youth Football Club, Julie Lange, and Stephanie Vallie.

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

PER CURIAM. Jessicca Sherry, a minor, by her next friend, Renee Sherry,[1] appeals as of right the trial court's order granting summary disposition in favor of defendants the East Suburban Football League (ESFL), the Macomb Youth Football Club (MYFC), Julie Lange, Stephanie Vallie, Jane Doe 1, and Jane Doe 2.[2] We reverse the trial court's order granting summary disposition to defendants and remand the case for further proceedings consistent with this opinion.

Plaintiff sustained injuries while performing a stunt, called a full extension cradle,[3] at "Spirit Day," a camp for cheerleaders of the ESFL. At the time, plaintiff cheered on the junior varsity team for the Macomb Mustangs, a team organized through the MYFC. The MYFC is a nonprofit organization and franchise member of the ESFL. Stephanie Vallie served as cheer coordinator for the Macomb Mustangs, and Julie Lange

[1] We refer to Jessicca as plaintiff.

[2] The trial court had entered a consent order dismissing all claims against defendant Carol Bommarito on November 10, 2009. Accordingly, Bommarito is not a party in the instant appeal notwithstanding the fact that defendants' appellate counsel's appearance includes Bommarito. The order also dismissed count III of plaintiff's complaint alleging violation of the Michigan Consumer Protection Act, MCL 445.901 *et seq*.

[3] In a half extension, two bases each hold one of the flier's feet at their chest level and a third base stands in back as a spotter. In a full extension, the bases extend their arms straight, lifting the flier above their head level. To finish the extension, the bases catch the flier in a cradle.

served as coach for the junior varsity cheerleading team. According to plaintiff, her injuries occurred as a result of defendants' negligence and gross negligence in, among other things, failing to properly train and supervise the cheerleaders.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), contending that there was no evidence that defendants were grossly negligent or engaged in reckless misconduct, so that they could not be held liable for plaintiff's injuries. The trial court, quoting *Gibbard v Cursan*, 225 Mich 311; 196 NW 398 (1923), overruled by *Jennings v Southwood*, 446 Mich 125; 521 NW2d 230 (1994), agreed that plaintiff must demonstrate reckless misconduct and that, because she failed to do so, summary disposition in defendants' favor was appropriate. In denying plaintiff's motion for reconsideration, the trial court relied on *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 94; 597 NW2d 517 (1999), to find that plaintiff's argument lacked merit.

I. APPLICABLE STANDARD OF CARE

Plaintiff first argues that the trial court erred by applying the reckless-misconduct standard of care adopted in *Ritchie-Gamester*. According to plaintiff, ordinary negligence principles apply, and genuine issues of material fact remain regarding whether defendants acted negligently in the supervision of plaintiff. We agree.

We review de novo decisions on motions for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition under MCR 2.116(C)(10) is 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). In reviewing the trial court's decision, "we consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id*. The general standard of care is a question of law for the courts, and thus subject to review de novo. *Moning v Alfono*, 400 Mich 425, 438; 254 NW2d 759 (1977).

In *Ritchie-Gamester*, the Michigan Supreme Court set out to decide "the proper standard of care among coparticipants for unintentional conduct in recreational activities." 461 Mich at 77. The undisputed facts of the case were that the defendant, a 12-year-old girl, while skating backwards during an open-skating period at an ice rink, ran into the plaintiff and knocked her to the ground, causing serious injury to the plaintiff's knee. *Id*. at 75. The Court stated:

> [W]e join the majority of jurisdictions and adopt reckless misconduct as the minimum standard of care for coparticipants in recreational activities. We believe that this standard most accurately reflects the actual expectations of participants in recreational activities. . . . [W]e believe that participants in recreational activities do not expect to sue or be sued for mere carelessness. A recklessness standard also encourages vigorous participation in recreational activities, while still providing protection from egregious conduct. Finally, this standard lends itself to commonsense application by both judges and juries. [*Id*. at 89.]

Unlike the claim in *Ritchie-Gamester*, plaintiff's claim in this case is not against a coparticipant. Therefore, the reckless-misconduct standard adopted in *Ritchie-Gamester* is inapplicable. The Court in *Ritchie-Gamester* was careful, in fact, to note the limited reach of its holding. In addition, the justifications that the Supreme Court cited for adopting the reckless-misconduct standard do not support extending the

standard to coaches and organizations. Coaches and organizations can expect to be sued for their carelessness, and holding coaches and organizations to an ordinary negligence standard of care does not discourage vigorous participation in recreational activities. Had plaintiff brought her claim against other cheerleaders, who may properly be considered coparticipants in the recreational activity of cheerleading, then, perhaps, the reckless-misconduct standard announced in *Ritchie-Gamester* would apply. Nothing in *Ritchie-Gamester*, however, precludes ordinary-negligence claims against coaches and organizations involved in recreational sports.

The case of *Behar v Fox*, 249 Mich App 314, 316-318; 642 NW2d 426 (2002), in which a panel of this Court applied the reckless-misconduct standard from *Ritchie-Gamester* to a soccer coach, is distinguishable from the case at hand. In *Behar*, the plaintiffs sued the defendant, their son's soccer coach, after he collided with or kicked their son in the knee during a soccer scrimmage, resulting in a torn anterior cruciate ligament. *Id*. at 315. The plaintiffs contended that the ordinary-negligence standard should apply, but this Court disagreed. *Id*. at 316. This Court stated, "the mere fact that [the] plaintiffs' minor son was injured in a collision with an adult coach rather than with a larger child coparticipant is of insufficient distinction to take this case out of the realm of the *Ritchie-Gamester* standard." *Id*. at 318. It further noted that the defendant "was as much a 'coparticipant' in the scrimmage as he was a coach." *Id*. Thus, although the reckless-misconduct standard applies in cases where a coach is acting as a coparticipant, the ordinary-negligence standard remains applicable in typical failure-to-supervise cases.

Further, in several cases involving recreational activities, this Court has held nonparticipating parties to an ordinary-negligence standard in the absence of an applicable immunity statute. See *Woodman v Kera, LLC*, 280 Mich App 125, 127-130; 760 NW2d 641 (2008), aff'd 486 Mich 228 (2010); *Tarlea v Crabtree*, 263 Mich App 80; 687 NW2d 333 (2004). The gross-negligence standard applies in cases involving coaches of publicly sponsored athletic teams who are entitled to governmental immunity, *id.* at 83-89, and the reckless-misconduct standard applies in cases alleging negligence on the part of coparticipants in recreational activities, *Ritchie-Gamester*, 461 Mich at 89. Defendants, however, cite no authority to support their position that the reckless-misconduct standard announced in *Ritchie-Gamester*, or any other heightened standard, applies in cases alleging negligence on the part of nonparticipating coaches and organizations involved in privately sponsored recreational activities.

A prima facie case of negligence requires the establishment of four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). Having determined that ordinary care is the appropriate standard of care in this case, the next question is whether genuine issues of material fact remain regarding whether defendants' conduct fell below that standard. In ordinary negligence cases, whether the defendant has breached his or her duty of care owed to the plaintiff is dependent on foreseeability. *Laier v Kitchen*, 266 Mich App 482, 494; 702 NW2d 199 (2005). The question is whether the defendant's action or inaction created a risk of harm to the plaintiff, and whether the resulting harm was foreseeable. *Schuster v Sallay*, 181 Mich App 558, 563; 450 NW2d 81 (1989).

Here, there remain genuine issues of material fact regarding whether defendants exercised ordinary care under the circumstances. Viewing the evidence in the light most favorable to plaintiff, it cannot be said as a matter of law that defendants provided proper supervision of the stunting station or that plaintiff's injuries were unforeseeable. Although a coach was supposed to be positioned at the stunting station, no coach was present when plaintiff suffered her injury. Without proper supervision, the girls in plaintiff's group who were in high school became inattentive and engaged in horseplay. Although a coach was notified, she simply threatened the high school girls with running laps if they dropped plaintiff. Despite this threat, the high school girls continued horsing around and were not counting properly to ensure their synchronization. The girls then attempted to execute an advanced cheerleading stunt with plaintiff, who had never before performed the maneuver. On the whole, we find that reasonable minds could differ regarding whether an individual exercising ordinary care would foresee that a young girl without proper supervision or training would become injured in an attempt to execute an advanced cheerleading stunt with a group of high school girls on a grass football field.

Defendants argue that, applying any standard of care, plaintiff cannot establish the requisite element of causation. We disagree. Reasonable minds could differ regarding whether it is foreseeable that unsupervised, high school girls assisting in the execution of difficult cheerleading stunts will become inattentive to the point of creating a risk of harm. Exercising due care, perhaps defendants would have maintained supervision at the stunting station, removed the girls who were incapable of focusing, or introduced only those stunts that were appropriate given the cheerleaders' ages and skill lev-

els. Thus, we are unable to conclude as a matter of law that defendants did not cause plaintiff's damages. At the very least, questions of fact remain, and summary disposition in defendants' favor was improper.

II. FAILURE TO CONSIDER THE AFFIDAVIT OF PLAINTIFF'S EXPERT

Plaintiff next challenges the trial court's refusal to consider the affidavit of plaintiff's expert witness. "[T]he decision whether to admit or exclude evidence is reviewed for an abuse of discretion." *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). A trial court's decision on a motion for reconsideration is also reviewed for an abuse of discretion. *Tinman v Blue Cross & Blue Shield of Mich*, 264 Mich App 546, 556-557; 692 NW2d 58 (2004). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). We hold that the trial court did not abuse its discretion when it refused to consider the affidavit for the reason that the affidavit lacked notarization.

To be valid, an affidavit must be (1) a written or printed declaration or statement of facts, (2) voluntarily made, and (3) confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation. *Detroit Leasing Co v Detroit*, 269 Mich App 233, 236; 713 NW2d 269 (2005). Because an affidavit lacking notarization is invalid, a trial court need not consider it. *Id*. Although plaintiff points out that defendants never contested the affidavit's validity, plaintiff cites no legal authority that would preclude a trial court from refusing sua sponte to consider an invalid affidavit.

Plaintiff also argues that, although notarization was lacking, plaintiff's expert signed the affidavit and swore

to its validity. That the affidavit comported with *some* elements required for validity, however, is not a basis to ignore that the affidavit failed to comport with *all* elements required for validity.

Finally, plaintiff argues that the trial court should have admitted the affidavit because she was prejudiced by its exclusion. To support this argument, plaintiff cites the harmless-error rule—where a trial court considers a defective affidavit on a motion for summary disposition, a challenging party must show prejudice resulting from the defect, or any error is harmless. *Hubka v Pennfield Twp*, 197 Mich App 117, 119-120; 494 NW2d 800 (1992), rev'd in part on other grounds 443 Mich 864 (1993). Plaintiff distorts the harmless-error rule. In *Hubka*, the trial court committed an error when it considered defective affidavits in ruling on a motion for summary disposition. In such case, reversal is appropriate only if the error resulted in prejudice. Here, however, the trial court properly refused to consider the defective affidavit—i.e., the trial court did not err. Any prejudice plaintiff may have suffered is a result of her own failure to see that the affidavit comported with the requirements for admission. Because the trial court did not err by refusing to consider the affidavit, plaintiff cannot claim prejudice resulting from that decision.

III. FAILURE TO RULE ON PLAINTIFF'S MOTION IN LIMINE

Plaintiff next argues that the trial court erred by refusing to hear her motion in limine to preclude any undisclosed witnesses and evidence from use or admission at trial. We agree.

We review a trial court's evidentiary decisions for an abuse of discretion. *People v Martzke*, 251 Mich App 282, 286; 651 NW2d 490 (2002). However, because the

trial court never ruled on plaintiff's motion in limine, there is no decision for us to review. *Village of Hickory Pointe Homeowners Ass'n v Smyk*, 262 Mich App 512, 516-517; 686 NW2d 506 (2004). We can, however, consider the trial court's failure to hold a hearing on plaintiff's motion in limine.

The trial court never heard plaintiff's motion in limine, scheduled for the same day as defendants' motion for summary disposition. Likely the trial court found it unnecessary to rule on the motion in limine considering that it decided to grant defendants' motion for summary disposition—there would be no trial. After the trial court granted defendants' motion for summary disposition, plaintiff filed a motion for reconsideration, in part, requesting an inference that defendants' witnesses would be adverse, since defendants had failed to produce the names of any coach or other personnel who witnessed plaintiff's fall. In denying plaintiff's motion for reconsideration, the trial court indicated that plaintiff waived her right to assert any ongoing discovery issues.

Plaintiff argues that she did not waive her right to assert any ongoing discovery issues because she filed a motion in limine, which was pending for hearing when the trial court granted defendants' motion for summary disposition. She raised the issue regarding defendants' abusive discovery tactics again in her motion for reconsideration. We agree with plaintiff. Waiver is defined as the intentional or voluntary relinquishment of a known right. *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003). There is simply no indication that plaintiff intentionally or voluntarily waived her right regarding a claim of discovery abuse. Quite the opposite, her course of conduct showed her strong desire to exercise such a right. Accordingly,

waiver is not a valid ground for the trial court's refusal to rule on plaintiff's motion in limine.

Defendants argue that the trial court did not abuse its discretion by refusing to hear plaintiff's motion in limine because, given that the trial court granted defendants' motion for summary disposition, there would be no trial. Because we find that the trial court erred by granting defendant's motion for summary disposition, however, defendants' argument lacks merit.

There now being no valid ground for refusing to rule on the motion in limine, the trial court is instructed to consider the same. Accordingly, we remand the case for consideration of plaintiff's motion.

IV. JUDGMENT UNDER MCR 2.116(I)(2)

In her last argument on appeal, plaintiff argues that the trial court erred by refusing to enter judgment as a matter of law in her favor as an opposing party under MCR 2.116(I)(2). We review de novo a trial court's decision to grant or deny summary disposition. *Rossow v Brentwood Farms Dev, Inc*, 251 Mich App 652, 657; 651 NW2d 458 (2002). "The trial court appropriately grants summary disposition to the opposing party under MCR 2.116(I)(2) when it appears to the court that the opposing party, rather than the moving party, is entitled to judgment as a matter of law." *Id*. at 658.

Plaintiff asserts the following undisputed facts, which she contends entitled her to judgment as a matter of law under MCR 2.116(I)(2): (1) no coach was present at the stunting station; (2) the girls stunting with plaintiff were reprimanded by a coach for engaging in horseplay; (3) despite being on notice of the risks, the coach walked away; (4) the MYFC supervisors were not supervising plaintiff at the time of the incident; and (5) defendants did not make it known that stunting would

be incorporated into Spirit Day's curriculum. Plaintiff further argues that an expert opined that defendants were negligent and even grossly negligent. According to plaintiff, an adult could have prevented plaintiff's injuries. Therefore, she argues, the trial court erred by granting summary disposition in favor of defendants, and should have granted judgment as a matter of law in favor of plaintiff under MCR 2.116(I)(2). We disagree.

Even assuming that the facts set forth above are undisputed, genuine issues of material fact remain regarding whether defendants failed to exercise the appropriate level of care to ensure plaintiff's safety. Given that ordinary negligence rather than reckless misconduct is the appropriate test in this case, certainly plaintiff has set forth sufficient evidence to survive defendants' motion for summary disposition. It remains the case, however, that plaintiff must prove (1) duty, (2) breach, (3) causation, and (4) damages before judgment may enter in her favor. The bare conclusions regarding negligence or gross negligence made by plaintiff's expert, who was not present on the day in question and whose affidavit was ruled invalid by the trial court, were insufficient to unequivocally establish breach and causation. Rather, questions of fact remain.

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

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

PEOPLE v ASPY

Docket No. 294949. Submitted January 4, 2011, at Grand Rapids. Decided February 1, 2011. Approved for publication March 22, 2011, at 9:00 a.m.

Larry J. Aspy was convicted by a jury in the Kent Circuit Court, James Robert Redford, J., of child sexually abusive activity and using a computer to commit that offense. Defendant, an Indiana resident, had contacted what he thought was a 14-year-old girl residing in Kent County, discussed sexually explicit topics with her by means of the Internet, and eventually set up a camping weekend with her to take place in Ottawa County. In fact, defendant communicated with an adult member of a group dedicated to identifying Internet sexual predators. When defendant arrived at what he had been told was the girl's address, the police arrested him. His truck contained camping equipment as well as alcoholic beverages. Defendant appealed.

The Court of Appeals *held*:

1. Under MCL 762.2(2)(a), Michigan has territorial jurisdiction over any crime in which an act constituting an element of the crime was committed in Michigan. The trial court must initially decide whether the facts offered by the prosecution, if proved, would be legally adequate to confer jurisdiction.

2. Under MCL 750.145c(2), child sexually abusive activity does not actually require conduct involving a minor. Preparing to arrange for child sexually abusive activity is enough. Defendant drove to Kent County intending to meet and engage in unlawful behavior with a child whom he believed to be under the age of 18. This satisfied the element of preparing to arrange for child sexually abusive activity, and Michigan thus had territorial jurisdiction for defendant's prosecution.

3. With respect to the crime of using a computer to commit child sexually abusive activity, MCL 750.145d(6) provides that a violation occurs if the communication originates in Michigan, is intended to terminate in Michigan, or is intended to terminate with a person who is in Michigan. Defendant was informed that his intended victim was in Michigan and made arrangements with her to meet in Michigan for illegal purposes. Even though the commu-

nications occurred elsewhere, defendant intended them to terminate in Michigan. Thus, Michigan had territorial jurisdiction for prosecuting defendant under this charge also.

4. Defendant was not denied the effective assistance of counsel.

5. MCL 750.145c(6) allows a defendant to assert an affirmative defense if the child alleged as a victim of child sexually abusive activity is a person emancipated under MCL 722.4. An affirmative defense, however, is one that admits the doing of the act charged, but seeks to justify, excuse, or mitigate it. Defendant did not concede that he knew, had reason to know, or should reasonably have been expected to know that the child was a child or that he did not take reasonable precautions to determine the child's age, which is an element of MCL 750.145c(2). He maintained instead that he communicated with an adult and was not entitled to assert the affirmative defense.

Affirmed.

MARKEY, P.J., and DONOFRIO, J., concurred.

ZAHRA, J., did not participate because he was appointed as a justice of the Supreme Court before the release of this opinion.

1. CRIMINAL LAW — TERRITORIAL JURISDICTION.

Michigan has statutory territorial jurisdiction over the prosecution of any crime in which an act constituting an element of the crime was committed within Michigan; the trial court must initially decide whether the facts offered by the prosecution, if proved, would be legally adequate to confer jurisdiction (MCL 762.2[2][a]).

2. CRIMINAL LAW — CHILD SEXUALLY ABUSIVE ACTIVITY — ELEMENTS — PREPARATION.

An individual violates MCL 750.145c(2), which concerns child sexually abusive activity and child sexually abusive material, by preparing to arrange for child sexually abusive material even if the preparations do not actually proceed to the point of involving a child.

3. CRIMINAL LAW — USE OF THE INTERNET OR COMPUTER TO COMMIT CRIMES AGAINST MINORS — ELEMENTS — COMMUNICATIONS — TERRITORIAL JURISDICTION.

MCL 750.145d prohibits the use of the Internet or a computer to communicate with any person to commit, attempt to commit, conspire to commit, or solicit the commission of various crimes against a minor; a communication violates the statute if it originates in Michigan, is intended to terminate in Michigan, or is

> intended to terminate with a person who is in Michigan; Michigan has territorial jurisdiction for purposes of prosecuting a violation of the statute if the defendant intended that his or her Internet communication terminate in this state (MCL 750.145d[1], [6]; MCL 762.2).

Bill Schuette, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Anica Letica*, Assistant Attorney General, for the people.

State Appellate Defender (by *Christopher M. Smith*) for defendant.

Before: MARKEY, P.J., and ZAHRA and DONOFRIO, JJ.

PER CURIAM. A jury convicted defendant of child sexually abusive activity, MCL 750.145c(2), and using a computer to commit that offense, MCL 750.145d(1)(a), punishable under MCL 750.145d(2)(f). The trial court sentenced him to 30 months' to 20 years' imprisonment for each conviction, to be served concurrently.

I. BASIC FACTS

Defendant is a resident of Portland, Indiana. In a website chat room, defendant, identifying himself as "steelmanoo," began to communicate with Nancy Popham, an Ohio resident, who identified herself as "carriebear_94." Popham is a member of Perverted Justice, a group dedicated to identifying Internet "predators."[1] When defendant contacted Popham, she asked his "asl" (age, sex, and location), and defendant responded "lol [laugh out loud] 57/m[male]/Indiana." Popham responded, "lol im 14 f [female] mi [Michigan]." Defendant wrote that he had looked at the profile for carriebear_94 and that she was "cute." The profile

[1] Both parties employed this descriptive term in their briefs on appeal.

for carriebear_94 indicated that she was a 14-year-old girl. Although the website expressly barred persons under 18 from entering the chat room, the website did not have an age-verification program.

Defendant soon steered the discussion toward sexual activity, and for over a one-month period, defendant on a daily basis broached topics including engagement in oral sex, group sex, and bestiality. At trial, defendant maintained that he did not believe Popham was 14 and asserted that he was merely role-playing with an adult. In any event, defendant and Popham soon discussed plans to meet in person. Defendant wrote to Popham that he wanted to meet her in a public place because "there are times guys are set up to pick up young ladys and i want to have a good time up there and not end up in jail." Defendant and Popham eventually agreed to camping one weekend when Pophams's "mother" was out of town, and defendant made online reservations for a campsite near Grand Rapids. Around the time they were discussing the camping trip, Popham told defendant that she liked to drink Mike's Hard Lemonade, but "you wouldn t get that for me cauz its alcohol." Defendant responded that he would not know what any beverage was if it were in a glass.

On October 16, 2008, Popham provided defendant her "address" at which defendant could pick her up to go camping, and defendant indicated that he was leaving his home at 11:30 a.m. Popham requested another member of Perverted Justice, Valentina Cardinas, to call defendant and pose as a 14-year-old girl. Cardinas called defendant four times and spoke with him three times. During one phone call, defendant told Cardinas that he was near Grand Rapids and asked for directions. Cardinas offered to obtain a Google map and indicated that she would call him back in five minutes. Cardinas

again called defendant and he was still lost, but eventually he located the address Popham had provided. Defendant asked Cardinas if there was a red car in the driveway, and she answered that she would be right out. The police then arrested defendant at the house. During a police interview, defendant claimed that he planned to camp, fish, and have fun, not to have sex. A police search of defendant's vehicle revealed a six-pack of Mike's Hard Lemonade and a bottle of bourbon.

II. TERRITORIAL JURISDICTION

A. STANDARD OF REVIEW

We review de novo issues of law and statutory interpretation. *People v McCuller*, 479 Mich 672, 681; 739 NW2d 563 (2007).[2]

B. ANALYSIS

In *People v Gayheart*, this Court noted that

> until 2002, the common-law rule in Michigan, which drew heavily on the United States Supreme Court's decision in *Strassheim* [*v Daily*, 221 US 280, 285; 31 S Ct 558; 55 L Ed 735 (1911)], was that the state could not exercise territorial jurisdiction over criminal conduct committed in another state unless that conduct was intended to have, and did in fact have, "a detrimental effect within the state." [*People v Gayheart*, 285 Mich App 202, 208; 776 NW2d 330 (2009), quoting *People v Blume*, 443 Mich 476, 477; 505 NW2d 843 (1993).]

[2] Also, MCL 767.45(1)(c) provides in relevant part that "[n]o verdict shall be set aside or a new trial granted by reason of failure to prove that the offense was committed in the county or within the jurisdiction of the court unless the accused raises the issue before the case is submitted to the jury." There was no mention here that the offense was not committed in the court's jurisdiction, and review is likely limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

In 2002, however, the Legislature enacted MCL 762.2, which provides:

> (1) A person may be prosecuted for a criminal offense he or she commits while he or she is physically located within this state or outside of this state if any of the following circumstances exist:
>
> (a) He or she commits a criminal offense wholly or partly within this state.
>
> (b) His or her conduct constitutes an attempt to commit a criminal offense within this state.
>
> (c) His or her conduct constitutes a conspiracy to commit a criminal offense within this state and an act in furtherance of the conspiracy is committed within this state by the offender, or at his or her instigation, or by another member of the conspiracy.
>
> (d) A victim of the offense or an employee or agent of a governmental unit posing as a victim resides in this state or is located in this state at the time the criminal offense is committed.
>
> (e) The criminal offense produces substantial and detrimental effects within this state.
>
> (2) A criminal offense is considered under subsection (1) to be committed partly within this state if any of the following apply:
>
> (a) An act constituting an element of the criminal offense is committed within this state.
>
> (b) The result or consequences of an act constituting an element of the criminal offense occur within this state.
>
> (c) The criminal offense produces consequences that have a materially harmful impact upon the system of government or the community welfare of this state, or results in persons within this state being defrauded or otherwise harmed.

"The language of MCL 762.2 has broadened the scope of Michigan's territorial jurisdiction over criminal matters, significantly expanding upon the common-law

rule . . . ." *Gayheart*, 285 Mich App at 209. "Michigan now has statutory territorial jurisdiction over any crime where any act constituting an element of the crime is committed within Michigan even if there is no indication that the accused actually intended the detrimental effects of the offense to be felt in this state." *Id.* at 209-210 (quotation marks and citation omitted).

Gayheart also explained that, in applying MCL 762.2, the trial court must initially decide, in its role as a gatekeeper, "whether the facts to be offered by the prosecution, if proven, would be legally adequate to confer jurisdiction." *Id.* at 211. Along these lines, defendant argues on appeal that the prosecution presented insufficient record evidence to support a criminal prosecution under MCL 762.2. Defendant specifically argues that, in regard to the offenses, there was "[n]o [e]vidence of Partial Commission," "[n]o Evidence of Michigan Attempt or Conspiracy," "[n]o qualifying 'Victim,' " and "[n]o Production of Substantial and Detrimental Effects."

MCL 750.145c(2) provides, in part that

> [a] person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material, or a person who arranges for, produces, makes, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make, or finance any child sexually abusive activity or child sexually abusive material is guilty of a felony . . . .

The prosecution charged defendant with attempting, preparing, or conspiring to arrange for child sexually abusive activity.

We conclude that the facts offered by the prosecution and proved to the jury were clearly adequate to confer jurisdiction. We also conclude that the prosecution

presented more than sufficient evidence to allow a rational jury to conclude that defendant prepared and attempted to commit child sexually abusive activity and that defendant used a computer and the Internet to commit this crime. With respect to a criminal offense, the word "preparation" " 'consists in devising or arranging means or measures necessary for its commission, while attempt is direct movement toward commission after preparations are made.' " *People v Thousand*, 241 Mich App 102, 115; 614 NW2d 674 (2000), rev'd in part on other grounds 465 Mich 149 (2001), quoting Black's Law Dictionary (5th ed). Defendant claims that "the only possible attempt here would have to be an attempt to commit the crime of preparing to arrange [, as] . . . those preparations and arrangements, were made in Indiana, not in Michigan." Defendant's argument is misplaced. Defendant admits that while in Indiana he used his computer to commit child sexually abusive activity. Defendant, however, fails to acknowledge he also prepared to commit child sexually abusive activity while in Michigan, not Indiana. MCL 762.2(2)(a) provides that Michigan has jurisdiction over any crime in which any act constituting an element of the crime is committed within Michigan. MCL 750.145c(2) " 'does not actually require conduct involving a minor. Rather, it only requires that the defendant prepare to arrange for child sexually abusive activity. The statute does not require that those preparations actually proceed to the point of involving a child.' " *People v Adkins*, 272 Mich App 37, 46; 724 NW2d 710 (2006), quoting *Thousand*, 241 Mich App at 117 (emphasis omitted). There is evidence that defendant acted consistently with the preparations he had made to commit child sexually abusive activity. He drove into Michigan to a location where he intended to meet a child whom he believed to be under the age of 18. There

is substantial evidence that he intended to take a girl under the age of 18 to a reserved campsite and engage in behavior wrongful under MCL 750.145c(2). Since preparation to arrange for child sexually abusive activity is an element of MCL 750.145c(2), we reject defendant's contention that Michigan lacked territorial jurisdiction for his prosecution under MCL 762.2.

With regard to defendant's conviction for violating MCL 750.145d(1)(a), defendant asserts that the evidence of territorial jurisdiction is even more lacking because preparation using the Internet is required. Defendant contends that because all of his computer activity took place in his home in Indiana, the police never recovered a laptop or smart phone from his vehicle in Michigan, and defendant engaged in no online discussions with carriebear_94 on the date he drove into Michigan, Michigan did not have territorial jurisdiction over him as it related to the charge of using the Internet to commit child sexually abusive activity. But defendant ignores MCL 750.145d(6), which provides: "A violation or attempted violation of this section occurs if the communication originates in this state, is intended to terminate in this state, or is intended to terminate with a person who is in this state."

While defendant's Internet communication originated in Indiana, not Michigan, the communication was intended to terminate in Michigan. Defendant viewed the profile information associated with the moniker "carriebear_94" indicating that she was from Michigan. During their initial chat, carriebear_94 informed defendant that she was from Michigan. During a time when defendant believed that carriebear_94's mother would be out of town, defendant informed carriebear_94 that he would come to Michigan to meet her and have fun. Defendant reserved a campsite for them in Michigan.

Defendant stocked his truck with alcohol and drove to Michigan where he then went to carriebear_94's house for the purpose of picking her up to engage in prohibited acts in Michigan, the intended result of the Internet communications. The record evidence supports the fact that although the Internet communications originated elsewhere, defendant clearly intended them to terminate in Michigan. MCL 750.145d(6). Because there is no doubt that defendant intended that his Internet communications terminate in Michigan, MCL 750.145d(6), we also reject defendant's contention that Michigan lacked territorial jurisdiction under MCL 762.2 to prosecute defendant for his violation of MCL 750.145d(1)(a).

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

There was no hearing in the trial court, and this Court's review of the issue is limited to the existing record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). The questions presented by a claim of ineffective assistance of counsel are mixed questions of law and fact; findings of fact by the lower court are reviewed for clear error, and questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

B. ANALYSIS

To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the

proceedings would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant argues that his trial counsel was ineffective by failing to present to the jury the factual question whether Michigan had territorial jurisdiction. As stated in *Gayheart*, 285 Mich App at 211-212,

> assuming that the exact location of a boundary line is *not* at issue in the case, the trier of fact must next determine as a factual matter whether the alleged act, consequence, or other condition that would confer territorial jurisdiction under MCL 762.2 did in fact occur within the state of Michigan. The clear majority rule in this country is to require the trier of fact to find beyond a reasonable doubt that the alleged act, consequence, or other condition that would confer jurisdiction has in fact occurred within the territorial jurisdiction of the court when the matter is placed in issue.

Defendant supports his argument by noting that the jury, while deliberating, asked, "What constitutes a crime in this case to be tried in Kent County?" and "Why specifically is this case being tried in Kent County?" Contrary to defendant's claim, we find that only the second question relates to territorial jurisdiction.[3] The trial court stated:

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[3] In regard to the first question, which does not address territorial jurisdiction, the trial court answered:

> As to the first question, the defendant is charged with soliciting, conspiring to commit an offense under the law. Either an actual person below the age of 18 must have been involved or the defendant must have believed someone below the age of 18 was involved. To put it another way, either the person who communicated [as] Carrie Bearie 94 was under the age of 18 or the defendant believed the

> The second question I answered as follows, and this will be made part of the record. "This question appears to address the issue of venue. You must be satisfied that at least some of the activity involved in each count you are considering took place in Kent County for there to be venue in Kent County. Why a case is being tried somewhere is not an element of the offense and is not something you need to consider."

The trial court asked if either counsel wished to "amplify the record," and both replied, "[n]o, your honor."

Initially we conclude that the trial court's instruction likely satisfied *Gayheart*'s requirement that the trier of fact determine whether MCL 762.2 was satisfied. The trial court expressly required that the jury "be satisfied that at least some of the activity involved in each count you are considering took place in Kent County . . . ." This instruction essentially enabled the jury to acquit defendant had it accepted defense counsel's claim at trial that no criminal activity occurred in Kent County. Thus, we are not convinced that the trial court failed to adequately instruct the jury in regard to territorial jurisdiction under MCL 762.2. Likewise, we are not convinced that there was a reasonable probability that the result of the proceeding would have been different had the jury been instructed on every circumstance allowing criminal prosecutions under MCL 762.2. As in *Gayheart*, we conclude that "sufficient evidence [was] presented at trial from which a rational jury could have found beyond a reasonable doubt that defendant committed at least one essential element" of preparing to engage in child sexually abusive activity and using a computer to do so and reversal is not required. See *Gayheart*, 285 Mich App at 219. Accordingly, defendant is not entitled to relief on the basis of his claim of ineffective assistance of counsel.

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person was under the age of 18. The burden of demonstrating this, as is the case for all elements of the offenses charged on the government, must be shown beyond a reasonable doubt.

We also reject defendant's argument that venue was improper in Kent County because the "alleged 'essential acts' took place in Indiana." This argument simply reiterates defendant's territorial-jurisdiction argument. Further, defendant fails to articulate any strategic reason that the trial should have been conducted in Ottawa County rather than Kent County. "The decision whether or not to move for a change of venue constitutes a matter of trial strategy." *People v Anderson*, 112 Mich App 640, 646; 317 NW2d 205 (1981). Last, defendant has not presented or articulated any prejudice arising from the failure to conduct the trial in Ottawa County rather than Kent County. Thus, there is no evidence that the result of the proceedings would have been different. See also *People v Houthoofd*, 487 Mich 568, 593-594; 790 NW2d 315 (2010) (noting that a venue error is not a constitutional structural error, that the matter is subject to a harmless error analysis under MCL 769.26, and that MCL 600.1645 explicitly provides that no judgment shall be voided solely on the basis of improper venue). Accordingly, defendant has failed to overcome the heavy burden for establishing ineffective assistance of counsel. *Solmonson*, 261 Mich App at 663.

IV. OPPORTUNITY TO PRESENT A DEFENSE

A. STANDARD OF REVIEW

Questions of law are reviewed de novo. *Brown v Loveman*, 260 Mich App 576, 591; 680 NW2d 432 (2004).

B. ANALYSIS

"Under the Due Process Clause of the Fourteenth Amendment[4] criminal prosecutions must comport with prevailing notions of fundamental fairness. We have

[4] US Const, Am XIV.

long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v Trombetta*, 467 US 479, 485; 104 S Ct 2528; 81 L Ed 2d 413 (1984).

Defendant argues that the trial court improperly denied his claim of an affirmative defense that the "victim" in this instant case was actually an adult. Defendant notes that in 2002 PA 629, the Legislature amended MCL 750.145c to provide an affirmative defense if the alleged child is a person who is emancipated by law under MCL 722.4. MCL 750.145c(6). Defendant specifically argues that the trial court denied him the right to present a defense when it precluded him from establishing that the alleged child-victim was actually more than one adult. We disagree.

"An affirmative defense is one that admits the doing of the act charged, but seeks to justify, excuse or mitigate it . . . ." *People v Mette*, 243 Mich App 318, 328; 621 NW2d 713 (2000) (citations and quotation marks omitted). "An affirmative defense does not negate selected elements or facts of the crime." *Id*. at 329 (citations and quotation marks omitted). MCL 750.145c(2) requires that the prosecution establish that the "person knows, has reason to know, or should reasonably be expected to know that the child is a child . . . or that person has not taken reasonable precautions to determine the age of the child." MCL 750.145c(2). Defendant does not concede this element of the offense, but maintains that he was communicating with an adult. Thus, defendant is not entitled to assert an affirmative defense. *Mette*, 243 Mich App at 328-329. Further, defendant interprets MCL 750.145c(6) far too broadly. Reading MCL 750.145c in its entirety, it is clear the Legislature only intended to

provide an affirmative defense to those persons who at least believed that the alleged child they intended to engage in sexual activity was younger than 18 and emancipated. Defendant did not seek to admit evidence that the "alleged child" was under 18 years and emancipated. Rather, defendant sought to establish only that the "alleged child" was over the age of 18. Accordingly, defendant did not seek to establish the affirmative defense afforded by the Legislature under MCL 750.145c(6).

We affirm.

MARKEY, P.J., and DONOFRIO, J., concurred.

ZAHRA, J., did not participate because he was appointed to the Michigan Supreme Court, effective January 14, 2011, before the release of this opinion.

BOTSFORD CONTINUING CARE CORPORATION v
INTELISTAF HEALTHCARE, INC

Docket No. 294780. Submitted February 1, 2011, at Detroit. Decided March 22, 2011, at 9:05 a.m.

Botsford Continuing Care Corporation brought an indemnification suit in the Oakland Circuit Court against Intelistaf Healthcare, Inc., doing business as StarMed Staffing Group. Plaintiff alleged claims of common-law indemnification, contractual indemnification, implied contractual indemnification, and contribution after having lost a medical-malpractice suit against it where active negligence had been alleged against both Botsford employees and StarMed employees. The jury verdict form in that underlying suit had not required the jury to differentiate between the employees, and it gave no indication whether the jury would have found Botsford actively negligent. Plaintiff moved for partial summary disposition on its claim for common-law indemnification, asserting that the jury had only found it passively negligent. Defendant moved for summary disposition, arguing that indemnification was improper because plaintiff's liability was not solely passive or vicarious. The court, Colleen A. O'Brien, J., agreed with plaintiff, denied defendant's motion, and entered judgment in plaintiff's favor for the full amount of the underlying action. Defendant appealed.

The Court of Appeals *held*:

A party seeking indemnity must plead and prove freedom from personal fault in the underlying action. The court must consider whether the complaint in the underlying action contains allegations of active negligence by the party seeking indemnity and, if the case was tried by a jury, whether issues of active negligence were submitted to and decided by the jury. The complaint in the underlying medical-malpractice action included allegations that plaintiff's own employees were actively negligent, and claims of plaintiff's active negligence were submitted to the jury. Because the verdict form did not require the jury to specify which employees were negligent, the jury could have concluded that plaintiff's liability was not merely passive or vicarious. The trial court erred by ruling as a matter of law that the jury found plaintiff had been only passively negligent.

Affirmed in part, reversed in part, and remanded.

INDEMNITY — COMMON-LAW INDEMNIFICATION — NEGLIGENCE — VICARIOUS LIABILITY.

A party seeking indemnity must plead and prove freedom from personal fault in the underlying action; that is, the party must only have been vicariously liable; the court must consider whether the complaint in the underlying action contains allegations of active negligence by the party seeking indemnity and, if the case was tried by a jury, whether issues of active negligence were submitted to and decided by the jury.

Tanoury, Nauts, McKinney & Garbarino, P.L.L.C. (by *Linda M. Garbarino* and *David R. Nauts*), for plaintiff.

Collins, Einhorn, Farrell & Ulanoff, P.C. (by *Deborah A. Hebert*), for defendant.

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

JANSEN, J. In this common-law indemnification action,[1] defendant, Intelistaf Healthcare, Inc., formerly doing business as StarMed Staffing Group (StarMed), appeals the circuit court's order denying its motion for summary disposition and granting partial summary disposition in favor of plaintiff, Botsford Continuing Care Corporation (Botsford). The circuit court ruled that Botsford was entitled to full common-law indemnification from StarMed as a matter of law. For the reasons that follow, we affirm the circuit court's denial

[1] Plaintiff, Botsford Continuing Care Corporation, also raised claims of contractual indemnification, implied contractual indemnification, and contribution in its complaint. "While the right [to indemnification] frequently arises out of an express contract to indemnify, it can also be based on an implied contract or be imposed by law." *Langley v Harris Corp*, 413 Mich 592, 596-597; 321 NW2d 662 (1982). "Indemnity should be distinguished from contribution. Contribution distributes a loss among joint tortfeasors, requiring each to pay its proportionate share; indemnity shifts the entire loss from the party who has been forced to pay to the party who should properly bear the burden." *Id*. at 597.

of StarMed's motion for summary disposition, but reverse the circuit court's grant of partial summary disposition in favor of Botsford and remand for further proceedings consistent with this opinion.

I

A

In August 2000, Virginia Harris, age 74, had routine bladder suspension surgery at Henry Ford Hospital. Unknown to Harris at the time, the surgeon nicked her bowel during the procedure, and Harris's bowel later became infected. This necessitated further bowel surgery, including a temporary colostomy. Thereafter, Harris's doctors discovered that although the surgeons had successfully removed the infected tissue from her bowel, the infection had spread to her back. Harris consequently returned for yet another surgery, this time to remove infected bone and tissue from her back, all of which had resulted from the initial bladder suspension procedure. On February 16, 2001, following her back surgery, Harris was admitted to a nursing home owned by Botsford. The plan was for Harris to recuperate at the facility while awaiting a colostomy-reversal surgery scheduled for March 12, 2001.

On the morning of March 11, 2001, while a patient at the Botsford facility, Harris was placed on a bowel preparation regimen to prepare her for the upcoming colostomy-reversal surgery. As a result of the bowel preparation regimen, Harris's colostomy bag needed to be emptied several times during the day on March 11, 2001.

At some point on March 11, 2001, Harris told her son, Robert Harris, that she needed to empty her colostomy bag. Robert Harris went to the nursing station just

outside his mother's room and asked for assistance taking his mother to the bathroom. According to Robert Harris, the nurses at the nursing station told him to take his mother to the bathroom by himself. Robert Harris apparently felt uncomfortable taking his mother to the bathroom and emptying her bag himself, but did so anyway. After helping to empty his mother's colostomy bag, Robert Harris returned his mother to her bed. Thereafter, he apparently left the Botsford facility for the day.

Harris's longtime companion, Robert Hayes, age 81, arrived at the Botsford facility and stayed with Harris during the afternoon of March 11, 2001. At some point that afternoon, Harris again needed to empty her colostomy bag. She pressed her call button but no one came to her room to help. Thus, Hayes went to the nursing station outside Harris's room and asked for assistance. According to Hayes, the two nurses working at the station (later discovered to be Joan Lay and Kathleen Holmes) instructed him that he should help Harris to the bathroom and assist her with emptying the bag himself, just as they had allegedly instructed Harris's son to do earlier in the day. In contrast, nurses Lay and Holmes testified that they informed Hayes to press the call button again and that a nurse's aide would respond to the call. At any rate, it is undisputed that Hayes returned to the room and helped Harris out of bed by himself. While Hayes was helping Harris to the bathroom, Harris fell and fractured her left hip. As a result of the fall, Harris ultimately had to undergo partial left hip replacement surgery.

There were both licensed practical nurses (LPNs) and nurse's aides working at the Botsford facility during February and March 2001. The LPNs were not employed by Botsford, but were contract nurses em-

ployed by StarMed, a staffing agency. By contrast, the nurse's aides were direct employees of Botsford. It is beyond dispute that the nurses working at the nursing station outside Harris's room on March 11, 2001, were LPNs Joan Lay and Kathleen Holmes.

In August 2003, Harris sued Botsford. Her complaint alleged that the nursing home personnel had been negligent on March 11, 2001, by telling Hayes that he should help Harris to the bathroom and by failing to actively respond when Hayes requested assistance. The complaint also alleged that the personnel had been negligent by failing to better monitor and observe Harris's colostomy bag during the day of March 11, 2001, by failing to help Harris to the bathroom to empty her bag more often during the day of March 11, 2001, by failing to directly supervise the emptying of Harris's colostomy bag, by delegating to Hayes the duties of helping Harris to the bathroom and emptying the colostomy bag, and by failing to complete an accurate and adequate "Fall Risk Assessment" at the time Harris was first admitted to the Botsford facility in February 2001.

Although the complaint did not distinguish between the LPNs and nurse's aides working at the Botsford facility, it later became clear during discovery that although certain of Harris's allegations of negligence pertained to the nurse's aides, other allegations in the complaint pertained to the LPNs.[2] Importantly, it was learned that the duties of monitoring and observing Harris's colostomy bag and helping Harris to the bathroom to empty the bag were duties of the Botsford-employed nurse's aides. It was also learned that LPNs Lay and Holmes were StarMed employees. Finally, it

[2] The affidavit of merit accompanying Harris's complaint was similarly critical of the LPNs as well as the nurse's aides.

was discovered that the preparation of Harris's Fall Risk Assessment had been a responsibility of a direct employee of Botsford.

Prior to trial, Botsford filed a third-party complaint against StarMed, contending that StarMed's employees, Lay and Holmes, were actually liable for most or all of the negligence alleged by Harris. However, Botsford's third-party complaint was voluntarily dismissed without prejudice by stipulation of the parties. The parties agreed that Botsford would be permitted to re-file its claims against StarMed in a separate action should Harris prevail on the merits of her lawsuit against Botsford.

Botsford then moved for partial summary disposition, seeking the dismissal of all claims except those that directly implicated LPNs Lay and Holmes. Botsford argued that the only claims actually set forth in the notice of intent had related to the actions of Lay and Holmes on March 11, 2001, at which time the two nurses allegedly told Hayes to help Harris to the bathroom by himself. Harris opposed the motion, contending that her notice of intent and other pleadings had specifically set forth other claims as well, and that her allegations of negligence were not limited to the actions of Lay and Holmes on March 11, 2001. In her response to Botsford's motion, Harris argued that Botsford was "attempting to eliminate any claims of negligence involving its own employees (including primarily nurse's aides) so that it can perfect its third-party case against StarMed." The circuit court agreed with Harris and denied Botsford's motion, ruling that the motion "lack[ed] legal and factual merit." Consequently, the matter proceeded to trial not only with respect to the claims against StarMed employees Lay and Holmes but also with respect to certain claims against Botsford's own nurse's aides.

During her opening statement at trial, Harris's attorney focused primarily on the actions of Lay and Holmes on March 11, 2001. However, Harris's attorney also addressed the actions of certain nurse's aides who allegedly failed to properly monitor and empty Harris's colostomy bag during her stay at the Botsford facility. In addition, counsel addressed the allegedly negligent preparation of the Fall Risk Assessment that was completed when Harris was admitted to the Botsford facility in February 2001.

On the third day of trial, the circuit court granted Botsford's motion for a directed verdict with respect to Harris's claim of negligent preparation of the Fall Risk Assessment. Thereafter, counsel for Harris and counsel for Botsford agreed on the record that "the only allegation that's left on the table is the conduct on March 11 . . . of the nurses and personnel." The circuit court responded, "Okay."

At the end of trial, when the attorneys were discussing the proposed jury instructions with the circuit court, counsel for both parties agreed that there were not only nurses at issue in the case but also nurse's aides. Counsel stipulated on the record that only one "professional negligence" instruction would be provided to the jury, and that this same instruction would apply to both the nurses and the nurse's aides at issue in the case.

The jury was provided a general verdict form that asked whether Botsford was "professionally negligent in one or more ways claimed by plaintiff," whether "Virginia Harris sustain[ed] injury or damage," and whether Botsford's "professional negligence [was] a proximate cause of the injury or damage to Virginia Harris." The jury answered "yes" to all three questions without ever being asked to differentiate between the

actions of the LPNs and those of the nurse's aides. The jury assessed damages in the amount of $205,000, including $155,000 for noneconomic damages that Harris had already sustained and $50,000 for future noneconomic damages.

Following the jury's verdict, the circuit court entered judgment in favor of Harris, which included the award of certain fees, costs, and case evaluation sanctions. Botsford appealed by right, but the portions of the judgment relevant to the instant case were affirmed on appeal. *Harris v Botsford Continuing Care Corp*, unpublished opinion per curiam of the Court of Appeals, issued June 26, 2007 (Docket Nos. 267997 and 269452).[3] Our Supreme Court denied leave to appeal. *Harris v Botsford Continuing Care Corp*, 480 Mich 953 (2007). Thereafter, Botsford satisfied the judgment.

B

On June 4, 2008, Botsford filed the instant action against StarMed to recover the money that it paid to satisfy the underlying medical malpractice judgment. Botsford asserted claims of common-law indemnification, contractual indemnification, implied contractual indemnification, and contribution. Botsford also sought from StarMed an additional $123,285.00 in defense costs incurred in the underlying action. The present action was assigned to the same circuit court judge who had presided over the underlying medical malpractice trial.

On March 11, 2009, Botsford filed a motion for partial summary disposition, requesting judgment on

[3] This Court did reverse the award of certain fees, costs, and case evaluation sanctions, but affirmed the jury's overall verdict and assessment of damages.

its claim of common-law indemnification only. Botsford argued that the only claims actually tried before the jury in the underlying action had related to the StarMed employees, Lay and Holmes, and that the jury's verdict therefore must have been based solely on Botsford's passive or vicarious negligence. Botsford asserted that because the jury had found it to be passively negligent rather than actively negligent, it was entitled to common-law indemnification from StarMed in the full amount of the underlying judgment.

StarMed filed its own motion for summary disposition on May 11, 2009. Among other things, StarMed argued that Botsford was not entitled to common-law indemnification because Botsford had not been free from active fault and its liability was not solely passive or vicarious in nature. StarMed asserted that, in addition to claims concerning the negligence of nurses Lay and Holmes, the jury had considered claims of active negligence against Botsford and its own employees. StarMed maintained that because Harris had asserted claims of active negligence against Botsford itself, and because the jury had considered these claims, Botsford was not entitled to common-law indemnification.[4]

The circuit court observed from the bench that there was no genuine issue of material fact concerning the nature of the claims that had been considered by the jury in the underlying medical malpractice case and that Botsford was entitled to common-law indemnification from StarMed as a matter of law. The court noted that common-law indemnification is "available only if the party seeking it is not actively negligent," and that

[4] StarMed also argued in its motion for summary disposition that Botsford's claims of contractual indemnification, implied contractual indemnification, and contribution should be dismissed.

the party seeking common-law indemnification "must plead and prove freedom from personal fault." The court went on to observe:

> [T]here's no genuine issue of material fact that Botsford was liable to Harris in the underlying case on passive negligence [only]. In other words, vicarious liability only for the actions of . . . StarMed's employed licensed practical nurses, Holmes and Lay.

The circuit court remarked that "the jury found professional negligence" and that "[t]he only licensed professionals whose care was at issue were nurses Holmes and Lay." The court also remarked that "[t]he only nurses attending Ms. Harris on March 11, 2001, were the employees of [StarMed], specifically nurses Holmes and Lay."

Accordingly, on October 8, 2009, the circuit court issued an order denying StarMed's motion for summary disposition, granting Botsford's motion for partial summary disposition, and entering judgment in favor of Botsford in the amount of $344,436.00—the full amount of the underlying medical malpractice judgment.[5] The order of October 8, 2009, provided that "[t]his Judgment disposes of the last pending claims in this matter and closes the case." StarMed moved for reconsideration, but the motion was denied. StarMed has timely appealed.

II

We review de novo the circuit court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Whether a party was free from active negligence

[5] With interest, the circuit court calculated that StarMed owed Botsford a total of $367,951.07.

in an underlying case and thus entitled to common-law indemnification is generally a question of fact for the jury. See *Warren v McLouth Steel Corp*, 111 Mich App 496, 505; 314 NW2d 666 (1981). Such questions may be decided on summary disposition as a matter of law only when reasonable minds could not disagree. See *Babula v Robertson*, 212 Mich App 45, 54; 536 NW2d 834 (1995); see also *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When there remains a genuine issue of fact as to whether the party seeking common-law indemnification was actively or passively negligent in the underlying case, summary disposition of the common-law indemnification claim is improper. *Peeples v Detroit*, 99 Mich App 285, 294; 297 NW2d 839 (1980).

III

As an initial matter, we note that the circuit court erred to the extent that it stated in its order of October 8, 2009, that "[t]his Judgment disposes of the last pending claims in this matter and closes the case." By way of the order of October 8, 2009, the circuit court clearly granted summary disposition in favor of Botsford with respect to its claim of common-law indemnification *only*, and just as clearly denied StarMed's motion for summary disposition in full. In other words, the order of October 8, 2009, left intact Botsford's remaining claims of contractual indemnification, implied contractual indemnification, and contribution and was *not* a final order. Thus, the circuit court's order of October 8, 2009, was not appealable to this Court as a matter of right. MCR 7.202(6)(a)(i); MCR 7.203(A)(1). Nevertheless, for the sake of judicial economy, we exercise our discretion to treat StarMed's claim of appeal as a granted application for leave to appeal. See

In re Investigative Subpoena, 258 Mich App 507, 508 n 2; 671 NW2d 570 (2003); *Waatti & Sons Electric Co v Dehko*, 230 Mich App 582, 585; 584 NW2d 372 (1998).

IV

Contrary to the ruling of the circuit court, we conclude that there remained genuine issues of material fact with respect to what claims were actually considered and decided by the jury in the underlying medical malpractice action and whether the jury found Botsford to be actively negligent or passively negligent only. Accordingly, while we affirm the circuit court's denial of StarMed's motion for summary disposition, we reverse the circuit court's grant of partial summary disposition in favor of Botsford and remand for further proceedings.

"[T]he right to common-law indemnification is based on the equitable theory that where the wrongful act of one party results in another party's being held liable, the latter party is entitled to restitution for any losses." *Lakeside Oakland Dev, LC v H & J Beef Co*, 249 Mich App 517, 531; 644 NW2d 765 (2002). The right " 'exists independently of statute, and whether or not contractual relations exist between the parties, and whether or not the negligent person owed the other a special or particular legal duty not to be negligent.' " *Dale v Whiteman*, 388 Mich 698, 705-706; 202 NW2d 797 (1972) (citation omitted). "Common-law indemnity is intended only to make whole again a party held vicariously liable to another through no fault of his own. This has been referred to as 'passive' rather than 'causal' or 'active' negligence." *Peeples*, 99 Mich App at 292. "It has long been held in Michigan that the party seeking indemnity must plead and prove freedom from personal fault. This has been frequently interpreted to mean

that the party seeking indemnity must be free from active or causal negligence." *Langley v Harris Corp*, 413 Mich 592, 597; 321 NW2d 662 (1982). Therefore, a common-law indemnification action "cannot lie where the plaintiff was even .01 percent actively at fault." *St Luke's Hospital v Giertz*, 458 Mich 448, 456; 581 NW2d 665 (1998); see also *Paul v Bogle*, 193 Mich App 479, 491; 484 NW2d 728 (1992) (observing that "common-law indemnity . . . require[s] that the person seeking indemnification be free from any active negligence").

In general, "[w]hether a party is 'passively' (vicariously) liable or 'actively' liable for purposes of determining the availability of common-law indemnity is to be determined from the primary plaintiff's complaint." *Parliament Constr Co v Beer Precast Concrete Ltd*, 114 Mich App 607, 612; 319 NW2d 374 (1982). If the primary plaintiff's complaint contained any allegations of active negligence, rather than merely allegations of passive negligence, common-law indemnification is not available. *Oberle v Hawthorne Metal Prod Co*, 192 Mich App 265, 270; 480 NW2d 330 (1991); see also *Williams v Litton Systems, Inc*, 164 Mich App 195, 199; 416 NW2d 704 (1987), aff'd 433 Mich 755 (1989). However, when the underlying action has been tried to a jury, as in the present case, the nature of the claims must be determined by examining not only the primary plaintiff's complaint, but also the issues actually submitted to and decided by the jury. See *Hartman v Century Truss Co*, 132 Mich App 661, 665; 347 NW2d 777 (1984); see also *Parliament Construction*, 114 Mich App at 613.

Virginia Harris's complaint in the underlying medical malpractice action contained allegations of both active and passive negligence against Botsford. The primary complaint alleged that Lay and Holmes, both

StarMed employees, had been negligent on March 11, 2001, by instructing Hayes to help Harris to the bathroom and by failing to actively respond when Hayes requested their assistance. Because Lay and Holmes were StarMed employees, Harris's claims concerning their actions were clearly claims of passive negligence only. However, the primary complaint also alleged that Botsford's staff had been negligent by failing to better monitor and observe Harris's colostomy bag during the day of March 11, 2001, by failing to help Harris to the bathroom to empty the bag more often, by failing to directly supervise the emptying of Harris's colostomy bag, by delegating to Hayes the duty of helping Harris to the bathroom, and by failing to complete an accurate and adequate Fall Risk Assessment at the time Harris was first admitted to the facility. It is undisputed that certain of the duties implicated in these additional allegations of negligence were the duties of Botsford's own nurse's aides. Accordingly, it is clear that Harris's complaint contained at least some allegations of active negligence by Botsford as well.

Moreover, it is manifest that certain of these claims of active negligence were presented to the jury. We acknowledge that because the jury returned a general verdict, it is impossible to determine from the face of the verdict form alone whether the jury actually found any active negligence by Botsford and its direct employees. Indeed, the jury never differentiated between the actions of the LPNs and the actions of the nurse's aides. However, this does not negate the fact that the jury heard and was free to consider certain claims of active negligence by Botsford and its employees. As noted previously, the circuit court denied Botsford's pretrial motion for partial summary disposition, which had sought the dismissal of all claims except those directly implicating Lay and Holmes. The effect of this ruling

was to allow all claims—including Harris's claims of active liability against Botsford's direct employees—to go to the jury. And while it is true that any claims related to the preparation of the Fall Risk Assessment were dismissed when the circuit court granted a directed verdict on this issue, counsel for both parties stipulated on the record on the final day of trial that there were not only LPNs at issue in the case but also nurse's aides. As explained earlier, the attorneys agreed that only one "professional negligence" instruction would be provided to the jury and that this instruction would apply to the alleged negligence of both the StarMed LPNs and the Botsford nurse's aides. Parties are bound by their agreements concerning the manner in which claims are submitted to the jury, and "issues that are tried by express or implied consent of the parties, even though they are not raised in the pleadings, are treated as if they had been raised in the pleadings." *Symons v Prodinger*, 484 Mich 851 (2009); see also MCL 2.118(C)(1). The circuit court erred by ruling as a matter of law that the jury in the underlying medical malpractice case did not consider or decide any claims of active negligence against Botsford and that the jury found Botsford to be passively negligent only.

As we have already stated, it is impossible to determine from the face of the verdict form alone whether the jury actually found any active negligence on the part of Botsford or its direct employees in the underlying case. But there certainly remained genuine issues of material fact with respect to this question. In light of the evidence presented in this case, reasonable minds surely could have differed as to whether the jury in the underlying medical malpractice action considered and decided any claims of active negligence and whether the jury found any active negligence by Botsford or its direct employees. See *West*, 469 Mich at 183. Accord-

ingly, the circuit court erred by granting summary disposition in favor of Botsford with respect to its common-law indemnification claim. See *Peeples*, 99 Mich App at 294. We reverse the circuit court's ruling on this issue and remand for further proceedings. On remand, it will be necessary for the trier of fact to determine whether the jury in the underlying medical malpractice case considered and decided any claims of active negligence and whether the underlying jury's verdict was based in any part on the active negligence of Botsford or Botsford's own employees.

V

StarMed also argues that we should direct the circuit court to enter judgment in its favor on Botsford's claims of contractual indemnification and implied contractual indemnification, both of which StarMed insists are without merit.[6] This argument is not properly before us on appeal because it was not included in StarMed's statement of the questions presented. MCR 7.212(C)(5); *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). In any event, however, we note that the circuit court denied StarMed's motion for summary disposition and did not decide these remaining claims. Consequently, Botsford's claims of contractual indemnification, implied contractual indemnification, and contribution remain pending and intact, and the circuit court will be required to consider them on remand.

VI

We affirm the circuit court's denial of StarMed's motion for summary disposition, but reverse the circuit

[6] On the other hand, StarMed concedes in its brief on appeal that Botsford's contribution claim should be allowed to go forward on remand.

court's grant of summary disposition in favor of Botsford with respect to its claim of common-law indemnification and remand for further proceedings consistent with this opinion. On remand, the circuit court shall also consider Botsford's remaining claims of contractual indemnification, implied contractual indemnification, and contribution.

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

BORRELLO, P.J., and FORT HOOD, J., concurred with JANSEN, J.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 25 v WAYNE COUNTY

Docket No. 298655. Submitted March 2, 2011, at Detroit. Decided March 24, 2011, at 9:00 a.m.

The American Federation of State, County and Municipal Employees, Council 25 brought an action in the Wayne Circuit Court against Wayne County, seeking an order compelling the county to comply with a collective-bargaining agreement (CBA) between the union and the county and an arbitrator's ruling that interpreted the CBA with respect to the assignment or selection of deputy circuit court clerks to serve in the courtrooms of the judges of the Wayne Circuit Court (WCC). The WCC had promulgated Local Administrative Order No. 2005-06 (LAO 2005-06) in response to the arbitrator's ruling. LAO 2005-06 provided, in relevant part, that deputy circuit court clerks would be assigned to a judge's courtroom only when the judge approves of such assignment and that LAO 2005-06 superseded the arbitrator's ruling to the extent that the arbitrator had ruled that the CBA required deputy circuit court clerks to be appointed from an appropriate applicant pool on the basis of seniority. LAO 2005-06 expressly indicated that the WCC was acting pursuant to its constitutional authority pertaining to court administration. Following motions for summary disposition by the union and the county, the WCC was allowed to intervene in the action as a defendant. After the WCC filed a counterclaim and a cross-claim, the union filed additional motions for summary disposition and the WCC filed its own motion for summary disposition. The trial court, Matthew S. Switalski, J., sitting by assignment, granted summary disposition in favor of the union, declaring as a matter of law that the arbitration ruling governed the assignment of WCC deputy court clerks. The WCC appealed. The Court of Appeals, STEPHENS, P.J., and ZAHRA and MURRAY, JJ., granted the WCC's motion for a stay pending the appeal or further order of the Court in an unpublished order entered July 20, 2010 (Docket No. 298655). The Supreme Court then denied an application for leave to appeal, but directed the Court of Appeals to decide the case on an expedited basis in light of the importance of the issues. 488 Mich 1008 (2010).

The Court of Appeals *held*:

1. The WCC was not bound by the CBA and the CBA-based arbitration ruling under common-law principles associated with contract formation and liability. The WCC, which was not a party to the CBA or the arbitration proceedings, was not bound under the contract-related principles of incorporation by reference, assumption, agency, veil-piercing/alter ego, and estoppel.

2. A contract based on the public employment relations act (PERA), MCL 423.201 *et seq*., such as the CBA involved in this case, and a related arbitration award that infringe on the judicial branch's inherent constitutional powers cannot be enforced to the extent of the encroachment. When application of PERA impinges on the judiciary's inherent constitutional powers, PERA cannot prevail.

3. The assignment or selection of a particular court clerk to serve in a judge's courtroom falls under the umbrella of the judiciary's administrative and managerial authority to carry out the court's day-to-day internal operations and to control personnel matters with regard to an individual, a court clerk, who indisputably is providing court services. The judicial branch's inherent constitutional powers encompass both the selection of a court clerk to work in a courtroom and control over the clerk in the courtroom after the selection is made. A judge has the exclusive constitutional authority to select a court clerk who the judge opines is the best suited to assist the judge in effectively and efficiently operating the judge's courtroom.

4. The circuit court is vested with the constitutional authority to direct the clerk of the circuit court to perform noncustodial ministerial duties pertaining to court administration as the court sees fit. The constitutional authority includes the discretion to create duties, abolish duties, or divide duties between the clerk and the other personnel, as well as the right to dictate the scope and the form of the performance of such noncustodial ministerial duties. The directives contained in LAO 2005-06 constitute noncustodial ministerial tasks relative to the division of duties and the scope and the form of performances within the WCC. LAO 2005-06 was a proper exercise of the WCC's exclusive judicial authority under the Michigan Constitution that was permissible because it concerned internal court management.

5. The assignment of a deputy court clerk to a WCC courtroom is patently a judicial matter and is not subject matter falling within the powers of the legislative branch. The order granting summary disposition in favor of the union is reversed and the case

is remanded to the trial court for entry of a judgment in favor of the WCC. This judgment has immediate effect.

Reversed and remanded.

1. CONSTITUTIONAL LAW — CONFLICT OF LAWS — PUBLIC EMPLOYMENT RELATIONS ACT — CONTRACTS — ARBITRATION.

A contract based on the public employment relations act and a related arbitration award that infringe on the judicial branch's inherent constitutional powers may not be enforced to the extent of such encroachment (MCL 423.201 *et seq*.).

2. CONSTITUTIONAL LAW — SEPARATION OF POWERS — INHERENT CONSTITUTIONAL POWERS — JUDICIAL BRANCH — COURT CLERKS.

The judicial branch's inherent constitutional powers encompass both the selection of a court clerk to work in a courtroom and the control over the clerk after the selection is made; a judge has the exclusive constitutional authority to select a court clerk who the judge opines is best suited to assist the judge in effectively and efficiently operating the judge's courtroom.

Miller Cohen, P.L.C. (by *Bruce A. Miller* and *Richard G. Mack, Jr.*), for the American Federation of State, County and Municipal Employees, Council 25.

Marianne Talon, Corporation Counsel, and *Cheryl Yapo*, Assistant Corporation Counsel, for Wayne County.

Allan Falk, P.C. (by *Allan Falk*), for the Wayne Circuit Court.

Before: MURPHY, C.J., and STEPHENS and M. J. KELLY, JJ.

MURPHY, C.J. In this case, intervening defendant, the Wayne Circuit Court (WCC), argued that its judges have the exclusive authority to make the determination with respect to the assignment or selection of a deputy circuit court clerk (hereafter "court clerk") to serve in a judge's courtroom, as reflected in Local Administrative

Order No. 2005-06 (LAO 2005-06).[1] Plaintiff, American Federation of State, County and Municipal Employees, Council 25 (hereafter "the union"), contended that the assignment is solely governed and controlled by the collective-bargaining agreement (CBA) between the union and defendant, Wayne County (hereafter "the county"), as implemented by the Wayne County Clerk (hereafter "the county clerk") and as interpreted in an underlying arbitration ruling that was entered before the adoption of LAO 2005-06. The county declined to take a stance on the merit of the arguments posed by the WCC and the union did not offer its own resolution of the issues presented. The trial court, sitting by assignment, sided with the union, entering an order granting summary disposition in favor of the union and denying the WCC's competing motion for summary disposition. We agree with the position proffered by the WCC. Accordingly, we reverse the trial court's order and remand for entry of an order granting summary disposition in favor of the WCC.

I. FACTS AND PROCEDURAL HISTORY

On March 30, 2007, the union filed a "complaint to compel" against the county, alleging that the union is a labor organization for purposes of the public employment relations act (PERA), MCL 423.201 *et seq.*, that it represents employees engaged in public employment in Wayne County, that the county is the "public employer" of these employees for purposes of PERA, and that the union and the county entered into the CBA at issue, effective December 1, 2000. According to the union, the CBA covered various classifications of county employ-

[1] This opinion applies equally to judges and referees, but we shall, for the most part, refer solely to judges throughout the opinion for ease of reference.

ees, including court clerks, and the CBA provided the procedure for processing and adjusting grievances, culminating in binding arbitration upon an impasse. The union alleged that in 2002 it filed two grievances on behalf of court clerks after the county failed to post and fill a court clerk vacancy in a juvenile court courtroom in accordance with the CBA. The union specifically complained that the county failed to comply with the CBA, as construed by the union, when it did not fill the position on the basis of seniority and improperly limited the pool of applicants. The union maintained that the arbitrator issued an opinion and award in December 2004, finding in favor of the union and the grieving employees with respect to the grievances and interpretation of the CBA. The union alleged that the county had refused since January 2007 to comply with the arbitrator's ruling, posting and filling court clerk vacancies in certain courtrooms without regard to seniority and absent consideration of the appropriate applicant pool. In its prayer for relief, the union requested that the trial court order the county to comply with the arbitration ruling and to repost and refill the vacancies in accordance with the ruling and the CBA.

The arbitrator's written ruling and the CBA provide additional details and enlightenment. We initially note that under the CBA, §10.04, Step 5F, there could be no appeal from the arbitrator's decision if rendered in a manner consistent with the arbitrator's jurisdiction and authority as provided under the CBA, and the decision was deemed final and binding "on the Employer, on the employee or employees, and the Union." Pursuant to §§ 17.01 and 17.02(A) of the CBA, when there exists an intradepartmental job vacancy resulting from the creation of a new position, a transfer, a resignation, a termination, a retirement, or other means, "an employee who holds the same classification

and has completed one (1) year of service within the division may exercise his or her seniority for the selection of a job." The CBA also provides, under § 17.02(G), that "[a] senior employee deemed not qualified for a job . . . shall have recourse to the grievance procedure." These CBA sections are general in scope and not specifically tailored to court clerks or any other particular employment classification. In its written ruling, the arbitrator concluded:

> Per the contract language[,] a vacant position is to be awarded to the employee, in the section of the division having the vacant position, who (1) holds the same classification, (2) has completed one year of service within the division and (3) elects to exercise his or her seniority. Under the CBA, subordination of seniority is permitted only upon a determination that a senior employee is not qualified for a job. There is no contention in this matter that any of the court clerks lack the knowledge, skills and ability required to serve in any courtroom at the [Lincoln Hall of Justice] LHJ. Absent some ambiguity in the contract language at issue, the claim of a past practice is unavailing to modify a clear promise.
>
> The County opines that prior to the instant matter the Union had not grieved or protested the County's restriction of the applicant pool for court clerk vacancies in judge-led courtrooms; thus, it may be found that the Union has acquiesced in the County's practice. One of the rules of contract interpretation related to the use of custom and practice is that a party's failure to file grievances or to protest past violations of a clear contract rule does not bar that party, after notice to the violator, from insisting upon compliance with the clear contract requirement in future cases. I conclude there is no basis for finding the Union acquiesced in the County's practice such that it should be held that the parties have, by their conduct, amended the CBA language on filling vacancies. I further conclude that the County violated the CBA when it limited the pool of court clerks who could apply for the . . . position.

> . . . I believe the foregoing discussions about what is required by Article 17 and particularly section [17.02(A) compel] a determination that the County violated the CBA by filling the position at issue with an employee who had less seniority than other interested applicants. Given the findings and conclusions above, the grievances must be granted.

By way of further background, in April 2005, the WCC's chief judge penned a letter that was delivered to the county clerk, indicating that the WCC would not abide by the arbitrator's ruling. The chief judge enclosed a draft of a LAO that would supersede the arbitration award and be implemented unless the WCC and the county clerk could come to a consensual resolution. The chief judge noted that the WCC had not been aware of the arbitration proceedings until after the arbitrator's ruling was entered and that the time-honored practice over the past 30 years had been to allow the judges to choose the courtroom clerks to be assigned to their particular courtrooms. When no consensual resolution could be reached, the WCC promulgated LAO 2005-06, which was issued on June 2, 2005.

LAO 2005-06 provided that upon written request of the chief judge or the court administrator, the county clerk shall be responsible for assigning a court clerk to perform clerk functions in a presiding judge's or referee's courtroom, that the judge or referee assigned to a particular courtroom shall notify the county clerk of the person from the appropriate pool of interested, eligible clerks whom the judge or referee approves, and that the county clerk "shall then assign that person to perform court clerk functions in that courtroom." Additionally, LAO 2005-06 provided that the county clerk "shall not permanently assign to any courtroom or transfer from any courtroom a court clerk without the prior written consent of the presiding courtroom judge or ref-

eree . . . ." It further stated that on the written request of the court administrator, the county clerk shall remove a court clerk previously assigned to a courtroom and assign a different court clerk consistent with the procedures in LAO 2005-06. Finally, LAO 2005-06 provided that it superseded the arbitration ruling discussed above and that, where not in conflict with LAO 2005-06, all other terms and conditions of the county's civil service rules and the CBA shall prevail. Under LAO 2005-06, seniority does not govern the assignment of a court clerk to a judge's or referee's courtroom. LAO 2005-06 expressly indicated that the WCC was acting pursuant to its constitutional authority to direct the county clerk, sitting as the clerk of the circuit court, "to perform noncustodial ministerial duties pertaining to court administration . . . ." The order further explained that, for purposes of efficiently and properly administering justice, the WCC had the authority to control its courtrooms and, more particularly, a presiding judge or referee had the authority to control his or her courtroom, which included control over the selection of a court clerk to work in the courtroom.

On June 8, 2005, the Michigan Supreme Court's State Court Administrative Office (SCAO) prepared a letter addressed to the chief judge of the WCC, which advised the chief judge that LAO 2005-06 conformed to the requirements of MCR 8.112(B) and was being accepted and filed. On July 27, 2006, the chief judge of the WCC entered an order regarding LAO 2005-06 that was directed at the county clerk. The order indicated that it had come to the attention of the chief judge that the county clerk "may decline to follow the dictates of LAO 2005-06 in light of [the] arbitrator's ruling . . . and the terms of [the CBA]." The order mandated the county clerk to comply with LAO 2005-06, noting, once again, that the WCC and its judges control the court-

rooms under the judicial branch's constitutional powers. Subsequently, grievances were filed by the union in 2007 when court clerks complained that the process of assigning them to certain courtrooms was not in accordance with their seniority status, the CBA, and the arbitration ruling. Instead, the assignment process was being governed by LAO 2005-06 and without regard to seniority.

In the instant litigation, which was commenced while the grievances were pending, the union filed a motion for summary disposition, arguing that the chief judge of the WCC lacked the authority to overturn and reject the CBA and the arbitrator's ruling. The union also contended that the arbitration award had to be enforced because it drew its essence from the CBA. The county filed a response to the union's motion for summary disposition and made its own request that the court enter an order granting summary disposition in favor of the county. In September 2008, an order was entered allowing the WCC to intervene as a party defendant. In November 2008, an order was entered allowing the union to supplement its previous motion for summary disposition and giving the county and the WCC an opportunity to respond to any supplemental motion. In February 2009, and before any further motions or responses were filed pertaining to summary disposition, the WCC formally filed an answer to the union's complaint. At the same time, the WCC filed a counterclaim and a cross-claim for declaratory judgment.

In the combined counterclaim/cross-claim, the WCC noted the history already recited by us and also indicated that court clerks are members of the union, that the WCC is not the employer of the court clerks, that the WCC had not been a party to the CBA, that the WCC was not a party to the arbitration proceedings,

and that the WCC was not aware of the arbitration proceedings until after the arbitrator's ruling was issued. Count I of the counterclaim/cross-claim requested a court declaration that, under common-law contract principles, the CBA did not bind the WCC. Count II of the counterclaim/cross-claim requested a court declaration that, under common-law principles governing arbitrations, the arbitration award did not bind the WCC. Count III of the counterclaim/cross-claim requested a court declaration that LAO 2005-06 and the chief judge's subsequent enforcement order directing the county clerk to abide by LAO 2005-06 were presumptively valid, that the trial court lacked subject-matter jurisdiction to otherwise consider the validity of LAO 2005-06 and the chief judge's enforcement order, and that the county clerk was required to follow LAO 2005-06 and the enforcement order. Count IV of the counterclaim/cross-claim requested, in the alternative, a court declaration that LAO 2005-06 and the chief judge's enforcement order controlled the assignment of court clerks to serve in courtrooms notwithstanding any contrary provisions in the CBA and the arbitration award.

Subsequently, the union filed a supplemental motion for summary disposition in regard to its complaint, the WCC filed its own motion for summary disposition, the union filed an additional motion for summary disposition, but this time with respect to the WCC's counterclaim against the union, and the parties filed responses to the competing motions for summary disposition. We shall explore the nature of the summary disposition arguments in the context of our analysis of the issues on appeal. The trial court heard oral arguments on the motions and took them under advisement. In June 2010, in open court, the trial court rendered its ruling from the bench. The trial court held that the CBA and

the arbitration ruling governed and controlled the matter, suggesting that the WCC should have involved itself in the arbitration proceedings and criticizing the WCC for changing the rules and nullifying the CBA and the arbitration award. The trial court opined that the county and the WCC were constructively coemployers of the court clerks and that they should have presented a united bargaining front relative to the arbitration proceedings and interpretation of the CBA. The trial court indicated that it would not be appropriate for a WCC judge, nor any judge, to be able to dictate who serves the judge as his or her courtroom clerk, analogizing it to a judge's dictating which assistant prosecutor from the prosecutor's office must handle a criminal case over which the judge is presiding. The court stated that if a judge is assigned a court clerk pursuant to the CBA and the arbitrator's ruling and the assignment turned problematic, a change could be worked out, just like in any other department under the county's umbrella. The trial court found that court clerks assigned to courtrooms did not serve a core function to the extent that a judge should control the decision to employ a court clerk in his or her courtroom. The court concluded that LAO 2005-06 could not prevail over the arbitrator's ruling, which was never appealed, and that the arbitration decision was enforceable. The order entered by the trial court provided that, for the reasons stated on the record, the union's motion for summary disposition to enforce the arbitration award was granted and the WCC's competing motion for summary disposition was denied.

The WCC filed a claim of appeal, and on the WCC's motion, this Court granted a stay pending this appeal or further order of the Court. *AFSCME Council 25 v Wayne Co*, unpublished order of the Court of Appeals, entered July 20, 2010 (Docket No. 298655). Thereafter,

this Court granted the WCC's motion for clarification, directing the county clerk to assign court clerks to courtrooms in accordance with the procedure being utilized immediately before the trial court's summary disposition ruling. *AFSCME Council 25 v Wayne Co*, unpublished order of the Court of Appeals, entered November 5, 2010 (Docket Nos. 298655 and 300515[2]). The Supreme Court then denied an application for leave to appeal, but directed this Court "to decide this case on an expedited basis, in light of the importance of the issues . . . ." *AFSCME Council 25 v Wayne Co*, 488 Mich 1008 (2010).

II. ANALYSIS

A. STANDARD OF REVIEW

We review de novo a ruling on a motion for summary disposition, *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006), constitutional issues, *Adair v Michigan*, 486 Mich 468, 477; 785 NW2d 119 (2010), the proper interpretation and application of a statute, *id.*, the construction of a court rule, *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008), and questions of law generally, *Oakland Co Bd of Co Rd Comm'rs*, 456 Mich 590, 610; 575 NW2d 751 (1998). We disagree with the union's argument that we should employ appellate-review standards applicable to arbitration proceedings or those found in the arbitration section of the CBA. As explained in detail later in this opinion, the WCC was not a party to, and did not participate in, the arbitration proceedings, and thus it had standing to independently attack the arbitration award outside the confines of an appeal of the arbitra-

[2] Docket No. 300515 pertained to a related contempt proceeding that we need not explore for purposes of this opinion.

tion award. Accordingly, this case does not entail an "appeal" of the arbitrator's ruling; rather, we are effectively addressing an appeal of a ruling in a declaratory judgment action, wherein the trial court declared as a matter of law that the arbitration ruling governed the assignment of court clerks to WCC courtrooms and not LAO 2005-06. Rulings in declaratory judgment actions are reviewed de novo on appeal. *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 10; 743 NW2d 902 (2008).

B. DISCUSSION

1. COMMON-LAW, CONTRACT-RELATED LEGAL PRINCIPLES

We begin our analysis with a brief discussion of whether the WCC was bound by the CBA and the CBA-based arbitration ruling under common-law principles associated with contract formation and liability. The WCC was not a party to the CBA, it did not execute the document, and the WCC was not a party in the arbitration proceedings. "It goes without saying that a contract cannot bind a nonparty." *Equal Employment Opportunity Comm v Waffle House, Inc*, 534 US 279, 294; 122 S Ct 754; 151 L Ed 2d 755 (2002). Arbitration, which is a matter of contract, cannot be imposed on a party that was not legally or factually a party to the agreement wherein an arbitration provision is contained. *St Clair Prosecutor v AFSCME*, 425 Mich 204, 223; 388 NW2d 231 (1986); *Hetrick v David A Friedman, DPM, PC*, 237 Mich App 264, 267; 602 NW2d 603 (1999). In *Genesee Co Prosecuting Attorney v City of Flint*, 64 Mich App 569, 571; 236 NW2d 146 (1975), this Court stated:

> The issue is whether the plaintiff lacked capacity to attack the arbitration award. One not a party to an arbitration is not bound by the award. *Ford Motor Co v Wayne Circuit Judge*, 247 Mich 538; 226 NW 218 (1929). It

> follows that a non-participant has standing to attack an arbitration award that makes determinations concerning its property or contractual rights. We agree with this well established rule. See *Orion Shipping & Trading Co v Eastern States Petroleum Corp*, 312 F2d 299 (CA 2, 1963) . . . , *Sloan v Journal Publishing Co*, 213 Or 324; 324 P2d 449 (1958), *Carpenters' Union v Citizens' Committee to Enforce Landis Award*, 333 Ill 225; 164 NE 393 (1928). We, therefore, conclude that the plaintiff has the legal capacity to maintain this action.[3]

As acknowledged by the WCC, nonsignatories of arbitration agreements can still be bound by an agreement pursuant to ordinary contract-related legal principles, including incorporation by reference, assumption, agency, veil-piercing/alter ego, and estoppel. *Thomson-CSF, S A v American Arbitration Ass'n*, 64 F3d 773, 776 (CA 2, 1995); see also *E I DuPont de Nemours & Co v Rhone Poulenc Fiber & Resin Intermediates*, *S A S*, 269 F3d 187, 198 (CA 3, 2001). We find that there was no documentary evidence indicating that the WCC had entered into a separate contractual relationship with anyone wherein the arbitration clause or any of the CBA language was incorporated by reference, nor was there any evidence that the WCC had engaged in conduct suggesting assumption of arbitration obligations or that the county was acting as the WCC's agent for purposes of collective bargaining and arbitration. *Thomson-CSF*, 64 F3d at 777. Furthermore, there was no evidence supporting imposition of a veil-piercing/alter-ego theory, given an absence of any fraud or indication that the WCC dominated and controlled

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[3] The union does not claim that the WCC lacked standing to litigate the issues presented. Moreover, we find that the WCC has standing, given that the CBA and the arbitration award concern the WCC's courtroom rights and affect its substantial interest in internal court operations. See *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010).

the county relative to contract negotiations and arbitration. *Id.* In regard to estoppel, the federal court in *E I DuPont*, 269 F3d at 200, stated that "courts prevent a non-signatory from embracing a contract, and then turning its back on the portions of the contract . . . that it finds distasteful." The court indicated that a party may be estopped from asserting that the lack of a signature on a written contract precludes enforcement of a certain clause when the party has consistently maintained that other provisions in the same contract should be enforced to benefit the party. *Id.* We are not prepared to invoke the estoppel theory, when the union fails to make an estoppel argument, and when the reason that the WCC rejected the CBA in regard to the arbitration of issues affecting court clerk assignments was of constitutional magnitude, rather than simply because the relevant CBA sections were distasteful. Additionally, we question whether the WCC "embraced" unchallenged sections of the CBA, as opposed to having merely accepted those sections as not infringing on judicial powers. In the context of collective bargaining and the circumstances of this case, it would be nonsensical to demand that the WCC reject the entire CBA, including sections that were not constitutionally offensive, as a prerequisite to later raising a nonsignatory defense.

In sum, there is no basis to conclude under common-law principles that the WCC was bound by the CBA and the arbitration award.

2. PERA AND INTRODUCTION TO THE INHERENT-JUDICIAL-POWERS DOCTRINE

We continue our analysis with a discussion of whether the CBA and the arbitration award govern the dispute and prevail by operation of PERA. PERA pro-

vides that "[a] *public employer* shall bargain collectively with the representatives of its employees . . . and may make and enter into collective bargaining agreements with those representatives." MCL 423.215(1) (emphasis added). The union maintains, without citation of authority, that the county is the "public employer" of court clerks for purposes of PERA. The WCC contends that the county and the county clerk are coemployers of court clerks, citing *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 297-300; 586 NW2d 894 (1998), and *Lapeer Co v Teamsters Local 214*, 1995 MERC[4] Lab Op 181. Neither the WCC nor the union assert that the WCC is the "public employer" of court clerks. The trial court stated that the county and the WCC are constructively coemployers of court clerks. The named parties to the CBA and the arbitration proceedings were the union and the county, not the WCC.

We need not determine which entity is properly designated as the public employer of court clerks for purposes of PERA, or whether court clerks have multiple public employers, because the question is irrelevant in regard to resolution of the particular issues in this case given the circumstances presented. In *St Clair Prosecutor*, 425 Mich at 207-208, the Court addressed multiple questions, including "whether the circuit court had jurisdiction to decide the arbitrability of an assistant prosecuting attorney's . . . removal from office under a collective bargaining agreement entered into by the county and the union without the participation of the prosecuting attorney[, and] whether the prosecutor is a coemployer with the county . . . ." The Court found that the county prosecuting attorney and the county were coemployers of assistant prosecuting attorneys for purposes of PERA; that while a public employer may

[4] Michigan Employment Relations Commission.

not refuse to bargain under PERA, there was no evidence that the union requested the prosecuting attorney to engage in collective bargaining; and that there was no evidence that the prosecuting attorney waived the right to bargain or acquiesced in such a waiver. *Id.* at 208. The Court held, in part, that the prosecuting attorney was not required to arbitrate the removal of the assistant prosecuting attorney under the collective-bargaining agreement executed by the county and the union, when the prosecuting attorney did not sign the agreement. *Id.* at 208, 237 ("[T]he prosecutor is not bound by an arbitration clause to which he was, in effect, not a party.").

Here, with respect to the CBA, there is no dispute that the WCC did not sign the document. Furthermore, there was no documentary evidence showing or suggesting that the WCC was asked or rejected a request to execute the CBA or engage in underlying CBA negotiations, that the WCC was actually involved in negotiations, or that the WCC designated the county as its representative relative to collective bargaining in order to protect its own interests. Moreover, there was no documentary evidence submitted to the trial court indicating that the WCC waived any claimed right to collectively bargain with the union, that the WCC acquiesced in any such waiver, or that the WCC expressed its consent to or approval of the pertinent provisions contained in the CBA.

With respect to the arbitration proceedings, there was no documentary evidence showing or suggesting that the WCC participated in the proceedings, that the WCC and the county joined forces in defending against the arbitrated grievances, or that the WCC designated the county as its representative relative to the arbitration proceedings. Additionally, there was no documen-

tary evidence submitted to the trial court indicating that the WCC waived any claimed right to participate in the arbitration proceedings, that the WCC acquiesced in any such waiver, or that the WCC approved of or adopted the arbitrator's award. In sum, there was no evidence whatsoever that the WCC had any association with or connection to the CBA and the arbitration proceedings. Indeed, the WCC's chief judge indicated in her letter to the county clerk that the WCC had not been aware of the arbitration proceedings until after the arbitrator's decision was issued.

The union argues that PERA requires parties to collectively bargain on matters concerning the terms and conditions of employment, which includes setting placement, transfer, appointment, and promotion criteria that would necessarily affect the assignment of court clerks to the WCC's courtrooms. And the CBA encompassed requisite matters by, in part, including provisions on the filling of vacancies, which mandated recognition and contemplation of minimum-service time and seniority. Therefore, according to the union, PERA demands that we honor the act with a holding that the CBA and the arbitrator's ruling govern the assignment of court clerks and prevail over LAO 2005-06 and any statutes to the contrary.

"The legislature may enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service." Const 1963, art 4, § 48. "Acting pursuant to this explicit constitutional authorization, PERA was enacted by the Legislature in 1965." *Local 1383, Int'l Ass'n of Fire Fighters, AFL-CIO v City of Warren*, 411 Mich 642, 651; 311 NW2d 702 (1981). PERA provides public employees the right to form and join labor organizations, along with the right to negotiate with public employers in

good faith regarding hours, wages, and other terms and conditions of employment. *Id.* We have held that "PERA was intended by the Legislature to supersede conflicting laws and is superimposed even on those institutions which derive their powers from the Constitution itself." *Central Mich Univ Faculty Ass'n v Central Mich Univ*, 404 Mich 268, 279; 273 NW2d 21 (1978).

In *City of Warren*, 411 Mich 642, a promotion provision in a collective-bargaining agreement entered into under PERA conflicted with provisions of a city charter and the firefighters and police officers civil service system act, MCL 38.501 *et seq*. However, the Supreme Court held that "the contract provision governing promotions entered into under PERA [was] valid and enforceable." *City of Warren*, 411 Mich at 649. The Court noted that it had "consistently held that PERA prevails over conflicting legislation, charters, and ordinances in the face of contentions by cities, counties, public universities and school districts that other laws or the constitution carve out exceptions to PERA." *Id.* at 655. In *Kalamazoo Police Supervisors' Ass'n v City of Kalamazoo*, 130 Mich App 513, 524; 343 NW2d 601 (1983), this Court also acknowledged that "if there is a conflict between PERA and another statute, charter provision or constitutional provision affecting mandatory bargaining subjects, the provisions of PERA and Const 1963, art 4, § 48, must dominate . . . ."[5]

MCL 423.215(1) provides, in part:

[5] The fact that the WCC was not involved in negotiating the PERA-based CBA does not mean that we forego a PERA analysis and simply conclude that PERA is irrelevant. There is no argument that the CBA is generally invalid, unenforceable, or undeserving of recognition. Therefore, we must determine whether PERA principles demand enforcement of the entire CBA.

> Except as otherwise provided in this section, for the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith *with respect to wages, hours, and other terms and conditions of employment*, or the negotiation of an agreement, or any question arising under the agreement, and the execution of a written contract, ordinance, or resolution incorporating any agreement reached if requested by either party, but this obligation does not compel either party to agree to a proposal or require the making of a concession. [Emphasis added.]

"The subjects included within the phrase 'wages, hours, and other terms and conditions of employment' are referred to as 'mandatory subjects' of bargaining." *Central Mich Univ*, 404 Mich at 277. "Once a specific subject has been classified as a mandatory subject of bargaining, the parties are required to bargain concerning the subject . . . ." *Id.* Promotion and appointment criteria, including seniority, as well as grievance procedures, are mandatory subjects of collective bargaining. *Id.* at 278; *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 55; 214 NW2d 803 (1974).

We agree that the provisions in the CBA that address intradepartmental job transfers and assignments, setting forth seniority and minimum-service criteria, and that address grievance procedures, including arbitration, do concern conditions of employment and are mandatory subjects of collective bargaining. Generally speaking, under the caselaw already cited, a PERA-based contract prevails in most instances even when in conflict with other authorities. However, the WCC invoked its constitutional powers as part of the judiciary in promulgating LAO 2005-06 and in rejecting and failing to heed the CBA and the arbitration ruling. Some of the PERA caselaw already discussed, while not involving the judicial branch's inherent constitutional

powers, suggests that PERA may prevail over conflicting constitutional provisions; again, PERA is grounded in the Michigan Constitution. The union itself does not make this argument, and it states that PERA prevails over inconsistent laws, "save the Constitution."

We hold that a PERA-based contract and related arbitration award that infringe on the judicial branch's inherent constitutional powers cannot be enforced to the extent of the encroachment.[6] See *Second Judicial Dist Court Employees & Judge v Hillsdale Co*, 423 Mich 705, 717; 378 NW2d 744 (1985) ("Each branch of government has inherent power to preserve its constitutional authority."). We have not been directed to any cases that suggest that if honoring PERA impinges on the judiciary's inherent constitutional authority, PERA governs and prevails. The inherent-powers doctrine, which has been recognized for over 120 years, "is derived from the separation of governmental powers set forth principally in Const 1963, arts 4-6, relating to the authorities of the legislative, executive, and judicial branches of government, and Const 1963, art 3, § 2 . . . ."[7] *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 140; 719 NW2d 553 (2006) (opinion by MARKMAN, J.). The "doctrine is rooted in the constitutional command that the judicial power of this state is vested exclusively in 'one court of justice['] [under] Const 1963, art 6, § 1."[8] *Id.* at 145.

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[6] We are not suggesting that if a court is indeed a party to a collective-bargaining agreement, it can later refuse to honor its own agreement on the basis that the court's constitutional powers are invaded by implementation of the agreement.

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

[8] Const 1963, art 6, § 1, provides:

In *74th Judicial Dist Judges v Bay Co*, 385 Mich 710; 190 NW2d 219 (1971), the plaintiff district court judges sought, in part, injunctive relief prohibiting MERC from conducting hearings on a charge of unfair labor practices leveled against a judge, and the trial court permanently enjoined MERC from proceeding. Our Supreme Court, in reversing the trial court's order, held that PERA provisions empowering MERC to act did not encroach on "the constitutional and inherent powers of the judiciary" and that MERC could properly exercise its jurisdiction under PERA. *Id.* at 729. While under the circumstances presented in *74th Judicial Dist Judges* there was no infringement on the judicial branch's inherent powers, the Court's analysis implicitly, yet strongly, indicated that if such an infringement does occur, PERA will not control.

The proposition that PERA must bow to the judiciary's inherent constitutional powers was made abundantly clear in *In re Petition for a Representation Election Among Supreme Court Staff Employees*, 406 Mich 647; 281 NW2d 299 (1979). In that case, a union, acting pursuant to PERA, petitioned for an election among certain Michigan Supreme Court clerical employees and proposed a bargaining unit comprised of those employees. MERC issued a finding that it had jurisdiction over the matter and ordered an election. MERC also rejected a separation-of-powers argument, observing that clerical employees did not exercise the powers of any branch of the government. *Id.* at 662. Our Supreme Court held:

> The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.

> This is a case of first impression. No Michigan or foreign opinion has been cited to us, nor did our research reveal any, where a quasi-judicial agency assumed to bring the Supreme Court before it for adjudication. However, those are the facts of this case. . . . MERC . . . has attempted to take jurisdiction over the Michigan Supreme Court to determine a union representation election proceeding in which this Court would be a defendant.
>
> We hold that Const 1963, art 3, § 2, headed separation of powers of government, precludes MERC's assumption of such jurisdiction over the Michigan Supreme Court. [*Id.* at 660-661.]

Although it concerned a dispute between the legislative and executive branches of government, this Court's decision in *Beadling v Governor*, 106 Mich App 530, 536-537; 308 NW2d 269 (1981), makes clear that the separation-of-powers doctrine prevails over PERA: "While the constitution expressly permits the Legislature to enact laws for the resolution of disputes involving public employees, Const 1963, art 4, § 48, that provision is inapplicable in this situation since it would otherwise substantially impair the separation of powers clause."

In *Irons v 61st Judicial Dist Court Employees Chapter of Local No 1645*, 139 Mich App 313, 321; 362 NW2d 262 (1984), this Court recognized the principle that application of PERA to the courts cannot occur if it would "violate the constitutional mandate of separation of powers."

Accordingly, if indeed application of PERA impinges on the judiciary's inherent constitutional powers, PERA cannot prevail. We also emphasize that the sections in the CBA generally governing the filling of vacancies and intradepartmental assignments are not rendered null and void by our ruling today. Rather, they are still wholly applicable, except that we ultimately

carve out, for reasons set forth later in this opinion, a small exception with respect to the placement of a court clerk in a courtroom in order to preserve the judiciary's constitutional authority. Before analyzing whether there was an unconstitutional infringement of the judicial branch's authority with respect to the assignment of court clerks to WCC courtrooms under the CBA and the arbitration ruling, we shall first examine additional statutory arguments.

3. ADDITIONAL STATUTORY PROVISIONS AND CONSIDERATIONS

We begin by providing some background regarding the county clerk and the judicial branch and the interrelationship between the two. "There shall be elected for four-year terms in each organized county a . . . county clerk . . . whose duties and powers shall be provided by law." Const 1963, art 7, § 4. "The clerk of each county organized for judicial purposes . . . shall be clerk of the circuit court for such county." Const 1963, art 6, § 14. Consistently with this constitutional provision, MCL 600.571(a) provides that "[t]he county clerk of each county shall . . . [b]e the clerk of the circuit court for the county." In *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW2d 452 (2003), the Michigan Supreme Court noted that, "[u]nder our Constitution, the county clerk serves in the unique posture of being both an executive officer and an officer of the judicial branch." The Court held:

> The constitutionally created office of the clerk of the circuit court must have the care and custody of the court records and can perform noncustodial ministerial functions of the court. The custodial function requires that the clerk act as guardian of the records, providing for their safekeeping. The clerk's noncustodial ministerial duties are directed by the Court, as the determination of the precise noncustodial ministerial duties to be performed is a matter

> of court administration entrusted exclusively to the judiciary under Const 1963, art 3, § 2 and Const 1963, art 6, §§ 1, 5. [*Id.* at 170-171.]

The union cites MCL 600.579(1) in support of the argument that the county clerk has the authority to make court clerk assignments to courtrooms absent approval and acceptance by WCC judges.[9] MCL 600.579(1) provides:

> In counties having a population of more than 1,000,000 or that shall hereafter attain a population of more than 1,000,000 and that have adopted civil service under Act No. 370 of the Public Acts of 1941, as amended, being sections 38.401 to 38.428 of the Compiled Laws of 1948, the county clerk shall appoint or promote from the classified eligible list of the civil service a chief deputy circuit court clerk and at least 1 deputy circuit court clerk for each acting circuit judge in the county.

We take judicial notice under MRE 201 that Wayne County has a population that exceeds 1,000,000, and it has adopted the county employees' civil service act, MCL 38.401 *et seq.*, as reflected in *Molis Estate v Wayne Co Bd of Auditors*, 373 Mich 172, 174; 128 NW2d 473 (1964). As argued by the union, MCL 600.579(1) does not reference any requirement that a judge or court approve the county clerk's appointment or promotion of a court clerk to serve a circuit court judge. On the other hand, MCL 600.571(c) provides that the county clerk shall "[a]ppoint in counties with more than 1 circuit judge *or* having more than 100,000 population but less than 1,000,000 a deputy for each judge *and approved by the judge* to attend the court sessions." (Emphasis added.) In general, the "disjunctive term 'or' refers to a

[9] The parties apparently accept that the county clerk was bound by the CBA and the arbitration ruling, and the county clerk has not intervened in the suit.

choice or alternative between two or more things," *Yankee Springs Twp v Fox*, 264 Mich App 604, 608; 692 NW2d 728 (2004), and Wayne County certainly has more than one circuit court judge. We also note the language in MCL 50.63, which provides that "[e]ach county clerk shall appoint 1 or more deputies, *to be approved by the circuit judge*, . . . and the deputy or deputies . . . may perform the duties of . . . clerks." (Emphasis added.) This provision concerns the general hiring of deputy clerks, which apparently requires judicial approval.

We decline to rule that MCL 600.579(1), which does not reference the need for judicial approval, resolves the dispute in favor of the union, considering that, for the same reasons that we rejected the union's PERA argument, the judicial branch's inherent constitutional powers take precedence over the statute. A fundamental and indisputable tenet of law is that a constitutional mandate cannot be restricted or limited by the whims of a legislative body through the enactment of a statute. *Stanhope v Village of Hart*, 233 Mich 206, 209; 206 NW 346 (1925) ("The provisions of the Constitution clearly point decision herein, and we find no occasion to go to statutory provisions on the same subject[;][t]he Constitution controls . . . ."); see also *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 710; 614 NW2d 607 (2000) (stating that a statute cannot contravene "the dictates of our state or federal constitution").

We also decline to rule that either MCL 50.63 or MCL 600.571(c), which incorporate a judicial-approval requirement, supports the WCC's position to the extent that it resolves the case and makes it unnecessary to reach the constitutional issues. See *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993) ("[W]e will not reach constitutional

issues that are not necessary to resolve a case."). First, there is some obvious tension between MCL 600.579(1) and MCL 600.571(c), and MCL 50.63 does not technically concern the assignment of a previously hired court clerk to a courtroom. More importantly, even if we determined that the judicial-approval provisions in MCL 50.63 and MCL 600.571(c) controlled over or irrespective of MCL 600.579(1), there would still arise a conflict between those statutes and the PERA-based CBA. And as reflected already in this opinion, PERA can supersede, dominate, and prevail over conflicting legislation. *City of Warren*, 411 Mich at 655; *Central Mich Univ*, 404 Mich at 279; *Kalamazoo Police Supervisors' Ass'n*, 130 Mich App at 524. Overall, placing any reliance on the statutes is problematic, and the Michigan Constitution provides a clear path in resolving the dispute.

The union also places reliance on MCL 38.415[10] and 38.416,[11] which are provisions contained in the county

[10] MCL 38.415 provides:

> Whenever possible, vacancies shall be filled by promotion. Promotion shall be made from among employees qualified by training and experience to fill the vacancy, and whose length of service entitles them to consideration. The commission shall, for the purpose of promotion, rate such employees so qualified on the basis of their service record if maintained, experience in the work involved in the vacant position, training and qualification for such work, seniority and war service ratings. Seniority shall be controlling only when other factors are equal. Only 1 name, the highest on the list of ratings, shall be certified. The appointing authority shall then appoint the person so qualified forthwith, or elect to make an original appointment, in which event the procedure for original appointments hereinbefore provided shall be followed.

[11] MCL 38.416 provides, in part, that "[a]ny officer or employee in the classified civil service may be removed, suspended or reduced in rank or compensation by the appointing authority, after appointment or promotion is complete, by an order in writing, stating specifically the reasons therefor."

employees' civil service act, and which, according to the union, do not give any authority to the WCC or any court to dictate the assignment of a court clerk to a courtroom or the removal of a court clerk from a courtroom.[12] Regardless of whether the union is accurately construing these statutes, to the extent that they infringe on the judicial branch's inherent constitutional powers, they also succumb to the primacy of the Michigan Constitution.

4. APPLICATION OF THE INHERENT-JUDICIAL-POWERS DOCTRINE

Having found, generally speaking, that the judiciary's inherent constitutional powers take precedence over PERA and the other statutory provisions cited by the union, we must now determine whether the act of assigning or selecting a court clerk for courtroom duty is a power that actually falls within the inherent-powers doctrine, so that the judiciary ultimately has the exclusive authority to make the decision regardless of seniority, the CBA, and the arbitration award. We find that *Judicial Attorneys Ass'n*, 459 Mich 291, and *Lapeer Co Clerk*, 469 Mich 146, control our analysis and demand that we hold in favor of the WCC.

In *Judicial Attorneys Ass'n*, 459 Mich at 294, our Supreme Court found that MCL 600.593a(3) to (10) and "parallel provisions of [MCL 600.591, 600.837, 600.8271, 600.8273, and 600.8274] of 1996 PA 374, concerning employees of the circuit, probate, and district courts, are unconstitutional." 1996 PA 374 provided that Wayne County or a local judicial council created under the act became the employer of WCC

[12] Section 14.01 of the CBA provides that, "[t]o the extent they are not in conflict with other provisions of this Agreement, the existing Wayne County Civil Service Rules . . . are incorporated by reference into this Agreement."

employees, rather than the State Judicial Council abolished by the act. *Judicial Attorneys Ass'n*, 459 Mich at 294. The Court noted that the option to create a local judicial council as the employer had already expired. *Id.* at n 1. The Court found that the statutory provisions constituted an unconstitutional invasion of the judicial branch's authority to control its internal operations. *Id.* at 301, 304.

The Court began its analysis by stating that "the separation of powers doctrine does not require so strict a separation as to provide no overlap of responsibilities and powers" and that "[i]f the grant of authority to one branch is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other, a sharing of power may be constitutionally permissible." *Id.* at 296-297. The critical questions, as viewed by the Court, were whether the "judicial branch's powers necessarily include the administrative function of controlling those who work within the judicial branch, and, if so, whether the legislatively prescribed sharing of personnel functions delineated in [MCL 600.593a] is sufficiently limited and specific so as not to encroach on the exercise of the constitutional responsibilities of the judicial branch." *Id.* at 297. Here, with respect to setting the criteria for purposes of a court clerk assignment and in regard to an assignment decision, there is *no* sharing of power with the judicial branch, where the CBA, as agreed to by the union and the county (legislative branch), exclusively governs the process. MCL 600.593a(5), which was struck down as unconstitutional in *Judicial Attorneys Ass'n*, preserved a limited role for the chief judge of the WCC in those aspects of decision-making relative to court personnel, yet the Supreme Court still found the statutory scheme constitutionally flawed. *Judicial Attorneys Ass'n*, 459 Mich at 302. Again, in the case at bar,

the WCC does not even play a limited role in the assignment process and determination.

The Court in *Judicial Attorneys Ass'n* observed that it was well established that the management of court personnel "falls within the constitutional authority and responsibility of the judicial branch" and that "[t]he power of each branch of government within its separate sphere necessarily includes managerial administrative authority to carry out its operations." *Id.* at 297. The Court also observed:

> Despite the complications of the trial court environment, the case law, taken as a whole, has come to strongly affirm that the fundamental and ultimate responsibility for all aspects of court administration, including operations and personnel matters within the trial courts, resides within the inherent authority of the judicial branch.
>
> * * *
>
> ". . . Employing and managing personnel to carry out day-to-day operations is one of the most basic administrative functions of any branch of government. This Court has already suggested that, pursuant to the doctrine of separation of powers, one branch of government should not be subject to oversight by another branch in personnel matters. . . ."
>
> We agree with plaintiffs and the Court of Appeals majority that [MCL 600.593a(3)] is not a sufficiently limited exercise by one branch of another branch's power, and therefore that it impermissibly interferes with the judiciary's inherent authority to manage its internal operations. . . .
>
> * * *
>
> . . . The judicial branch is constitutionally accountable for the operation of the courts and for those who provide court services . . . . [*Id.* at 299-302 (citations omitted).]

Here, we hold that the assignment or selection of a particular court clerk to serve in a judge's courtroom clearly falls under the umbrella of the judiciary's administrative and managerial authority to carry out the court's day-to-day internal operations and to control personnel matters with regard to an individual, a court clerk, who indisputably is providing court services.

The union attempts to make a distinction between the WCC's having control over the operation and function of the courtroom, which power the union concedes is beyond dispute, and the WCC's having control over personnel who perform duties in the courtroom. Stated otherwise, the union accepts that a WCC judge can direct the activities of a court clerk once the clerk is assigned to the judge's courtroom, but argues that the judge does not have the authority to determine which particular court clerk is assigned to the courtroom in the first place. We disagree and hold that the judicial branch's inherent constitutional powers encompass both the selection of a court clerk to work in a courtroom and the control over the clerk in the courtroom after the selection is made. Controlling a court's personnel matters and its daily internal operations, which are powers held by the judicial branch as indicated in *Judicial Attorneys Ass'n*, necessarily include deciding which court clerk will be assigned to work with a judge in the judge's courtroom. We find that it would be constitutionally unsound to conclude that a judge can dictate the activities of a court clerk once the court clerk is assigned to the judge's courtroom, but that the judge can have no relevant say in regard to which court clerk will work with the judge on a day-to-day basis in conducting the business of the court.

We reject the trial court's analogy that allowing the WCC to govern the court-clerk-assignment determina-

tion is akin to a judge's dictating which assistant prosecutor from the prosecutor's office must handle a criminal case over which the judge is presiding. A court clerk who is performing court functions on behalf and at the direction of a judge simply does not have the same status as a party or attorney who is merely appearing before a judge to argue a case. A prosecutor is not performing work or providing court services for the benefit of the judge and persons appearing in the court.

Under the CBA, as interpreted by the arbitrator, a WCC judge is effectively deprived of any meaningful voice with respect to which court clerk serves in his or her courtroom. A judge has no formally recognized control over the assignment or removal decision; there is an absence of empowerment granted to the judiciary. We acknowledge that the CBA requires the placement of a qualified clerk in a courtroom, but there is no procedural mechanism that requires the county clerk, the county, or the union to take into consideration a judge's input with regard to whether a court clerk is qualified. If a judge attempted to demand that the county clerk remove a court clerk deemed unqualified by the judge, or if a judge sought to prevent the assignment of a court clerk to his or her courtroom on the basis that the clerk was unqualified, the judge could be wholly ignored without any legal consequences or ramifications. Even when, in the spirit of cooperation, a county clerk works with a judge and respects the judge's wishes, a disgruntled court clerk can invoke the grievance procedures, possibly culminating in arbitration. And a judge or the WCC, not being a party to the CBA and, under the union's argument, not having constitutional authority to interfere with CBA procedures, could not become involved in the grievance procedures. At oral argument, when asked what the WCC could do if the county clerk found a court clerk qualified for

assignment to a courtroom but the judge to whom the court clerk is to be assigned thinks differently, the union's counsel responded that the WCC could file a lawsuit. Aside from the fact that such a suit would be overly burdensome on the judiciary, we fail to see how the WCC could succeed in the litigation if the union's stance controlled, given its position that the WCC has no right to play a role in the assignment of court clerks. We conclude that a judge has the exclusive constitutional authority to select a court clerk who the judge opines is the best suited to assist the judge in effectively and efficiently operating the judge's courtroom.

Furthermore, *Lapeer Co Clerk*, 469 Mich 146, lends further support for our conclusion. In *Lapeer Co Clerk*, *id.* at 149, our Supreme Court held that a county clerk, serving as clerk of the circuit court, "must have the care and custody of the court records" and "is to perform ministerial duties that are noncustodial as required by the court." Reviewing historical instances in which circuit court clerks, i.e., county clerks, have been assigned noncustodial, ministerial tasks, the Court stated:

> Court clerks [have] . . . computed amounts due on bonds, generated transcripts, filed transcripts, entered and docketed judgments, advertised writs of judgment, certified and filed stipulations, received court papers, transmitted certified copies of proceedings to the Supreme Court, certified various court documents, and accepted court filings. Court clerks could not undertake nonministerial functions, such as assessing damages in a contested action, exercising any judicial power over individuals, or taking complaints and issuing warrants. In addition, it was well understood that these noncustodial ministerial functions were subject to change. [*Id.* at 158-159 (citations omitted).]

The Court further ruled that "the judiciary is vested with the constitutional authority to direct the circuit

court [county] clerk to perform noncustodial ministerial duties pertaining to court administration as the Court sees fit." *Id.* at 164. The constitutional authority "includes the discretion to create duties, abolish duties, or divide duties between the clerk and other court personnel, as well as the right to dictate the scope and the form of the performance of such noncustodial ministerial duties." *Id.*

We find that the directives contained in LAO 2005-06, which required the county clerk to assign a court clerk to a presiding judge's courtroom on the basis of the judge's selection of a clerk from the appropriate pool, constitute noncustodial ministerial tasks relative to the division of duties and the scope and the form of performances within the circuit court. As such, LAO 2005-06 was a proper exercise of the WCC's exclusive judicial authority under the Michigan Constitution, and it was permissible because it concerned "internal court management," MCR 8.112(B)(1).

We find additional support for our position in *Rutledge v Workman*, 175 W Va 375; 332 SE2d 831 (1985), wherein the West Virginia Supreme Court of Appeals considered whether an elected circuit court clerk could remove and replace a deputy circuit court clerk when a judge entered an order prohibiting the change. The elected circuit court clerk had acknowledged that there was statutory authority requiring court approval before her initial hiring decision, but argued that "she has absolute, complete, and unfettered discretion to fire, assign, and reassign personnel in the office of the circuit clerk." *Id.* at 377. Similar to the Michigan Constitution, the West Virginia Constitution provided for a unitary court system. *Id.* at 379, citing W Va Const, art VIII, § 1 *et seq*. The court, examining New Jersey caselaw that had addressed the issue, stated:

> The New Jersey courts have decided cases on this subject and their reasoning is persuasive. The county clerk is the New Jersey equivalent of the West Virginia circuit court clerk. Because these clerks are elected, they have a hybrid status--half county official: half judicial officer. Nevertheless, these clerks are fully answerable to the judicial system. When a conflict arose between the assignment judge, the chief administrator of New Jersey's county judicial system, and county officials, the court upheld the judge's constitutional power to administer the judiciary. The court stated:
>
> "The power of the assignment judge to select and assign as his assistants those who satisfy his needs from the coterie of county employees stems from the inherent power of the courts as implemented by R. 1:33-3(b). And although these assistants may remain county employees for the purpose of payment of their remuneration, they nevertheless serve under the control and direction of the assignment judge in the unclassified category and at his pleasure." *Matter of Court Reorganization Plan; etc.*, 161 N.J. Super. 483, 391 A.2d 1255, 1260 (App. Div. 1978) *aff'd o.b.* 78 N.J. 498, 396 A.2d 1144 (1979).
>
> And since this power to regulate the conduct of the courts is constitutional, it transcends any legislative directives. 161 N.J. Super. 483, 391 A.2d at 1260. In the same manner, the *West Virginia Constitution* mandates that we, and the circuit court judges administer the judicial system with dispatch. Although the circuit court clerks are more than our minions, the constitution's mandate for effective justice guides their action as well as ours. They must aid the administration of justice or face censure. [*Rutledge*, 175 W Va at 379-380.]

The West Virginia court also relied on W Va Const, art VIII, § 9, which established the office of the clerk of the circuit court under the judicial article, to conclude that the circuit court clerk's duties must be analyzed in the framework of the judicial system. *Rutledge*, 175 W Va at 380. In Michigan, the county clerk's role as clerk of the circuit court was also established under the

judicial article, Const 1963, art 6, § 14, and the relationship between the clerk of the circuit court and the judicial branch in Michigan is comparable to the relationship between the two that exists in West Virginia. See *Lapeer Co Clerk*, 469 Mich 146.

Later, in *State ex rel Core v Merrifield*, 202 W Va 100, 109; 502 SE2d 197 (1998), the West Virginia Supreme Court of Appeals upheld that part of a general order which provided that each circuit judge had the ultimate authority to "select and assign as his Courtroom Clerk that individual whom most satisfies his needs from the coterie of deputy clerks."

We wholeheartedly agree with the analysis and conclusion reached by the West Virginia and New Jersey courts.

5. ALLEGED INFRINGEMENT ON THE POWERS OF THE LEGISLATIVE BRANCH AND ASSOCIATED CASES

The union asserts that LAO 2005-06 violates the separation-of-powers doctrine in that it infringes on the constitutional authority of the county, as a legislative branch of government, to have control over the employment conditions of court clerks as bargained for in the CBA. We first note that the county itself has not voiced such an infringement. Regardless, we do not agree that the assignment of a *court* clerk to a WCC *courtroom* is a subject matter falling within the powers of the legislative branch; it is patently a judicial matter. Assuming that the county's role in generally setting the work conditions and duties of court clerks through collective bargaining is of constitutional magnitude relative to the powers of the legislative branch, the judicial branch must nonetheless be permitted to take control over particular matters when necessary to satisfy constitutional demands, even if closely related to legislative

matters. And any incursion by the judiciary into the county's general constitutional territory that results from our ruling that grants the judiciary control over courtroom assignments is "sufficiently limited and specific so as not to encroach on the exercise of the constitutional responsibilities of the [legislative] branch." *Judicial Attorneys Ass'n*, 459 Mich at 297. The CBA is an expansive document covering myriad matters of employment conditions pertaining to court clerks, as well as other union members, none of which bargained-for conditions are affected by our ruling, except for the criteria on filling vacancies, and then only to the extent that the matter concerns a courtroom assignment.[13] The WCC has made it clear that, aside from this minimally intrusive yet constitutionally mandated exception, it would honor the provisions in the CBA. The union attempts to support its position by citation of *Wayne Circuit Judges v Wayne Co*, 386 Mich 1; 190 NW2d 228 (1971), *74th Judicial Dist Judges*, 385 Mich 710, *Bartkowiak v Wayne Co*, 341 Mich 333; 67 NW2d 96 (1954), *Sabbe v Wayne Co*, 322 Mich 501; 33 NW2d 921 (1948), *Bischoff v Wayne Co*, 320 Mich 376; 31 NW2d 798 (1948), and *Beadling*, 106 Mich App 530. These cases do not require a different outcome here because they are either factually or legally distinguishable and thus not pertinent to the specific legal questions that we have addressed today, or they actually support the WCC's position, or they are not as closely on point as *Lapeer Co Clerk*, 469 Mich 146, and *Judicial*

[13] We emphasize, however, that this opinion should not be read as a ruling that all remaining provisions of the CBA are constitutionally acceptable, because those provisions are not before us. Further, while we are only concerned with the assignment of court clerks to courtrooms, nothing in this opinion should be interpreted as necessarily limiting its potential application to court clerk assignments.

Attorneys Ass'n, 459 Mich 291, wherein our Supreme Court has embraced recognition of the judicial branch's constitutional powers.

III. CONCLUSION

We hold that under the judicial branch's inherent constitutional authority the WCC's judges have the exclusive authority to make the determination with respect to the assignment or selection of a particular court clerk to serve in a judge's courtroom. Promulgation of LAO 2005-06 constituted a proper exercise of the WCC's authority, and the WCC was not bound by the CBA, nor the arbitrator's ruling, on the narrow issue of courtroom assignments.

We reverse and remand for entry of judgment in favor of the WCC. We do not retain jurisdiction. Considering that our Supreme Court directed us to decide this case on an expedited basis in light of the important issues at stake, we order that this opinion, i.e., our judgment, is to take immediate effect pursuant to MCR 7.215(F)(2). No taxable costs are awarded.

STEPHENS and M. J. KELLY, JJ., concurred with MURPHY, C.J.

MICHIGAN FARM BUREAU v DEPARTMENT OF ENVIRONMENTAL QUALITY

Docket No. 290323. Submitted July 7, 2010, at Grand Rapids. Decided March 29, 2011, at 9:00 a.m.

Michigan Farm Bureau and other farming organizations brought an action for a declaratory judgment in the Newaygo Circuit Court challenging an administrative rule promulgated by the Department of Environmental Quality. The rule, Mich Admin Code R 323.2196, regulates water quality in accord with the National Pollutant Discharge Elimination System (NPDES) and requires owners or operators of concentrated animal feeding operations (CAFOs) to apply for NPDES permits even if they do not actually discharge pollutants. The rule includes an exception that allows a CAFO owner or operator to bypass the permit requirement if it has received a determination from defendant that the CAFO has no potential to discharge. Plaintiffs argued that the rule exceeds the scope of defendant's statutory rulemaking authority, that it is inconsistent with the intent of the Legislature, and that it is arbitrary and capricious. Plaintiffs relied on federal caselaw that had found enactment by the federal Environmental Protection Agency (EPA) of a similar federal rule exceeded the scope of the EPA's rulemaking authority. Both parties moved for summary disposition. The court, Anthony A. Monton, J., concluded that the rule did not violate federal law, that defendant had statutory authority to promulgate the rule, that the rule was not inconsistent with legislative intent, and that the rule was not arbitrary or capricious. Plaintiffs appealed.

The Court of Appeals *held*:

1. When analyzing the substantive validity of an administrative rule, Michigan courts employ a three-part test: (1) whether the rule is within the subject matter of the enabling statute, (2) whether it complies with the legislative intent underlying the enabling statute, and (3) whether it is arbitrary or capricious. A rule is within the subject matter of the enabling statute if it is necessary for the efficient exercise of a duty that the Legislature has conferred on the agency. The Legislature empowered defendant to take all appropriate steps to prevent any pollution of

waters of the state that defendant considered unreasonable and against the public interest. Requiring CAFOs with the potential to discharge to obtain permits before they actually discharged any pollutants was within defendant's statutory duty to prevent pollution.

2. Rule 323.2196 complies with the Legislature's intent because it is consistent with the Legislature's conferring broad powers on defendant, empowering it to prevent any pollution of waters of the state that defendant considers unreasonable and against the public interest.

3. A rule is arbitrary if it was the result of an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance and capricious if it was apt to change suddenly, freakish, or whimsical. Even though it was modeled on the language struck down by the federal courts, Rule 323.2196 is not arbitrary and capricious because defendant has broader powers than its federal counterpart and is free to enact more stringent limitations than federal limitations. There was no evidence that defendant was motivated by caprice or that the rule was promulgated without reference to adequate principles or standards.

Affirmed.

1. ADMINISTRATIVE LAW — RULES — SUBSTANTIVE VALIDITY — SUBJECT MATTER.

When analyzing the substantive validity of an administrative rule, Michigan courts employ a three-part test: (1) whether the rule is within the subject matter of the enabling statute, (2) whether it complies with the legislative intent underlying the enabling statute, and (3) whether it is arbitrary or capricious; a rule is within the subject matter of the enabling statute if it is necessary for the efficient exercise of a duty that the Legislature has conferred on the agency.

2. ADMINISTRATIVE LAW — RULEMAKING — STATUTORY AUTHORITY OF AGENCY.

The Legislature has conferred broad powers on the Department of Environmental Quality and has empowered it to prevent any pollution of the waters of the state that the department considers unreasonable and against the public interest (MCL 324.3106).

3. ADMINISTRATIVE LAW — RULES — ARBITRARY AND CAPRICIOUS.

Mich Admin Code, R 323.2196, which requires owners or operators of concentrated animal feeding operations to obtain water-quality permits, is not arbitrary and capricious because the Department of

Environmental Quality has broader powers than its federal counterpart and is free to enact more stringent limitations than federal limitations.

Varnum LLP (by *Richard A. Samdal* and *Aaron M. Phelps*) for plaintiffs.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Alan F. Hoffman*, Assistant Attorney General, for defendant.

Before: HOEKSTRA, P.J., and JANSEN and BECKERING, JJ.

JANSEN, J. Plaintiffs commenced this declaratory judgment action in the circuit court to challenge an administrative rule promulgated by defendant, the Department of Environmental Quality (DEQ). The circuit court determined that the challenged rule fell within the scope of the DEQ's statutory rulemaking authority, that it was rationally related to the DEQ's statutory mandate to protect Michigan's waters from pollution, and that it was neither arbitrary nor capricious as a matter of law. The court accordingly granted summary disposition in favor of the DEQ and dismissed plaintiffs' claims. Plaintiffs now appeal as of right, arguing that the challenged rule exceeds the scope of the DEQ's statutory rulemaking authority, that the rule violates the intent of the Legislature, that the rule is arbitrary and capricious, and that the circuit court therefore erred by granting summary disposition in favor of the DEQ. For the reasons set forth in this opinion, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

A. STATUTORY BACKGROUND

The Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA), 33 USC 1251 *et*

seq., "is a comprehensive water quality statute designed to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' " *PUD No 1 of Jefferson Co v Washington Dep't of Ecology*, 511 US 700, 704; 114 S Ct 1900; 128 L Ed 2d 716 (1994), quoting 33 USC 1251(a). By enacting the CWA, Congress sought to eliminate "the discharge of pollutants into the [nation's] navigable waters" and to attain "an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife . . . ." 33 USC 1251(a)(1) and (2). "Toward this end, the [CWA] provides for two sets of water quality measures." *Arkansas v Oklahoma*, 503 US 91, 101; 112 S Ct 1046; 117 L Ed 2d 239 (1992). These two types of water quality measures are known as "effluent limitations," 33 USC 1311, and "water quality standards," 33 USC 1313.

" 'Effluent limitations' are promulgated by the EPA and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources."[1] *Arkansas*, 503 US at 101. The "primary means for enforcing" these effluent limitations is the National Pollutant Discharge Elimination System (NPDES). *Id*. In particular, "[t]he [CWA] prohibits the 'discharge of any pollutant' into 'navigable waters' from any 'point source,' except when authorized by a permit issued under the [NPDES]." *Sierra Club Macki-*

[1] In contrast, " '[w]ater quality standards' are, in general, promulgated by the States and establish the desired condition of a waterway." *Arkansas*, 503 US at 101; see also 33 USC 1313. Water quality limitations serve to "supplement effluent limitations 'so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.' " *Arkansas*, 503 US at 101, quoting *Environmental Protection Agency v State Water Resources Control Bd*, 426 US 200, 205 n 12; 96 S Ct 2022; 48 L Ed 2d 578 (1976).

nac Chapter v Dep't of Environmental Quality, 277 Mich App 531, 534; 747 NW2d 321 (2008), quoting 33 USC 1311(a), 33 USC 1342, and 33 USC 1362(12); see also *Arkansas*, 503 US at 102. "Section 402 [of the CWA] establishes the NPDES permitting regime, and describes two types of permitting systems: state permit programs that must satisfy federal requirements and be approved by the EPA, and a federal program administered by the EPA." *Arkansas*, 503 US at 102.

"Before a state desiring to administer its own program can do so, the [EPA's] approval is required and the state must demonstrate, among other things, adequate authority to abate violations through civil or criminal penalties or other means of enforcement." *Ringbolt Farms Homeowners Ass'n v Town of Hull*, 714 F Supp 1246, 1253 (D Mass, 1989). Once the EPA approves a state's request to administer its own NPDES program, that state's NPDES program is administered pursuant to *state law* rather than federal law. *Id*. In other words, the EPA's authorization of a state-administered NPDES program is " 'not a delegation of Federal authority,' " but instead allows the state-administered program to function " 'in lieu of the Federal program.' " *Id*. (citation omitted); see also *Sierra Club*, 277 Mich App at 556 (ZAHRA, J., dissenting). A state that administers its own NPDES program may adopt discharge standards and effluent limitations that are more stringent than the federal standards and limitations. 40 CFR 123.1(i)(1); *West Virginia Highlands Conservancy, Inc v Huffman*, 625 F3d 159, 162 (CA 4, 2010); see also 40 CFR 123.25(a). However, a state's discharge standards and effluent limitations may not be less stringent than the federal standards and limitations. 33 USC 1370.

In 1973, the EPA granted Michigan the authority to administer its own NPDES program. *Sierra Club*, 277

Mich App at 535; see also *United States v Bay-Houston Towing Co, Inc*, 197 F Supp 2d 788, 801 (ED Mich, 2002). Part 31 of Michigan's Natural Resources and Environmental Protection Act (NREPA), MCL 324.3101 *et seq*., governs the protection of water resources in this state. Under Part 31 of the NREPA, "the DEQ is responsible for issuing NPDES permits in Michigan and ensuring that those permits comply with applicable federal law and regulations." *Sierra Club*, 277 Mich App at 535-536.

B. THE FEDERAL CAFO RULE

As explained previously, the CWA requires an individual to seek and obtain an NPDES permit before he or she may discharge pollutants into the nation's navigable waters from any "point source." *Id*. at 534; see also *Arkansas*, 503 US at 102. The CWA defines the term "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, *concentrated animal feeding operation*, or vessel or other floating craft, from which pollutants are or may be discharged." 33 USC 1362(14) (emphasis added). Concentrated animal feeding operations (CAFOs) are "large-scale industrial operations that raise extraordinary numbers of livestock." *Waterkeeper Alliance, Inc v Environmental Protection Agency*, 399 F3d 486, 492 (CA 2, 2005). The federal regulations promulgated under the CWA define and categorize CAFOs depending on the number of animals that they stable or confine.[2] *Sierra Club*, 277 Mich App at 535; see also 40 CFR 122.23(b).

[2] The Michigan Administrative Code defines and categorizes CAFOs in a similar manner, according to the number of animals that they stable or confine. See Mich Admin Code, R 323.2102(i).

The EPA first promulgated regulations for CAFOs in the 1970s. *Waterkeeper*, 399 F3d at 494. These initial regulations, "very generally speaking, defined the types of animal feeding operations that qualify as CAFOs, set forth various NPDES permit requirements, and established effluent limitation guidelines for CAFOs." *Id*. Thereafter, in 2001, the EPA "proposed to 'revise and update' the first set of CAFO regulations." *Id*. (citation omitted). The EPA published a proposed new rule for CAFOs and received numerous public comments. *Id*. at 494-495. Ultimately, in 2003, the EPA promulgated its final CAFO rule (the 2003 Federal CAFO Rule), which was codified within 40 CFR parts 9, 122, 123, and 412. National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed Reg 7176 (February 12, 2003); see also *Waterkeeper*, 399 F3d at 495.

Among other things, the 2003 Federal CAFO Rule as originally promulgated provided that all CAFO owners or operators "must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit." 40 CFR 122.23(d)(1); see also *Waterkeeper*, 399 F3d at 495. The federal rule also contained an exception to this requirement for "CAFOs that have successfully demonstrated *no potential to discharge* . . . ." NPDES Permit Regulation and Effluent Guidelines and Standards for CAFOs, 68 Fed Reg at 7182 (emphasis added); see also former 40 CFR 122.23(d)(2).

C. THE MICHIGAN CAFO RULE

In light of the EPA's promulgation of the 2003 Federal CAFO Rule, "Michigan promulgated its own administrative rules specific to the NPDES for CAFOs,

which the EPA reviewed." *Sierra Club*, 277 Mich App at 536 (footnote omitted). Michigan's CAFO regulations are codified within Mich Admin Code, R 323.2102, R 323.2103, R 323.2104, and R 323.2196. *Sierra Club*, 277 Mich App at 536 n 18. Like the 2003 Federal CAFO Rule as originally promulgated, the Michigan regulations provide that "[a]ll CAFO owners or operators shall apply either for an individual NPDES permit, or a certificate of coverage under an NPDES general permit[.]" Rule 2196(1)(b); see also *Sierra Club*, 277 Mich App at 536-537. Also like the 2003 Federal CAFO Rule as originally promulgated, the Michigan regulations provide an exception to this requirement for CAFO owners and operators who have "received a determination from the department, made after providing notice and opportunity for public comment, that the CAFO has 'no potential to discharge[.]' "[3] Rule 2196(1)(b); see also *Sierra Club*, 277 Mich App at 536-537.

D. THE *WATERKEEPER* DECISION

In 2003 and 2004, various plaintiffs sought review of the 2003 Federal CAFO Rule in the United States Court of Appeals for the Second Circuit.[4] See *Waterkeeper*, 399 F3d at 490, 497. Among these plaintiffs was a group of farming organizations that challenged the permitting scheme established by the federal rule. In particular, these plaintiffs argued that the EPA had exceeded its statutory jurisdiction by requiring all CAFOs, including those that were not actually discharging pollutants into

[3] The DEQ's determination that a CAFO has "no potential to discharge" is made pursuant to Rule 323.2196(4).

[4] The United States Court of Appeals has exclusive jurisdiction over challenges to the EPA's promulgation of "any effluent limitation" under the CWA. 33 USC 1369(b)(1); see also *Central Hudson Gas & Electric Corp v Environmental Protection Agency*, 587 F2d 549, 555 (CA 2, 1978).

the navigable waters, "to either apply for NPDES permits or otherwise demonstrate that they have no potential to discharge." *Id*. at 504.

The United States Court of Appeals began by observing that § 1342(a)(1) of the CWA authorizes the EPA to issue NPDES permits for "the *discharge of any pollutant or combination of pollutants*." *Id*. (emphasis in original); see also 33 USC 1342(a)(1). "In other words," the *Waterkeeper* court continued, "unless there is a 'discharge of any pollutant,' there is no violation of the [CWA], and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit." *Waterkeeper*, 399 F3d at 504. The *Waterkeeper* court then considered § 1362(12) of the CWA, which defines the phrase "discharge of any pollutant" as " '(A) any addition of any pollutant to navigable waters from any point source, [or] (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.' " *Waterkeeper*, 399 F3d at 504-505, quoting 33 USC 1362(12). On the basis of the language of § 1342(a)(1), as well as the definition of "discharge of any pollutant" set forth in § 1362(12), the court rejected the EPA's argument that it had statutory authority to promulgate rules requiring *all* CAFOs to seek and obtain an NPDES permit—even those CAFOs that were not actually discharging pollutants into the navigable waters:

> [I]n the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point

> sources to seek or obtain an NPDES permit in the first instance. [*Waterkeeper*, 399 F3d at 505.]

The *Waterkeeper* court further disagreed with the EPA's argument that it was statutorily authorized to require the plaintiffs to seek and obtain NPDES permits because "all CAFOs have the *potential* to discharge pollutants." *Id*. (emphasis in original). Relying in part on *Natural Resources Defense Council v Environmental Protection Agency*, 859 F2d 156, 170 (CA DC, 1988), the *Waterkeeper* court ruled that "the Clean Water Act gives the EPA jurisdiction to regulate and control only *actual* discharges—not potential discharges, and certainly not point sources themselves." *Waterkeeper*, 399 F3d at 505 (emphasis in original). So, too, did the *Waterkeeper* court reject the EPA's argument that it had authority to require the plaintiffs to seek and obtain an NPDES permit because the term "point source" "is defined to mean not only 'any discernible, confined and discrete conveyance' from which pollutants 'are' discharged, but also 'any discernible, confined and discrete conveyance' from which pollutants '*may be*' discharged." *Id*., quoting 33 USC 1362(14) (emphasis in original). The *Waterkeeper* court noted that "while point sources are statutorily defined to include potential dischargers, effluent limitations can, pursuant to 33 U.S.C. § 1311(e), be applied only to 'point sources of *discharge of pollutants*,' i.e. those point sources that are *actually* discharging." *Waterkeeper*, 399 F3d at 505 (emphasis in original).

In the end, the *Waterkeeper* court determined that the challenged provisions of the 2003 Federal CAFO Rule exceeded the scope of the EPA's statutory rulemaking authority as conferred by the CWA. The court ruled that even though the plaintiffs had the *potential* to discharge, the EPA lacked authority to require them

to seek and obtain an NPDES permit because they were not *actually* discharging pollutants into the navigable waters. *Id*. at 505-506. The *Waterkeeper* court therefore struck down the challenged provisions of the 2003 Federal CAFO Rule that required all CAFOs to either (1) seek and obtain an NPDES permit (irrespective of whether they actually discharge pollutants) or (2) demonstrate that they have no potential to discharge.[5]

E. PROCEEDINGS IN THE NEWAYGO CIRCUIT COURT

On October 22, 2007, plaintiffs commenced the present action by filing a complaint for declaratory relief in the Newaygo Circuit Court. Relying in part on the *Waterkeeper* decision, plaintiffs alleged that Mich Admin Code, R 323.2196 (Rule 2196) violated the language of the CWA. Plaintiffs suggested that the federal and Michigan NPDES programs were intended to be coextensive and that the DEQ's authority to promulgate rules requiring CAFOs to obtain NPDES permits was therefore naturally constrained by the language of the CWA itself. Plaintiffs also alleged that Rule 2196 exceeded the scope of the DEQ's statutory rulemaking authority under Part 31 of the NREPA. Plaintiffs pointed out that, like the 2003 Federal CAFO Rule partially struck down in *Waterkeeper*, Rule 2196 purported to require all CAFOs to either (1) seek and obtain an NPDES permit (irrespective of whether they actually discharge pollutants), or (2) demonstrate that they have no potential to discharge. Relying on the rationale of *Waterkeeper*, plaintiffs alleged that the

[5] In the wake of the *Waterkeeper* decision, the EPA has made certain changes to the federal CAFO regulations. See Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision, 73 Fed Reg 70418 (November 20, 2008).

DEQ was without authority to promulgate any regulation requiring them to seek and obtain NPDES permits because they did not actually discharge any pollutants into the waters of Michigan. Plaintiffs asserted that, like the CWA, Part 31 of the NREPA authorizes administrative rulemaking with regard to *actual discharges only*. Lastly, plaintiffs alleged that by promulgating Rule 2196, the DEQ had violated the intent of the Legislature as expressed through § 229(a) of SB 1086, which ultimately became 2006 PA 343.[6] Among other things, plaintiffs requested that the circuit court (1) declare that the DEQ exceeded its statutory rulemaking authority by promulgating Rule 2196, (2) declare that Rule 2196 was arbitrary and capricious, (3) declare that Rule 2196 violated the intent of the Legislature to the extent that it purported to regulate CAFOs that did not actually discharge pollutants, (4) vacate Rule 2196, and (5) enjoin the DEQ from promulgating similar rules in the future.

On December 26, 2007, in lieu of filing an answer, the DEQ moved for summary disposition pursuant to MCR 2.116(C)(4) on the ground that the circuit court lacked jurisdiction over the present suit because plaintiffs had failed to exhaust certain requirements set forth in Michigan's Administrative Procedures Act (APA), MCL 24.201 *et seq*. The DEQ pointed out that, prior to filing the present declaratory judgment action in circuit court, plaintiffs had formally requested from the DEQ a declaratory ruling pursuant to § 63 of the APA, MCL 24.263. Specifically, plaintiffs had requested "a ruling declaring

[6] The language of § 229(a) of SB 1086 provided in pertinent part that the DEQ "shall not implement or enforce administrative rules, policies, guidelines, or procedures that . . . [r]equire a farm to obtain a [NPDES] permit under part 31 of the [NREPA] . . . if the farm has not been found by the [DEQ] to have a regulated discharge of pollutants into waters of this state."

that . . . [Rule 2196], which requires . . . [CAFOs] in the state of Michigan to apply for and obtain . . . [NPDES] permits, is not applicable to CAFOs that have not had and do not propose to have an actual discharge of pollutants . . . ." On August 24, 2007, the DEQ granted plaintiffs' request and issued a ruling in which it declared that "large CAFOs must apply for and obtain coverage under Michigan's NPDES permitting system unless the DEQ makes a determination that the CAFO has sufficiently demonstrated '[n]o [p]otential to [d]ischarge' pursuant to [Rule 2196]."

In its motion for summary disposition, the DEQ contended that rather than commencing the instant declaratory judgment action in circuit court, § 63 of the APA, MCL 24.263, had required plaintiffs to seek judicial review of the DEQ's declaratory ruling pursuant to Chapter 6 of the APA, MCL 24.301 *et seq*., which governs judicial review in contested cases. See MCL 24.263 (providing that "[a] declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case"). However, relying in part on *Michigan Ass'n of Home Builders v Dep't of Labor & Economic Growth Dir*, 276 Mich App 467, 480-481; 741 NW2d 531 (2007), vacated in part on other grounds 481 Mich 496 (2008), the circuit court determined that plaintiffs' request to the DEQ had, in reality, been a challenge to the *validity* of Rule 2196 rather than a request for a ruling on the *applicability* of Rule 2196 to "an actual state of facts" within the meaning of MCL 24.263. The court noted that, in responding to plaintiffs' request, the DEQ had not considered the rule's applicability to any given set of facts, but had merely reiterated what the plain language of Rule 2196 already clearly required—namely, that all large CAFOs must either seek and obtain an NPDES permit or satisfactorily demonstrate that they

have no potential to discharge. The court observed that plaintiffs' request for a declaratory ruling had raised "merely . . . a question of law" with "no need for factual development," and noted that although MCL 24.263 would have authorized the DEQ to issue a declaratory ruling concerning the *applicability* of Rule 2196 to a particular set of facts, there was no statutory authority permitting the DEQ to make rulings or pronouncements concerning the "substantive validity" of its own rule. Instead, the court concluded that the proper mechanism for challenging the substantive validity of Rule 2196 was an action for declaratory relief in the circuit court. Accordingly, the circuit court denied the DEQ's motion for summary disposition and allowed the instant declaratory judgment action to go forward.[7]

On October 3, 2008, plaintiffs moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that

[7] We perceive no error in the circuit court's ruling on this matter. As the circuit court properly concluded, plaintiffs did not truly request "a declaratory ruling as to the applicability to an actual state of facts of a . . . rule . . . of the agency" within the meaning of MCL 24.263. Instead, and more accurately, what plaintiffs actually requested was a simple declaration that Rule 2196 was invalid. As Dean LeDuc has explained in his treatise on Michigan administrative law, MCL 24.263 "empowers an agency to issue a declaratory ruling only as to the *applicability* of a rule, not as to its *validity*." LeDuc, Michigan Administrative Law (2001), § 8:13, p 576 (emphasis added). "The reason for this is obvious, an agency is unlikely to find its own rules invalid and those rules are presumed to be valid anyway. Courts will ultimately determine the validity of a rule." *Id*. Because plaintiffs sought to challenge the *validity* of Rule 2196 rather than its *applicability* to a particular state of facts, they were not required to ask the DEQ for a declaratory ruling under MCL 24.263 in the first instance, and were instead entitled to directly commence this declaratory judgment action in the circuit court pursuant to MCL 24.264. Nor did the exhaustion requirement of MCL 24.264 apply to plaintiffs given that they sought to challenge the validity of Rule 2196 rather than its applicability. See LeDuc, § 8:13, p 577. "The exhaustion requirement of [MCL 24.264] (requiring resort first to the submission of a [request for a] declaratory ruling) applies only when a plaintiff wishes to challenge the applicability of a rule to an actual state of facts." *Id*.

it was beyond genuine factual dispute that Rule 2196 was an invalid regulation and that they were entitled to judgment as a matter of law. In particular, plaintiffs argued that the DEQ's promulgation of Rule 2196 violated the language of the CWA, as interpreted in the *Waterkeeper* decision, and that it exceeded the scope of the DEQ's statutory rulemaking authority under Part 31 of the NREPA. Plaintiffs also argued that Rule 2196 was arbitrary, capricious, and inconsistent with the intent of the Legislature.

The DEQ opposed plaintiffs' motion and sought summary disposition in its favor pursuant to MCR 2.116(I)(2). The DEQ argued that the reasoning of the *Waterkeeper* decision was inapplicable to the present controversy and that the validity of Rule 2196 was purely a matter of state law. The DEQ claimed that it had full authority to promulgate Rule 2196 pursuant to §§ 3103 and 3106 of the NREPA, MCL 324.3103 and MCL 324.3106, and that these sections authorized it "to establish permit requirements that are more stringent and have greater specificity than [the] federal regulations." The DEQ also argued that Rule 2196 was neither arbitrary nor capricious, and that it fell squarely within the subject matter of Part 31 of the NREPA. Lastly, the DEQ pointed out that § 229(a) of SB 1086, which plaintiffs had referred to in support of their motion for summary disposition, was vetoed by Governor Granholm on August 15, 2006, and therefore never became part of 2006 PA 343, the DEQ appropriations act for fiscal year 2007.

The circuit court held oral argument on November 24, 2008. Plaintiffs' counsel pointed out that his clients were not currently discharging pollutants and had no present plans to discharge pollutants, and therefore argued that the DEQ was without authority to require

them to seek and obtain an NPDES permit. He explained his position by way of an analogy, remarking that the DEQ's application of Rule 2196 to his clients was "something akin to the Secretary of State asking all potential drivers to get a driver's license even if they are not going to use one." Counsel argued that neither the CWA nor the NREPA authorized the DEQ to promulgate Rule 2196. Although plaintiffs' counsel seemed to acknowledge that §§ 3103 and 3106 of the NREPA confer broad rulemaking authority on the DEQ, he argued that the language of § 3103, like the relevant language of the CWA at issue in *Waterkeeper*, "doesn't talk about potential or hypothetical . . . [discharges], it talks about actual [discharges]; it uses an active voice." He also argued that even though § 3106 specifically grants the DEQ authority to regulate municipal, industrial, and commercial discharges, it does not mention "agricultural" discharges. Thus, he contended that under the doctrine *expressio unius est exclusio alterius*, § 3106 does not authorize the DEQ to regulate "agricultural" discharges.

Counsel for the DEQ asserted that because the EPA had granted Michigan authority to administer its own NPDES program, the validity of the Michigan CAFO regulations was to be assessed solely according to Michigan law—not federal law. For this reason, counsel contended that "the *Waterkeeper* decision is really irrelevant in this matter." Counsel argued that the NREPA's grant of rulemaking authority to the DEQ was "broad enough" to encompass Rule 2196, even if the language of the CWA examined in the *Waterkeeper* decision did not grant the EPA similarly broad powers. Counsel for the DEQ also argued that both § 3103 and § 3106 of the NREPA provided "a solid legal foundation for [Rule 2196]" and that "Rule 2196 complies with . . . NREPA's underlying legislative purposes." With respect to plaintiffs' contention

that § 3106 does not allow the DEQ to regulate "agricultural" discharges because it mentions only municipal, industrial, and commercial discharges, counsel for the DEQ argued that CAFOs are clearly "commercial" operations and that the term "commercial" in § 3106 is expansive enough to encompass large-scale, for-profit agricultural activities such as those carried on by plaintiffs. Lastly, counsel argued that Rule 2196 was not arbitrary and capricious and that it was amply supported by the existing administrative record. He cited several studies, documents, and findings contained in the administrative record to demonstrate the serious environmental effects of CAFO discharges into the waters of this state. The circuit court took the matter under advisement.

On January 20, 2009, the circuit court issued a thoughtful and detailed opinion denying plaintiffs' motion for summary disposition and granting summary disposition in favor of the DEQ. Judge Anthony A. Monton reasoned in pertinent part:

> The plaintiffs advance three arguments to support their claim that Rule 2196 is invalid: (1) the rule violates federal law, because it is contrary to the Clean Water Act and regulations promulgated by the EPA; (2) the rule violates state law, because it exceeds the scope of its enabling act which is Part 31 of the Natural Resources Environmental Protection Act; and (3) the rule is arbitrary and capricious.
>
> As previously discussed, Michigan created its own NPDES program using state law, NREPA, for its authority. Federal law clearly contemplates that states may run their own programs, provided the regulations are at least as stringent as the federal program. 40 CFR Sec. 123.25.
>
> The Waterkeeper decision held that the federal enabling act, the Clean Water Act, was not broad enough to regulate potential discharges of animal waste. The effect of this decision would prohibit regulating potential discharges in

states where the EPA enforces the NPDES program and in states running their own programs under state enabling statutes that contain the same limitations as the Clean Water Act.

Michigan runs its own program under an enabling statute that is clearly more expansive than the federal Clean Water Act. For example, the scope of the Clean Water Act is limited to discharges into navigable waters in contrast to the broader scope of Michigan law, which includes discharges into all surface and underground waters. MCL [3]24.3103(1). This distinction, by itself, does not give the DEQ authority to regulate potential discharges, but it does serve to give it authority to regulate discharges that would not be covered by the Clean Water Act.

The fact that the DEQ adopted portions of federal regulations struck down by the Waterkeeper decision does not necessarily mean that the corresponding state regulation is invalid. Michigan used its own enabling statute and followed its own Administrative Procedures Act to [promulgate] Rule 2196, which took almost two years to complete. The EPA approved Rule 2196, and this approval represents its determination that the rule does not violate the federal Clean Water Act. Jurisdiction to challenge this determination is vested exclusively with the United States Court of Appeals under 33 USC 1369(b), and no such challenge has been filed. As a result, the real question in this case involves whether or not Rule 2196 complies with Michigan law.

The plaintiffs argue that Rule 2196 does indeed violate state law. The parties agree that this regulation must pass a three-part test to be valid: (1) the rule must be within the subject matter of its enabling statute; (2) the rule must comply with the legislative intent underlying the enabling statute; and (3) the rule must not be arbitrary and capricious. Dy[k]stra v DNR, 198 Mich App 482, 484 [499 NW2d 367] (1993). The parties also agree that NREPA is the applicable enabling act for Rule 2196 and that the rule fulfills the first prong of the three-part test. The parties disagree about whether the rule is consistent with NREPA's legislative intent and whether it is arbitrary and capricious.

[S]ections 3103 and 3106 of NREPA provide the authority to adopt Rule 2196[.]

* * *

Section 3103 of NREPA plainly and broadly gives the DEQ the authority to pass regulations designed to protect the water resources of Michigan from waste disposal, and this term is fairly interpreted to include the process of collecting, storing, and removing waste from a CAFO. See MCL 691.1416(j). There is no real dispute that CAFOs generate a large amount of waste, and the improper disposal of the waste can pollute Michigan's waters. The language of these sections clearly contemplate[s] that, in appropriate circumstances, the DEQ may assert its regulatory authority before there is an actual discharge of waste into the waters.

The plaintiffs note that the legislature, in sections 3109 and 3112 of NREPA, requires a permit when someone actually discharges waste or an oceangoing vessel actually discharges ballast waters into Michigan's waters. They argue that these provisions of NREPA suggest that DEQ's authority to require a permit starts only if there has been an actual discharge of waste. I disagree. Regulatory enabling statutes establish the general boundaries within which an administrative agency may act, and, in this case, sections 3103 and 3106 set these boundaries. The fact that the legislature may prescribe specific things that the agency must do within these boundaries does not negate the broad grant of authority.

The plaintiffs argue that a budget bill for the 2007 fiscal year (2006 P.A. 343) demonstrates . . . the legislative intent that only actual discharges from CAFOs should be regulated. This funding bill purported to prohibit the DEQ from expending funds to implement a program requiring CAFOs to obtain a NPDES permit, unless they are actually discharging pollutants into the water. In Governor Granholm's veto message, she correctly noted that this portion of the legislation was invalid, because it attempted to amend another statute by reference. The legislature is certainly free to modify NREPA

to limit its broad grant of authority to the DEQ, but, a budget bill for the 2007 fiscal year does not accomplish this result. It was noted by the DEQ that the legislature did not impose a similar restriction on the expenditure of funds for the 2008 fiscal year.

Lastly, the plaintiffs contend that Regulation 2196 is invalid, because it is arbitrary and capricious. In Dykstra, the Court of Appeals expressed the principle that a rule is neither arbitrary [n]or capricious if it is rationally related to the purpose of the statute. Id., 491. For this prong of the three-part test, great deference must be given to the judgment of the administrative agency, and any doubts about meeting this part of the test must be resolved in favor [of] the agency. Id.

The practical effect of Rule 2196 is to expand the DEQ's regulations from CAFOs that make actual discharges, to all CAFOs, except those that are able to demonstrate no potential to discharge. To satisfy the third prong of the test, the DEQ must provide evidence in its administrative record to support its finding that the expanded rule is reasonably related to protecting water resources from pollution.

The plaintiffs claim that the DEQ's sole basis for adopting Rule 2196 was to comply with the [2003 Federal CAFO Rule] so that Michigan could maintain its NPDES program. The Waterkeeper decision invalidated the EPA's version of this rule; thus, the plaintiffs claim that the record is devoid of any rationale [sic] basis to support it. This argument requires that the administrative record supporting the rule be evaluated.

During the process of adopting rule 2196, the DEQ submitted a regulatory impact statement which supported its claim that the expanded rule was needed to protect the environment. It noted that previously, 30 CAFOs in Michigan had illegal discharges of animal waste into Michigan's water resources. The number of these discharges, by itself, was reason for the DEQ to examine whether the old rule was adequately protecting the environment. The DEQ also noted that illegal discharges of animal waste adds [sic] disease-

causing organisms such as E Coli to the water and that such waste causes the depletion of dissolved oxygen in water which can be fatal to aquatic life.

Additionally, the DEQ cited the studies and findings relied on by the EPA to expand the scope of its regulation to include potential discharges. Federal Register, Vol. 68, No. 29 (February 12, 2003), pp. 7234-7250. In these findings, the EPA explained the characteristics of animal waste which cause water pollution; it described how animal waste from CAFOs can makes [sic] its way into water resources; it revealed its statistics regarding the number of previous illegal discharges from CAFOs; and it did a cost/benefit analysis to support its claim that an expanded rule was necessary.

The EPA described several characteristics of animal waste that can adversely affect water quality: (1) it contains nitrogen and phosphorous which can cause eutrophication (excessive plant growth and decay) of water, leading to the depletion of oxygen and resultant reduction in water quality and aquatic life, which has been documented as a leading stressor in the Great Lakes; (2) the nitrogen from animal waste contains nitrates which can contaminate drinking water supplies; and (3) animal waste contains pathogens which are disease-causing organisms, and more that 150 pathogens found in such waste pose a risk to humans.

The EPA noted that land application of the waste (spreading manure on the ground or injecting it into the soil) is not the only method by which CAFOs have polluted water. It found that the improper storage of animal waste can result in spills onto the land, or leaks from storage areas can result in waste entering the underground and surface water.

In support of the need to expand the scope of regulations over CAFOs, the EPA stated the following:

. . . "A literature survey conducted for the proposed rule identified more than 150 reports or discharges to surface waters from hog, poultry, dairy, and cattle operations. Over 30 separate incidents of discharges from swine operations

> between the years 1992 and 1997 in Iowa alone were reported by the State's Department of Natural Resources. The incidents resulted in fish kills ranging from about 500 to more than 500,000 fish killed per event. Fish kills or environmental impacts have also been reported by agencies in other States, including Nebraska, Maryland, Ohio, Michigan and North Carolina."
>
> Id., 7237. The studies and findings referenced by the EPA provide additional support to the DEQ's contention that there is a rational basis to regulate potential discharges from CAFOs.
>
> The plaintiffs correctly claim that certain CAFOs pose no risk to pollute water resources, and they should not be ensnared into a costly, complex regulatory scheme to address an environmental risk that does not exist. Rule 2196 reasonably deals with this fact by providing a method for CAFOs to be exempted from the permit requirement i[f] they pose no potential to discharge, and the DEQ states that two of the plaintiffs in this case have already received the benefit of this exemption.
>
> In sum, I make the following rulings: (1) DEQ's Rule 2196 does not violate the federal Clea[n] Water Act; (2) the enabling act for this rule, Part 31 of NREPA, provides the DEQ the legal authority to regulate potential discharges of animal waste from CAFOs; and (3) the rule is rationally related to the DEQ's responsibility under NREPA to protect Michigan's water resources from pollution. I grant summary disposition in favor of the DEQ.

II. STANDARDS OF REVIEW

We review de novo the circuit court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). The scope of an administrative agency's statutory rulemaking authority and whether an agency has exceeded that authority are questions of law that we review de novo. *Consumers Power Co v Pub Serv Comm*, 460 Mich 148, 157; 596 NW2d 126 (1999); *In re Com-*

plaint of Pelland Against Ameritech Mich, 254 Mich App 675, 682; 658 NW2d 849 (2003). Whether an administrative rule is arbitrary and capricious is a question of law, as is the question whether a rule comports with the intent of the Legislature. See *Chesapeake & Ohio R Co v Pub Serv Comm*, 59 Mich App 88, 99; 228 NW2d 843 (1975); see also *Blank v Dep't of Corrections*, 222 Mich App 385, 407-408; 564 NW2d 130 (1997). Statutory interpretation is a question of law that we review de novo on appeal. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 102; 754 NW2d 259 (2008).

III. DISCUSSION

Plaintiffs argue that the circuit court erred by denying their motion for summary disposition and by granting summary disposition in favor of the DEQ. Specifically, plaintiffs assert that Rule 2196 exceeds the scope of the DEQ's statutory rulemaking authority under the NREPA, that Rule 2196 is inconsistent with the intent of the Legislature, and that Rule 2196 is arbitrary and capricious. We disagree with plaintiffs in all respects.

A. GENERAL PRINCIPLES

In Michigan, the rulemaking authority of a state administrative agency "derives from powers that the Michigan Legislature has granted." *Wolverine Power Supply Coop, Inc v Dep't of Environmental Quality*, 285 Mich App 548, 557; 777 NW2d 1 (2009). "It is firmly established that the [L]egislature may authorize the adoption by an administrative agency, charged with the administration of a particular enactment, of rules and regulations designed to effectuate the purposes of the enactment." *Sterling Secret Service, Inc v Dep't of State Police*, 20 Mich App 502, 513; 174 NW2d 298 (1969). At

the same time, however, it is well settled that "[a] statute that grants power to an administrative agency must be strictly construed and the administrative authority drawn from such statute must be granted plainly, because doubtful power does not exist." *In re Procedure & Format for Filing Tariffs Under the Mich Telecom Act*, 210 Mich App 533, 539; 534 NW2d 194 (1995).

To be enforceable, administrative rules must be constitutionally valid, procedurally valid, and substantively valid.[8] LeDuc, Michigan Administrative Law (2001), § 4:30, p 214. To determine the substantive validity of an administrative rule, Michigan courts employ a three-part test: (1) whether the rule is within the subject matter of the enabling statute, (2) whether it complies with the legislative intent underlying the enabling statute, and (3) whether it is arbitrary or capricious. *Luttrell v Dep't of Corrections*, 421 Mich 93, 100; 365 NW2d 74 (1984); see also *Ins Institute of Mich v Comm'r of Fin & Ins Servs*, 486 Mich 370, 385; 785 NW2d 67 (2010). Administrative rules "are valid so long as they are not unreasonable; and, if doubt exists as to their invalidity, they must be upheld." *Sterling Secret Service*, 20 Mich App at 514; see also *Toole v State Bd of Dentistry*, 306 Mich 527, 533-534; 11 NW2d 229 (1943).

The construction of a statute by a state administrative agency charged with administering it " 'is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons.' " *In re Complaint of Rovas*, 482 Mich at 103, quoting *Boyer-Campbell Co v Fry*, 271 Mich 282, 296; 260 NW 165

[8] Administrative rules are presumed to be constitutional. *Toole v State Bd of Dentistry*, 306 Mich 527, 533; 11 NW2d 229 (1943). Plaintiffs do not argue that Rule 2196 is constitutionally or procedurally invalid. Instead, plaintiffs argue only that Rule 2196 is substantively invalid.

(1935). Even so, " '[r]espectful consideration' is not equivalent to any normative understanding of 'deference' as the latter term is commonly used . . . ." *In re Complaint of Rovas*, 482 Mich at 108. Indeed, an administrative agency's interpretation "is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue." *Id*. at 103; see also *Ins Institute of Mich*, 486 Mich at 385. Thus, even a longstanding administrative interpretation cannot overcome the plain language of a statute. *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 173; 744 NW2d 184 (2007). The Michigan courts have never adopted the *Chevron*[9] deference doctrine, which is followed by the federal courts.[10] *In re Complaint of Rovas*, 482 Mich at 111; see also *Kinder Morgan*, 277 Mich App at 172.

B. INAPPLICABILITY OF FEDERAL LAW

On appeal, plaintiffs appear to have abandoned their argument that Rule 2196 is violative of the CWA. However, lest there be any lingering confusion on the subject, we wish to make clear that the scope of the DEQ's statutory authority to promulgate administrative rules concerning NPDES permitting in Michigan is purely a matter of state law. As explained earlier, the EPA granted Michigan the authority to administer its own NPDES program in 1973. Once the EPA has

[9] *Chevron, USA, Inc v Natural Resources Defense Council, Inc*, 467 US 837; 104 S Ct 2778; 81 L Ed 2d 694 (1984).

[10] Under *Chevron*, the federal courts will defer to an administrative agency's interpretation of a statute that it is charged with administering—even if that interpretation differs from what the courts believe to be the best interpretation—so long as the particular statute is ambiguous on the point at issue and the agency's construction is reasonable. *Chevron*, 467 US at 843-844; see also *Nat'l Cable & Telecom Ass'n v Brand X Internet Servs*, 545 US 967, 980; 125 S Ct 2688; 162 L Ed 2d 820 (2005).

approved a state's request to administer its own NPDES program, that state's NPDES program is administered pursuant to state law rather than federal law. *Ringbolt Farms*, 714 F Supp at 1253; see also *Sierra Club*, 277 Mich App at 556 (ZAHRA, J., dissenting). The DEQ's administration of Michigan's NPDES permitting system is governed by and carried out pursuant to Part 31 of the NREPA. *Sierra Club*, 277 Mich App at 535-536. We reiterate that although a state's discharge standards and effluent limitations may not be less stringent than the federal standards and limitations, 33 USC 1370, a state that administers its own NPDES program may adopt discharge standards and effluent limitations that are more stringent than the federal standards and limitations, 40 CFR 123.1(i)(1); *West Virginia Highlands*, 625 F3d at 162.

C. WHETHER RULE 2196 IS WITHIN THE SUBJECT MATTER OF THE NREPA

In order to determine whether the DEQ exceeded its statutory rulemaking authority in this case, we must begin with the first prong of the *Luttrell* test. This requires us to ask whether Rule 2196 falls within the subject matter of the NREPA, see *Luttrell*, 421 Mich at 100, and is essentially a question of statutory construction, see *Wolverine Power*, 285 Mich App at 557-558.

Our primary goal when interpreting a statute is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). " '[T]he Legislature's intent must be gathered from the language used, and the language must be given its ordinary meaning.' " *Id*. (citation omitted). 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), and clear statutory language must be enforced as written, *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007). We presume that every word of a statute has some meaning and must avoid any interpretation that would render any part of a statute surplusage or nugatory. *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561, 574; 592 NW2d 360 (1999). As far as possible, effect should be given to every sentence, phrase, clause, and word. *Pohutski v Allen Park*, 465 Mich 675, 683-684; 641 NW2d 219 (2002).

Under Part 31 of the NREPA the DEQ has broad powers to regulate the discharge of pollutants into the waters of the state, to set standards concerning water pollution, to issue permits regarding the discharge or potential discharge of pollutants into Michigan's waters, and to compel compliance with those permits. See MCL 324.3103(1); MCL 324.3106; MCL 324.3112(1). In order to allow the DEQ to effectively perform its duties with regard to the control of water pollution under Part 31, the Legislature has expressly conferred various rulemaking powers upon the DEQ. See, e.g., MCL 324.3103(2); MCL 324.3103(3); MCL 324.3106; MCL 324.3107; MCL 324.3111; MCL 324.3112(6); MCL 324.3131(1). While many of the rulemaking powers conferred by Part 31 of the NREPA plainly do not apply in this case, the DEQ contends that it was authorized to promulgate Rule 2196 pursuant to the rulemaking authority set forth in §§ 3103 and 3106. The circuit court concurred with the DEQ, ruling that "sections 3103 and 3106 of NREPA provide the authority to adopt Rule 2196[.]" We agree that the DEQ had authority to promulgate Rule 2196 under the rulemaking provision of § 3103(2), but conclude that the DEQ lacked authority to do so under the rulemaking provision of § 3106.

There are two separate rulemaking provisions set forth in § 3103. Those provisions state in pertinent part:

> (2) The [DEQ] shall enforce this part and may promulgate rules as it considers necessary to carry out its duties under this part. . . .
>
> (3) The [DEQ] may promulgate rules and take other actions as may be necessary to comply with the federal water pollution control act . . . and to expend funds available under such law for extension or improvement of the state or interstate program for prevention and control of water pollution. [MCL 324.3103(2) and (3).]

Section 3103(2) contains a broad and general grant of rulemaking authority, authorizing the DEQ to promulgate any rules "as it considers necessary to carry out its duties under this part."[11] MCL 324.3103(2). The term "this part" in § 3103(2) clearly means Part 31 of the NREPA, which confers several "duties" upon the DEQ. In particular, the Legislature has given the DEQ the duty to "protect and conserve the water resources of the state" and to "control . . . the pollution of surface or underground waters of the state and the Great Lakes, which are or may be affected by waste disposal of any person." MCL 324.3103(1). The Legislature has also charged the DEQ with the duty to "establish pollution standards for lakes, rivers, streams, and other waters of

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[11] In contrast, the rulemaking authority conferred by § 3103(3) is much more limited, granting the DEQ power to promulgate rules "necessary to comply with the [CWA] . . . ." MCL 324.3103(3). Although the challenged provisions of Rule 2196 parallel similar provisions that were contained in the 2003 Federal CAFO Rule as originally promulgated, the United States Court of Appeals for the Second Circuit has struck down these provisions as inconsistent with the language of the CWA. *Waterkeeper*, 399 F3d at 506. In light of the *Waterkeeper* decision, it cannot be said that Rule 2196 is "necessary to comply with the [CWA]" within the meaning of § 3103(3). We therefore conclude that the rulemaking authority conferred by § 3103(3) is inapplicable in this case.

the state in relation to the public use to which they are or may be put, as it considers necessary," to "issue permits that will assure compliance with state standards to regulate municipal, industrial, and commercial discharges or storage of any substance that may affect the quality of the waters of the state," to "set permit restrictions that will assure compliance with applicable federal law and regulations," and to "take all appropriate steps to prevent any pollution the [DEQ] considers to be unreasonable and against public interest in view of the existing conditions in any lake, river, stream, or other waters of the state." MCL 324.3106. Under the plain language of § 3103(2), the DEQ has authority to promulgate rules that it considers necessary to carry out any of these enumerated duties. MCL 324.3103(2). It is well settled that "an administrative agency may make such rules and regulations as are necessary for the efficient exercise of its powers expressly granted . . . ." *York v Detroit* (*After Remand*), 438 Mich 744, 767; 475 NW2d 346 (1991).

Accordingly, the question becomes whether the subject matter of Rule 2196 is encompassed by, or falls within, any of the abovementioned statutory duties. We answer this question in the affirmative. Unlike the EPA, which is limited by the plain language of the CWA to regulating the "discharge of pollutants" or the "discharge of any pollutant," see 33 USC 1311(e); 33 USC 1342(a)(1); *Waterkeeper*, 399 F3d at 504-505, the DEQ has much broader duties and powers with respect to the regulation of water pollution under Part 31 of the NREPA. For instance, as explained earlier, the DEQ has the duty to "protect and conserve the water resources of the state," MCL 324.3103(1), and to "take all appropriate steps to prevent any pollution the [DEQ] considers to be unreasonable and against public interest in view of the existing conditions in any . . . waters of the

state,"[12] MCL 324.3106. Unlike the provisions of the CWA examined in *Waterkeeper*, these statutory duties do not speak of "discharges" at all; nor do they implicate only present or actual pollution. Indeed, the duty to "take all appropriate steps to *prevent* any pollution the [DEQ] considers to be unreasonable and against public interest," *id*. (emphasis added), clearly grants the DEQ authority to forestall potential pollution *even before* any discharge of pollutants ever occurs. The primary definition of the verb "prevent" is "to keep from occurring[.]" *Random House Webster's College Dictionary* (1997). As more fully explained in the dictionary, "[t]o PREVENT is to stop something effectually *by forestalling action and rendering it impossible*[.]" *Id*. (emphasis added). These definitions confirm that § 3106 confers upon the DEQ the responsibility of forestalling and rendering impossible any water pollution that it considers to be unreasonable and against the public interest, even before such pollution ever occurs. We consequently reject plaintiffs' argument that "section 3106 speaks only to actual discharges."

It is well established that an agency may exercise some discretion concerning the rules that it promulgates, as long as the ultimate rules are consistent with the legislative scheme. See *Bunce v Secretary of State*, 239 Mich App 204, 217; 607 NW2d 372 (1999); see also *Argo Oil Corp v Atwood*, 274 Mich 47, 52; 264 NW 285 (1935). Here, the DEQ has chosen to carry out its duties under Part 31 of the NREPA by requiring all CAFOs to either (1) seek and obtain an NPDES permit (irrespective of whether they actually discharge pollutants) or (2) satisfactorily demonstrate that they have no potential to discharge. Rule 2196 furthers the DEQ's statu-

[12] The term "[w]aters of the state" includes groundwater and all other watercourses and waters within the state of Michigan. MCL 324.3101(z).

tory duty to "prevent any pollution the [DEQ] considers to be unreasonable and against public interest," MCL 324.3106, by *preventing* all CAFO discharges before they occur, except as otherwise allowed under the terms of an NPDES permit. Moreover, as the circuit court correctly noted, Rule 2196 applies only to CAFOs that have a real potential to discharge pollutants, providing a complete exemption for CAFOs which establish that they truly pose "no potential to discharge." Rule 2196(1)(b). In sum, because Part 31 of the NREPA confers upon the DEQ the duty to "prevent any pollution" of the state's waters, MCL 324.3106, the DEQ had the statutory authority to promulgate Rule 2196 under the rulemaking provision of § 3103(2).

In contrast, the rulemaking provision of § 3106 is plainly inapplicable to the present controversy. That provision grants the DEQ authority to promulgate rules "restricting the *polluting content* of any waste material or polluting substance discharged or sought to be discharged . . . ." MCL 324.3106 (emphasis added). In other words, it grants the DEQ power to promulgate rules concerning the actual *content* or *composition* of waste and other polluting substances that are discharged into Michigan's waters. Purely by way of example, the rulemaking provision of § 3106 would authorize the DEQ to promulgate rules setting the maximum amount of mercury that could be contained in any waste effluent or the maximum number of harmful bacteria that could be contained in every gallon of discharged waste. However, the provision simply does not contain any language authorizing the DEQ to promulgate rules concerning the types of point-source dischargers (CAFOs, for example) that must seek and obtain NPDES permits. As explained earlier, "[a] statute that grants power to an administrative agency must be strictly construed and the administrative authority drawn from such statute must be granted plainly,

because doubtful power does not exist." *In re Procedure & Format for Filing Tariffs*, 210 Mich App at 539. An agency may not expand its rulemaking authority beyond that which the Legislature has delegated to it. *Jackson v Secretary of State*, 105 Mich App 132, 139; 306 NW2d 422 (1981).[13]

We conclude that Rule 2196 is within the scope of Part 31 of the NREPA and that the DEQ had authority, under § 3103(2), to promulgate Rule 2196 in furtherance of its statutory duty "to prevent any pollution" of the waters of the state. MCL 324.3106. We also conclude that, because the powers conferred upon the DEQ by Part 31 of the NREPA are broader than the powers conferred upon the EPA by the CWA, the reasoning of the *Waterkeeper* decision does not apply in this case. As the DEQ acknowledges in its brief on appeal, the effect of the *Waterkeeper* decision has been to "ma[ke] the Michigan CAFO Rule more stringent than the federal rule." But as noted earlier, Michigan is perfectly free to adopt NPDES permitting and discharge standards that are more stringent than the federal requirements. 40 CFR 123.1(i)(1); *West Virginia Highlands*, 625 F3d at 162.

D. WHETHER RULE 2196 COMPLIES WITH THE LEGISLATURE'S INTENT

We must next determine whether Rule 2196 comports with the legislative intent underlying Part 31 of

[13] Given our conclusion that the rulemaking provision of § 3106 does not apply in this case, we need not consider plaintiffs' argument that, under the doctrine *expressio unius est exclusio alterius*, § 3106 does not authorize the DEQ to regulate "agricultural" discharges. Moreover, in light of our conclusion that the DEQ was authorized to promulgate Rule 2196 under the rulemaking provision of § 3103(2), we need not determine whether the authority to promulgate Rule 2196 was "necessarily implied" or "reasonably required for the execution of the powers expressly delegated" by any other section of Part 31 of the NREPA. *Jackson*, 105 Mich App at 139; compare LeDuc, § 4:03, pp 151-152.

the NREPA. See *Luttrell*, 421 Mich at 100. We conclude that it does. Plaintiffs' primary argument in this regard is that the Legislature intended to limit the DEQ's rulemaking powers to the regulation of *actual* or *imminent* discharges of waste or pollutants. In support of their argument, plaintiffs cite MCL 324.3110 (requiring the certification of wastewater treatment facility operators for any "entity that discharges liquid wastes into any surface water or groundwater"), MCL 324.3111 (requiring an annual report from any person "who discharges to the waters of the state"), MCL 324.3113(1) (requiring a person who intends to make a new or increased discharge to file an application describing the "proposed point of discharge" and "the estimated amount to be discharged"), and MCL 324.3120(1) (setting forth fees that must accompany an application for a permit "authorizing a discharge into surface water"). Plaintiffs argue that "[n]one of these requirements apply [sic] to a person that 'might' discharge." Plaintiffs additionally contend that, with the possible exception of MCL 324.3112(6) (requiring "all ocean going vessels engaging in port operations" to seek and obtain a permit), there are no provisions of Part 31 of the NREPA that extend NPDES permit requirements to point sources which are *not* actively discharging but which merely have the *potential* to discharge. We concede that many of the statutory sections relied on by plaintiffs are phrased in terms of present discharges. But plaintiffs' arguments wholly disregard the Legislature's specific command that the DEQ "take all appropriate steps to *prevent* any pollution the department considers to be unreasonable and against public interest in view of the existing conditions in any . . . waters of the state." MCL 324.3106 (emphasis added). The Legislature has declared that "[a]ll words and phrases shall be construed and understood according to the

common and approved usage of the language[.]" MCL 8.3a. As we have already explained, the common and approved meaning of the verb "prevent" is "to keep from occurring," or "to stop something effectually by forestalling action and rendering it impossible." *Random House Webster's College Dictionary* (1997). Accordingly, and for the reasons already stated, § 3106 confers upon the DEQ broad powers to preempt or forestall the pollution of the waters of this state before any pollutants are ever discharged in the first instance.

Plaintiffs also argue that Rule 2196 violates the Legislature's intent as expressed in § 229(a) of SB 1086, which ultimately became 2006 PA 343. As passed by the Michigan House of Representatives and Michigan Senate, § 229(a) provided in pertinent part that the DEQ "shall not implement or enforce administrative rules, policies, guidelines, or procedures that . . . [r]equire a farm to obtain a [NPDES] permit under part 31 of the [NREPA] . . . if the farm has not been found by the [DEQ] to have a regulated discharge of pollutants into waters of this state." However, while Governor Granholm signed SB 1086, she exercised her line-item veto authority[14] with respect to the language contained in § 229(a), stating in her veto message to the Michigan Senate that "boilerplate section[] 229 . . . [is] legally unenforceable, as [it] attempt[s] to amend [the NREPA] by reference."[15] 2 Public & Local Acts of Michigan (Session of 2006), Vetoes, p 2472. Because Governor

[14] "The governor may disapprove any distinct item or items appropriating moneys in any appropriation bill. The part or parts approved shall become law, and the item or items disapproved shall be void unless re-passed according to the method prescribed for the passage of other bills over the executive veto." Const 1963, art 5, § 19.

[15] "No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length." Const 1963, art 4, § 25.

Granholm vetoed the language contained in § 229(a), and because that language was not "re-passed . . . over the executive veto," Const 1963, art 5, § 19, by two-thirds of the members elected to and serving in both houses of the Legislature, the language contained in § 229(a) never became law, Const 1963, art 4, § 33. Indeed, following the governor's veto "[t]he Legislature took no further action to carry out its earlier expressed intention[.]" *Oakland Schools Bd of Ed v Superintendent of Pub Instruction*, 392 Mich 613, 618; 221 NW2d 345 (1974).

Notwithstanding the fact that § 229(a) of SB 1086 never became part of the final DEQ appropriations act for fiscal year 2007, plaintiffs maintain that the language contained in § 229(a) was still indicative of the Legislature's intent to limit the DEQ's authority to require certain CAFOs to seek and obtain NPDES permits. However, the Michigan Constitution sets forth the sole means by which the Legislature's intent may be expressed: (1) three readings in each house, (2) enactment, and (3) gubernatorial approval or passage over the governor's veto. Const 1963, art 4, § 26; Const 1963, art 4, § 33; see also *Craig v Larson*, 432 Mich 346, 365; 439 NW2d 899 (1989) (LEVIN, J., concurring in part and dissenting in part). Because the language of § 229(a) was vetoed by the governor and was not reenacted over her veto, that language cannot be cited as evidence of the Legislature's intent.

All told, the Legislature has conferred upon the DEQ broad powers to regulate the pollution of Michigan's waters, MCL 324.3103(1); MCL 324.3106, and to promulgate any rules that it "considers necessary to carry out its duties" under Part 31 of the NREPA, MCL 324.3103(2). It cannot be gainsaid that most CAFOs, by virtue of their sheer size and number of animals,

accumulate great amounts of waste that must either be stored or ultimately discharged. While plaintiffs claim that they have no present plans to discharge pollutants into Michigan's waters, there is always a possibility that large CAFOs will be forced to discharge some or all of their animal waste and that these discharges may eventually find their way into the "waters of this state." MCL 324.3106. Likely aware of these possibilities, the Legislature not only empowered the DEQ to regulate actual or present discharges, but also charged the DEQ with the duty to "take all appropriate steps to *prevent* any pollution the [DEQ] considers to be unreasonable and against public interest in view of the existing conditions in any . . . waters of the state." *Id*. (emphasis added). In order to carry out this duty, the DEQ has found it necessary to require all CAFOs to either (1) seek and obtain an NPDES permit (irrespective of whether they actually discharge pollutants), or (2) demonstrate that they have no potential to discharge. Rule 2196. The circuit court did not err by concluding that Rule 2196 comports with the intent of the Legislature.

E. WHETHER RULE 2196 IS ARBITRARY AND CAPRICIOUS

The final question, then, is whether Rule 2196 is arbitrary and capricious. See *Luttrell*, 421 Mich at 100. "Arbitrary means fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances or significance, and capricious means apt to change suddenly, freakish or whimsical[.]" *Nolan v Dep't of Licensing & Regulation*, 151 Mich App 641, 652; 391 NW2d 424 (1986); see also *Bundo v City of Walled Lake*, 395 Mich 679, 703 n 17; 238 NW2d 154 (1976). In general, an agency's rules will be found to be arbitrary

only if the agency "had no reasonable ground for the exercise of judgment." *American Trucking Associations, Inc v United States*, 344 US 298, 314; 73 S Ct 307; 97 L Ed 337 (1953).

Plaintiffs argue that Rule 2196 is arbitrary and capricious for several reasons. First, plaintiffs contend that the DEQ arbitrarily modeled Rule 2196 on the 2003 Federal CAFO Rule, even after the DEQ knew or should have known that the *Waterkeeper* court had struck down the challenged federal regulation. Second, plaintiffs contend that Rule 2196 "violates common sense" because it is similar to a rule "requiring a 10 year old . . . to obtain a driver's license." Third, plaintiffs assert that the DEQ "flip-flopped on its earlier stated position" by promulgating Rule 2196 after the election of Governor Granholm. Lastly, plaintiffs argue that the DEQ acted arbitrarily by promulgating Rule 2196 without considering any "alternative options." We disagree in all respects.

It is true, by and large, that the DEQ modeled the language of Rule 2196 on the 2003 Federal CAFO Rule. It is also true that the DEQ went forward with the finalization of Rule 2196 even after the United States Court of Appeals for the Second Circuit had struck down the analogous provisions of the 2003 Federal CAFO Rule in *Waterkeeper*. But it does not necessarily follow that Rule 2196 is arbitrary and capricious. After the *Waterkeeper* decision, the DEQ determined that Rule 2196 was still necessary as a means to protect Michigan's waters from CAFO-originated pollution. Indeed, in its regulatory impact statement,[16] the DEQ had identified two different environmental studies to sup-

[16] Under the APA, an agency that proposes to promulgate a rule must complete and submit a "regulatory impact statement." MCL 24.245(3) and (4).

port its proposed promulgation of Rule 2196. The *Waterkeeper* decision did nothing to invalidate the findings of these studies or to otherwise undermine their reliability. Instead, the *Waterkeeper* decision was based entirely on the federal court's interpretation of the language of the CWA—language unlike that contained in Part 31 of the NREPA. The fact that the DEQ proceeded undeterred with its plans to promulgate Rule 2196 on the basis of the environmental studies cited in its previously published regulatory impact statement does not render the rule arbitrary or capricious. Again, we note that federal law allows Michigan to adopt discharge standards and effluent limitations that are more stringent than the federal NPDES standards and limitations. 40 CFR 123.1(i)(1).

We also reject plaintiffs' assertion that Rule 2196 is arbitrary and capricious because the DEQ promulgated it without considering any "alternative options." Contrary to plaintiffs' argument in their brief on appeal, the DEQ has not "repeatedly state[d]" that "the only reason for [Rule 2196] is the federal mandate[.]" As Judge Monton aptly observed in his detailed opinion, the DEQ carefully considered whether Rule 2196 was needed to deter ongoing illegal discharges of animal waste into the waters of this state. Given that numerous CAFOs without NPDES permits had already discharged waste into Michigan's waters, the DEQ concluded that it was reasonable and necessary to require all CAFOs to seek and obtain an NPDES permit or to satisfactorily demonstrate that they have no potential to discharge. We perceive no evidence that the DEQ failed to consider all of its available options.

Nor can we agree with plaintiffs' contention that Rule 2196 "violates common sense" because it is akin to a rule "requiring a 10 year old . . . to obtain a driver's

license." As explained earlier, CAFOs generate large amounts of animal waste and pose known risks to Michigan's water resources. Rule 2196 is rationally related to the Legislature's purpose to *prevent* the pollution of the waters of this state. See *Dykstra v Dep't of Natural Resources*, 198 Mich App 482, 491; 499 NW2d 367 (1993); *Binsfeld v Dep't of Natural Resources*, 173 Mich App 779, 787; 434 NW2d 245 (1988).

Finally, we fully acknowledge that counsel for the DEQ stated at oral argument before the circuit court that the promulgation of Rule 2196 was motivated, at least in part, by a change of administrations in Lansing. But Rule 2196 is not arbitrary and capricious merely because the DEQ changed its position with regard to CAFOs following the election of Governor Granholm. Administrative agencies such as the DEQ are part of the executive branch of state government. *In re Complaint of Rovas*, 482 Mich at 97. The executive power of the state is vested exclusively in the governor. Const 1963, art 5, § 1. The Framers of the Michigan Constitution desired to give the Governor "real control over the executive branch," *House Speaker v Governor*, 443 Mich 560, 562; 506 NW2d 190 (1993), including the power to appoint the heads of departments like the DEQ, Const 1963, art 5, § 3, and to supervise the affairs of each principal department, Const 1963, art 5, § 8. For our constitutional framework to operate as it was intended, each newly elected governor must possess the power and ability to manage the bureaucracy, to supervise the administrative agencies, and to influence those agencies' rulemaking decisions through his or her appointments and directives. It would be illogical, indeed, to conclude that an administrative rule is arbitrary and capricious merely because it differs from a prior rule that was promulgated under a previous administration.

On the facts before us, we simply cannot conclude that Rule 2196 is arbitrary or capricious. Rule 2196 is a regulation of general applicability that the DEQ intends to apply to all CAFOs of a certain size. Accordingly, it is not "apt to change suddenly, freakish or whimsical[.]" *Nolan*, 151 Mich App at 652. Nor is there any evidence that the DEQ was motivated by caprice, prejudice, or animus or that Rule 2196 was promulgated without reference to adequate principles or standards. See *id*. Instead, it strikes us that Rule 2196 was promulgated deliberatively, with reference to sufficient standards, and without improper motives. We recognize that plaintiffs are unhappy with Rule 2196, which will certainly impose new costs and requirements. But a rule is not arbitrary or capricious merely because it displeases the regulated parties. See *Binsfeld*, 173 Mich App at 786-787. Nor is a rule arbitrary or capricious simply because it causes some inconvenience or imposes new or additional requirements. See *Nolan*, 151 Mich App at 652. Although Rule 2196 may displease plaintiffs, we conclude that it is rationally related to the Legislature's purpose to prevent the pollution of the waters of this state and that it is therefore neither arbitrary nor capricious. *Dykstra*, 198 Mich App at 491.

F. SCOPE OF THE ADMINISTRATIVE RECORD

Lastly, plaintiffs suggest that the DEQ has improperly attempted to bolster Rule 2196 by citing certain justifications for the rule that are not contained in the administrative record. It is true, at least in the federal context, that an agency must typically defend its actions on the basis of justifications contained in the administrative record rather than post hoc rationalizations developed during litigation. See, e.g., *Securities & Exchange Comm v Chenery Corp*, 332 US 194, 196-197; 67

S Ct 1575; 91 L Ed 1995 (1947). However, this issue is not properly before us because it is not contained in plaintiffs' statement of the questions presented. MCR 7.212(C)(5); *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008); *McGoldrick v Holiday Amusements, Inc*, 242 Mich App 286, 298; 618 NW2d 98 (2000). We therefore decline to address it further.

IV. CONCLUSION

Rule 2196 does not exceed the scope of the DEQ's statutory rulemaking authority. The rule falls squarely within the scope of Part 31 of the NREPA, is consistent with the underlying legislative intent, and is not arbitrary or capricious. We conclude that the DEQ was fully authorized to require CAFOs to either (1) seek and obtain an NPDES permit (irrespective of whether they actually discharge pollutants) or (2) satisfactorily demonstrate that they have no potential to discharge. The circuit court properly denied plaintiffs' motion for summary disposition and granted summary disposition in favor of the DEQ.

In light of our conclusions in this case, we need not consider the remaining arguments raised by the parties on appeal.

Affirmed. No taxable costs pursuant to MCR 7.219, a public question having been involved.

HOEKSTRA, P.J., and BECKERING, J., concurred with JANSEN, J.

MICHIGAN PROPERTIES, LLC v MERIDIAN TOWNSHIP

Docket Nos. 289174, 289175, and 289176. Submitted June 9, 2010, at Lansing. Decided April 5, 2011, at 9:00 a.m. Amended, 292 Mich App 801. Reversed, 491 Mich 518.

Michigan Properties, LLC, filed a petition in the Tax Tribunal, appealing increases in the 2007 taxable value of several parcels of property that were based on transfers of the ownership of the parcels in 2004. Although petitioner had timely filed property transfer affidavits notifying Meridian Township of the transfers, the township failed to adjust the 2005 taxable value of the parcels to their 2005 state equalized valuation (SEV), a process known as uncapping, which was permitted under the General Property Tax Act (GPTA), MCL 211.1 *et seq*., and the Michigan Constitution. The township then notified petitioner in 2006 that it would receive revised tax bills reflecting adjusted taxable values, although it took no action, and in petitioner's appeal to the tribunal at that time, the parties had agreed to consent judgments, stipulating that the 2005 taxable values would be returned to their pretransfer rates and that the 2006 taxable values would not be adjusted. In the appeal of the 2007 increases in taxable value, petitioner argued that under MCL 211.27a respondent could only uncap the taxable value in the year immediately following the transfer, but the tribunal disagreed and allowed the township to uncap the 2007 assessments. Petitioner appealed.

The Court of Appeals *held*:

MCL 211.27a(2) provides that a property's taxable value is the lesser of (1) the property's taxable value in the immediately preceding year minus any losses, multiplied by the lesser of 1.05 or the inflation rate, plus all additions or (2) the property's current SEV. This formula applies unless the property was transferred in the previous year, in which case MCL 211.27a(3) provides that the property's taxable value for the calendar year following the year of the transfer is the property's SEV for the calendar year following the transfer. Because no property transfer occurred in 2006, MCL 211.27a(3) did not apply and the 2007 taxable values could be adjusted only by the formula provided by MCL 211.27a(2).

Reversed and remanded.

Honigman Miller Schwartz and Cohn LLP (by *Michael B. Shapiro* and *Jason Conti*) for petitioner.

The Hubbard Law Firm, P.C. (by *Peter A. Teholiz*), for respondent.

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

PER CURIAM. In this property tax action, petitioner appeals as of right three orders of the Michigan Tax Tribunal (MTT) granting summary disposition to respondent and setting the taxable value of certain transferred properties. We reverse.

The facts of this case are not in dispute. Petitioner is the taxpayer for several parcels of real estate for which ownership was transferred in December 2004. Under the Michigan Constitution and applicable property tax statutes, a transfer of ownership allows the taxable value of a parcel of real estate, normally allowed to increase no more than five percent a year, to be set at the state equalized valuation (SEV) for the next tax year. This is referred to by the parties as "uncapping." It is triggered by the owner's filing a property transfer affidavit, which notifies the assessor of the transfer. MCL 211.27a(3). In this case, property transfer affidavits were timely filed in January 2005, but respondent failed to uncap the taxable values of the property for the 2005 tax year. In October 2006, respondent sent petitioner letters stating that the taxable values should have been uncapped for 2005 and that petitioner would be getting revised tax bills for 2005. The letters also stated that the 2006 taxable values would be adjusted by the December board of review. However, the December board of review took no action.

Petitioner appealed in the MTT, arguing that respondent had unlawfully uncapped the 2005 value. The parties agreed to consent judgments in February 2007 in which they stipulated that the 2005 taxable values of the parcels would be returned to their pretransfer rates and that the 2006 taxable values would not be adjusted. In each consent judgment, respondent "reserve[d] its right to petition the March 2007 (or any year thereafter) board of review for uncapping relief regarding the subject property." Shortly thereafter, respondent filed appeals with the March board of review, which then uncapped the taxable value of the parcels for tax year 2007 on the basis of the 2004 transfer.

Petitioner again filed appeals in the MTT, and both parties moved for summary disposition. Specifically, petitioner argued that under MCL 211.27a(3), the taxable value could only be uncapped in the tax year immediately following the transfer. After that, petitioner argued, the value could only change "by either the rate of inflation or 5 percent, whichever is less, until the year after ownership . . . is transferred again." The MTT ruled that the March board of review was authorized to uncap the 2007 assessments under MCL 211.29 and MCL 211.30. The MTT noted that MCL 211.27b allows later adjustments to the taxable value if the assessor is not notified of the transfer; thus, uncapping under MCL 211.27a(3) was not strictly limited to the year following the transfer.

Petitioner moved for reconsideration and rehearing, but the MTT denied the motion. Petitioner now appeals as of right.

Petitioner first argues that the MTT committed a legal error by holding that it was permissible to uncap the 2007 and 2008 taxable values of petitioner's real property even though the transfer of those parcels of

property occurred three years before the uncapping. Petitioner asserts that this legal error was the result of a misinterpretation of several statutory provisions, including MCL 211.27a and MCL 211.30. We agree.

In the absence of fraud, review of a decision by the MTT 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, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Continental Cablevision of Mich, Inc v City of Roseville*, 430 Mich 727, 735; 425 NW2d 53 (1988). Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence. *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-353; 483 NW2d 416 (1992). Additionally, the MTT's holding was dependent on statutory interpretation and the application of constitutional principles. Statutory interpretation is a question of law that is considered de novo on appeal. *Esselman v Garden City Hosp*, 284 Mich App 209, 216; 772 NW2d 438 (2009). This Court also reviews constitutional issues de novo. *Harvey v Michigan*, 469 Mich 1, 6; 664 NW2d 767 (2003).

Petitioner contends that this dispute is controlled by MCL 211.27a, which provides as follows:

> (1) Except as otherwise provided in this section, property shall be assessed at 50% of its true cash value under section 3 of article IX of the state constitution of 1963.
>
> (2) Except as otherwise provided in subsection (3), for taxes levied in 1995 and for each year after 1995, the taxable value of each parcel of property is the lesser of the following:
>
> (a) The property's taxable value in the immediately preceding year minus any losses, multiplied by the lesser of

> 1.05 or the inflation rate, plus all additions. For taxes levied in 1995, the property's taxable value in the immediately preceding year is the property's state equalized valuation in 1994.
>
> (b) The property's current state equalized valuation.
>
> (3) Upon a transfer of ownership of property after 1994, the property's taxable value for the calendar year following the year of the transfer is the property's state equalized valuation for the calendar year following the transfer.
>
> (4) If the taxable value of property is adjusted under subsection (3), a subsequent increase in the property's taxable value is subject to the limitation set forth in subsection (2) until a subsequent transfer of ownership occurs. If the taxable value of property is adjusted under subsection (3) and the assessor determines that there had not been a transfer of ownership, the taxable value of the property shall be adjusted at the July or December board of review. Notwithstanding the limitation provided in [MCL 211.53b(1)] on the number of years for which a correction may be made, the July or December board of review may adjust the taxable value of property under this subsection for the current year and for the 3 immediately preceding calendar years. A corrected tax bill shall be issued for each tax year for which the taxable value is adjusted by the local tax collecting unit if the local tax collecting unit has possession of the tax roll or by the county treasurer if the county has possession of the tax roll. For purposes of [MCL 211.53b], an adjustment under this subsection shall be considered the correction of a clerical error.

On appeal, petitioner argues that that, when read together, MCL 211.27a(2) and (3) unambiguously provide that a property's taxable value can only be uncapped in the year following the transfer of that property. Petitioner essentially argues that when a taxpayer correctly files a property transfer affidavit, the relevant authority has one year to uncap the property for tax purposes. Pursuant to this argument, if the property is not timely uncapped, it may not be uncapped until the

next time it is transferred. Alternatively, petitioner asserts that should this Court determine that MCL 211.27a is an ambiguous statute, it must be interpreted favorably to the taxpayer.

At oral argument, respondent appeared to concede that MCL 211.27a was ambiguous because, in the present case, it was not possible to comply with MCL 211.27a(2) without violating MCL 211.27a(3). However, respondent asserted that the ambiguity was without consequence because this dispute is governed by MCL 211.29 and MCL 211.30. MCL 211.29(2) provides as follows:

> [The March board of review], of its own motion, or on sufficient cause being shown by a person, shall add to the roll the names of persons, the value of personal property, and the description and value of real property liable to assessment in the township, omitted from the assessment roll. The board shall correct errors in the names of persons, in the descriptions of property upon the roll, and in the assessment and valuation of property. The board shall do whatever else is necessary to make the roll comply with this act.

MCL 211.30(4) provides as follows:

> At the request of a person whose property is assessed on the assessment roll or of his or her agent, and if sufficient cause is shown, the board of review shall correct the assessed value or tentative taxable value of the property in a manner that will make the valuation of the property relatively just and proper under this act. . . . The board of review, on its own motion, may change assessed values or tentative taxable values or add to the roll property omitted from the roll that is liable to assessment if the person who is assessed for the altered valuation or for the omitted property is promptly notified and granted an opportunity to file objections to the change at the meeting or at a subsequent meeting.

According to respondent, these statutes demonstrate that the Legislature granted the March board of review broad power to ensure that the tax rolls comply with the General Property Tax Act (GPTA), MCL 211.1 *et seq*. Pursuant to MCL 211.30, the March board of review was permitted, on its own motion, to modify the assessed values or tentative taxable values of the property in question as long as petitioner was notified and provided an opportunity to file an objection. In further support of this argument, respondent cites State Tax Commission Bulletin No. 9 of 2005, in which the tax commission opined on a hypothetical scenario that was analogous to the facts of this case. While administrative interpretations are entitled to respectful consideration, however, they are not binding on this court. *In re Complaint of Rovas against SBC Mich*, 482 Mich 90, 117; 754 NW2d 259 (2008).

The GPTA unambiguously provides the method for calculating a property's taxable value. When statutory language is clear and there is no ambiguity, this Court is not permitted to engage in judicial construction. *Gateplex Molded Prod, Inc v Collins & Aikman Plastics, Inc*, 260 Mich App 722, 726; 681 NW2d 1 (2004). MCL 211.27a(2) provides that a property's taxable value is the lesser of the property's current SEV or the "[t]he property's taxable value in the immediately preceding year minus any losses, multiplied by the lesser of 1.05 or the inflation rate, plus all additions." The formula provided in MCL 211.27a(2) applies unless the property was transferred in the previous year, in which case MCL 211.27a(3) provides that "the property's taxable value for the calendar year following the year of the transfer is the property's state equalized valuation for the calendar year following the transfer." It is undisputed that petitioner's property was transferred in 2004. The tax year at issue in the present case is 2007. Therefore,

because the parcels in question were not transferred in 2006, the unambiguous language of MCL 211.27a(2) provides that the 2007 taxable value is of each parcel the lesser of (1) the parcel's 2006 taxable value, minus any losses, multiplied by the lesser of 1.05 or the inflation rate, plus all additions, or (2) the parcel's 2007 SEV.

We conclude that the MTT erroneously concluded that MCL 211.30 permitted the uncapping of petitioner's property for the tax years in question. In doing so, we acknowledge that MCL 211.29 and 211.30 do grant broad power to the March board of review to ensure that the assessment roll complies with the provisions of the GPTA. However, we further conclude that while the March board of review possesses broad power, that power must be limited by the other provisions of the GPTA. In other words, while the March board of review may modify assessed values and tentative taxable values to be consistent with a provision of the GPTA, it may not make a modification that will contradict an express GPTA provision. Our conclusion is required by a well-established principle of statutory interpretation: this Court must avoid interpreting a statute in a way that would render statutory language nugatory. *Robinson v City of Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010). If the March board of review was statutorily permitted to uncap a property's value for a year that was not immediately subsequent to a year of transfer, MCL 211.27a(2) and (3) would essentially be rendered meaningless. As a result, taxpayers would be subject to perpetual uncertainty. Further, we are not persuaded by the language of MCL 211.27b(1), which addresses a circumstance in which the taxable value of a property is not uncapped as a result of a transferee failing to report the property transfer. There is no allegation in this case that petitioner failed to follow the proper protocol after

the property transfer. Rather, for reasons that are unclear, respondent merely failed to uncap the property in a timely manner.

We note that our holding is limited to the specific facts of this case. As stated earlier, respondent entered a consent agreement regarding the 2005 taxable value. As a result, we offer no opinion regarding whether the March board of review would have been permitted to retroactively uncap the taxable value for the year immediately following the transfer of the property.

Finally, because we conclude that the MTT erred, it is unnecessary to address whether principles of res judicata or collateral estoppel precluded respondent from petitioning the March board of review.

Reversed and remanded to the Michigan Tax Tribunal for entry of judgments consistent with this opinion. We do not retain jurisdiction.

FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ., concurred.

CITY OF BAY CITY v BAY COUNTY TREASURER

Docket No. 294556. Submitted July 14, 2010, at Lansing. Decided April 5, 2011, at 9:05 a.m.

Bay City filed an action in the Bay Circuit Court seeking declaratory relief and a writ of mandamus directing the Bay County Treasurer to transfer to the city certain tax-foreclosed properties. Defendant had refused to sell the parcels to plaintiff because he was not satisfied that plaintiff would return the properties to a position of generating tax revenue. Plaintiff asserted that it had a public purpose for acquiring the properties and that therefore defendant had a statutory duty to sell the properties to plaintiff. After a bench trial, the court, Kenneth W. Schmidt, J., concluded that plaintiff's plans for two of the properties were too speculative to serve a public purpose but ordered defendant to convey to plaintiff title to the other two properties. Plaintiff appealed the part of the order denying the conveyance of one parcel.

The Court of Appeals *held*:

1. Defendant's subsequent offer to convey the parcel to plaintiff did not render plaintiff's appeal moot. An action is not moot if there remains a case or controversy between the parties. Plaintiff had not accepted defendant's offer, and conveyance of the parcel would have granted only some of the relief plaintiff sought. In addition to the conveyance, plaintiff also sought a declaratory judgment that its stated public purpose was a valid public purpose under MCL 211.78m.

2. Under MCL 211.78m(1), a city, village, or township may purchase for a public purpose tax-foreclosed property located within its boundaries. The statute places no restrictions or conditions on what constitutes a public purpose and does not require that a public purpose be executed efficiently and expeditiously. The trial court's reading such restrictions into the statute usurped plaintiff's authority as a legislative body to determine what constitutes a public purpose.

3. Plaintiff's complaint stated that its purpose was to reduce the number of vacant properties and to remove blighted conditions on the properties, and the resolution it passed to authorize the purchase identified the purpose as stimulating private investment

and economic development. These were valid public purposes, and defendant was therefore required by MCL 211.78m(1) to convey the property to plaintiff. The trial court erred by failing to grant plaintiff an order of mandamus.

4. Under MCR 7.216(A)(7) and MCR 7.219(A), the Court of Appeals may order that no party is entitled to costs when a public question is involved, as it was in this case.

Reversed and remanded.

1. ACTIONS — MOOTNESS.

A defendant's offer to provide incomplete relief to the plaintiff does not render an action moot.

2. TAXATION — FORECLOSURES — PURCHASE BY FORECLOSING GOVERNMENTAL UNIT — PUBLIC PURPOSES.

Under MCL 211.78m(1), a city, village, or township may purchase for a public purpose tax-foreclosed property located within its boundaries; the statute places no restrictions or conditions on what constitutes a public purpose and does not require that a public purpose be executed efficiently and expeditiously.

3. COSTS — APPEALS — PUBLIC QUESTIONS.

The Court of Appeals may order that no party is entitled to costs when a public question is involved (MCR 7.216[A][7], 7.219[A]).

Warner Norcross & Judd LLP (by *Kurt M. Brauer* and *Nicole L. Mazzocco*) for plaintiff.

Peter Goodstein for defendant.

Amici Curiae:

Miller, Canfield, Paddock and Stone, P.L.C. (by *Steven D. Mann* and *Don M. Schmidt*), for the Michigan Municipal League and the Michigan Townships Association.

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

BORRELLO, J. Plaintiff appeals as of right the trial court's order denying its claim to declaratory and

mandamus relief following a bench trial. For the reasons set forth in this opinion, we reverse.

I. FACTS

The relevant facts are largely undisputed. Under the current statutory tax-foreclosure scheme, the state of Michigan has a right of first refusal to purchase any tax-foreclosed properties in the state. MCL 211.78m(1). If the state declines to purchase a property, the city, village, or township within whose limits the property is located may purchase it "for a public purpose." *Id.* The price of purchase (referred to as the "minimum bid") is set at what the minimum bid would be if the property were being auctioned off, which is determined by adding all taxes, interest, and fees owed on the property, so that the foreclosing governmental unit (FGU) breaks even on the property. MCL 211.78m(11). Before 1999, the state administered the tax-foreclosure scheme in every Michigan county. In 1999, the Legislature passed Public Act 123, which allowed counties to "opt in" and replace the state as the FGU, administering foreclosures within their jurisdictions. MCL 211.78(3), as amended by 1999 PA 123. On December 14, 2004, Bay County elected to name its treasurer, defendant, as its FGU.

Starting in 2005, defendant, as the FGU, began foreclosing on properties, but plaintiff did not seek to purchase any foreclosed properties until 2008. In 2008, defendant foreclosed on 16 parcels within plaintiff's limits. Plaintiff informed defendant that it wished to purchase four of the parcels and forwarded a check to defendant in the amount of the total of the minimum bids for the four parcels. Defendant determined that he was not obligated to sell the parcels to plaintiff unless he was satisfied that plaintiff would be returning the property to a position in which the property would

generate tax revenue. Following defendant's determination, officials of plaintiff and Bay County met to discuss the issue and come to an understanding, but they were not able to reach an agreement. On August 22, 2009, plaintiff filed this action against defendant for declaratory and mandamus relief. Plaintiff sought a declaration that its stated public purpose for the parcels was valid and a writ of mandamus directing defendant to transfer title to the parcels.

The properties sought by plaintiff were located at 105 West Thomas, 1216 Park Avenue, 606 Wilson, and 1906 Broadway. In its complaint, plaintiff stated that its public purpose was "to reduce the number of vacant tax reverted properties within [plaintiff]'s limits thereby minimizing the real and present dangers they present and to remove certain blighted conditions present on the subject properties" and that, through redevelopment of the properties, plaintiff "will ensure a healthy and growing tax base."

Both parties moved for summary disposition, with plaintiff arguing that there were only two conditions placed on the conveyance of property: that plaintiff tender the purchase price to the FGU and that plaintiff have a public purpose for the property. Plaintiff argued it was undisputed that both of these requirements were fulfilled; hence, defendant had a clear legal duty to convey the properties and plaintiff had a clear legal right to the performance of that duty. Defendant argued he had a statutory duty "to confirm that the municipality wants the requested property for a public purpose and that the municipality will be able to accomplish that purpose efficiently and expeditiously." He asserted that plaintiff had no public purpose for the Park Avenue, Broadway, and West Thomas properties and that plaintiff would not be able to achieve its public purpose for the Wilson property

efficiently and expeditiously. The trial court denied both parties' motions, and the case went to a bench trial.

At trial, defendant testified that it was unclear that plaintiff had a public purpose for the properties. Stephen Black, plaintiff's Deputy City Manager of Community Development, testified that plaintiff sought to acquire the Broadway property in order to tear down the building thereon and use the land as a parking lot for the adjacent property, which the city already owned. The Park Avenue property, according to Black, presented health and safety issues because it was "severely impacted by cat urine." Black said that foreclosure of the West Thomas property presented an opportunity to eliminate a multi-family home, noting that multi-family homes generate complaints in single-family areas. The city planned to either demolish the home or redevelop it. Defendant testified that the West Thomas property was a single-family, not a multi-family, dwelling. As for the Wilson property, Black testified it was a vacant lot that the city was considering conveying to Habitat for Humanity for it to build a new home.

The trial court found for defendant with respect to the Wilson and Broadway parcels, and for plaintiff with respect to the Park Avenue and West Thomas parcels. The parties agreed that, pending appeal, defendant would not "auction, sell, or otherwise dispose of" the Park Avenue, West Thomas, and Wilson properties and that it would not convey the Park Avenue and West Thomas properties to plaintiff. Plaintiff agreed not to seek the Broadway property.

Because defendant did not appeal the decision with respect to the Park Avenue and West Thomas properties, and because plaintiff agreed not to pursue its claim to the Broadway property, the only property at issue in this appeal is the Wilson property.

II. MOOTNESS

Defendant argues on appeal that this claim is moot because he has offered to settle the suit by conveying the Wilson property to plaintiff. According to defendant, this removes any case or controversy between the parties. Defendant also argues that this does not fall into the mootness exception "carved out for those situations where . . . the issue is of public significance and likely to recur while also likely to evade judicial review." Defendant argues that it is speculative whether plaintiff will seek to purchase tax-foreclosed property from defendant again and that even if it does, it is only speculative that defendant will refuse to convey the property, and that even if both of these things occur, there will be opportunity for judicial review of the issue at that time.

Plaintiff denies the assertion that there is no case or controversy between the parties. Plaintiff argues that an offer to settle does not render a case moot unless the offer is accepted, and plaintiff has not accepted defendant's offer to convey the property in question. Plaintiff also notes that defendant has not conceded the legal points at issue in this case. Regarding the mootness exception for cases involving issues of public significance that recur but are likely to evade judicial review, plaintiff points out that, although it did not purchase any tax-foreclosed properties in 2009, it has regularly purchased tax-foreclosed properties in the past and certainly will do so in the future. And plaintiff argues that, if defendant's settlement offer renders the issue moot, there is a possibility that the issue will evade judicial review because defendant could simply convey the property every time plaintiff challenges its refusal to do so.

In *MGM Grand Detroit, LLC v Community Coalition for Empowerment, Inc*, 465 Mich 303; 633 NW2d 357 (2001), the Detroit City Council passed an ordinance

allowing the plaintiff to use a specified site to build a casino. *Id.* at 311-312 (CAVANAGH, J., dissenting). The defendant conducted a petition drive in an attempt to refer the ordinance, but the city clerk denied the petition on the ground that the ordinance was exempt from referendum. *Id.* at 312. The plaintiff sought a declaratory judgment that the ordinance was in fact exempt from referendum. *Id.* After the trial court granted the plaintiff's motion for summary disposition, the plaintiff went ahead with its casino construction, although the defendant had filed a claim of appeal in this Court. *Id.* at 312-313. Our Supreme Court addressed the issue of mootness in light of these developments. Justice CAVANAGH's dissent, which Justice KELLY joined, concluded that the defendant could not have the relief it sought, because even if the referendum were allowed and the ordinance defeated, the casino would remain as an allowed, prior nonconforming use of the land. *Id.* at 313-314. The majority rejected this conclusion, holding that "a party can not [sic] obliterate an opponent's appeal, on the basis of mootness, by so changing the status quo during the appeal . . . that [it] can then argue it is impossible to return to the situation that existed when the appeal was filed." *Id.* at 307.

This case presents the reverse situation—defendant seeks to render the appeal moot not by making it impossible for plaintiff to have the relief it seeks, but by giving plaintiff that relief. In *Oak Park & River Forest High Sch Dist 200 Bd of Ed v Ill State Bd of Ed*, 79 F3d 654, 659 (CA 7, 1996), the United States Court of Appeals for the Seventh Circuit held that a party's "strategic choice [not to 'cut its losses' by settling] does not make [a] lawsuit moot. A desire for a favorable precedent will not prevent a case from becoming moot, but the fact that such a desire figures in the decision not to abandon or settle a suit does not *make* the suit moot." (Citations

omitted; emphasis in original.) Relative to the issues presented in this case, we find the reasoning of the Seventh Circuit persuasive. Here, defendant has offered a settlement. We note that a full and complete settlement has yet to be reached and there continues to be, though with an offer of settlement on the table, an ongoing controversy.

Additionally, as plaintiff notes, even if it received the Wilson property, this would only satisfy the mandamus claim. Plaintiff also sought a declaratory judgment that its "stated public purpose is a valid public purpose under the laws of the State of Michigan." Because defendant will not and cannot give plaintiff such a declaration, there is still a controversy that this Court may decide. Although the nature of the action by which defendant seeks to render this case moot differs from that in *MGM Grand Detroit*, that case did hold that a defendant may not unilaterally render a case moot "by . . . changing the status quo during the appeal." *MGM Grand Detroit*, 465 Mich at 307. Similarly, the fact that plaintiff has not accepted defendant's offer to settle the suit by conveying the property to plaintiff because it desires a favorable precedent does not render the case moot. *Oak Park*, 79 F3d at 659. Accordingly, we hold that the issues presented in this case are not rendered moot by defendant's offer of settlement.

III. PUBLIC PURPOSE UNDER MCL 211.78m(1)

Plaintiff argues that MCL 211.78m requires it to have a public purpose to purchase the Wilson property and that it sought the property to build a new home, which qualifies as economic development and therefore is a public purpose. Plaintiff further contends that defendant refused to convey the property because he did not believe that the public purpose could be accom-

plished " 'efficiently' and 'expeditiously.' " According to plaintiff, the statute only requires a public purpose and not these additional conditions. Conversely, defendant argues that the intent of MCL 211.78m will not be carried out unless properties are purchased by municipalities for a public purpose that can be efficiently and expeditiously carried out. Defendant points out that in other contexts, Michigan courts have interpreted "public purpose" to be more than just a speculative idea or a future possibility and have held that without a requirement of a detailed plan that can be expeditiously carried out, the "public purpose" requirement is illusory. According to the trial court, plaintiff's "proposal [regarding the Wilson property] does not promote the prosperity and general welfare of the residents of Bay City" and was "too speculative to constitute a proper public purpose."

"A trial court's decision regarding a writ of mandamus is reviewed for an abuse of discretion." *Casco Twp v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). However, "whether defendant had a clear legal duty to perform and whether plaintiff had a clear legal right to the performance of that duty . . . are questions of law, which this Court reviews de novo." *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 438; 722 NW2d 243 (2006). Similarly, this Court reviews de novo the legal question of the interpretation of a statute. *People v Moore*, 470 Mich 56, 61; 679 NW2d 41 (2004); *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 739; 641 NW2d 567 (2002).

In *Tuggle v Dep't of State Police*, 269 Mich App 657, 668; 712 NW2d 750 (2006), this Court held that man-

damus is appropriate where (1) the plaintiff has a clear legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other legal or equitable remedy exists that might achieve the same result. See also *Lickfeldt v Dep't of Corrections*, 247 Mich App 299, 302; 636 NW2d 272 (2001); *Delly v Bureau of State Lottery*, 183 Mich App 258, 260-261; 454 NW2d 141 (1990).

MCL 211.78m(1) provides, in relevant part:

> Not later than the first Tuesday in July, immediately succeeding the entry of judgment under section 78k vesting absolute title to tax delinquent property in the foreclosing governmental unit, this state is granted the right of first refusal to purchase property at the greater of the minimum bid or its fair market value by paying that amount to the foreclosing governmental unit if the foreclosing governmental unit is not this state. If this state elects not to purchase the property under its right of first refusal, a city, village, or township may purchase for a public purpose any property located within that city, village, or township set forth in the judgment and subject to sale under this section by payment to the foreclosing governmental unit of the minimum bid.

At trial, defendant seemingly conceded that plaintiff stated a public purpose for purchasing the Wilson property. On appeal, however, he argues that plaintiff's public purpose was unclear. He claims that plaintiff sought to obtain the properties "in order to minimize a 'real and present danger' and to remove 'blighted conditions on the subject properties.' " But according to the complaint, plaintiff sought the property "to reduce the number of vacant tax reverted properties within Bay City's limits thereby minimizing the real and present dangers they present and to remove certain blighted conditions present on the subject properties."

And the resolution passed by plaintiff authorizing it to acquire the properties reads, in relevant part, as follows:

> **Whereas**, the City of Bay City desires to acquire selected tax-reverted properties for the purpose of stimulating private investment through the redevelopment of each property; and
>
> **Whereas**, by improving and selling the various parcels, these economic development efforts will ensure a healthy and growing tax base . . . .

Thus, plaintiff demonstrated a public purpose beyond minimizing dangers and abating blight. Cf. *Kelo v City of New London*, 545 US 469, 484; 125 S Ct 2655; 162 NW2d 439 (2005) (rejecting the argument that economic development does not qualify as a public use in an eminent domain case and stating that "[p]romoting economic development is a traditional and long-accepted function of government").

However, defendant argues that the statutory scheme requires that the identified public purpose be capable of being efficiently and expeditiously carried out. Plaintiff asserts that the trial court's conclusion that plaintiff's plan to construct a new home on the Wilson property was too "speculative to constitute a proper public purpose" essentially incorporates the requirements that a public purpose must be executed efficiently and expeditiously. The terms "efficiently," "expeditiously," and "speculative" are not found in MCL 211.78m(1). The statute clearly and unambiguously provides that if the "state elects not to purchase the property under its right of first refusal, a city, village, or township may purchase" the property "for a public purpose." MCL 211.78m(1). If the language in a statute is clear and unambiguous, this Court assumes that the Legislature intended its plain meaning, and the

statute must be enforced as written. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). This 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." *Id.* Similarly, this Court should not "judicially legislate by adding language to the statute." *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 421; 565 NW2d 844 (1997). In *Advisory Opinion on Constitutionality of 1976 PA 295, 1976 PA 297*, 401 Mich 686, 696; 259 NW2d 129 (1977), our Supreme Court stated that "the determination of what constitutes a public purpose is primarily the responsibility of the Legislature, and . . . the concept of public purpose has been construed quite broadly in Michigan." Accordingly, it is not for the courts to read into MCL 211.78m(1) restrictions or conditions on what constitutes a public purpose that are not within the language of the statute itself and that essentially usurp the Legislature's authority to determine what constitutes a public purpose.

We note that while MCL 211.78m(1) does not contain any language requiring the property to be purchased for a public purpose that can be carried out efficiently and expeditiously, such language is found in MCL 211.78(1):

> The legislature finds that there exists in this state a continuing need to strengthen and revitalize the economy of this state and its municipalities by encouraging the efficient and expeditious return to productive use of property returned for delinquent taxes. Therefore, the powers granted in this act relating to the return of property for delinquent taxes constitute the performance by this state or a political subdivision of this state of essential public purposes and functions.

The reference to "efficient and expeditious return to productive use" in this legislative finding is not a constraint on the public purpose identified by a city,

village, or township purchasing tax-delinquent property under MCL 211.78m(1). Rather, it is a statement of the purposes of the tax-reversion statutory scheme. Due to the perception of the Legislature that the existing statutory provisions addressing reverted properties were inefficient, the Legislature revamped the General Property Tax Act in 1999 PA 123 in order to effectuate "the efficient and expeditious return to productive use of property returned for delinquent taxes."[1] This is the public purpose of the GPTA, not the public purpose of a city, village, or township purchasing tax-delinquent property.[2]

It is not the prerogative of this Court to "judicially legislate by adding language to [a] statute." *Empire Iron*, 455 Mich at 421. In this case, the trial court essentially imposed a constraint on what constitutes a public purpose that is not found within the language of MCL 211.78m(1). Plaintiff's stated purpose was to improve and sell the property. Whether it could do so efficiently and expeditiously was relevant to plaintiff's ability to carry out its purpose, but was not relevant to

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[1] The legislative analysis prepared for 1999 PA 123 states that the then current "tax delinquent property reversion process takes about six years to complete." House Legislative Analysis, HB 4489, July 23, 1999, p 1. In order to address this delay in returning tax-delinquent property to tax-current status, while still honoring the rights of property owners, the legislation revamping the tax-reversion process was proposed. *Id.*, p 2. While the use of legislative analysis has been criticized as being unpersuasive in terms of statutory construction, such analyses do have probative value in certain circumstances, see, e.g., *Kinder Morgan Michigan, LLC v City of Jackson*, 277 Mich App 159, 170; 744 NW2d 184 (2007), and continue to be cited in cases involving statutory interpretation, see, e.g., *Bush v Shabahang*, 484 Mich 156, 174 n 29; 772 NW2d 272 (2009).

[2] In some ways, this is an example of the classic fallacy of equivocation. The term "public purpose" is being used in two different, albeit related, ways in MCL 211.78(1) and MCL 211.78m(1).

the question whether plaintiff was purchasing the property "for a public purpose" as required by MCL 211.78m(1).

We hold that the trial court erred in finding for defendant with respect to the Wilson property by adding conditions on a "public purpose" that are not found within the clear and unambiguous language of MCL 211.78m(1). Given the evidence presented, including defendant's admission at trial that plaintiff had stated a public purpose, there was no basis for the trial court to find in favor of defendant regarding the Wilson property. Because the trial court added language to the statute to arrive at its conclusions, it abused its discretion in denying mandamus relief to plaintiff.

IV. COUNTY TREASURER'S AUTHORITY TO MAKE AN INDEPENDENT ASSESSMENT OF PUBLIC PURPOSE UNDER MCL 211.78m(1)

Plaintiff argues that MCL 211.78m(1) gives no authority to defendant to question plaintiff's determination of public purpose. According to plaintiff, such a determination is traditionally considered a legislative function and is thus properly left to plaintiff, as a legislative body. Plaintiff contends that unless the statute says otherwise, the power to review plaintiff's decision lies in the courts, the branch of government that traditionally reviews actions for their consistency with the laws. Finally, plaintiff argues that the proper course of action would be for defendant to obey the statute's command that it sell the property to plaintiff. If it later becomes evident that plaintiff does not have a public purpose for the property, a party with standing could bring suit to challenge the purchase of the property.

Conversely, defendant argues that it does not usurp the function of the courts for an FGU to review a municipality's determination of public purpose. Defen-

dant contends that if the courts can review the FGU's determination, judicial review is still possible. Additionally, defendant argues that he is in the best position to determine which properties to allow municipalities to purchase at the minimum bid and which properties to put to public auction to best manage and maintain the integrity of the delinquent tax revolving fund.

As noted above, MCL 211.78m(1) requires property purchased by a municipality under the statute to be purchased "for a public purpose." The statute does not, however, specify who makes the determination whether a purpose constitutes a public purpose, nor does it specify what body, if any, may review that determination.

Although defendant claims that the statute empowers him to review plaintiff's determination of public purpose, he makes no argument in support of this assertion. His argument, instead, is that it will benefit the entire county if he is allowed to decide which properties are sold to municipalities and which go to auction. But this argument does not relate to the question of public purpose—instead, defendant's argument is that he should have general discretion to sell or not sell properties to municipalities on the basis of what most benefits the county.

Plaintiff argues that its council is the proper body to determine whether there is a public purpose, because it consists of " 'the elected representatives of the people.' " *Horton v Kalamazoo*, 81 Mich App 78, 81; 264 NW2d 128 (1978), quoting *Gregory Marina, Inc v Detroit*, 378 Mich 364, 394; 144 NW2d 503 (1966) (opinion by T. M. KAVANAGH, C.J.). Defendant points out that he is also an elected representative, elected by a larger constituency than plaintiff's council.

More to the point, however, is plaintiff's separation of powers argument. As noted previously in this opinion, our Supreme Court has stated that "the determination of what constitutes a public purpose is primarily the responsibility of the Legislature." *1976 PA 295*, 401 Mich at 696; accord *Gregory Marina, Inc*, 378 Mich at 394-395 (opinion by T. M. KAVANAGH, C.J.) (noting that determination of public purpose is a legislative, not a judicial, question); *Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich 93, 129-130; 422 NW2d 186 (1988) (stating that Michigan has "recognized a liberal version of the public purpose doctrine"). The determination of public purpose is an essentially legislative function, see MCL 211.78, and plaintiff's council is a legislative body. The review of an action of the Legislature for compliance with the law is an essentially judicial function. The language of the portion of the statute at issue contemplates no discretionary or decision-making role for any executive body. Indeed, the FGU's role in a city's purchase of property is essentially administrative, as well as mandatory: "If property is purchased by a city, village, township, or county under this subsection, the [FGU] *shall convey* the property to the purchasing city, village, township, or county within 30 days." MCL 211.78m(1) (emphasis added). The statute's use of the word "shall" indicates a mandatory act, not a permissive one. *People v Francisco*, 474 Mich 82, 87; 711 NW2d 44 (2006).

In keeping with precedent, we hold that the determination of a proper purpose for the purchase of tax-delinquent property is a legislative function, vesting such determinations as arose in this case with plaintiff's council. Furthermore, because MCL 211.78m(1) creates a mandatory legal duty on defendant's part to sell the property to plaintiff, granting him no discretion to decide not to sell such property, the statute does not

empower a county treasurer such as defendant to make an independent determination as to a municipality's professed "public purpose." Pursuant to MCL 211.78m, the selling of property is a mandatory act by defendant, not a discretionary one. For these reasons, the trial court erred to the extent it implicitly held that defendant had a right to review plaintiff's determination of public purpose, and it abused its discretion by denying plaintiff mandamus relief.

Reversed and remanded. No costs are awarded to either party, a public question being involved. MCR 7.216(A)(7) and MCR 7.219(A).

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

PEOPLE v GIOGLIO

Docket No. 293629. Submitted November 4, 2010, at Grand Rapids. Decided April 5, 2011, at 9:10 a.m. Reversed and remanded to the Court of Appeals, 490 Mich 868. Trial court's order vacated and case remanded by unpublished order entered November 15, 2011. Opinion on remand from Supreme Court reported at 296 Mich App 12.

Jeffrey P. Gioglio was charged in the Kalamazoo Circuit Court with two counts of second-degree criminal sexual conduct and one count of attempted second-degree criminal sexual conduct. At trial, defense counsel did not cross-examine the child victim and did not present any witnesses or evidence. The jury convicted defendant as charged. After sentencing, the assistant prosecuting attorney sent the court administrator a letter expressing concerns she had about defense counsel's performance before, during, and after trial. Defendant obtained new counsel and moved in the trial court for a new trial, arguing that his original defense counsel had provided ineffective assistance. The court, Pamela L. Lightvoet, J., held a hearing on the motion. Defense counsel testified about the strategic reasons underlying her actions at trial and provided testimony about her pre- and posttrial conduct, which conflicted with the prosecuting attorney's testimony. The court concluded that defense counsel's trial strategy was reasonable and that, although defense counsel might have acted unprofessionally outside the courtroom, her conduct did not rise to the level of ineffective assistance. The court ruled that defendant had not established a reasonable probability that the outcome of the trial would have been different in the absence of defense counsel's actions. Defendant appealed.

The Court of Appeals *held*:

Every person accused of a crime has the right to effective assistance of counsel. To succeed in a claim that counsel was ineffective, a defendant generally must show that trial counsel's performance fell below an objective standard of reasonableness and that it is reasonably probable that the result of the proceeding would have been different had it not been for counsel's error. However, a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial when the defendant was completely denied the assistance of counsel at a critical stage,

when the defendant's trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing, or when the circumstances under which the defendant's trial counsel functioned were such that the likelihood that any lawyer, even a fully competent one, could provide effective assistance is small. If a defendant does not argue that defense counsel failed on the whole to subject the prosecution's case to meaningful adversarial testing but instead argues that discrete acts at specific points in the trial were inadequate, the proper test includes the consideration of whether counsel's conduct affected the outcome of the case. Although defense counsel took some action on defendant's behalf, she completely failed to submit the prosecution's case to meaningful adversarial testing and did so little to counter the prosecution's evidence of defendant's guilt that it was tantamount to having no defense lawyer present at all.

Reversed and remanded for a new trial.

K. F. KELLY, J., dissenting, would have held that defense counsel's conduct did not amount to a complete failure to submit the prosecution's case to meaningful adversarial testing and that defendant was arguing that counsel was inadequate at specific points in the trial. Thus, prejudice should not have been presumed but should have been taken into account. Judge KELLY would have held that defense counsel's actions were strategic and not to be second-guessed and that counsel's assistance was not deficient. Any errors would not have changed the outcome because the evidence against defendant was overwhelming.

CONSTITUTIONAL LAW — RIGHT TO COUNSEL — INEFFECTIVE ASSISTANCE OF COUNSEL — MEANINGFUL ADVERSARIAL TESTING.

To succeed in a claim that counsel was ineffective, a defendant generally must show that trial counsel's performance fell below an objective standard of reasonableness and that it is reasonably probable that the result of the proceeding would have been different had it not been for counsel's error; a presumption of prejudice is appropriate, however, without inquiry into the actual conduct of the trial (1) when the defendant was completely denied the assistance of counsel at a critical stage, (2) when the defendant's trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing, or (3) when the circumstances under which the defendant's trial counsel functioned were such that the likelihood that any lawyer, even a fully competent one, could have provided effective assistance were small; but if a defendant does not argue that his or her counsel failed on the whole to subject the prosecution's case to meaningful adversarial

testing, but instead argues that discrete acts at specific points in the trial were inadequate, the proper test includes the consideration of whether counsel's conduct affected the outcome of the case (US Const, Am VI; Const 1963, art 1, § 20).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jeffrey R. Fink*, Prosecuting Attorney, and *Cheri L. Bruinsma*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Desiree M. Ferguson*) for defendant.

Before: M. J. KELLY, P.J., and K. F. KELLY and BORRELLO, JJ.

M. J. KELLY, P.J. Defendant Jeffrey Paul Gioglio appeals as of right his jury convictions of two counts of criminal sexual conduct in the second degree (CSC II) and one count of attempted CSC II. See MCL 750.520c(1)(a). The trial court sentenced him to serve 80 to 270 months in prison for his first CSC II conviction, 60 to 270 months in prison for his second CSC II conviction, and 18 to 90 months in prison for his conviction of attempted CSC II. On appeal, defendant argues that he did not have the assistance of counsel that the United States Constitution guaranteed him. And the record of the trial proceedings strongly suggests that he did not receive the kind of vigorous representation that one would expect in a trial that could—and did—result in a lengthy prison sentence. Indeed, after reviewing the trial record in light of the evidence adduced at the hearing on defendant's motion for a new trial, we conclude that the trial court erred, as a matter of law, when it summarily concluded that this case did not implicate *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984), and instead

analyzed defendant's motion solely under the test stated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defendant's trial counsel failed to subject the prosecution's case to any meaningful adversarial testing. Therefore, prejudice must be presumed under *Cronic*. Accordingly, we reverse defendant's convictions and remand for a new trial.

I. PROCEDURAL HISTORY

The prosecutor charged defendant with three counts arising from alleged sexual contact between defendant and his niece, TB, who was approximately six years old at the time of the events at issue. The prosecutor charged him with two counts of CSC II for his conduct, which included causing TB to touch his penis. The prosecutor also charged him with one count of attempting to commit CSC II for an incident where TB's mother discovered TB sitting on defendant's lap in her underclothes.

A. THE TRIAL

The trial began on the same day that the parties selected their jury. The prosecuting attorney, Christine Bourgeois, opened the case by giving a short summary of the evidence that she proposed to offer. She stated that, in May 2004, TB's mother walked into her daughter's room and saw TB "straddling" defendant's lap on a chair and "rocking" and she could see that defendant "had an erect penis." The prosecution then explained that the evidence would show that this was not the only incident; TB would testify about two other incidents where he touched TB or had TB touch him "for a sexual purpose." She stated that TB would give the "specifics on exactly what happened" and that there would also be

corroborating evidence. Based on the evidence she planned to present, she asked the jury to find defendant guilty. Defendant's trial counsel, Susan Prentice-Sao, elected not to give an opening statement, but reserved it for later.

The prosecution's first witness testified that she was TB's physical education instructor for the 2008 to 2009 school year. The instructor testified that there was an incident in gym class where several students told her that TB had been telling other students that "her uncle had raped her." The instructor stated that she notified various persons and that, as a result, child protective services became involved. Prentice-Sao did not object to the instructor's testimony about what TB purportedly told other students,[1] and did not cross-examine the instructor.

The prosecution next called TB to testify. She testified that she was born in 1998 and that in 2004 she and her family lived at her grandmother's house in Kalamazoo along with defendant. She said, without objection, that defendant came to live with her after it was learned that his father "did some bad stuff to football players." She stated that while living at her grandmother's home, defendant "raped" her.

TB stated that on one occasion defendant kissed her on the lips and all over her body; he "French-kissed" her. On another day, defendant was mowing the lawn and when he finished he got her and took her behind the "air conditioning vent-type thing" and "stuck his private area out from—out from under his—he un-

[1] The instructor's testimony was hearsay within hearsay and quite possibly objectionable. See MRE 801; MRE 802; *People v Rodriquez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996) (noting that testimony by teachers relating what the victim allegedly told them was inadmissible hearsay).

zipped his pants and stuck his private up" and then made her "touch it and lick it." She said that she licked it once and that he said "[TB] you're doing it" while she licked it. She said she did not tell anyone at the time because she did not know any better. TB said that, on another day, he took her behind the couch, had her unzip her pants, and kissed her "private area." He "pulled down my pants and underwear, and then kissed my private area."

As for the final incident, TB testified that defendant sat on the desk chair in her room and asked her to sit on his lap. She "was sitting with [her] legs spread apart on his lap facing him." She was wearing her nightgown and socks and he was about to make her touch his penis. She knew this because he "folded down his pants and boxers and stuck up his penis and—and before he was—he was trying to stick up his penis," but her mother walked in.

TB testified that she finally told a girl at school and her gym teacher because she could not hold it in any longer. She did not tell her mother about the other incidents until after someone came to her school to speak to her about the incidents. After Bourgeois finished her direct examination, Prentice-Sao informed that court that she had no questions for TB.

HB testified next that she was defendant's half-sister and TB's mother. She stated that she and her family were living with her adoptive mother when her half-brother "came into a bind" and she took him into her home.

HB said that she has a sleep disorder and that her daughter normally stays in the living room with her when she sleeps. She said she awoke because she could not hear TB playing and got up to look for her. She found TB in her room with defendant: "[TB] was in her

underwear, and [defendant] was on her desk chair in his pajama bottoms and [TB] was straddling him. And I walked in, and I told [defendant] to get the heck out of my house." She said that when defendant got up she noticed that he had an erection. HB said that defendant tried to blame the incident on TB, stating that "it was her fault." HB said she did not report the incident at that time because she thought she could handle it. After the incident came to light, she told an officer that defendant told her at the time that TB "wanted it."

HB also said that she knew about a prior incident where her mother mentioned that she saw TB and defendant behind the air conditioner outside and TB had her pants undone. She said she put precautions in place to prevent any further problems but kicked him out after the incident in the bedroom.

At the close of direct examination, Prentice-Sao cross-examined HB. She asked her about what her mother noticed on the day TB was outside by the air conditioner with defendant. HB responded that her mother told her that she saw TB with her zipper undone. Prentice-Sao then asked about the visibility around the area where the compressor unit was in the yard. She then elicited testimony about the nature and frequency of HB's discussions with TB about good touches and bad touches before the incidents at issue.

On redirect examination, HB agreed that she talked to TB about good touches and bad touches a couple of times and was surprised that TB never told her about defendant's actions.

HB's adoptive mother, SC, testified next. She said that she was living with HB and HB's family in Kalamazoo. Defendant moved in with them on Labor Day weekend in 2003. SC said that there is an air-conditioning unit outside in an area that is difficult to

see from anywhere in the house and that is also concealed from the neighbors. She testified that defendant would often play with TB and that he was willing to play with her on a more "childlike level." She recalled that there was a time when TB came in from playing outside with defendant and had her zipper down.

She stated that, at some point in the spring or summer of 2004, she received a call at work from her daughter. Her daughter told her that something happened between TB and defendant; specifically, HB told her that she believed defendant "acted sexually toward [TB]." SC stated—without objection—that, although she did not initially have suspicions about defendant, "it was something I was always wary of because I knew [defendant's] history of having been abused as a child." She further stated that she decided to question TB and defendant individually to find out what happened.

SC testified that TB responded to her questions as though she did not know what she was talking about. She got the impression "that nothing had happened—or at least nothing that [TB] perceived to have happened." When Bourgeois asked SC about her reaction given the "allegations [that] have surfaced," she testified that TB must have felt that "she had to protect him, that he had probably told her that it was not something she should tell anyone else, that other people wouldn't understand." Prentice-Sao did not object to this question and answer and Bourgeois immediately asked SC whether she really knew that and SC agreed that it was just her guess.

SC testified that defendant denied that there had been any inappropriate touching, but that "he and [TB] loved each other and that [TB] had told him she loved him and they wanted to get married and have children." He appeared to believe that this was a possibility. She

said she explained to him that it was inappropriate, wrong, and illegal, but he "didn't seem to understand that":

> And I said, you know, Jeffrey, even if she was—even if she was 16 years old and was begging you for sex, it would be wrong and illegal because you're an adult and she's a child. And he was just—seemed totally unable to see that line of what was appropriate and what was not.

She said he just kept saying "but we love each other." She stated that she took her time with him to ensure that he understood her but "felt pretty certain that I had not gotten through to him, which is why I determined that he couldn't stay in our house." SC testified that she contacted defendant's case manager and told her that there needed to be other arrangements for his living situation, and the caseworker arranged for him to move into an adult foster home. She said that she asked defendant if he understood why he had to leave and he said "yeah, 'cause you're afraid of what might happen between me and [TB]."

Again, Prentice-Sao did not object to any of this testimony. Moreover, after the close of SC's direct examination, she informed the court that she had no questions for SC.

Detective Christina Ellis testified that she interviewed defendant about the accusations against him. He said that the accusations were "bull crap." He admitted that his sister walked in on him at a time when TB was sitting on his lap, but he denied that there was "inappropriate conduct." He told her that his family was always trying to get him in trouble and that his sister was trying to get him in trouble because "she did not like the mentally handicapped." He told her that he left the house because he and TB's father got into a

heated argument and that had TB not walked in on them, TB's father might not be here today.

Ellis said that, in her experience, it is sometimes difficult for the accused to admit what he or she has done, so she decided to help defendant admit what he had done by putting some blame on TB. When she told him that TB had a crush on him and wanted to marry him, "he giggled—almost seemed kind of pleased about that." He also stated that TB had tried to kiss him and, when asked whether TB might have kissed him when he was sleeping and he "didn't realize it was [TB] so he kissed her back," he told her that that "probably" happened. She said she told him she believed that, whatever had happened, it happened because "they cared so much about each other," and defendant agreed that "he did care a great deal about [TB]." He nodded in agreement when she told him it was her opinion that he only did what he did because he thought "what he was doing was the right thing because they had grown so close" and he was "simply trying to show [TB] his love for her."

Ellis said that she then told him that she knew "that he had been abused when he was younger. And so I explained to him the cycle of abuse and that sometimes when a child is abused—" At this point Prentice-Sao objected to the relevance of the testimony. The trial court sustained the objection and instructed the jury that it was not to consider during its deliberations whether defendant had been abused. Ellis said that when she asked defendant whether he did these things to TB in order to express his love, he responded, "possibly, yes, but he couldn't really remember."

On cross-examination, Prentice-Sao asked Ellis whether defendant ever said he touched TB or had TB touch him, and she admitted that he did not ever say that.

She also admitted that uncles do love their nieces and that it would not be unusual for an uncle to say so.

Bourgeois's last witness was a mental health therapist, Connie Black-Pond. The trial court qualified her, without objection or voir dire, as an expert in the assessment and treatment of children and adults who have been sexually abused. Black-Pond testified generally about certain characteristics and behaviors that are common in children who have been sexually abused. Specifically, she testified about why it is that sexually abused children might not disclose the abuse until long after it has occurred, that when they do first disclose the abuse they might minimize it and often have trouble relating the details. Finally she testified that abused children might show a range of emotions when describing how they were abused and might even seem detached when describing the abuse.

On cross-examination, Prentice-Sao got Black-Pond to admit that women can be abusers as well as men. She also got her to admit that children are capable of lying. She then asked Black-Pond to describe the types of signs that would reveal that a child is lying. Black-Pond testified that children who are lying "often provide descriptions of events that actually tend not to change over time." She also stated that the child's description of the events might lack context and some of the emotional qualities that normally accompany descriptions of abuse, such as the "quality of relationships" and "worries the children have."

On redirect examination, Black-Pond testified that her evaluations "are not intended to determine if children are telling the truth or lying." In any event, she stated, the percentage of children that make false allegations is "very small." Indeed, the research shows that about "two percent of—of the disclosures [are] potentially false."

Prentice-Sao did not object to Black-Pond's testimony on redirect—including the testimony that there was, in effect, a 98% chance that TB's allegations were true. She also did not examine Black-Pond any further.

After Black-Pond testified, Bourgeois rested the prosecution's case. Prentice-Sao then rested her case without presenting any witnesses and without making an opening statement.

In closing, Bourgeois summarized TB's testimony and then told the jury that TB's testimony alone satisfied the elements of each of the charges at issue; "So if you believe [TB], the defendant's guilty." Bourgeois then went on to state why it is that the jury should believe TB. And specifically she noted that children normally lie to get out of trouble, not to get into trouble; and TB had to endure the trouble of relating what happened to her to a police officer, a forensic interviewer, a prosecutor, the court, 12 strangers, and anyone else who happened to be in the court. Bourgeois, however, apparently forgot to change her closing statement to reflect the realities of the trial, because she stated that the fact that TB endured cross-examination was further evidence that she was telling the truth:

> She underwent a cross-exam. Most adults would have had difficulty simply talking about sexual acts, let alone coming in here being cross-examined, talking about it in front of all these people; yet she went through that.
>
> She had a lot of fun doing that, didn't she? You saw her reaction when I asked her how it felt. She was on the verge of tears and didn't quite react. She had a lot of fun.

Bourgeois then used Black-Pond's expert testimony as a possible explanation as to why TB might have waited so long to disclose the abuse. She also noted that TB was credible because her testimony was not rehearsed: "If she had zipped through everything and

been real factual and real clear on it, wouldn't we have thought it was rehearsed? If everything she said matched exactly what grandma and mom said, wouldn't we have thought they all sat down and colluded and planned this for some reason?" Finally, Bourgeois stated that the "United States Constitution claims justice for all," including "the small victims, even when we don't want to believe that these things happen." And she closed her remarks by asking the jury to find defendant guilty.

Prentice-Sao began her closing remarks by noting that Black-Pond admitted that children lie. She also reminded the jury that defendant had to move into an adult foster home after he was kicked out of the home and that HB kicked him out around the time that she became pregnant. She then stated that TB "testified with robotic and rehearsed precision. There was no evidence of any inconsistencies. No evidence that her story evolved or changed in any way." Prentice-Sao also said she thought that TB showed a lack of emotions and suggested that this was because there was no abuse. She also argued that the adults were not very credible because there were inconsistencies in their statements. Finally, she noted that there did not appear to be any trigger that might have caused TB to suddenly reveal the abuse so many years later and, as such, there was reasonable doubt as to whether defendant was guilty.

In rebuttal, Bourgeois argued that TB's testimony was consistent because she told it to the jury just once—and the inconsistencies with the adults was to be expected when relating events that occurred so long ago. Bourgeois then reminded the jury that Black-Pond had said that studies show that only 2% of children falsely report sexual abuse. She also noted that there was a trigger—gym class. And that, even though we do

not know exactly what the trigger was, it is consistent with the types of things that happen in gym. Finally, Bourgeois reminded the jury that TB was in fact quite emotional: "But we saw her feelings. We saw her tear up. It looked like she was on the verge of tears. She didn't have a word to say how she felt about it. It was five years earlier. But it clearly traumatized her. We saw that trauma."

The jury then retired to deliberate at 11:32 a.m. At 1:30 p.m., the jury returned a verdict of guilty on all three counts. This appeal followed.

B. THE MOTION FOR A NEW TRIAL

In October 2009, Bourgeois wrote to the court administrator and expressed concerns about Prentice-Sao's handling of defendant's trial. She alleged that Prentice-Sao had confided in her that defendant had admitted guilt and wanted to testify. Bourgeois said that Prentice-Sao said she was going to call defendant to the stand and ask him whether he engaged in the conduct at issue, which she expected he would deny. Bourgeois stated that she told Prentice-Sao that she could not ask him that question under the rules of ethics. Prentice-Sao also told her that she could not bring herself to question a child sexual assault victim. Finally, Bourgeois stated that, after sentencing, Prentice-Sao "greeted me with a big smile, a thumbs-up, and the statement 'He's toast!' "

The court administrator asked Prentice-Sao to respond to Bourgeois's claims in writing. In a letter dated November 12, 2009, Prentice-Sao responded to the accusations made by Bourgeois. Prentice-Sao admitted that she told Bourgeois that defendant had made some admissions but claimed that she did not state "which admissions were made" and did not state "that he

admitted all of the charges as laid out in the police report." Prentice-Sao also stated that she told Bourgeois that she did not plan to question the child because then Bourgeois might not "go overboard preparing her for trial." She said she actually chose not to question TB because TB revealed new information on direct examination that might have led to new charges. She also stated that it would not have been possible to impeach the child because she

> did not have a history of lying, having problems in school, or being difficult at home. She did not have a prior criminal record. She was not snotty or robotic. The whole time she testified the jury sat on the edge of their seats, looked horrified, and paid attention. I know this, because I watched the jury throughout her entire testimony.

Prentice-Sao also did not deny that she smiled and gave Bourgeois a thumbs-up after defendant's sentencing; rather, she admitted that this was "possible," but "I don't remember." However, *if* she did that, she imagined that it was because she "was just happy that the case was over." Likewise, *if* she said he was "toast," which she did not remember, then she imagined that she said that because it was "accurate" considering his sentence.[2]

In November 2009, defendant's new counsel moved for a new trial premised on ineffective assistance of counsel. Specifically, defendant's new counsel argued that defendant was deprived of the assistance of counsel under the test stated in *Cronic*, because Prentice-Sao completely failed to advocate on his behalf, and because

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[2] As can be seen from the record, Prentice-Sao very carefully avoided denying these claims and instead professed that it was "possible," but that she did not remember. For that reason, we cannot understand the dissent's assertion that Prentice-Sao outright denied having smiled, gestured, and exclaimed, "He's toast!"

her representation was constitutionally ineffective under the test stated in *Strickland*. The trial court held a hearing on the motion in February 2010.

At the hearing, Bourgeois testified that she was assigned to prosecute the charges against defendant. After the close of the case, she sent a memorandum to the court administrator. She sent the letter because she had concerns about Prentice-Sao's handling of defendant's case and, after speaking with "some people in the office," she was instructed to notify the court administrator. In her 17 years as a prosecutor, she had never before sent such a letter; indeed, she never even made a verbal complaint.

Bourgeois stated that she had concerns after a few events that occurred during trial. It struck her when Prentice-Sao did not cross-examine the victim because "the victim gave differing testimony than anything that we had seen in any of the reports."

Bourgeois also testified that, after her expert reviewed the file, the expert expressed concern that defendant would need special services in prison should he be convicted. Because she expected defendant to be convicted, she approached Prentice-Sao about seeking those services, but it "was at that point that [Prentice-Sao] told me that he wasn't innocent [and] that he had told her that he had done it." Bourgeois acknowledged that Prentice-Sao claimed that this discussion arose during plea negotiations, but stated that this was incorrect.

Prentice-Sao also "made it very clear to me on multiple occasions that she could not question a child sexual assault victim." Bourgeois stated that Prentice-Sao might have told her this as many as a "dozen times." Prentice-Sao also said that defendant "made her sick" and told Bourgeois that "she couldn't stand to

look at him." Prentice-Sao even told her at trial that defendant "was downstairs and she knew that he wanted to talk to her, but that she wasn't going down[,] that he made her sick." Bourgeois testified that she had seen Prentice-Sao "mimic" defendant's speech impediment on "two or three occasions." Bourgeois testified that, after defendant's sentencing, Prentice-Sao gave Bourgeois "a big thumbs up with a big smile and said, He's toast." She stated that Prentice-Sao did not seem disappointed, but had a "happier voice." She also did not believe that Prentice-Sao was being sarcastic or flippant; she believed her. Based on Prentice-Sao's handling of the trial, Bourgeois stated that she felt as though "we had both just prosecuted him."

Prentice-Sao testified that she had practiced criminal, bankruptcy, estate planning, and family law for five years. She stated that this was the first case where she had an opportunity to work with Bourgeois as a prosecutor. And her interactions with Bourgeois were "challenging" and not "professional." She felt that Bourgeois was condescending towards her and stated that Bourgeois once told her that the case was "too big" for her to handle. She said that Bourgeois tried to tell her how to proceed with her case and asked her about the details of her defense. She said that she gave Bourgeois "snotty" responses that were not genuine. She did not try to "dissuade" Bourgeois from thinking that she did not know what she was doing. In the end, Prentice-Sao testified that Bourgeois misinterpreted her statements—that she misunderstood things that she "meant to be snotty" and took them to heart.[3]

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[3] We find it troubling that, even when read from a transcript, Prentice-Sao's testimony appears impish and contrived; it seems that she was unable or unwilling to appreciate the gravity of the moment.

Prentice-Sao testified that she did have discussions with Bourgeois about his admissions, but that those conversations occurred during plea negotiations. She said that Bourgeois wanted to know if he would be able to admit to the elements of the crime and she told her "possibly." She also noted that defendant had made some general admissions in the police reports, but she denied that she ever told Bourgeois that defendant had admitted that he did it.

Prentice-Sao stated that she has had occasion to question children in her past practice and would not hesitate to question a child if necessary. She said she "aggressively" spoke with defendant about accepting a plea deal because TB was such a compelling witness:

> [TB's] statements to the police and the forensic experts and prosecutors had been consistent, but not consistent to the point of being of—showing signs of coaching. Her language, vocabulary didn't show signs of coaching. It was age appropriate. And I had spoken with . . . the prosecutor who charged the case and who did the initial interview with [TB] . . . and had learned that she thought that the testimony of [TB] was extremely strong; one of the best child witnesses that she had ever interviewed and one of the best sexual assault victims that she had ever interviewed.

At trial, Prentice-Sao decided not to cross-examine TB because she testified about additional details concerning the events and thought that these details could lead to more serious charges: "My concern was that if I did anything to highlight those incidences, Chris Bourgeois would become aware and amend the felony complaint to include CSC one, which is a life offense." She thought that by avoiding the cross-examination, Bourgeois was "going to miss the boat and not amend the complaint." She also did not want to alienate the jury because it was clear to her that they were "on the edge

of their seats" and "looked like they were believing her." Indeed, on cross-examination, Prentice-Sao stated that she herself "believed the child." Finally, she stated that she wanted to be able to argue that TB's testimony was "rehearsed and coached"; so she could not highlight that TB's story "had expanded."

Prentice-Sao testified that she was not sure if defendant would testify because he had an unpredictable personality. However, in case he did testify, she wanted to reserve her opening statement so that she could give a statement before he testified. Ultimately, defendant decided not to testify after her advice. She said that she had concerns about his mental abilities and his mental health and that he was emotional, unpredictable, and easily upset. Thus, she was worried about how he would hold up under cross-examination. She was even concerned that he might reveal his penis to the jury. Because defendant agreed not to testify and she did not have any further proofs, she no longer had a need for an opening statement; this was the reason that she did not give an opening statement.

Prentice-Sao also testified generally about the advocacy that she performed on defendant's behalf outside the actual trial. She noted that she wrote him letters, spoke with him on the phone, spoke with his treatment team at Spectrum Health, and arranged for a forensic interview. She stated that she did not "know what else I could have done differently."

When asked whether she disregarded defendant's request to visit with her at any point during the trial, Prentice-Sao stated that she did not "know when there would have been time to speak with me or to disregard him." She also stated that she did not remember ever giving Bourgeois a thumbs-up or saying that defendant was "toast."

In March 2010, the trial court issued an opinion and order denying defendant's motion for a new trial. The trial court—without explaining its reasoning—first determined that the "case does not contain the type of circumstances which call for an analysis under *Cronic*." It then examined defendant's claim of ineffective assistance under the test stated in *Strickland*. The trial court determined that "it was reasonable for defense counsel to waive an opening statement" and to not "question the minor victim." Because Prentice-Sao's reasons were logical and reasonable, the trial court ruled that defendant failed to overcome the presumption that his attorney's "actions constituted sound trial strategy." The trial court also rejected defendant's contention that his trial counsel violated the rules of professional conduct or exhibited hostility towards him.

In its opinion, the trial court recognized that there was conflicting testimony, but did not resolve the conflicts through findings of fact. It did find that there was "animosity and a lack of respect" between Bourgeois and Prentice-Sao but did not state how that finding applied to the claims of ineffective assistance of counsel; it merely stated that the actions did not "rise to the level of ineffective assistance of counsel." Finally, the trial court determined that defendant failed to establish a reasonable probability that the outcome of the trial would have been different but for his trial counsel's actions.

This appeal followed.

II. THE RIGHT TO COUNSEL

A. STANDARDS OF REVIEW

This Court reviews de novo questions of constitutional law such as whether a defendant was deprived of

his constitutional right to the assistance of counsel. *People v Bryant*, 483 Mich 132, 138, 768 NW2d 65 (2009). However, to the extent that the trial court made findings of fact related to a defendant's claim that he was denied the effective assistance of counsel, this Court reviews those findings for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

B. THE *CRONIC* AND *STRICKLAND* TESTS

The United States and Michigan constitutions protect the right of an accused to have the assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. The right to have the assistance of a lawyer is a fundamental component of our criminal justice system: "Their presence is essential because they are the means through which the other rights of the person on trial are secured." *Cronic*, 466 US at 653. "That a person who happens to be a lawyer is present at trial alongside the accused, however," is not enough to guarantee the right; this is because the right "envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Strickland*, 466 US at 685. For that reason, the right to counsel includes the right to the effective assistance of counsel. *Id.* at 686. That is, an accused is "entitled to be assisted by an attorney, whether retained or appointed, *who plays the role necessary to ensure that the trial is fair.*" *Id.* at 685 (emphasis added). Where an accused's counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result," the accused has not received the effective assistance of counsel. *Id.* at 686.

When examining a claim of ineffective assistance of counsel under either the United States or Michigan constitutions, Michigan courts generally apply the test

stated in *Strickland*. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007) ("Most claims of ineffective assistance of counsel are analyzed under the test developed in *Strickland* . . . ."); see also *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999). This test takes into account the "variety of circumstances faced by defense counsel" and the wide "range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*, 466 US at 689. In order to warrant relief, the defendant must show that his or her trial counsel's performance fell below an objective standard of reasonableness and that it is reasonably probable that the result of the proceeding would have been different had it not been for counsel's error. *Frazier*, 478 Mich at 243, citing *Strickland*, 466 US at 687, 690, 694. Further, the defendant must overcome a "strong presumption" that his or her trial counsel's action was a matter of trial strategy. *Strickland*, 466 US at 489. Although Michigan courts will generally apply *Strickland* to ineffective-assistance claims, under certain rare situations, Michigan courts will presume prejudice under the test stated in *Cronic*. See *Frazier*, 478 Mich at 243.

In *Cronic*, the Court recognized that a defendant receives the kind of support envisioned by the Sixth Amendment where the defendant's trial counsel subjects the prosecution's case to "meaningful adversarial testing" even though he or she "made demonstrable errors." *Cronic*, 466 US at 656. However, "if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Id.* at 656-657. The Court further recognized that there were circumstances involving trial counsel's performance that were so likely "to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.* at 658. In such cases, prejudice is presumed.

The Court in *Cronic* identified three situations warranting a presumption of prejudice: where the defendant was completely denied the assistance of counsel at a critical stage, where the defendant's trial counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," and where the circumstances under which the defendant's trial counsel functions are such that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* at 659-660.

In the present case, we conclude that Prentice-Sao's performance implicates the second exception stated in *Cronic*—the failure to meaningfully test the prosecution's case.

C. *CRONIC*: MEANINGFUL ADVERSARIAL TESTING

In *Cronic*, the Supreme Court recognized that, where a defendant's trial counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Cronic*, 466 US at 659. In order to meet the requirements of this exception, a defendant must show that his or her counsel's "failure" was "complete"; that is, he must show that his counsel "*entirely*" failed to subject the prosecutor's case to meaningful adversarial testing. *Bell v Cone*, 535 US 685, 697; 122 S Ct 1843; 152 L Ed 2d 914 (2002). Where a defendant does not argue that his counsel failed on the whole to subject the prosecution's case to meaningful adversarial testing, but instead argues that discrete acts at specific points in the trial were inadequate, the proper test is that stated in *Strickland*. *Id.* at 697-698. "For purposes of distin-

guishing between the rule of *Strickland* and that of *Cronic*, this difference is not of degree but of kind." *Id.* at 697; see also *Moss v Hofbauer*, 286 F3d 851, 860-861 (CA 6, 2002) (listing cases where courts have found that *Cronic* applied). Nevertheless, even in cases where a defendant has the benefit of adversarial testing, his trial counsel's performance can be "so inadequate that, in effect, no assistance of counsel is provided." *Cronic*, 466 US at 654 n 11 (quotation marks and citation omitted).

In this case, Prentice-Sao did not make an opening statement and did not present any witnesses or evidence. Accordingly, the extent of her adversarial testing was limited to reacting to Bourgeois's examination of her own witnesses, to her cross-examination of Bourgeois's witnesses, and to her closing statement. And although an attorney might offer meaningful testing of a prosecution's case through objections, cross-examination, and closing arguments alone, this is not such a case.[4]

Prentice-Sao did not cross-examine TB's physical education instructor concerning the circumstances giving rise to the allegations in this case. By failing to address this evidence, she permitted an inference that TB's allegations came about spontaneously rather than out of circumstances tending to suggest fabrication. Further, she did not object to the instructor's hearsay testimony.

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[4] On appeal, defendant cites specific moments where Prentice-Sao failed to test the prosecution's case, including the decision to not cross-examine TB. However, it is clear that defendant cites these incidents as evidence that Prentice-Sao failed to test the prosecution's case as a whole. We do not take these examples as proof that defendant's claim is really one premised on individual failings that should be analyzed under *Strickland*. To be thorough, we shall examine every action taken by Prentice-Sao at trial to determine whether, as a whole, those actions can be said to amount to meaningful adversarial testing of the prosecutor's case.

Prentice-Sao also did not cross-examine TB, whose testimony constituted the primary evidence against defendant on all three charges. She failed to cross-examine her even though TB's testimony at trial differed from that of her mother concerning the acts underlying the attempt charge and differed from her earlier accounts. She also did not test TB's memory, or ability to distinguish between innocuous contact and contact done for a sexual purpose. Prentice-Sao also failed to object when TB offered testimony that defendant came to live with her family after his father did something "bad" to football players. Thus, Prentice-Sao allowed Bourgeois to present her most damaging evidence without any challenge whatsoever.

As for TB's mother, Prentice-Sao did cross-examine her. However, she did not cross-examine her about the context surrounding the time she allegedly walked in on defendant while TB was straddling his lap, which was by far the most damaging testimony. Nor did she challenge her credibility by asking her pointed questions about her relationship with her half-brother. Instead, she asked some tangential questions about what her mother might have seen on the day defendant allegedly took TB behind the air conditioning unit. She did establish that HB had had discussions with TB about good touches and bad touches but failed to relate that testimony to the case in any meaningful way. Accordingly, HB's testimony, which corroborated and provided context to TB's testimony, was left unchallenged.

Prentice-Sao then allowed TB's grandmother, SC, to testify without objection that she knew defendant had been abused as a child. She also provided testimony that strongly suggested that defendant had a propensity to commit inappropriate sexual acts—also without objec-

tion. Indeed, she was allowed to testify that she kicked defendant out of her home because, despite her efforts to make him understand that his behavior was "wrong" and "illegal," he could not appreciate the "line of what was appropriate and what was not" and, for that reason, he could not be trusted around TB.[5] Prentice-Sao also allowed SC to testify that defendant had a case manager and that, after she kicked him out of her home, his case manger got him into an adult group home. Prentice-Sao nevertheless felt no need to cross-examine SC about any of this testimony.

Detective Ellis testified next about her interview with defendant. She stated that she tried to manipulate defendant into admitting that he committed the charged acts and suggested that she knew he was guilty. Indeed, she stated that she tried to help him admit his guilt by placing some of the blame on TB and by suggesting that his conduct was just his special way of showing how much he loved TB. Prentice-Sao allowed this testimony to go virtually unchallenged—her only objection was when Ellis began to testify that she knew that defendant had been abused and began to talk about the "cycle of abuse." And while the objectionable character of this line of questioning is obvious, Prentice-Sao had already allowed similar testimony that defendant

[5] It is noteworthy that Prentice-Sao completely failed to cross-examine any of defendant's family members about his mental limitations and how those limitations might have affected his ability to effectively communicate despite clear record evidence that she was aware of those limitations. Had she done so, she might have limited the harm caused by SC and Ellis's testimony that tended to suggest that defendant admitted to having inappropriate feelings for TB and engaged in the sexual conduct at issue. See *People v Yost*, 278 Mich App 341, 365-366; 749 NW2d 753 (2008) (holding that it was prejudicial error for the trial court to prevent the defendant from presenting evidence concerning her intellectual limitations because the implications of the defendant's statements could not be fully evaluated without understanding those limitations).

had been abused—possibly sexually—and might have a propensity to act in the same way. Moreover, on cross-examination, Prentice-Sao's questions were limited and not particularly useful to the defense; she got Ellis to admit that defendant never specifically admitted to doing the charged acts and to admit that uncles may love their nieces and might say as much. Yet the fact that uncles sometimes express love to their nieces is a matter of common sense, and that rejoinder did nothing to mitigate the harm caused by the testimony that defendant agreed that he might have kissed TB back if she kissed him first and agreed that anything that might have happened between him and TB happened because he loved her. Taken in light of SC's testimony that defendant—a grown man—purportedly said he wanted to marry TB and have children with her, this testimony was tantamount to an admission of guilt even in the absence of an admission to the specific acts.

Bourgeois's final witness was Black-Pond, who testified generally about some behaviors exhibited by children who have been abused. Bourgeois offered this testimony to explain why TB's reports of abuse might have been delayed, why she might have trouble relating the details of the abuse, and why her emotional response might not be what the jury would expect. Although Black-Pond offered no substantive evidence regarding the events at issue—indeed she admitted that she had not met TB and only knew about the case through written reports—Prentice-Sao saved her most extensive cross-examination, such as it was, for this witness.

On cross-examination, Prentice-Sao got Black-Pond to admit that women can be abusers, a fact that was completely irrelevant to the case at hand. She also got her to admit that children can and do lie, which is also

a matter of common sense. Finally, she got Black-Pond to describe some signs that a child's allegations might be false. Whatever good that this cross-examination might have produced was, however, quickly undone when Black-Pond testified on redirect that literature showed that only 2% of all allegations of abuse by children are false. That is, although Prentice-Sao got Black-Pond to admit that children might make false allegations and got her to describe some possible signs that TB's allegations might be false, she also allowed her to testify—without any objection—that there was a 98% chance that TB's allegations were true. After this particularly prejudicial testimony, both the prosecution and defense rested.

In her closing, Prentice-Sao's argument focused on reasonable doubt. She argued that TB's testimony appeared robotic and rehearsed and suggested that it was insufficient for the jury to find defendant guilty beyond a reasonable doubt. She made this argument despite the fact that Bourgeois already characterized TB's testimony in her closing as emotional, which, if true, would have been readily apparent to the jury, and despite the fact that the prosecution's expert testified that the vast majority of allegations of abuse made by children are true. She also suggested that the jury could not believe HB's corroborating testimony because there were inconsistencies between her version and that of TB. But she failed to discuss the inconsistencies at any length and failed to address Black-Pond's testimony that child victims will often get details wrong. It is also difficult to see how she could make this argument after she failed to explore the inconsistencies through cross-examination of the witnesses. Further, Prentice-Sao admitted after the trial that TB was an excellent witness, did not appear robotic or rehearsed, and that it

was obvious to her at the time that the jurors not only believed her but were on the edge of their seats throughout her testimony.

Examining Prentice-Sao's handling of the defense as a whole, we conclude that she completely failed to submit the prosecution's case to the meaningful adversarial testing contemplated under the Sixth Amendment to the United States Constitution and the Michigan Constitution. "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." *Cronic*, 466 US at 657 (quotation marks and citation omitted). Here, Prentice-Sao threw defendant into the ring with no defense whatsoever. She permitted Bourgeois to present a parade of damaging—and sometimes highly improper—testimony with virtually no objection and with no meaningful adversarial testing. She also mounted the feeblest of defenses imaginable under the circumstances: a defense that was undermined by her failure to bring out the flaws in the testimony of the prosecution's witnesses on cross-examination and that apparently was not supported by the actual events at trial. Indeed, the prosecutor herself characterized defendant's trial as one in which there were two prosecutors.[6] It is, therefore, no wonder that the jury returned a verdict of guilty on all counts after only two hours of deliberation and in a timespan that likely even included a break for lunch.

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[6] Although we believe Prentice-Sao's deficient handling of this case is evident on the record alone, we find it particularly noteworthy that Bourgeois felt compelled to report Prentice-Sao: the first time she so felt compelled in her 17-year career. Prosecutors are not known for challenging the fairness of the trials they prosecute and the fact that Bourgeois did so is—besides an act of courage—compelling evidence that defendant did not receive proper representation at trial. It is troubling that our dissenting colleague sees fit to traduce the prosecutor for this.

Defendant may very well be guilty and might deserve a lengthy prison term, but our constitutions do not reserve the right to the effective assistance of counsel to only those defendants who are actually innocent; rather, the integrity of our criminal justice system demands that every defendant receive effective assistance of counsel. In this case, it is clear that Prentice-Sao's performance was so inadequate that, in effect, defendant had no assistance of counsel at all. See *Cronic*, 466 US at 654 n 11; see also *Rickman v Bell*, 131 F3d 1150, 1157 (CA 6, 1997) (stating that the defendant's trial counsel's total failure to actively advocate for his client's cause coupled with his expressions of contempt for the defendant amounted to the provision of a second prosecutor rather than a defense counsel, which warranted reversal under *Cronic*). Accordingly, prejudice must be presumed under *Cronic* and defendant is entitled to a new trial.

D. *STRICKLAND*

On appeal, defendant also argues that Prentice-Sao's total failure to challenge the prosecutor's case warrants the reversal of his convictions under the test stated in *Strickland*. Although we agree that Prentice-Sao's conduct of the defense was deficient in several respects,[7]

[7] Prentice-Sao failed to object to hearsay, failed to object to testimony that defendant had been abused and had a case manager, failed to object to suspect expert testimony concerning the veracity of sexual abuse allegations by children, failed to cross-examine several witnesses, provided inadequate cross-examination of others, failed to make an opening statement, and presented a defense attacking TB's credibility in her closing even though she herself testified that TB was an excellent witness and did not appear to be coached or rehearsed. Had defendant properly raised each of these shortcomings, we would conclude that these failings warranted a new trial in the aggregate without the need for a remand, even if no one error warranted relief on its own. *LeBlanc*, 465 Mich at 591.

defendant does not address the specific instances he claims deprived him of a fair trial under the test stated in *Strickland*. Instead, he merely refers to the examples cited in his discussion of *Cronic*. These include Prentice-Sao's alleged betrayal of his confidences and her decision not to cross-examine TB. However, given the record as it now stands, defendant likely cannot meet the prejudice prong of that test. See *Strickland*, 466 US at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). As Justice Stevens once noted, the failure to offer any meaningful adversarial testing makes a prejudice analysis difficult: "a proper *Strickland* inquiry is difficult, if not impossible, to conduct when counsel has completely abdicated his role as advocate, because the abdication results in an incomplete trial record from which a court cannot properly evaluate whether a defendant has or has not suffered prejudice from the attorney's conduct." *Bell*, 535 US at 718 (Stevens, J., dissenting). This is a case in point. By abdicating her ethical obligation to vigorously defend the accused—whether consciously or otherwise—Prentice-Sao created a record that gives the impression of overwhelming guilt. This problem was further exacerbated by the trial court's failure to make specific findings of fact after the hearing on defendant's motion for a new trial and specifically its declining to resolve the credibility dispute between Bourgeois and Prentice-Sao.

At the hearing, Bourgeois gave credible testimony that Prentice-Sao thought defendant was guilty and had expressed a strong dislike—even contempt—for him; she had said he made her "sick" and had stated that she could not even stand to "look at him." She also testified that Prentice-Sao refused to meet with her

client on one occasion because of her dislike for him. Bourgeois even saw Prentice-Sao mimic his speech impediment. She stated that Prentice-Sao had repeatedly—at least eight times, and perhaps as many as a dozen times—told her that she *could not* cross-examine TB. And Prentice-Sao testified that TB had not appearred to be lying and that she herself had believed TB. This evidence strongly suggests that Prentice-Sao's decision not to cross-examine TB had nothing to do with reasonable trial strategy; rather, it suggests that Prentice-Sao chose not to cross-examine TB because she believed TB was truthful and, for that reason, did not deserve to be put through a cross-examination on behalf of her guilty client. If that was the case, then Prentice-Sao's decision necessarily fell below an objective standard of reasonableness under prevailing professional norms. But the trial court did not make the findings necessary to resolve this issue.

Similarly, the trial court did not find whether Prentice-Sao actually told Bourgeois that her client was guilty and did not find whether Prentice-Sao expressed an unbecoming enthusiasm after the trial court gave defendant a lengthy sentence by giving Bourgeois a thumbs-up and exclaiming, "He's toast." The ascertainment of these facts would have gone a long way to aiding this Court in determining whether Prentice-Sao's individual decisions to object to testimony, to cross-examine witnesses, and to pursue the closing argument that she did were legitimate and reasonable efforts on behalf of her client.

This evidence also tends to suggest that Prentice-Sao had an intractable bias against her own client that made it impossible for her to make sound professional decisions on his behalf. Where an attorney has an actual conflict of interest that affects his or her ability to

advocate on behalf of a defendant and that conflict actually causes the attorney to take an action that was not in the defendant's best interest, the defendant is entitled to a new trial without a further showing of prejudice. See *Mickens v Taylor*, 535 US 162, 168; 122 S Ct 1237; 152 L Ed 2d 291 (2002). We conclude that an attorney's strong bias against his or her own client constitutes such a conflict of interest. See *United States v Swanson*, 943 F2d 1070, 1074 (CA 9, 1991) (noting that an attorney who adopts the view that his client is guilty and acts on that belief fails to function in any meaningful sense as the government's adversary). Yet the trial court did not make the findings necessary to resolve this matter either. Nevertheless, given our determination that Prentice-Sao failed to subject the prosecution's case to any meaningful adversarial testing, we do not need to determine whether defendant's inadequate representation also warrants relief under *Strickland*. Nor do we need to remand this case back to the trial court for more specific findings or for a clear resolution of the credibility dispute between Bourgeois and Prentice-Sao.

III. RESPONSE TO THE DISSENT

As already explained, the present case implicates the "meaningful adversarial testing" prong of the test stated in *Cronic*. Our dissenting colleague faults us for applying this test because she believes that this test cannot apply in any case where a defendant's trial counsel took *any* action on behalf of his or her client—however meaningless that action might have been. But the United States Supreme Court did not state that the *Cronic* test applied only to those situations where there was *no* adversarial testing *whatsoever*; rather, it very clearly stated that there had to be a total failure to

subject the prosecution's case to "*meaningful* adversarial testing." *Cronic*, 466 US at 659 (emphasis added). That is, the Supreme Court recognized that there might be extreme cases where, although the defendant's trial counsel took some actions on behalf of his or her client, the actions were so few and so ineffectual that it was tantamount to having no lawyer present at all. See *id.* at 654 n 11. And a court reviewing such a case would be justified in presuming prejudice. *Id.* at 659-660.

Further, in order to determine whether a defendant's trial counsel subjected the prosecutor's case to *meaningful* adversarial testing, a reviewing court must necessarily evaluate the actions actually taken on the defendant's behalf—one simply cannot determine whether a defense was meaningful without evaluating the totality of the acts taken in furtherance of the defense. A trial lawyer might offer meaningful testing through pretrial procedures. However, consulting with other professionals, reviewing the law, and generally familiarizing oneself with the evidence do not constitute meaningful pretrial testing. In this case—as with the majority of cases—the true testing must take place before the jury. For these reasons, we carefully examined every action taken on defendant's behalf *at trial* to determine whether those actions, when viewed as a whole, amounted to "meaningful adversarial testing." We concluded that—as a matter of law—those acts did not meet that minimum threshold. It is clear that this is where we part company with our learned colleague: the dissent would conclude that an occasional objection, some limited and rather benign questioning on cross-examination, and a feckless closing statement that was contradicted by the evidence actually presented were sufficient to remove this case from application of the test stated in *Cronic*. We simply cannot agree.

The dissent also rebukes us for failing to properly apply *Strickland*. But as the dissent acknowledges, we did *not* apply *Strickland*. We noted that defendant presented a claim of error under *Strickland* and we explained that that claim would likely fail, but we chose not to address it given our resolution of defendant's claim under *Cronic*. We also explained that it would be difficult to even analyze this case under *Strickland* given that the prosecution's case was not subjected to *meaningful* adversarial testing. As should be obvious, where a defendant's trial lawyer fails to put on a meaningful defense, the evidence of guilt will invariably appear overwhelming. That is the reason for a presumption of prejudice. And, contrary to the dissent's claim, we did not "ignore" *Bell* by adopting the minority position on this point. Rather, we simply demonstrated that this rather unremarkable observation was not novel. In any event, notwithstanding that observation, we plainly applied *Bell*, which requires a showing that the failure to offer meaningful testing was "complete." See *Bell*, 535 US at 697.[8] Respectfully, it is the dissent that disregards the Supreme Court's guidance by effectively omitting the Court's reference to "meaningful" testing and instead asserting that any testing—even meaningless testing—is sufficient to preclude analysis under *Cronic*.

Given that we did not apply *Strickland*, it is also difficult to respond to the accusation that we failed to properly defer to the trial court's findings and credibility determinations. To this accusation we can only offer that one cannot defer to findings that were never made. As can be seen from the dissent's lengthy quotation of the

[8] In point of fact, there is no minority test in *Bell*. In his dissent, Justice Stevens did not express disagreement with the requirement that the failure must be entire in order to implicate *Cronic*. He merely expressed his disagreement with the majority's conclusion that the record showed that the defendant's trial counsel did offer some level of meaningful adversarial testing. See *Bell*, 535 US at 716-717 (Stevens, J., dissenting).

trial court's opinion, the opinion is devoid of any relevant findings. The trial court did state that it "was reasonable for defense counsel to waive an opening statement," that it was "reasonable for defense counsel not to question the minor victim," and that the court did "not find that such actions rise to the level of ineffective assistance of counsel," but those statements are conclusions of law—not findings. The only statement that could constitute a relevant finding is the court's admission that Prentice-Sao and Bourgeois had "different views about the discussions [and] events" at issue and that there was "animosity and a lack of respect between the attorneys."[9] However, contrary to the dissent's assertion, this did not resolve the credibility dispute between Prentice-Sao and Bourgeois and did not amount to a finding that Prentice-Sao did or did not take a specific action for any particular reason or that she made a specific statement. Thus, there was no relevant finding on this matter to which this Court could defer. Given the serious allegations against Prentice-Sao, one might be tempted to *infer* that the trial court must have made a finding in favor of Prentice-Sao in order to reach the result that it did, but even if we were inclined to apply *Strickland* to this case, unlike the dissent, we would not be inclined to make such inferences.[10] Rather, we would feel compelled to remand this matter for more definite findings.

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[9] The court did briefly note that Prentice-Sao took some basic steps to prepare for trial and acknowledged her background working with children, but these findings did not resolve any of the disputes about the evidence that were material to determining whether Prentice-Sao was ineffective.

[10] While we noted that Prentice-Sao's testimony at the hearing appeared contrived, we did not make a specific finding or credibility determination. Instead, our analysis focused on the record and the actions actually taken by Prentice-Sao on her client's behalf.

We recognize that the presumption of prejudice under *Cronic* will apply only in the most extraordinary of cases. We believe that this is such a case. And, because this is such an extreme case, we find it difficult to believe that this conclusion will be the occasion for a flood of new *Cronic* claims. Whatever the faults in our system, we have no difficulty concluding that the vast majority of criminal defense lawyers not only subject the prosecution to meaningful adversarial testing, but also do so in a professional and effective way. This was one of those rare trials where that was not the case.

IV. CONCLUSION

Defendant's trial counsel entirely failed to subject the prosecution's case to "meaningful adversarial testing." *Cronic*, 466 US at 659. Therefore, he did not receive the assistance for his defense that is guaranteed by the United States and Michigan Constitutions. Accordingly, we must reverse his convictions and remand for a new trial.

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

BORRELLO, J., concurred with M. J. KELLY, P.J.

K. F. KELLY, J. (*dissenting*). I respectfully dissent from the majority's conclusion that defendant was denied his Sixth Amendment right to counsel pursuant to *United States v Cronic*, 466 US 648, 659; 104 S Ct 2039; 80 L Ed 2d 657 (1984). The majority completely misreads and misapplies *Cronic* and its progeny. In so doing, the majority reversibly errs. In my view, *Cronic* does not apply to the facts of this case, and the trial court properly applied the performance and prejudice test for claims of ineffective assistance of counsel as

articulated in *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Moreover, the majority oversteps its authority by refusing to defer to the credibility determinations of the trial court and instead wrongfully substitutes its own preferred version of events to reach an outcome not warranted by either the facts or law. As the trial court properly determined, defendant failed to demonstrate that counsel's performance was deficient or that he suffered prejudice as a result of her alleged errors. I would affirm.

I. BASIC FACTS

Defendant, the victim's uncle, was charged with two counts of criminal sexual conduct in the second degree (CSC II) and one count of attempted CSC II. MCL 750.520c(1)(a) (victim under 13); MCL 750.520g(2). He was also subject to an enhanced sentence as a second habitual offender, MCL 769.10, having previously been convicted of assault with a dangerous weapon, MCL 750.82.

The events giving rise to the CSC II charges stem from sexual assaults committed by defendant against the victim when she was five years old and living with her grandmother. The first assault started when the victim went to wake up defendant so that he could mow the lawn. Defendant "French-kissed" her on the mouth as well as kissing her arms, legs, and neck. The assault ended when her mother called out to her and she left defendant's room. The second assault occurred later that same day. Defendant took the victim behind the air conditioning unit, unzipped his pants, stuck his "private" through the zipper and made her touch his penis for 10 to 20 seconds. Thereafter, he made her lick his penis while he stated to her, "Yeah, . . . you're doing it." The following

day, defendant took the victim behind the couch, pulled down her pants and underwear and kissed her "private" area. The fourth assault occurred in the victim's bedroom. Defendant sat on a desk chair and told the victim to get on his lap and she did so facing him with her legs spread apart. He then folded down his pants and boxers and was trying to "stick up" his penis when her mother walked in. Both the defendant and the victim jumped, and the victim's mother ordered defendant out of the house. While defendant was leaving the bedroom, the victim's mother saw that defendant's penis was erect.

At defendant's arraignment on the charges, he requested a court-appointed attorney. Counsel, Susan Prentice-Sao, was appointed to represent him. Before trial, counsel met with defendant on numerous occasions and spoke with him by telephone. She successfully moved for a forensic examination and a competency hearing. She engaged in extensive discussions with members of defendant's family and defendant's mental-health-care providers. She consulted with other attorneys on trial strategy both before and during the trial and reviewed testimony previously given by the prosecution's expert witness. She successfully persuaded the prosecution to offer defendant a plea deal in which defendant would receive a sentence of five years' tethered probation with no jail or prison time. Defendant rejected the offer, as was his right, because he did not want to register as a sex offender. During the trial, defense counsel conducted voir dire and excused more than one juror. She cross-examined witnesses, made objections, requested and received a cautionary instruction, and argued in closing that there were inconsistencies in the trial testimony and that the victim's version of the assaults was not worthy of belief.

The jury found defendant guilty on all three counts. The trial court sentenced him as a second habitual offender to serve 80 to 270 months in prison for his first CSC II conviction, to serve 60 to 270 months in prison for his second CSC II conviction, and to serve 18 to 90 months in prison for his conviction of attempted CSC II.

Two months after sentencing, the assistant prosecuting attorney assigned to the case wrote to the court administrator, expressing "concerns" about defendant's representation. Defense counsel rejected the assistant prosecuting attorney's "concerns." No further action was taken by the court administrator or the office of the prosecuting attorney, and the assistant prosecuting attorney apparently did not share her "concerns" with the Attorney Grievance Commission.

Defendant requested and received appellate counsel. Appellate counsel moved for a new trial based on ineffective assistance of counsel. In support of the motion, defendant relied upon the representations from the assistant prosecuting attorney's letter to the court administrator. The office of the prosecuting attorney repudiated the assistant prosecuting attorney's position and vigorously opposed the motion.

At the evidentiary hearing on the motion for a new trial, both the assistant prosecuting attorney and defense counsel testified and had sharply divergent memories of events and the conduct of the trial. In a written opinion, the trial court denied the motion:

> Following a Jury Trial, the Defendant was convicted of two counts of Criminal Sexual Conduct-2nd Degree and one count of Attempted Criminal Sexual Conduct-2nd Degree. After the Trial, Assistant Prosecuting Attorney Christine Bourgeois wrote a Memorandum to the Court Administrator regarding the representation provided by the defense attorney. Defendant filed a Motion for New Trial. The Court heard arguments and testimony on February 26, 2010.

Defendant argues that his Sixth Amendment Rights were violated in this case as defense counsel failed to subject the prosecution's case to meaningful adversarial testing. In *United States v. Cronic*, 466 US 648, 658 (1984), the U.S. Supreme Court stated there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Such circumstances would arise "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing [and] that makes the adversary process itself presumptively unreliable. No specific showing of prejudice [would then be required]." (citation omitted) *Id*. at 659. Additionally, there may be an occasion when circumstances of such magnitude are present wherein, "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." (citation omitted) *Id*. at 659 - 660.

The instant case does not contain the type of circumstances which call for an analysis under *Cronic*, supra. Rather, the Court looks to the test outlined in *Strickland v. Washington*, 466 US 668 (1984). First, a Defendant must establish that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Second, a reasonable probability must exist that, in the absence of counsel's errors, the outcome of the proceeding would have been different.

In this case, Defendant argues that defense counsel was ineffective in (1) failing to give an opening statement, (2) failing to cross-examine the minor victim, and (3) disclosing client confidences. Defendant outlined in detail various issues addressed by Assistant Prosecuting Attorney Christine Bourgeois in the Memorandum written by her after the Trial.

The Court sat through the trial, reviewed the parties' briefs and considered the arguments set forth by counsel. In determining whether there was ineffective assistance of counsel, a Defendant must overcome a strong presumption that the counsel's performance constituted sound trial

strategy. *People v Carbin*, 463 Mich 590, 600 (2001). At the hearing on February 26, 2010, defense counsel outlined her background and experience as an attorney. She testified that she spoke with three other experienced attorneys, reviewed trial strategy books and reviewed expert testimony in preparation for Defendant's Trial. She also testified as to her involvement/handling of child witnesses in other cases.

The Court concludes that it was reasonable for defense counsel to waive an opening statement. Since the Defendant did not testify, it would seem odd to give an opening statement, then rest and immediately proceed with closing arguments. Furthermore, it was reasonable for defense counsel not to question the minor victim. There are certainly pros and cons to consider when cross examining a young witness. Defense counsel's explanations for her actions were logical and reasonable. Defendant has failed to overcome the presumption that his attorney's actions constituted sound trial strategy.

Defendant also argues that his counsel violated the Rules of Professional Conduct, disclosed confidences and exhibited hostility toward him. At the hearing there was conflicting testimony from the Assistant Prosecuting Attorney and Defense Attorney. They had different views about the discussions/events that took place off the record throughout this case. It is unfortunate, but clear to this Court, that there was animosity and a lack of respect between the attorneys that tried the case. Given the testimony from defense counsel, the handling of matters outside of the Court lacked professionalism at times. However, the Court does not find that such actions rise to the level of ineffective assistance of counsel, or that defense counsels [sic] actions fell below an objective standard of reasonableness under prevailing professional norms.

Furthermore, given the evidence presented at trial, Defendant has not established a reasonable probability that the outcome of the Trial would have been different in the absence of defense counsels [sic] actions.

This appeal followed, alleging ineffective assistance of counsel because of two perceived errors: counsel's disclosure of client confidences and her failure to cross-examine the child victim.

II. STANDARDS OF REVIEW

Claims of ineffective assistance present a mixed issue of fact and constitutional law, and the trial court must first determine the facts and then decide whether those facts demonstrate a violation of the defendant's constitutional right to the assistance of counsel. *People v Lewis (On Remand)*, 287 Mich App 356, 364; 788 NW2d 461 (2010). "When a defendant asserts that his assigned lawyer is not adequate or diligent . . . the judge should hear his claim and, if there is a factual dispute, take testimony and state his findings and conclusion." *People v Ginther*, 390 Mich 436, 441-442; 212 NW2d 922 (1973).

We review the trial court's factual findings for clear error and review de novo its ultimate determination. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008) (quotation marks and citation omitted). In reviewing the trial court's determination, this Court must keep in mind "the special opportunity" of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). The trial judge's resolution of a factual issue where there is conflicting testimony is entitled to deference. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999).

III. ASSISTANCE OF COUNSEL—*CRONIC*

A. OVERVIEW

I disagree with the majority's assertion that defendant was completely denied the assistance of counsel under *Cronic*. In my view, the majority improperly applies the presumption of prejudice based on defense counsel's actions at trial because, when viewing the record as a whole, it cannot be said that defense counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 US at 659. In reality, the facts of this case warrant review under *Strickland*, the case under which, as the majority notes, " '[m]ost claims of ineffective assistance of counsel are analyzed,' " and not under *Cronic*. Specific instances of counsel's performance are at issue here, not the whole adversarial process. Although the majority pays lip service to the fact that courts will rarely presume prejudice under *Cronic*, the majority ignores relevant case law and inflates its authority to support its contention that *Cronic* applies.

B. *CRONIC* AND ITS PROGENY

In *Cronic*, the defendant was indicted on several counts of mail fraud relating to the transfer of over $9.4 million in checks between numerous banks. *Cronic*, 466 US at 649. After the defendant's retained counsel withdrew, the trial court appointed an inexperienced and young real estate lawyer as defense counsel. *Id.* Counsel was only permitted 25 days to prepare for the trial despite the fact that the government had over 4½ years to investigate the case and had obtained and reviewed thousands of documents. *Id.* During trial, counsel put on no defense but did cross-examine the government's witnesses. *Id.* at 651. On appeal, the United States Court of Appeals for the Tenth Circuit

reversed the conviction because it "inferred" defendant's constitutional right to the effective assistance of counsel had been violated. *Id.* at 652. The "inference" was based on "(1) [t]he time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel." *Id.* at 652 (quotation marks and citations omitted).

The Supreme Court of the United States rejected this "inferential" approach, holding that only in the circumstances that no *actual* assistance has been provided has there been a constitutional violation. *Id.* at 654 ("If no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated."). The Supreme Court identified three circumstances in *Cronic*, 466 US at 659-660, where prejudice would be presumed because of the lack of actual assistance:

> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice was required in *Davis* v. *Alaska*, 415 U.S. [308, 318; 94 S Ct 1105; 39 L Ed 2d 347] (1974), because the petitioner had been denied the right of effective cross-examination which would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.[26]
>
> Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.

[26] Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt.

[Quotation marks and citations omitted.]

The Supreme Court mandated that the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer. *Id.* at 657. If counsel is a reasonably effective advocate, he meets constitutional standards irrespective of his client's evaluation of his performance. *Id.* at 657 n 21, citing *Jones v Barnes*, 463 US 745; 103 S Ct 3308; 77 L Ed 2d 987 (1983) and *Morris v Slappy*, 461 US 1; 103 S Ct 1610; 75 L Ed 2d 610 (1983). Pursuant to *Cronic*, circumstances must indicate that it is unlikely that a defendant *could* have received effective assistance, not whether a defendant *did* receive effective assistance, the latter of which is evaluated under *Strickland*. *Cronic*, 466 US at 660-661.

The majority relies on the second exception in *Cronic*, 466 US at 659, to overturn defendant's conviction: "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." The majority then examines specific instances in the trial to determine that, in its opinion, counsel failed to "meaningfully test" the prosecution's case.[1] The majority misunderstands the law.

In *Bell v Cone*, 535 US 685, 696-697; 122 S Ct 1843; 152

[1] The majority argues that counsel failed to provide *meaningful* adversarial testing without defining what *meaningful* means by reference to any case law. Rather than relying on the law, the majority bases its decision on its own feelings regarding what is and what is not meaningful.

L Ed 2d 914 (2002), the Supreme Court examined this second exception of *Cronic* and the meaning of the failure to subject the prosecution's case to meaningful adversarial testing:

> When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, *we indicated that the attorney's failure must be complete.* We said "if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing." *Cronic*, [466 US] at 659 (emphasis added). Here, respondent's argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points. For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, this difference is not of degree but of kind. [First emphasis added.]

The Supreme Court concluded in *Bell* that the defendant's allegations regarding the defense counsel's failure to present mitigating evidence and make a closing argument did not amount to a complete failure to test the prosecution's case and were the kind of allegations to be addressed by the *Strickland* test and not by *Cronic*. *Id.* at 697-698 (stating that counsel's errors "are plainly of the same ilk as other specific attorney errors we have held subject to *Strickland's* performance and prejudice components").

Similarly, in *Florida v Nixon*, 543 US 175, 178; 125 S Ct 551; 160 L Ed 2d 565 (2004), the United States Supreme Court held that prejudice should not be presumed under *Cronic* when at the guilt phase of a capital trial the defense counsel conceded that the defendant committed murder, without the defendant's express approval, in order to establish a reason for sparing the defendant's life at the penalty phase. The Florida Supreme Court ultimately held that *Cronic* applied and prejudice should be presumed because the defense counsel failed to obtain the defendant's express ap-

proval for the admission of guilt. *Id.* at 186. The Florida Supreme Court reasoned that the admission of guilt without the defendant's approval at the guilt phase was analogous to entering a plea of guilty without the defendant's approval. *Id.* at 185. The United States Supreme Court disagreed and concluded that the defense counsel's strategy at the guilt phase could not be divorced from his strategy at the penalty phase in a capital case; it held that the defense counsel's strategy did not amount to a complete failure to test the prosecution's case. *Id.* at 190-191. It clarified that the *Cronic* test is to be applied in very narrow circumstances:

> *Cronic* recognized a narrow exception to *Strickland*'s holding that a defendant who asserts ineffective assistance of counsel must demonstrate not only that his attorney's performance was deficient, but also that the deficiency prejudiced the defense. *Cronic* instructed that a presumption of prejudice would be in order in "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." 466 U. S., at 658. The Court elaborated: "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id*., at 659; see *Bell* v. *Cone*, 535 U. S. at 685, 696-697 (2002) (for *Cronic*'s presumed prejudice standard to apply, counsel's "failure must be complete"). We illustrated just how infrequently the "surrounding circumstances [will] justify a presumption of ineffectiveness" in *Cronic* itself. In that case, we reversed a Court of Appeals ruling that ranked as prejudicially inadequate the performance of an inexperienced, underprepared attorney in a complex mail fraud trial. 466 U. S., at 662, 666. [*Nixon*, 543 US at 190.]

Thus, the United States Supreme Court held in *Nixon* that whether the defense counsel was ineffective must be analyzed under the performance and prejudice inquiries set out in *Strickland*. *Id.* at 178, 192.

In *People v Frazier*, 478 Mich 231, 244-245; 733 NW2d 713 (2007), our own Supreme Court clarified how to apply the *Cronic*/*Strickland* standards to cases within our jurisdiction: "[T]he *Cronic* test applies when the attorney's failure is *complete*, while the *Strickland* test applies when counsel failed at specific points of the proceeding."[2] In *Frazier*, our Supreme Court refused to apply *Cronic* and presume prejudice when the defense counsel advised the defendant to waive his right to counsel at the police interrogation and failed to attend the interrogation with the defendant. *Id.* at 244-245. Our Supreme Court held that "[b]ecause counsel consulted with defendant, gave him advice, and did nothing contrary to defendant's wishes, counsel's alleged failure was not complete." *Id.*

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[2] The procedural history of *Frazier* is complex. *Frazier*, 478 Mich at 234. The Michigan courts initially affirmed the defendant's convictions. *Id.* On habeas corpus review, the United States District Court for the Eastern District of Michigan ordered the defendant to be released unless he was granted a new trial. *Id.* The federal district court found that under *Cronic* the defendant was totally deprived of the assistance of counsel at a critical stage of the proceedings, an interrogation, and, as a result, the defendant's confession during the interrogation should have been excluded. *Id.* at 237-238. During pretrial hearings for the new trial, the trial court suppressed the testimony of two witnesses whose identity was obtained during the interrogation at which counsel was absent. *Id.* at 238. Following an interlocutory appeal by the prosecution, this Court adopted the reasoning of the federal district court in the habeas proceeding and concluded that, as a result of *Cronic*, the testimony of the witnesses must be suppressed because the witnesses' identities were obtained when the defendant was totally deprived of counsel. *People v Frazier*, 270 Mich App 172, 179; 715 NW2d 341 (2006), rev'd and vacated in *Frazier*, 478 Mich at 256. The Michigan Supreme Court specifically rejected the reasoning of the federal district court applying *Cronic* and vacated this Court's underlying published opinion that approved of the reasoning of the federal district court and the application of *Cronic*. *Frazier*, 478 Mich at 246. In doing so, the Supreme Court recognized that the federal district court's decision excluding the defendant's confession was binding with regard to *Frazier*, but it ensured that the federal district court's analysis utilizing *Cronic* was not binding in future cases. *Id.*

In contrast, in *Rickman v Bell*, 131 F3d 1150, 1157, 1160 (CA 6, 1997) the United States Court of Appeals for the Sixth Circuit concluded that there was a *Cronic* violation as a result of a failure to meaningfully test the prosecution's case when the defense counsel "combined a total failure to actively advocate his client's cause with repeated expressions of contempt for his client for his alleged actions" to the jury. The Sixth Circuit noted that the defense counsel called the defendant "nuts" or "just . . . out of somebody's insane asylum" and "wished to portray [the defendant] as vicious and abnormal." *Id.* at 1159-1160. Similarly, the United States Court of Appeals for the Fifth Circuit concluded that a *Cronic* violation occurred and prejudice should be presumed in a case in which the defense counsel slept through substantial portions of the trial. *Burdine v Johnson*, 262 F3d 336, 349 (CA 5, 2001). While this Court is not bound by the decisions of the lower federal courts, *People v Gillam*, 479 Mich 253, 261; 734 NW2d 585 (2007), and while I do not necessarily agree with their reasoning and conclusions, at least it can be said that these cases, unlike the present case, reflect rather extreme circumstances that may warrant the potential applicability of *Cronic*.

C. APPLICATION OF THE *CRONIC* TEST

The majority claims that the totality of defense counsel's conduct at trial was completely deficient, effectively depriving him of counsel in violation of the Sixth Amendment. As a result, the majority asserts, defendant's claim of ineffective assistance of counsel falls under the analytical framework of *Cronic*, 466 US at 658-659, which does not require a defendant to show prejudice, as contrasted with *Strickland*, 466 US at 687, 694, which requires a defendant to make a showing of

"how specific errors of counsel undermined the reliability of the finding of guilt." *Cronic*, 466 US at 659 n 26, citing *Strickland*, 466 US at 693-696. I disagree. The majority's reasoning is flawed because it utilizes the same analysis specifically *rejected* in *Bell*. *Bell*, 535 US at 697 (finding erroneous the argument that prejudice should be presumed under *Cronic* as a result of counsel's failure "at specific points" rather than "throughout the . . . proceeding as a whole"). *Cronic*—decided the same day as *Strickland*—does not represent a separate standard; rather, it provides an explanation of specific circumstances that are "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 US at 658. The presumed prejudice in *Cronic* is based on the premise that the attorney's failure to "subject the prosecution's case to meaningful adversarial testing" was *complete*. *Bell*, 535 US at 697. I see no evidence of that occurring here.

The record indicates that defense counsel adequately ensured the reliability of the adversarial process. Counsel met with defendant before trial on numerous occasions to discuss trial strategy and other pretrial issues. She successfully moved for a forensic examination and a competency hearing. Defense counsel consulted with other attorneys, both before and during trial, and reviewed prior testimony of the prosecution's expert. She successfully obtained a plea deal for defendant. She engaged in voir dire and excused potential jurors from the jury. She conducted cross-examination, made objections and was successful in moving the trial court to provide a cautionary instruction. She utilized inconsistencies in the testimony and the prosecution's expert witness to argue to the jury that the victim should not be believed. Clearly, assistance of counsel was provided

and defense counsel's alleged failures were not "complete"; the majority simply quibbles with its effectiveness.

Indeed, the majority's discussion of the facts in this case indicates that *Cronic* does not apply and prejudice should not be presumed. In summarizing the record, the majority highlights specific examples of where it claims counsel failed to test the prosecution's case. The majority appears most troubled by counsel's waiver of an opening statement; her refusal to cross-examine the child victim, the physical education instructor, and the victim's grandmother; and her failure to present any witnesses on defendant's behalf.[3] The majority highlights these potential deficiencies but does not argue that they were erroneous. At the same time, the majority also indicates areas where counsel did test the prosecution's case. It notes that she cross-examined the victim's mother, Detective Christina Ellis, and expert Connie Black-Pond, and she objected during Detective Ellis's testimony. While the majority questions the efficacy of counsel's cross-examination of all three witnesses, the fact that the majority discusses how effective, or ineffective, she was in her cross-examination demonstrates that *Strickland*, not *Cronic*, should apply to the facts of the case. The majority further remarks that counsel gave a closing statement. It characterizes her closing argument as "the feeblest of defenses imaginable under the circumstances," but, in doing so, recognizes that she provided a defense.

The majority also fails to understand that attorneys representing criminal defendants can face daunting challenges in devising ethically appropriate trial strategies, not the least of which is what to do when a

[3] Notably, with the exception of cross-examining the child witness, even defendant does not complain of any of these actions by defense counsel.

defendant's guilt is often clear. This is particularly true when a defendant invokes his right not to testify, thereby precluding the jury from hearing a denial of the charges. As our Supreme Court held in *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997):

> "[T]he Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." [*Id.* at 164, quoting *Cronic*, 466 US at 656 n 19.]

While the majority criticizes counsel's use of the feeblest defense possible, it makes no suggestion as to what other possible theory this case could have been successfully defended on. From the review of the record it is clear that the only bona fide jury issue open to counsel was to argue that the inconsistencies of the testimony and the untrustworthiness of the victim should fail to convince the jury of defendant's guilt beyond a reasonable doubt. Effective assistance of counsel is not the equivalent of successful assistance. *People v Tranchida*, 131 Mich App 446, 449; 346 NW2d 338 (1984).

Finally, I find particularly troubling the majority's holding:

> As Justice Stevens once noted, the failure to offer any meaningful adversarial testing makes a prejudice analysis difficult: "a proper *Strickland* inquiry is difficult, if not impossible, to conduct when counsel has completely abdicated his role as advocate, because the abdication results in an incomplete trial record from which a court cannot properly evaluate whether a defendant has or has not suffered prejudice from the attorney's conduct." *Bell*, 535 US at 718 (Stevens, J., dissenting). This is a case in point.

What the majority fails or refuses to recognize is that Justice Stevens's point of view was specifically *rejected* by the eight other justices of the United States Su-

preme Court. *Id.* at 687. Rather than feeling bound by United States Supreme Court precedent, the majority adopts the reasoning in the dissent in *Bell* to gauge when a *Cronic* violation has occurred. However, statements in a minority opinion are insufficient to undermine the validity of a majority's holding. It is difficult for me to understand how a Michigan intermediate appellate court panel can ignore the 2002 United States Supreme Court's decision in *Bell* limiting *Cronic*'s application and instead apply *Cronic* more broadly when specific instances of potential error are at issue. *Cronic* and *Bell* are binding on all states in this nation and that includes Michigan. But even if the majority finds that it may simply disregard the United States Supreme Court, it *is* bound by the decision of our Supreme Court in *Frazier*.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL—*STRICKLAND*

A. OVERVIEW

Since counsel's failure to test the prosecution's case was not complete, this case should be analyzed under the ineffective assistance of counsel test from *Strickland*. In this case, defendant only makes two specific allegations of error with regard to his claim of ineffective assistance of counsel: (1) counsel violated client confidentiality and (2) counsel failed to cross-examine the victim. Neither claim supports his assertion of ineffective assistance of counsel.

The right to effective counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20; *Strickland*, 466 US 686. To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing

professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Pickens*, 446 Mich 298, 309, 312-313; 521 NW2d 797 (1994). Thus, unlike *Cronic*, the *Strickland* test addresses specific errors made by counsel, requiring defendant to show that not only was counsel's performance deficient but also that the defective performance was prejudicial. *Strickland*, 466 US at 686; *Mitchell*, 454 Mich at 157-158.

Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). Decisions as to when to make an opening statement, what evidence to present, whether to call or question witnesses, and on what to focus in closing argument are presumed to be matters of trial strategy, *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008); *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004), and declining to raise objections to procedures, evidence, or argument can also be sound trial strategy, *People v Unger*, 278 Mich App 210, 242, 253; 749 NW2d 272 (2008). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

B. APPLICATION OF *STRICKLAND*

I disagree with the majority's conclusion that counsel's performance "necessarily fell below an objective

standard of reasonableness under prevailing professional norms." Under *Strickland*, defendant was not denied the effective assistance of counsel.

1. CREDIBILITY DETERMINATIONS

Before discussing the alleged errors committed by counsel, I must note my strong disagreement with the majority's credibility determinations. The majority oversteps its review function and, in effect, makes independent findings, substituting its judgment for that of the trial court when it refuses to defer to the trial court's assessment of the credibility of witnesses and makes new credibility determinations to support its conclusion that defendant was totally denied the assistance of counsel. It also completely ignores the standard of review: the trial court first determines the facts and decides whether there is a violation of constitutional magnitude, *Lewis*, 287 Mich App at 364, and then we review, not substitute, the factual findings for clear error and the trial court's ultimate determination de novo, *Petri*, 279 Mich App at 410. Despite the majority's wishes to the contrary, the fact remains that it was *this* trial court that sat through the trial and evidentiary hearing. It was *this* trial court, and not the majority, that observed the demeanor of witnesses and the conduct of counsel. Our Supreme Court stated:

> Resolution of facts about which there is conflicting testimony is a decision to be made initially by the trial court. The trial judge's resolution of a factual issue is entitled to deference. This is particularly true where a factual issue involves the credibility of the witnesses whose testimony is in conflict. [*Farrow*, 461 Mich at 209, quoting *People v Burrell*, 417 Mich 439, 448-449; 339 NW2d 403 (1983).]

A trial court's findings of fact are sufficient if it appears from the record that the trial court was aware of the

issues and correctly applied the law. *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995).

In this case, after presiding over the jury trial and the hearing on the motion for a new trial, the trial court made a number of findings with regard to whether counsel's assistance was ineffective. The trial court found that counsel "spoke with three other experienced attorneys, reviewed trial strategy books and reviewed expert testimony in preparation for Defendant's Trial." Moreover, the trial court noted her past "involvement/handling of child witnesses in other cases." It further reasoned:

> The Court concludes that it was reasonable for defense counsel to waive an opening statement. Since the Defendant did not testify, it would seem odd to give an opening statement, then rest and immediately proceed with closing arguments. Furthermore, it was reasonable for defense counsel not to question the minor victim. There are certainly pros and cons to consider when cross examining a young witness. Defense counsel's explanations for her actions were logical and reasonable. Defendant has failed to overcome the presumption that his attorney's actions constituted sound trial strategy.

The trial court recognized the "conflicting testimony from the Assistant Prosecuting Attorney and Defense Attorney," noting "[t]hey had different views about the discussions/events that took place off the record throughout this case" and "there was animosity and a lack of respect between the attorneys that tried the case." Still, the trial court concluded that counsel's actions did not "rise to the level of ineffective assistance of counsel," and it could not find that "counsel's actions fell below an objective standard of reasonableness under prevailing professional norms."

Despite these findings of fact, the majority completely ignores the unique position of the trial judge,

who is not only experienced but is also the Chief Judge Pro Tem of the Ninth Circuit Court, and disregards the trial judge's credibility findings. In fact, the majority asserts that the trial court "decline[d] to resolve the credibility dispute between [the assistant prosecuting attorney and defense counsel]." I disagree. The trial court clearly found counsel's testimony more credible than the assistant prosecuting attorney's testimony because, despite the assistant prosecuting attorney's allegations that counsel told her that defendant "made her sick" and counsel "couldn't look at him," the trial court found counsel's performance was not deficient. Without having been at the trial or having witnessed the testimony of the assistant prosecuting attorney and counsel in person, the majority concludes that the assistant prosecuting attorney is more "credible" than counsel, even though the trial judge found just the opposite. The majority even characterizes counsel's testimony as "impish and contrived" without having watched the trial or seen her testify in person. I find it hard to believe that the majority could make such a credibility determination based on the transcript alone, and I cannot go along with the majority's refusal to defer to the clear credibility determinations of the trial court.

Moreover, the majority's faith in the credibility and the motives of the assistant prosecuting attorney is misplaced. The majority finds it "particularly noteworthy" and "an act of courage" that the assistant prosecuting attorney decided to report counsel for the inadequacy of her representation. The majority writes, "Prosecutors are not known for challenging the fairness of the trials they prosecute, and the fact that [the assistant prosecuting attorney] did so is . . . compelling evidence that defendant did not receive proper representation at trial." I adamantly disagree. A prosecutor

"has the responsibility of a minister of justice" and has an ethical obligation to ensure that "the defendant is accorded procedural justice . . . ." Comment to MRPC 3.8. If the assistant prosecuting attorney felt that counsel's representation was so deficient, she had an ethical obligation to bring her beliefs to the trial court's attention *before* defendant was convicted and sentenced. Instead, the assistant prosecuting attorney only raised the issue *after* defendant was convicted and sentenced. The assistant prosecuting attorney's failure to raise the issue in a timely manner amounts to an ethical violation and reflects her own misfeasance rather than any evidence that counsel's assistance was ineffective. I also note that the assistant prosecuting attorney's report regarding counsel's supposedly ineffective representation of defendant was apparently not made to the Attorney Grievance Commission, but rather to the court administrator; a move clearly designed to affect future assignments rather than any "concern" over competency. Moreover, the assistant prosecuting attorney's "concerns" and defendant's motion for a new trial were vigorously opposed by the Office of the Prosecutor. As a result, the assistant prosecuting attorney's claims were not recognized as legitimate even by the Office of the Prosecutor or the trial court. They should not be given any legitimacy here. The letter to the court administrator merely consisted of the assistant prosecuting attorney's own feelings on the matter. She was determined to take a particularly vindictive approach to the issue; otherwise, as a prosecutor bound by our rules of professional conduct, she would have certainly brought it to the attention of the trial court *during* trial. The question whether an attorney has rendered effective assistance has never been one to be decided by plebiscite; we should not start now.

2. CROSS-EXAMINATION OF CHILD VICTIM

The majority concludes that counsel was ineffective for failing to cross-examine the victim since counsel expressed a belief that the victim was telling the truth and "for that reason, did not deserve to be put through a cross-examination on behalf of her guilty client." The trial court concluded that counsel's decision was reasonable, and I agree. Counsel testified that the victim expanded her testimony slightly during direct examination and that she believed the new testimony could have supported a charge of first-degree criminal sexual conduct. Counsel was concerned that cross-examination would highlight this new information and that the assistant prosecuting attorney, as a result, would amend the felony information to include a new charge. A trial court may amend the information at any time before, during or after trial. MCL 767.76. Counsel also indicated that the jury looked shocked during the victim's direct examination and she did not want to be perceived as bullying the then 11-year-old victim. As the trial court noted, "[t]here are certainly pros and cons to consider when cross examining a young witness," and it found counsel's explanation to be reasonable and logical. The trial court's finding was not clearly erroneous. Decisions regarding the questioning of witnesses should not be second-guessed on appeal. *Horn*, 279 Mich App at 39. Moreover, no two attorneys will ever try a particular case in the exact same way. And this Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Defendant has not overcome the strong presumption that counsel's decision was based on sound trial strategy.

3. CONFIDENTIAL COMMUNICATIONS AND PERSONAL ANIMUS

The majority concludes that it cannot determine whether defense counsel was ineffective based on, as defendant alleges, her disclosure of confidential communications to the prosecuting attorney and her personal animus towards defendant. I disagree. With regard to these claims, the testimony at the motion hearing was conflicting. The assistant prosecuting attorney testified that counsel told her that defendant committed the crimes, while counsel denied making such a statement and testified that she only told the assistant prosecuting attorney of the same admissions defendant had made in the police report. The assistant prosecuting attorney further testified that counsel told her that defendant "made her sick," while counsel testified that she advocated vigorously for defendant and was not pleased that he was convicted. Counsel also denied giving the assistant prosecuting attorney a "thumbs-up" and stating that defendant was "toast" after defendant had been sentenced. Counsel testified that the assistant prosecuting attorney was condescending throughout the case. Counsel admitted to being "snotty" and flippant in return and that, in her view, the assistant prosecuting attorney had taken some of her sarcastic remarks as true. After considering these testimonies, the trial court resolved the conflicting version of events in counsel's favor.

The trial court's finding was not clearly erroneous. As noted above, the trial court is in a better position to judge the credibility of the witnesses, and we will not displace its findings in this regard on appeal, absent some clear error. *Sexton*, 461 Mich at 752; *Petri*, 279 Mich App at 410. The trial court acknowledged the attorneys' conflicting views of the events and found that "there was animosity and a lack of respect between

the attorneys . . . [and that] the handling of matters outside of the Court lacked professionalism . . . ." Given the character of the attorneys' relationship, the trial court found counsel's testimony more believable and found that her performance was not deficient. Nothing in the record testimony leaves me with a definite and firm conviction that this finding was wrong. Accordingly, just as the trial court concluded, I conclude that counsel's performance did not fall below an objective standard of reasonableness under prevailing professional norms.

4. PHYSICAL EDUCATION TEACHER'S TESTIMONY

The majority also criticizes counsel for not cross-examining the gym teacher, although defendant does not raise this as an element of ineffective assistance.[4] I can only note that the teacher's testimony was contained on barely 2½ pages of the trial transcript. The question asked by the prosecutor was simple: "Can you tell us what happened?" I am unclear as to what possible objection could have been made to this question. While the teacher's response is troublesome, it is a simple fact of life in the trial courts that there are some witnesses who will blurt out inappropriate comments. See *People v Gonzales*, 193 Mich App 263, 265; 483 NW2d 458 (1992). And, "there are times when it is better not to object and draw attention to an improper comment." *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). The majority creates this "failing" out of whole cloth.

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[4] This Court usually does not address issues not raised in the parties' briefs. *People v Byrne*, 199 Mich App 674, 677; 502 NW2d 386 (1993). As a result, it was improper for the majority to address this issue, which was not even mentioned in the parties' briefs.

5. DEFENDANT'S MENTAL LIMITATIONS

The majority also complains that counsel did not bring forward evidence about defendant's mental limitations. Again, this issue is not even raised by defendant. Moreover, it has no support in the record.

Within a week of defense counsel's appointment, she successfully moved for a forensic examination and a competency hearing and met with defendant's mental health providers. At the examination, defendant was "eager to present himself as disabled," with a low IQ and an inability to spell or read, and seemed angry about being charged with the criminal offenses because it "was too long ago!" But, as noted by the examiner, defendant's claims were belied by the examination. Defendant was able to read out loud portions of the documents he brought with him to the examination, and

> defendant was able to fill out the personal history questionnaire and sign his name providing information about his current address, age, date of birth, number of children, education, etc. He was well able to track the conversation and was very well aware of nonverbal nuances indicating a keen awareness of the forensic process. Moreover, it appeared that the defendant preferred to manipulate this process as noted above. The defendant also appeared to prefer to present himself as one who has less ability to remember than he does truly. For example, he would often state, "I don't know", or "I can't remember," "I'm mentally retarded," and then contradict these statements by providing other details (i.e., about his biker club, Hell's Angels" [sic], his work history," "his knowledge about his past IQ testing) that required a more complex level of memory or associative skills.

When he discussed the charges against him, defendant believed that even if the victim were to testify, she would not want him to go to jail, and he blamed his

sister, the victim's mother, for the charges. He also noted that there were no witnesses to the assaults. Finally, he discussed plea bargaining and stated that he would not accept any plea that required him to register as a sex offender. Had counsel tried to introduce defendant's supposed mental limitations, it would have been subject to serious impeachment. Even defendant does not set forth this as a claim on appeal for obvious reasons given the content of the forensic report. The majority's suggestion that failure to explore defendant's mental health limitations is an error committed by counsel ignores the reality that such evidence is unfavorable.

V. CONCLUSION

In sum, defendant has not shown that the trial court clearly erred by finding that counsel's performance was not deficient. And, after reviewing the record, I cannot conclude otherwise. Because counsel was not deficient, no prejudice resulted. Even if there were errors at trial, the evidence against defendant was overwhelming. Accordingly, the trial court did not err by finding that defendant was not denied the effective assistance of counsel and by denying defendant's motion for a new trial.

I also question how the majority's opinion is now to be applied to future cases. Taken as a whole, it places a burden on the appellate courts of this state to review de novo every claim of ineffective assistance of counsel. I have little faith in the ability of an appellate court, especially in cases where credibility is at issue and the record is cold, to substitute its judgment for that of the trial court judge who actually sat through a trial and conducted the requisite evidentiary hearing. In effect, the majority's position simply permits random refer-

enda on an attorney's overall performance based on what a given Court of Appeals panel believes is "meaningful" while ignoring the duty to actually analyze any given case pursuant to the law. Under this opinion, and keeping in mind that *Cronic* refers to the *kind* of violation and not the *degree* of violation, we now have a *Cronic* violation any time a witness blurts out an unresponsive answer or any time counsel reserves an opening argument, does not cross-examine a child victim of sexual assault, fails to voir dire a previously certified expert witness, or refuses to put into evidence damaging mental health testimony. A *Cronic* violation will also arise whenever an attorney argues in closing trial-testimony inconsistencies or that a victim is not worthy of belief. Application of this new rule of law will result in inconsistent outcomes in every case. The rule of law should not depend on the idiosyncrasies of a particular Court of Appeals panel. As Justice Scalia recently wrote in his dissent in *Michigan v Bryant*, 562 US ___, ___; 131 S Ct 1143, 1176; 179 L Ed 2d 93 (2011):

> Judicial decisions, like the Constitution itself, are nothing more than "parchment barriers." Both depend on a judicial culture that understands its constitutionally assigned role . . . and has the modesty to persist when it produces results that go against the judges' policy preferences. Today's opinion falls far short of living up to that obligation—short on the facts, and short on the law. [Citation omitted.]

The trial court did not err in denying defendant's motion for a new trial. I would affirm.

JOHNSON v RECCA

Docket No. 294363. Submitted March 8, 2011, at Lansing. Decided April 5, 2011, at 9:15 a.m. Reversed in part, 492 Mich 169.

Penny Jo Johnson filed an action in the Osceola Circuit Court against John Recca, seeking third-party no-fault benefits, and Allstate Property and Casualty Insurance Company, seeking first-party no-fault benefits. Plaintiff claimed that she had sustained a serious impairment of a body function after being hit in an automobile-pedestrian collision involving Recca and also sought damages for replacement services obtained more than three years after the accident. The claims against Recca and Allstate were severed. The court granted summary disposition for Allstate, but the Court of Appeals reversed in an unpublished opinion per curiam, issued November 9, 2010 (Docket No. 292401). In the action against him, Recca moved for summary disposition. The court, Scott Hill-Kennedy, J., granted the motion, ruling that replacement services are not "allowable expenses" that a plaintiff may recover in a third-party action pursuant to MCL 500.3531(3)(c). The court also concluded as a matter of law that Johnson had not suffered an impairment of a body function that affected her ability to lead her normal life. Johnson appealed.

The Court of Appeals *held*:

1. A plaintiff may recover damages for replacement services that are in excess of the daily and 3-year limitations contained in MCL 500.3107(1)(c) in a third-party action. MCL 500.3107(1)(a) allows an injured person to receive personal protection insurance benefits that include allowable expenses which are reasonable charges incurred for reasonably necessary products, services, and accommodations for the injured person's care, recovery, or rehabilitation. Replacement services are services for the care of an injured person necessitated by a motor vehicle accident. Thus, replacement services are not separate and distinct from "allowable expenses" as defined in MCL 500.3107(1)(a), but are simply a category of allowable expenses that the Legislature chose to place limits on for purposes of recovering them as first-party benefits. Under MCL 500.3135(3)(c), tort liability remains for allowable expenses in excess of the limits imposed by MCL 500.3107.

2. Summary disposition was also improper because there was a factual dispute related to whether Johnson suffered a serious impairment of a body function. The trial court considered only the evidence favoring Recca's position without also considering the medical evidence tending to show that Johnson had an objectively manifested injury in the form of a herniated disk. Further inquiries into the issue must be addressed by applying the standards set forth in *McCormick v Carrier*, 487 Mich 180 (2010).

Reversed and remanded.

INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — ALLOWABLE EXPENSES — REPLACEMENT SERVICES.

Damages for replacement services that are in excess of the daily and three-year limitations contained in MCL 500.3107(1)(c) may be recovered as allowable expenses in a third-party action brought pursuant to MCL 500.3135(3)(c).

Skupin & Lucas, P.C. (by *Mark E. Boegehold*), for Penny Jo Johnson.

Garan Lucow Miller, P.C. (by *Sarah E. Nadeau*), for John Recca.

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

HOEKSTRA, J. In this action for third-party benefits under the no-fault act, MCL 500.3101 *et seq.*, plaintiff appeals as of right the trial court's order granting summary disposition to defendant under MCR 2.116(C)(10). We reverse and remand the case to the trial court for further proceedings.

I. BASIC FACTS AND PROCEDURAL HISTORY

In July 2004, plaintiff, a pedestrian at the time, was hit by a vehicle driven by defendant. Plaintiff was knocked backwards. She fell on her back and hit her head on the cement. At the time of the accident, plaintiff lived with Harrietta Johnson, her ex-mother-in-law. Neither woman owned a vehicle. Defendant had

a no-fault insurance policy with Allstate Property and Casualty Insurance Company.

Plaintiff sued Allstate and defendant. In the first-party claim against Allstate, plaintiff alleged that Allstate had failed to pay personal protection insurance benefits, including expenses for attendant care and replacement services. In the third-party claim against defendant, plaintiff alleged that the accident caused her to sustain a serious impairment of body function. She asserted that she suffered injuries to her lumbar, thoracic, and cervical spine, including a herniated disk[1] at L5-S1 (between the fifth lumbar and the first sacral vertebrae). She also asserted that she suffered a traumatic brain injury, which aggravated a preexisting seizure disorder. Plaintiff further claimed that defendant was required to pay her expenses for replacement services that Harrietta rendered more than three years after the date of the accident. The claims against Allstate and defendant were severed. The case against defendant was stayed, while the case against Allstate proceeded.

In the action for first-party benefits, Allstate moved for summary disposition on plaintiff's claim that she was entitled to benefits for attendant care and replacement services. The trial court granted the motion, concluding that plaintiff had failed to show that the care and services provided by Harrietta after the accident were either reasonable or necessary or that she incurred any expenses for the care and services. However, this Court reversed. *Johnson v Allstate Prop & Cas Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued November 9, 2010 (Docket No. 292401). It held that genuine issues of material fact existed

[1] We recognize that "disk" is sometime referred to in plaintiff's medical records using the commonly accepted alternate spelling "disc."

regarding how often Harrietta provided care and services to plaintiff, whether the care and services were causally connected to the injuries plaintiff suffered in the accident, whether the care and services were reasonably necessary, and whether plaintiff incurred any expenses for the care and services Harrietta rendered. *Id.* at 4-5.

Before this Court reversed the trial court's order in the first-party action, defendant moved in this case for summary disposition under MCR 2.116(C)(10) on plaintiff's claim for economic and noneconomic damages. The trial court granted the motion. First, the trial court held that expenses for replacement services were not allowable expenses because the phrase "allowable expenses" is defined in MCL 500.3107(1)(a) and expenses for replacement services are addressed in a separate subsection of the statute. Thus, it concluded that plaintiff was not entitled to excess benefits for "allowable expenses." In addition, the trial court held that, in light of its order granting summary disposition to Allstate, plaintiff was not entitled to excess benefits from defendant. It explained that because it previously held that plaintiff had failed to provide reasonable proof that any expenses for services rendered by Harrietta were reasonable and necessary, plaintiff was prevented from relitigating the issue under the doctrine of collateral estoppel.

Second, the trial court held that plaintiff was not entitled to noneconomic damages because she had not suffered a serious impairment of body function. It concluded that there was not a valid dispute about the extent of plaintiff's injuries because the medical records showed no traumatic brain injury or lasting spinal damage. The trial court also concluded that plaintiff had not suffered an impairment of a body function. It

explained that the medical records established that plaintiff suffered from a seizure disorder and degenerative back problems before the accident and that no changes were observed in medical examinations after the accident. It further concluded that even if plaintiff could show an impairment of body function, she failed to show that the impairment affected her ability to lead her normal life. The court reasoned that plaintiff was subject to significant limitations before the accident and that the quality of her life after the accident had not drastically changed.

II. EXPENSES FOR REPLACEMENT SERVICES

On appeal, plaintiff argues that the trial court erred by holding that expenses for replacement services rendered more than three years after the date of the motor vehicle accident are not compensable damages in third-party actions.

A. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." We also review de novo issues of statutory interpretation. *Ward v Mich State Univ (On Remand)*, 287 Mich App 76, 79; 782 NW2d 514 (2010).

B. APPLICABLE NO-FAULT STATUTES

With the enactment of the no-fault act, "the Legislature abolished tort liability generally in motor vehicle accident cases and replaced it with a regime that

established that a person injured in such an accident is entitled to certain economic compensation from his own insurance company regardless of fault." *Kreiner v Fischer*, 471 Mich 109, 114; 683 NW2d 611 (2004), overruled by *McCormick v Carrier*, 487 Mich 180; 795 NW2d 517 (2010).[2] The benefits that an injured person is entitled to receive from his or her own insurance company are listed in MCL 500.3107 (§ 3107). Subsection (1) of that statute provides:

> Except as provided in subsection (2), personal protection insurance benefits are payable for the following:
>
> (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. Allowable expenses within personal protection insurance coverage shall not include charges for a hospital room in excess of a reasonable and customary charge for semiprivate accommodations except if the injured person requires special or intensive care, or for funeral and burial expenses in the amount set forth in the policy which shall not be less than $1,750.00 or more than $5,000.00.
>
> (b) Work loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured. . . .
>
> (c) Expenses not exceeding $20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had not been injured, an injured person would have performed during the first 3 years after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent. [MCL 500.3107(1).]

[2] The Supreme Court in *McCormick* overruled the *Kreiner* Court's interpretation of the definition of "serious impairment of body function" in MCL 500.3135(7). See *McCormick*, 487 Mich at 194-209.

In addition, a no-fault insurer must pay survivor's loss benefits to the dependent survivors of a deceased insured. See MCL 500.3108(1). Survivor's loss benefits, which are payable for no more than three years after the date of the accident, may not exceed $20 a day for a dependent and may not exceed a certain sum in a 30-day period. MCL 500.3108(1) and (2).

The Legislature, however, did not abolish all tort liability in motor vehicle accident cases. See MCL 500.3135(3); *Kreiner*, 471 Mich at 115. An injured person may recover certain limited economic damages from a negligent operator or owner of a motor vehicle. See MCL 500.3135(3)(c); *Kreiner*, 471 Mich at 114 n 2. MCL 500.3135(3) states:

> Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by [MCL 500.3101] was in effect is abolished except as to:
>
> * * *
>
> (c) Damages for allowable expenses, work loss, and survivor's loss as defined in [MCL 500.3107 to MCL 500.3110] in excess of the daily, monthly, and 3-year limitations contained in those sections.[3]

C. ANALYSIS

The issue in the present case is whether the excess "damages for allowable expenses" that an injured per-

[3] In addition, MCL 500.3135(3) provides that tort liability was not abolished for intentionally caused harm, damages for noneconomic loss when the person has suffered death, serious impairment of body function, or permanent serious disfigurement, or damages up to $500 to motor vehicles if the damages are not covered by insurance. MCL 500.3135(3)(a), (b), and (d).

son may recover in a third-party action pursuant to MCL 500.3135(3)(c) include expenses for services commonly known as replacement services that are rendered more than three years after the date of the accident. Resolution of this issue requires interpretation of § 3107(1).

The goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Tevis v Amex Assurance Co*, 283 Mich App 76, 81; 770 NW2d 16 (2009). The first criterion in determining legislative intent is the language of the statute. *Id.* If the language is unambiguous, the Legislature is presumed to have intended the meaning clearly expressed, and a court must enforce the statute as written. *Ameritech Publishing, Inc v Dep't of Treasury*, 281 Mich App 132, 136; 761 NW2d 470 (2008). "Identical terms in different provisions of the same act should be construed identically . . . ." *Cadle Co v City of Kentwood*, 285 Mich App 240, 249; 776 NW2d 145 (2009); see also *Capitol Props Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422, 434; 770 NW2d 105 (2009) ("If the statute defines a term, that definition controls."). Judicial construction of a statute is appropriate only when the language is ambiguous. *Capitol Props Group*, 283 Mich App at 434.

The Legislature defined "allowable expenses" as those expenses "consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a). This definition does not specifically describe expenses for replacement services. Replacement-services expenses, however, are specifically addressed in subdivision (c) of § 3107(1). The question then is whether this separate treatment of replacement-services expenses means that replacement-services expenses are expenses separate

and distinct from allowable expenses or whether they are merely a category of allowable expenses.

As just stated, allowable expenses are those expenses "consisting of all reasonable charges incurred for reasonably necessary products, *services* and accommodations for an injured person's *care*, recovery, or rehabilitation." MCL 500.3107(1)(a) (emphasis added). In *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 534-535; 697 NW2d 895 (2005), the Supreme Court stated that the terms "recovery" and "rehabilitation" referred to restoring an injured person to the condition he or she was in before sustaining the injuries. Then, recognizing that the term "care" must have a meaning broader than "recovery" and "rehabilitation," and yet not so broad as to render those terms nugatory, the *Griffith* Court held that "care" referred to "those products, services, or accommodations whose provision is necessitated by the injury sustained in the motor vehicle accident." *Id.* at 535. It explained that " '[c]are' is broader than 'recovery' and 'rehabilitation' because it may encompass expenses for products, services, and accommodations that are necessary because of the accident but that may not restore a person to his preinjury state." *Id*.

Considered within the definition of "care" in § 3107(1)(a) provided by the Supreme Court in *Griffith*, replacement services are services for the "care" of an injured person. Replacement services are those services performed by another that the injured person would have performed for his or her benefit or the benefit of dependents had the person not been injured. MCL 500.3107(1)(c). Consequently, replacement services are services that are needed as the result of an injury sustained in the motor vehicle accident. See *Griffith*, 472 Mich at 535. For example, in this case, plaintiff

claims that before the accident she prepared her own meals, but since the accident and because of the back injury she sustained in the accident, she is no longer able to cook and Harrietta does so for her. If a person injured in a motor vehicle accident cooked his or her food before being injured, but because of the injury sustained is no longer able to cook, any expense incurred in paying someone to cook for him or her is a replacement-service expense. But the expense is also conceptually an "allowable expense" because the cooking service is "care" as defined in *Griffith*; it was necessitated by the injury sustained in the accident. Because replacement services are services for the "care" of an injured person, we conclude that replacement-services expenses are not separate and distinct from allowable expenses; rather, they are merely one category of allowable expenses.

A question remains, however, concerning why the Legislature separately addressed replacement-services expenses in § 3107(1)(c). The answer, we believe, is that the Legislature included subdivision (c) in § 3107(1) to place limits on the amount of expenses for replacement services that a no-fault insurer must pay. MCL 500.3107(1)(a) contains no daily or yearly limits on the amount of allowable expenses that a no-fault insurer is required to pay. But a no-fault insurer is only required to pay $20 a day for replacement services for those services performed in the first three years after the date of the accident. MCL 500.3107(1)(c). Also, this explanation of the Legislature's decision to include subdivision (c) in § 3107(1) is consistent with the fact that the expenses in the subdivision are not labeled "replacement services expenses." Rather, subdivision (c) only refers to "[e]xpenses" and then describes services that have become known as replacement services. Because the expenses are not specifically named, it is reasonable

to conclude that the expenses are simply one category of allowable expenses that are subject to a limit on recovery that is not applicable to other allowable expenses.

Our conclusion that replacement-services expenses are a category of allowable expenses is also supported by the inclusion of the phrase "allowable expenses, work loss, and survivor's loss" in four provisions of the no-fault act. See MCL 500.3110(4); MCL 500.3116(4); MCL 500.3135(3)(c); MCL 500.3145(1).[4] These provisions contain general rules regarding the recovery of economic losses. For example, MCL 500.3110(4) provides that "[p]ersonal protection insurance benefits payable for accidental bodily injury accrue not when the injury occurs but as the allowable expense, work loss or survivors' loss is incurred." If replacement-services expenses are a category of allowable expenses, then the phrase "allowable expenses, work loss, and survivor's loss" refers to all economic losses for which the no-fault act permits recovery. We find nothing in the language of the no-fault act to suggest an intent by the Legislature to exclude replacement-services expenses from general rules applying to the recovery of economic losses.[5]

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[4] The only other provision in the no-fault act in which the term "allowable expenses" appears is § 3107.

[5] We note that our conclusion also agrees with how our Supreme Court and this Court have viewed the allowable expenses that are recoverable in third-party actions. In *Kreiner*, 471 Mich at 114 n 2, the Supreme Court wrote: "An injured person may file a tort claim against the party at fault seeking to recover *excess* economic losses (wage losses and replacement expenses beyond the daily, monthly, and yearly maximum amounts). MCL 500.3135(3)(c)." (Emphasis in original.) In addition, in *Swantek v Auto Club of Mich Ins Group*, 118 Mich App 807, 809; 325 NW2d 588 (1982), this Court stated, "The right of action against the tortfeasor for excess economic loss exists in all categories in which the insurer's liability is limited by the statute: work loss, funeral cost, and replacement services."

In addition, the model civil jury instruction on economic loss in an action for third-party benefits, M Civ JI 36.06, states that the plaintiff has the

In conclusion, because replacement-services expenses are "allowable expenses," and because MCL 500.3135(3)(c) did not abolish tort liability for "[d]amages for allowable expenses . . . in excess of the daily, monthly, and 3-year limitations contained in [MCL 500.3107 to 500.3110]," we hold that damages for replacement-services expenses that are in excess of the daily and three-year limitations contained in MCL 500.3107(1)(c) may be recovered in a third-party action. Accordingly, we reverse the trial court's order granting defendant summary disposition on plaintiff's claim for excess replacement-services expenses.[6]

III. SERIOUS IMPAIRMENT OF BODY FUNCTION

Plaintiff also argues on appeal that the trial court erred by granting summary disposition on her claim that she suffered a serious impairment of body function.

"A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1).

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burden of proving sustained damages and the trial court is instructed to "insert those applicable economic loss damages suffered by the plaintiff in excess of compensable no-fault benefits for which plaintiff seeks recovery—e.g., work loss during the first three years in excess of no-fault benefits, all work loss beyond three years, excess replacement service expenses, etc."

[6] In their respective briefs on appeal, the parties dispute the effect the trial court's order granting summary disposition to Allstate on plaintiff's first-party claim for expenses for replacement services has on plaintiff's third-party claim. Because this Court reversed the trial court's order and it is unknown whether plaintiff is entitled to benefits from Allstate for replacement services rendered within three years of the date of the accident, we decline to address whether plaintiff can recover excess benefits from defendant if she is not entitled to collect benefits from Allstate. The underlying factual basis of the parties' controversy does not currently exist, and it may never exist again.

The Legislature defined a "serious impairment of body function" as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7). Three prongs must be met to establish the threshold injury: "(1) an objectively manifested impairment (2) of an important body function that (3) affects the person's general ability to lead his or her normal life." *McCormick*, 487 Mich at 195. In *McCormick*, our Supreme Court held that it had previously incorrectly interpreted MCL 500.3135(7) and established new standards for determining whether a person has suffered a serious impairment of body function. *Id.* at 214-216.

Plaintiff claims that the trial court erred by determining as a matter of law that she had not suffered a serious impairment of body function because there was a factual dispute concerning the nature and extent of the injuries she suffered to her lumbar spine in the motor vehicle accident.[7]

Whether a person has suffered a serious impairment of body function is a question of law for the court if the court finds that (1) there is no factual dispute about the nature and extent of the injuries or (2) if there is a factual dispute, the dispute is not material to the determination whether the person suffered a serious impairment of body function. MCL 500.3135(2)(a); *McCormick*, 487 Mich at 192-194. A material dispute is one that is " 'significant or essential to the issue or matter at hand' "; it need not be outcome determinative. *McCormick*, 487 Mich at 194, quoting Black's Law Dictionary (8th ed).[8]

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[7] Plaintiff has abandoned any claims that as a result of the accident she suffered a brain injury, that her seizure disorder was aggravated, or that she sustained impairments to her cervical or thoracic spine.

[8] The Court in *McCormick* stated that its reading of MCL 500.3135(2) was "not necessarily inconsistent" with the *Kreiner* Court's interpretation the statute's plain language. *McCormick*, 487 Mich at 194 n 8.

After reviewing plaintiff's medical records, we conclude there was a dispute concerning whether plaintiff's injuries from the motor vehicle accident included a herniated disk at L5-S1. According to two MRIs, plaintiff suffered a herniated disk. A June 2005 MRI revealed "a moderate sized broad based central disc herniation" at L5-S1. In addition, an August 2006 MRI showed "a right paracentral disk herniation" at L5-S1. Although plaintiff suffered from back problems before the motor vehicle accident, the scans and x-rays taken of plaintiff's back before the accident showed only degenerative changes; they did not reveal a herniated disk. Dr. James Whelan, plaintiff's primary-care physician, stated that plaintiff's October 2006 surgery was necessitated by injuries sustained in the accident.

However, other medical records indicated that plaintiff did not suffer a herniated disk. In a September 2006 office note, Dr. Farook Kidwai, the surgeon who performed plaintiff's surgery, wrote that he had reviewed an MRI of plaintiff's lumbosacral spine and it revealed a "bulging of the disc" at L5-S1. Kidwai also wrote that he told plaintiff that any surgery would involve decompression. In addition, in his surgical report, Kidwai stated that there were "severe degenerative changes" and a "considerable bulging of the disc at L5-S1." Kidwai's report made no mention of a herniated disk. Further, Dr. William Boike, who performed an independent medical evaluation of plaintiff, concluded after reviewing the August 2006 MRI and Kudwai's surgical report that plaintiff did not have a herniated disk.[9]

In determining that there was no valid dispute about the nature and extent of the injuries plaintiff sustained

[9] Whether plaintiff had a herniated disk or a bulging disk is relevant because Boike testified that a bulging disk is not a traumatic injury and that it would not have been caused by a motor vehicle accident.

in the motor vehicle accident, the trial court failed to acknowledge the two MRIs that showed that plaintiff had a herniated disk at L5-S1. It did so even after defense counsel stated at the hearing on the motion for summary disposition that there was a dispute regarding whether plaintiff actually had a herniated disk. Because the trial court failed to account for the evidence suggesting that plaintiff suffered an objectively manifested injury, we reverse the trial court's order granting summary disposition to defendant on plaintiff's claim that she suffered a serious impairment of body function. All further inquiries into whether plaintiff suffered a threshold injury must be answered using the new standards announced by the Supreme Court in *McCormick*.[10]

Reversed and remanded for further proceedings.

SHAPIRO, P.J., and TALBOT, J., concurred with HOEKSTRA, J.

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[10] Both parties have filed supplemental briefing regarding *McCormick*. However, any application of the standards announced in *McCormick* should first be undertaken by the trial court.

PEOPLE v CROCKRAN

Docket No. 294831. Submitted March 8, 2011, at Detroit. Decided April 5, 2011, at 9:20 a.m.

Dewayne E. Crockran was charged in the Genesee Circuit Court with first-degree premeditated murder, carrying a concealed weapon, possession of a firearm by a felon, and possession of a firearm during the commission of a felony. The court, Judith A. Fullerton, J., granted defendant's motions to suppress the custodial statement he made to the police without the assistance of counsel and to dismiss the information. The prosecution appealed.

The Court of Appeals *held*:

1. The determination whether an attorney-client relationship exists focuses on a client's subjective belief that he or she is consulting the attorney in his or her professional capacity and the client's intent to seek the attorney's professional legal advice. The record in this case contains a plethora of evidence that demonstrates that there was an attorney-client relationship between defendant and attorney Frederick Blanchard before defendant made his custodial statement to the police. Defendant demonstrated a subjective intent to consult Blanchard in his professional capacity and seek legal advice about his alleged involvement in the crimes before he was arrested, at the time of his arrest, and following his arrest. Under the facts presented, an attorney-client relationship existed between defendant and Blanchard. The trial court erred by holding that, because Blanchard was not paid for his services before defendant was arrested, Blanchard was not defendant's lawyer.

2. There is no doubt that defendant knew that he had a lawyer at the time of his arrest and knew that his lawyer wanted to talk to the police. Under the circumstances, it cannot be shown that the police concealed the fact that defendant had counsel available to him and that counsel was at his disposal. Suppression of the statement was not warranted on this basis.

3. The right to counsel may be validly waived in custodial interrogation after the Sixth Amendment right to counsel has attached, even if the interrogation was initiated by the police. No error occurred in the police-initiated interrogation of defendant

wherein defendant did not say that he wanted his attorney present and said that he would talk without his attorney present. The order suppressing defendant's statement is reversed, the order dismissing the information is vacated, and the case is remanded to the trial court.

Reversed, vacated, and remanded.

1. CONSTITUTIONAL LAW — RIGHT TO COUNSEL — CUSTODIAL INTERROGATIONS.

Law enforcement investigators may not, as part of a custodial interrogation, conceal from a suspect that counsel has been made available to and is at the disposal of the suspect.

2. ATTORNEY AND CLIENT — EXISTENCE OF ATTORNEY-CLIENT RELATIONSHIP.

The determination whether an attorney-client relationship exists focuses on the client's subjective belief that the client is consulting the attorney in his or her professional capacity and the client's intent to seek the attorney's professional legal advice.

3. CONSTITUTIONAL LAW — RIGHT TO COUNSEL — WAIVER OF RIGHT TO COUNSEL — CUSTODIAL INTERROGATIONS.

The Sixth Amendment right to counsel may be validly waived in custodial interrogation after the right to counsel has attached even if the interrogation was initiated by the police.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *David S. Leyton*, Prosecuting Attorney, *Donald A. Kuebler*, Chief of Appeals, Training, and Research, and *Vikki Bayeh Haley*, Assistant Prosecuting Attorney, for the people.

Before: WILDER, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM. Defendant was charged with first-degree premeditated murder, MCL 750.316(1)(a), carrying a concealed weapon, MCL 750.227, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Relying on *People v Bender*, 452 Mich 594; 551 NW2d 71 (1996), the trial court suppressed defendant's custodial statement and thereafter granted de-

fendant's motion to dismiss the information. The prosecution appeals as of right. We reverse the order suppressing defendant's statement, vacate the dismissal of the information, and remand. This opinion shall have immediate effect pursuant to MCR 7.215(F)(2).

I. FACTS AND PROCEEDINGS

Defendant was charged with first-degree murder and the weapons offenses in connection with the February 6, 2009, shooting death of Nate Henson outside the front door of Club Xclusive in Flint. Defendant was arrested at approximately 10:30 a.m. on February 26, 2009. Between the date of the charged offense and defendant's arrest, defendant had over 20 contacts with an attorney, Frederick Blanchard, to discuss the matter. Shortly after defendant was arrested, defendant's family members made a payment to Blanchard between 11:00 a.m. and noon on February 26, to secure his services as counsel for defendant. Blanchard then contacted the police station several times to advise the police that he was defendant's attorney and wanted to speak to defendant. No one advised defendant that Blanchard had attempted to contact him. Defendant submitted to a police interview at approximately 10:00 or 11:00 p.m. that night. Defendant gave a statement to Sergeant Mike Angus in which he admitted shooting the victim, but claimed that he had acted in self-defense. Angus testified that he was not aware of Blanchard's attempt to reach his client. Angus received the message the following day.

Defendant moved to suppress his statement on the basis of *Bender*, 452 Mich 594, because the police failed to inform him that his "retained counsel had been attempting to contact him." The trial court found that,

despite all the contacts between defendant and Blanchard, "the record is clear that [Blanchard] was not retained until around noon that day." The trial court also found that the record supported Blanchard's assertions that he had repeatedly attempted to contact defendant or reach Angus before defendant made his statement to Angus. The trial court agreed that *Bender* controlled and specifically cited Justice CAVANAGH's opinion at 452 Mich 614. The trial court determined that the instant case was indistinguishable from *Bender*, and that Justice CAVANAGH's opinion controlled, stating:

> [T]he Court [in *Bender*] affirmed the trial court's suppression of the Defendant's [sic] statement after the police failed to inform [the defendants] that counsel had been retained for them and of counsel's attempt to contact them. It seems to me that fits exactly in that situation, of this box, the *Bender* box, if you want to call it that.

The trial court thereafter granted defendant's motion to quash because, without the statement, the evidence was insufficient to bind defendant over for trial. This appeal followed.

II. ANALYSIS

This Court reviews a trial court's findings of fact at a suppression hearing for clear error and reviews de novo questions of law and the trial court's ultimate decision whether to suppress the evidence. *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001).

The prosecution initially argues that *Bender* was incorrectly decided and should be overruled. However, only the Supreme Court has the authority to overrule its own decisions. *Paige v Sterling Hts*, 476 Mich 495, 524; 720 NW2d 219 (2006). Until it does so, "all lower courts and tribunals are bound by that prior decision

and must follow it even if they believe that it was wrongly decided . . . ." *Id*. Therefore, this Court is bound to follow *Bender*, as was the trial court. But, importantly, the lead opinion in *Bender* cited by the trial court that was authored by Justice CAVANAGH and joined by Justices LEVIN and MALLETT was not the majority opinion in *Bender*. Rather, as our Supreme Court stated in *People v Sexton*, 458 Mich 43, 53; 580 NW2d 404 (1998), the "ultimate holding" of the *Bender* Court was stated in the opinion by Chief Justice BRICKLEY, joined by Justices LEVIN, CAVANAGH, and MALLETT. *Id*. at 53-54, citing *Bender*, 452 Mich at 620-621 (opinion by BRICKLEY, C.J.). The trial court, therefore, improperly relied on Justice CAVANAGH's opinion in *Bender*, because it was not the majority opinion. *Sexton*, 458 Mich at 53.

The trial court also relied on this Court's opinion in *People v Leversee*, 243 Mich App 337, 346-347; 622 NW2d 325 (2000), that also incorrectly referred to Justice CAVANAGH's lead opinion as the majority opinion. In *Leversee*, this Court explained that it is not necessary that an attorney or family member speak directly to the interrogating officer. Rather, it is sufficient if an attorney contacts a "police" station to communicate the attorney's desire to speak to a client because " 'the police, as an entity, have the fundamental responsibility to establish and maintain adequate procedures that will allow an attorney to communicate with a suspect and the interrogating officers without unreasonable delay.' " *Id.*, quoting *Bender*, 452 Mich at 617-618 n 24 (CAVANAGH, J.). This discussion is merely dicta because it does not go to the holding of the case where the panel found that although the admission of the defendant's statement to the police was error, the error was harmless because of the overwhelming evidence of the defendant's guilt. *Leversee*, 243 Mich App

at 347. Statements and comments in an opinion concerning a rule of law or debated legal proposition that are not essential to the disposition of the case constitute obiter dicta and lack the force of a binding adjudication. *McNally v Wayne Co Bd of Canvassers*, 316 Mich 551, 558; 25 NW2d 613 (1947). Accordingly, we conclude that the language relied on by defendant creating a "police entity" is not binding and has no precedential value. *People v Borchard-Ruhland*, 460 Mich 278, 286 n 4; 597 NW2d 1 (1999). Moreover, we question the wisdom of treating a police or sheriff's department as a monolithic entity to the extent that an inquiry to "one person" will be treated as notice to all.

The rule applicable to this case is the prophylactic rule outlined by Chief Justice BRICKLEY in *Bender* in his majority opinion:

> The right to counsel and the right to be free of compulsory self-incrimination are part of the bedrock of constitutional civil liberties that have been zealously protected and in some cases expanded over the years. Given the focus and protection that these particular constitutional provisions have received, it is difficult to accept and constitutionally justify a rule of law that accepts that *law enforcement investigators, as part of a custodial interrogation, can conceal from suspects that counsel has been made available to them and is at their disposal*. If it is deemed to be important that the accused be informed that he is entitled to counsel, it is certainly important that he be informed that he has counsel. [*Bender*, 452 Mich at 621 (emphasis added).]

Thus, the crux of the question presented here is whether, under the facts presented, it can be shown that the police actually concealed the fact that defendant had counsel available to him and that counsel was at his disposal. *Id.* To answer this question, we must first scrutinize the relationship between defendant and

Blanchard. In *Grace v Center for Auto Safety*, 72 F3d 1236, 1242 (CA 6, 1996), the United States Court of Appeals for the Sixth Circuit stated that whether an attorney-client relationship exists focuses on a client's subjective belief that he or she is consulting the attorney in his or her professional capacity and the client's intent to seek the attorney's professional legal advice. Here, contrary to the trial court's determination, the record contains a plethora of evidence that demonstrates that an attorney-client relationship between defendant and Blanchard existed before defendant's statements to Angus.

Blanchard testified that in the early part of February, he and defendant "had discussed him retaining me but it hadn't been finalized" because Blanchard had not been paid. They had many conversations. Blanchard's cell phone records showed over 20 phone calls between defendant and him from February 21 to February 26, 2009. When Blanchard became aware of information about Crime Stoppers, he and defendant "had a conversation and I told him that he should turn himself in and subsequent to that he said okay, see what they, you know, want to do and so I called the local Crime Stoppers number."

Blanchard called the local Crime Stoppers phone number on February 20, at 4:48 p.m. The call went to Officer Jermaine Reese's voice mailbox. Blanchard left a message that he was an attorney and Reese should contact him about "my bringing Mr. Crockran." Blanchard agreed that the message stated, "I was Mr. Crockran's attorney. I requested a call back so that I could arrange for his surrender." Reese testified that he received a voicemail message on the Crime Stoppers phone line from Blanchard stating that he believed that defendant had been on

Crime Stoppers, that Angus was in charge of the case, and requesting a return phone call.

On February 26, 2009, at 10:34 a.m., defendant called Blanchard and said that the police were downstairs at defendant's house. Blanchard advised defendant to go downstairs, peacefully turn himself in, hand the cell phone to the police officer, and say that Blanchard wanted to speak with him. Before Blanchard could speak to the police, the phone went dead. The call lasted approximately two minutes. Blanchard called one of defendant's family members and reported that defendant had been arrested and "that the terms of the agreement need to be finalized." A family member "made the arrangements" and Blanchard received the initial funds in Flint between 11:00 a.m. and noon. When Blanchard was asked when he was "retained on this matter," he responded, "Well, the terms were discussed sometime the 22nd/23rd of February. When did I actually receive money? It was . . . between eleven and twelve on the 26th of February."

Without a doubt, defendant demonstrated a subjective intent to consult Blanchard in his professional capacity and seek legal advice about his alleged involvement in this matter before his arrest. The record shows that defendant and Blanchard had more than 20 contacts in less than one week immediately preceding his arrest. The record is plain that Blanchard advised defendant with regard to the Crime Stoppers issue and even called the Crime Stoppers' phone number indicating that he was in a position to bring defendant in to the police to surrender and face the charges.

Further, the record is plain that defendant demonstrated a subjective intent to consult Blanchard in his professional capacity and seek legal advice about his alleged involvement in this matter both at the exact

time of his arrest and following his arrest. Defendant testified that when he became aware of the fact that the police were present and wanted to take him into custody on February 26, 2009, he called Blanchard. Blanchard told defendant that he wanted to speak with the police. According to defendant, he had a phone in his hand while he was going down the stairs to tell the police that Blanchard wanted to speak with them, but when he got to the end of the stairs, the arresting officer threw defendant on the floor, grabbed the phone, and hung it up. Defendant's testimony indicates that he repeatedly referred to "my" lawyer when he spoke to the police.

> *Q.* Did you mention to the police officers the reason you had the phone in your hand?
>
> *A.* Yes, I did. I told 'em my lawyer was on the phone.
>
> *Q.* And that was before you were taken into custody?
>
> *A.* Yes, sir.

Defendant further testified that after the police placed him in the back of a vehicle, he asked an officer standing nearby if he could call his attorney. The officer told defendant to wait until Angus came out of the house. Defendant stated that when Angus came outside, defendant asked him if he could call his lawyer, but Angus did not respond. They went across the street to buy gas. Defendant "asked him again can I see my—can I talk to my lawyer?"

Under the facts presented at the evidentiary hearing by both defendant and Blanchard, we conclude that an attorney-client relationship existed pursuant to the test set out in *Grace*, 72 F3d at 1242. The trial court clearly erred when it found that Blanchard was not defendant's lawyer because he had not been paid and used this faulty analysis in its determination about the existence

of an attorney-client relationship between defendant and Blanchard. While payment for services is important to the determination whether an attorney had been retained, it is but one consideration in whether an attorney-client relationship existed. And here, where voluminous evidence shows an attorney-client relationship, it overwhelms the fact that defendant had not paid Blanchard for his services before his arrest.

Because the facts indicate that defendant and Blachard had an established attorney-client relationship as shown by their conduct during the week leading up to defendant's arrest as well as at the time of his arrest, there is no doubt that defendant was aware that he had counsel immediately following his arrest during transport and in the hours following his arrest at the police station. Again, defendant was actually speaking to his counsel at the time the police took him into custody. At that time his counsel explicitly told defendant that he wanted to speak with the police. Defendant even relayed that message to the arresting officer. However, during the arrest the phone went dead and the arresting officer did not speak to defendant's counsel. Defendant certainly knew that his counsel wanted to talk to the police and knew that that did not happen. Under these circumstances we cannot see how it could be shown that the police concealed the fact that defendant had counsel available to him and that counsel was at his disposal. *Bender*, 452 Mich at 621 (opinion by BRICKLEY, J.). Defendant was clearly aware that he had counsel and that his counsel wanted to speak to the police. That Blanchard repeatedly called the police station after defendant's arrest but never reached defendant or Angus is of no consequence to our determination because defendant already knew that he had counsel and that his counsel was available to him. *Id*. In fact,

defendant testified that later in the day at the police station Angus came to his holding cell just before the interview. Angus asked defendant to come with him, and defendant "asked him where we going? And he said we come to talk to you." According to defendant, defendant asked him again if he could have his lawyer, stating, "I need my lawyer." Defendant testified that Angus did not respond and took him to the interview room next door. This is further evidence that defendant was aware that counsel was available to him and that counsel was at his disposal. *Id*. Under these facts, we conclude that there has been no violation of *Bender* and suppression was not warranted.

While not explicitly raised, under these circumstances, we are compelled to point out that once the Sixth Amendment right to counsel has attached a defendant may still validly waive that right to counsel even if the interrogation was initiated by the police. *Montejo v Louisiana*, 556 US 778; 129 S Ct 2079; 173 L Ed 2d 955 (2009). *Montejo* reflects a recent change in the law. Previously, in *Michigan v Jackson*, 475 US 625; 106 S Ct 1404; 89 L Ed 2d 631 (1986), overruled by *Montejo*, 556 US at 797, the United States Supreme Court held that once the Sixth Amendment right to counsel attached, a defendant could not validly waive that right to counsel in custodial interrogation initiated by the police. *Jackson*, 475 US at 636. The holding in *Jackson* was expressly overruled in *Montejo*. *Montejo*, 556 US at 797. The United States Supreme Court held that the right to counsel may be validly waived in custodial interrogation after the Sixth Amendment right to counsel has attached, even if the interrogation was initiated by the police. *Id*. at 794-796.

Defendant admitted that he received his *Miranda*[1] rights and understood them before the interrogation. According to defendant, during the interview, he asked Angus if he knew Blanchard and if defendant needed him. Defendant testified that Angus told him that if he "lawyered up," it would be "a problem." Defendant also testified that he told Angus that at the time of his arrest, he was on the phone with Blanchard. Defendant agreed that he was willing to talk to Angus and tell him his side of what happened. Defendant asked Angus if he needed a lawyer, but never said he wanted to stop talking to Angus and wanted an attorney. Angus videotaped the entire two-hour conversation. Angus testified that defendant did not say that he wanted an attorney present and said that he would talk without an attorney present. After reviewing the record, we see no error with this police-initiated interrogation. *Montejo*, 556 US at 794-796.

Reversed, vacated, and remanded. This opinion shall have immediate effect pursuant to MCR 7.215(F)(2). We do not retain jurisdiction.

WILDER, P.J., and SAAD and DONOFRIO, JJ., concurred.

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

ISIDORE STEINER, DPM, PC v BONANNI

Docket No. 294016. Submitted November 4, 2010, at Lansing. Decided April 7, 2011, at 9:00 a.m.

Isidore Steiner, D.P.M., P.C., brought an action in the Livingston Circuit Court against Dr. Marc A. Bonanni, a former employee of plaintiff, alleging breach of contract, conversion, fraud, and misrepresentation, and seeking an accounting. Plaintiff claimed that defendant breached his employment contract with plaintiff, which prohibited defendant from soliciting or servicing any patients of the corporation after he left its employment, when, following his termination of employment with plaintiff, he allegedly treated plaintiff's patients. During discovery, plaintiff requested disclosure of the names, addresses, and telephone numbers of the patients defendant had treated since terminating his employment with plaintiff. Defendant objected to such disclosure on the bases that such disclosure would violate the Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d *et seq*., and state law regarding physician-patient privilege. Plaintiff filed a motion to compel production of the information requested. The court, Michael P. Hatty, J. denied the motion. Plaintiff appealed by leave granted.

The Court of Appeals *held*:

1. HIPAA asserts supremacy in the area of physician-patient privilege, but HIPAA allows for the application of state law regarding physician-patient privilege if the state law is more protective of patients' privacy rights. In the context of litigation that, as here, involves nonparty patients' privacy, HIPAA requires only notice to the patient to effectuate disclosure whereas Michigan law grants the added protection of requiring patient consent before disclosure of patient information. Because Michigan law is more protective of patients' privacy interests in the context of this litigation, Michigan law applies to plaintiff's attempted discovery of defendant's patient information. The trial court correctly denied plaintiff's motion to compel disclosure because Michigan law protects the very fact of the physician-patient relationship from disclosure without patient consent.

2. The public policy underlying both HIPAA and Michigan's physician-patient privilege, MCL 600.2157, supports applying Michigan law, because there are only limited exceptions to Michigan's general nondisclosure requirement and there is no Michigan rule for nonconsensual disclosure of nonparty patients in judicial proceedings like there is in HIPAA. On this issue, Michigan law is more stringent than HIPAA and HIPAA does not preempt MCL 600.2157.

3. The names, addresses, and telephone numbers of defendant's patients are privileged under MCL 600.2157.

Affirmed.

CONFLICT OF LAWS — PHYSICIANS AND SURGEONS — PHYSICIAN-PATIENT PRIVILEGE — HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT.

The federal Health Insurance Portability and Accountability Act asserts supremacy in the area of the physician-patient privilege but allows for the application of state law regarding the privilege if the state law is more protective of patients' privacy rights; Michigan's physician-patient privilege statute is more stringent than the federal act when a plaintiff seeks to discover from a defendant authorized to practice medicine or surgery the names, addresses, and telephone numbers of the defendant's nonparty patients and, therefore, the federal act does not preempt the state law (MCL 600.2157; 42 USC 1320d *et seq*.).

Wood, Kull, Herschfus, Obee & Kull, *P.C.* (by *Brian H. Herschfus* and *Nicole J. LaVake*), for plaintiff.

Giarmarco, Mullins & Horton, P.C. (by *William H. Horton* and *Elizabeth A. Favaro*), for defendant.

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

SAAD, J. This Court granted plaintiff's application for leave to appeal a trial court order that denied plaintiff's motion to compel discovery. For the reasons set forth below, we affirm.

I. NATURE OF THE CASE

Plaintiff, Isidore Steiner, D.P.M., P.C., claims that

defendant, Dr. Marc Bonanni, a former employee of the corporation, breached his employment contract with plaintiff and misappropriated property of the corporation. Plaintiff maintains that defendant stole its patients in violation of a clause in the employment agreement that prohibited defendant from soliciting or servicing any patients of the corporation after he left its employment. After defendant left the employment of plaintiff, plaintiff sued defendant and sought disclosure of defendant's patient list to prove its case and damages. Defendant objected to disclosure pursuant to the Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d *et seq*., and state law regarding physician-patient privilege. This discovery dispute requires us to decide whether federal or state law controls and whether disclosure would violate the nonparty patients' privacy rights.

By its language, HIPAA asserts supremacy in this area, but allows for the application of state law regarding physician-patient privilege if the state law is more protective of patients' privacy rights. In the context of litigation that, as here, involves nonparty patients' privacy, HIPAA requires only notice to the patient to effectuate disclosure whereas Michigan law grants the added protection of requiring patient consent before disclosure of patient information. Because Michigan law is more protective of patients' privacy interests in the context of this litigation, Michigan law applies to plaintiff's attempted discovery of defendant's patient information. And, because Michigan law protects the very fact of the physician-patient relationship from disclosure, absent patient consent, the trial court properly rejected plaintiff's efforts to obtain this confidential information, and we affirm the trial court's ruling.

II. FACTS AND PROCEEDINGS

On July 6, 1999, plaintiff and defendant entered into an employment agreement that contained a noncompetition and nonsolicitation clause. Among other things, the clause in issue prohibited defendant from inducing, soliciting, diverting, servicing, or taking away patients from plaintiff for a three-year period following the termination of the employment agreement. Defendant resigned from plaintiff in July 2007. Thereafter, plaintiff filed a lawsuit against defendant for breach of contract, conversion, fraud, and misrepresentation, and seeking an accounting. An essential component of plaintiff's claim for damages is that, after he left the practice, defendant treated plaintiff's patients in violation of the employment agreement.

During discovery, plaintiff sent defendant a set of interrogatories, one of which requested the names, addresses, and telephone numbers for every patient treated by defendant since he resigned. Plaintiff claims that it cannot protect its contractual rights to its patients without discovery of which of its former patients are now patients of defendant. Defendant objected to the interrogatory on the ground that such disclosure would violate HIPAA and Michigan's physician-patient privilege, and the trial court issued a qualified protective order in which the parties agreed to conduct their litigation in compliance with HIPAA and agreed to maintain all privileges. Because defendant failed to fully respond to plaintiff's interrogatories, plaintiff filed a motion to compel. In response, defendant argued that the information requested is protected by Michigan's statutory physician-patient privilege, which, he argued, contains more stringent requirements than HIPAA. The trial court denied plaintiff's motion to compel production of the patients' names,

and ruled that the names of the nonparty patients are privileged under Michigan law.

III. ANALYSIS

A. STANDARDS OF REVIEW

We review de novo a trial court's decision about the application of the physician-patient privilege. *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 468; 608 NW2d 823 (2000). If the privilege does apply, we review for an abuse of direction a trial court's order regarding disclosure. *Id*. An abuse of discretion occurs when a trial court chooses a result that falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Whether HIPAA preempts Michigan law is a question of law, which is reviewed de novo. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 438; 695 NW2d 84 (2005).

B. DISCUSSION

Plaintiff argues that the trial court erred by holding that the names, addresses, and telephone numbers of the nonparty patients that defendant allegedly wrongfully took from plaintiff are privileged and protected from disclosure by Michigan law, under MCL 600.2157 and *Baker*, 239 Mich App 461, because HIPAA applies and permits disclosure.

HIPAA is the federal statute and associated regulations that govern the retention, use, and transfer of information obtained during the course of the physician-patient relationship. *In re Petition of Attorney General for Investigative Subpoenas*, 274 Mich App 696, 699; 736 NW2d 594 (2007). "Under HIPAA, the general rule pertaining to the disclosure of protected health information is that a

covered entity may not use or disclose protected health information without a written authorization from the individual as described in 45 CFR 164.508, or, alternatively, the opportunity for the individual to agree or object as described in 45 CFR 164.510." *Holman v Rasak*, 486 Mich 429, 438-439; 785 NW2d 98 (2010). However, 45 CFR 164.512 "enumerates several specific situations in which '[a] covered entity may use or disclose protected health information without the written authorization of the individual, as described in [45 CFR] 164.508, or the opportunity for the individual to agree or object as described in [45 CFR] 164.510 . . . .' " *Holman*, 486 Mich at 439, quoting 45 CFR 164.512. Included within those situations is disclosure for judicial and administrative proceedings, which allows a provider or other covered entity to disclose the protected information in response to an order or in response to a subpoena or discovery request if the provider receives satisfactory assurance that notice was provided to the patient or that reasonable efforts were made to secure a qualified protective order. 45 CFR 164.512(e). As our Supreme Court also explained in *Holman*:

> Under HIPAA, "[a] standard, requirement, or implementation specification" of HIPAA "that is *contrary* to a provision of State law preempts the provision of State law" unless, among other exceptions, "[t]he provision of State law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted under" HIPAA. 45 CFR 160.203 (emphasis added). "Contrary" means either that "[a] covered entity would find it impossible to comply with both the State and federal requirements" or that "[t]he provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of" HIPAA. 45 CFR 160.202. "More stringent," in this context, means "provides greater

> privacy protection for the individual who is the subject of the individually identifiable health information." 45 CFR 160.202. [*Holman*, 486 Mich at 440-441.]

Plaintiff maintains that Michigan law is less stringent than HIPAA because it can be informally waived and that, therefore, MCL 600.2157 is preempted by HIPAA as a matter of law.

We first observe that, under Michigan law, the privilege belongs to the patient and only the patient may waive it. *Baker*, 239 Mich App at 470. The purpose of the physician-patient privilege is to protect the confidential nature of the physician-patient relationship. *Swickard v Wayne Co Medical Examiner*, 438 Mich 536, 560; 475 NW2d 304 (1991); *Gaertner v Michigan*, 385 Mich 49, 53; 187 NW2d 429 (1971). These principles are particularly important in a context, as here, wherein a plaintiff seeks the names, addresses, and telephone numbers of nonparty patients, many of whom are unlikely to know the lawsuit is pending.

MCL 600.2157 provides, in part, that,

> [e]xcept as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon.

When interpreting a statute, this Court must give effect to the Legislature's intent as expressed in the language of the statute by analyzing the words, phrases, and clauses according to their plain meaning. *Bukowski v Detroit*, 478 Mich 268, 273-274; 732 NW2d 75 (2007). The language of MCL 600.2157 states that physicians "shall not" disclose information obtained from patients for purposes of medical treatment, except as otherwise provided in the law. The use of the word "shall" denotes

mandatory action. *Wolverine Power Supply Coop, Inc v Dep't of Environmental Quality*, 285 Mich App 548, 561; 777 NW2d 1 (2009). This type of mandatory language is not found in HIPAA. Instead, HIPAA provides that a physician *may* disclose protected health information in response to a subpoena or discovery request when adequate assurances are given from the requesting party that the patients have been notified and informed of their right to deny the request. 45 CFR 164.512(e). Thus, the language of HIPAA allows for permissive disclosure, whereas Michigan law generally prohibits disclosure.

There are no exceptions under Michigan law for providing random patient information related to any lawsuit. Unlike HIPAA, MCL 600.2157 does not provide for disclosure in judicial proceedings. Also, HIPAA, unlike Michigan law, makes disclosure exceptions for public-health activities; victims of abuse, neglect, or domestic violence; and for health-oversight activities. 45 CFR 164.512(b), (c), and (d).[1]

Plaintiff argues that because the privilege may be waived involuntarily under MCL 600.2157, it is less stringent than HIPAA. Under MCL 600.2157, the privi-

[1] However, Michigan law does provide for some exceptions other than the waivers specifically stated in MCL 600.2157. See *People v Keskimaki*, 446 Mich 240, 247, 254-255; 521 NW2d 241 (1994) (If after an accident a sample of a person's blood is withdrawn for the purpose of medical treatment, that sample shall be admissible in a criminal prosecution. An accident is often unexpected and undesired by at least one of the parties involved, but not necessarily all.); *People v Johnson*, 111 Mich App 383, 390-391; 314 NW2d 631 (1981) (Communications between a physician and a patient, however confidential they may be, are held not to be privileged if they have been made in the furtherance of an unlawful or criminal purpose.); *Osborn v Fabatz*, 105 Mich App 450, 455-456; 306 NW2d 319 (1981) (Communication between a person and a physician that is for the purpose of a lawsuit, and not for treatment or advice regarding treatment, is not protected by the physician-patient privilege.).

lege may be waived if a patient pursues a medical-malpractice claim and calls his or her physician as a witness, if the heirs of a patient contest the patient's will, or if the beneficiaries of a life insurance policy of a deceased patient provide the necessary documents to the life insurer when the insurer is examining a claim for benefits. Relying on *Law v Zuckerman*, 307 F Supp 2d 705, 711 (D Md, 2004), plaintiff contends that HIPAA should apply here because these waiver possibilities "can force disclosure without a court order, or the patient's consent." In *Law*, the United States District Court for the District of Maryland held, "If state law can force disclosure without a court order, or the patient's consent, it is not 'more stringent' than the HIPAA regulations." *Id*. The *Law* court ruled, in a case of first impression, that HIPAA preempted Maryland state law and governed all ex parte communications between defense counsel and the patient's treating physician. *Id*. at 709. However, the key component in analyzing HIPAA's so-called "more stringent" requirement is *the ability of the patient to withhold permission and to effectively block disclosure*. *Id*. at 711. Under MCL 600.2157, a patient or his representative can withhold permission by not engaging in acts that waive the privilege. In this way, the patient may indeed block disclosure. Moreover, HIPAA also covers instances in which the patient's consent is not necessary in order to warrant disclosure. A patient's protected health information may be disclosed without the patient's written consent or authorization in a judicial or administrative proceeding in response to a court order, or in response to a subpoena or discovery request without a court order, if the party seeking the information has given the patient notice and an opportunity to object. 45 CFR 164.512(e)(1)(ii)(A) and (B). Thus, disclosure under HIPAA may be made without judicial order, much like

some disclosures under MCL 600.2157. Additionally, unlike HIPAA, MCL 600.2157 does not authorize disclosure under a qualified protective order. For these reasons, we do not find persuasive the argument that automatic waiver of the privilege under some circumstances makes Michigan law less stringent than HIPAA.

We further note that the policy behind the *Law* standard on stringency supports the application of Michigan law. The *Law* court opined that the main concern regarding the disclosure of patient medical information is that the patient is in a position to authorize the disclosure. *Law*, 307 F Supp 2d at 711. This policy has also been repeatedly expressed by this Court and the Michigan Supreme Court. See *Baker*, 239 Mich App at 470; *Gaertner*, 385 Mich at 53; *Swickard*, 438 Mich at 560-561. Here, protecting the interests of the nonparty patients is of utmost importance. The nonparty patients who defendant allegedly treated confided in defendant with personal information, including the fact that they were treated at all, which should not be disclosed without their consent. Moreover, these patients are not in a position to waive their rights. Nothing in the record shows that they are aware of this case or were given the right to decide the issue. Thus, the public policy underlying both HIPAA and Michigan's physician-patient privilege supports applying Michigan law, specifically because there are only limited exceptions to Michigan's general nondisclosure requirement and there is no Michigan rule for nonconsensual disclosure of nonparty patients in judicial proceedings as in HIPAA. Therefore, on this issue, Michigan law is more stringent than HIPAA and HIPAA does not preempt MCL 600.2157.[2]

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[2] We further note that nothing in the protective order supports a conclusion that HIPAA controls.

Applying MCL 600.2157, we affirm the trial court's holding that the names, addresses, and telephone numbers are privileged. In *Schechet v Kesten*, 372 Mich 346, 350-351; 126 NW2d 718 (1964), our Supreme Court held that the physician-patient privilege protects the names of patients who were not parties to the case. The Court ruled that the physician-patient privilege

> imposes an absolute bar. It protects, "within the veil of privilege," whatever . . . "was disclosed to any of his senses, and which in any way was brought to his knowledge for that purpose." Such veil of privilege is the patient's right. It prohibits the physician from disclosing, in the course of any action wherein his patient or patients are not involved and do not consent, even the names of such noninvolved patients. [*Id.* at 351 (citation omitted).]

In *Dorris v Detroit Osteopathic Hosp Corp*, 220 Mich App 248, 249; 559 NW2d 76 (1996), the plaintiff sued a hospital and alleged that she refused a particular drug that was subsequently administered to her. After she received the drug, the plaintiff's blood pressure dropped. *Id*. The plaintiff requested the name of her roommate in the hospital because she claimed that the roommate was present when she refused the drug. Relying on *Schechet*, this Court held the name of the nonparty roommate was protected by the physician-patient privilege. *Id*. at 251-252.

Similarly, in *Popp v Crittenton Hosp*, 181 Mich App 662; 449 NW2d 678 (1989), this Court relied on *Schechet* and held that the plaintiff was not entitled to the name and medical records of a nonparty patient. In *Dierickx v Cottage Hosp Corp*, 152 Mich App 162, 164-165; 393 NW2d 564 (1986), the plaintiffs brought a medical-malpractice action claiming that their first-born daughter suffered central-nervous-system damage because of the defendants' negligence. The defendants

requested the medical records of the plaintiffs' two youngest children, one of whom appeared to have a disorder similar to that of the eldest daughter, to determine if the central-nervous-system damage could have been genetic. *Id*. at 165. This Court held that the two younger children had not placed any disorder in controversy, and therefore did not waive the privilege. *Id*. at 167. This Court in *Baker*, 239 Mich App at 463, with the support of the above-cited cases, held that "the physician-patient privilege is an absolute bar that prohibits the unauthorized disclosure of patient medical records, including when the patients are not parties to the action."

Thus, *Schechet* and its progeny fully support our holding that the names, addresses, and telephone numbers requested by plaintiff are privileged under Michigan law.[3] These cases clearly state that nonparty names and other related medical information is "within the veil of privilege." *Schechet*, 372 Mich at 351 (quotation marks and citation omitted). The nonparty patients in this case have not waived the privilege by putting their medical condition in controversy. *Dierickx*, 152 Mich App at 167. Additionally, much like the nonparty patient in *Dorris*, the patients in this matter likely are not aware of the pending lawsuit. Because we hold that HIPAA does not preempt Michigan law on this issue

[3] To support its request for defendant's patient list, plaintiff says it cannot press its claim that defendant stole its patients without knowing the identity of defendant's patients and that, unless the courts grant such discovery, it cannot enforce its contractual right to protect its valuable patient list from poaching by any unscrupulous ex-employee, such as plaintiff regards defendant. To this, we say that it is not our role to address either the wisdom of a physician's efforts to restrict with whom a patient may consult or the appropriate business or legal means by which a corporation can effectively protect its practice. Instead, our limited role is to decide whether the names, addresses, and telephone numbers of nonparty patients are protected from disclosure by law.

and that, under MCL 600.2157, plaintiff is not entitled to the requested nonparty-patient information, we hold that the trial court did not abuse its discretion when it denied plaintiff's motion to compel discovery.[4]

Affirmed.

SAWYER, P.J., and FITZGERALD, J., concurred with SAAD, J.

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[4] We also reject plaintiff's assertion that defendant did not timely raise this claim of privilege under MCL 600.2157. MCR 2.310(C)(2) generally requires that a party to whom a request for the production of documents is served must make a written response within 28 days after service of the request. Plaintiff submitted the interrogatories on April 7, 2009, and defendant timely objected to plaintiff's interrogatories on May 5, 2009. Defendant stated that "HIPAA, as well as medical privilege, precludes Defendant from releasing the information sought in this request." Defendant's response clearly stated that he objected to the disclosure of the requested information and gave a sufficient reason for the objection. Therefore, defendant's reply was timely and his objection stated adequate grounds in accordance with MCR 2.310(C)(2).

MEEMIC INSURANCE COMPANY v DTE ENERGY COMPANY

Docket Nos. 295232 and 296102. Submitted April 5, 2011, at Lansing. Decided April 7, 2011, at 9:05 a.m. Leave to appeal denied, 490 Mich 873.

MEEMIC Insurance Company brought suit in the Mecosta Circuit Court against DTE Energy Company and Michigan Consolidated Gas Company on behalf of MEEMIC's insureds, Bradley and Kimberly Brew. The complaint alleged that defendants' negligence and breach of contract caused a house fire that originated at the Brews' home's gas meter. Defendants moved for summary disposition, relying on the deposition testimony of their investigator, who opined that the fire likely originated some distance away from the meter. Plaintiff's response relied on expert testimony and a report in which its expert stated that the cause of the fire could not be determined but, because the meter had been destroyed in the fire, it could not be eliminated as a cause. The court, Scott P. Hill-Kennedy, J., granted defendants' motion on both counts. The court also denied plaintiff's motion for reconsideration. Defendants filed a motion for case evaluation sanctions 16 days after that order entered, which was also 37 days after the entry of summary disposition. The court found that defendants' motion for sanctions was not filed within 28 days after the final order and denied the motion. Plaintiff appealed in Docket No. 295232; defendants appealed in Docket No. 296102.

The Court of Appeals *held*:

1. A party moving for summary disposition under MCR 2.116(C)(10) has the initial burden of presenting documentary evidence to support the motion. To survive the motion, the nonmoving party must then present evidence showing a genuine issue of material fact exists. Plaintiff's expert's statement that the meter could not be ruled out as a cause of the fire was insufficient to create a question of fact relating to the causation of the fire.

2. Under MCR 2.403(O), a party that has rejected a case evaluation must pay the opposing party's actual costs if the verdict in the case is more favorable to the opposing party than the case evaluation, after certain adjustments are made. A verdict includes a judgment entered as a result of a ruling on a motion after

rejection of the case evaluation. A request for costs under this rule must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion for a new trial or to set aside the judgment. When a trial court has entered a summary disposition order that fully adjudicates the entire action, a party must file and serve its motion for case evaluation sanctions within 28 days after entry of a ruling on a subsequent motion for reconsideration. Defendants filed their motion for case evaluation sanctions 16 days after the court ruled on plaintiff's motion for reconsideration. Therefore, defendants' motion was timely and the court erred when it ruled to the contrary.

Affirmed in part and reversed in part.

PRETRIAL PROCEDURE — CASE EVALUATION SANCTIONS — VERDICTS FOR PURPOSES OF AWARDING CASE EVALUATION SANCTIONS.

When a trial court has entered a summary disposition order that fully adjudicates the entire action and rules on a subsequent motion for reconsideration, the order granting or denying reconsideration is a verdict for purposes of case evaluation sanctions; a party seeking such sanctions must file and serve its motion for costs within 28 days after entry of the ruling on the motion for reconsideration (MCR 2.403[O][1], [2][c]).

Kreis, Enderle, Hudgins & Borsos, P.C. (by *Floyd E. Gates, Jr.*, *Sean P. Fitzgerald*, and *James D. Lance*), for plaintiff.

Lincoln G. Herweyer, P.C. (by *Lincoln G. Herweyer*), for defendants.

Before: O'CONNELL, P.J., and K. F. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM. These consolidated appeals arise from a fire that engulfed the home of plaintiff's insureds. In Docket No. 295232, plaintiff appeals by right the grant of summary disposition in favor of the defendants, utility companies. We affirm the summary disposition on the ground that plaintiff failed to present sufficient evidence to create an issue of cause in fact. In Docket No. 296102, defendants appeal by right the trial court's

determination that their motion for case evaluation sanctions was untimely. We reverse the trial court's determination and remand for further consideration of the motion for case evaluation sanctions.

On the day of the fire at issue, plaintiff's insured saw smoke and heard a hissing noise near his home. He ran between the house and the garage and found the back of his house engulfed in flames. There was a ball of fire in the location of the gas meter. Plaintiff's experts subsequently opined that the fire originated outside of the house near the gas meter. In contrast, defendants' investigator determined that the fire originated four or five feet west of the meter. Plaintiff sued defendants, alleging negligence and breach of contract claims. The trial court granted summary disposition in favor of defendants on both claims. Plaintiff moved for reconsideration, which the trial court denied. After the trial court denied the motion for reconsideration, defendants filed a motion for case evaluation sanctions under MCR 2.403(O). The trial court found the motion to be untimely.

I. SUMMARY DISPOSITION — DOCKET NO. 295232

This Court conducts a de novo review of the trial court's decision on summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A summary disposition motion under MCR 2.116(C)(10) tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). When deciding a summary disposition motion, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the opposing party. *Id*.

A plaintiff asserting a negligence claim has the burden of establishing "(1) duty; (2) breach of that duty; (3) causation, both cause in fact and proximate causation; and (4) damages." See *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18, 21-22; 762 NW2d 911 (2009). In the present case, the parties dispute at least two of the elements of plaintiff's negligence claim: whether plaintiff established that defendants had a duty with regard to the gas meter and whether any breach of that duty was the cause in fact of the fire. We need not decide the duty issue because the record demonstrates that, even if defendants had a duty with regard to the meter, plaintiff failed to present sufficient evidence to establish an issue of fact as to whether the meter caused the fire.

Defendants had the initial burden of presenting documentary evidence to support their summary disposition motion. *Coblentz v City of Novi*, 475 Mich 558, 568-569; 719 NW2d 73 (2006). Defendants met this burden by submitting the deposition testimony of their investigator. The investigator testified that the area of the meter had less charring than other areas, which indicated that the fire likely originated some distance from the meter. The investigator further testified that the first material to ignite was probably natural gas emanating from the insured's fuel line.

The burden then shifted to plaintiff to present evidence to establish a genuine issue with regard to whether the gas meter was the cause of the fire. MCR 2.116(G)(4); see also *Coblentz*, 475 Mich at 568-569. The trial court found that plaintiff had failed to present sufficient evidence to create a question of fact, finding that plaintiff's evidence was akin to the evidence our Supreme Court rejected in *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994). In *Skinner*, our

Supreme Court explained the plaintiff's burden relating to causation: "causation theories that are mere possibilities or, at most, equally as probable as other theories do not justify denying defendant's motion for summary judgment." *Id*. at 172-173.

We agree with the trial court's well-reasoned opinion. None of the documents submitted by plaintiff confirm the status of the meter either prior to the fire or at the moment the fire originated. Rather, the documents confirm the undisputed fact that the fire destroyed the meter. Similarly, the expert testimony submitted by plaintiff fails to meet the *Skinner* standard. Plaintiff's expert reported that the natural gas meter was destroyed during this fire and could not be eliminated as a cause of the fire. The statement that the meter "could not be eliminated" as a cause of the fire does not allow a factfinder to infer that the meter was the cause in fact of the fire. Instead, a factfinder would have to speculate that the meter caused the fire. As explained in *Skinner*, speculation is insufficient to create an issue of fact. 445 Mich at 172-173; see also *Ghaffari v Turner Constr Co (On Remand)*, 268 Mich App 460, 464-465; 708 NW2d 448 (2005) ("Speculation and conjecture are insufficient to create an issue of material fact."). The expert's deposition testimony does not salvage the equivocation in his report.

Given that plaintiff failed to establish a factual issue regarding cause in fact for the negligence claim, plaintiff also failed to establish sufficient support for the contract claim. To avoid summary disposition on the contract claim, plaintiff had the burden of presenting evidence to establish that the alleged damages were the direct, natural, and proximate result of the alleged breach of contract. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). The trial

court properly granted summary disposition in favor of defendants on both of plaintiff's claims.[1]

II. CASE EVALUATION SANCTIONS — DOCKET NO. 296102

This Court reviews de novo a trial court's decision to grant case evaluation sanctions. *Peterson v Fertel*, 283 Mich App 232, 235; 770 NW2d 47 (2009). The trial court's decision in this case turned on the interpretation of a court rule, which is a question of law that this Court reviews de novo. *Haliw v Sterling Heights*, 471 Mich 700, 704; 691 NW2d 753 (2005).

MCR 2.403 provides the framework for case evaluation in Michigan. A party that has rejected a case evaluation must pay the opposing party's actual costs if the verdict in the case is more favorable to the opposing party than the case evaluation, after adjustments as described in MCR 2.403(O)(3). See MCR 2.403(O)(1). The recoverable costs include reasonable attorney fees "for services necessitated by the rejection of the case evaluation." MCR 2.403(O)(6).

The following portions of the rule are pertinent to this appeal:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.
>
> (2) For the purpose of this rule "verdict" includes,
>
> (a) a jury verdict,

[1] Defendants argue that the trial court erred in admitting the testimony of plaintiff's expert. Because we have affirmed the summary disposition, we need not address defendants' argument.

(b) a judgment by the court after a nonjury trial,

(c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

* * *

(8) A request for costs under this subrule must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion for a new trial or to set aside the judgment. [MCR 2.403(O).]

In *Peterson*, 283 Mich App at 237, this Court considered whether a ruling on a medical-malpractice plaintiff's motion for reconsideration, filed before the plaintiff rejected the case evaluation, was a "verdict" for purposes of MCR 2.403. The Court held that the trial court's denial of the motion for reconsideration was a verdict within the meaning of MCR 2.403(O)(2)(c). *Id*. The Court noted that the objective of the plaintiff's motion for reconsideration was "to call attention to the trial court's alleged error in granting the motion for summary disposition, to urge the reversal of that decision, to keep the action alive against the defendants and, at its essence, to continue the litigation toward trial." *Id*. at 238.

In the present case, the case evaluation was held in August 2009. The trial court issued its summary disposition order on October 13, 2009. On November 3, 2009, plaintiff filed a motion for reconsideration of the summary disposition order. The trial court denied plaintiff's motion for reconsideration the following day. Defendants filed their motion for case evaluation sanctions on November 19, 2009, which was 37 days after the entry of summary disposition, but was only 16 days after the trial court denied plaintiff's motion for reconsideration.

The trial court found defendants' motion for sanctions untimely on the ground that a motion for recon-

sideration is not equivalent to a motion for a new trial or to set aside judgment for purposes of the 28-day rule in MCR 2.403(O)(8). We disagree. As the *Peterson* Court indicated, a motion for reconsideration corresponds to a motion for a new trial or to set aside a judgment. Although the three motions have different labels and are used at different procedural points in litigation, all three have the same purpose: to rescind a dispositive ruling or judgment issued by the trial court. See MCR 2.119(F) (motion for reconsideration); MCR 2.610(A) (motion to set aside judgment); MCR 2.611 (motion for new trial). All three motions must be filed within 21 days after the issuance of the ruling or judgment. MCR 2.119(F)(1); MCR 2.610(A)(1); MCR 2.611(B). The 21-day limit on these motions will expire before the 28-day limit on motions for case evaluation sanctions, so a party seeking case evaluation sanctions may elect to hold the motion for sanctions until learning whether the opposing party has filed any dispositive motions. See *Brown v Gainey Transp Servs, Inc*, 256 Mich App 380, 384; 663 NW2d 519 (2003) (the logic of MCR 2.403(O)(8) is to enable a party to await pending dispositive motions after trial).

We hold that when a trial court has entered a summary disposition order that fully adjudicates the entire action, MCR 2.403(O)(8) requires a party to file and serve a motion for case evaluation sanctions within 28 days after entry of a ruling on a motion for reconsideration of the order. Accordingly, we reverse the trial court's finding that defendants' motion for case evaluation sanctions was untimely, and we remand for further consideration of defendants' motion.

We affirm the grant of summary disposition in favor of defendants in Docket No. 295232. We reverse the trial court's denial of case evaluation sanctions in

Docket No. 296102, and we remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

O'CONNELL, P.J., and K. F. KELLY and RONAYNE KRAUSE, JJ., concurred.

KUBICKI v MORTGAGE ELECTRONIC REGISTRATION SYSTEMS

Docket No. 295854. Submitted February 1, 2011, at Detroit. Decided February 22, 2011. Approved for publication April 12, 2011, at 9:00 a.m.

Gary Kubicki brought an action in the Oakland Circuit Court against Mortgage Electronic Registration Systems and Citibank, requesting that a sheriff's foreclosure sale be set aside. The sheriff's foreclosure sale had been conducted by Matthew J. Chodak. Chodak was president of County Civil Process Services, Inc., which had entered into a written agreement with Oakland County Sheriff Michael J. Bouchard authorizing it to conduct acts related to civil process, which specifically included sheriff's foreclosure sales, on behalf of the sheriff's department. Plaintiff alleged that Chodak had unlawfully conducted the foreclosure sale because he was not properly appointed as a deputy sheriff or undersheriff. Defendants moved for summary disposition. The court, Denise Langford Morris, J., granted defendants' motion, ruling that there was no genuine issue of material question of fact regarding whether the person who conducted the foreclosure sale was properly empowered to do so. Plaintiff appealed.

The Court of Appeals *held*:

The provisions of MCL 51.73 requiring that the appointment of an undersheriff or deputy sheriff be recorded in the county clerk's office do not apply to a person properly appointed as a special deputy under MCL 51.70. MCL 51.70 authorizes a sheriff to execute a written instrument deputizing a person as a special deputy to do particular acts, and the agreement satisfied this requirement. A special deputy may lawfully conduct a sheriff's foreclosure sale pursuant to MCL 600.3216. Any other conclusion would produce an absurd result. Because plaintiff failed to demonstrate a strong case of fraud or irregularity or a peculiar exigency justifying overturning the foreclosure sale, the trial court did not err by granting defendants summary disposition.

Affirmed.

1. MORTGAGES — FORECLOSURES — BASIS FOR OVERTURNING — FRAUD, IRREGULARITY, OR PECULIAR EXIGENCY.

Statutory foreclosures are a matter of contract, authorized by the mortgagor; they will be set aside only if very good reasons exist for doing so, such as a strong case of fraud or irregularity or some peculiar exigency.

2. MORTGAGES — FORECLOSURES BY ADVERTISEMENT — SHERIFF'S SALES — SPECIAL DEPUTIES.

The statutory provisions requiring that the appointment of an undersheriff or deputy sheriff be recorded in the county clerk's office do not apply to a special deputy appointed by the sheriff in a written instrument to do particular acts; a person properly appointed as a special deputy may lawfully conduct a sheriff's foreclosure sale (MCL 51.70, 51.73, and 600.3216).

Nicoletti & Associates, P.L.L.C. (by *Paul J. Nicoletti*), for Gary Kubicki.

Hertz Schram PC (by *Ari M. Charlip* and *Amy Sabbota Gottlieb*) for Mortgage Electronic Registration Systems and Citibank.

Before: TALBOT, P.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM. In this action to set aside a sheriff's foreclosure sale, plaintiff appeals as of right the circuit court's order granting summary disposition in favor of defendants under MCR 2.116(C)(10) (no genuine issue of material fact). We affirm the order of the circuit court.

On appeal, plaintiff asserts that the sheriff's deed on mortgage foreclosure (Sheriff's Deed) executed by Matthew J. Chodak fraudulently misrepresents that Chodak is a "deputy sheriff." According to plaintiff, Chodak is not a sheriff, an undersheriff, or a deputy sheriff, as required by the Michigan mortgage foreclosure statute, MCL 600.3216, because he did not request to be, and was not actually, properly appointed by

Sheriff Michael J. Bouchard and no such appointment was filed with the Oakland County Clerk's office, as required by the statute governing the appointment of an undersheriff or a deputy sheriff, MCL 51.73. We disagree.

We review de novo a trial court's decision on a motion for summary disposition. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008). Evidence must be examined "in the light most favorable to the nonmoving party." *Id.* "Summary disposition should be granted only where the evidence fails to establish a genuine issue regarding any material fact." *Id.* at 457-458.

The Michigan Supreme Court has held that statutory foreclosures will only be set aside if "very good reasons" exist for doing so. *Markoff v Tournier*, 229 Mich 571, 575; 201 NW 888 (1925). " '[I]t would require a strong case of fraud or irregularity, or some peculiar exigency, to warrant setting a foreclosure sale aside.' " *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 497; 739 NW2d 656 (2007), quoting *United States v Garno*, 974 F Supp 628, 633 (ED Mich, 1997). "Statutory foreclosures are a matter of contract, authorized by the mortgagor, and ought not to be hampered by an unreasonably strict construction of the law." *White v Burkhardt*, 338 Mich 235, 239; 60 NW2d 925 (1953).

Under MCL 600.3216, a sheriff's foreclosure sale "shall be made by the person appointed for that purpose in the mortgage, or *by the sheriff, undersheriff, or a deputy sheriff of the county*, to the highest bidder." Concerning appointment of deputy sheriffs by the sheriff, MCL 51.70 provides that

> [e]ach sheriff may appoint 1 or more deputy sheriffs at the sheriff's pleasure, and may revoke those appointments at any time. *Persons may also be deputed by a sheriff, by an*

> *instrument in writing, to do particular acts, who shall be known as special deputies* and each sheriff may revoke those appointments at any time.

Similarly, concerning appointments, MCL 51.73 provides that

> [e]very appointment of an under sheriff, or of a deputy sheriff, and every revocation thereof, *shall be in writing under the hand of the sheriff, and shall be filed and recorded in the office of the clerk of the county*; and every such under sheriff or deputy shall, before he enters upon the duties of his office, take the oath prescribed by the twelfth article of the constitution of this state.[1] *But this section shall not extend to any person who may be deputed by any sheriff to do a particular act only*.

In this case, plaintiff argues that Chodak could not have lawfully conducted the foreclosure sale given that he was not properly appointed as a deputy sheriff because there is no written and recorded appointment on file with the Oakland County Clerk's office. In support of his argument, plaintiff cites four cases that deal with either appointment by someone other than a sheriff or situations in which no written instrument memorializes an appointment. This case is factually distinguishable in that it does not involve appointment by an undersheriff or someone acting on behalf of the sheriff, but instead concerns whether Chodak was appointed for purposes of MCL 51.70 when he signed the "Agreement to Serve and/or Execute Civil Process for the Oakland County Sheriff's Office" (Agreement).

While plaintiff is correct that Chodak was not properly appointed as a deputy sheriff under the requirements set forth in MCL 51.73, Chodak was properly deputized as a special deputy under MCL 51.70. In this

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[1] The reference is to the 1835 Michigan Constitution. The oath now appears in Const 1963, art 11, § 1.

case, there is a written instrument, i.e., the Agreement, that was signed by Sheriff Bouchard. According to the terms of the Agreement, "Civil Process" includes, but is not limited to, "selling lands on the foreclosure of a mortgage by advertisement; executing deeds and performing all related services required on sale of property . . . ." In this way, the Agreement prescribes the particular acts to be performed. Therefore, the Agreement constitutes the necessary written instrument for purposes of deputizing a special deputy. As a result, Chodak qualifies as a special deputy, and the provisions of MCL 51.73 requiring filing and recording of an appointment are inapplicable.

Plaintiff also argues that MCL 51.70 and MCL 51.73 require appointment by the sheriff of an individual, who can be monitored, and were not intended to allow the sheriff to appoint a corporation, which may delegate its duties to unaccountable third parties. Plaintiff notes that the Agreement is between Sheriff Bouchard and County Civil Process Services, Inc., of which Chodak is the president,[2] but the Sheriff's Deed has only Chodak's name on it. However, plaintiff points to no authority to support this proposition concerning the intent of the Legislature in enacting these provisions of the sheriffs' statute. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641, 588 NW2d 480 (1998). Additionally, plaintiff's fears concerning a contractor's unilateral delegation of authority to "anybody of its choosing" are unfounded in light of language in the Agreement requiring that any

[2] Chodak signed the Agreement on behalf of County Civil Process Services, Inc.

employee of the contractor who performs a duty of the sheriff's office must be a "Special Deputy . . . in accordance with the DEPUTIZATION ADDENDUM." Similarly, the deputization addendum (Addendum) requires that any employees of the contractor must request to be appointed as a "Special Deputy pursuant to MCL 51.70, with the powers of deputy sheriff." Therefore, even if plaintiff had supported his argument concerning the intent behind MCL 51.70 and MCL 51.73 with citations of authority, this argument could not succeed because the terms of the Agreement and Addendum preserve the emphasis on accountability of particular individuals and thereby prevent the haphazard delegation and appointment schemes that plaintiff raises as concerns. Furthermore, while plaintiff correctly points out that, under the Addendum to the Agreement, the contractor must request that the sheriff appoint a specific individual as a special deputy to serve as deputy sheriff, this requirement deals with deputization of a contractor's employees, not the contactor himself (in this case, Chodak), who has signed a contract with the sheriff.

Additionally, plaintiff points out that the copy of the oath attached to defendants' brief on appeal has no liber or page number, thereby giving no indication that the oath was filed with the Oakland County Clerk's office as claimed by defendants. This argument is unpersuasive because MCL 51.70 does not require an oath to be recorded for deputization of a special deputy.

Defendants assert that Chodak is a special deputy charged with a specific task and that Chodak qualifies as a deputy sheriff when carrying out this task. We agree. MCL 51.70 allows for deputization of persons "to do particular acts." If such persons were without statutory authorization to carry out those acts, an absurd result would be reached: authority "to do particular

acts" would be granted by MCL 51.70, but then revoked under MCL 600.3216 because of a technicality. In this case, the technicality would be that a person may be deputized as a special deputy to carry out particular acts under MCL 51.70, but would be unable to carry out those acts under MCL 600.3216 because a special deputy would not qualify as a deputy sheriff. Additionally, the Addendum expressly states that a special deputy has the powers of a deputy sheriff. Therefore, Chodak, performing his specifically assigned functions in his capacity as a special deputy, qualifies as a deputy sheriff. As a result, his acts of conducting the foreclosure sale and executing the Sheriff's Deed are valid under the foreclosure statute. For these reasons, plaintiff's argument that Chodak declared himself to be a deputy sheriff, not a special deputy, in his oath is without merit.

Under these circumstances, there is no genuine issue of material fact concerning whether Chodak was properly appointed pursuant to the Agreement or whether the foreclosure sale and Sheriff's Deed were valid. Therefore, plaintiff has failed to show the requisite "strong case of fraud or irregularity, or some peculiar exigency," to overturn the foreclosure sale. *Sweet Air Investment*, 275 Mich App at 497.

Affirmed.

TALBOT, P.J., and SAWYER and M. J. KELLY, JJ., concurred.

In re RECEIVERSHIP OF 11910 SOUTH FRANCIS ROAD
(PRICE v KOSMALSKI)

Docket No. 295212. Submitted April 6, 2011, at Lansing. Decided April 12, 2011, at 9:05 a.m. Reversed, 492 Mich 208.

Nastassia Price and Erin Duffy-Price, as personal representatives of the estate of Darryl H. Price, brought an action in the Ingham Circuit Court to collect a judgment against Lori Jean Kosmalski and others, seeking a lien against certain property. At plaintiffs' request, the court, William E. Collette, J., appointed Thomas Woods as receiver, and he took possession of the property and made substantial repairs, but market conditions rendered the property unsalable. Dart Bank foreclosed on the property and purchased it at the foreclosure sale for substantially less than the appraisal value. Unable to find a competitive buyer, Woods moved to dissolve the receivership and sought an order requiring the bank to pay the costs of receivership. The court placed a lien on the property for the costs to be paid whenever the property was sold. The bank appealed.

The Court of Appeals *held*:

A court may order a party that benefits from a receivership and ultimately establishes a right to the property protected and preserved by that receivership to pay the costs of the receivership, even if the party did not consent to the receivership or become a party until after the receiver was appointed. Thus, even though the bank became a party after the trial court appointed Woods, it established its right to the property and benefited from the receivership. The trial court did not err by ordering the bank to pay the costs.

Affirmed.

COSTS — RECEIVERSHIPS — LIABILITY FOR COSTS.

A court may order a party that benefits from a receivership and ultimately establishes a right to the property protected and preserved by the receivership to pay the costs of the receivership, even if the party did not consent to the receivership or become a party until after the court appointed the receiver (MCR 2.622[D]).

Allan Falk, P.C. (by *Allan S. Falk*), and *Cummins Woods* (by *Thomas E. Woods*) for Thomas E. Woods.

The Hubbard Law Firm, P.C. (by *Peter A. Teholiz*), for Dart Bank.

Before: O'CONNELL, P.J., and K. F. KELLY and RONAYNE KRAUSE, JJ.

O'CONNELL, P.J. Intervening defendant-appellant, Dart Bank, appeals as of right the trial court's order granting receiver-appellee, Thomas Woods, a lien over certain property. The issue on appeal is whether the trial court erred by imposing the costs of the receivership on appellant by granting the lien given that appellant neither consented nor objected to the receivership. We affirm.

I. FACTS AND PROCEDURAL HISTORY

The original parties in this case stipulated to the appointment of appellee as receiver over certain property in DeWitt.[1] The receivership order authorized appellee to take immediate possession of the property in order to sell it and to make any expenditure necessary for the upkeep and repair of the property. The property required substantial repairs, totaling approximately $20,000, which appellee borrowed by authority granted in the receivership order. Market conditions rendered appellee unable to sell the property.

The receivership order also prohibited anyone with actual notice of the order from interfering with appellee's possession and management of the property. Appellant was not a party to this case at the time of the order and

[1] The original stipulated order appointing appellee was entered April 10, 2008. An amended order was entered on April 28, 2008.

thus did not stipulate to it. Appellant foreclosed on the property on June 5, 2008. Appellant was not aware of the receivership order before beginning the foreclosure process but learned of the order before the foreclosure sale. Specifically, appellant received a copy of the original receivership order on April 18, 2008, and does not dispute that appellee served it with a copy of the amended order on April 28, 2008. Appellant was the only bidder at the foreclosure sale and purchased the property for $169,312.50. Appellant subsequently appraised the property at $245,000. Appellee eventually filed a motion to void the foreclosure and hold appellant in contempt for violating the receivership order's prohibition on interfering with appellee's possession of the property. The trial court denied the motion but extended the redemption period to give appellee additional time to sell the property at a better price than that paid by appellant.

After determining that he could not find a buyer for any amount close to $245,000, appellee moved to dissolve the receivership and to have the trial court order appellant to pay the costs of the receivership. The trial court essentially granted this motion by placing a lien on the property to be paid whenever the property is sold. The court noted that it had ordered appellee to sell the property and that appellant did not ask the court to set that order aside. Further, the court stated that it would not be able to find receivers in the future if it did not pay them.

II. AUTHORITY TO IMPOSE RECEIVERSHIP COSTS

Whether the trial court had authority to place a lien on the property to collect the costs of receivership is a question of law, which we review de novo on appeal. See *Attica Hydraulic Exch v Seslar*, 264 Mich App 577, 588; 691 NW2d 802 (2004).

Appellant first argues that a receiver has no greater rights than the original owner of the property,[2] citing *Gray v Lincoln Housing Trust*, 229 Mich 441, 446-447; 201 NW 489 (1924). Appellant contends that allowing appellee to recover his costs essentially grants him greater rights than the original owner would have had. However, the cited case stands for the proposition that appellee cannot destroy the bank's right to payment under the mortgage. The case does not resolve the issue at hand.[3]

Both parties cite *Bailey v Bailey*, 262 Mich 215, 219; 247 NW 160 (1933), in which our Supreme Court ruled that a mortgagee was liable for receivership expenses when the mortgagee consented to appointment of the receiver and "availed themselves of any possible advantage of the receivership." Appellant attempts to distinguish *Bailey* because it did not consent to the receivership in the present case. However, the *Bailey* Court also acknowledged that "[a]dministration expenses are incurred on the theory that they benefit the parties ultimately entitled to the property" and that " 'the property becomes chargeable with the necessary expenses incurred in taking care of and saving it, including the allowance to the receiver for his services.' " *Id.* at 220 (citation omitted). Therefore, the *Bailey* Court based its decision not only on the mortgagee's consent but also on the fact that the mortgagee benefited from the receivership.

Our Supreme Court addressed a similar issue in *Fisk v Fisk*, 333 Mich 513; 53 NW2d 356 (1952). In that case, the Court held:

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[2] Appellant does not contest the validity of appellee's expenses. Rather, appellant contests only whether the trial court could properly place a lien on the property for those costs.

[3] *Gray* involved an attempt by a receiver to prevent a plaintiff from recovering on a breach-of-contract claim. *Gray*, 229 Mich at 444-446.

> In a case such as this, the primary purpose of a receivership is to preserve and protect the property involved in the controversy. This being so it logically follows that he who ultimately establishes his right to the property thus held is the one who benefits from the property having been protected and preserved. For this reason the general rule followed by the courts is that a receiver's compensation and the expenses necessarily incurred by him in preserving and caring for the property under the order of a court of competent jurisdiction are primarily a charge on and should be paid out of the fund or property in his hands, regardless of the ultimate outcome of the principal suit. [*Id.* at 516 (citations and quotation marks omitted).]

The Court remarked that exceptions include cases in which the trial court does not have proper jurisdiction or it was improper to appoint a receiver. *Id.* The defendant in *Fisk* agreed to the appointment of the receiver and therefore, the Court concluded, could not object to the receiver being paid by a charge against the property held by him. *Id.* at 516-517.

This Court discussed a trial court's authority to order an intervening party to pay the costs of a receivership in *Attica*, 264 Mich App at 588-594. The Court first discussed MCR 2.622(D), which allows the trial court to direct that the party who moved for appointment of the receiver pay the receiver's costs. That rule is inapplicable in this case, as it was in *Attica*, because appellant did not move for appointment of the receiver and, in fact, did not become a party until after the receiver was appointed. See *id.* at 591.

The Court then considered *Fisk*, stating:

> Although *Fisk* does hold that the party who benefited from the receivership is responsible for the receivership expenses, *Fisk* defines a party who benefits as one who "ultimately establishes his right to the property . . . having been protected and preserved." [*Id.* at 592, quoting *Fisk*, 333 Mich at 516.]

The *Attica* Court concluded that *Bailey* similarly held that mortgagees could not contest the receivership expenses when they benefited "as the parties ultimately entitled to the property." *Attica*, 264 Mich App at 593.

Appellant would read these cases as holding that any party who does not seek a receivership is not required to pay for it. It is true that the parties who were forced to pay in *Bailey* and *Fisk* each consented to the receivership, but the Court did not focus on that fact alone, as explained in *Attica*. It was also important that those parties ended up in possession of the property that had been preserved by the efforts of the receivers. Indeed, in *Attica* the key point that allowed the Department of Environmental Quality (DEQ) to avoid paying the receiver's costs was that the DEQ's interest was purely regulatory—that is, it would never take possession of the property that had been preserved by the receivership. *Id.* at 592-593. The *Attica* Court held on the basis of that fact that the DEQ did not fit *Fisk*'s definition of a party who benefits from a receivership. *Id.* at 593.

Appellant in the present case is situated similarly to the DEQ in *Attica* to the extent that it became a party only after the receiver was appointed and did not consent to the receivership. Unlike the DEQ, though, appellant ultimately established its right to the property. Therefore, under *Fisk* and *Attica*, because appellant benefited from the receivership, it may be held responsible for the receivership expenses.

Affirmed.

K. F. KELLY and RONAYNE KRAUSE, JJ., concurred with O'CONNELL, P.J.

WHEELER v CENTRAL MICHIGAN INNS, INC

Docket No. 296511. Submitted April 6, 2011, at Lansing. Decided April 14, 2011, at 9:00 a.m.

LaToya F. Wheeler, personal representative of the estate of Domonique D. Wheeler, deceased, brought an action in the Ingham Circuit Court against Central Michigan Inns, Inc., after the minor decedent drowned in the swimming pool of the defendant's hotel. Plaintiff had taken Domonique and five other children to the hotel to celebrate Domonique's birthday and was watching Domonique and four of the children play in the pool from the deck of the pool when Domonique drowned. The pool complied with all relevant rules and regulations, which did not require defendant to provide a life guard. Plaintiff asserted claims for wrongful death, nuisance, and loss of consortium. The court, Paula J. M. Manderfield, J., agreed with defendant's contention that it had no duty to protect Domonique because the pool was an open and obvious danger and granted defendant's motion for summary disposition. Thereafter, the court, agreeing with plaintiff's argument that the wrongful-death claim was premised on a negligence theory, not a premises-liability theory, and that the open and obvious danger doctrine therefore did not apply, granted plaintiff's motion for reconsideration. Defendant again moved for summary disposition, arguing that it had no duty to supervise Domonique under the circumstances presented. The court agreed and again granted summary disposition in favor of defendant. Plaintiff appealed.

The Court of Appeals *held*:

1. Because plaintiff's cause of action sounded in ordinary negligence, rather than premises liability, the open and obvious danger doctrine was inapplicable. The trial court correctly recognized that property owners generally owe no duty to supervise the minor children of guests on their property.

2. Landowners have an affirmative duty to supervise minor guests only when a minor guest is unaccompanied by a parent and the landowner has voluntarily assumed a duty to supervise the minor. Domonique was accompanied by plaintiff, his mother, and defendant did nothing to indicate that it had voluntarily assumed

a duty to protect and watch Domonique. Defendant had no duty to supervise under the circumstances of this case.

Affirmed.

NEGLIGENCE — PROPERTY OWNERS — DUTY TO SUPERVISE MINOR GUESTS — UNACCOMPANIED MINOR GUESTS.

Property owners generally owe no duty to supervise the minor children of guests on their property; property owners have an affirmative duty to supervise minor guests only when a minor guest is unaccompanied by a parent and the property owner has voluntarily assumed a duty to supervise the minor.

Alan J. Bloomfield for plaintiff.

Law Offices of Johnston, Sztykiel, Hunt, Goldstein, Fitzgibbons & Clifford, P.C. (by *James F. Hunt*), for defendant.

Before: K. F. KELLY, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. LaToya Felicia Wheeler, as personal representative of the estate of Domonique Daquan Wheeler, deceased, appeals as of right the order granting defendant's motion for summary disposition of plaintiff's claims alleging wrongful death, nuisance, and loss of consortium. We affirm.

This case arises from the tragic drowning death of five year old Domonique Wheeler. On the night of Domonique's death, his mother, LaToya Wheeler, took Domonique and five other children, including her infant son, to defendant's Comfort Inn hotel to celebrate Domonique's sixth birthday, which was the next day. The group checked into two adjoining rooms and swam in the hotel's pool before they took a short break to eat pizza. LaToya had become overwhelmed by watching the children, and she contacted various cousins and friends in an attempt to summon help. Unfortunately, no one else arrived.

The pool was three feet deep at its shallowest point and sloped down to five feet in the middle. The hotel had no staff monitoring the pool area, but signs prominently stated that there was no lifeguard present. Because none of the children was more than five feet tall and only two could actually swim, LaToya instructed the children to stay in the shallow areas of the pool and not go into the middle where the pool was its deepest. There were no ropes or floatation devices strung across the pool, but LaToya did state that she saw a "flotation doughnut with a rope on it" somewhere in the pool area.

While the older children swam, LaToya remained on the pool deck, watching her infant son. Despite doing her best to watch both her baby and the older children in the water, at some point LaToya lost sight of Domonique. When LaToya's attention was brought back to the pool, she discovered her son lying on the bottom, near the five-foot-deep area. LaToya did not see Domonique move to the deeper area of the pool nor did she see him struggling or having a difficult time staying afloat.

Upon realizing that Domonique was in trouble, LaToya began to scream for help and one of the other children pulled Domonique from the water. Domonique had been underwater from anywhere between one and five minutes, according to the emergency medical services records and an autopsy report, and was not breathing when he was pulled from the pool. Someone, most likely a guest of the hotel, tried to revive him through CPR. By this time the hotel's front-desk personnel had been alerted and 911 had been called. Comfort Inn's desk manager attempted to use the hotel's automated external defibrillator machine on Domonique, but neither she nor anyone else at the hotel

that evening knew how to operate it. When ambulance personnel arrived they also attempted to resuscitate Domonique, but they were unsuccessful.

The Ingham County Health Department conducted an inspection of defendant's swimming pool in response to Domonique's death. The report found that the pool and the pool area were mostly in compliance, including properly posted depth markers, properly posted signage warning that there was no lifeguard, and proper other safety equipment on hand. The report found a few minor concerns (such as the need to add a drinking fountain), but it notably ordered defendant to "install lifelines as required." However, because the water did not exceed five feet in depth, lifelines were not actually required, Mich Admin Code, R 325.2132(10), and the inspectors confirmed that the order to install lifelines should not have been in the report. The inspectors also confirmed that no lifeguard was required at defendant's pool and that the pool did have proper "no lifeguard on duty" signage.

LaToya, as the personal representative of Domonique's estate, filed claims against defendant Central Michigan Inns, Inc., the owner of the Comfort Inn where Domonique drowned, including wrongful death, nuisance, and loss of consortium. Defendant moved for summary disposition, arguing that it had no duty to protect Domonique because the pool was an open and obvious danger.[1] The trial court agreed and granted summary disposition in defendant's favor. Plaintiff moved for reconsideration, arguing that the wrongful-death claim was premised on a negligence theory, not a premises-liability theory, and that the open and obvious

[1] Because plaintiff has not presented any arguments on appeal pertaining to the trial court's dismissal of her nuisance and loss-of-consortium claims, we likewise decline to discuss them.

danger doctrine therefore did not apply. The trial court granted reconsideration on that basis. Defendant again moved for summary disposition, arguing that it had no duty to supervise Domonique under the circumstances. The trial court agreed and again granted summary disposition in defendant's favor. Plaintiff now appeals.

This Court reviews a trial court's grant or denial of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden*, 461 Mich at 120. When reviewing a motion under MCR 2.116(C)(10), the Court considers all the evidence submitted by the parties in the light most favorable to the nonmoving party. *Maiden*, 461 Mich at 120. Summary disposition will be granted only where the evidence fails to establish a genuine issue regarding any material fact. *Id*.

Plaintiff argues, correctly, that the open and obvious danger doctrine does not apply to ordinary negligence claims and landowners owe a duty to exercise reasonable care to protect children from dangerous conditions on their premises notwithstanding the presence of the children's parents. *Woodman v Kera, LLC*, 280 Mich App 125, 154; 760 NW2d 641 (2008) (opinion by TALBOT, J.). However, although "[l]andowners owe minor invitees the highest duty of care," this duty arises in the context of premises liability claims only. *Id*., citing *Bragan v Symanzik*, 263 Mich App 324, 335; 687 NW2d 881 (2004). *Woodman* stated that such a duty pertains to a premises-liability claim, and not a negligence claim. *Woodman*, 280 Mich App at 154. Terms such as "premises possessor" and "dangerous condition on the land" relate to the elements of a premises liability, rather than ordinary negligence, claim. Because plaintiff herself stated that her cause of action sounded in ordinary

negligence, rather than premises liability, the portions of *Woodman* on which she relied are irrelevant.[2] "A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *Holmes v Holmes*, 281 Mich App 575, 587-588; 760 NW2d 300 (2008) (quotation marks and citation omitted).

The trial court correctly recognized that property owners generally owe no duty to supervise minor children of guests on their property. In *Bradford v Feeback*, 149 Mich App 67; 385 NW2d 729 (1986), the plaintiffs' minor child had been injured while playing on the defendants' property. While *Bradford* was mostly a premises-liability case, the plaintiffs argued, among other things, that the "defendants had a duty to supervise and control the children of guests invited onto the property." *Id*. at 71. This Court disagreed, explaining that "as a matter of public policy, property owners should not be charged with the duty of supervising and controlling children of guests who have been invited onto the property." *Id.* at 71-72. Public policy would be further contravened if defendant businesses like the Comfort Inn who operate their pools in compliance with all relevant rules and regulations were required to have staff present to supervise and control minor guests on their premises.

The trial court also properly relied on *Stopczynski v Woodcox*, 258 Mich App 226; 671 NW2d 119 (2003),

[2] Plaintiff did not provide pinpoint citations or other clear articulation of the specific reasoning in *Woodman* on which she relied. Our review revealed that the only plausibly applicable portions of *Woodman* discussed premises-liability concepts. Furthermore, that discussion is not binding on this Court because the two concurring opinions in *Woodman* did not explicitly agree with or discuss those legal principles. See *People v Sexton*, 458 Mich 43, 65; 580 NW2d 404 (1998).

which adopted and explained the dissenting opinion in *Pigeon v Radloff*, 215 Mich App 438; 546 NW2d 655 (1996), lv den and ordered to have no precedential force or effect 451 Mich 885 (1996).[3] Like the case here, *Stopczynski* involved a wrongful-death claim based on the decedent's drowning death in the defendant's pool. The plaintiff brought a negligence claim, arguing that the defendant had a duty to protect and supervise the decedent while she used the pool because of her status as a guest and a minor. This Court held that defendant landowners have an affirmative duty to supervise minor guests only when a minor guest is *unaccompanied* by a parent and the defendant has voluntarily assumed a duty to supervise the child. *Stopczynski* at 236, quoting *Pigeon* at 448-450 (SAWYER, P.J., dissenting). Domonique was accompanied by his mother and she was present to supervise him at all times on the day in question, and defendant did nothing to indicate that it had voluntarily assumed a duty to protect and watch Domonique.

This Court has mentioned that recreational facilities "may" have a duty to supervise children simply because of their age. *Dillon v Keatington Racquetball Club*, 151 Mich App 138, 142; 390 NW2d 212 (1986). However, this Court mentioned that possibility as *only* being a possibility, and moreover it did so in dicta. In a much earlier case, a panel of this Court indicated that whether the owners of a trailer park had a duty to provide a lifeguard or lifesaving equipment at a small lake on their property should be a question for the jury, and it discussed the concept of negligence. *Kreiner v Yezdbick*, 22 Mich App 581, 587; 177 NW2d 629 (1970). But, again critically, *Kreiner* discussed that duty in the

[3] This Court was free to adopt the reasoning in the dissent because our Supreme Court had ordered *Pigeon* to have no precedential force or effect. *Stopczynski*, 258 Mich App at 232.

context of the defendants' duty to make their premises reasonably safe for their invitees, so while this Court did not say so explicitly, *Kreiner* appears to have also been a premises-liability case. *Id*. In further contrast to the case at bar, this Court recently imposed possible liability on a recreational organization, on a negligence theory, for failing to properly supervise cheerleaders, one of whom was allegedly injured as a result. *Sherry v East Suburban Football League*, 292 Mich App 23; 807 NW2d 859 (2011). Notably, the minors in *Sherry* were unaccompanied by their parents, and the defendants had assumed responsibility for supervising the minors.

Plaintiff's reliance on *Woodman* is misplaced because her case sounds in ordinary negligence and not premises liability. Defendant had no duty to supervise under the circumstances of this case. We need not consider defendant's additional arguments

Affirmed.

K. F. KELLY, P.J., and M. J. KELLY, J., concurred with RONAYNE KRAUSE, J.

PEOPLE v STEELE

Docket No. 299641. Submitted March 2, 2011, at Lansing. Decided April 14, 2011, at 9:05 a.m. Leave to appeal denied, 490 Mich 861.

James C. Steele was charged in the Jackson Circuit Court with possession of methamphetamine, as well as several other charges. Following a report from a loss-prevention officer that defendant had purchased methamphetamine precursors, a police officer had conducted an investigative stop of defendant's automobile. During the course of that stop, defendant told the officer that there were materials for manufacturing methamphetamine and methamphetamine itself in the car. The officer took defendant to the police department and advised him of his rights under *Miranda v Arizona*, 384 US 436 (1966). Defendant waived his rights and, upon questioning, repeated the statements he had made at the roadside stop. Defendant subsequently moved to suppress the evidence seized and his statements to the police. The court, Thomas D. Wilson, J., granted the motion, concluding that the traffic stop was illegal and that the evidence obtained from defendant's vehicle was the fruit of an illegal search. The court also found that defendant was in custody for purposes of *Miranda* during the roadside interrogation and, therefore, that his statements were illegally obtained. Lastly, the court found that defendant's statements at the police station were the fruit of an illegal roadside custodial interrogation. The prosecution appealed by leave granted.

The Court of Appeals *held*:

1. A police officer may make a brief investigative stop and detain a person in an automobile if the officer has a reasonable, articulable suspicion that the person is engaged in criminal activity. The reasonableness of the suspicion must be determined case by case on the basis of the totality of the facts and circumstances, and the officer's conclusion must be drawn from reasonable inferences based on the facts in light of the officer's training and experience. The tip from the loss-prevention officer, who had provided reliable information on several occasions in the past, that a customer had purchased methamphetamine precursors, including several packages of Sudafed and a gallon of camping fuel,

coupled with the officer's training and experience with regard to the manufacturing of methamphetamine, formed a solid basis for the reasonable suspicion necessary to justify the investigative stop of defendant's vehicle. The trial court erred by suppressing the fruits of the search.

2. When a lawful investigative stop of an automobile has been executed, an officer's brief questioning of the driver within the scope of the stop does not subject the driver to a custodial interrogation that would implicate *Miranda* requirements. The circumstances justified the investigative stop, the officer asked a minimal number of questions immediately after the stop in an attempt to confirm or dispel the officer's suspicions, and defendant voluntarily answered the questions. The trial court erred by suppressing defendant's roadside statements.

3. Because the officer was not required to advise defendant of his *Miranda* rights at the time of the roadside questioning, the trial court erroneously suppressed defendant's subsequent statements at the police station after concluding that they had been tainted by his earlier statements. Moreover, even if an initial statement was illegally obtained in violation of *Miranda*, a subsequent statement can be lawfully obtained after the defendant has been advised of and waived his or her *Miranda* rights as long as any taint from the earlier obtained statement has been removed. The key consideration is whether the later questioning constituted a new and distinct experience and genuinely presented a choice to follow up on an earlier admission.

Reversed and remanded.

1. SEARCHES AND SEIZURES — INVESTIGATIVE STOPS — AUTOMOBILES — REASONABLE BASIS.

A police officer may make a brief investigative stop and detain a person in an automobile if the officer has a reasonable, articulable suspicion that the person is engaged in criminal activity; the reasonableness of the suspicion must be determined case by case on the basis of the totality of the facts and circumstances, and the officer's conclusion must be drawn from reasonable inferences based on the facts in light of the officer's training and experience (US Const, Am IV; Const 1963, art 1, § 11).

2. CONSTITUTIONAL LAW — *MIRANDA* WARNINGS — NECESSITY — MOTOR VEHICLE STOPS.

The warnings articulated in *Miranda v Arizona*, 384 US 436 (1966), are not required unless the accused is subject to a custodial

interrogation; a motorist detained for a routine traffic or investigative stop is ordinarily not in custody for purposes of *Miranda*.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Henry C. Zavislak*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Assistant Prosecuting Attorney, for the people.

Rappleye & Rappleye, P.C. (by *Robert K. Gaecke, Jr.*), for defendant.

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

FITZGERALD, P.J. The prosecution appeals by leave granted the trial court's order granting defendant's motion to suppress both his statements to the police and the evidence seized from his vehicle following an investigative stop. We reverse and remand.

I. FACTS AND PROCEDURAL HISTORY

On March 11, 2010, a Blackman Township Public Safety desk sergeant received a telephone call from Carol Williams, a loss-prevention officer employed by the Meijer store in Jackson. Williams had been trained to identify and monitor customers who might be purchasing precursors for the manufacture of methamphetamine. Williams informed the sergeant that a man had purchased packages of Sudafed and one gallon of Coleman fuel, both of which are known precursors for methamphetamine. Williams followed the person out of the store and observed him get into a Ford Taurus and drive off.

The desk sergeant contacted Blackman Township road patrol officer Brent Doxtader and provided him with the information relayed by Williams. According to Officer Doxtader, Williams had been trained by Black-

man Township Public Safety and the Jackson County Narcotics Enforcement Team regarding the precursors for methamphetamine. Williams would contact officers to advise them of suspicious activities at Meijer involving the purchase or theft of methamphetamine precursors. During his employment, Officer Doxtader had had contact with Williams regarding methamphetamine investigations on more than 10 occasions, and the information that Williams provided had "always been spot on."

After receiving the information from the sergeant, Officer Doxtader located the Ford Taurus on US-127 and conducted an investigative stop. He requested defendant's driver's license and vehicle paperwork. Defendant responded that he did not have a driver's license. Officer Doxtader asked defendant to get out of the vehicle and, as a safety precaution, had him place his hands on the roof of the car. Officer Doxtader then informed defendant that he possessed information that there were controlled substances in the vehicle and asked defendant whether that information was accurate. Defendant responded that there was methamphetamine in the vehicle's door. Officer Doxtader proceeded to engage in a brief conversation with defendant during which defendant answered affirmatively when asked if he used or "cooked" methamphetamine. Defendant also indicated that there were materials for manufacturing methamphetamine in the vehicle.

After this conversation, Officer Doxtader arrested defendant for possession of methamphetamine and for driving without a valid driver's license. Officer Doxtader handcuffed defendant and placed him in the backseat of his patrol car. Officer Doxtader subsequently searched defendant's vehicle and retrieved the methamphetamine that defendant had indicated was in the door.

Officer Doxtader transported defendant to the Blackman Township Public Safety Department and placed him in an interview room. After activating the room's recording system, Officer Doxtader advised defendant of his *Miranda*[1] rights. Defendant indicated that he understood and waived those rights. Officer Doxtader then interviewed defendant, who essentially repeated the statements he had made during the roadside questioning approximately 45 minutes earlier.

Defendant later moved to suppress both the evidence found in his vehicle and the statements to Officer Doxtader. Defendant claimed that the evidence was obtained in violation of the Fourth Amendment right to be free from unreasonable searches and seizures because the police lacked the requisite particularized suspicion necessary to conduct an investigative stop. Defendant also asserted that Officer Doxtader had subjected him to custodial interrogation at the location of the stop without first advising him of his *Miranda* rights. Finally, defendant asserted that the statements he made at the police station were inadmissible as the fruit of an illegal stop and an illegal roadside interrogation.

At the suppression hearing, the prosecutor argued that Officer Doxtader had a reasonable suspicion to stop defendant's vehicle based on the combination of the officer's training and experience and the tip from a trained and experienced loss-prevention officer who had knowledge of the precursors of methamphetamine and who had provided reliable information to the police in the past. The prosecutor also argued that even if defendant's initial roadside statement had been obtained in violation of *Miranda*, Officer Doxtader's subsequent questioning of defendant at the police station

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

constituted a new and different experience from the roadside interrogation.

The trial court suppressed the evidence and defendant's statements. The court opined that "the purchase of only one package of Sudafed and camping fuel is not enough to meet the standard of a particularized suspicion." Thus, the court found that the traffic stop was illegal and that the evidence obtained from defendant's vehicle was the fruit of an illegal search. The court also found that defendant was in custody for purposes of *Miranda* during the roadside interrogation and, therefore, that his statements were illegally obtained. Lastly, the court found that defendant's statements at the police station were the fruit of an illegal roadside custodial interrogation because "there were no intervening circumstances to purge the taint between the statements made at the side of the road to the statements made in-house."

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's ruling on a motion to suppress. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). Although this Court engages in a de novo review of the entire record, it will not disturb a trial court's factual findings unless those findings are clearly erroneous. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005). A factual finding is clearly erroneous if it leaves the Court with a definite and firm conviction that the trial court made a mistake. *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003).

III. LEGALITY OF THE INVESTIGATIVE STOP

The prosecution argues that Officer Doxtader had a reasonable suspicion that criminal activity was afoot

when he stopped defendant's vehicle and that the investigative stop of the vehicle therefore did not violate the Fourth Amendment. In contrast, defendant argues that the mere purchase of methamphetamine precursors does not create a reasonable suspicion that criminal activity is afoot.

The stop of defendant's vehicle implicated defendant's right to be free from unreasonable searches and seizures. Both the United States and Michigan Constitutions guarantee protection against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). The Fourth Amendment search and seizure protections also apply to brief investigative detentions. See *People v Green*, 260 Mich App 392, 396; 677 NW2d 363 (2004), overruled on other grounds by *People v Anstey*, 476 Mich 436; 719 NW2d 579 (2006). However, in *Terry v Ohio*, 392 US 1, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968), the United States Supreme Court held that the Fourth Amendment permits a police officer to make a brief investigative stop (a "*Terry* stop") and detain a person if the officer has a reasonable, articulable suspicion that criminal activity is afoot. The police may also make a *Terry* stop and briefly detain a person who is in a motor vehicle if the officer has a reasonable, articulable suspicion that the person is engaged in criminal activity. *People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001).

In determining reasonableness, the court must consider whether the facts known to the officer at the time of the stop would warrant an officer of reasonable precaution to suspect criminal activity. *Terry*, 392 US at 21-22. "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). "[I]n determining whether the totality of the circumstances provide reasonable suspicion to support an investigatory stop, those circumstances must be viewed 'as understood and interpreted by law enforcement officers, not legal scholars . . . .' " *Oliver*, 464 Mich at 192, quoting *People v Nelson*, 443 Mich 626, 632; 505 NW2d 266 (1993). An officer's conclusion must be drawn from reasonable inferences based on the facts in light of his training and experience. *Terry*, 392 US at 27. 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, 273-274; 122 S Ct 744; 151 L Ed 2d 740 (2002); see also *Oliver*, 464 Mich at 196, 200. Fewer foundational facts are necessary to support a finding of reasonableness when moving vehicles are involved than when a house or home is involved. *Oliver*, 464 Mich at 192.

Initially, we conclude that the trial court clearly erred when it found that Officer Doxtader had been informed that defendant purchased a single box of Sudafed. The evidence indicated that Officer Doxtader had been advised that defendant had purchased "packages" of Sudafed. The evidence also indicated that defendant purchased a gallon of Coleman fuel. Sudafed and Coleman fuel are both known methamphetamine precursors. This is not a case in which one person purchased only a quantity of Sudafed *or* only a gallon of fuel. Rather, defendant purchased "packages" of Sudafed together with a gallon of fuel. Because defendant was not a resident of the local area, the store pharmacist had alerted the loss-prevention officer of the purchase of the pills. The information regarding the purchase of the Sudafed and the Coleman fuel, as well as a description of defendant's vehicle, was provided to the police by

the loss-prevention officer who was trained to recognize methamphetamine precursors and had provided reliable information to the police in more than 10 previous methamphetamine investigations. Defendant's purchase of a combination of methamphetamine precursors from one store, when considered in totality with Officer Doxtader's training and experience with regard to the manufacturing of methamphetamine, formed a solid basis on which Officer Doxtader had a reasonable suspicion of criminal activity to justify the *Terry* stop. Thus, the trial court erred by granting defendant's motion to suppress the fruits of the vehicle search.

IV. THE ROADSIDE STATEMENTS

The prosecution argues that the trial court erred by suppressing defendant's roadside statements on the ground that defendant had not been advised of his *Miranda* rights during the questioning. We review de novo the question whether defendant was in custody at the time he made the statements at issue. *People v Herndon*, 246 Mich App 371, 395; 633 NW2d 376 (2001).

Miranda warnings are not required unless the accused is subject to a custodial interrogation. *People v Hill*, 429 Mich 382, 385; 415 NW2d 193 (1987); *People v Vaughn*, 291 Mich App 183, 189; 804 NW2d 764 (2010). Generally, a custodial interrogation is a questioning initiated by law enforcement officers after the accused has been taken into custody or otherwise deprived of his or her freedom of action in any significant way. *Yarborough v Alvarado*, 541 US 652, 661; 124 S Ct 2140; 158 L Ed 2d 938 (2004); *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). Whether an accused was in custody depends on the totality of the circumstances. The key question is whether the accused could have

reasonably believed that he or she was not free to leave. *Yarborough*, 541 US at 663; *Vaughn*, 291 Mich App at 189.

However, a motorist detained for a routine traffic stop or investigative stop is ordinarily not in custody within the meaning of *Miranda*. *Maryland v Shatzer*, 559 US ___, ___; 130 S Ct 1213, 1224; 175 L Ed 2d 1045 (2010); *Berkemer v McCarty*, 468 US 420, 440; 104 S Ct 3138; 82 L Ed 2d 317 (1984); *People v Burton*, 252 Mich App 130, 138-139; 651 NW2d 143 (2002). As was stated in *Berkemer*, this is because

> [t]wo features of an ordinary traffic stop mitigate the danger that a person questioned will be induced "to speak where he would not otherwise do so freely," *Miranda v. Arizona*, 384 U. S. [436, 467; 86 S Ct 1602; 16 L Ed 2d 694 (1966)]. First, detention of a motorist pursuant to a traffic stop is presumptively temporary and brief. The vast majority of roadside detentions last only a few minutes. A motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he most likely will be allowed to continue on his way. In this respect, questioning incident to an ordinary traffic stop is quite different from stationhouse interrogation, which frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek. See *id*., at 451.
>
> Second, circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police. To be sure, the aura of authority surrounding an armed, uniformed officer and the knowledge that the officer has some discretion in deciding whether to issue a citation, in combination, exert some pressure on the detainee to respond to questions. But other aspects of the situation substantially offset these forces. Perhaps most importantly, the typical traffic stop is public,

at least to some degree. Passersby, on foot or in other cars, witness the interaction of officer and motorist. This exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist's fear that, if he does not cooperate, he will be subjected to abuse. The fact that the detained motorist typically is confronted by only one or at most two policemen further mutes his sense of vulnerability. In short, the atmosphere surrounding an ordinary traffic stop is substantially less "police dominated" than that surrounding the kinds of interrogation at issue in *Miranda* itself, see 384 U. S., at 445, 491-498, and in the subsequent cases in which we have applied *Miranda*.

In both of these respects, the usual traffic stop is more analogous to a so-called "*Terry* stop," see *Terry v. Ohio*, 392 U. S. 1, (1968), than to a formal arrest. Under the Fourth Amendment, we have held, a policeman who lacks probable cause but whose "observations lead him reasonably to suspect" that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to "investigate the circumstances that provoke suspicion." *United States v. Brignoni-Ponce*, 422 U. S. 873, 881 [95 S Ct 2574 45 L Ed 2d 607] (1975). "[T]he stop and inquiry must be 'reasonably related in scope to the justification for their initiation.' " *Ibid*. (quoting *Terry v. Ohio* [392 US] at 29.) Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released. The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not "in custody" for the purposes of *Miranda*. [*Berkemer*, 468 US at 437-440 (citations omitted).]

Both defendant and the trial court improperly considered this case to be one involving a custodial interrogation requiring *Miranda* protections. Given the circumstances that justified the *Terry* stop, Officer Doxtader was permitted to temporarily detain defendant and make a reasonable inquiry into possible criminal activity. The officer's questions were asked immediately after the stop, were minimal in number, and were posed in an attempt to gather information confirming or dispelling the officer's suspicions. Defendant voluntarily answered the officer's questions regarding the presence of controlled substances in the vehicle and his use of methamphetamine. Officer Doxtader's brief questioning was within the scope of the stop and confirmed the officer's suspicions concerning the presence of a controlled substance without subjecting defendant to a custodial interrogation. Consequently, the trial court erred by suppressing defendant's roadside statement.

V. THE STATEMENTS AT THE POLICE DEPARTMENT

Lastly, the prosecution challenges the trial court's ruling that defendant's statements made at the police station during a custodial interrogation and after he was advised of and waived his *Miranda* rights must be suppressed as the fruit of an illegal roadside interrogation.

As discussed in part IV, Officer Doxtader was not required to advise defendant of his *Miranda* rights at the time of the roadside questioning because defendant was not in custody for purposes of *Miranda*. Consequently, the trial court's holding that defendant's second set of statements was subject to suppression because of the taint of his earlier, illegally obtained statements was erroneous.

Even assuming that defendant's first roadside statements were illegally obtained in violation of *Miranda*, defendant's second set of statements at the police department was lawfully obtained. The second confession was given approximately 45 minutes after the first confession, in an interrogation room at the police department after defendant had been advised of and waived his *Miranda* rights. There is no indication in the record that the second confession was obtained illegally or involuntarily. The subsequent giving of *Miranda* warnings removed any taint given that a reasonable person in defendant's shoes " 'could have seen the station house questioning as a new and distinct experience,' and 'the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission.' " *Coomer v Yukins*, 533 F3d 477, 491 (CA 6, 2008), quoting *Missouri v Seibert*, 542 US 600, 616; 124 S Ct 2601; 159 L Ed 2d 643 (2004). The trial court erred by suppressing defendant's statements given at the police station.

Reversed and remanded for further proceedings. Jurisdiction is not retained.

O'CONNELL and METER, JJ., concurred with FITZGERALD, P.J.

RESIDENTIAL FUNDING CO, LCC v SAURMAN
BANK OF NEW YORK TRUST COMPANY v MESSNER

Docket Nos. 290248 and 291443. Submitted October 7, 2010, at Detroit. Decided April 21, 2011, at 9:00 a.m. Reversed, 490 Mich 909 (2011).

Gerald Saurman purchased real property, obtaining financing from Homecomings Financial, LLC. The financing transaction involved loan documentation (the note) and a mortgage security instrument (the mortgage instrument). The mortgage instrument provided the mortgagee the right to foreclosure on the property in the event of a default on the loan. Homecomings, though named as the lender in the mortgage instrument, was not designated therein as the mortgagee. Instead, the mortgage instrument stated that Mortgage Electronic Registration Systems, Inc. (MERS), was the mortgagee, acting solely as a nominee for the lender and the lender's successors and assigns. It also stated that it secured to the lender the repayment of the loan and the performance of the borrower's covenants and agreements under the mortgage instrument and the note. The mortgage instrument further provided that MERS held only legal title to the interests granted by Saurman in the security instrument and that MERS (as the nominee for the lender and the lender's successors and assigns) had the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the property and to take any action required of the lender including releasing and canceling the security instrument. Saurman defaulted on his note. MERS began nonjudicial foreclosure by advertisement under MCL 600.3201 *et seq*., purchased the property at the subsequent sheriff's sale, and then quitclaimed the property to Residential Funding Co, LLC, Homecomings' successor lender. Residential Funding began an eviction action in the 62-A District Court. Saurman challenged the foreclosure as invalid, asserting that MERS did not have the statutory authority to foreclose by advertisement under MCL 600.3204(1)(d) because MERS was not an owner of the indebtedness, an owner of an interest in the indebtedness secured by the mortgage, or the servicing agent of the mortgage as required under the statute. The district court, Steven M. Timmers, J., disagreed with Saurman and granted a judgment for possession

of the property in favor of Residential Funding. The Kent Circuit Court, George S. Buth, J., affirmed the judgment of the district court. The Court of Appeals granted Saurman's application for leave to appeal (Docket No. 290248).

Corey Messner purchased real property in the same manner as Gerald Saurman, obtaining financing from Homecomings. The same type of note and mortgage instrument were executed. Messner defaulted on his note, and MERS foreclosed by advertisement, purchased the property at the sheriff's sale, and quitclaimed the property to Bank of New York Trust Company, Homecomings' successor lendor. Bank of New York Trust Company began an eviction action in the 12th District Court. Messner challenged the foreclosure as invalid on the same grounds as asserted by Gerald Saurman. The district court, Michael J. Klaeren, J., disagreed and granted a judgment for possession of the property in favor of Bank of New York Trust Company. The Jackson Circuit Court, Chad C. Schmucker, J., affirmed the judgment of the district court. The Court of Appeals granted Messner's application for leave to appeal (Docket No. 291443) and consolidated the appeals.

The Court of Appeals *held*:

1. There was no dispute that MERS was neither the owner of the indebtedness nor the servicing agent of the mortgage, therefore, under MCL 600.3204(1)(d), MERS lacked authority to foreclose by advertisement unless it was the owner of an interest in the indebtedness secured by the mortgage.

2. Defendants' indebtedness was solely based on the notes because defendants owed monies pursuant to the terms of the notes. In order for a party to own an interest in the indebtedness secured by a mortgage, it must have a legal share, title, or right in the note. Even though they are typically employed together, the indebtedness, i.e., the note, and the mortgage are two different legal transactions providing two different sets of rights. There is no merit to plaintiffs' suggestion that an interest in the mortgage is sufficient under MCL 600.3204(1)(d).

3. MERS did not have the authority to foreclose by advertisement on defendants' properties. MERS, as the mortgagee, only held an interest in the properties as security for the notes, not an interest in the notes themselves. MERS's interest in the mortgages did not give it an interest in the notes. MERS had no financial interest in the notes. The fact that, in the mortgage instrument, Homecomings gave MERS authority to take any action required of the lender did not transform MERS into an owner of an interest in the notes. The mortgages expressly limit the interests MERS owns to those granted in the mortgage

instrument and limits MERS's right to take action to those actions related to the mortgage instrument. Nothing in the mortgage permits MERS to take action with respect to the debt, or provides it any interest therein. The Legislature has specifically required ownership of an interest in the note before permitting foreclosure by advertisement. Where the Legislature has limited the availability to take action to a specific group of individuals, parties cannot grant an entity that falls outside that group the authority to take such action. Although MERS owns the mortgage, it owns neither the related debt nor an interest in any portion of the debt, and is not a secondary beneficiary of the payment of the debt.

4. MCL 600.3204(1)(d) does not permit foreclosure by advertisement in the name of an agent or a nominee. Only servicing agents, not all agents, may foreclose by advertisement.

5. Because the risk of a double recovery only occurs when the mortgage holder and the noteholder are separate, the Legislature limited foreclosure by advertisement to those parties that were entitled to enforce the debt instrument, resulting in an automatic credit toward payment on the instrument in the event of foreclosure.

6. MERS's inability to comply with the requirements of MCL 600.3204(1)(d) rendered the foreclosure proceedings in both cases void *ab initio*. The circuit courts improperly affirmed the district court's decisions to proceed with eviction on the bases of the foreclosures of defendants' properties. The orders of the circuit courts are reversed, the foreclosure proceedings are vacated, and the cases are remanded for further proceedings.

Reversed, vacated, and remanded.

WILDER, P.J., dissenting, stated that MERS was the owner of an interest in the indebtedness secured by the mortgage in each case. As the mortgagee, MERS owned a contractual interest in the indebtedness. MERS's interest in the indebtedness is derived from the fact that its contractual obligations as mortgagee were dependent on whether the mortgagor met the obligation to pay the indebtedness that the mortgage secured. By conveying to MERS the right to take any action required of Homecomings, Homecomings gave, and MERS received, a greater interest than just an interest in the property as security for the note, namely it gave MERS the contractual right to act for the benefit of Homecomings. MERS was the contractual owner of an interest in the notes, which were secured by the mortgages. Nothing in MCL 600.3204 precludes a noteholder-mortgagee from delegating, by contract, some of its rights and responsibilities under the statute and the mortgage to a nominee that, while not the owner of the note and,

therefore, not the holder of an interest in the note identical to that of the noteholder, nevertheless, clearly has an interest in whether the note is paid or defaulted on. MERS did have the authority to foreclose on defendants' property by advertisement and the orders in each case should be affirmed.

1. MORTGAGES — FORECLOSURES BY ADVERTISEMENT — INTERESTS IN MORTGAGES — INTERESTS IN INDEBTEDNESS.

A party may foreclose a mortgage by advertisement if the party is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or is the servicing agent of the mortgage; an interest in a mortgage is different from an interest in the indebtedness because notes and mortgages are separate documents that provide evidence of separate obligations and interests; the Legislature limited foreclose by advertisement to those parties that are entitled to enforce the debt instrument, resulting in an automatic credit toward payment on the instrument in the event of foreclosure.

2. TRUSTS — TRUSTEES — OWNERSHIP INTERESTS IN TRUSTS.

A trustee authorized to take any action on behalf of the trust is not, as a result of such authority, given an ownership interest in the trust.

3. CONTRACTS — AUTHORITY TO TAKE ACTIONS.

Where the Legislature has limited the availability to take action to a specific group of individuals, parties cannot grant an entity that falls outside that group the authority to take such action.

Orlans Associates, P.C. (by *Timothy B. Myers*), for Residential Funding Co, LLC, and Bank of New York Trust Company.

Tripp & Tagg, Attorneys at Law (by *David H. Tripp*), for Gerald Saurman.

Jackson Legal, PLLC (by *Lysle G. Hall*), for Corey Messner.

Amici Curiae:

Michigan Poverty Law Program (by *Lorray S. C. Brown*) and *Legal Services of South Central Michigan*

(by *Robert F. Gillett*) for the Legal Services Association of Michigan, the Michigan Poverty Law Program, the State Bar of Michigan Consumer Law Section Council, and the National Consumer Law Center.

Reinhart Boerner Van Deuren S.C. (by *Robert S. Driscoll* and *J. Bushnell Nielsen*) for the American Land Title Association.

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

SHAPIRO, J. These consolidated appeals each involve a foreclosure instituted by Mortgage Electronic Registration Systems, Inc. (MERS), the mortgagee in both cases. The sole question presented is whether MERS is an entity that qualifies under MCL 600.3204(1)(d) to foreclose by advertisement on the subject properties, or if it must instead seek to foreclose by judicial process. We hold that MERS does not meet the requirements of MCL 600.3204(1)(d) and, therefore, may not foreclose by advertisement.

I. BASIC FACTS AND PROCEDURAL HISTORY

In these cases, each defendant purchased property and obtained financing for their respective properties from a financial institution. The financing transactions involved loan documentation ("the note") and a mortgage security instrument (the "mortgage instrument"). The original lender in both cases was Homecomings Financial, LLC.

Each note stated, in part, the amount of the loan, the interest rate, methods and requirements of repayment, and the identity of the lender and the borrower. Each mortgage instrument provided the mortgagee the right to foreclosure on the property in the event of default on

the loan. The lender, though named as the lender in the mortgage instrument, was not designated therein as the mortgagee. Instead, the mortgage instrument stated that MERS "is the mortgagee under this Security Instrument" and it contained several provisions addressing the relationship between MERS and the lender, including:

> "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the mortgagee under this Security Instrument.
>
> * * *
>
> This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, warrant, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, with power of sale, the following described property . . . .
>
> . . . Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

Defendants defaulted on their respective notes. Thereafter, MERS began nonjudicial foreclosures by advertisement as allegedly permitted under MCL 600.3201 *et seq.*, purchased the property at the subsequent sheriff's sales, and then quitclaimed the property

to plaintiffs as respective successor lenders. When plaintiffs subsequently began eviction actions, defendants challenged the respective foreclosures as invalid, asserting, *inter alia*, that MERS did not have authority under MCL 600.3204(1)(d) to foreclose by advertisement because it did not fall within any of the three categories of mortgagees permitted to do so under that statute. The district courts denied defendants' assertions that MERS lacked authority to foreclose by advertisement and their conclusions were affirmed by the respective circuit courts on appeal. We granted leave to appeal in both cases.[1]

II. ANALYSIS

A. STANDARD OF REVIEW

We review de novo decisions made on motions for summary disposition,[2] *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006), as well as a circuit court's affirmance of a district court's decision on a motion for summary disposition. *First of America Bank v Thompson*, 217 Mich App 581, 583; 552 NW2d 516 (1996). We review all affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion, in this case, defendants. *Coblentz*, 475 Mich at 567-568.

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[1] *Residential Funding Co LLC v Saurman*, unpublished order of the Court of Appeals, entered May 15, 2009 (Docket No. 290248); *Bank of New York Trust Co v Messner*, unpublished order of the Court of Appeals, entered July 29, 2009 (Docket No. 291443).

[2] In Docket No. 290248, the district court granted summary disposition under MCR 2.116(C)(10). In Docket No. 291443, the district court granted summary disposition under MCR 2.116(I)(2) ("If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party.").

We also review de novo questions of statutory interpretation and the proper application of statutes. *Id.* at 567.

> The primary goal of statutory interpretation is to give effect to the intent of the Legislature. This determination is accomplished by examining the plain language of the statute. Although a statute may contain separate provisions, it should be read as a consistent whole, if possible, with effect given to each provision. If the statutory language is unambiguous, appellate courts presume that the Legislature intended the meaning plainly expressed and further judicial construction is neither permitted nor required. Statutory language should be reasonably construed, keeping in mind the purpose of the statute. If reasonable minds could differ regarding the meaning of a statute, judicial construction is appropriate. When construing a statute, a court must look at the object of the statute in light of the harm it is designed to remedy and apply a reasonable construction that will best accomplish the purpose of the Legislature. [*ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526-527; 672 NW2d 181 (2003) (citations omitted).]

B. MERS BACKGROUND

The parties, in their briefs and at oral argument, explained that MERS was developed as a mechanism to provide for the faster and lower-cost buying and selling of mortgage debt. Apparently, over the last two decades, the buying and selling of loans backed by mortgages after their initial issuance had accelerated to the point that those operating in that market concluded that the statutory requirement that mortgage transfers be recorded was interfering with their ability to conduct sales as rapidly as the market demanded. By operating through MERS, these financial entities could buy and sell loans without having to record a mortgage transfer for each transaction because the named mortgagee

would never change; it would always be MERS even though the loans were changing hands. MERS would purportedly track the mortgage sales internally so as to know for which entity it was holding the mortgage at any given time and, if foreclosure was necessary, after foreclosing on the property, would quitclaim the property to whatever lender owned the loan at the time of foreclosure.

As described by the New York Court of Appeals in *MERSCORP, Inc v Romaine*, 8 NY3d 90, 96; 828 NYS2d 266; 861 NE2d 81(2006):

> In 1993, the MERS system was created by several large participants in the real estate mortgage industry to track ownership interests in residential mortgages. Mortgage lenders and other entities, known as MERS members, subscribe to the MERS system and pay annual fees for the electronic processing and tracking of ownership and transfers of mortgages. Members contractually agree to appoint MERS to act as their common agent on all mortgages they register in the MERS system.
>
> The initial MERS mortgage is recorded in the County Clerk's office with "Mortgage Electronic Registration Systems, Inc." named as the lender's nominee or mortgagee of record on the instrument. During the lifetime of the mortgage, the beneficial ownership interest or servicing rights may be transferred among MERS members (MERS assignments), but these assignments are not publicly recorded; instead they are tracked electronically in MERS's private system. In the MERS system, the mortgagor is notified of transfers of servicing rights pursuant to the Truth in Lending Act, but not necessarily of assignments of the beneficial interest in the mortgage.

The sole issue in this case is whether MERS, as a mortgagee, but not a noteholder, could exercise its contractual right to foreclose by means of advertisement.

C. MCL 600.3204(1)(d)

Foreclosure by advertisement is governed by MCL 600.3204(1)(d), which provides, in pertinent part:

> [A] party may foreclose a mortgage by advertisement if all of the following circumstances exist:
>
> * * *
>
> (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.

The parties agree that MERS was neither the owner of the indebtedness nor the servicing agent of the mortgage. Therefore, MERS lacked the authority to foreclose by advertisement on defendants' properties unless it was "the owner . . . of an interest in the indebtedness secured by the mortgage . . . ." MCL 600.3204(1)(d).

The question, then, is what is required to be the "owner . . . of an interest in the indebtedness secured by the mortgage." According to Black's Law Dictionary, to "own" means "[t]o have a good legal title; to hold as property; to have a legal or rightful title to . . . ." Black's Law Dictionary (6th ed), p 1105. The dictionary defines an "interest" as "[t]he most general term that can be employed to denote a right, claim, title, or legal share in something." *Id*., p 812. "Indebtedness" is defined as "[t]he state of being in debt . . . [t]he owing of a sum of money upon a certain and express agreement." *Id*., p 768.

In each of these cases, a promissory note was exchanged for a loan. Thus, reasonably construing the statute according to its common legal meaning, *ISB Sales Co*, 258 Mich App at 526-527, the defendants' indebtedness is solely based on the notes because de-

fendants owed monies pursuant to the terms of the notes. Consequently, in order for a party to own an interest in the indebtedness, it must have a legal share, title, or right in a note.

Plaintiffs' suggestion that an "interest in the mortgage" is sufficient under MCL 600.3204(1)(d) is without merit. This is necessarily so, because the indebtedness, i.e., the note, and the mortgage are two different legal transactions providing two different sets of rights, even though they are typically employed together. A "mortgage" is "[a] conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms." Black's Law Dictionary (7th ed), p 1026. The mortgagee has an interest in the *property*. See *Capital Mtg Corp v Mich Basic Prop Ins Ass'n*, 111 Mich App 393, 397; 314 NW2d 635 (1981) (referring to the "mortgagee's interests in the property"). The mortgagor covenants, pursuant to the mortgage, that if the money borrowed under the note is not repaid, the mortgagee will retain an interest in the *property*. Thus, unlike a note, which provides evidence of a debt and represents the obligation to repay, a mortgage represents an interest in real property contingent on the failure of the borrower to repay the lender. The indebtedness, i.e., the note, and the mortgage are two different things.

Applying these considerations to the present cases, it becomes obvious that MERS did not have the authority to foreclose by advertisement on defendants' properties. Pursuant to the mortgages, defendants were the mortgagors and MERS was the mortgagee. However, it was the plaintiff lenders that lent defendants money pursuant to the terms of the notes. In each case, MERS, as mortgagee, only held an interest in the *property* as

security for the note, not an interest in the note itself. MERS could not attempt to enforce the note nor could it obtain any payment on the loan on its own behalf or on behalf of the lender. Moreover, each mortgage specifically clarified that, although MERS was the mortgagee, MERS held "only legal title to the interests granted" by the relevant defendant in the *mortgage*.[3] Consequently, MERS's interest in each mortgage represented, at most, an interest in the relevant defendant's property. MERS was not referred to in any way in the notes and only Homecomings held the notes. The record evidence establishes that MERS owned neither the notes, nor an interest, legal share, or right in the notes. The only interest MERS possessed was in the properties through the mortgages. Given that the notes and the mortgages are separate documents, providing evidence of separate obligations and interests, MERS's interest in the mortgages did not give it an interest in the debts.

Moreover, plaintiffs' analysis ignores the fact that the statute does not merely require an "interest" in the debt, but rather it requires that the foreclosing party *own* that interest. As already noted, to own means "[t]o have a good legal title; to hold as property; to have a legal or rightful title to . . . ." Black's Law Dictionary (6th ed), p 1105. None of these terms describes MERS's relationship to the notes. Plaintiffs' claim—that MERS was a contractual owner of an interest in the notes pursuant to the agreements between MERS and the lenders—misstates the interests created by the agreements. Although MERS stood to benefit if the debt was not paid—it could become the owner of the property—it

[3] We note that, in these cases, MERS disclaims any interest in the properties other than the legal right to foreclose and immediately quitclaim each property to the true owner, i.e., the appropriate lender.

was to receive no benefit if the debt was paid. MERS had no right to possess the debt, or the money paid on it. Likewise, it had no right to use or convey the notes. Its only "right to possess" was the right to possess the property if and when foreclosure occurred. Had the lender decided to forgive the debt in the notes, MERS would have had no recourse; it could not have sued the lender for any financial loss. Accordingly, it owned no financial interest in the notes. Indeed, it is uncontested that MERS is wholly without legal or rightful title to the debt and that there are no circumstances under which it is entitled to receive any payments on the notes.

The dissent relies on the language in the mortgage instruments to suggest a contractual basis to find that MERS had an ownership interest in the loans. However, the fact that Homecomings gave MERS authority to take "any action required of the Lender" did not transform MERS into an owner of an interest in the notes. Trustees have the authority to take action on behalf of a trust; they can even be authorized to take "any" action. Nevertheless, such authority does not give them an ownership interest in the trust. Moreover, the provision on which the dissent relies (but does not fully quote) contains language limiting MERS to taking action on behalf of the lenders' equitable interest in the mortgage instruments.[4] The relevant language provides that the borrower "understands and agrees that MERS holds only legal title *to the interests granted by Borrower in this Security Instrument*" and gives MERS "the right: to exercise any or all *of those interests* . . . and to

[4] Though the lenders do not hold legal title to the mortgage instruments, they do have an equitable interest therein. See *Aiton v Slater*, 298 Mich 469, 480; 299 NW 149 (1941); *Atwood v Schlee*, 269 Mich 322; 257 NW 712 (1934). The lenders' equitable interest in the mortgages does not, however, translate into an equitable interest for MERS in the loans.

take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument." (Emphasis and underlining added.) Thus, the contract language expressly limits the interests MERS owns to those granted in the mortgage instrument and limits MERS's right to take action to those actions related to the mortgage instrument. Nothing in this language permits MERS to take any action with respect to the debt, or provides it any interest therein.

Finally, even assuming that the contract language did create such a right, Homecomings cannot grant MERS the authority to take action when the statute prohibits it. Regardless of whether Homecomings would like MERS to be able to take such action, it can only grant MERS the authority to take actions that our Legislature has statutorily permitted. Where the Legislature has limited the availability to take action to a specified group of individuals, parties cannot grant an entity that falls outside that group the authority to take such action. Here, the Legislature specifically requires ownership of an interest in the note before permitting foreclosure by advertisement.

The contention that the contract between MERS and Homecomings provided MERS with an ownership interest in the notes stretches the concept of legal ownership past the breaking point. While the term may be used very loosely in some popular contexts, such as the expression to "own a feeling," such use refers to a subjective quality or experience. We are confident that such a loose and uncertain meaning is not what the Legislature intended. Rather, the Legislature used the word "owner" because it meant to invoke a legal or equitable right of ownership. Viewed in that context, although MERS owns the mortgages, it owns neither

the related debt nor an interest in any portion of the debt, and is not a secondary beneficiary of the payment of the debt.[5]

The dissent's conclusion that MERS owns an interest in each note because whether it ultimately receives the property depends on whether the note is paid, similarly distorts the term "interest" from a legal term of art to a generalized popular understanding of the word. It may be that MERS is concerned with (i.e., interested in) whether the loans are paid because that will define its actions vis-à-vis the properties, but being concerned about whether someone pays his or her loan is not the same as having a legal right, or even a contingent legal right, to those payments.

Plaintiffs are mistaken in their suggestion that our conclusion that MERS does not have "an interest in the indebtedness" renders that category in the statute nugatory. We need not determine the precise scope of that category, but, by way of example, any party to whom a note has been pledged as security by the lender has "an interest in the indebtedness" because, under appropriate circumstances, it owns the right to the repayment of that loan.

Plaintiffs also argue that MERS had the authority to foreclose by advertisement as the agent or nominee of

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[5] The dissent's analogy between MERS's ability to "own an interest" in the notes and an easement-holder's ownership of an interest in land without owning the land is unavailing. An easement holder owns rights to the land that even the landholder cannot infringe upon or divest him or her of, see *Dobie v Morrison*, 227 Mich App 536, 541; 575 NW2d 817 (1998) (noting that a fee owner cannot use the burdened land in any manner that would interfere with the easement holders' rights), while the interest the dissent contends that MERS "owns" would be equal to or less than that of the noteholders and the noteholders could completely divest MERS of the alleged interest by forgiving the notes without MERS having any recourse. Accordingly, the analogy fails.

Homecomings, who held the notes and an equitable interest in the mortgages. However, this argument must also fail under the statute because the statute explicitly requires that, in order to foreclose by advertisement, the foreclosing party must possess an interest in the indebtedness. MCL 600.3204(1)(d). It simply does not permit foreclosure by advertisement in the name of an agent or a nominee. If the Legislature intended to permit such actions, it could have easily included "agents or nominees of the noteholder" as parties that could foreclose by advertisement. Indeed, had the Legislature intended the result suggested by plaintiffs, it would have merely had to delete the word "servicing." The law is clear that this Court must "avoid a construction that would render any part of the statute surplusage or nugatory." *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001). Thus, the Legislature's choice to permit only servicing agents, and not all agents, to foreclose by advertisement must be given effect.

Similarly, we reject plaintiffs' reliance on *Jackson v Mtg Electronic Registration Sys, Inc*, 770 NW2d 487 (Minn, 2009). *Jackson*, a Minnesota case, is inapplicable because it interpreted a statute that is substantially different from MCL 600.3204. The statute at issue in *Jackson* specifically permits foreclosure by advertisement if "a mortgage is granted to a mortgagee as nominee or agent for a third party identified in the mortgage, and the third party's successors and assigns[.]" *Jackson*, 770 NW2d at 491, quoting Minn Stat 507.413(a)(1). Thus, the Minnesota statute specifically provides for foreclosure by advertisement by entities that stand in the exact position that MERS does here. Indeed, the Minnesota statute is "frequently called 'the MERS statute . . . .' " *Id.* at 491. Our statute, MCL 600.3204(1)(d) makes no references to nominees or

agents. Rather, it requires that the party foreclosing be either the mortgage servicer or have an ownership interest in the indebtedness. The *Jackson* statute also revolves around the mortgage, unlike MCL 600.3204(1)(d), which uses the term indebtedness, which, as discussed previously, is a reference to the note, not the mortgage. Thus, *Jackson* has no application to the case at bar. Moreover, the Minnesota statute demonstrates that if our Legislature had intended to allow MERS to foreclose by advertisement, it could readily have passed a statute including language like that included in Minnesota.

D. ANALYSIS BEYOND THE LANGUAGE OF THE STATUTE

Plaintiffs suggest that, despite the plain language of the statute, the Legislature did not create three discrete categories of entities that could foreclose by advertisement. Instead, plaintiffs assert that the Legislature envisioned a *continuum* of entities: those that actually own the loan, those that service the loan, and some ill-defined category that might be called "everything in between." However, courts may not "rewrite the plain statutory language and substitute our own policy decisions for those already made by the Legislature." *DiBenedetto v West Shore Hosp*, 461 Mich 394, 405; 605 NW2d 300 (2000). Thus, without any language in the statute providing for a "continuum," let alone an analysis of what it constitutes, we find no merit in this position.

Plaintiffs also raise a straw man argument by citing this Court's decision in *Davenport v HSBC Bank USA*, 275 Mich App 344; 739 NW2d 383 (2007), where we observed that "[o]ur Supreme Court has explicitly held that '[o]nly the record holder of the mortgage has the power to foreclose' under MCL 600.3204." *Davenport*,

275 Mich App at 347, quoting *Arnold v DMR Fin Servs, Inc (After Remand)*, 448 Mich 671, 678; 532 NW2d 852 (1995). However, the facts in *Davenport* do not reflect that the party who held the note was a different party than the party who was the mortgagee. *Davenport*, 275 Mich App at 345. Indeed, the fact that the Court used the term "mortgage" interchangeably with "indebtedness," *id*. at 345-347, rather than distinguishing the two terms, indicates that the same party held both the note and the mortgage. Because the instant cases involve a situation where the noteholder and the mortgage holder are separate entities, the general proposition set forth in *Davenport* does not apply. There is nothing in *Davenport* holding that a party that owns only the mortgage and not the note has an ownership interest in the debt.[6]

We also note that *Arnold*, the Supreme Court case relied on in *Davenport*, was interpreting a previous version of MCL 600.3204, which was substantially revised when the Legislature adopted the version we must apply in this case. The statute as it existed when *Arnold* was decided included a provision stating:

> "To entitle any party to give a notice as hereinafter prescribed, and to make such a foreclosure, it shall be requisite:
>
> * * *
>
> "(3) That the mortgage containing such power of sale has been duly recorded; and if it shall have been assigned that all the assignments thereof shall have been recorded." [*Arnold*, 448 Mich at 676, quoting MCL 600.3204(3).]

[6] In addition, while we reject plaintiffs' overly broad reading of *Davenport* for the reasons just stated, we note that even under their reading, plaintiffs would merely have to obtain an assignment of the mortgage from MERS before initiating foreclosure proceedings.

This requirement, that a noteholder could only foreclose by advertisement if the mortgage it holds is duly recorded, is no longer part of the statute and does not apply in this case. The version of the statute interpreted in *Arnold* also lacked the language, later adopted, and operative in this case, specifically permitting foreclosure by advertisement by the owner of the note. Moreover, the language that the Legislature chose to adopt in the amended statute appears to reflect an intent to protect borrowers from having their mortgages foreclosed on by advertisement by those who did not own the note because it would put the borrowers at risk of being foreclosed but still owing the noteholder the full amount of the loan.

Under MCL 440.3602(1)(*ii*), an instrument is only discharged when payment is made "to a person entitled to enforce the instrument." Those parties listed in MCL 600.3204(1)(d)—the servicer, the owner of the debt, or someone owning an interest in the debt—would all be persons entitled to enforce the instrument that reflects the indebtedness. As previously noted, MERS is not entitled to enforce the notes. Thus, if MERS were permitted to foreclose on the properties, the borrowers obligated under each note would potentially be subject to a double recovery for the debt. That is, having lost their property to MERS, they could still be sued by the noteholder for the amount of the debt because MERS does not have the authority to discharge the note. MERS members may agree to relinquish the right of collection once foreclosure occurs, but even if they were to do so within MERS, that would not necessarily protect the borrower in the event a lender violated that policy or the note was subsequently transferred to someone other than the lender.[7]

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[7] The dissent's observation that, had Homecomings remained the mortgagee, it would have had the right to foreclose by advertisement does not change the outcome because the statutory language provides that it

These risks are, however, not present in a judicial foreclosure. MCL 600.3105(2) provides:

> After a complaint has been filed to foreclose a mortgage on real estate or land contract, while it is pending, and after a judgment has been rendered upon it, no separate proceeding shall be had for the recovery of the debt secured by the mortgage, or any part of it, unless authorized by the court.

Thus, once a judicial foreclosure proceeding on the mortgage has begun, a subsequent action on the note is prohibited, absent court authorization, thereby protecting the mortgagor from double recovery. See *Church & Church, Inc v A-1 Carpentry*, 281 Mich App 330, 341-342; 766 NW2d 30 (2008), aff'd in part and vacated in part on other grounds 483 Mich 885 (2009); *United States v Leslie*, 421 F2d 763, 766 (CA 6, 1970) ("[I]t is the purpose of the statute to force an election of remedies which if not made would create the possibility that the mortgagee could foreclose the mortgage and at the same time hold the maker of the note personally liable for the debt.").

Given that this risk of a double recovery only occurs when the mortgage holder and the noteholder are separate, the Legislature limited foreclosure by advertisement to those parties that were entitled to enforce the debt instrument, resulting in an automatic credit toward payment on the instrument in the event of foreclosure.[8]

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is Homecomings' additional status as the *noteholder* that would give it that right. The question before us is whether a mortgagee that is *not* a noteholder has the right to foreclose by advertisement.

[8] The dissent's assertion that MCL 600.3105(2) provides for an election of remedies that prevents this double recovery is erroneous, because that statute governs only judicial foreclosures, not foreclosures by advertisement. MCL 600.3105(2) requires the filing of a complaint, something that does not occur in foreclosure by advertisement. Absent a complaint, there

While MERS seeks to blur the lines between itself and the lenders in this case in order to position itself as a party that may take advantage of the restricted tool of foreclosure by advertisement, it has, in other cases, sought to clearly define those lines in order to avoid the responsibilities that come with being a lender. For example, in *Mtg Electronic Registration Sys, Inc v Nebraska Dep't of Banking & Fin*, 270 Neb 529; 704 NW2d 784 (2005), the Nebraska Department of Banking and Finance asserted that MERS was a mortgage banker and, therefore, subject to licensing and registration requirements. *Id.* at 530. MERS successfully maintained that it had nothing to do with the loans and did not even have an equitable interest in the property, holding only "legal title to the interests granted by Borrower . . . ." *Id.* at 534 (quotation marks omitted). The court accepted MERS's argument that it was not a lender, but merely a shell designed to make buying and selling of loans easier and faster by disconnecting the mortgage from the loan. *Id.* at 535. Having separated the mortgages from the loans, and disclaimed any interest in the loans in order to avoid the legal *responsibilities* of a lender, MERS nevertheless claims in the instant cases that it can employ the *rights* of a lender by foreclosing in a manner that the statute affords only to those mortgagees who also own an interest in the loan. But as the Nebraska court stated in adopting MERS's argument, "MERS has no independent right to collect

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would be neither a time during which a complaint would be "pending" nor any judgment that could be "rendered upon it" that would prohibit the filing of any "separate proceeding . . . for the recovery of the debt secured by the mortgage . . . ." See also *Cheff v Edwards*, 203 Mich App 557, 560; 513 NW2d 439 (1994) (holding that "foreclosure by advertisement is not a judicial action"). Consequently, the prohibitions expressed in MCL 600.3105(2) would not apply to foreclosure by advertisement and, therefore, would not protect borrowers from double recovery if MERS were permitted to foreclose by advertisement.

on any debt because MERS itself has not extended credit, and none of the mortgage debtors owe MERS any money." *Id.*

The separation of the note from the mortgage in order to speed the sale of mortgage debt without having to deal with all the "paper work" of mortgage transfers appears to be the sole reason for MERS's existence. The flip side of separating the note from the mortgage is that it can slow the mechanism of foreclosure by requiring judicial action rather than allowing foreclosure by advertisement. To the degree that there were expediencies and potential economic benefits in separating the mortgagee from the noteholder so as to speed the sale of mortgage-based debt, those lenders that participated were entitled to reap those benefits. However, it is no less true that, to the degree that this separation created risks and potential costs, those same lenders must be responsible for absorbing the costs.

III. CONCLUSION

Defendants were entitled to judgment as a matter of law because, pursuant to MCL 600.3204(1)(d), MERS did not own the indebtedness, own an interest in the indebtedness secured by the mortgage, or service the mortgage. MERS's inability to comply with the statutory requirements rendered the foreclosure proceedings in both cases void *ab initio*. Thus, the circuit courts improperly affirmed the district courts' decisions to proceed with eviction on the basis of the foreclosures of defendants' properties.

In both Docket Nos. 290248 and 291443, we reverse the circuit courts' affirmance of the district courts' orders, vacate the foreclosure proceedings, and remand for further proceedings consistent with this opinion. We

do not retain jurisdiction. Defendants, as the prevailing parties, may tax costs. MCR 7.219(A).

SERVITTO, J., concurred with SHAPIRO, J.

WILDER, P.J. (*dissenting*). Because I conclude that, pursuant to MCL 600.3204(1)(d), Mortgage Electronic Registration Systems, Inc. (MERS), was "the owner . . . of an interest in the indebtedness secured by the mortgage" at issue in each of these consolidated appeals, I respectfully dissent.

I

Defendant Gerald Saurman (Saurman) and defendant Corey Messner (Messner) executed promissory notes in exchange for loans from Homecomings Financial, LLC (Homecomings). To secure the repayment of the loans, Saurman and Messner executed mortgage agreements that encumbered the properties purchased with the money loaned to them by Homecomings. The mortgage agreements provided that MERS, "solely as a nominee for [Homecomings] and [Homecomings'] successors and assigns," was the mortgagee under each security instrument and held the legal interests to the properties, and that MERS's interests under each security instrument, as nominee for Homecomings, included the right to foreclose and sell the properties. The mortgage agreements also provided that MERS had the obligation "to take any action required of [Homecomings], including, but not limited to, releasing and canceling" the security instruments. Though it was not the mortgagee, as the lender, Homecomings retained an equitable interest in the mortgages.

Both Saurman and Messner defaulted on their payments, and MERS initiated nonjudicial foreclosure by

advertisement under MCL 600.3201 *et seq*. MERS purchased the properties in sheriff's sales, and subsequently, quitclaimed Saurman's property to Residential Funding Co, LLC (RFC), and Messner's property to Bank of New York Trust Company (BNYT). After the redemption periods expired, RFC and BNYT each sought to obtain possession of the respective properties. During eviction proceedings, Saurman and Messner each challenged the foreclosure by MERS, asserting that MERS was not the servicing agent, did not own the indebtedness secured by the mortgage, and did not own an interest in the indebtedness secured by the mortgage as required by MCL 600.3204(1)(d). These arguments were rejected by both the district courts and the circuit courts, and this Court granted leave to appeal.

II

This Court reviews de novo rulings made on a motion for summary disposition including a circuit court's affirmance of a district court's ruling on a motion for summary disposition. *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644, 647; 761 NW2d 414 (2008); *First of America Bank v Thompson*, 217 Mich App 581, 583; 552 NW2d 516 (1996). Issues of statutory construction are questions of law, which this Court reviews de novo on appeal. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007). Statutory construction discerns and gives effect to the Legislature's intent. *Potter v McLeary*, 484 Mich 397, 410; 774 NW2d 1 (2009). In determining that intent, this Court first looks to the language of the statute. *Id*. The interpretation of the language must accord with the legislative intent. *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009). As far as possible, this Court gives effect to every phrase, clause, and word in the statute.

Id. "The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Id*. (quotation marks and citations omitted). Courts read a statute as a whole, and individual words and phrases, while important, are read in the context of the entire legislative scheme. *Id*.

"The interpretation of a contract is also a question of law this Court reviews de novo . . . ." *DaimlerChrysler Corp v G-Tech Prof Staffing, Inc*, 260 Mich App 183, 184-185; 678 NW2d 647 (2003). A contract must be interpreted according to its plain and ordinary meaning. *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008).

> Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations [or the provisions irreconcilably conflict with each other], factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate. If 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, 721-722; 565 NW2d 401 (1997) (citations omitted).]

See also *Shaw v Ecorse*, 283 Mich App 1, 22; 770 NW2d 31 (2009). A court may not rewrite clear and unambiguous language under the guise of interpretation. *Woodington v Shokoohi*, 288 Mich App 352, 374; 792 NW2d 63 (2010). Rather, "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).

III

MCL 600.3204 provides, 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.

There are three categories of parties who may foreclose by advertisement under MCL 600.3204(1)(d): (1) the owner of the indebtedness secured by the mortgage; (2) the servicing agent of the mortgage; and (3) the owner of *an interest* in the indebtedness secured by the mortgage. Because we must give meaning to each of these phrases and each word in the phrases in order to give effect to the Legislature's intent, *Bush*, 484 Mich at 167, it is clear that the owner of an interest in the indebtedness secured by the mortgage, while accorded the same right to foreclose by advertisement, is a person or entity different from either the owner of the indebtedness secured by the mortgage or the servicing agent of the mortgage. To "own" means "[t]o have a good legal title; to hold as property; to have a legal or rightful title to . . . ." Black's Law Dictionary (6th ed), p 1105.

"Owner" is defined as, "[the] person in whom is vested the ownership, dominion, or title of property; proprietor. He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases, even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right." *Id*. "Indebtedness" is defined as "[t]he state of being in debt" or "[t]he owing of a sum of money upon a certain and express agreement." *Id*., p 768. The indebtedness secured by the mortgages are, in these cases, the promissory notes signed by Saurman and Messner. Thus, the owner of the indebtedness secured by the mortgage owns the debt or the notes. In these cases, the owner of the indebtedness is Homecomings.

The signature questions presented in these cases are what it means to own "an interest" in the indebtedness secured by the mortgage, i.e., to own an interest in the debt or the note, as opposed to owning the debt or the note, and what entity or person the Legislature meant to refer to when it permitted "the owner . . . of an interest in the indebtedness secured by the mortgage" to have the same ability as the owner of the indebtedness and the servicer of the mortgage to foreclose by advertisement. In general,

> [t]he right to foreclosure by advertisement is statutory. *Calaveras Timber Co v Michigan Trust Co*, 278 Mich 445, 450; 270 NW 743 (1936). Such foreclosures are a matter of contract, authorized by the mortgagor, and ought not be hampered by an unreasonably strict construction of the law. *Cramer v Metro S & L Ass'n*, 401 Mich 252, 261; 258 NW2d 20 (1977). Harsh results may and often do occur because of mortgage foreclosure sales, "but we have never held that because thereof, such sale should be enjoined, when no showing of fraud or irregularity is made." *Calaveras Timber Co*, [278 Mich] at 454. [*Church & Church, Inc*

v A-1 Carpentry, 281 Mich App 330, 339-340; 766 NW2d 30 (2008), aff'd in part and vacated in part on other grounds 483 Mich 885 (2009).]

"Interest" is defined, in part, as "[t]he most general term that can be employed to denote a right, claim, title, or legal share in something . . . . The word 'interest' is used in the Restatement of Property both generically to include varying aggregates of rights, privileges, powers and immunities and distributively to mean any one of them." Black's Law Dictionary (6th ed), p 812. "Mortgage" is defined as "an interest in land created by a written instrument providing security for the performance of a duty or the payment of a debt." *Id*., p 1009. Notably, "[t]he mortgage operates as a conveyance of the legal title to the mortgagee, but such title is subject to defeasance on payment of the debt or performance of the duty by the mortgagor." *Id.*, p 1010. In other words, the mortgagee's title is defeated when the debt is paid.

I would conclude that, as mortgagee, MERS owned a contractual interest in the indebtednesss. If the indebtedness is paid in conjunction with the note, MERS has the contractual obligation to cancel the security agreement because its title is defeated. If the indebtedness is not paid, however, MERS has the contractual right and obligation to exercise the rights granted to it by the mortgagors, including the right to foreclose by advertisement under the statute. In other words, MERS's interest in the indebtedness is derived from the fact that its contractual obligations as mortgagee were dependent on whether the mortgagor met the obligation to pay the indebtedness that the mortgage secured.

According to the security instruments, MERS was the nominee of Homecomings and held its status as mortgagee only in that capacity. "Nominee" is defined as "[a] person designated to act in place of another, usu.

in a very limited way . . . [a] party who holds bare legal title for the benefit of others . . . ." Black's Law Dictionary (9th ed), p 1149. Although Saurman and Messner each agreed that MERS held "only legal title to the interests granted" in the respective security instruments, the security interest was specifically created to secure performance by Saurman and Messner of the obligation each undertook in a note, namely, to repay the debt. In other words, the security interest created was specifically linked to the debt and specifically created to ensure payment of the debt. Saurman and Messner each agreed that "if necessary to comply with law or custom, MERS (as nominee for [Homecomings] . . . , ha[d] the right . . . to take any action required of [Homecomings] including, but not limited to, releasing and canceling" the security instruments.

By conveying the right to take *any* action required of it, Homecomings gave, and MERS received, a greater interest than just an interest in the property as security for the note, namely it gave the contractual right to act for the benefit of Homecomings. MERS's interest in the debt reflected by the note is inextricably linked to its obligations under the mortgage. For example, if Saurman and Messner had satisfied their notes, MERS would have been obligated to cancel the security instruments on behalf of Homecomings. Alternatively, if Saurman and Messner had elected to sell their properties without Homecomings' prior written consent, MERS would have had the right to exercise on behalf of Homecomings the option to require immediate payment in full of all sums secured by the security instruments. Failure to pay in full would have then given MERS the right to invoke remedies such as foreclosure of the properties, as provided in the security instruments. In short, MERS was the contractual owner of an interest in the notes, which were secured by the mortgages.

There is no dispute that, had Homecomings retained its status as mortgagee, it would have been entitled to foreclose by advertisement upon the defaults by Saurman and Messner. Nothing in MCL 600.3204 precludes a noteholder-mortgagee from delegating, by contract, some of its rights and responsibilities under the statute and the mortgage to a nominee that, while not the owner of the note and, therefore, not the holder of an interest in the note identical to that of the noteholder, nevertheless, clearly has an interest in whether the note is paid or defaulted on.[1]

Finally, it bears noting that, contrary to the majority's contention that permitting MERS to foreclose by advertisement could potentially subject the mortgagors to a double recovery for the same debt, MCL 600.3105(2) forces an election of remedies, so that Homecomings would be precluded from the recovery of any debt secured by the mortgage if a foreclosure proceeding had already been initiated by MERS.

I would conclude that MERS did have the authority to foreclose on defendants' properties by advertisement. I would affirm in each case.

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[1] In this regard, MERS's interest in the indebtedness is similar to the interest held by one who possesses an easement right. "[A]n easement is a [sic] not a possessory right." *Terlecki v Stewart*, 278 Mich App 644, 659; 754 NW2d 899 (2008). Rather, "[a]n easement is, by nature, a limited property *interest*. It is a right to use the land burdened by the easement rather than a right to occupy and possess [the land] as does an estate owner." *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 378-379; 699 NW2d 272 (2005) (quotation marks and citations omitted; emphasis added and deleted). Because one can "own" an easement right and have an interest in land without owning the land, so, too, can MERS "own" an interest in the note held by Homecomings without actually owning the note.

SHARP v CITY OF BENTON HARBOR

Docket No. 292389. Submitted April 12, 2011, at Grand Rapids. Decided April 21, 2011, at 9:05 a.m.

Jeanette Sharp brought an action in the Berrien Circuit Court, alleging that the city of Benton Harbor negligently maintained a curb within its jurisdiction. She had been injured when she stepped onto the curb abutting a street and it crumbled and caused her to fall. Defendant moved for summary disposition, arguing that the curb was not within the statutory definition of "highway" and therefore governmental immunity barred plaintiff's claim. The court, John E. Dewane, J., denied the motion. Defendant appealed.

The Court of Appeals *held*:

The first two sentences of MCL 691.1402(1) describe the duty of a municipality to maintain and repair highways within its jurisdiction. A curb falls within the statutory definition of "highway" because it forms the edge of the road and is an integral component of the road that facilitates public travel on the road. Defendant had a duty to repair and maintain the curb of its road and therefore the trial court did not err in denying defendant's motion.

Affirmed.

GOVERNMENTAL IMMUNITY — HIGHWAYS — INTEGRAL COMPONENTS OF HIGHWAYS.

A curb falls within the statutory definition of "highway" because it forms the edge of the road and is an integral component of the road that facilitates public travel on the road (MCL 691.1401[e]).

Law Office of Douglas A. Merrow, PLLC (by *Douglas A. Merrow*), for plaintiff.

Secrest Wardle (by *Steven L. Kreuger*) for defendant.

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

PER CURIAM. Jeanette Sharp sustained injuries when she fell from a crumbling curb. Sharp sued the city of Benton Harbor, averring that it had breached a statutory duty to maintain the curb that caused her fall. Benton Harbor moved for summary disposition on the basis of governmental immunity. The circuit court denied Benton Harbor's motion, and Benton Harbor now appeals as of right. For the reasons set forth in this opinion, we affirm.

Late in the evening of May 7, 2007, Sharp walked home near the intersections of Cross and Pearl Streets located in the city of Benton Harbor. Sharp described that as she stepped onto a curb abutting the street, "the curb like crumbled, and I fell to the ground." The curb was neither at the corner nor within a crosswalk. A grass verge separated the curb from the sidewalk. Benton Harbor acknowledges jurisdiction over the curb where Sharp fell.

Sharp filed this action alleging negligent maintenance of the "roadway and curbing." Benton Harbor moved for summary disposition under MCR 2.116(C)(10), contending that because the curb did not fall within the definition of "highway" in MCL 691.1401(e), governmental immunity barred Sharp's claim. The circuit court denied Benton Harbor's motion, relying on *Meek v Dep't of Transp*, 240 Mich App 105; 610 NW2d 250 (2000), overruled in part on other grounds *Grimes v Dep't of Transp*, 475 Mich 72, 73-76 (2006).

We review de novo a circuit court's summary disposition ruling, *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998), as well as its decision concerning the applicability of governmental immunity, *Linton v Arenac Co Rd Comm*, 273 Mich App 107, 112; 729 NW2d 883 (2006). "In reviewing a motion under

MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004); see also MCR 2.116(G)(5).

We first consider whether the circuit court properly applied *Meek* to the facts of this case. In *Meek*, this Court held that "the barrier curb must be considered part of the improved portion of the highway designed for vehicular travel and comes within the highway exception to governmental immunity." *Meek*, 240 Mich App at 113. Sharp urges that *Meek* applies here and controls the outcome of this case. Benton Harbor counters that the Supreme Court overruled *Meek*'s central holding in *Grimes*, 475 Mich at 72, and that a curb defect does not fall within the exception to governmental immunity set forth in MCL 691.1402(1).

We find Sharp's reliance on *Meek* misplaced because that case concerned the portion of MCL 691.1402(1) detailing the highway maintenance duties of state and county road commissions, rather than municipalities. Likewise, we reject Benton Harbor's position that *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000), dictates the outcome of this case. In *Nawrocki*, the Supreme Court considered "the extent, if any, to which the highway exception accords protection to pedestrians injured by a condition within the improved portion of the highway designed for vehicular travel." *Id*. at 148. The Supreme Court observed that "[t]he structure of MCL 691.1402(1) . . . is critical to its meaning." *Id*. at 159. The Court continued:

> Thus, we begin by observing that the first and second sentences of the highway exception clause apply to all

> governmental agencies having jurisdiction over any highway. In contrast, the third and fourth sentences address more specifically the duty and resulting liability of the state and county road commissions. Therefore, while we are constrained to construe the highway exception as a whole, it is necessary to parse each sentence of the statutory clause to ascertain the scope of the exception, as determined by the stated policy considerations of the Legislature. [*Id*. at 159 (footnote omitted).]

Our Supreme Court explained that the fourth sentence of MCL 691.1402(1) applies only to state and county road commissions, and "expressly provides that the limited duty [to repair and maintain] does *not* extend to 'sidewalks, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel.' " *Id*. at 161. Our Supreme Court held that the state's and county road commissions' duties arise only in the "improved portion of the highway," as reflected by the plain language of the fourth sentence. *Id*. at 168. But because the fourth sentence of MCL 691.1402(1) lacks applicability to highways maintained by municipal corporations, *Nawrocki* affords Benton Harbor no basis for summary disposition.

The first two sentences of the highway exception to governmental immunity apply to Benton Harbor's duties in this case:

> Except as otherwise provided in section 2a, each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. [MCL 691.1402(1).]

Benton Harbor argues that the circuit court incorrectly denied summary disposition because the following definition of "highway" set forth in MCL 691.1401(e) does not extend to a curb: "[A] public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway. The term highway does not include alleys, trees, and utility poles."

We now consider whether a curb comes within the definition of "a public highway, road, or street"; an issue of first impression in Michigan. Well-established principles guide our statutory construction efforts. When construing a statute, this Court must ascertain and effectuate the Legislature's intent as expressed in the words of the statute. *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 10; 654 NW2d 610 (2002). In discerning legislative intent, we endeavor to give effect to every word, phrase, and clause in the statute. *People v Hill*, 269 Mich App 505, 515; 715 NW2d 301 (2006). We construe an act in a manner that harmonizes its provisions, thereby carrying out the legislative purpose. *Id*.

In defining the term "highway," the Legislature set forth examples of structures both included within and excluded from the statutory meaning: " 'Highway' means a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway," but "does not include alleys, trees, and utility poles." MCL 691.1401(e). The question before us is whether the Legislature intended that the word "highway" encompasses curbs. "When used in the text of a statute, the word 'includes' can be used as a term of enlargement or of limitation, and the word in and of itself is not determinative of how it is intended to be used." *Frame*

v Nehls, 452 Mich 171, 178-179; 550 NW2d 739 (1996). In *Frame*, the Supreme Court interpreted the term "includes" in a limited fashion, "[i]n light of the statute's text and legislative history." *Id*. at 180.

"[C]ontext matters, and thus statutory provisions are to be read as a whole." *Robinson v Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). We find that the Legislature's decision to list structures both included within and excluded from the definition of "highway" signals that yet-unidentified structures could fall within the definition of "highway." Alternatively stated, the Legislature intended as illustrative rather than exhaustive the list of structures it "included" within the definition of "highway." By setting forth examples of structures both falling under and outside the definition of "highway," the Legislature contemplated that neither list should be considered complete. Our conclusion comports with the Supreme Court's characterization of the definition of "highway" in MCL 691.1401(e) as "broad." *Nawrocki*, 463 Mich at 182 n 37.

We further consider context in ascertaining whether a curb comes within the meaning of a "highway." *Random House Webster's Unabridged Dictionary* (2d ed, 1998), p 490, defines a curb as "a rim, esp. of joined stones or concrete, along a street or roadway, forming an edge for a sidewalk." Here, the curb travelled along the road and formed an edge for the road itself. Indisputably, passengers entering and exiting parked vehicles often step on curbs. Curbs routinely serve as the frames for travel on public roads and in this sense are integral components of a road. The statutory context also supports that a curb falls within the definition of "highway" expressed in § 1401(e). Each of the five structures expressly identified within the statutory definition of a highway represents a governmentally

constructed object that facilitates public travel on a system of public roads. Vehicles and pedestrians travel on bridges, trailways, crosswalks, and sidewalks; culverts maintain the structural integrity of portions of the road on which cars and people travel. Abrogating immunity for governmental agencies having jurisdiction over these structures fosters the statutory purpose of making highways "reasonably safe and fit for travel." MCL 691.1402(1). By contrast, the items specifically excluded from the purview of MCL 691.1401(e), "alleys, trees, and utility poles," do not contribute to or assist the public's ability to travel. Because the inclusion of curbs within the statutory definition of "highway" comports with legislative intent, we hold that governmental immunity does not bar a claim against a municipality arising from a defective curb.

For the purpose of our construction of Michigan's governmental tort liability act, we recognize the limited precedential value inherent in decisions from other jurisdictions. See *People v Bartlett*, 231 Mich App 139, 146; 585 NW2d 341 (1998) ("Notably, the interpretations that other jurisdictions give to similar or identical language is of limited value in determining what the Michigan Legislature intended . . . ."). Nonetheless, we find worth mentioning that the analyses in several decisions of other state courts express similar views of a curb's function in a highway system. "A curb separated from the sidewalk by a grass strip is a feature of the road, not the sidewalk." *Levin v Devoe*, 221 NJ Super 61,65; 533 A2d 977 (1987). "[T]he term 'street' certainly includes a raised curb on public property at the edge of a roadway . . . ." *Humphries v Trustees of Methodist Episcopal Church of Cresco, Iowa*, 566 NW2d 869, 873 (Iowa, 1997). "A curb and gutter falls under the definition of '[h]ighway defects' or defects on 'other public grounds.' " *VanCleve v City of Marinette*, 2003 WI

2, ¶ 22; 258 Wis 2d 80, 92; 655 NW2d 113 (2003), quoting Wis Stat 81.17. In *Skelly v Village of Port Chester*, 6 AD2d 717; 174 NYS2d 562, 563 (1958), New York's Supreme Court, Appellate Division, construed a municipal law requiring pre-suit notice of any injury sustained "in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out of repair, unsafe, dangerous or obstructed." The court opined that "it would require a strained and unrealistic construction or interpretation" of the municipal law "to hold that the curb, which was the dividing line between the part of the street or highway intended for vehicular traffic and the sidewalk, the part intended for the use of pedestrians, was not part of the highway, or part of the street, or part of the sidewalk." *Id*. at 563-564.

We conclude that the curb framing Cross Street constitutes an integral part of the road, and that Benton Harbor bore responsibility for maintaining Cross Street's curb in reasonable repair. Consequently, the circuit court properly denied Benton Harbor's motion for summary disposition.

Affirmed. Plaintiff being the prevailing party may assess costs. MCR 7.219(A).

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

JOHNSON v QFD, INC

Docket No. 294732. Submitted January 11, 2011, at Detroit. Decided April 21, 2011, at 9:10 a.m.

Robert and Amanda Johnson brought an action in the Genesee Circuit Court against QFD, Inc., and others, alleging in part that QFD had refused to repair defects in the mobile home they purchased from it and that QFD had violated the Mobile Home Commission Act (MHCA), MCL 125.2301 *et seq*. Plaintiffs raised claims of breach of warranty, false advertising, trespass to land, trespass to chattels, innocent misrepresentation, fraudulent misrepresentation, and constructive eviction, and they sought rescission and damages. QFD moved for summary disposition, arguing that the claims sounded in breach of contract and were therefore time-barred by the one-year limitations period contained in the parties' contract. The court, Judith A. Fullerton, J., agreed that this was a contract claim and that it was untimely under the terms of the contract. Plaintiffs appealed.

The Court of Appeals *held*:

1. The MHCA authorizes the promulgation of administrative rules concerning the business, sales, and service practices of mobile home dealers. The rules promulgated under the MHCA specifically require a mobile home dealer to obtain a license for each location from which the dealer proposes to operate and require a mobile home dealer to file separate license applications for each sales location. Any violation of the MHCA or the regulations promulgated thereunder is sufficient to give rise to a claim under the act. There was no dispute that QFD violated the licensing requirements of the MHCA. Plaintiffs properly pleaded a claim for rescission on the basis of QFD's violations.

2. The Uniform Commercial Code (UCC) governs some aspects of mobile home sales, but the MHCA also applies. Because the MHCA is more specifically applicable on the facts of this case, its three-year period of limitations controls over the more general provision of the UCC that allows parties to shorten the period of limitations. Therefore, plaintiffs had three years in which to bring their claim under the MHCA.

Affirmed in part, reversed in part, and remanded.

1. STATUTES — MOBILE HOME COMMISSION ACT — VIOLATIONS.

The Mobile Home Commission Act (MHCA) authorizes the promulgation of administrative rules concerning the business, sales, and service practices of mobile home dealers; the rules promulgated under the MHCA specifically require a mobile home dealer to obtain a license for each location from which the dealer proposes to operate and require a mobile home dealer to file separate license applications for each sales location; any violation of the MHCA or the regulations promulgated thereunder is sufficient to give rise to a claim under the act (MCL 125.2305[1][b], 125.2321[1]).

2. LIMITATION OF ACTIONS — MOBILE HOME COMMISSION ACT.

The Uniform Commercial Code (UCC) governs some aspects of mobile home sales, but the Mobile Home Commission Act (MHCA) also applies; when the MHCA is more specifically applicable to the facts of a case, its three-year period of limitations controls over the more general provision of the UCC that allows parties to shorten the period of limitations (MCL 125.2331).

Shelton Legal Services, PLLC (by *Steven E. Shelton*), for Robert and Amanda Johnson.

Swistak & Levine, P.C. (by *I. Matthew Miller*), for QFD, Inc.

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

JANSEN, P.J. Plaintiffs appeal by right the trial court's grant of summary disposition in favor of defendant QFD, Inc.[1] We reverse in part and remand for further proceedings consistent with this opinion.

I

In this case of first impression, we are required to interpret and apply certain provisions of Michigan's

[1] All claims against defendant Homefirst, L.L.C., have been dismissed with prejudice. Homefirst is not involved in the present appeal. Similarly, defendants Winkelman, Lipschutz, Lewis, Karbal, Smith, and Meadow Creek Limited Partnership have all been dismissed by stipulation of the parties and are not involved in this appeal.

Mobile Home Commission Act (MHCA), MCL 125.2301 *et seq*. Specifically, we are asked to determine whether plaintiffs were entitled to sue QFD under MCL 125.2331 for rescission of their agreement to purchase a mobile home. We are also asked to determine whether, assuming plaintiffs were entitled to sue under MCL 125.2331, the applicable statutory period of limitations was effectively shortened by a term in the parties' contract.

In November 2006, plaintiffs entered into a contract to purchase a mobile home from QFD at a mobile home park in Burton, Michigan. Thereafter, plaintiffs executed certain loan documents with QFD. Plaintiffs assert that their agreement to purchase the mobile home was conditioned on QFD's promise to complete certain necessary repairs to the home. QFD apparently failed to complete these repairs, and plaintiffs hired an outside contractor to finish the work. According to plaintiffs, the contractor discovered that the hot-water heater in their mobile home was defective and "not safe for mobile home use." It is plaintiffs' contention that this defective hot-water heater was hidden behind a wall where it could not easily be inspected. Plaintiffs filed a complaint with the Bureau of Construction Codes, reporting the unsafe hot-water heater and detailing certain other alleged problems and irregularities with the sale, title, and condition of the mobile home. In September 2007, plaintiffs stopped making their monthly payments on the mobile home. Plaintiffs subsequently moved out of the home, allegedly because of the defective hot-water heater. At some point, QFD discovered that plaintiffs had moved out of the mobile home, and its agent entered and took possession of the home.

In September 2008, plaintiffs filed the instant action in the Genesee Circuit Court. After amending their

complaint three times, plaintiffs ultimately set forth several claims against QFD, including claims of breach of warranty, false advertising, trespass to land, trespass to chattels, innocent misrepresentation, fraudulent misrepresentation, and constructive eviction. Plaintiffs also set forth claims (1) alleging that QFD had sold them the mobile home in violation of the MHCA and seeking damages, (2) seeking rescission of their mobile home purchase agreement and restoration of the status quo, (3) seeking revocation of acceptance under Article 2 of the Uniform Commercial Code (UCC), MCL 440.2102 *et seq*., and (4) alleging certain violations of Article 9 of the UCC, MCL 440.9101 *et seq*.

In September 2009, QFD moved for summary disposition pursuant to MCR 2.116(C)(7) and (10). Among other things, QFD argued that many of plaintiffs' claims were based on the purchase agreement and actually sounded in breach of contract and were therefore time-barred by a shortened, one-year limitations period contained in the parties' contract. It is undisputed that ¶ 14 of the parties' purchase agreement provided:

> Purchaser understands and agrees that — if either of us should breach this contract — the other of us shall have only one year, after the occurrence of that breach, in which to commence an action for a breach of contract.

QFD asserted that its sale of the mobile home to plaintiffs was governed by the UCC, under which buyers and sellers may contractually agree to "reduce the period of limitation to not less than 1 year." MCL 440.2725(1). QFD asserted that because plaintiffs had waited more than one year after their purchase of the mobile home to file suit, their claims (including those alleging violations of the MHCA and seeking rescission) were barred by the shortened, one-year limitations

period in the contract. QFD also contended that plaintiffs' claims seeking rescission and revocation of acceptance were barred by ¶ 11 of the parties' contract, which provided in pertinent part:

> PURCHASER ALSO AGREES THAT ONCE PURCHASER HAS ACCEPTED THE UNIT, EVEN THOUGH A WARRANTY DOES NOT ACCOMPLISH ITS PURPOSE, THAT PURCHASER CANNOT RETURN THE UNIT TO RETAILER AND SEEK A REFUND FOR ANY REASON.

QFD lastly argued that even if plaintiffs' claims were not barred by these two provisions in the purchase agreement, there remained no genuine issues of material fact and it was entitled to judgment as a matter of law.

In response to QFD's motion for summary disposition, plaintiffs argued that they were entitled to sue for rescission of the purchase agreement because QFD had violated the MHCA in several respects. Plaintiffs pointed out that the MHCA contains its own internal statute of limitations, and argued that their claims were governed by this statutory limitations period rather than by the shortened, one-year period contained in the parties' contract. Specifically, plaintiffs argued that because their claims were primarily based on the MHCA rather than on the parties' contract, they were not breach-of-contract claims as QFD asserted and were therefore unaffected by the shortened, one-year period set forth in the purchase agreement.

The trial court entertained oral argument concerning QFD's motion for summary disposition. The trial court agreed with QFD's assertion that plaintiffs' claim for rescission was actually a "contract" claim and that it was therefore time-barred by the shortened, one-year limitations period set forth in the purchase agreement.

The court also found that plaintiffs' remaining claims were either time-barred or insufficiently supported by admissible evidence. On October 5, 2009, the trial court entered an order granting QFD's motion for summary disposition "for the reasons stated on the record."

II

We review de novo a trial court's decision to grant a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Statutory interpretation is a question of law that we review de novo on appeal. *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 102; 754 NW2d 259 (2008). Contract interpretation similarly presents a question of law that we review de novo. *Daimler-Chrysler Corp v G-Tech Prof Staffing, Inc*, 260 Mich App 183, 184-185; 678 NW2d 647 (2003).

III

Plaintiffs argue that because QFD was operating in violation of certain provisions of the MHCA or the administrative rules promulgated thereunder, it was unauthorized to enter into any contract for the sale of a mobile home in this state. As a consequence, plaintiffs argue, the parties' purchase agreement was void and unenforceable. We disagree.

The MHCA prohibits a dealer from engaging in the retail sale of mobile homes without a license. MCL 125.2321(1). The MHCA further authorizes the promulgation of administrative rules concerning, among other things, "[t]he business, sales, and service practices of mobile home dealers." MCL 125.2305(1)(b). The rules promulgated under the MHCA specifically require a mobile home dealer to "obtain a license for each loca-

tion from which the [dealer] proposes to operate," Mich Admin Code, R 125.1214g(1), and require a mobile home dealer to file "[s]eparate [license] applications . . . for each sales location," Mich Admin Code, R 125.1214g(2). It is undisputed that QFD was in violation of these rules because it did not have a license to sell mobile homes at the Burton location.

It is true, as a general matter, that "contracts founded on acts prohibited by a statute, or contracts in violation of public policy, are void." *Maids Int'l, Inc v Saunders, Inc*, 224 Mich App 508, 511; 569 NW2d 857 (1997); see also *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 239; 615 NW2d 241 (2000). But it does not necessarily follow that every statutory or regulatory violation by one of the contracting parties renders the parties' contract void and unenforceable. In *Maids Int'l*, 224 Mich App at 511-512, this Court considered whether the plaintiff's violation of Michigan's Franchise Investment Law (FIL), MCL 445.1501 *et seq*., rendered void and unenforceable certain franchise agreements entered into between the plaintiff and the defendants. In that case, the plaintiff, a Nebraska-based franchisor, sold franchises to the defendants. *Maids Int'l*, 224 Mich App at 509. However, the plaintiff allegedly failed to provide necessary disclosure documents to the defendants as required by the FIL. *Id*. at 510. The trial court determined that the franchise agreements were void because the plaintiff had failed to comply with the FIL, and accordingly granted summary disposition in favor of the defendants. *Id*. at 509.

On appeal, this Court reversed, rejecting the defendants' argument that the franchise agreements were void. *Id*. at 511-512. This Court noted that the Legislature had "directly spoken" on the matter in question, and observed that the FIL "sets forth the various

requirements a franchisor must meet in order to sell a franchise in this state." *Id*. This Court went on to observe: "The Legislature also set forth the appropriate penalties for violation of the various requirements. The requirement plaintiff violated in this case, the provision of a disclosure statement, provides as remedies the franchisor's liability for damages or rescission of the franchise agreement." *Id*. at 512. Because the Legislature had provided an express remedy for the specific violation committed by the plaintiff—i.e., liability for damages or rescission, MCL 445.1531(1)—this Court determined that the defendants were left to the statutory remedy and that the plaintiff's violation did not render the franchise agreements void. *Maids Int'l*, 224 Mich App at 512.

Turning to the case at bar, the Legislature has similarly provided an express private remedy that may be pursued when a mobile home dealer has violated the MHCA or the administrative regulations promulgated thereunder. In particular, the Legislature has declared that "[a] person who offers, sells, or purchases a mobile home or equipment or a mobile home site in violation of this act or the [regulations promulgated thereunder] may have an action brought against him or her to rescind the transaction and recover damages." MCL 125.2331.[2] Because the Legislature has "directly spoken" and has provided an express private remedy for parties such as plaintiffs in this case, we conclude that plaintiffs were left to this statutory remedy and that QFD's violation of the administrative rules promul-

[2] The Legislature has also provided certain civil, criminal, and administrative penalties for a mobile home dealer's violation of the MHCA or the regulations promulgated thereunder. See, e.g., MCL 125.2341; MCL 125.2342; MCL 125.2343; MCL 125.2343a. The MHCA specifically provides that "[t]he remedies provided for in this act are not mutually exclusive[.]" MCL 125.2344.

gated under the MHCA did not render the parties' purchase agreement void and unenforceable. See *Maids Int'l*, 224 Mich App at 511-512.

IV

Plaintiffs also argue that they were entitled to sue QFD for rescission and damages under MCL 125.2331, and that their claim was not time-barred by the shortened one-year limitations period contained in the purchase agreement.

A

As an initial matter, we reject QFD's assertion that plaintiffs never actually pleaded a claim seeking rescission of the purchase agreement and damages under MCL 125.2331. Count I of plaintiffs' third amended complaint alleged that QFD had sold the mobile home at issue in violation of the MHCA and requested money damages. Among other things, plaintiffs alleged that QFD had violated the MHCA or administrative rules promulgated thereunder by selling the mobile home without a license for the Burton location. Count VIII of plaintiffs' third amended complaint sought rescission of the agreement by which plaintiffs had purchased the mobile home from QFD. As explained previously, it is undisputed that QFD was in violation of certain rules promulgated under the MHCA because it did not have a license to sell mobile homes at the Burton location. See Rule 125.1214g.

It is true that, although plaintiffs' allegations concerning QFD's violation and request for money damages were contained in count I of the third amended complaint, plaintiffs' request for rescission of the purchase agreement was contained in count VIII. It is also

true that plaintiffs' third amended complaint did not specifically mention MCL 125.2331. However, Michigan is a notice-pleading state. See *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 700 n 17; 684 NW2d 711 (2004). All that is required is that the complaint set forth "allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend[.]" MCR 2.111(B)(1). Moreover, it is well settled that we will look beyond mere procedural labels and read the complaint as a whole when ascertaining the exact nature of a plaintiff's claims. *Tipton v William Beaumont Hosp*, 266 Mich App 27, 33; 697 NW2d 552 (2005); see also *MacDonald v Barbarotto*, 161 Mich App 542, 547; 411 NW2d 747 (1987). When read as a whole, the allegations in counts I and VIII of plaintiffs' third amended complaint were sufficient to reasonably inform QFD that it would be required to defend against a claim for rescission and money damages brought pursuant to MCL 125.2331.

B

We must next address whether QFD's failure to maintain a license for the Burton location was a sufficient violation of the rules promulgated under the MHCA to support plaintiffs' claim for rescission and damages under MCL 125.2331. QFD argues that it committed a mere technical violation of the rules, which was too minor to support a claim under MCL 125.2331. QFD also contends that plaintiffs were not entitled to sue under MCL 125.2331 because any damages they sustained were not directly attributable to QFD's failure to maintain a license for the Burton location. QFD suggests that MCL 125.2331 was never intended to allow rescission of a purchase agreement in cases such

as this and asserts that even if plaintiffs properly pleaded a claim under MCL 125.2331, it is beyond factual dispute that plaintiffs are not entitled to any relief. We cannot agree with QFD.

Neither this Court nor our Supreme Court has interpreted or applied MCL 125.2331 in any reported decision. Our primary goal when interpreting a statute is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). " '[T]he Legislature's intent must be gathered from the language used, and the language must be given its ordinary meaning.' " *Id*. (citation omitted). The best evidence of the Legislature's intent is the language used in the statute itself. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (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), and clear statutory language must be enforced as written, *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007).

As explained earlier, MCL 125.2331 provides that "[a] person who offers, sells, or purchases a mobile home or equipment or a mobile home site in violation of this act or the [regulations promulgated thereunder] may have an action brought against him or her to rescind the transaction and recover damages." This language does not limit the availability of a private action for rescission and damages to instances in which a mobile home dealer has committed a *significant* or *substantial* violation of the MHCA or the regulations promulgated thereunder. Nor does it limit the availability of such an action to instances in which a dealer has acted in bad faith. Instead, the language of MCL 125.2331 simply provides that a party may sue "to

rescind the transaction and recover damages" whenever a mobile home dealer has offered or sold a mobile home, mobile home site, or equipment "in violation" of the MHCA or the regulations promulgated thereunder. In other words, *any* violation of the MHCA or the regulations promulgated thereunder is sufficient to give rise to a claim under MCL 125.2331. Had the Legislature wished to limit the type of violations sufficient to give rise to a claim under MCL 125.2331 to *significant* or *substantial* violations only, it surely could have done so. See *Potter v McLeary*, 484 Mich 397, 422 n 30; 774 NW2d 1 (2009) (observing, albeit in an unrelated context, that "[i]f the Legislature wanted such a requirement it could have easily included it"). However, it did not. "We cannot read into a statute language that was not placed there by the Legislature." *Risk v Lincoln Charter Twp Bd of Trustees*, 279 Mich App 389, 399; 760 NW2d 510 (2008).[3]

We also reject QFD's assertions that, in order to proceed under MCL 125.2331, plaintiffs must be able to show that they relied to their detriment on QFD's

[3] Although any violation of the MHCA or the regulations promulgated thereunder is strictly sufficient to give rise to a legally cognizable claim of rescission under MCL 125.2331, it *does not* follow that *any* violation of the MHCA or the regulations promulgated thereunder will be sufficient to entitle a plaintiff to relief. A claim to "rescind the transaction" under MCL 125.2331 is equitable in nature, and therefore discretionary with the trial court. *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 31; 331 NW2d 203 (1982) (stating that "[r]escission is an equitable remedy which is granted only in the sound discretion of the court"). Therefore, once a plaintiff has properly pleaded a claim of rescission under MCL 125.2331, the trial court must balance the equities to determine whether the plaintiff is entitled to the relief that he or she seeks. 27A Am Jur 2d, Equity, § 78, p 616. It strikes us that, in balancing the equities of a particular case, the trial court may assess the severity or significance of a mobile home dealer's violation of the MHCA or the regulations promulgated thereunder, and may consider whether that violation is sufficient to warrant rescission of the transaction.

purported compliance with the MHCA or establish a direct link between their alleged damages and the fact that QFD lacked a license for the Burton location. The statutory text contains no support for such propositions. The scope of a statutory remedy or right of action is defined by the language of the statute itself. See *Lash v Traverse City*, 479 Mich 180, 193 n 25; 735 NW2d 628 (2007). The text of the MHCA says nothing about a plaintiff's reliance on a dealer's purported compliance with the statute. Nor does the statute set forth any other prerequisites that must be satisfied before an injured plaintiff may bring an action for rescission and damages under MCL 125.2331. Instead, as noted earlier, MCL 125.2331 states that a plaintiff may bring an action to rescind the transaction and recover damages when a mobile home dealer has acted "in violation" of the act or the rules promulgated thereunder. We conclude that the Legislature intended MCL 125.2331 to serve as a general, private remedy provision, which may be invoked by an injured plaintiff whenever a mobile home dealer has acted "in violation" of the MHCA or the administrative rules.

Nor can we conclude that plaintiffs' entitlement to proceed under MCL 125.2331 was in any way affected by the presence of alternate remedies in the MHCA. We acknowledge that the private cause of action for rescission and damages created by MCL 125.2331 is merely one of the several remedies that the Legislature has provided for violations of the MHCA or the rules promulgated thereunder. There are several other penalties and remedies set forth in the MHCA, including MCL 125.2341 (allowing the department or local prosecuting attorney to bring an action to enjoin a person from violating the MHCA), MCL 125.2342 (providing that a violation of the MHCA is a misdemeanor), and MCL 125.2343a (allowing the department to hold pro-

ceedings to summarily suspend a license under the MHCA). However, the Legislature has specifically declared that the remedies provided in the MHCA "are not mutually exclusive," MCL 125.2344, and that the MHCA is "remedial and curative" in nature, MCL 125.2349(g). It is well established that a remedial statute must be "liberally construe[d] . . . in favor of the persons intended to be benefited." *Empson-Laviolette v Crago*, 280 Mich App 620, 629; 760 NW2d 793 (2008). It cannot be seriously disputed that the persons "intended to be benefited" by the MHCA are the purchasers of mobile homes and lots in mobile home parks.

In light of the fact that QFD violated the rules promulgated under the MHCA, we conclude that plaintiffs were entitled to bring an action for rescission of the purchase agreement and for damages under MCL 125.2331.[4]

C

Plaintiffs further argue that the trial court erred by ruling that their claim under MCL 125.2331 was time-barred by the one-year limitations period contained in the parties' purchase agreement. We agree.

QFD contends that this case is governed by the UCC and that, pursuant to MCL 440.2725(1), the parties were free to contractually "reduce the period of limita-

[4] In addition to providing a claim to "rescind the transaction," MCL 125.2331 also provides that an aggrieved party may "recover damages." Unlike an action for rescission, a suit for damages is an action at law. See *King v Gen Motors Corp*, 136 Mich App 301, 308; 356 NW2d 626 (1984). Actions at law are founded upon a party's absolute right rather than upon an appeal to the discretion of the court. *Hathaway v Hudson*, 256 Mich 694, 702; 239 NW 859 (1932). We note that a plaintiff is not required to elect between the remedies of rescission and damages. *Jefferson Park Land Co v Wayne Circuit Judge*, 234 Mich 341, 345-346; 207 NW 903 (1926).

tion to not less than 1 year." The problem with QFD's argument in this regard is that ¶ 14 of the parties' contract shortens the limitations period to one year for "action[s] for a breach of contract" only. Contrary to QFD's assertions, plaintiffs' claim for rescission of the purchase agreement and damages under MCL 125.2331 is a statutory claim—not an "action for a breach of contract" within the meaning of ¶ 14.

Furthermore, even if plaintiffs' claim for rescission and damages under MCL 125.2331 could be characterized as an "action for a breach of contract," we would still conclude that it is governed by the MHCA's internal, three-year period of limitations. We acknowledge that the UCC governs at least some aspects of mobile home sales. See *Ladd v Ford Consumer Fin Co, Inc*, 217 Mich App 119, 126 n 3; 550 NW2d 826 (1996), rev'd on other grounds 458 Mich 876 (1998). But so, too, does the MHCA, which is more specifically applicable on the facts of this case. "When two statutes or provisions conflict, and one is specific to the subject matter while the other is only generally applicable, the specific statute prevails." *Frank v William A Kibbe & Assoc, Inc*, 208 Mich App 346, 350; 527 NW2d 82 (1995). Because the MHCA is more specific, it prevails over the more general provisions of the UCC with regard to the issue of mobile home sales. See *Ladd*, 217 Mich App at 128.

The MHCA contains its own internal statute of limitations, which provides in relevant part that "[a] person may not bring an action under this act more than 3 years after the contract of sale . . . ." MCL 125.2333. We conclude that the MHCA's three-year period of limitations controls plaintiffs' statutory claim for rescission and damages under MCL 125.2331, and prevails over the more general UCC provisions governing the limitation of actions. See *Ladd*, 217 Mich App at

128. Because plaintiffs purchased the mobile home at issue in this case in November 2006 and filed the instant action in the Genesee Circuit Court in September 2008, their claim for rescission and damages under MCL 125.2331 was timely filed. MCL 125.2333.

V

Finally, with respect to QFD's argument that plaintiffs' rescission claim was barred by ¶ 11 of the purchase agreement, we simply note that any contractual provision purporting to bind a person "to waive compliance with [the MHCA] or a rule promulgated or order issued under [the MHCA] is void." MCL 125.2332. As we have already explained, one of the possible remedies for aggrieved purchasers of mobile homes is rescission of the purchase agreement under MCL 125.2331.[5] Paragraph 11 of the parties' purchase agreement, which provided in relevant part that "once purchaser has accepted the unit, . . . purchaser cannot return the unit to retailer and seek a refund for any reason," is void and unenforceable under MCL 125.2332 because it would essentially permit QFD to waive its own compliance with any order of rescission ultimately issued pursuant to MCL 125.2331.

VI

We do not disturb the trial court's dismissal of plaintiffs' breach of warranty, false advertising, trespass to land, trespass to chattels, innocent misrepresentation, fraudulent misrepresentation, constructive evic-

[5] "[T]he remedy of rescission returns the parties to the status quo, i.e., it places the parties in the position they occupied before the transaction in question." *McMullen v Joldersma*, 174 Mich App 207, 218; 435 NW2d 428 (1988); see also *Wall v Zynda*, 283 Mich 260, 264; 278 NW 66 (1938).

tion, and UCC claims, none of which have been addressed by plaintiffs on appeal.

However, we reverse the trial court's grant of summary disposition in favor of QFD with respect to counts I and VIII of plaintiffs' third amended complaint, which together amounted to a claim for rescission of the purchase agreement and damages under MCL 125.2331. We remand for further proceedings with respect to this statutory claim for rescission and damages. On remand, the trial court shall consider plaintiffs' request to rescind the mobile home purchase agreement pursuant to MCL 125.2331 and shall balance the equities to determine whether plaintiffs are entitled to the rescission they seek. The trial court shall also consider what damages, if any, plaintiffs are entitled to recover from QFD under MCL 125.2331.

In light of our conclusions, we need not address the remaining arguments raised by the parties on appeal.

Reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, plaintiffs may tax costs pursuant to MCR 7.219.

OWENS and SHAPIRO, JJ., concurred with JANSEN, P.J.

HUNTINGTON NATIONAL BANK v RISTICH

Docket No. 297151. Submitted April 12, 2011, at Detroit. Decided April 26, 2011, at 9:00 a.m.

Huntington National Bank brought an action in the Macomb Circuit Court against Jovica Ristich, alleging breach of contract and fraud in relation to two loans that had been made to defendant totaling approximately $80,000. Defendant failed to file a responsive pleading and instead moved for an evidentiary hearing and a stay of the proceedings, arguing that answering the complaint would violate his constitutional right against self-incrimination. Plaintiff requested and the clerk entered a default, and plaintiff subsequently moved for entry of a default judgment. The court, David F. Viviano, J., denied defendant's motion for an evidentiary hearing and a stay of the proceedings and instructed him to answer each allegation in the complaint specifically. After plaintiff again moved for a default judgment, defendant moved to set aside the default, arguing that manifest injustice would result because his motion for an evidentiary hearing and a stay of the proceedings was sufficient to preclude entry of a default under MCR 2.108(A)(1) and 2.603(A)(1). The court denied defendant's motion to set aside the default and ultimately entered a default judgment in plaintiff's favor. Defendant appealed.

The Court of Appeals *held*:

1. Under MCR 2.108(A)(1), a defendant is generally required to file an answer to a complaint or take other action permitted by law within 21 days of being served. MCR 2.108(E) allows the court to extend the time upon request, but moving for a stay of the proceedings is not equivalent to moving for an extension of time. Instead, the defendant must comply with the requirements of MCR 2.108(E) and request an extension that states with particularity the grounds and authority on which it is based and the relief sought in order to avoid being subject to default.

2. A motion for an evidentiary hearing and a stay of proceedings cannot be characterized as taking "other action permitted by law" under MCR 2.108(A)(1) or a defense to the action under MCR 2.603(A)(1) that would preclude entry of a default. A defendant desiring to invoke the privilege against self-incrimination at the

pleading stage of a civil action is not excused from filing a timely answer to the complaint unless otherwise provided by law. A defendant must answer the allegations in the complaint that he or she can and make a specific claim of privilege to the remaining allegations. A defendant's proper invocation of the privilege in an answer will be treated as a specific denial. Defendant was properly defaulted in this case.

3. A properly entered default can be set aside under some circumstances, but both good cause and an affidavit showing a meritorious defense are required under MCR 2.603(D)(1). Good cause can be shown by a substantial defect or irregularity in the proceedings on which the default was based or a reasonable excuse for failure to comply with the requirements that created the default. Defendant did not specifically assert a substantial defect or irregularity or a reasonable excuse. While defendant argued that manifest injustice would occur if the default were allowed to stand, he could have invoked the privilege against self-incrimination in an answer. Moreover, defendant failed to meet the requirements for establishing a meritorious defense when his affidavit consisted simply of unsupported facts and contested only the amount of liability. The trial court did not abuse its discretion by refusing to set aside the default and entering a default judgment in plaintiff's favor.

Affirmed.

1. PLEADING — ANSWERS — TIME TO RESPOND — MOTIONS.

A defendant must serve and file an answer or take other action permitted by law within 21 days after being served with the summons and complaint; the court may extend the time if a request is made before the period expires if the motion states with particularity the grounds and authority on which it is based and the relief sought; a motion to stay the proceedings will not be treated as a motion to extend the time for filing an answer (MCR 2.108[A][1] and [E], 2.119[A][1]).

2. CONSTITUTIONAL LAW — SELF-INCRIMINATION — FIFTH AMENDMENT — CIVIL ACTIONS — INVOCATION OF RIGHT.

A defendant desiring to invoke the privilege against self-incrimination at the pleading stage of a civil action is not excused from filing a timely answer to the complaint unless otherwise provided by law; a defendant must answer the allegations in the complaint that he or she can and make a specific claim of privilege to the remaining allegations; a defendant's proper invocation of

the privilege in an answer will be treated as a specific denial (US Const, Am V; Const 1963, art 1, § 17).

3. JUDGMENTS — DEFAULT — SETTING ASIDE — MERITORIOUS DEFENSE.

An affidavit of meritorious defense provided in support of a motion to set aside a default judgment must include particular facts establishing the meritorious defense; simply disputing the amount of liability does not establish a meritorious defense (MCR 2.603[D][1]).

Simon, Galasso & Frantz, PLC (by *Steven A. Morris*, *Craig T. Mierzwa*, and *Frank R. Simon*), for plaintiff.

Joseph & Associates P.C. (by *Paul T. Joseph* and *Adil Daudi*), for defendant.

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

PER CURIAM. In this action for breach of contract and fraud, defendant, Jovica Ristich, appeals as of right the trial court's January 25, 2010, order denying defendant's motion to set aside a default and entering a default judgment in favor of plaintiff Huntington National Bank. We affirm.

I

On October 1, 2009, plaintiff filed a complaint against defendant alleging two counts of breach of contract and one count of fraud. Plaintiff alleged that defendant breached (1) a June 2009 personal loan agreement in which defendant obtained approximately $55,000 in financing for a 2008 BMW 6 Series automobile and (2) a June 2009 personal credit-line agreement in which defendant obtained $25,000. According to plaintiff, defendant did not grant it a security interest in the BMW pursuant to the loan agreement, and he

misrepresented his yearly income on his applications for the loan and credit line.

On October 5, 2009, defendant was personally served with a copy of the summons and complaint. Nine days later, defendant, proceeding *in propria persona*, moved the trial court for an evidentiary hearing and a stay of the proceedings. Defendant asserted that he believed the FBI, the United States Secret Service, and a special agent were investigating him for "the same allegations contained in the Complaint in this case." Defendant also asserted that

> if he [were] required to answer the Complaint and compelled to proceed in [the] cause of action, his responses could be utilized against him if charged by the U.S. Attorney's Office and this obligation would violate his fifth amendment rights guaranteed under the United States Constitution and art 1, § 17 of the Michigan Constitution of 1962.

Defendant, therefore, requested that the trial court conduct an evidentiary hearing and stay the proceedings to "protect his constitutional rights." He did not file an answer to the complaint.

Plaintiff subsequently requested, and the county clerk entered, a default against defendant "for failure to plead or otherwise defend as provided by law." Plaintiff then moved for findings of fact and a default judgment against defendant. Plaintiff also filed a response to defendant's motion for an evidentiary hearing and a stay of the proceedings, arguing that it was entitled to have defendant respond to the complaint and to a discovery record of his assertion of the privilege against self-incrimination in response to each question plaintiff asked. Plaintiff argued that defendant could not make a blanket assertion of the privilege against self-incrimination by refusing to file an answer and that

defendant had failed to "provide support in the record" to warrant an evidentiary hearing.

At a January 4, 2010, hearing, the trial court denied defendant's motion for an evidentiary hearing and a stay of the proceedings because a default had been entered against him. The court opined that the arguments defendant raised in his motion were insufficient, stating that defendant could not "just wave a magic wand because he's been indicted and say I'm immune from civil process." The court instructed defendant to answer the complaint and answer each allegation specifically and to raise the privilege against self-incrimination in response to each paragraph that he believed he could not answer so that the court could determine whether it was a sufficient response to the complaint. Finally, the court instructed defendant to move the court in writing if he wished to set aside the default.

Thereafter, plaintiff again moved for findings of fact and a default judgment against defendant. Defendant moved to set aside the default, arguing that manifest injustice would result if the court allowed the default to stand because his motion for an evidentiary hearing and a stay of the proceedings constituted "other action permitted by law" under MCR 2.108(A)(1) and a defense under MCR 2.603(A)(1). Defendant also submitted an affidavit of meritorious defense. In the affidavit, defendant stated: "I have a meritorious defense to Plaintiff's complaint in that I dispute the amount of the debt owed."

At a January 25, 2010, hearing, the trial court denied defendant's motion to set aside the default. The court stated that "there may be" good cause to set aside the default, but "it's not been fleshed out or put forth to me

by way of affidavit." The court held that defendant had not provided a meritorious defense, stating that

> the only affidavit that we do have from [defendant] only says that he has a meritorious defense and that he disputes the amount of debt owed. . . . [I]t's not sufficient in terms of an affidavit setting forth what the defense to the claim is, simply to make a general denial.

The court concluded that defendant had defrauded plaintiff and entered a default judgment in plaintiff's favor in the amount of $86,423.06, plus interest. Defendant moved for reconsideration, and the court denied the motion on March 18, 2010.

II

Defendant argues that the trial court erred when it denied his request to set aside the default and granted the default judgment. Specifically, defendant argues that his motion to stay the proceedings was equivalent to a request for an extension of time to file an answer. We disagree.

We review defendant's unpreserved claim for plain error affecting his substantial rights. See *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). As a general rule, "[a] defendant must serve and file an answer or take other action permitted by law or [the Michigan Court Rules] within 21 days after being served with the summons and a copy of the complaint." MCR 2.108(A)(1). MCR 2.603(A)(1) requires a court clerk to enter a default of a defendant when the defendant fails "to plead or otherwise defend as provided by [the Michigan Court Rules]." But, under MCR 2.108(E), "[a] court may . . . extend the time for serving and filing a pleading . . . if [a] request is made before the expiration of the period originally prescribed" and the court's authority to do so is not limited by another rule.

Under MCR 2.119(A)(1)(b) and (c), a motion must "state with particularity the grounds and authority on which it is based" and "state the relief or order sought."

Defendant moved for an evidentiary hearing and stay of the proceedings. However, the motion did not state that he was seeking an extension of time to file an answer, nor did it state the grounds or authority on which the trial court could extend the time for filing an answer, i.e., MCR 2.108(E). Therefore, we cannot conclude that defendant moved for an extension of time to file an answer, which would have shielded him from default in the event that he did not file an answer within 21 days after being served with the summons and complaint. See MCR 2.108(A)(1); MCR 2.603(A)(1).

According to defendant, moving for a stay of the proceedings is equivalent to moving for an extension of time under MCR 2.108(E) because both motions request the same relief: more time to file an answer. But defendant has not identified any legal rule supporting the assertion that the two motions are equivalent. Moreover, defendant's argument, which focuses on the factual circumstances of his case, ignores a significant distinction between a motion for a stay of the proceedings and a motion for an extension of time to file an answer. While a defendant might assume that a motion to stay the proceedings extends the time for filing an answer, nothing in the motion notifies the trial court of the defendant's desire to extend the time, as a motion under MCR 2.108(E) does. The trial court could assume that the defendant fully intends to answer within 21 days of service. For this reason, motions to stay the proceedings and to extend the time for filing an answer should not be treated synonymously. In order to request an extension of time for filing an answer, a defendant

must file a motion pursuant to MCR 2.108(E), particularly requesting the extension. See MCR 2.119(A)(1).

Accordingly, we hold that the trial court did not plainly err by denying defendant's motion to set aside the default and granting the default judgment in plaintiff's favor and properly rejected defendant's claim that a motion to stay the proceedings was the equivalent of a motion for an extension of time to file an answer.

III

Defendant further argues that the trial court should have granted his motion to set aside the default because he took "other action permitted by law" under MCR 2.108(A)(1) and "otherwise defend[ed]" himself under MCR 2.603(A)(1) by filing a motion for an evidentiary hearing and a stay of the proceedings, wherein he invoked the constitutional privilege against self-incrimination. Again, we disagree.

Defendant preserved this issue by raising it in his motion to set aside the default. See *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005). We review issues of law, including the interpretation and application of court rules and constitutional issues, de novo. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009); *Champion v Secretary of State*, 281 Mich App 307, 309; 761 NW2d 747 (2008). We review for an abuse of discretion a trial court's decision on a motion to set aside a default and whether to grant a default judgment. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). A trial court abuses its discretion when it reaches a decision that falls outside the range of principled outcomes. *Corporan v Henton*, 282 Mich App 599, 605-606; 766 NW2d 903 (2009).

The United States and Michigan Constitutions provide for a privilege against self-incrimination. US

Const, Am V; Const 1963, art 1, § 17. "The privilege against self-incrimination under the Michigan Constitution is no more extensive than the privilege afforded by the Fifth Amendment of the United States Constitution." *Phillips v Deihm*, 213 Mich App 389, 400; 541 NW2d 566 (1995). The privilege allows a person to decline to testify against himself or herself during a criminal trial in which the person is a defendant. *Allen v Mich Basic Prop Ins Co*, 249 Mich App 66, 74; 640 NW2d 903 (2001). It also allows a person " 'not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.' " *Id*., quoting *Phillips*, 213 Mich App at 400. A person may invoke the privilege despite the fact that criminal proceedings have not been instituted or even planned. *People v Guy*, 121 Mich App 592, 609-610; 329 NW2d 435 (1982).

Our Supreme Court has long recognized that "a defendant may not be required in his answer to state facts which would tend to criminate" him. *People ex rel Moll v Danziger*, 238 Mich 39, 44; 213 NW 448 (1927). Nonetheless, although the constitutional privilege against self-incrimination must be protected, the constitutional right of a plaintiff in a civil case to have his day in court must also be protected. *Id*. at 48. "The assertion of a constitutional right should not deprive a party of his day in court. If it did, a constitutional right is but a shadow and its assertion only serves to ensnare the one asserting it." *Id*. at 50. For this reason, our Supreme Court has held that a defendant in a civil action may assert the privilege against self-incrimination in the answer to the complaint when he or she believes that responding to particular paragraphs or allegations in the complaint calls for an incriminating response. *Id*. at 51; see also *Albert v*

Chambers, 335 Mich 111, 115-116; 55 NW2d 752 (1952) (citing *Danziger*). The Court, however, was careful to note that a defendant "is not the sole judge" of determining whether an allegation in a complaint calls for an incriminating response. *Danziger*, 238 Mich at 51. The Court stated:

> When a question is propounded (a question which the witness declines to answer upon the ground that it may tend to criminate him) it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge [of] what his answer would be. The court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows, and which he claims. It follows necessarily, then, from this statement of things, that, if the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact. [*Id*. (quotation marks and citation omitted).]

Although a defendant in a civil action may raise the privilege against self-incrimination in his or her answer to the complaint, we have not discovered any Michigan law excusing a defendant who invokes the privilege from filing an answer. To the contrary, our Supreme Court's opinion in *Danziger* suggests that the invocation of the privilege does not excuse the obligation to file an answer. See *id*. at 48 ("The constitutional rights of the defendant must be protected, but the constitutional

rights of the plaintiff to his day in court must likewise be protected."). The Court indicated that in its "*answer* defendant may assert its constitutional right to decline to answer such paragraphs . . . as call for an answer which . . . violates such rights." *Id*. at 51 (emphasis added). The *Danziger* Court's statement suggests that a defendant must answer the complaint paragraph for paragraph, asserting the privilege when he or she feels it is necessary.

The United States Court of Appeals for the Fourth Circuit directly addressed this issue in *North River Ins Co v Stefanou*, 831 F2d 484 (CA 4, 1987). The court noted that the privilege against self-incrimination applies at the pleading stage of civil actions. *Id*. at 486. It emphasized that "a proper invocation of the privilege [does not] mean that a defendant is excused from the requirement to file a responsive pleading." *Id*. Rather, a defendant "is obliged to answer those allegations that he can and to make a specific claim of the privilege as to the rest." *Id*. The court also stated that the "strategy" used by a defendant to invoke the privilege against self-incrimination cannot "effectively [negate] a fair balancing of his interests against the interests of those pursuing a claim against him, and the interests of society in the expeditious resolution of litigation." *Id*. As for the effect of a defendant's invocation of the privilege in an answer to the complaint, federal appellate courts have held that a defendant's proper invocation of the privilege in an answer is treated as a specific denial. See, e.g., *Rogers v Webster*, 776 F2d 607, 611 (CA 6, 1985); *Nat'l Acceptance Co of America v Bathalter*, 705 F2d 924, 929 (CA 7, 1983).

We agree with the federal courts that have addressed this issue and hold that a defendant desiring to invoke the privilege against self-incrimination at the pleading

stage of a civil action is not excused from filing a timely answer to the complaint unless otherwise provided by law. A defendant must answer the allegations in the complaint that he or she can and make a specific claim of privilege to the rest. A defendant's proper invocation of the privilege in an answer will be treated as a specific denial.

In this case, defendant did not file an answer to plaintiff's complaint within 21 days after being served with the summons and complaint. Rather, defendant moved for an evidentiary hearing and a stay of the proceedings, asserting that his responses to the complaint could be self-incriminating. Defendant's failure to invoke the privilege against self-incrimination in an answer to plaintiff's complaint was an improper invocation of the privilege. See *Danziger*, 238 Mich at 48-51; *North River Ins Co*, 831 F2d at 486.

Moreover, defendant's failure to answer the complaint violated MCR 2.108(A)(1). Defendant argues that his motion for an evidentiary hearing and a stay of the proceedings constituted "other action permitted by law" under MCR 2.108(A)(1). MCR 2.108(A)(1) requires a defendant to "serve and file an answer or take other action permitted by law or [the Michigan Court Rules] within 21 days after being served." But defendant has not provided us with any legal basis on which to conclude that filing a motion for an evidentiary hearing and a stay of the proceedings constitutes other action permitted by law under the court rule. Other than a motion to extend the time for filing an answer under MCR 2.108(E), this Court has recognized only certain actions as altering the time for filing an answer, such as motions for summary disposition under MCR 2.116, to strike, and for a more definite statement. MCR 2.108(C)(1) and (4); *Belle Isle Grill Corp v Detroit*, 256

Mich App 463, 470-471; 666 NW2d 271 (2003) (citation omitted). This Court has characterized such motions as "attacks on the pleadings." *Belle Isle Grill*, 256 Mich App at 470. A motion for an evidentiary hearing and a stay of the proceedings does not attack a pleading. Therefore, we are not persuaded that such a motion is sufficient to extend the time for answering the complaint.

Defendant further argues that the default was improperly entered because he "otherwise defend[ed]" himself under MCR 2.603(A)(1) by filing the motion for an evidentiary hearing and a stay of the proceedings. A court clerk must enter a default "[i]f a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend . . . ." MCR 2.603(A)(1). This Court has previously interpreted MCR 2.603(A)(1) as meaning that a party must not be defaulted if the party pleads or, as an alternative to filing a responsive pleading, otherwise defends the action. In *Marposs Corp v Autocam Corp*, 183 Mich App 166, 168; 454 NW2d 194 (1990), the defendant filed motions for summary disposition and a change of venue. The trial court denied both motions. *Id*. The defendant filed an application for leave to appeal the court's denial of its motion for a change of venue but not the denial of its motion for summary disposition. *Id*. The defendant did not file an answer and was defaulted. *Id*. This Court held that the defendant was required to file a responsive pleading within 21 days after the denial of its motion for summary disposition under MCR 2.108(A)(1), which it had not done. *Id*. at 168-169. Nonetheless, the trial court erred by concluding that the defendant was properly defaulted. *Id*. at 170. The defendant otherwise defended itself under MCR 2.603(A)(1) by its actions. *Id*.

We conclude, however, that defendant's motion for an evidentiary hearing and a stay of the proceedings cannot be characterized as otherwise defending an action under MCR 2.603(A)(1). Defendant has not provided us with any legal basis for such a conclusion. Furthermore, the essence of defendant's motion was not defensive; rather, the essence of the motion was to postpone the proceedings indefinitely, i.e., for as long as the possibility that he could be criminally indicted existed. Nothing in defendant's motion demonstrated that he was intending to defend or was defending the action. Finally, defendant's suggestion that he defended himself by raising self-incrimination concerns in his motion fails because, as articulated earlier, the proper method for invoking the privilege against self-incrimination is through a responsive pleading.

Defendant did not file an answer as required by MCR 2.108(A)(1), and his motion for an evidentiary hearing and stay of the proceedings did not constitute other action permitted by law or a defense to the action. Therefore, we must conclude that defendant was properly defaulted.

IV

Under some circumstances, a default may be set aside, even when it was initially properly entered. But we cannot conclude that the trial court in this case abused its discretion by declining to set aside the default and granting plaintiff a default judgment. As indicated, we review for an abuse of discretion a trial court's decision on a motion to set aside a default and whether to grant a default judgment. *Saffian*, 477 Mich at 12. " '[A]lthough the law favors the determination of claims on the merits, it has also been said that the policy of this state is generally against setting aside

defaults and default judgments that have been properly entered.' " *Shawl v Spence Bros, Inc*, 280 Mich App 213, 221; 760 NW2d 674 (2008), quoting *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999). When there has been a valid exercise of the trial court's discretion, "appellate review is sharply limited." *Alken-Ziegler*, 461 Mich at 227.

Under MCR 2.603(D)(1), "[a] motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown *and* an affidavit of facts showing a meritorious defense is filed." (Emphasis added.) Our Supreme Court has recognized that " 'good cause' and a 'meritorious defense' are separate requirements that may not be blurred and that a party must have both," but "trial courts should base the final result on the totality of the circumstances." *Shawl*, 280 Mich App at 237.

> Good cause can be shown by: (1) a substantial defect or irregularity in the proceedings upon which the default was based, (2) a reasonable excuse for failure to comply with the requirements which created the default, or (3) some other reason showing that manifest injustice would result from permitting the default to stand. [*Id*. at 221 (quotation marks and citations omitted).][1]

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[1] The *Shawl* Court held that in determining whether a party has shown good cause, the trial court should consider the relevant factors from the following nonexhaustive list of factors:

> (1) [W]hether the party completely failed to respond or simply missed the deadline to file;
>
> (2) if the party simply missed the deadline to file, how long after the deadline the filing occurred;
>
> (3) the duration between entry of the default judgment and the filing of the motion to set aside the judgment;
>
> (4) whether there was defective process or notice;

While courts of this state have indicated that establishing "manifest injustice" is a third way to show good cause, see, e.g., *Shawl* and the cases cited therein,[2] our Supreme Court has attempted to clarify the manifest-injustice factor of the good-cause test, stating:

> "The first two prongs of the Honigman & Hawkins[3] 'good cause' test are unremarkable and accurately reflect our decisions. It is the third factor, 'manifest injustice,' that has been problematic. The difficulty has arisen because, properly viewed, 'manifest injustice' is not a discrete occurrence such as a procedural defect or a tardy filing that can be assessed independently. Rather, manifest injustice is the result that would occur if a default were to be allowed to stand where a party has satisfied the 'meritorious defense' and 'good cause' requirements of the court rule. When a party puts forth a meritorious defense and then attempts to satisfy 'good cause' by showing (1) a procedural irregularity or defect, or (2) a reasonable excuse for failure to comply with the requirements that created the default, the strength of the defense obviously will affect the 'good cause' showing that is necessary. In other words, if a party states a meritorious defense that would be absolute if proven, a lesser showing of 'good cause' will be required than if the defense were weaker, in order to prevent a manifest injustice." [*Id*. at 235, quoting *Alken-Ziegler*, 461 Mich at 233-234.]

> (5) the circumstances behind the failure to file or file timely;
>
> (6) whether the failure was knowing or intentional;
>
> (7) the size of the judgment and the amount of costs due under MCR 2.603(D)(4);
>
> (8) whether the default judgment results in an ongoing liability (as with paternity or child support); and
>
> (9) if an insurer is involved, whether internal policies of the company were followed. [*Shawl*, 280 Mich App at 238-239.]

[2] *Id*. at 221 & n 10, 229-230.

[3] 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), comment 7, p 662 (discussing GCR 1963, 520.4).

MCR 2.603(D)(1) requires an affidavit of facts establishing a meritorious defense. The purpose of an affidavit of meritorious defense is to inform the trial court whether the defaulted defendant has a meritorious defense to the action. *Cramer v Metro Savings Ass'n* (*Amended Opinion*), 136 Mich App 387, 398; 357 NW2d 51 (1983). Such an affidavit requires the affiant to have personal knowledge of the facts, state admissible facts with particularity, and show that the affiant can testify competently to the facts set forth in the affidavit. *Miller v Rondeau*, 174 Mich App 483, 487; 436 NW2d 393 (1988).[4]

In regard to a showing of good cause, defendant did not in this case specifically assert that a substantial defect or irregularity in the proceedings existed or that he had a reasonable excuse for failing to file a timely answer to the complaint. Rather, in his motion to set aside the default, defendant argued that "manifest injustice would result if the default were allowed to stand because Defendant would not have been given a fair opportunity to litigate and/or respond to the Plaintiff's complaint." Defendant also stated that his motion for an evidentiary hearing and a stay of the proceedings constituted other action permitted by law under MCR 2.108(A)(1) and a defense to the action under MCR 2.603(A)(1). But, as explained, there was no legal basis

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[4] In determining whether a party has a meritorious defense, the trial court should consider, when relevant, whether the affidavit contains evidence that

> (1) the plaintiff cannot prove or defendant can disprove an element of the claim or a statutory requirement;
>
> (2) a ground for summary disposition exists under MCR 2.116(C)(2), (3), (5), (6), (7) or (8); or
>
> (3) the plaintiff's claim rests on evidence that is inadmissible. [*Shawl*, 280 Mich App at 238-239.]

on which defendant could have concluded that his motion could be characterized as an action permitted by law that extended the time for filing an answer or that it constituted a defense. Further, Michigan law permitted defendant to invoke the constitutional privilege against self-incrimination in an answer to the complaint. See *Danziger*, 238 Mich at 51. Given that defendant could have invoked the privilege in an answer, it is not unreasonable to say that no manifest injustice would result from permitting the default to stand. Accordingly, we cannot conclude that the trial court abused its discretion by holding that defendant failed to show good cause for not filing an answer.

Furthermore, even if defendant's reading of the law at the time this case commenced could be construed as a reasonable excuse for failing to file an answer, the trial court did not abuse its discretion by holding that defendant failed to submit an affidavit of facts establishing a meritorious defense. Although defendant submitted a document entitled affidavit of meritorious defense with his motion to set aside the default, the affidavit did not provide the trial court with any particular facts establishing a meritorious defense. See *Miller*, 174 Mich App at 487. Rather, defendant simply asserted that he had a meritorious defense because he disputed the amount of the debt owed to plaintiff. Merely contesting the amount of liability does not establish a meritorious defense. See *Pinto v Buckeye Union Ins Co*, 193 Mich App 304, 307; 484 NW2d 9 (1992) (stating that a defendant does not establish a meritorious defense where only the amount of liability is in dispute); *Novi Constr, Inc, v Triangle Excavating Co*, 102 Mich App 586, 590; 302 NW2d 244 (1980) (stating that a defendant's conclusive statement that it has a meritorious defense because it does not owe an alleged amount of money, without any factual basis for

the statement, is insufficient to establish a meritorious defense). Defendant failed to present any evidence, other than his own unsupported assertion, that he could defend against plaintiff's claim.[5]

Because defendant failed to establish both good cause and a meritorious defense, the trial court did not abuse its discretion by declining to set aside the default and granting plaintiff a default judgment.

Affirmed.

BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ., concurred.

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[5] While it may be arguable in some cases that requiring a defendant to submit an affidavit of meritorious defense alleging specific facts would infringe on the constitutional privilege against self-incrimination, defendant has not raised such an argument, either before the trial court or now on appeal. Therefore, we decline to address it.

In re CARROLL

Docket No. 292649. Submitted April 12, 2011, at Detroit. Decided April 26, 2011, at 9:05 a.m. Leave to appeal sought.

Alan A. May petitioned the Macomb County Probate Court to order Auto Club Insurance Association to pay his fee for serving as the conservator of Auto Club's insured, Edward Carroll, who had been injured in a car accident. Auto Club opposed the petition, arguing that the $6816.70 fee, most of which had been charged for expenses associated with liquidating Carroll's property, was not related to Carroll's care, recovery, or rehabilitation and that Auto Club was therefore not required to pay it under MCL 500.3107(1)(a), a provision of the no-fault act (MCL 500.3101 *et seq*.). The court, Pamela G. O'Sullivan, J., ordered Auto Club to pay $99 of the fee, but determined that Carroll's estate was liable for the rest. May appealed.

The Court of Appeals *held*:

1. A person injured in an automobile accident is entitled to recover from his or her no-fault insurance carrier all reasonable charges incurred for reasonably necessary products, services, and accommodations for his or her care, recovery, or rehabilitation under MCL 500.3107(1)(a). The term "care" is not restricted to medical care; rather, it includes the type of care provided by a guardian who may be appointed for an incapacitated person pursuant to MCL 700.5306. The type of care that a guardian provides is not significantly distinguishable from the care that a conservator may be appointed to provide for a person who is unable to manage property and business affairs effectively because of a mental or physical illness or disability pursuant to MCL 700.5401(3)(a). Because Carroll could not manage his property or business affairs as a result of the injuries he incurred in an automobile accident, May's services as a conservator were reasonably necessary for Carroll's care, and Auto Club was obligated under MCL 500.3107(1)(a) to pay his entire fee.

2. A person injured in an automobile accident is entitled to recover from his or her no-fault insurance carrier expenses of not more than $20 a day that were reasonably incurred in obtaining ordinary and necessary services that he or she would

have performed during the first three years after the accident, not for income but for the benefit of himself or herself or of his or her dependent under MCL 500.3107(1)(c). Although a person would presumably have managed his or her own property and business affairs without compensation before the accident that caused the injury, if, as in this case, a person was so incapacitated by the injury that he or she could no longer manage his or her own affairs and could not offer direction to those who might act on his or her behalf, the services a conservator provides transcend the ordinary replacement services that are governed by MCL 500.3107(1)(c). They are instead extraordinary professional services related to the injured person's care. Accordingly, May's fee for services was not barred by the three-year limit in MCL 500.3107(1)(c).

3. May's fee was for services that were reasonably necessary for Carroll's care, and Carroll would not have required those services but for the accident. Therefore, the fee was an allowable expense under *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521 (2005).

Reversed.

1. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — COMPENSABLE EXPENSES — ALLOWABLE EXPENSES — CONSERVATOR'S FEES.

A person injured in an automobile accident is entitled to recover from his or her no-fault insurance carrier all reasonable charges incurred for reasonably necessary products, services, and accommodations for his or her care, recovery, or rehabilitation; the term "care" includes care that a conservator provides for a person who is unable to manage his or her property and business affairs effectively because of an injury caused by the accident; the conservator's fee is an allowable expense if it was for services that were reasonably necessary for the injured person's care and if the services would not have been required but for the accident (MCL 500.3107[1][a]).

2. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — REPLACEMENT SERVICES — CONSERVATOR'S SERVICES.

The services that a conservator provides to a person who was so incapacitated by an injury sustained in an automobile accident that he or she can no longer manage his or her own affairs and cannot offer direction to those who might act on his or her behalf may be compensable under MCL 500.3107(1)(a); these services are not replacement services under MCL 500.3107(1)(c).

Kemp Klein Law Firm (by *Lawrence G. Snyder*) for Alan A. May.

Garan Lucow Miller, P.C. (by *Daniel S. Saylor*), for Auto Club Insurance Association.

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

M. J. KELLY, J. Petitioner, Alan A. May, acting as the conservator of the estate of Edward Carroll, appeals as of right the probate court's opinion and order apportioning the fee for his services between Carroll's estate and respondent, Auto Club Insurance Association. The order obliged Auto Club to pay $99 and Carroll's estate to pay the remaining $6,816.70 of May's fee. On appeal, May argues that the probate court erred to the extent that it determined that only $99 of the fee was for a reasonably necessary service for Carroll's care and recovery under MCL 500.3107(1)(a). Because Carroll would not have needed a conservator but for the injuries he sustained in an automobile accident, May maintains that Auto Club must pay the full amount of the conservator's fee as a reasonably necessary service for Carroll's care. We agree that Auto Club was obligated to pay the entire fee for May's services as a reasonably necessary expense for Carroll's care. For that reason, we reverse.

I. BASIC FACTS AND PROCEDURAL HISTORY

Carroll was involved in an automobile accident in 1982 that left him seriously debilitated. In the petition for appointment of a conservator, it is stated that he suffered a closed head injury, and the guardian ad litem's report indicates that Carroll was hospitalized for $2^1/_2$ years following the accident. Auto Club was

Carroll's no-fault insurer. For approximately 26 years, Auto Club paid $7000 to $8500 a month to Carroll's wife for the 24-hour care she gave to Carroll. Carroll's wife died in November 2008. Just before Mrs. Carroll's death, the Carrolls' daughter committed her father to a psychiatric ward. Upon his release, the daughter placed him in an adult foster care home.

Carroll's daughter sought a formal guardianship, but he had concerns with her handling of his finances. A lawyer petitioned for the appointment of a conservator on Carroll's behalf and, in December 2008, the probate court appointed May to be the conservator of Carroll's estate.

On March 19, 2009, May petitioned for payment of his fee. He averred that Auto Club refused to pay his conservator fee of $6816.70. He attached an itemized billing to the petition and asked the court to approve the fee and order Auto Club to pay it. Auto Club opposed the petition, arguing that the fee was not for allowable expenses under MCL 500.3107(1)(a) of the no-fault act, MCL 500.3101 *et seq*., because it did not relate to Carroll's care, recovery, or rehabilitation. In a subsequent reply, Auto Club indicated that Carroll had moved to an assisted living facility and that the conservator fee related to efforts to rent or sell Carroll's residence, liquidate his personal property, and sell his car.

In its June 2009 opinion and order, the probate court stated that the majority of May's claims involved "marshalling assets, paying bills, meetings, and administrative and legal services on Mr. Carroll's behalf." The court further noted that under MCL 500.3107(1)(a), personal protection benefits were payable for "allowable expenses," which were expenses related to a person's care, recovery, or rehabilitation. The court con-

cluded that, although the majority of the fee related to conservator duties, the services it reflected were for the most part not related to Carroll's care, recovery, or rehabilitation as required under MCL 500.3107(1)(a). The court determined that Auto Club was obligated to pay $99 dollars of the fee and that Carroll's estate was liable for the remainder.

This appeal followed.[1]

II. PERSONAL PROTECTION INSURANCE BENEFITS

A. STANDARD OF REVIEW

On appeal, we must determine whether the probate court erred when it concluded that the majority of May's fee for serving as Carroll's conservator did not constitute "reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation" under MCL 500.3107(1)(a). We must also determine whether May's fee was, in the alternative, for replacement services under MCL 500.3107(1)(c), which would be barred because Carroll incurred the expenses more than three years after the date of his accident.[2] This

[1] This Court originally held this appeal in abeyance pending our Supreme Court's decision in *Wilcox v State Farm Mut Auto Ins Co*. See *In re Carroll*, unpublished order of the Court of Appeals, entered June 23, 2010 (Docket No. 292649). However, on November 9, 2010, the Supreme Court vacated its earlier order in *Wilcox* and denied leave to appeal. See *Wilcox v State Farm Mut Auto Ins Co*, 488 Mich 930 (2010).

[2] We note that Auto Club raised the argument that the conservator's fee was for replacement services under MCL 500.3107(1)(c) for the first time on appeal. Although this Court normally will not consider issues that were not properly preserved by raising them in the lower court, we "may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented[.]"

Court reviews de novo the proper interpretation of statutes such as MCL 500.3107. *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005).

B. EXPENSES FOR CARE, RECOVERY, OR REHABILITATION

A person injured in an automobile accident is entitled to a variety of personal protection insurance benefits—often referred to as PIP benefits—from his or her insurance carrier under MCL 500.3107. An injured person is entitled to "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a). In addition, the injured person is entitled to expenses, "not exceeding $20.00 per day, reasonably incurred in obtaining ordinary and necessary services" that he or she "would have performed during the first 3 years after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent." MCL 500.3107(1)(c). At issue here is whether May's services as a conservator were reasonably necessary for Carroll's "care, recovery, or rehabilitation" under MCL 500.3107(1)(a) or whether May's fee was for "ordinary and necessary services" that Carroll would have performed within the meaning of MCL 500.3107(1)(c).

Although this Court has not directly addressed whether a conservator's services are compensable as services reasonably necessary for an injured person's care, recovery, or rehabilitation, this Court has addressed whether services by a guardian were compensable under MCL 500.3107(1)(a). In *Heinz v*

Smith v Foerster-Bolser Constr, Inc, 269 Mich App 424, 427; 711 NW2d 421 (2006). Because the facts are sufficient to determine this question of law, we shall address this issue.

Auto Club Ins Ass'n, 214 Mich App 195, 196; 543 NW2d 4 (1995), the guardian and conservator of a person injured in an automobile accident sought to recover the fees and expenses associated with the guardianship under MCL 500.3107(1)(a). On appeal, the defendant insurer argued that MCL 500.3107(1)(a) applied only to medical care. *Id.* at 197. This Court determined that MCL 500.3107(1)(a) was not so limited:

> In short, [MCL 500.3107(1)(a)] provides for the payment of expenses incurred for the reasonably necessary services for an injured person's care. It is clear to us that if a person is so seriously injured in an automobile accident that it is necessary to appoint a guardian and conservator for that person, the services performed by the guardian and conservator are reasonably necessary to provide for the person's care. Therefore, they are allowable expenses under [MCL 500.3107]. [*Id.* at 198.]

Because the question in *Heinz* involved only the fees charged by the guardian, the court's references to conservators were arguably dicta. Nevertheless, the *Heinz* Court clearly concluded that the term "care," as used in MCL 500.3107(1)(a), was not restricted to medical care alone. Rather, it concluded that the type of care provided by a guardian could constitute "care" for purposes of MCL 500.3107(1)(a). And we conclude that there is little basis for distinguishing the care provided by a guardian from that provided by a conservator.[3]

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[3] This Court has addressed the recovery of conservator expenses in two other cases, but those cases are distinguishable from the issue present here. In *In re Shields Estate*, 254 Mich App 367; 656 NW2d 853 (2002), this Court noted the holding of *Heinz*. However, the issue in *Shields* concerned whether the holding applied to fees of a conservator who was appointed because of a minor's status and not because of injuries incurred in an accident. *Id.* at 370-371. In *Freeman v Colonial Penn Ins Co*, 138 Mich App 444; 361 NW2d 356 (1984), the question was whether a conservator who managed the investments of his ward could collect work-loss benefits under MCL 500.3107(1)(b). The *Freeman* Court did

MCL 700.5306 governs the appointment of a guardian for an incapacitated person. To appoint a guardian, a court must find that a person is incapacitated and "that the appointment is necessary as a means of providing continuing *care* and supervision of the incapacitated individual . . . ." MCL 700.5306(1) (emphasis added). Moreover, the guardian must "make provision for the ward's care, comfort, and maintenance" and must "secure services to restore the ward to the best possible state of mental and physical well-being so that the ward can return to self-management at the earliest possible time." MCL 700.5314(b). If the guardian's ward does not have a conservator, the guardian may institute support proceedings and "[r]eceive money and tangible property . . . for the ward's support, care, and education." MCL 700.5314(d). If the ward has a conservator, the guardian must "pay to the conservator, for management as provided in this act, the amount of the ward's estate received by the guardian in excess of the amount the guardian expends for the ward's current support, care, and education" and must "account to the conservator for the amount expended." MCL 700.5314(f).

A probate court may appoint a conservator if the court determines that the "individual is unable to manage property and business affairs effectively," in relevant part because of "mental illness, mental deficiency, physical illness or disability," MCL 700.5401(3)(a), and that the individual has "property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to

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refer to " 'work loss benefits' for the replacement services of plaintiff," *id.* at 447, but it was not addressing compensation for replacement services under MCL 500.3107(1)(c).

the individual's support, and that protection is necessary to obtain or provide money," MCL 700.5401(3)(b). A probate court may also "appoint a conservator" for "an individual who is mentally competent, but due to age or physical infirmity is unable to manage his or her property and affairs effectively and who, recognizing this disability, requests a conservator's appointment." MCL 700.5401(4).

In the present case, May, as Carroll's nominee, petitioned the probate court for a conservatorship for Carroll. He represented that Carroll could not manage his property and business affairs because of physical illness or disability resulting from a closed head injury. Similar to a guardianship, the conservatorship was necessary as part of Carroll's care because he could no longer manage his own affairs as a result of a physical disability.

Auto Club makes two arguments against treating a conservatorship as "care" under *Heinz*. It argues that a conservatorship is really a replacement service under MCL 500.3107(1)(c) or that it no longer constitutes an "allowable expense" for a service for an injured person's care under MCL 500.3107(1)(a) after our Supreme Court's decision in *Griffith*. Neither of these arguments is availing.

C. REPLACEMENT SERVICES

As already noted, *Heinz* stands for the proposition that the term "care," as used in MCL 500.3107(1)(a), is not limited to medical care. Under *Heinz*, the term "care" encompasses guardian services that, under MCL 700.5306(1), are for the purpose of providing "continuing care and supervision of the incapacitated individual . . . ." In contrast, conservator services are for an individual who is unable to "manage property and

business affairs." While a guardianship would qualify as a service for a person's care, a closer question is whether the service of managing property and business affairs is care.

This question is complicated by the definition of what have traditionally been recognized as replacement services: "*ordinary* and necessary services in lieu of those that . . . an injured person would have performed during the first 3 years after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent." MCL 500.3107(1)(c) (emphasis added). Before the accident that caused the injury, the injured person would presumably have managed his or her own property and business affairs without compensation. Thus, the duties of a conservator could be construed to be a replacement service. However, this is not a situation involving ordinary living activities that can be performed by family, friends, or unskilled laborers. This is not a case in which Carroll might have been able to hire a family member or friend to write checks and pay his bills at his direction. Rather, Carroll is so incapacitated by his injuries that he cannot manage his own affairs and cannot offer direction to those who might act on his behalf; indeed, he had to have a lawyer petition a court to appoint and approve a conservator—complete with fiduciary responsibilities—to manage his affairs. Under these circumstances, the services provided transcend "ordinary" services akin to cooking, cleaning, or doing yard work and thus are not replacement services within the meaning of MCL 500.3107(1)(c). Instead, we conclude that the services are extraordinary professional services related to Carroll's care. See *In re Geror*, 286 Mich App 132, 135-136; 779 NW2d 316 (2009) (holding that services provided by a lawyer to a disabled person were compensable under MCL 500.3107(1)(a) because the services had been pro-

vided to ensure that the disabled person was receiving necessary care and—as such—were also related to the injured person's care.).

D. ALLOWABLE EXPENSES AFTER *GRIFFITH*

After the decision in *Heinz*, our Supreme Court examined the type of expenses allowed under MCL 500.3107(1)(a) in *Griffith*. The *Griffith* Court addressed whether food expenses fall within the provisions of MCL 500.3107(1)(a) as expenses for an injured person's "care." *Griffith*, 472 Mich at 525. In that case, the insured was living at home but had been incapacitated as the result of an automobile accident. The Court held that whether an expense was allowable depended on whether it was causally connected to an accidental bodily injury arising out of an automobile accident under MCL 500.3105(1). *Id.* at 531. The Court determined that the plaintiff had failed to establish that the costs were for an accidental bodily injury given that his diet was not different from an uninjured person's diet, was not part of a treatment plan, and was not related to his injuries. *Id.* at 531-532. Further, the Court held that whether these ordinary food expenses were allowable expenses under MCL 500.3107(1)(a) depended on whether they were reasonably necessary for *an injured person's* care, recovery, or rehabilitation. The Court concluded that the care, recovery, or rehabilitation at issue had to be related to the injury. *Id.* at 534. The Court noted that recovery and rehabilitation were intended to restore a person to his or her preinjury state and were therefore necessary because of the injuries sustained. *Id.* at 534-535. As for care, the Court noted that some expenses might be necessary because of an accident but might not restore a person to his or her

preinjury state. The Court concluded that the food expenses at issue were not related to the injured person's care:

> Griffith's food costs here are not related to his "care, recovery, or rehabilitation." There has been no evidence introduced that he now requires different food than he did before sustaining his injuries as part of his treatment plan. While such expenses are no doubt necessary for his *survival*, they are not necessary for his recovery or rehabilitation from the injuries suffered in the accident, nor are they necessary for his care because of the injuries he sustained in the accident. Unlike prescription medications or nursing care, the food that Griffith consumes is simply an ordinary means of sustenance rather than a treatment for his "care, recovery, or rehabilitation." In fact, if Griffith had never sustained, or were to fully recover from, his injuries, his dietary needs would be no different than they are now. We conclude, therefore, that his food costs are completely unrelated to his "care, recovery, or rehabilitation" and are not "allowable expenses" under MCL 500.3107(1)(a). [*Id.* at 535-536.]

In this case, Carroll had a closed head injury that prevented him from being able to manage his own affairs—that is, Carroll's need for a conservator was causally related to the injuries Carroll sustained in an accident. Admittedly, even if Carroll had not been in the accident, he would have needed to pay his bills and manage his accounts and assets. The question therefore becomes whether the conservator's actions were needed for Carroll's care, recovery, or rehabilitation *from the injury*. Unlike the situation in *Griffith*, petitioner here was not seeking payment of the actual expenses that Carroll would have incurred—such as the cost of food—nor was he seeking to recover the cost of engaging a real estate agent to sell Carroll's home or the cost of advertisements. Those expenses would likely have been incurred regardless of the accident. Instead, the claim here is for

the *service* of having a conservator *manage* these matters; and this would not have been necessary but for the accident-related injury. The conservator's services here are more akin to attendant care provided by a nursing assistant who handles an injured person's intimate hygiene needs; in that situation, although the injured person would normally have handled those needs on his or her own, as a result of the injury he or she is no longer able to do so. Because expenses incurred to have someone perform those hygiene services are reasonably incurred for the injured person's care, recovery, or rehabilitation, the nursing assistant's services are compensable under MCL 500.3107(1)(a). See *Heinz*, 214 Mich App at 198; *Geror*, 286 Mich App at 135-136. Similarly, because the need for the conservator was causally connected to Carroll's injury and the expense is reasonably necessary for his care, it too is compensable under MCL 500.3107(1)(a). Accordingly, *Griffith* does not bar recovery of the conservator's fee.

The expenses for the service the conservator provided were not expenses for ordinary and necessary replacement services—they were expenses incurred for Carroll's care under MCL 500.3107(1)(a). For that reason, the probate court erred when it concluded that Auto Club was not liable to pay the full amount of the conservator's fee.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, petitioner may tax costs. MCR 7.219(A).

BECKERING, P.J., and WHITBECK, J., concurred with M. J. KELLY, J.

AUGUSTINE v ALLSTATE INSURANCE COMPANY

Docket No. 296646. Submitted April 5, 2011, at Detroit. Decided April 26, 2011, at 9:10 a.m.

Shirley Augustine brought an action in the Oakland Circuit Court against Allstate Insurance Company, seeking first-party, no fault insurance benefits. Plaintiff had been seriously injured in an automobile accident and had received from defendant, plaintiff's insurer, payment for the attendant-care services she required for two years before defendant ceased making the payments as a result of a dispute regarding plaintiff's refusal to provide more detailed documentation of the nature of her care. Plaintiff was victorious, and a judgment was entered in her favor. Plaintiff, who had a contingency-fee agreement with her attorneys, sought attorney fees on an hourly basis pursuant to MCL 500.3148(1) for defendant's unreasonable delay in making the benefit payments. The trial court awarded attorney fees to plaintiff. Defendant appealed, challenging the award of attorney fees. The Court of Appeals, MURRAY, P.J., and WHITBECK and TALBOT, JJ., vacated the award of attorney fees and remanded the case to the trial court for further proceedings in light of *Smith v Khouri*, 481 Mich 519 (2008), which was decided after defendant filed its appeal. *Augustine v Allstate Insurance Co*, unpublished opinion per curiam, issued August 21, 2008 (Docket No. 276537) (*Augustine I*). The Court of Appeals provided specific instructions to be followed on remand, explicitly outlining the procedural steps set out in *Smith* for determining a reasonable attorney-fee award. The Court of Appeals explained that, in determining the hourly rate, the focus is on initially finding a reasonable fee, i.e., the fee customarily charged in the locality for similar legal services, and indicted that, if warranted, the trial court can increase the rate on the basis of the relevant factors under *Wood v DAIIE*, 413 Mich 573, 588 (1982), and MRPC 1.5(a). The Court of Appeals ordered the trial court to make specific findings, consistent with *Smith*, with regard to each attorney whose fees plaintiff sought to recover and instructed the trial court to not rely on previous awards to the attorneys without first determining whether those other awards were for work on cases similar to this case. On remand, the visiting trial court judge, Edward Avadenka, granted defendant's request

for an evidentiary hearing regarding the attorney fees. Defendant requested that its expert on attorney fees be given an opportunity to review the entire litigation file that plaintiffs' attorneys relied on in support of their itemization of fees in order to test the accuracy of the billings against the alleged work product. Plaintiff claimed the file was privileged. Defendant stated that it was willing to accept the file with redactions under a protective order. The trial court ruled that defendant could not see the file unless it was used at the evidentiary hearing to refresh the recollection of an attorney witness, in which case it would then be made available to defendant. Following the hearing the trial court held that there was no dispute with regard to the costs incurred and billed, that plaintiff and her attorneys had a contingency-fee agreement, that the charge of $500 an hour was reasonable, and that the reasonable number of hours expended was 537.5. The trial court issued an order awarding plaintiff $250,000 in attorney fees. The trial court, Nanci J. Grant, J., then entered a judgment and order consistent with that order. Defendant appealed.

The Court of Appeals *held*:

1. The trial court abused its discretion when it failed to entertain a procedure that would have allowed defendant access to plaintiff's attorneys' litigation file with the attorneys mental impressions, thoughts, or strategies broadly and completely redacted. In the absence of any meaningful discovery, no genuine inquiry could be made by defendant of plaintiff and defendant could make no real challenge. Defendant met its burden of showing the need for review of properly redacted trial-preparation materials as contemplated by MCR 2.302(B)(3)(a) because it demonstrated a substantial need for the materials and a lack of other reasonable avenues for obtaining the information.

2. The trial court's award of attorney fees on remand was an abuse of discretion under the law-of-the-case doctrine because the trial court failed to make specific findings consistent with *Smith* as directed in *Augustine I*. The trial court did not comply with the first step in the *Smith* analysis, which is to determine the fee customarily charged in the locality for similar legal services. Although the trial court discussed the evidence presented regarding the fee customarily charged in the locality for similar legal services, it did not conclude that $500 an hour was the fee customarily charged. The trial court simply found that $500 an hour was a reasonable fee and did not make a determination whether an upward or downward adjustment was appropriate on the basis of the factors stated in *Wood* and MRPC 1.5(a) as the Supreme Court discussed in *Smith*.

3. The trial court failed to make specific findings consistent with *Smith* and failed to make findings regarding each attorney whose fees plaintiff sought to recover. *Smith* was controlling as the law of the case and the trial court was required to follow the directive in *Augustine I* to make findings consistent with *Smith*. Even if *Smith* were not the law of the case, the trial court should have applied *Smith*, because the framework outlined in *Smith* is the proper standard to be applied in cases brought pursuant to MCL 500.3148(1) when, as in this case, a party seeks hourly attorney fees.

4. The trial court abused its discretion by admitting hearsay evidence consisting of four letters written by four attorneys to plaintiff's attorneys, in response to solicitations from plaintiff's attorneys, in which the four attorneys discussed their hourly fees. The letters were not admissible under MRE 803(6), because they were not business records, and did not satisfy the elements for admission under the other-exceptions provision of MRE 803(24). Despite the fact that the letters tended to establish a material fact, they were not the most probative evidence regarding that material fact that could have been produced through reasonable efforts.

5. The evidentiary hearing established only that plaintiff claimed the amount of hours listed. Plaintiff did not provide a document, an example, or specific testimony to show that a billable item was performed in the amount of time claimed or was even completed. Plaintiff failed to provide documentary support for the work performed and the amount of time spent on any task. The trial court's finding of the hours expended by plaintiff's attorneys was clearly erroneous because so many areas went unexplored and remained undocumented after the hearing. The trial court's calculation of attorney fees was erroneous.

6. A meaningful application of the *Wood* factors and the MRPC 1.5(a) factors utilized for determining attorney-fee awards, as set forth in *Smith*, requires a trial court to consider the interplay between the factors and how they relate to the client, the case, and even the larger legal community. The trial court acknowledged the fee-consideration factors, but provided little analysis or insight into the application of those factors to the client or the case.

7. The trial court abused its discretion by failing to provide defendant limited discovery in order to allow meaningful examination of the issue of an award of attorney fees pursuant to MCL 500.3148(1), by misapprehending the law to be applied, and by entering an award of attorney fees that was inconsistent with the directions of the Court in *Augustine I*. The trial court abused its discretion by admitting the four letters from the attorneys. The

trial court clearly erred in its award of attorney fees because its assessment of the work performed and the number of hours expended both failed for want of evidentiary support. The award of attorney fees is vacated and the case is remanded for rehearing and redetermination by Judge Grant. The judge must make specific findings, consistent with *Smith*, for each attorney whose fees plaintiff seeks to recover.

Vacated and remanded.

1. ATTORNEY AND CLIENT — WORK-PRODUCT DOCTRINE.

The work-product doctrine protects from discovery the notes, working documents, and memoranda that an attorney prepares in anticipation of litigation.

2. ATTORNEY AND CLIENT — ATTORNEYS WORK PRODUCT — DISCOVERY.

A party may obtain discovery of documents and tangible things otherwise discoverable under MCR 2.302(B)(1) and prepared in anticipation of litigation or for trial by or for another party or another party's representative, including an attorney, only on a showing that the party seeking discovery has substantial need of the materials in preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means; a trial court, in ordering discovery of such materials when the required showing has been made, shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation (MCR 2.302[B][3][a]).

3. APPEAL — LAW-OF-THE-CASE DOCTRINE.

The determination of an issue in a case by the Court of Appeals, regardless of the correctness of the determination, binds both the trial court on remand from the Court of Appeals and the Court of Appeals in subsequent appeals in the same case under the law-of-the-case doctrine; on remand, the trial court may not take action that is inconsistent with the judgment of the Court of Appeals; a question of law decided by an appellate court may not be decided differently on remand or in a subsequent appeal in the same case.

4. TRIAL — ATTORNEY AND CLIENT — ATTORNEY-FEE AWARDS.

A trial court determining reasonable hourly attorney fees should first determine the fee customarily charged in the locality for similar legal services using reliable surveys or other credible evidence and then multiply that amount by the reasonable number of hours expended in the case; the court may then consider making

adjustments up or down to this base number in light of the factors listed in *Wood v Detroit Automobile Inter-Insurance Exchange*, 413 Mich 573, 588 (1982), and MRPC 1.5(a); to establish the customarily charged fee, the fee applicant must present something more than anecdotal statements; the trial court should briefly indicate its view of each of the factors.

5. TRIAL — ATTORNEY-FEE AWARDS — REASONABLE HOURLY RATE — MARKET RATE.

The reasonable hourly rate for an attorney's services, for purposes of an award of attorney fees by a trial court, represents the fee customarily charged in the locality for similar legal services, which is reflected by the market rate for the attorney's work; the market rate is the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question.

6. EVIDENCE — HEARSAY STATEMENTS.

A hearsay statement, in order to be admissible under the "other exceptions" hearsay exception found in MRE 803(24), must demonstrate circumstantial guarantees of trustworthiness equivalent to the categorical exceptions in MRE 803(1) to (23), be relevant to a material fact, be the most probative evidence of that fact reasonably available, and serve the interests of justice by its admission; the trial court should consider the totality of the circumstances, taking into consideration any factors that detract from or add to the reliability of the statement in determining whether a statement has particularized guarantees of trustworthiness.

7. ATTORNEY AND CLIENT — ATTORNEY-FEE AWARDS.

An applicant for an award of attorney fees has the burden to support its claimed hours with evidentiary support; the applicant must submit detailed billing records, which the court must examine and opposing parties may contest for reasonableness.

8. ATTORNEY AND CLIENT — ATTORNEY-FEE AWARDS.

A trial court determining a reasonable attorney fee should consider (1) the professional standing and experience of the attorney, (2) the skill, time, and labor involved, (3) the amount in question and the results achieved, (4) the difficulty of the case, (5) the expenses incurred, and (6) the nature and the length of the professional relationship with the client; consideration should also be given to the following factors listed in MRPC 1.5(a): (1) the time and labor required, the novelty and difficulty of the questions involved, and

> the skill requisite to perform the legal services properly, (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer, (3) the fee customarily charged in the locality for similar legal services, (4) the amount involved and the results obtained, (5) the time limitations imposed by the client or by the circumstances, (6) the nature and length of the professional relationship with the client, (7) the experience, reputation, and ability of the lawyer or lawyers performing the services, and (8) whether the fee is fixed or contingent.

Speaker Law Firm, PLLC (by *Liisa R. Speaker* and *Jodi M. Latuszek*), for plaintiff.

Garan Lucow Miller, P.C. (by *Daniel S. Saylor* and *James L. Borin*), for defendant.

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

DONOFRIO, P.J. In this first-party, no-fault-insurance action, defendant, Allstate Insurance Company, appeals as of right the trial court's order awarding plaintiff, Shirley Augustine, $327,090.60 for attorney fees and interest. The sole issue on appeal is attorney fees. Defendant maintains that, on remand, the trial court abused its discretion by awarding attorney fees to plaintiff. Because, on remand, the trial court failed to follow the directive of this Court, did not comply with the law-of-the-case rule, and did not properly apply *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008), we vacate the award of attorney fees and remand for rehearing and redetermination in accordance with this opinion.

I. FACTS AND PROCEDURAL HISTORY

This is the second time this matter is before this Court. See *Augustine v Allstate Ins Co*, unpublished

opinion per curiam of the Court of Appeals, issued August 21, 2008 (Docket No. 276537) (*Augustine I*). In the first appeal, defendant challenged the trial court's award of attorney fees in the final judgment. *Id*. at 1. This Court vacated the award and remanded the case for further proceedings in light of *Smith*, which was decided after defendant filed its appeal. *Augustine I*, unpub op at 1, 3. The *Augustine I* Court set out the substantive facts of the case as follows:

> Plaintiff was seriously injured in an auto accident and sought first-party, no-fault benefits from her insurer, defendant, to pay for the permanent attendant care that she now requires. Defendant paid the benefits for two years but ceased payments over a dispute regarding plaintiff's refusal to provide more detailed documentation of the nature of her care. Plaintiff brought the instant suit and was victorious, recovering $371,700 of the $929,000 that she sought, plus interest in the amount of $42,524. Plaintiff subsequently sought attorney fees pursuant to MCL 500.3148(1) due to defendant's "unreasonable delay" in making benefit payments. The trial court awarded attorney fees in the amount of $312,625 based upon a finding that plaintiff's attorneys had done 543.75 hours of work at $500 per hour and 51.25 hours at $300 per hour.[1] [*Id.* at 1.]

Defendant appealed the final judgment, challenging the reasonableness of the award of attorney fees. After the briefs were filed, our Supreme Court decided *Smith*, 481 Mich at 522 (opinion by TAYLOR, C.J.), which delineated the steps a trial court must take when considering a request for attorney fees. *Augustine I*, unpub op at 2. This Court held that "[i]n light of the procedure set out by the

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[1] Notwithstanding a contingency-fee agreement, plaintiff sought attorney fees on an hourly basis. Of the $312,625 the trial court awarded, $287,250 represented the actual attorney fees ordered. *Augustine I*, unpub op at 2 (" '[T]he Court will allow 543.75 hours at $500.00 per hour and 51.25 hours at $300.00 per hour for a total of $287,250.00.' ").

Smith Court, which the trial court naturally did not follow, we must vacate the award of attorney fees and remand to the trial court to apply the procedure outlined in *Smith*." *Id*. at 3.

In ruling in the first appeal, this Court provided specific instructions to be followed on remand, explicitly outlining the procedural steps set out in *Smith* for determining a reasonable attorney-fee award. *Augustine I*, unpub op at 2-3. This Court explained that "in determining the hourly rate, the focus is on initially finding a reasonable fee, i.e., the 'fee customarily charged in the locality for similar legal service.' " *Id*. at 3, citing *Smith*, 481 Mich at 530 (opinion by TAYLOR, C.J.). It further indicated that "if warranted, the court can increase [the] rate based upon the relevant factors under *Wood* [*v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982)] and MRPC 1.5(a)." *Id*. at 3. This Court vacated the trial court's award of attorney fees, remanding the case for the trial court "to make specific findings, consistent with *Smith*, on each attorney whose fees plaintiff sought to recover . . . ." *Id*. It also explicitly instructed that, on remand, "the trial court should take care in not relying upon previous awards to these attorneys without first determining whether those other awards were for work on cases similar to this one." *Id*.

A. ON REMAND

On remand, the trial court granted defendant's request for an evidentiary hearing regarding attorney fees. Defendant requested that its expert be given the opportunity to review the entire litigation file that plaintiff's attorneys relied on in support of their itemization of fees. Defendant argued that it needed to see if all the work that was attributed to the attorneys was reflected in the file in order to test the accuracy of the

billings against the alleged work product. Plaintiff maintained that the request for the file went far beyond what was argued during the first appeal and that she feared that defendant would publish the contents of the file. Though defendant was willing to accept the file with redactions under a protective order, plaintiff argued that it was improper to allow defendant access to the attorneys' work product and privileged communications. Plaintiff contended that the entire file was privileged and that without the privileged information there would be nothing left for defendant's expert to review other than the billing summary. The trial court ruled that defendant could not see the litigation file unless it was used at the evidentiary hearing to refresh the recollection of an attorney witness, in which case the file would then be made available.

B. EVIDENTIARY HEARING

On October 9, 2009, the trial court conducted an evidentiary hearing on fees. It was established that the law firm of Liss, Seder & Andrews gave plaintiff the option of paying an hourly fee of $500 or entering into a contingency-fee arrangement for representation. The $500 hourly fee was based on factors such as the law firm's experience, track record, commitments made to other clients, and limited resources, and the difficulty of handling catastrophic no-fault-insurance cases. Plaintiff chose to enter into a contingency-fee arrangement.

Plaintiff's trial attorney, Nicholas Andrews, prepared the billing summary as part of his trial preparation and completed the summary after the trial. Liss, Seder & Andrews did not have an "office procedure or methodology" for keeping track of the time expended on cases on a daily basis. Senior partner Arthur Liss testified that he never made his time entries contemporaneously

with his work. Andrews testified that he may have used an Excel spreadsheet or office notes to assist in the preparation of a billing summary. The minimum time increment for billing was 0.25 hours. Plaintiff's attorneys indicated that a significant amount of the time that the firm actually expended on the case was not billed and emphasized that these types of cases required extensive discussion between the attorneys in the office to strategize. The trial court admitted into evidence in support of the firm's claim for 625.25 hours the firm's billing summary, a listing of the dates of service, the identification of each of the four lawyers who provided a service, a brief description of the service provided, and a time entry. Liss and Andrews testified regarding their expertise, experience, trial results, and other fee awards that they had each received. Plaintiff also produced letters from four attorneys that had been sent to plaintiff's attorneys regarding the fees they charged and were awarded in similar cases. Though the trial court recognized the letters as being self-serving, the trial court admitted the letters into evidence over defendant's objection because they were records kept in the ordinary course of business.

Defense counsel James Borin testified for the defense. The trial court admitted Borin's law firm's billing statement that reflected hourly charges totaling 252.8 hours. The trial court also admitted a survey of the hourly rates of approximately 208 attorneys authorized to conduct mediation in Oakland County during the relevant time. The trial court also admitted the State Bar of Michigan's 2007 Economics of Law Practice survey on hourly billing rates. Defendant also produced Thomas H. Blaske, who testified as an expert regarding attorney fees. Blaske provided testimony regarding plaintiff's counsel's practice, hourly rates, and allegedly excessive charges based on plaintiff's counsel's billing summary alone. He also stated

that he was unable to provide a complete analysis of the reasonableness of plaintiff's attorneys' services because he did not have plaintiff's litigation file to cross-check the services enumerated.

C. OPINION OF THE TRIAL COURT

On December 30, 2009, the trial court issued an opinion and order that was later reduced to a judgment. The trial court acknowledged the remand order from this Court and then proceeded to perform an analysis of the evidence submitted. The trial court addressed the reasonableness of the hourly fee and, in making that determination, relied on the factors set forth in *Wood*, 413 Mich at 588, *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973), and MRPC 1.5 as referred to in *Smith*, 481 Mich at 529-532 (opinion by TAYLOR, C.J.). The trial court commented on the arguments of the attorneys, the witnesses testimony, and generally on the character of the evidence regarding each party's view of the reasonable local fee that should be used. The trial court opined that these cases (the underlying action for attendant-care services) are among the most complex civil cases. The trial court observed that Andrews had a long relationship with the client, having represented her in a previous attendant-care dispute with the same carrier, and had obtained good results in both cases. In summary, the trial court held that there was no dispute with regard to the costs incurred and billed, that the fee arrangement was contingent, that Blaske was well recognized as an expert, but that his opinion on fees in Oakland County based on the mediator pool survey would not be credited, that the charge of $500 an hour was reasonable, and that the reasonable number of hours was 537.5. Ultimately, the trial court awarded $250,000 in attorney fees. This appeal followed.

II. DISCOVERY

First, defendant argues that the trial court committed error requiring reversal by denying defendant's discovery request for plaintiff's entire litigation file. Generally, we review the grant or denial of a discovery motion for an abuse of discretion. *Linebaugh v Sheraton Mich Corp*, 198 Mich App 335, 343; 497 NW2d 585 (1993). An abuse of discretion is not simply a matter of a difference in judicial opinion, rather it occurs only when the trial court's decision is outside the range of reasonable and principled outcomes. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

Whether the attorney-client or work-product privilege may be asserted is a question reviewed de novo by this Court. *Leibel v Gen Motors Corp*, 250 Mich App 229, 236; 646 NW2d 179 (2002); *Koster v June's Trucking, Inc*, 244 Mich App 162, 168; 625 NW2d 82 (2000). Whether a party has waived a privilege is also a question of law that this Court reviews de novo. *Leibel*, 250 Mich App at 240. Once we determine whether the privilege is applicable, this Court then reviews whether the trial court's order was an abuse of discretion. *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 618; 576 NW2d 709 (1998).

"It is well settled that Michigan follows an open, broad discovery policy that permits liberal discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case." *Id.* at 616, citing MCR 2.302(B)(1). This is true "whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party." *Cabrera v Ekema*, 265 Mich App 402, 407; 695 NW2d 78 (2005), citing MCR 2.302(B)(1). However, "Michigan's commitment to open and far-reaching discovery does not encompass fishing expedition[s]." *VanVorous v Burmeis-*

ter, 262 Mich App 467, 477; 687 NW2d 132 (2004) (quotation marks and citation omitted). "Allowing discovery on the basis of conjecture would amount to allowing an impermissible fishing expedition." *Id*.

MCR 2.302(B)(1) limits discovery to matters that are not privileged. "The attorney-client privilege attaches to direct communication between a client and his attorney as well as communications made through their respective agents." *Reed Dairy Farm*, 227 Mich App at 618. "The scope of the attorney-client privilege is narrow, attaching only to confidential communications by the client to his advisor that are made for the purpose of obtaining legal advice." *Id*. at 618-619. "Although either [the attorney or the client] can assert the privilege, only the client may waive the privilege." *Kubiak v Hurr*, 143 Mich App 465, 473; 372 NW2d 341 (1985).

This Court has also recognized the common-law privilege protecting the disclosure of attorney work product. *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 638; 591 NW2d 393 (1998). The work-product doctrine protects from discovery the notes, working documents, and memoranda that an attorney prepares in anticipation of litigation. *Leibel*, 250 Mich App at 244. MCR 2.302(B)(3)(a) provides:

> Subject to the provisions of subrule (B)(4), a party may obtain discovery of documents and tangible things otherwise discoverable under subrule (B)(1) and prepared in anticipation of litigation or for trial by or for another party or another party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only on a showing that the party seeking discovery has substantial need of the materials in preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the

> mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

"Thus, if a party demonstrates the substantial need and undue hardship necessary to discover work product, that party may discover only factual, not deliberative, work product." *Leibel*, 250 Mich App at 247 (quotation marks and citation omitted). Like the attorney-client privilege, a party may waive work-product protections. *Id*. at 248.

The trial court did not directly address the issue of privilege in its ruling and defendant acknowledges that it was not seeking information protected by the attorney-client privilege. The trial court simply held that the file was not available to defendant unless a question was asked of an attorney witness at the evidentiary hearing and the file was necessary to refresh the attorney witness's recollection.

The nature of a request for discovery in a claim such as that presented here for attorney fees allowable pursuant to MCL 500.3148(1) must be carefully scrutinized. A request for discovery that constitutes an attempt to invade the attorney-client relationship or to discover the mental impressions and strategies generally employed by opposing counsel must be rejected. But the reasonableness of an attorney-fee claim cannot be assessed in a vacuum. At the time of the discovery request, defendant had been provided a simple, albeit lengthy, billing statement without any corroboration of the time reflected. Defendant knew that plaintiff's attorneys' law firm did not maintain a time-billing procedure and that lawyers of the firm did not make contemporaneous time entries. Further, defendant knew that the summary billing statement presented in support of an attorney-fee award was a retrospective

exercise based on memory and possibly some office notes or Excel spreadsheets. Defendant could only compare dates from its own counsel's billing statement with plaintiff's summary to determine if there was a comparable match. If there were logs, reports, summaries, or spreadsheets that would tend to corroborate the billing statement, they could be provided with the redaction of any impressions or thoughts on future work or strategies. In other words, counsel for plaintiff could provide a copy of the litigation file with all items that include the mental impressions, thoughts, or strategies of counsel broadly and completely redacted. The "sanitized" file would clearly be useful in corroborating and validating time claims to determine a reasonable attorney fee. Carefully redacting the litigation file would assuage the trial court's concern that there was nothing to stop defendant's attorney from obtaining strategy information from the litigation file that could be used in subsequent cases against plaintiff's attorneys. The trial court's failure to even entertain such a procedure seems highly unreasonable and therefore an abuse of discretion.

A review of the evidentiary hearing causes concern regarding the likelihood that an honest and fair determination of fees could be awarded on this record. Blaske testified as an expert but he could not offer a complete analysis of the reasonableness of plaintiff's conduct, charges, or time on the billing summary without some materials from which to extrapolate. Starkly, the litigation file was noticeably absent. Notwithstanding defendant's attempt to serve a subpoena for the file by certified mail before the evidentiary hearing, plaintiff refused the mail. During the evidentiary hearing, neither Liss nor Andrews referred to the litigation file, and both denied having reviewed any of it in preparation for the hearing. As a result, the testimony was replete with

speculation, conjecture, and a denial of knowledge. Liss testified at the evidentiary hearing that the billing statement did not refresh his recollection of what he did or the time spent on any listed service. Both of plaintiff's lead counsel lacked any specific memory of the time spent on any series of billable events. This is curious. In the end, all that one could reasonably glean from the testimony of plaintiff's attorneys concerning the summary billing statement was that they submitted it, therefore they believed that it was correct, and in fact, they believed that it was an underestimate of the time spent on the matter.

The burden of proving the reasonableness of a request for attorney fees rests with the party requesting it. *Smith*, 481 Mich at 528-529 (opinion by TAYLOR, C.J.). Here, in the absence of any meaningful discovery, no genuine inquiry could be made of the party requesting the fees and concomitantly no real challenge could be made by the party opposing the fee request. Under these circumstances, defendant has met its burden of showing the need for review of properly redacted trial-preparation materials as contemplated by MCR 2.302(B)(3)(a) because it has demonstrated a substantial need for the materials and a lack of other reasonable avenues for obtaining the information. The failure of the trial court to grant discovery when defendant agreed to redacted materials and a protective order as provided in the rule is not a principled outcome because it denied defendant a fair opportunity to be meaningfully heard on the issue.

III. DETERMINATION OF ATTORNEY FEES

Interpreting the meaning of a court order involves questions of law that are reviewed de novo. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 460; 750

NW2d 615 (2008). This Court also reviews de novo the question of law whether the trial court followed this Court's ruling on remand. *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 127; 737 NW2d 782 (2007). Similarly, this Court reviews de novo the determination whether the law-of-the-case doctrine applies and to what extent it applies. *Kasben v Hoffman*, 278 Mich App 466, 470; 751 NW2d 520 (2008).

This Court generally reviews for an abuse of discretion a trial court's decision to award attorney fees and the determination of the reasonableness of the fees. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008); *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 438; 695 NW2d 84 (2005). Again, an abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Saffian*, 477 Mich at 12.

"[T]he decision whether to admit or exclude evidence is reviewed for an abuse of discretion." *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). "Evidentiary errors are not a basis for vacating, modifying, or otherwise disturbing a judgment unless declining to take such action would be inconsistent with substantial justice." *Miller v Hensley*, 244 Mich App 528, 531; 624 NW2d 582 (2001).

This Court "review[s] the trial court's factual findings for clear error." *Brandt v Brandt*, 250 Mich App 68, 72; 645 NW2d 327 (2002). There is clear error when there is "no evidentiary support for [the factual findings] or where there is supporting evidence but the reviewing court is nevertheless left with a definite and firm conviction that the trial court made a mistake." *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007). "This Court affords great deference to the special opportunity of the trial court to judge the

credibility of the witnesses who appeared before it." *Lumley v Univ of Mich Bd of Regents*, 215 Mich App 125, 135; 544 NW2d 692 (1996).

A. LAW-OF-THE-CASE DOCTRINE

Defendant argues that the trial court abused its discretion by awarding attorney fees on remand because it failed to comply with this Court's remand directive. Under the law-of-the-case doctrine, this Court's determination of an issue in a case binds both the trial court on remand and this Court in subsequent appeals. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). On remand, the trial court may not take action that is inconsistent with the judgment of this Court. *Id*. "[T]he trial court is bound to strictly comply with the law of the case, as established by [this Court], according to its true intent and meaning." *Kasben*, 278 Mich App at 470 (quotation marks and citation omitted). "Thus, a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case." *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997). "This rule applies without regard to the correctness of the prior determination." *Id*. "Where the trial court misapprehends the law to be applied, an abuse of discretion occurs." *Bynum v ESAB Group, Inc*, 467 Mich 280, 283; 651 NW2d 383 (2002).

In remanding the case in the first appeal, this Court explicitly directed "the trial court to make specific findings, consistent with *Smith*, on each attorney whose fees plaintiff sought to recover . . . ." *Augustine I*, unpub op at 3. This Court clearly ordered the trial court to complete a *Smith* analysis to determine the award of attorney fees. In *Smith*, 481 Mich at 537 (opinion by TAYLOR, C.J.), our

Supreme Court outlined very specific steps for determining reasonable attorney fees. First, the trial court should "determine the fee customarily charged in the locality for similar legal services," which shall be made using "reliable surveys or other credible evidence." *Id*. To establish the customarily charged fee, the fee applicant must present "something more than anecdotal statements . . . ." *Id*. at 532. Next, the trial court "should multiply that amount by the reasonable number of hours expended in the case." *Id*. at 537. Finally, the trial court "may consider making adjustments up or down to this base number in light of the other factors listed in *Wood* and MRPC 1.5(a)." *Id*. The trial court "should briefly indicate its view of each of the factors." *Id*.

Given the remand directive, the trial court's award of attorney fees was an abuse of discretion under the law-of-the-case doctrine because the trial court failed to make specific findings consistent with *Smith*. It did not comply with the first step in the *Smith* analysis, which is to determine the fee customarily charged in the locality for similar legal services. Though the trial court discussed the evidence presented regarding the fee customarily charged in the locality for similar legal services, it did not conclude that $500 an hour was the fee customarily charged. As stated in *Smith*, 481 Mich at 531-532 (opinion by TAYLOR, C.J.):

> The reasonable hourly rate represents the fee customarily charged in the locality for similar legal services, which is reflected by the market rate for the attorney's work. The market rate is the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question. We emphasize that the burden is on the fee applicant to produce satisfactory evidence–in addition to the attorney's own affidavits–that the requested rates are in line with those prevailing in the

> community for similar services by lawyers of reasonably comparable skill, experience and reputation. The fees customarily charged in the locality for similar legal services can be established by testimony or empirical data found in surveys and other reliable reports. But we caution that the fee applicant must present something more than anecdotal statements to establish the customary fee for the locality. Both the parties and the trial courts of this state should avail themselves of the most relevant available data. For example, as noted earlier, in this case defendant submitted an article from the Michigan Bar Journal regarding the economic status of attorneys in Michigan. [Quotation marks, citations, and footnote omitted.]

In the instant case, the trial court apparently failed to credit the Michigan Bar Journal article in its calculus of the appropriate hourly rate. The Michigan Bar Journal article not only ranks fees by percentile, it differentiates fee rates on the basis of locality, years of practice, and fields of practice. Further, the record was silent in drawing any comparisons between no-fault-insurance litigation and other complex areas of litigation. The trial court simply accepted the testimony that the area of the law was complex. This is undoubtedly so, however, the trial court excluded from its analysis evidence of other complex areas of litigation that may rival no-fault-insurance litigation in complexity and for which a published fee is established. Also, amazingly absent from the testimony, evidence of anecdotal experiences, and other statements was any substantive evidence that real, actual clients have paid $500 an hour in similar circumstances. Ultimately, the language of the trial court's opinion and order indicates that it simply found that $500 an hour was a *reasonable fee* in a first-party, no-fault-insurance case on the basis of its review of the criteria set forth in *Crawley*, 48 Mich App at 737, and MRPC 1.5. But, importantly, the trial court did not find that $500 an hour was the *fee customarily*

charged in the locality for similar legal services. The trial court then multiplied the rate of $500 an hour by the reasonable number of hours expended, but did not make the determination whether an upward or downward adjustment was appropriate on the basis of the *Wood* and MRPC 1.5(a) factors as our Supreme Court discussed in *Smith*, 481 Mich at 537 (opinion by TAYLOR, C.J.).

Not only did the trial court fail to make specific findings consistent with *Smith* generally, but it also failed to make findings regarding each attorney whose fees plaintiff sought to recover. The trial court's opinion and order indicated, "[o]ther attorneys in the office were involved at various time [sic] and they will be discussed later," but the trial court never addressed them later in the opinion. The only attorneys that the trial court highlighted were Andrews and Liss. In the first award of attorney fees, the trial court discussed the rate of $300 an hour for attorneys Karen Seder and Jay Schrier. *Augustine I*, unpub op at 1. Presumably these were the "other attorneys." But, on remand, the trial court failed to refer to Seder and Schrier, and the trial court curiously did not include the rate of $300 an hour in its attorney-fee calculation.

The law-of-the-case doctrine "applies without regard to the correctness of the prior determination," and this Court is bound by the decision on a question of law made by a panel of this court in the first appeal. *Driver*, 226 Mich App at 565. While plaintiff highlights cases regarding the applicability of *Smith* and the failure to address *Smith*, these references to no-fault-insurance attorney-fee cases, interesting as they may be, are wholly irrelevant. *Smith* is controlling as the law of the case, and the trial court was required to follow this Court's remand directive to make findings consistent

with *Smith*. But, even were it not the law of this case as a result of *Augustine I*, the trial court should have applied *Smith*, because the framework outlined in *Smith* is the proper standard to be applied in cases brought pursuant to MCL 500.3148(1) when a party seeks hourly attorney fees.[2] Thus, the trial court abused its discretion because it misapprehended the law to be applied, the award of attorney fees was inconsistent with our remand directive, and the trial court did not properly apply *Smith*.

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[2] We are not unmindful of this Court's opinion in *Univ Rehab Alliance, Inc v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 691; 760 NW2d 574 (2008), in which this Court rejected the applicability of *Smith* in the context of an award of attorney fees based on an unreasonable delay in paying no-fault-insurance benefits. But that case is distinguishable on its facts. While the plaintiff in *Univ Rehab* and plaintiff in the instant case both retained counsel under a contingent-fee agreement, only the plaintiff in *Univ Rehab* sought to recover an attorney-fee award pursuant to that agreement. Plaintiff here sought recovery of attorney fees on an hourly basis, rejecting her own contingency-fee agreement. *Univ Rehab* rejected the applicability of *Smith* to contingent-fee awards under MCL 500.3148(1), stating that "a reasonable attorney fee is determined by considering the totality of the circumstances. While a contingent fee is neither presumptively reasonable nor presumptively unreasonable, multiplying the reasonable number of hours worked by a reasonable hourly rate is not the preferred method." *Univ Rehab*, 279 Mich App at 700. Certainly, the *Wood* and MRPC 1.5(a) factors as reflected in *Smith* would be considered under the totality of the circumstances in an evaluation of the reasonableness of a fee request based on a contingency-fee agreement. Unlike in *Smith*, the trial court is not required to first establish a base rate in its analysis of the reasonableness of the fee request based on a contingency-fee agreement. Here, plaintiff has rejected her contingency-fee agreement and seeks to have an hourly rate employed in the determination of a reasonable attorney fee. This is a completely different situation than the situation presented in *Univ Rehab*. Plaintiff here sought to recover an award of attorney fees on an hourly basis under MCL 500.3148(1). And while we conclude that the *Smith*, 481 Mich at 537 (opinion by TAYLOR, C.J.), analysis is controlling and should be applied here because it is the law of the case, we similarly conclude that it is the appropriate analysis and should be applied under these and similar circumstances where plaintiffs seek recovery of attorney fees on an hourly basis pursuant to MCL 500.3148(1).

B. ATTORNEY LETTERS IN SUPPORT OF FEE CALCULATION

Defendant also contends that the trial court erred by admitting, over defendant's relevance and hearsay objections, four letters written by attorneys who had litigated catastrophic no-fault-insurance cases in which letters they discussed their hourly fees. " 'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). In *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Dorsey (On Remand)*, 273 Mich App 26, 41-42; 730 NW2d 17 (2006), quoting *People v Katt*, 468 Mich 272, 290-291; 662 NW2d 12 (2003), we stated:

> [I]n order to be admissible under the exception found in MRE 803(24), "a hearsay statement must: (1) demonstrate circumstantial guarantees of trustworthiness equivalent to the categorical exceptions, (2) be relevant to a material fact, (3) be the most probative evidence of that fact reasonably available, and (4) serve the interests of justice by its admission." There is no complete list of factors to consider when determining whether a statement has " ' "particularized guarantees of trustworthiness." ' " [Citation omitted.]

Because there is no complete list of factors to consider when determining whether a statement has particularized guarantees of trustworthiness, the trial court should consider the totality of the circumstances. *Dorsey*, 273 Mich App at 42. Any factors that detract from or add to the reliability of the statement should be taken into consideration. *Id*.

At the hearing, plaintiff argued that the four letters from the attorneys should be admitted under the "catch-all" exception because they were inherently reliable. Instead of articulating the reason that the letters were inherently reliable, plaintiff simply argued:

> [Y]our Honor, you're the gatekeeper of evidence. We do not have a juror [sic]. As the gatekeeper of all evidence in any case, you can make the determination both of reliability and what weight to give any particular document. As you said earlier, this is essentially a bench trial, and I think that you can use the catch-all to make that determination.

The trial court responded, "[a]nd that's exactly what I'm going to do. I will accept these in evidence based upon that, the same way I will not entertain any objection to [defendant's Oakland County courthouse compilation of fees for mediators] . . . because I think they fall in the same class . . . ."

The trial court abused its discretion by admitting the letters into evidence because they were not admissible under MRE 803(6) or (24). The letters were hearsay because they contained statements that were not made by any declarant testifying at the trial or hearing and were offered in evidence to prove the truth of the matter asserted. MRE 801(c). The letters were not admissible under MRE 803(6) because they were not business records. Rather, the letters were nothing more than responses to solicitations by plaintiff's counsel in form and content for use in supporting the demand for an attorney fee of $500 an hour. The attorneys solicited had all referred similar cases to plaintiff's attorneys' law firm. Similarly, the letters were not admissible under MRE 803(24) because they did not satisfy the elements of this exception. At the evidentiary hearing, there was no evidence offered to demonstrate that there existed circumstantial guarantees of trustworthiness equivalent to the categorical exceptions in MRE 803(1) to (23). Considering the totality of the circumstances, the letters were not sufficiently trustworthy because they were prepared exclusively for litigation, they were all favorable to plaintiff, the attorneys who wrote the letters had reason to exaggerate because it might ben-

efit their attorney-fee awards in the future, and there was no independent evidence presented to support the attorneys' claims that their rates were $500 an hour. Despite the fact that the letters tended to establish a material fact, they were not the most probative evidence regarding that fact that the plaintiff could have produced through reasonable efforts.

C. HOURS AND FUNCTION

Defendant also argues that the trial court abused its discretion by assessing the number of hours allowed for the attorney-fee calculation. "The fee applicant bears the burden of supporting its claimed hours with evidentiary support." *Smith*, 481 Mich at 532 (opinion by TAYLOR, C.J.). "The fee applicant must submit detailed billing records, which the court must examine and opposing parties may contest for reasonableness." *Id*.

Because of the meager state of the record, the trial court's finding that plaintiff's attorneys expended 537.5 hours instead of the 595 hours claimed is not subject to meaningful review. The evidentiary hearing established only that plaintiff claimed the amount of hours listed. While the billing summary supported the hours plaintiff's attorneys claimed they expended, the testimony provided in its support was so overwhelmingly lacking in substance and description that any statement of hours spent on a particular task is suspect for accuracy. Notably, plaintiff had the burden of supporting the claim for fees. But plaintiff did not demonstrate by a document, an example, or with specific testimony that a billable item was performed in the amount of time listed or, for that matter, even completed. The billing summary alone did not explain the work that was actually performed by plaintiff's attorneys, as shown by the fact that the

billing summary did not refresh Liss's memory regarding what work he did on a particular entry. While defendant was able to cross-examine plaintiff's attorneys with regard to the time they spent on the case and presented an expert who rendered an opinion on some of the hours expended as they appeared on the face of the document, defendant's cross-examination was substantially limited by the absence of litigation materials.

Our review of the record reveals that plaintiff requested attorney fees in her complaint. Considering the fact that plaintiff's counsel requested attorney fees from the very outset of the underlying claim, we are befuddled by the fact that plaintiff's attorneys claim they had no billing protocol to account for those fees and did not set one up. In today's technological world, it would be but a minute task to set up a spreadsheet detailing the date of the service, the service provided, the time expended on the task, and the amount charged for the specific service that could be updated and summed at any time. Indeed, it would seem a handwritten ledger might even do. Plaintiff's attorneys allege that they are top-tier attorneys with exceptional experience in their field. We do not challenge this point. But we do find it inconceivable that attorneys of this caliber and experience would be unaware of the requirements of *Smith* and would not keep adequate records in support of their claims for attorney fees, especially considering the amount of time and talent expended on this case. As a result of these deficiencies, plaintiff did not and could not point to any documentary support for the work performed and the amount of time spent on any task in the absence of counsel's file. Consequently, counsel for defendant was effectively handcuffed by the re-

fusal of discovery and plaintiff's strategy of not bringing her counsel's file to the evidentiary hearing.

On the basis of the evidence presented, the trial court made the finding that the billings were unreasonable in certain areas. Indeed, we afford great deference to the special opportunity of the trial court to judge the credibility of the witnesses at the evidentiary hearing. *Lumley*, 215 Mich App at 135. But because so many areas went unexplored and remained undocumented after the hearing, we must conclude that the trial court's finding of the hours expended by plaintiff's attorneys was clearly erroneous. *Hill*, 276 Mich App at 308. We question the value of an evidentiary hearing where the evidence reviewed was restricted and the areas explored so narrow. A hearing on remand will necessarily require expansion. Because we have found that the trial court clearly erred in its assessment of the number of hours allowed for the attorney-fee calculation, we conclude that the trial court's calculation of attorney fees on this record was erroneous. See *id.*

D. *SMITH*, *WOOD*, AND MRPC 1.5(a) FACTORS

The *Wood* factors and the MRPC 1.5(a) factors used for determining attorney-fee awards overlap and are both set forth in *Smith*, 481 Mich at 530-531 (opinion by TAYLOR, C.J.). According to *Smith*, the six factors to be considered in determining a reasonable attorney fee that were set out in *Wood* are

> "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client." [*Smith*, 481 Mich at 529 (opinion by TAYLOR, C.J.), quoting *Wood*, 413 Mich at 588 (citations omitted).]

The *Smith* Court also set out the eight factors listed in Rule 1.5(a) of the Michigan Rules of Professional Conduct to be considered in determining a reasonable attorney fee, as follows:

> "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> "(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> "(3) the fee customarily charged in the locality for similar legal services;
>
> "(4) the amount involved and the results obtained;
>
> "(5) the time limitations imposed by the client or by the circumstances;
>
> "(6) the nature and length of the professional relationship with the client;
>
> "(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> "(8) whether the fee is fixed or contingent." [*Smith*, 481 Mich at 530 (opinion by TAYLOR, C.J.), quoting MRPC 1.5(a).]

In *Smith*, the Supreme Court endeavored to "fine-tune" the multifaceted and intersecting approach for determining fee awards set out in both *Wood* and MRPC 1.5(a). *Smith*, 481 Mich at 530 (opinion by TAYLOR, C.J.). In order to promote greater consistency in attorney-fee awards, *Smith* directed that a trial court should begin its analysis by first applying factor 3 under MRPC 1.5(a) ("the fee customarily charged in the locality for similar legal services") and then multiplying that number by the reasonable number of hours expended as determined by factor 1 under MRPC 1.5(a) and *Wood* factor 2 ("the reasonable number of hours expended in the case"), in that order. *Smith*, 481 Mich at 530-531

(opinion by TAYLOR, C.J.). And then, our Supreme Court directed that the trial court should consider the remaining *Wood* and MRPC factors. *Id*. at 531. Our Supreme Court reminded trial courts to discuss the *Wood* and MRPC 1.5(a) factors in a manner sufficient "to aid appellate review . . . ." *Id*.

A meaningful application of the factors is more than a recitation of those factors prefaced by a statement such as "after careful review of the criteria the ultimate finding is as follows . . . ." Similarly, an analysis is not sufficient if it consists merely of the recitation of the factors followed by a conclusory statement that "the trial court has considered the factors and holds as follows . . ." without clearly setting forth a substantive analysis of the factors on the record. The trial court should consider the interplay between the factors and how they relate to the client, the case, and even the larger legal community.

Here, the trial court acknowledged the fee-consideration factors, but provided little analysis or insight into the application of those factors to the client or the case. By way of example, the trial court noted that the fee agreement was contingent. MRPC 1.5(a)(8). Aside from that observation, the trial court presented no other information and did not explain the import of the fact that the fee agreement was contingent in the context of its determination of fees. It might be an insightful exercise for a trial court to look at what the fee would have been on such a basis and compare that to the fee actually being sought.

The trial court also commented that the attorney achieved "good" results from this litigation as well as from a prior dispute involving the same insurance carrier. In its discussion of *Wood* factor 3 ("the amount in question and the results achieved"), in assessing

attorney fees, this Court has stated that a reasonable fee is proportionate to the results achieved. The trial court may in its discretion adjust fees upward or downward. *Schellenberg v Rochester, Mich, Elks Lodge No 2225*, 228 Mich App 20, 44-45; 577 NW2d 163 (1998). Rather than making a blanket announcement that the result of the litigation was "good," the trial court was charged with evaluating the results obtained in the context of the claim presented. For example, in the instant case, plaintiff claimed $929,000 in attendant-care services at a rate of $25 an hour. The jury awarded $371,700 for those services. At $929,000 and $25 an hour, the total hours claimed would amount to 37,160 hours. The amount awarded, $371,700, when compared to 37,160 hours produces an effective hourly rate of just over $10 an hour. At the time of the termination of benefits when plaintiff refused to provide an update regarding the need for and the amount of the attendant-care services required, defendant was paying $18 an hour for attendant-care services. While this mathematical review may not necessarily reflect the jury's analysis of the case, the jury may have determined a higher rate for services, but fewer hours, such an analysis may be beneficial when determining an attorney-fee rate with an upward or downward departure.

The trial court also commented that counsel had a long relationship with the client, having represented her in a previous attendant-care dispute with the same carrier. The nature and length of the professional relationship with the client is considered in both MRPC 1.5(a)(6) and *Wood* factor 6. *Smith*, 481 Mich at 529-530 (opinion by TAYLOR, C.J.). A long and storied professional relationship has many implications. While we do not endeavor to paint with a broad brush, practicality compels us to point out that knowledge gained in

previous litigation involving the same attorney, client, and opposing insurance carrier may result in certain efficiencies. Further, it is not uncommon in the practice of law to provide discounted fees to repeat clients for these same reasons. Fairness dictates that under these and similar circumstances, the trial court may want to consider whether any services performed were unnecessarily duplicative.

When a trial court entertains a discussion of attorney-fee factors and analyzes those factors by way of a searching inquiry into the record evidence, the parties benefit by receiving a true and fair attorney-fee award. Additionally, in the event of a challenge, the appellate process will be enhanced because we will have the opportunity for meaningful review. Our discussion is not exhaustive, and is only provided as a representative method that trial court's may consider in performing attorney-fee analysis in accordance with our Supreme Court's directives in *Smith*, 481 Mich at 530-531 (opinion by TAYLOR, C.J.).

IV. CONCLUSION

We conclude that the trial court abused its discretion by failing to provide defendant limited discovery in order to allow a meaningful examination of the issue of an award of attorney fees pursuant to MCL 500.3148(1). The trial court also abused its discretion because it misapprehended the law to be applied and the award of attorney fees was inconsistent with our remand directive. The trial court abused its discretion by admitting the four letters by the attorneys into evidence because they were neither admissible under MRE 803(6) nor admissible under 803(24). And, the trial court clearly erred in its award of attorney fees

because the assessment of the work performed and the number of hours expended both fail for want of evidentiary support.

We vacate the trial court's award of attorney fees and remand this case to the trial court for rehearing and redetermination in accordance with this opinion. We direct the trial court to make specific findings, consistent with *Smith*, for each attorney whose fees plaintiff sought to recover. We refer this matter, on remand, to the Honorable Nanci J. Grant, the trial judge assigned in this matter, rather than a visiting judge.

Defendant may tax costs as the prevailing party pursuant to MCR 7.219. We do not retain jurisdiction.

CAVANAGH and STEPHENS, JJ., concurred with DONOFRIO, P.J.

PEOPLE v JAMISON

Docket No. 297154. Submitted April 13, 2011, at Detroit. Decided April 26, 2011, at 9:15 a.m. Leave to appeal denied, 490 Mich 934.

Pecola M. Jamison was convicted by an Oakland Circuit Court jury of assault with intent to do great bodily harm less than murder and possession of a firearm during the commission of a felony. The court, Rudy J. Nichols, J., sentenced defendant to a prison term of 1 to 10 years for the assault conviction and the mandatory 2-year term for felony-firearm, to be served consecutively. When scoring the sentencing guidelines, the court found that 10 points were properly assessed for offense variable (OV) 10, MCL 777.41 (victim vulnerability), because defendant and the victim had a domestic relationship. Defendant appealed.

The Court of Appeals *held*:

MCL 777.41(1)(b) requires the assessment of 10 points for OV 10 when the defendant exploited a domestic relationship. To qualify as a "domestic relationship," there must be a familial or cohabitating relationship. While it is undisputed that defendant and the victim had been involved in a dating relationship in the past and the victim had been allowed to keep some clothing at the defendant's house, they did not share a domicile and were not related. Thus, their relationship did not display the characteristics needed to elevate their ordinary relationship to a domestic relationship. Accordingly, the trial court erred by assessing 10 points for OV 10. Resentencing was required because the minimum sentence imposed exceeded the guidelines recommendation for defendant's properly calculated offense variable level.

Sentence vacated and case remanded for resentencing.

CRIMINAL LAW — SENTENCING GUIDELINES — OFFENSE VARIABLE 10 — DOMESTIC RELATIONSHIPS.

Offense variable 10 of the sentencing guidelines relates to the exploitation of vulnerable victims and requires an assessment of 10 points when a defendant exploits a domestic relationship; to qualify as a "domestic relationship," there must be a familial or cohabitating relationship; a current or former dating relationship

> alone, without these additional characteristics, is not enough warrant the assessment of 10 points for this variable (MCL 777.40[1][6]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, and *Thomas R. Grden*, Assistant Prosecuting Attorney, for the people.

Gerald Ferry for defendant.

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

PER CURIAM. A jury convicted defendant, Pecola Jamison, of assault with intent to do great bodily harm less than murder[1] and felony-firearm.[2] The trial court sentenced Jamison to a prison term of 1 to 10 years for assault with intent to do great bodily harm less than murder and the mandatory consecutive 2-year prison term for felony firearm. Jamison now appeals as of right. We vacate Jamison's sentence and remand to the trial court for resentencing.

I. FACTS

Jamison and her boyfriend, Alexis Jenkins, dated from sometime in 2006 to the spring or early summer of 2007. In the winter of 2007, they engaged in consensual sexual relations, but Jenkins chose to end the relationship in early January 2008. Jenkins testified that Jamison was not happy about the breakup and that he changed his telephone number so that Jamison could not contact him. After that, Jenkins saw Jamison at a

[1] MCL 750.84.

[2] MCL 750.227b.

social gathering in March 2008 and then several times in traffic before a May 3, 2009, encounter.

Jenkins testified that on May 3, 2009, at approximately 4:00 p.m., he made eye contact with Jamison while they passed each other in traffic. Shortly thereafter, Jenkins noticed Jamison's vehicle in his rearview mirror. He testified that she was driving the vehicle erratically, swerving back and forth in the lane. Jenkins testified that Jamison's vehicle was so close to his that he had to either speed up or get out of her way to avoid a collision.

Jenkins testified that he then pulled over on a side street. He thought that Jamison might have wanted to talk to him. Jenkins testified that Jamison pulled her vehicle alongside his and that the vehicles were separated by about three feet. Before Jenkins had the opportunity to speak to Jamison, she pulled out a pistol, pointed it at his face, and fired. Jenkins drove away and went to the hospital, thinking that he might have been shot. After being examined by hospital staff, he was reassured that he was not injured. There was, however, a large bullet hole in the driver's side door. Police officers later removed a large caliber bullet from the driver's seat of Jenkins's vehicle. The next day, Jenkins filed for a personal protection order against Jamison in the Oakland Circuit Court.

A jury convicted Jamison of assault with intent to do great bodily harm less than murder and felony-firearm. The sentencing information report indicated the assessment of 10 points for offense variable (OV) 10 under the sentencing guidelines. Defense counsel objected to the OV 10 score, asserting that Jenkins and Jamison did not have the requisite domestic relationship to justify a score of 10 points. The trial court overruled the objec-

tion and sentenced Jamison on the basis of a total OV score of 40 points. Jamison now appeals.

II. OFFENSE VARIABLE 10

A. STANDARD OF REVIEW

A trial court has discretion to determine the number of points assigned for a particular offense variable, "provided that evidence of record adequately supports a particular score."[3] This Court will uphold a sentencing court's scoring decision if it is supported by record evidence.[4] However, we review de novo questions of law involving the proper construction or application of the statutory sentencing guidelines.[5] When a sentence is based on a scoring error, resentencing is required.[6]

B. LEGAL STANDARDS

This Court must affirm a sentence that is within the legislative guidelines range unless the trial court erred in scoring the sentencing guidelines or relied on inaccurate information in determining the defendant's sentence.[7] The facts the trial court relied on when assessing points for a particular variable under the sentencing guidelines need not have been determined by the jury when rendering its verdict.[8] "Rather, all that is required is that evidence exists that is adequate to support a particular score."[9] This Court will uphold a sentencing court's

[3] *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

[4] *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003).

[5] *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001).

[6] *People v Jackson*, 487 Mich 783, 792; 790 NW2d 340 (2010).

[7] MCL 769.34(10).

[8] *People v Williams*, 191 Mich App 269, 276; 477 NW2d 877 (1991).

[9] *Id*.

scoring decision if there is any record evidence to support it.[10]

OV 10 deals with the exploitation of vulnerable victims.[11] A sentencing court properly assesses 10 points for this variable if "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or *a domestic relationship*, or the offender abused his or her authority status."[12]

C. APPLYING THE STANDARDS

Jamison argues that there was no domestic relationship between her and Jenkins because the two had never shared a domicile, nor had they engaged in a familial or cohabitating relationship. Accordingly, Jamison contends that had OV 10 been properly scored, her total OV score would have been 30 points. Because Jamison's prior record variable score was 0, this would have lowered her minimum sentence range to 0 to 11 months.[13] Thus, she argues that her one-year minimum sentence was in excess of the guidelines range, entitling her to resentencing.[14]

In construing the statutory sentencing guidelines, courts must discern and give effect to the intent of the Legislature.[15] The process begins with an examination of the plain language of the statute.[16] When that language is unambiguous, Courts must "presume that the Legislature intended the meaning clearly

[10] *Spanke*, 254 Mich App at 647.

[11] MCL 777.40.

[12] MCL 777.40(1)(b) (emphasis added).

[13] See MCL 777.65.

[14] See *Jackson*, 487 Mich at 792.

[15] *People v Morey*, 461 Mich 325, 329-330; 603 NW2d 250 (1999).

[16] *Id.* at 330.

expressed—no further judicial construction is required or permitted, and the statute must be enforced as written."[17]

The sentencing guidelines do not define "domestic" or "domestic relationship." And this Court has not published an opinion addressing the meaning of the term "domestic relationship" in the context of OV 10. This Court has, however, interpreted the term in unpublished opinions, albeit with divergent conclusions. While these opinions are not binding precedent on this Court, we may consider them as instructive or persuasive.[18]

In *People v Davis*, a panel of this Court turned to the domestic assault statute for guidance on interpretation of the phrase "domestic relationship" as used in OV 10.[19] Under the domestic assault statute, a person is guilty of domestic assault if the person assaults "his or her spouse or former spouse, *an individual with whom he or she has or has had a dating relationship*, an individual with whom he or she has had a child in common, or a resident or former resident of his or her household."[20] "As used in this section, 'dating relationship' means frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context."[21] The *Davis* panel held that because the victim and the defendant engaged in con-

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[17] *Id.*

[18] MCR 7.215(C)(1); *Slater v Ann arbor Pub Sch Bd of Ed*, 250 Mich App 419, 432; 648 NW2d 205 (2002).

[19] *People v Davis*, unpublished opinion per curiam of the Court of Appeals, issued April 14, 2009 (Docket No. 280547), p 5.

[20] MCL 750.81(2) (emphasis added).

[21] MCL 750.81(6).

sensual sexual relations; the defendant often spent the night at the victim's apartment, keeping personal belongings there; and the defendant spent time with the victim's family, taking care of the victim's son when the victim was away, the pair maintained a domestic relationship.[22]

Using the *Davis* approach, we would conclude that Jamison formerly maintained a dating relationship with Jenkins because they *had* a previous dating relationship, after the relationship ended they had infrequent consensual sexual relations, and Jenkins kept some clothing at Jamison's residence. Therefore, if we were to adopt this interpretation, Jamison and Jenkins would have had a domestic relationship that merits a score of 10 points under OV 10. However, we find it significant that the defendant in *Davis* was convicted of domestic assault. This case is distinguishable in that the record here reflects that Jamison was convicted of assault with intent to do great bodily harm less than murder and, further, the prosecution did not even charge Jamison with the crime of domestic assault. Additionally, it would seem that under the *Davis* approach, neither the brevity of the relationship's duration nor its distant temporal nature is a limiting factor to designate a relationship as "domestic." Thus, we find application of the approach questionable here, in which Jamison and Jenkins had a fairly brief relationship that ended more than a year before the shooting incident.

In contrast to the *Davis* approach, several other panels of this Court have used the lay dictionary definition of "domestic" and concluded that there must be a "familial" or "cohabitating" relationship to qualify as

[22] *Davis*, unpub op at 5.

a domestic relationship.[23] As explained in these decisions, if a statute does not provide a definition for a particular term, courts must "give the term its plain and ordinary meaning."[24] "When determining the common, ordinary meaning of a word or phrase, consulting a dictionary is appropriate."[25] *Random House Webster's College Dictionary* (1997) defines "domestic" as "1. of or pertaining to the home, family, or household affairs. 2. devoted to home life." Under these definitions, a familial or cohabitating relationship characterizes a domestic relationship.

We do not believe that simply *any* type of dating relationship, past or present, meets the requirements of OV 10. If this were the case, the Legislature would merely have said "relationship" or "dating relationship" rather than "domestic relationship."[26] Thus, to qualify as a "domestic relationship," there must be a familial or cohabitating relationship. Further, contrary to the *Davis* analysis that adopted the domestic assault definition of "domestic relationship," we "cannot assume that the Legislature inadvertently omitted from

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[23] See *People v Robbins*, unpublished opinion per curiam of the Court of Appeals, issued February 19, 2009 (Docket No. 280080); *People v Patrowic*, unpublished opinion per curiam of the Court of Appeals, issued March 6, 2007 (Docket No. 267864); *People v Counts*, unpublished opinion per curiam of the Court of Appeals, issued May 20, 2004 (Docket No. 246717); cf. *People v Montgomery*, unpublished opinion per curiam of the Court of Appeals, issued May 22, 2007 (Docket No. 269201) (relying on both the domestic assault statute and dictionary definitions to conclude that the defendant had a domestic, or familial, relationship with the victim because they had a child together in a case in which the defendant was convicted of domestic violence, MCL 750.81(2), and assessed 10 points under OV 10).

[24] *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 522; 676 NW2d 207 (2004).

[25] *Id.*

[26] See *Counts*, unpub op at 3.

one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there."[27] Accordingly, we are not inclined to adopt the *Davis* panel's interpretation, as it implies a potentially overbroad application based on words that are not in the statute.

Thus, we conclude that Jenkins and Jamison did not have the requisite domestic relationship to warrant assessing 10 points for OV 10. The pair did not share a domicile, and they were not related. The prosecution nevertheless argues that such a relationship did exist, noting that at some point in the past Jenkins was allowed to keep various articles of clothing at Jamison's house. However, merely being permitted to keep *some* of one's belongings at a person's home does not establish a cohabitating relationship.[28] Therefore, Jamison and Jenkins' relationship did not display the characteristics needed to elevate their ordinary relationship to "domestic relationship" status.[29] Accordingly, the trial court erred by assessing 10 points for OV 10.

Jamison had a prior record variable level of zero points. Originally, her presentence investigation report showed a total OV score of 50 points. However, at sentencing, the parties stipulated that OV 17, for which 10 points had been assessed, should have received a score of zero points. For a class D offense,[30] an OV level of 40 points results in a recommended minimum sentence range of zero to 17 months.[31] Had points not been

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[27] *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993).

[28] See *Counts*, unpub op at 3.

[29] Because we conclude that Jamison and Jenkins did not have a domestic relationship, we refrain from determining the extent, if any, that it was exploited.

[30] See MCL 777.16d.

[31] MCL 777.65.

assessed for OV 10, Jamison's offense variable level would have been 30 points, and her minimum sentence range would have been zero to 11 months.[32] Because her minimum sentence of 1 year is in excess of the guidelines range, she is entitled to resentencing.[33]

We vacate the trial court's sentence for assault with intent to do great bodily harm less than murder and remand this matter for resentencing consistent with this opinion. We do not retain jurisdiction.

BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ., concurred.

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[32] See *id.*

[33] See *Jackson*, 487 Mich at 792.

LICAVOLI v LICAVOLI

Docket No. 295901. Submitted April 13, 2011, at Lansing. Decided April 26, 2011, at 9:20 a.m.

James Licavoli (plaintiff) obtained a divorce from Konnie Licavoli (defendant) in the Bay Circuit Court. The divorce judgment required plaintiff to pay defendant child support and alimony and awarded plaintiff the home he had acquired in Bay City during the divorce proceedings. Plaintiff later remarried and deeded the Bay City home to himself and his new wife as tenants by the entirety. Subsequently, plaintiff stopped making child support and alimony payments. Defendant moved to enforce the divorce judgment. The court, William J. Caprathe, J., ultimately ordered the attachment of the Bay City home to satisfy the divorce judgment and also ordered that 50 percent of plaintiff's income be withheld to pay his spousal support obligation. Plaintiff appealed.

The Court of Appeals *held*:

1. MCL 600.2807(1) provides that a judgment lien does not attach to an interest in real property owned as tenants by the entirety unless the underlying judgment is entered against both spouses. This is a clear legislative mandate protecting property owned as tenants by the entirety from judgment liens intended to satisfy a debt against only one spouse. As a result, notwithstanding the broad discretion given to trial courts to do equity regarding the disposition of property in divorce cases, property owned as tenants by the entirety cannot be attached to satisfy a debt arising from the divorce judgment related to a previous marriage. The trial court erred by ordering the attachment of the property.

2. Because defendant failed to comply with court orders to pay child support and alimony for a significant length of time, the trial court's order that 50 percent of plaintiff's income be withheld to satisfy his support obligation was appropriate. The percentage to be withheld did not exceed the federal withholding limits set forth in 15 USC 1673(b).

Affirmed in part, reversed in part, and remanded for further proceedings.

DIVORCE — DELINQUENT SUPPORT OBLIGATIONS — ATTACHMENT OF PROPERTY — TENANTS BY THE ENTIRETY.

A judgment lien does not attach to an interest in real property owned as tenants by the entirety unless the underlying judgment is entered against both spouses; notwithstanding the broad discretion given to trial courts to do equity in divorce cases, property owned as tenants by the entirety cannot be attached to satisfy a debt arising from a divorce judgment related to a previous marriage (MCL 600.2807[1]).

Smith & Brooker, P.C. (by *George B. Mullison*), for plaintiff.

Hauffe & Hauffe, P.C. (by *John A. Picard* and *Irwin F. Hauffe, II*), for defendant.

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

SAAD, J. Plaintiff appeals the trial court's order that granted defendant's motion to attach assets jointly owned by plaintiff and his current wife. Plaintiff also appeals the trial court's spousal support income withholding order that withholds 50 percent of plaintiff's earnings. For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEEDINGS

The parties were divorced pursuant to a judgment entered on September 13, 2005. The divorce judgment contained a provision setting child support and spousal support/alimony for a specified period. During the divorce proceedings, plaintiff acquired a home at 413 South Madison in Bay City, and the divorce judgment awarded the home to plaintiff. Plaintiff remarried in 2005 and, thereafter, recorded a quitclaim deed, deeding the South Madison house jointly to himself and his new wife.

When the divorce judgment was entered, plaintiff was the owner and operator of Bay County Abstract, Inc., which he was also awarded in the divorce judgment. As a result of a downturn in the housing market, Bay County Abstract ceased operations, plaintiff filed for Chapter 7 bankruptcy and stopped making alimony and child support payments. Defendant then moved to enforce the divorce judgment. The trial court entered orders on June 22, 2007, and September 25, 2007, ordering the release of funds from plaintiff's individual retirement accounts to pay child support and alimony that plaintiff owed defendant. Plaintiff remained delinquent in his payments to defendant, and she filed another motion to enforce the judgment. In an April 3, 2009, order, the trial court directed the liquidation of plaintiff's 401(k) account and ordered that the proceeds be paid to defendant. The court later issued a written opinion and lien ordering the attachment of the South Madison house in order to satisfy the divorce judgment. The court also ordered that 50 percent of plaintiff's current income be withheld to pay his spousal support obligation.

II. ANALYSIS

A. SOUTH MADISON HOME

Plaintiff argues that the trial court erred when it ordered the attachment of the South Madison home jointly owned by plaintiff and his new wife as tenants by the entirety in order to provide for payments to defendant as spousal support. As this Court explained in *Reed v Reed*, 265 Mich App 131, 150; 693 NW2d 825 (2005),

> [i]n granting a divorce judgment, the trial court must make findings of fact and dispositional rulings. *Sands v Sands*,

> 442 Mich 30, 34; 497 NW2d 493 (1993). The trial court's factual findings will not be reversed unless they are clearly erroneous, i.e., if this Court is left with the definite and firm conviction that a mistake has been made. *Id.*; *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). If this Court upholds the trial court's findings of fact, it must then decide whether the dispositional ruling was fair and equitable in light of those facts. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992). The trial court's dispositional ruling is discretionary and will be affirmed unless this Court is left with the firm conviction that it was inequitable. *Id.* at 152; *Draggoo, supra* at 429-430.

This Court reviews de novo issues of statutory interpretation. *Vyletel-Rivard v Rivard*, 286 Mich App 13, 20; 777 NW2d 722 (2009). The goal of statutory interpretation is to give effect to the intent of the Legislature. *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008). If statutory language is unambiguous, the Legislature is presumed to have intended the plain meaning of the statute. *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 591; 735 NW2d 644 (2007). An unambiguous statute must be enforced as written. *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007).

In ordering attachment of the South Madison house, the trial court relied on *Wood v Savage*, 2 Doug 316 (Mich, 1846), and held that "if a person is indebted at the time the transfer is made that asset remains available for use by [defendant] despite it being held as Tenants by the Entirety." However, *Wood* predates the applicable statute, MCL 600.2807(1), which provides, "A judgment lien does not attach to an interest in real property owned as tenants by the entirety unless the underlying judgment is entered against both the husband and wife." As this Court explained in *Walters v Leech*, 279 Mich App 707, 711-712; 761 NW2d 143 (2008),

> [our] longstanding common law provides that, when a deed is conveyed to a husband and wife, the property is held as a tenancy by the entirety. *Morgan v Cincinnati Ins Co*, 411 Mich 267, 284; 307 NW2d 53 (1981) (opinion by FITZGERALD, J.). In a tenancy by the entirety, the husband and wife are considered one person in the law. *Id.* They cannot take the property in halves. *Id*. Rather, the property is seised by the entirety. *Id.* The consequence is that neither the husband nor the wife can dispose of the property without the assent of the other and the whole property must remain to the survivor. *Id.* Therefore, at the heart of a tenancy by the entirety is the right of survivorship, meaning that when one party dies, the other party automatically owns the whole property. 1 Cameron, Michigan Real Property Law (3d ed), § 9.14, p 328.
>
> As a general proposition under the common law, property that is held as a tenancy by the entirety is not liable for the individual debts of either party. *Id.* at § 9.16, p 330; *Rossman v Hutchinson*, 289 Mich 577, 588; 286 NW 835 (1939) (stating that "[e]ntireties property is liable to execution for joint debts of husband and wife"). Our Legislature codified this proposition with respect to judgment liens in MCL 600.2807. MCL 600.2807 became effective September 1, 2004, and provides that "[a] judgment lien does not attach to an interest in real property owned as tenants by the entirety unless the underlying judgment is entered against both the husband and wife." MCL 600.2807(1).

Therefore, though Michigan law grants the trial court in a divorce case broad discretion to do equity regarding the disposition of property, within the outline of those factors articulated by our Supreme Court in *Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992), Michigan's Legislature made it clear in MCL 600.2807 that a judgment lien does not attach to property owned as tenants by the entirety unless the judgment is against both the husband and wife. The underlying judgment here is the divorce judgment, which was not

entered against plaintiff and his current wife. Accordingly, even the broad discretion afforded the court to make dispositional rulings is circumscribed by the clear legislative mandate to protect property held as a tenancy by the entirety from lien attachments unless the underlying debt is the debt of both husband and wife. Therefore, the property here could not be attached by judgment lien to satisfy the divorce judgment, and we reverse the trial court's order granting defendant's motion on this issue.[1]

B. INCOME WITHHOLDING

We affirm the trial court's income withholding order in the amount of 50 percent of plaintiff's salary. Under the Federal Consumer Credit Protection Act, specifically 15 USC 1673(b), the federal limit on withholding is usually 50 percent of disposable income, but may be increased to as much as 65 percent. Though plaintiff may have experienced financial troubles that made it difficult for him to meet his obligations, he failed to comply with the court's orders to pay child support or spousal support for a significant length of time and, therefore, we affirm the trial court's order.

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

METER, P.J., and WILDER, J., concurred with SAAD, J.

[1] In light of this holding, we need not decide whether the amount of the lien was correct.

BARR v FARM BUREAU GENERAL INSURANCE COMPANY

Docket No. 293737. Submitted February 4, 2011, at Detroit. Decided February 15, 2011. Approved for publication April 26, 2011, at 9:25 a.m.

Terrance Barr brought an action in the Genesee Circuit Court against Farm Bureau General Insurance Company seeking damages for breach of contract. The suit arose as a result of a residential fire at a home insured under a policy issued by defendant. Despite tests by the state police that were negative for accelerants, defendant maintained that plaintiff was involved in setting the fire and offered the testimony of an expert witness to that effect. The court, Archie L. Hayman, J., admitted the expert's testimony, and the jury returned a verdict of no cause of action. Plaintiff appealed.

The Court of Appeals *held*:

Plaintiff challenged the methodology used by defendant's expert to reach his conclusions. Plaintiff argued that the expert's methodology deviated from guidelines issued by the National Fire Protection Association that stated that an investigator should not rely solely on visual interpretation of an irregular fire pattern when classifying a fire as incendiary. The expert witness, however, justified the deviation between his methodology and that recommended by the guidelines. In addition, the expert's testimony demonstrated that his opinion regarding the origin of the fire was not based solely on visual interpretation. Thus, the trial court properly performed its gatekeeper function in assessing the proposed evidence and did not abuse its discretion by admitting the expert's testimony.

Affirmed.

Richard E. Shaw for plaintiff.

Yeager, Davison & Day, P.C. (by *Phillip K. Yeager*), for defendant.

Before: WHITBECK, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM. Plaintiff appeals as of right the trial court's order of no cause of action entered pursuant to a jury verdict on plaintiff's action for fire insurance proceeds. We affirm.

Plaintiff brought this suit in August 2007, seeking damages for breach of contract. In February 2007, plaintiff, his girlfriend, and his friend escaped from a fire in plaintiff's home in Flint. Plaintiff had purchased the home and made payments to the mortgage company until the previous spring. The home was insured under a homeowner's and fire insurance policy with defendant. The home was in foreclosure, and plaintiff did not anticipate being able to pay the redemption amount because he had been out of work for some time and owed large sums for child support. After the fire, plaintiff's friend lived in the damaged home for several weeks. A sample taken at the scene by the Flint police was analyzed by the state police and tested negative for accelerants. Defendant nonetheless denied plaintiff's claim, suspecting that plaintiff had a "guilty connection" to the fire. After a four-day trial, the jury found this to be true and returned a verdict of no cause of action.

The only issue on appeal is the admissibility of the testimony of Lewis Draper. Draper was called by defendant as an expert in the cause and origin of fires. On the morning of trial, plaintiff filed a motion in limine to exclude Draper's testimony. After reviewing Draper's deposition taken five days previously, the trial court concluded that the testimony was admissible under MRE 702 and *Daubert v Merrell Dow Pharm, Inc*, 509 US 579, 593-594; 113 S Ct 2786; 125 L Ed 2d 469 (1993). MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to

> understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MCL 600.2955(1) provides additional standards that the court must examine in determining the admissibility of expert testimony.

On appeal, we review a trial court's ruling admitting or excluding expert testimony for an abuse of discretion. *Mulholland v DEC Int'l Corp*, 432 Mich 395, 402; 443 NW2d 340 (1989); *Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005). An abuse of discretion occurs when the court's ruling is outside the range of reasonable and principled outcomes. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). Under MRE 103(a)(1), error may not be predicated on a ruling admitting or excluding evidence unless a substantial right is affected. A close evidentiary ruling ordinarily cannot be an abuse of discretion. *Morales v State Farm Mut Auto Ins Co*, 279 Mich App 720, 729; 761 NW2d 454 (2008); *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003).

We conclude that the trial court did not abuse its discretion by admitting Draper's testimony. A former detective sergeant in the Michigan State Police Fire Marshal Division, Draper had investigated about 2000 fires and testified as an expert 115 times. Plaintiff's main criticism was of Draper's methodology, which allegedly deviated from a set of guidelines known as NFPA 921, which was issued by the National Fire Protection Association. This guide states that samples should be taken to confirm the presence of an ignitable

liquid and that the investigator should not rely solely on visual interpretation of an irregular fire pattern to term a fire incendiary because such patterns may have other causes. NFPA 921, § 6.17.8.2.2 to 6.17.8.2.5. However, NFPA 921 also states in § 1.3 that deviations from its procedures are not necessarily wrong, but need to be justified.

Draper's testimony showed that he did not rely on visual interpretation alone. He used the scientific method, consistently with NFPA 921, to examine the structure and pinpoint the origin of the fire as a rear bedroom occupied by plaintiff and his girlfriend. Draper eliminated other causes, such as the electrical system. He did not take samples because he was not called to investigate until three weeks after the fire. In the meantime, the scene had been disturbed by public safety officials, an insurance adjuster, plaintiff, and plaintiff's friend who continued to live there. Draper testified that the fire burned out of the bedroom and into the hallway, charring through several layers of flooring and melting an aluminum strip between the bedroom and the hall. Temperatures of 1200 degrees Fahrenheit would have been required to melt the aluminum strip in this manner, and this would not have occurred in the absence of an accelerant. Further, Draper testified that plaintiff's only suggestion regarding the cause of the fire, the tipping of a candle to ignite the carpet, was very unlikely and would not have accounted for the damage observed. Draper testified that several situations mentioned in NFPA 921 in which burn patterns might "mimic" those of ignitable liquids, such as "flashover" or whole-room involvement, were not present here.

The trial court did not abuse its discretion by admitting Draper's testimony. The court properly applied the

tests of reliability in MRE 702, MCL 600.2955, and *Daubert* and adequately performed its "gatekeeper" function in assessing the proposed expert testimony. Draper explained how and why his methodology deviated from NFPA 921, and the court had sufficient basis to determine that his opinion testimony was admissible under MRE 702.

Affirmed.

WHITBECK, P.J., and O'CONNELL and WILDER, JJ., concurred.

FLORENCE CEMENT COMPANY v VETTRAINO

Docket No. 295090. Submitted February 3, 2011, at Detroit. Decided May 3, 2011, at 9:00 a.m. Amended, 292 Mich App 801 (2011).

Florence Cement Company brought an action in the Macomb Circuit Court against Antonio Vettraino, Dante Bencivenga, A.V. Investment Corporation, Ernest J. Essad, Jr., Shelby Property Investors, L.L.C., and others, seeking payment for work performed pursuant to a construction contract between Florence and Shelby. Shelby's founding members were Essad, Bencivenga, and Vettraino, however, A.V. Investment later replaced Vettraino as a member. Florence argued that Shelby had made improper distributions to its members while insolvent and sought, in part, to have the corporate veil pierced. The trial court, Edward Servitto, Jr., J., entered a consent judgment in favor of Florence and against Shelby. The remaining relevant defendants at trial were Essad, Bencivenga, Vettraino, and A.V. Investment (hereafter defendants). Florence sought to have the corporate veil of Shelby pierced in order to require that all the distributions made by Shelby while insolvent be refunded to Shelby, so that Shelby's obligation to Florence under the consent judgment could be satisfied. Defendants moved for a directed verdict. The trial court entered a judgment of no cause of action against Vettraino and A.V. Investment and judgments in the amount of $19,000 each against Essad and Bencivenga. Florence appealed the judgment of no cause of action and the judgments against Essad and Bencivenga. Essad cross-appealed the judgment against him.

The Court of Appeals *held*:

1. The rules regarding piercing a corporate veil are applicable in determining whether to pierce the corporate veil of a limited-liability company. In order for a corporate veil to be pierced, the corporate entity must be a mere instrumentality of another individual or entity, must have been used to commit a wrong or fraud, and there must have been an unjust injury or loss to the plaintiff.

2. Defendants used Shelby as a mere instrumentality for themselves as individuals and did not treat Shelby as an entity separate from themselves. Defendants used Shelby to commit a

wrong or fraud. Florence suffered a significant loss as a result of defendants' treating Shelby as a mere instrumentality of themselves and deliberately undercapitalizing Shelby. Florence satisfied all the elements for piercing the corporate veil of Shelby. The trial court clearly erred by concluding otherwise, therefore, reversal is warranted.

3. Shelby made several distributions to defendants while it was insolvent in addition to the $38,000 in distributions to Essad and Bencivenga. The trial court erred by holding that Shelby only made $38,000 in distributions to its members while insolvent.

4. MCL 450.4307(1)(a) and (b) provide that a limited-liability company cannot make a distribution if, after giving the distribution effect, the limited-liability company would not be able to pay its debts as they become due or the company's assets would be less than its liabilities. MCL 450.4308 provides that a member of a limited-liability company who assents to or receives such a distribution is personally liable, jointly and severally, to the limited-liability company for the amount of the distribution. The trial court erred by granting judgments against Essad and Bencivenga individually, rather than jointly and severally, because they assented to distributions made while Shelby was insolvent.

5. The parties tried the statutory claim for distributions, thereby consenting to the statutory claim. Essad's claim that his due-process rights were violated because Florence did not plead a statutory claim for distributions failed.

6. Essad waived any claim that Florence's claim was time barred because the limitations period in MCL 450.4308(5) had expired because Essad did not plead the statute-of-limitations defense in his first responsive pleading or amend his pleadings in the trial court to include the affirmative defense.

7. The trial court erred by holding that Florence could recover for Essad's violation of MCL 450.4307. MCL 450.4308 provides that a member of a limited-liability company who assents to or receives a distribution in violation of MCL 450.4307 is personally liable, jointly and severally, to the limited-liability company for the amount of the distribution. The trial court, on remand, must modify the judgment by ordering Shelby's members to refund the unlawful distributions to Shelby so that Shelby can satisfy its obligation to Florence under the consent judgment.

Reversed and remanded.

1. CORPORATIONS — LIMITED LIABILITY COMPANIES — PIERCING THE CORPORATE VEIL.

The rules regarding piercing a corporate veil apply in determining whether to pierce the corporate veil of a limited liability company; in order for a corporate veil to be pierced, the corporate entity must be a mere instrumentality of another individual or entity, must have been used to commit a wrong or fraud, and there must have been an unjust injury or loss to the plaintiff.

2. CORPORATIONS — LIMITED LIABILITY COMPANIES — WORDS AND PHRASES — DISTRIBUTIONS.

A limited liability company cannot make a distribution if, after giving the distribution effect, the company would not be able to pay its debts as they become due or its assets would be less than its liabilities; a member of a limited liability company who assents to or receives such a distribution is personally liable, jointly and severally, to the limited liability company for the amount of the distribution; a "distribution" is a direct or indirect transfer of money or other property or the incurrence of indebtedness by a limited liability company to or for the benefit of its members or assignees of its members in respect of the members' membership interests (MCL 450.4102[1][g], MCL 450.4307[1][a] and [b], MCL 450.4308[1]).

3. TRIAL — PLEADING — ISSUES NOT RAISED BY THE PLEADINGS.

Issues that are not raised by the pleadings but are tried by the express or implied consent of the parties are treated as if they had been raised by the pleadings (MCR 2.118[C][1]).

4. TRIAL — PLEADING — AFFIRMATIVE DEFENSES — FAILURE TO RAISE AFFIRMATIVE DEFENSES — WAIVER — CURE.

A defendant waives an affirmative statute-of-limitations defense by failing to raise it in the defendant's first responsive pleading; the defendant can cure the failure to raise the defense in the first responsive pleading by amending the pleading, but the defendant must, in any event, raise the defense in the trial court to prevent waiver of the defense (MCR 2.111[F][3][a]).

Ruggirello, Velardo, Novara & Ver Beek, P.C. (by *Armand Velardo* and *Michael Oblizajek*), for Florence Cement Company.

Williams, Williams, Rattner & Plunkett, PC (by *Wayne Walker*), for Antonio Vettraino, Ernest J. Essad, Jr., and A.V. Investment Corporation.

Before: WHITBECK, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

I. OVERVIEW

Plaintiff, Florence Cement Company, appeals as of right the trial court's judgment of no cause of action in favor of defendants Antonio Vettraino and A.V. Investment Corporation. Florence also appeals the trial court's award to Florence of $19,000 each from defendants Ernest J. Essad, Jr., and Dante Bencivenga. Essad cross-appeals the money judgment against him. We reverse and remand.

II. FACTS

A. THE UNDERLYING EVENTS

This case arises out of a construction contract between Florence and Shelby Property Investors, L.L.C. Shelby is a limited-liability company formed to own, develop, and sell vacant lots for residential construction. Shelby's founding members were Essad, Bencivenga, and Vettraino. However, A.V. Investment later replaced Vettraino as a member. In July 2006, Florence contracted with Shelby to perform concrete and asphalt work on Shelby's development. Ultimately, the project was not successful. Nevertheless, Shelby was able to pay all the contractors and subcontractors on the job, except one—Florence.

In establishing the subject project, Shelby obtained a cost estimate for the development, and, on the basis of the cost estimate, Shelby determined that it would need to borrow money in order to finance the project. Accordingly, around September 2003, Shelby obtained a loan

from the private banking department of Comerica Bank for $700,000. Shelby's members provided unlimited personal guarantees that this loan would be repaid.

In October 2003, Essad and Bencivenga personally borrowed $300,000 from Comerica, which Essad and Bencivenga then "loaned" to Shelby to invest in the project. There was no promissory note by Shelby to Essad and Bencivenga. When asked whether Shelby paid the interest on the $300,000, Essad testified that Shelby "reimbursed" him and Bencivenga. According to Essad, "The checks went to the bank as a reimbursement to us for the interest on the note [to Comerica]." In other words, "[i]nstead of writing two checks, [they] wrote one check to the bank directly." "The money was lent through me [Essad] into Shelby . . . . Shelby . . . paid the interest. And we had [Shelby] pay it directly instead of paying it to us and then us paying it . . . to the bank."

In January 2005, Shelby obtained another loan from Comerica in the amount of $2,134,000. The proceeds of this loan were used, in part, to pay off the original $700,000 loan. Essad, Bencivenga, and Vettraino personally guaranteed this additional loan.

In February 2005, Shelby made certain payments to Essad and Bencivenga. Shelby paid $20,000 to Bencivenga, and testimony indicated that this payment was to reimburse Bencivenga for earnest money that he had paid on the purchase of some of the property. Shelby also paid Bencivenga approximately $104,000, which defendants contend was to compensate Bencivenga for two parcels that he had acquired for the development project, as reimbursement for preconstruction carrying costs. Similarly, Shelby reimbursed Essad $97,350 for expenses that he had paid as preconstruction carrying costs.

In November 2005, Shelby's members concluded that it was short $226,000 in capital. So Shelby's members

obtained yet another loan from Comerica in that amount. The proceeds of this loan were invested in the development project.

In November 2006, when seeking a final draw from Comerica, Essad signed a sworn statement to Comerica, stating the amounts of money that various contractors were owed. This sworn statement indicated that of the total amount requested in the final draw Shelby owed Florence $142,000 of that amount. However, the actual amount owed on Florence's contract was $256,557.27. Essad testified about why the lower figure was used, instead of the contract price:

> When we got all the final bills in, when I looked at what money was left in the draws on the $2,000,000.00 mortgage and the cash we had . . . that was the most that I could pay them out of the bank funds, and out of the funds that we had on hand, so I talked to somebody at the bank . . . [and] told her what was going on, and told her I wanted to . . . make a final draw in effect out of the loan and pay as much money as I could pay out, in particular, to Florence, so I drew down 142,000 for them and paid it to them.

Essad admitted at trial that the other contractors were paid in full with this final draw. Essad contended at trial that the contractors were paid by Shelby in the order in which they finished their work, or in the order in which he received their bills. It is undisputed that Comerica provided the remaining $142,000 requested for Florence, and that this amount, but only this amount, was paid to Florence, leaving a shortfall of $114,557.27.

B. PROCEDURAL HISTORY

Florence commenced this action in April 2008 against Vettraino, Bencivenga, A.V. Investment, Essad, Shelby, and others. Florence's complaint alleged claims

based on theories of alter ego, breach of contract, account stated, fraudulent conveyances, fraud in the inducement, violation of the building contract fund act, MCL 570.151 *et seq*., and unjust enrichment/quantum meruit and sought exemplary damages in the form of attorney fees and other further relief and foreclosure of construction liens. The trial court entered a consent judgment for $114,000 in Florence's favor and against Shelby. Therefore, the remaining relevant defendants at trial were Vettraino, Bencivenga, A.V. Investment, and Essad (hereafter "defendants").

At trial, Florence argued that Shelby had made improper distributions to its members while insolvent. Florence sought to have the corporate veil pierced in order to require that all the distributions made by Shelby, while insolvent, be refunded to Shelby, so that Shelby's obligation to Florence (under the consent judgment) could be satisfied. At trial, Florence's expert witness, Michael Locricchio, an attorney and CPA, opined that, on the basis of his review of financial documents from Shelby and its members, Shelby was insolvent in 2004 through 2006.

At the close of Florence's proofs, defendants moved for a directed verdict. Essad contended that there was a lack of evidence of ill will or fraudulent intent and that there was no evidence to prove alter ego or undercapitalization. The trial court concluded that, "as you go through the inventory of the records that have been provided[,] this project was not underfunded," and there was no fraudulent act. However, the trial court also concluded that a change by Essad and Bencivenga in the characterization of $20,000 capital investments to loans was a distribution that was contrary to the limited liability act, although the trial court did not find that it was fraudulent. The trial court therefore con-

cluded that there was a question of fact about whether the recharacterizations amounted to improper distributions. Accordingly, the trial court granted a directed verdict to Vettraino and A.V. Investment and dismissed "all the other matters . . . with the exception of" the alleged distributions to Essad and Bencivenga.

Following the conclusion of trial, the trial court held that there was a distribution that caused Shelby's total liabilities to be greater than the sum of its total assets. The trial court entered a judgment of no cause of action against Vettraino and A.V. Investment, and judgments in the amount of $19,000 against Essad and $19,000 against Bencivenga. Florence requested that Essad and Bencivenga be held jointly and severally by liable, but the trial court rejected that request, reasoning that "[e]ach took a distribution." Florence now appeals and Essad cross-appeals.

III. PIERCING THE CORPORATE VEIL

A. STANDARD OF REVIEW

Florence argues that the trial court erred by failing to pierce Shelby's corporate veil. Following a bench trial, this Court reviews findings of fact for clear error and conclusions of law de novo.[1] This Court also reviews de novo a trial court's decision on whether to pierce a corporate veil because piercing a corporate veil is an equitable remedy.[2]

B. LEGAL STANDARDS

The rules regarding piercing a corporate veil are applicable in determining whether to pierce the corpo-

[1] *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007).

[2] *Foodland Distrib v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996).

rate veil of a limited-liability company.[3] While "[t]here is no single rule delineating when the corporate entity may be disregarded[,] . . . [t]he entire spectrum of relevant fact forms the background for such an inquiry, and the facts are to be assessed in light of the corporation's economic justification to determine if the corporate form has been abused."[4] In order for a court to order a corporate veil to be pierced, the corporate entity (1) must be a mere instrumentality of another individual or entity, (2) must have been used to commit a wrong or fraud, and (3) there must have been an unjust injury or loss to the plaintiff.[5]

C. MERE INSTRUMENTALITY

The facts in this case show that defendants used Shelby as a mere instrumentality for themselves as individuals.[6] Defendants clearly did not treat Shelby as an entity separate from themselves. Bencivenga acquired parcels of property, which he turned over to Shelby without a formal transfer. Essad and Bencivenga incurred expenses for developmental costs, and then simply had Shelby reimburse them directly. And Shelby made payments at the behest of defendants, but these payments were not beneficial to the company. In fact, through his role as financial manager of Shelby, Essad wrote the distribution checks personally. Moreover, whenever Shelby needed capital, defendants borrowed

[3] *Lakeview Commons Ltd Partnership v Empower Yourself, LLC*, 290 Mich App 503, 510 n1; 802 NW2d 712 (2010).

[4] *Foodland Distrib*, 220 Mich App at 456-457 (quotation marks and citations omitted).

[5] *Rymal v Baergen*, 262 Mich App 274, 293-294; 686 NW2d 241 (2004) (citations omitted); see also *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 702-705; 762 NW2d 529 (2008).

[6] See *Rymal*, 262 Mich App at 293-294.

money from Comerica. They did this either in their own names or as guarantors for Shelby. Defendants therefore treated their personal liabilities to Comerica as Shelby's liabilities. As a result, the debts of Shelby to Comerica for the development project were coterminous with those of its members to Comerica, and vice versa. And while Shelby had no duty to make payments on behalf of its members, Shelby made payments directly to Comerica on defendants' loans.

Thus, Shelby was defendants' alter ego. Defendants made no distinction between their own debts and Shelby's debts. Defendants did not treat Shelby as a separate entity. Such a failure is a hallmark of a claim for piercing the corporate veil. Essentially, where members do not treat an artificial entity as separate from themselves, neither will this Court.

D. WRONG OR FRAUD

The facts of this case further show that defendants used Shelby to commit a wrong or fraud.[7] Essad falsified the sworn statement that he submitted to Comerica for the final draw of the remaining loan proceeds. It is undisputed that the request for the draw stated that Shelby "OWES NO MONEY FOR THE IMPROVEMENT OTHER THAN AS SET FORTH ABOVE." However, Essad knew that Shelby owed Florence more than the $142,000 indicated on this request for the draw because Essad had signed the contract with Florence on behalf of Shelby. Thus, the evidence overwhelmingly shows that Essad knowingly falsified the request for the draw, which amounted to fraud. And, as such, Essad clearly used Shelby to commit a wrong or fraud.

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[7] See *id.*

Further, Essad, a licensed attorney, is held to a higher standard. His extensive experience and expertise in business formations and transactions clearly should have provided him with the knowledge that falsifying a sworn statement is fraudulent. We will not countenance an intentional falsification, no matter how beneficent the result; that is, we reject defendants' argument that there was no wrong when Florence was paid at least part of its contractual consideration.

Additionally, testimony about Shelby's tax returns showed that Shelby was insolvent at the time that it entered into the contract with Florence. Shelby was undercapitalized. It had debt in the millions of dollars and capital contributions of only $2,000. Defendants knew or should have known that when Shelby attempted to settle the Florence account there would be insufficient funds to do so. Under MCL 450.4307(1)(a) and (b), a limited-liability company cannot make a distribution if, after giving the distribution effect, the limited-liability company would not be able to pay its debts as they become due, or the limited liability company's assets would be less than its liabilities. As a result of the distributions to Essad and Bencivenga, Shelby was unable to pay its full debt to Florence when it came due. This knowledge, or constructive knowledge, points to fraudulent intent.

E. UNJUST INJURY OR LOSS

Finally, Florence suffered a significant loss as a result of defendants treating Shelby as a mere instrumentality of themselves and deliberately undercapitalizing Shelby.[8] Namely, Florence lost over $100,000 of its contractual payment for the work that it undisputedly performed.

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[8] See *id*.

F. CONCLUSION

Because defendants treated their own liabilities as Shelby's liabilities and vice versa, intentionally undercapitalized Shelby, causing Shelby to be continuously insolvent, including at the time it contracted with Florence, and because Essad falsified the sworn statement in the final loan draw request, Florence satisfied all the elements for piercing the corporate veil. Accordingly, we conclude that reversal is warranted because the trial court clearly erred by concluding otherwise.

IV. DISTRIBUTIONS

A. STANDARD OF REVIEW

Florence argues that the trial court erred by granting judgment in its favor only on the distributions of $19,000 each to Essad and Bencivenga. According to Florence, Shelby's 2005 payments of $104,039.50 to Bencivenga and $97,350 to Essad, as well as Shelby's interest payments to Comerica on the $300,000 loan taken in October 2003 and a $226,000 loan taken in November 2005, were also distributions. This Court reviews issues of statutory application de novo.[9]

B. ANALYSIS

A distribution is "a direct or indirect transfer of money or other property or the incurrence of indebtedness by a limited liability company to or for the benefit of its members or assignees of its members in respect of the members' membership interests."[10]

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[9] *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

[10] MCL 450.4102(1)(g).

Here, Shelby made several distributions to defendants while it was insolvent. As the trial court correctly held, the recharacterization of Essad's and Bencivenga's individual $20,000 capital contributions as loans of $19,000 to Shelby amounted to distributions because they resulted in Shelby incurring indebtedness to its members. Likewise, the 2005 payments of $104,039.50 to Bencivenga and $97,350 to Essad, as well as Shelby's interest payments to Comerica on the $300,000 loan taken in October 2003 and the $226,000 loan taken in November 2005, were distributions because they were transfers of money to or for the benefit of Shelby's members.[11] This is the extent of the requisite analysis necessary to categorize the payments as distributions.[12] Consequently, the trial court erred by holding that Shelby only made $38,000 in distributions to its members while insolvent.

V. JOINT AND SEVERAL LIABILITY

A. STANDARD OF REVIEW

Florence argues that the trial court erred by granting judgments against Essad and Bencivenga individually, rather than jointly and severally. According to Florence, pursuant to statute, Essad and Bencivenga were jointly and severally liable for the total distributions taken while Shelby was insolvent. This Court reviews issues of statutory application de novo.[13]

B. ANALYSIS

As stated, a limited-liability company cannot make a

[11] *Id*.

[12] See *McManamon v Redford Charter Twp*, 273 Mich App 131, 136; 730 NW2d 757 (2006).

[13] *Dressel*, 468 Mich at 561.

distribution if, after giving the distribution effect, the limited-liability company would not be able to pay its debts as they become due, or the limited-liability company's assets would be less than its liabilities.[14] And under MCL 450.4308, a member of a limited-liability company who assents to or receives such a distribution is "personally liable, *jointly and severally*, to the limited liability company for the amount of the distribution . . . ."[15]

Essad and Bencivenga, along with Vettraino, controlled Shelby, so there is no possible way that Shelby could have made the distributions to Essad and Bencivenga without their consent. Essad controlled the finances of Shelby. Thus, Essad's consent is clear because he personally controlled Shelby's finances and wrote the checks. A corporate entity can only act through its officers.[16] Indeed, defendants do not even contend that the distributions to Essad and Bencivenga were somehow made without their consent. Essad and Bencivenga are therefore "personally liable, jointly and severally" because they assented to distributions made while Shelby was insolvent.[17]

VI. ESSAD'S CROSS-APPEAL

A. STANDARD OF REVIEW

This Court reviews due-process claims and statutory claims de novo.[18]

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[14] MCL 450.4307(1)(a) and (b).

[15] MCL 450.4308(1) (emphasis added).

[16] *People v American Med Ctrs of Mich, Ltd*, 118 Mich App 135; 324 NW2d 782 (1982); *Mossman v Millenbach Motor Sales*, 284 Mich 562, 568; 280 NW 50 (1938).

[17] MCL 450.4308(1).

[18] *Dressel*, 468 Mich at 561; *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009).

B. DUE PROCESS

Essad argues that the trial court violated his due-process rights when it entered judgment against him because Florence did not plead a statutory claim for distributions.

MCR 2.118(C)(1) governs the amendment of complaints at trial, and provides:

> *When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings*. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment.[19]

Here, the parties tried the statutory claim, in addition to the piercing-the-corporate-veil remedy, thereby consenting to the statutory claim. Accordingly, Essad's due-process argument fails.

C. LIMITATIONS PERIOD

Essad argues that Florence's claim was time barred because the limitations period in MCL 450.4308(5) had expired.

MCR 2.111 requires affirmative defenses be stated in a party's responsive pleadings.[20] Under the Michigan Court Rules, a defendant waives a statute-of-limitations defense by failing to raise it in the first responsive pleading.[21] The court rule states, in part:

> Affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in

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[19] Emphasis added.

[20] MCR 2.111(F)(3).

[21] *Walters v Nadell*, 481 Mich 377, 389; 751 NW2d 431 (2008).

> accordance with MCR 2.118. Under a separate and distinct heading, a party must state the facts constituting
>
> (a) an affirmative defense, such as contributory negligence; the existence of an agreement to arbitrate; assumption of risk; payment; release; satisfaction; discharge; license; fraud; duress; estoppel; statute of frauds; *statute of limitations*; immunity granted by law; want or failure of consideration; or that an instrument or transaction is void, voidable, or cannot be recovered on by reason of statute or nondelivery[.][22]

Defendants had separate counsel and filed separate answers in response to Florence's complaint. While Bencivenga affirmatively raised the statute-of-limitations defense in his initial answer, Essad did not. "It has long been the rule in Michigan that a defendant may waive a statute of limitations defense by failing to raise it in the trial court."[23] However, "[t]he defendant may cure his failure to raise the defense in his first responsive pleading by amending the pleading, but the defendant must, in any event, raise the defense in the trial court."[24] On behalf of himself and Shelby, Essad did file a motion to amend and conform the pleadings to the evidence presented. However, the lower-court record does not contain Essad's amended pleading, nor does it contain an order concerning the disposition of that motion. Because Essad did not affirmatively plead the statute of limitations in his responsive pleadings and because the record does not reflect that the pleadings were amended to include the affirmative defense, we deem the defense waived.[25] Further, because we deem this issue waived, Florence's argument in response is not considered.

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[22] MCR 2.111(F)(3)(a) (emphasis added).

[23] *Nadell*, 481 Mich at 389.

[24] *Id*.

[25] *Id*.

D. STATUTORY REMEDY

Essad argues that the trial court erred when it held that *Florence* could recover for his violation of MCL 450.4307. On this point, Essad is correct. Under MCL 450.4308, a member of a limited-liability company who assents to or receives a distribution in violation of MCL 450.4307 is "personally liable, jointly and severally, *to the limited liability company* for the amount of the distribution . . . ."[26] MCL 450.4308 does not provide relief to the limited-liability company's creditor (here, Florence) directly. Therefore, on remand, the trial court should modify the judgment, in accordance with the statute, by ordering Shelby's members to refund the unlawful distributions to Shelby so that Shelby can satisfy its obligation to Florence.

VII. CONCLUSION

First, we conclude that the trial court erred by holding that piercing the corporate veil was not warranted. As we have explained, all the elements for piercing the corporate veil have been satisfied because defendants, while using Shelby as a mere instrumentality, committed fraud and caused loss to Florence.

Second, because Shelby made numerous distributions to, and for the benefit of, Shelby's members, the trial court erred by granting judgment on only the $19,000 distributions to Essad and Bencivenga. Moreover, the trial court erred by concluding that the judgment amount be paid to Florence directly. Accordingly, on remand, the trial court should order Shelby's members to refund all the unlawful distributions to Shelby so that Shelby can satisfy its obligation to Florence.

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[26] MCL 450.4308(1) (emphasis added).

Third, the members' liability to Shelby for the amount of the unlawful distributions should be joint and several, pursuant to MCL 450.4308.

We reverse and remand for further proceedings pursuant to this opinion. We do not retain jurisdiction.

WHITBECK, P.J., and O'CONNELL and WILDER, JJ., concurred.

MICHIGAN PIPE AND VALVE–LANSING, INC
v HEBELER ENTERPRISES, INC

Docket No. 294530. Submitted March 9, 2011, at Lansing. Decided March 22, 2011. Approved for publication May 3, 2011, at 9:05 a.m. Leave to appeal denied, 490 Mich 874.

Michigan Pipe and Valve–Lansing, Inc. (MPV), brought an action in the Genesee Circuit Court against Hebeler Enterprises, Inc., Firstbank–St. Johns, Grand River Infrastructure Inc. (GRI), and others in connection with construction liens filed by MPV and GRI. MPV and GRI had provided materials to Hebeler Enterprises, Inc., which had been hired to build the infrastructure and roads on property intended to be developed into a residential subdivision, but Hebeler failed to pay the amounts due under their contracts. The court, Randy L. Tahvonen, J., concluded that both MPV and GRI had properly perfected construction liens that were coequal in priority to each other but were superior to the mortgage on the property held by Firstbank because a test well drilled on the property shortly before Firstbank recorded its mortgage constituted an actual physical improvement to the property for purposes of MCL 570.1103(1), part of the Construction Lien Act, MCL 570.1101 *et seq*. The court granted MPV and GRI summary disposition. Firstbank appealed the court's determination that the well constituted an actual physical improvement. MPV cross-appealed the court's refusal to include in the amount of its lien any amount for the service charge provided for by the terms of its contract.

The Court of Appeals *held*:

1. MCL 570.1119(3) provides that construction liens have priority over all other interests, liens, and encumbrances that were recorded after the first actual physical improvement made to the property. MCL 570.1103(1) defines "actual physical improvement" as including a readily visible actual physical change in real property that would alert a person upon reasonable inspection of the existence of an improvement, but specifically excludes certain preparations for changes or alterations to the property. The well drilled to obtain a water sample was an actual physical improvement. The fact that the well did not add any value to the property

did not affect its status as an actual physical improvement under the statutory definition. In addition, the well was not similar to the exceptions provided for by the statute because unlike the statutory exceptions, which include such things as surveying and soil testing, the well left a permanent presence on the property. The trial court did not err by concluding that the construction liens held by MPV and GRI were superior in priority to Firstbank's mortgage on the property.

2. MCL 570.1107(1) authorizes a construction lien for a contractor, subcontractor, supplier, or laborer who provides an improvement to real property pursuant to a contract. The amount of the lien is determined by the terms of the contract and cannot exceed the amount of the lien claimant's contract less payments made. In turn, MCL 570.1107(7) limits the amount of interest that can be included in a construction lien for an improvement to a residential structure to the amount accrued under the contract up to 90 days after the claim of lien is recorded. While MPV did not provide supplies for an improvement to a residential structure and MCL 570.1107(7) thus did not apply to this case, the statutory provisions must nonetheless be read together to produce a harmonious whole. When a contract provides for the assessment of a service charge on past due amounts, this constitutes a type of interest similar to a time-price differential that may be included in the amount of a construction lien. Read together, the statutes provide that the amount of the lien claimant's contract includes all interest charges contemplated by the contract, and MPV was entitled to a lien that included a sum representing the service charge. The trial court erred by concluding that MPV could not include a service charge in the amount of its construction lien.

Affirmed in part and reversed in part.

1. LIENS — CONSTRUCTION LIEN ACT — ACTUAL PHYSICAL IMPROVEMENTS — WELLS.

Construction liens have priority over all other interests, liens, and encumbrances that were recorded after the first actual physical improvement made to the property; actual physical improvements include a readily visible actual physical change in real property that would alert a person upon reasonable inspection of the existence of an improvement; a well drilled to obtain a water sample is an actual physical improvement, regardless of whether the well adds any value to the property (MCL 570.1103[1]).

2. LIENS — CONSTRUCTION LIEN ACT — AMOUNT OF LIEN CLAIMANT'S CONTRACT — SERVICE CHARGES.

The amount of a construction lien is determined by the terms of the contract; if a contract provides for a service charge on all past due amounts, that charge constitutes an interest charge contemplated by the contract and should be included in the amount of the lien claimant's contract for purposes of determining the amount of the construction lien (MCL 570.1107[1], [7]).

Loomis, Ewert, Parsley, Davis & Gotting, P.C. (by *Jeffrey S. Theuer* and *Sara L. Cunningham*), for Michigan Pipe and Valve–Lansing, Inc.

The Gallagher Law Firm, PLC (by *Byron P. Gallagher, Jr.*, and *Michael S. Hill*), for Firstbank–St. Johns.

Winegarden Haley Lindholm & Robertson, P.L.C. (by *Alan F. Himelhoch* and *Donald H. Robertson*), for Grand River Infrastructure, Inc.

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

PER CURIAM. Appellant Firstbank-St. Johns appeals as of right the judgment of foreclosure. Specifically, Firstbank appeals the trial court's order granting summary disposition under MCR 2.116(C)(10) to appellees Michigan Pipe and Valve–Lansing, Inc. (MPV), and Grand River Infrastructure, Inc. (GRI), on MPV's and GRI's claims that their construction liens had priority over its mortgage. MPV cross-appeals the trial court's order that its construction lien could not include any sums representing a service charge. We affirm in part and reverse in part.

I. BASIC FACTS AND PROCEDURAL HISTORY

Windy Pines View, L.L.C., is the owner of property in St. Johns, Michigan. Windy Pines intended to develop

the property into a 77-unit residential subdivision. To secure financing for the project, Windy Pines granted a mortgage on the property to Firstbank. Firstbank recorded the mortgage on February 10, 2005.

Two days earlier, on February 8, 2005, F & W Well Drilling, Inc., had drilled a 245-foot deep well on the property. A plastic casing was placed in the well from 140 feet below grade to 1 foot above grade. The well, which was used to obtain a water sample from the aquifer below the property, was capped after Windy Pines decided that the subdivision would be serviced by the Bingham Township municipal water supply.

In 2007, Windy Pines contracted with Hebeler Enterprises, Inc., to build the "[i]nfrastructure and roads." Hebeler purchased pipe and other materials from MPV and GRI. Hebeler's contract with GRI contained the following provision:

> The undersigned agrees to pay GRI's credit price for all amounts unpaid after 30 days from invoice date. Under the credit price terms, time price differential charges will accrue on all such amounts at the rate of 1.5% per month (18% per annum). Accordingly, it is agreed that the timeliness of payment for the goods and/or service provided is an integral part of the price of those goods and/or services and is thus an integral part of this agreement.

MPV's contract contained a somewhat similar provision: "For open credit sales, terms of payment are NET 30 DAYS from invoice date. A service charge of 1½% per month or any lesser charge reflecting the maximum amount legally permissible will be added to all past due accounts."

Although it was paid in full by Windy Pines, Hebeler failed to pay MPV and GRI the total amounts due under the contracts. Consequently, GRI filed a claim of lien

against the property in February 2008 and MPV filed a claim of lien in May 2008.

Thereafter, this litigation was commenced to foreclose on the liens. The parties filed cross-motions for partial summary disposition under MCR 2.116(C)(10). Relevant to this appeal, the issues were whether the well drilled days before the recording of Firstbank's mortgage constituted an "actual physical improvement" under MCL 570.1103(1) and whether MPV could recover service charges as provided in its contract with Hebeler.

The trial court held that the drilling of the well on February 8, 2005, was an actual physical improvement to the property and, therefore, pursuant to MCL 570.1119, the liens filed by MPV and GRI had priority over Firstbank's mortgage. The trial court determined that the amount of GRI's lien was $46,459.24, plus sums representing the time-price-differential charges of 1.5 percent a month. It also concluded that the amount of MPV's lien was $153,639.68, which did not include the 1.5 percent a month "service charge" provided for in its contract.

II. STANDARDS OF REVIEW AND RULES OF STATUTORY INTERPRETATION

We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition is proper under MCR 2.116(C)(10) if "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."

We also review de novo questions of statutory interpretation. *Bates v Gilbert*, 479 Mich 451, 455; 736 NW2d 566 (2007). The goal of statutory interpretation is to

give effect to the intent of the Legislature. *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008). If the language of the statute is unambiguous, the Legislature is presumed to have intended the meaning plainly expressed, and judicial construction is not permitted. *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 141; 783 NW2d 133 (2010). An unambiguous statute must be enforced as written. *Klida v Braman*, 278 Mich App 60, 64; 748 NW2d 244 (2008). "[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). When a statute defines a given term, that definition controls. *Kuznar*, 481 Mich at 176.

III. ACTUAL PHYSICAL IMPROVEMENT

On appeal, Firstbank argues that the trial court erred by holding that the well was an actual physical improvement. We disagree.

MPV and GRI filed their lien claims under the Construction Lien Act (CLA), MCL 570.1101 *et seq*. MCL 570.1119(3) addresses the priority of construction liens:

> A construction lien arising under this act shall take priority over all other interests, liens, or encumbrances which may attach to the building, structure, or improvement, or upon the real property on which the building, structure, or improvement is erected when the other interests, liens, or encumbrances are recorded subsequent to the first actual physical improvement.

The date of the "first actual physical improvement" is the date that construction liens attach to the property for determining priority among competing liens and encumbrances. *M D Marinich, Inc v Mich Nat'l Bank*,

193 Mich App 447, 454-455; 484 NW2d 738 (1992). The CLA defines "actual physical improvement" as

> the actual physical change in, or alteration of, real property as a result of labor provided, pursuant to a contract, by a contractor, subcontractor, or laborer which is readily visible and of a kind that would alert a person upon reasonable inspection of the existence of an improvement. Actual physical improvement does not include that labor which is provided in preparation for that change or alteration, such as surveying, soil boring and testing, architectural or engineering planning, or the preparation of other plans or drawings of any kind or nature. Actual physical improvement does not include supplies delivered to or stored at the real property. [MCL 570.1103(1).]

Firstbank advances two arguments in support of its claim that the well in this case was not an actual physical improvement. Initially, it argues that the well did not meet the definition of an "actual physical improvement" because the well did not add any value to the property. In support of this argument, it cites Barron's Law Dictionary for the proposition that improvements to real property are generally thought to increase the value of the property.

Firstbank's reliance on a dictionary definition is unavailing because the CLA definition of "actual physical improvement" controls. *Kuznar*, 481 Mich at 176. Further, nothing in the unambiguous definition of "actual physical improvement," MCL 570.1103(1), requires that the improvement add value to the real property. We may not read such a requirement into the definition. *Roberts*, 466 Mich at 63. Accordingly, we reject Firstbank's argument that the well was not an actual physical improvement because it did not add value to the property.

Next, Firstbank asserts that the well fell within the exception identified in MCL 500.1103(1) for "labor

which is provided in preparation for that change or alteration . . . .” In doing so, Firstbank does not suggest that the well was not an “actual physical change in . . . real property . . . which [was] readily visible and of a kind that would alert a person upon reasonable inspection of the existence of an improvement,” MCL 570.1103(1). Instead, Firstbank maintains that the exception provided for in the definition encompasses what it calls the “due diligence process.” Under this interpretation, Firstbank argues that the well was only a test well and, therefore, not an actual physical improvement.

As defined in MCL 570.1103(1), an actual physical improvement “does not include that labor which is provided in preparation for that change or alteration, such as surveying, soil boring and testing, architectural or engineering planning, or the preparation of other plans or drawings of any kind or nature.” We do not dispute that the exceptions provided may suggest the recognition of a due-diligence process that involves the specific procedures stated in the statute. Nor does the plain language of the statute, which includes the phrase “such as,” suggest that the list is exhaustive. However, none of the procedures identified in the statute as an exception equates with the digging of a well or any other act that makes a readily visible physical change to the property. To the contrary, the acts identified in the statute are all of a nature that will not leave a permanent presence on the property. Consequently, we conclude that Firstbank’s assertion that the exception encompasses all acts done in the “due diligence process” is not supported by the plain and unambiguous language of MCL 570.1103(1).

Because Firstbank’s mortgage was recorded after the digging of the well, which was the first actual physical

improvement to the property, the construction liens filed by MPV and GRI had priority over Firstbank's mortgage. MCL 570.1119(3). Accordingly, the trial court did not err by granting priority to the liens held by MPV and GRI.

IV. SERVICE CHARGE

On cross-appeal, MPV argues that the trial court erred by holding that its construction lien could not include any amounts for the service charge that was specified in its contract with Hebeler. We agree.

MCL 570.1107(1) provides:

> Each contractor, subcontractor, supplier, or laborer who provides an improvement to real property has a construction lien upon the interest of the owner or lessee who contracted for the improvement to the real property . . . . A construction lien acquired pursuant to this act shall not exceed the amount of the lien claimant's contract less payments made on the contract.

Pursuant to the plain language of the statute, the amount of the lien is determined by the terms of the contract. *Erb Lumber Co v Homeowner Constr Lien Recovery Fund*, 206 Mich App 716, 722; 522 NW2d 917 (1994). The terms of MPV's contract with Hebeler provided that a service charge of 1.5 percent a month would be added to all past due amounts.

The trial court relied on *Erb Lumber* to conclude that MPV could not include in its lien an amount representing the service charge. In *Erb Lumber*, the supplier's contract provided that payment for materials had to be made within 150 days of delivery and, if not, a time-price-differential charge of two percent a month would be added until the total was fully paid. *Erb Lumber*, 206 Mich App at 717. The Homeowner Construction Lien Recovery Fund agreed to pay the entire amount of the

supplier's lien except for the time-price-differential charges. It argued that the time-price differential was a finance charge and could not be considered part of the contract. *Id*. at 718. This Court disagreed. It reasoned:

> [P]laintiff here relies on the terms of the contract to establish its costs. By including a time-price differential, plaintiff essentially set differing costs for the materials depending on when they were paid for after delivery. . . . [S]ince the contract terms established the cost of the materials, and profit and overhead were included, plaintiff is entitled to recover the time-price differential as well. Furthermore, the statute here clearly contemplates that recovery is based on the value of the contract less amounts already paid. [*Id.* at 721.]

According to the trial court, because "there is a difference between [a] time price differential and a periodic interest rate," *Erb Lumber* did not permit MPV to secure payment of the service charge with its lien claim. We agree that a time-price differential is different from an interest payment or a service charge. A time-price differential relates the cost of an item to the method of payment. See *Grand Blanc Cement Prod, Inc v Ins Co of North America*, 225 Mich App 138, 149 n 3; 571 NW2d 221 (1997) ("A time-price differential charge is the difference between the cash and credit price, the latter being higher.").[1] However, on the basis of MCL 570.1107(7), we conclude that any distinction between a time-price differential and a service charge, when contained in the contract, is a distinction without a difference for purposes of MCL 570.1107(1).

MCL 570.1107(7) provides:

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[1] Black's Law Dictionary (7th ed) provides similar definitions: "1. A figure representing the difference between the current cash price of an item and the total cost of purchasing it on credit. 2. The difference between a seller's price for immediate cash payment and a different price when payment is made later or in installments."

> After the effective date of the amendatory act that added this subsection, a construction lien of a subcontractor or supplier for an improvement to a residential structure shall only include an amount for interest, including, but not limited to, a time-price differential or a finance charge, if the amount is in accordance with the terms of the contract between the subcontractor or supplier and the contractor or subcontractor and does not include any interest that accrues after 90 days after the claim of lien is recorded.

Subsection (7) was added to MCL 570.1107 in 2006. See 2006 PA 497.[2] According to the legislative analyses, the Legislature added subsection (7) to help ensure the solvency of the Home Owner Construction Lien Recovery Fund. See Senate Legislative Analysis, SB 405 and SB 459, November 21, 2006. The analysis explained that payments from the fund were more than had been anticipated—in part, because of interest added to amounts owed by contractors—and to ensure that the fund remained solvent, interest paid from the fund should be limited. *Id.* Thus, MCL 570.1107(7) limited the amount of interest that could be included in a lien filed against a residential structure: the amount of interest may not include "any interest" that accrues after 90 days of the claim of lien being recorded.

The parties agree that because MPV did not provide supplies for an improvement to a "residential structure,"[3] MCL 570.1107(7) does not apply to the present case. However, because "statutory provisions are not to be read in isolation; rather, context matters, and thus

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[2] The act took effect on January 3, 2007.

[3] A "residential structure" is defined by the CLA as "an individual residential condominium unit or a residential building containing not more than 2 residential units, the land on which it is or will be located, and all appurtenances, in which the owner or lessee contracting for the improvement is residing or will reside upon completion of the improvement." MCL 570.1106(3).

statutory provisions are to be read as a whole," *Robinson v Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010) (emphasis omitted), subsection (7) of MCL 570.1107 aids in the interpretation of subsection (1).

MCL 570.1107(7) provides that a lien against a residential structure may include an amount for "interest" as long as (1) the amount is in accordance with the terms of the contract and (2) the amount does not include any interest that accrues 90 days after the claim of lien is recorded. The interest that may be included in the lien is that "including, but not limited to, a time-price differential or a finance charge . . . ." *Id*. "[T]he word 'includes' can be used as a term of enlargement or limitation . . . ." *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644, 650; 761 NW2d 414 (2008) (quotation omitted). It is clear from the context in which it is used in MCL 570.1107(7)—"including, but not limited to"—that the word "including" in subsection (7) is a term of enlargement. Thus, the specific types of interest that are listed in subsection (7), time-price differentials and finance charges, are specific examples of interest that may be included in the claim of lien and not an exhaustive list. See *Thorn*, 281 Mich App at 651.

We conclude that the service charge contained in MPV's contract with Hebeler would fall within the scope of the "amount of interest" that could be included in a lien under MCL 570.1107(7). Interest is "[t]he compensation fixed by agreement or allowed by law for the use or detention of money, or for the loss of money by one who is entitled to its use; [especially], the amount owed to a lender in return for the use of borrowed money." Black's Law Dictionary (7th ed). A service charge, as pertinent to this case, is "[t]he sum of . . . all charges payable by the buyer and imposed by the seller as an incident to the extension of credit." *Id*.

Thus, like a time-price differential and a finance charge, which is "[a]n additional payment, [usually] in the form of interest, paid by a retail buyer for the privilege of purchasing goods or services in installments," *id.*, a service fee is an amount owed in return for the privilege of purchasing goods or services with credit.

Pursuant to MCL 570.1107(1), the amount of a construction lien is determined by the terms of the contract. *Erb Lumber*, 206 Mich App at 722. MCL 570.1107(7) places an additional limitation on the amount of a lien on a residential structure: any "amount of interest" that is in accordance with the contract terms may not include interest that accrues more than 90 days after the claim of lien was filed. An unharmonious result would be reached if interest that is permitted under MCL 570.1107(7) to be included in a construction lien claim against a residential structure could not be included in all other construction lien claims, especially given that subsection (7) was enacted to limit the lien amounts against residential structures. Accordingly, reading MCL 570.1107(1) and (7) together to produce a harmonious result, we hold that the "amount of the lien claimant's contract" includes all interest charges that are contemplated by the contract. Because the service charge of 1.5 percent a month on all past due amounts was an interest charge that was contemplated in MPV's contract with Hebeler, MPV was entitled to a lien that included a sum representing the service charge. The trial court erred by holding to the contrary. We reverse that portion of the order regarding the motions for partial summary disposition and the judgment of foreclosure that precluded MPV from including in its lien a sum representing the service charge.

Affirmed in part and reversed in part.

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

PEOPLE v ROBERTS

Docket No. 294212. Submitted January 11, 2011, at Grand Rapids. Decided May 10, 2011, at 9:00 a.m. Leave to appeal denied, 490 Mich 893.

Roger D. Roberts was convicted by a jury in the Muskegon Circuit Court of three counts of child sexually abusive activity, MCL 750.145c(2). The court, Timothy G. Hicks, J., sentenced him as a fourth-offense habitual offender to 7 to 22 years in prison for each conviction. Defendant appealed.

The Court of Appeals *held*:

1. The language contained in MCL 722.4(2), which provides that emancipation by operation of law occurs when a minor is legally married, an individual reaches 18 years of age, if the minor is on active duty in the military, or for certain medical purposes when the minor is in the custody of a law-enforcement agency or a prisoner committed to the jurisdiction of the Department of Corrections, is not vague and provides specific criteria that must be met for a minor to be considered emancipated by operation of law. The provision in MCL 750.145c(6) of the child sexually abusive activity statute that states that it is an affirmative defense to a prosecution under the statute that the alleged child is a person who is emancipated by operation of law under MCL 722.4(2) as proven by a preponderance of the evidence provides the applicable burden of proof for the affirmative defense and does not change the criteria that must be proven to show emancipation by operation of law. MCL 750.145c clearly provides a person of ordinary intelligence a reasonable opportunity to know what is prohibited and what circumstances must exist in order for emancipation by operation of law to be applicable. MCL 750.145c provides fair notice of the conduct proscribed. The trial court properly determined that there was no merit to defendant's argument that the statute was unconstitutionally vague.

2. MCL 750.145c(2) is not unconstitutionally overbroad. When, as in this case, the statute adequately defines the prohibited conduct and that conduct bears heavily and pervasively on the welfare of children engaged in the production of child sexually

abusive material, regulation is permissible. When the law provides fair notice of the conduct proscribed and combats the production of materials that depict child sexually abusive activity, the materials do not enjoy the protection of the First Amendment. MCL 750.145c does not impinge on any privacy interest because it does not criminalize consensual sexual activity engaged in by persons between 16 and 18 years of age, but only criminalizes the recording or photographing of such activity.

3. The trial court did not abuse its discretion by determining that the testimony of two law enforcement officers who allegedly violated the court's sequestration order by speaking to each other about the case did not have to be excluded after each officer clearly testified that his testimony was not colored to conform with the testimony of the other.

4. The results of a polygraph examination should only be considered with regard to the general credibility of the examinee, not with regard to the truth or falsehood of any particular statement. Thus, the trial court was entitled to use its discretion in considering defendant's polygraph examination results in weighing defendant's credibility.

5. The evidence does not support defendant's claims that he did not consent to the entry of police officers into his home, that defendant was in the custody of the police when he gave them certain statements and evidence, and that defendant had requested his counsel. The trial court did not err by denying defendant's request to suppress the evidence.

6. The trial court, in sentencing defendant, correctly considered the totality of the circumstances, made no error in scoring the sentencing guidelines, and did not rely on inaccurate information in determining that a downward departure from the sentencing guidelines range was not justified.

Affirmed.

1. CONSTITUTIONAL LAW — STATUTES — NOTICE OF CONDUCT PROSCRIBED.

A statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited in order to afford proper notice of the conduct proscribed.

2. CONSTITUTIONAL LAW — MINORS — EMANCIPATION BY OPERATION OF LAW.

The provisions of MCL 722.4(2) that provide specific criteria that must be met for a minor to be considered emancipated by operation of law are not unconstitutionally vague.

3. CRIMINAL LAW — CONSTITUTIONAL LAW — CHILD SEXUALLY ABUSIVE ACTIVITY — PERSONS EMANCIPATED BY OPERATION OF LAW.

The statute prohibiting child sexually abusive activity clearly provides a person of ordinary intelligence a reasonable opportunity to know what is prohibited and what circumstances must exist in order for the affirmative defense that the alleged child victim is a person who is emancipated by operation of law to be applicable (MCL 750.145c).

4. CRIMINAL LAW — EVIDENCE — POLYGRAPH TESTS.

The results of a polygraph examination should only be considered by a trial court with regard to the general credibility of the examinee and not with regard to the truth or falsehood of any particular statement.

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

Scott A. Grabel for defendant.

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

PER CURIAM. Defendant appeals as of right his convictions by a jury of three counts of child sexually abusive activity, MCL 750.145c(2). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 7 to 22 years' imprisonment for each of the three convictions. We affirm.

I

Defendant advertised in a newspaper for models. The 17-year-old victim responded to the advertisement, and she and her father met with defendant at his gymnasium. Defendant requested that the victim's parents sign a release stating, "I understand my daughter is under . . . 18 years of age and that my daughter will [be] performing nudity in [an] R- and X-rated capacity." The release, which the parents signed, also provided, "I also

understand that [my daughter] has full permission to make her own decisions and will have our full support." However, defendant advised the victim's parents that no X-rated photographs would be taken of her until she was 18 years old and that any photographs taken beforehand could not be distributed. The victim was "anxious to start the process as quick as possible" so that she could start making money.

Defendant prohibited the victim's parents from attending the photography session scheduled for the day after they signed the release. Rather than photographing her at the gymnasium or the beach, as was the victim's initial understanding, defendant drove her to see his remodeled studio and then took her to his nearby home.

At defendant's home, defendant showed the victim a pornographic magazine and indicated to her that, when nude photographs are taken, "you have to have this kind of attitude." Defendant offered the victim alcohol, but she declined. Defendant subsequently began taking photographs of her—first clothed and then unclothed. The victim testified that she allowed the unclothed pictures because defendant told her that she could earn approximately $18,000 by the time she was 18 years old.

Later in the photography session, defendant "pulled down his pants," "pulled out his penis," and "forced it" into her mouth. Defendant said "this will help you relax and get over your nervousness." Without informing the victim, defendant recorded this sexual act using the video feature on his cellular telephone. The victim testified that she did not want to perform this act, but she did it because she "was scared" and thought it was going to help her modeling career.

The victim testified, "Then he takes the rest of his clothes off and put me on top of him and he makes me

do 69." Next, the victim testified that defendant "wanted to do doggy style." Again, without informing the victim, defendant recorded these acts using the video feature on his cellular telephone. Defendant took additional photographs afterward, and the victim explained that she did not run away because she was scared of defendant, who had told her "he was a black belt," and she was afraid he would not give her a ride home. Although defendant warned the victim not to tell her family what happened, the victim told her mother, who called the police.

II

A

Defendant argues that the statute under which he was convicted is unconstitutionally void for vagueness. He first argues that, in contravention of federal and state principles of substantive due process, MCL 750.145c does not adequately inform the public of the conduct proscribed. Specifically, defendant avers that MCL 750.145c, which provides a defendant with an affirmative defense as long as the defendant proves by a preponderance of the evidence that the child was emancipated by operation of law, is fatally defective. Defendant also argues that MCL 750.145c is overbroad because it infringes on the fundamental right of consenting individuals to engage in recreational or expressive sexual intercourse. Defendant argues that MCL 750.145c cannot survive strict scrutiny because it is a total ban on capturing, by way of video or other media, consensual and otherwise legal sexual acts involving individuals who have reached the age of consent. "The constitutionality of a statute is a question of law, reviewed de novo on appeal." *In re McEvoy*, 267 Mich App 55, 68; 704 NW2d 78 (2005).

"The 'void for vagueness' doctrine is derived from the constitutional guarantee that the state may not deprive a person of life, liberty, or property, without due process of law. US Const, Am XIV; Const 1963, art 1, § 17." *State Treasurer v Wilson (On Remand)*, 150 Mich App 78, 80; 388 NW2d 312 (1986). This Court indicated in *People v Heim*, 206 Mich App 439, 441; 522 NW2d 675 (1994):

> A statute may be challenged for vagueness on three grounds: (1) it is overbroad and impinges on First Amendment freedoms; (2) it does not provide fair notice of the conduct proscribed; or (3) it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed.

As stated by the Court in *People v Brian Hill*, 269 Mich App 505, 524-525; 715 NW2d 301 (2006):

> In testing a statute challenged as unconstitutionally vague, the entire text of the statute should be examined and the words of the statute should be given their ordinary meanings. Judicial constructions of the statute should also be considered. In general, a criminal defendant may not defend on the basis that a statute is unconstitutionally vague where the defendant's conduct is fairly within the constitutional scope of the statute. Statutes are presumed to be constitutional and are so construed unless their unconstitutionality is clearly and readily apparent. [Citations omitted.]

To afford proper notice of the conduct proscribed, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited. *People v Sands*, 261 Mich App 158, 161; 680 NW2d 500 (2004).

MCL 750.145c(2) provides:

> A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child

> sexually abusive activity for the purpose of producing any child sexually abusive material, or a person who arranges for, produces, makes, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make, or finance any child sexually abusive activity or child sexually abusive material is guilty of a felony . . . if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child.

MCL 750.145c(1)(m) defines "child sexually abusive material" as follows:

> "Child sexually abusive material" means any depiction, whether made or produced by electronic, mechanical, or other means, including a developed or undeveloped photograph, picture, film, slide, video, electronic visual image, computer diskette, computer or computer-generated image, or picture, or sound recording which is of a child or appears to include a child engaging in a listed sexual act . . . .

A "child" is "a person who is less than 18 years of age, subject to the affirmative defense created in [MCL 750.145c(6)] regarding persons emancipated by operation of law." MCL 750.145c(1)(b). MCL 750.145c(6) provides: "It is an affirmative defense to a prosecution under this section that the alleged child is a person who is emancipated by operation of law under section 4(2) of 1968 PA 293, MCL 722.4, as proven by a preponderance of the evidence." According to MCL 722.4(2), emancipation by operation of law occurs under any of the following circumstances:

> (a) When a minor is validly married.
>
> (b) When a person reaches the age of 18 years.

> (c) During the period when the minor is on active duty with the armed forces of the United States.
>
> (d) For the purposes of consenting to routine, nonsurgical medical care or emergency medical treatment to a minor, when the minor is in the custody of a law enforcement agency and the minor's parent or guardian cannot be promptly located. The minor or the minor's parent shall remain responsible for the cost of any medical care or treatment rendered pursuant to this subdivision. An emancipation pursuant to this subdivision shall end upon the termination of medical care or treatment or upon the minor's release from custody, whichever occurs first.
>
> (e) For the purposes of consenting to his or her own preventive health care or medical care including surgery, dental care, or mental health care, except vasectomies or any procedure related to reproduction, during the period when the minor is a prisoner committed to the jurisdiction of the department of corrections and is housed in a state correctional facility operated by the department of corrections or in a youth correctional facility operated by the department of corrections or a private vendor under section 20g of 1953 PA 232, MCL 791.220g; or the period when the minor is a probationer residing in a special alternative incarceration unit established under the special alternative incarceration act, 1988 PA 287, MCL 798.11 to 798.18. This subdivision applies only if a parent or guardian of the minor cannot promptly be located by the department of corrections or, in the case of a youth correctional facility operated by a private vendor, by the responsible official of the youth correctional facility.

Pursuant to the ordinary language of MCL 722.4, emancipation by operation of law occurs when a minor is legally married, an individual reaches 18 years of age, if the minor is on active duty in the military, or for certain medical purposes when the minor is in the custody of a law enforcement agency or a prisoner committed to the jurisdiction of the Michigan Department of Corrections. *Brian Hill*, 269 Mich App at

524-525. We conclude that this language is not vague, but rather provides specific criteria that must be met for a minor to be considered emancipated by operation of law. MCL 722.4(2); *Sands*, 261 Mich App at 161. We reject defendant's argument that the preponderance-of-the-evidence standard is misleading because it implies that a defendant could present enough evidence to convince a court that the child has been emancipated, such as in this case where the victim's parents signed a release permitting her to engage in adult activities. The preponderance-of-the-evidence standard simply provides the applicable burden of proof—it does not change the criteria that must be proven by a preponderance of the evidence. Hence, MCL 750.145c clearly provides "a person of ordinary intelligence a reasonable opportunity to know what is prohibited" and what circumstances must exist in order for the affirmative defense of emancipation by operation of law to be applicable. *Sands*, 261 Mich App at 161. Accordingly, defendant's challenge that MCL 750.145c does not provide fair notice of the conduct proscribed fails. *Id*. Consequently, the trial court did not err when it concluded that defendant's vagueness argument on this ground was without merit. *People v Beam*, 244 Mich App 103,105; 624 NW2d 764 (2000).

B

Defendant next argues that MCL 750.145c(2) is unconstitutionally overbroad. We disagree. "An overbroad statute is one which is likely to 'chill' constitutionally protected behavior." *People v Hicks*, 149 Mich App 737, 742; 386 NW2d 657 (1986), citing *Broadrick v Oklahoma*, 413 US 601; 93 S Ct 2908; 37 L Ed 2d 830 (1973). But the challenged statute does not hinder any constitutionally protected behavior.

The United States Supreme Court has held that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance" and "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." *New York v Ferber*, 458 US 747, 757-758; 102 S Ct 3348; 73 L Ed 2d 1113 (1982). As a result, the Supreme Court held that where the law provides fair notice of the conduct proscribed and combats the production of materials that depict child sexually abusive activity, the materials do not enjoy the protection of the First Amendment. *Id*. at 764. Further, MCL 750.145c does not impinge on any privacy interest because the statute does not criminalize consensual sexual activity engaged in by persons between 16 and 18 years of age, but only criminalizes the *recording or photographing* of such activity. Accordingly, contrary to defendant's arguments, MCL 750.145c is not unconstitutionally overbroad.[1]

C

Next, defendant asserts that the trial court erred when it denied defendant's motion to suppress certain evidence. Defendant argues that he did not freely and voluntarily consent to police officers entering his home during their investigation. In addition, defendant asserts that he was in custody and subjected to interrogation in his home, and that accordingly, there was a

[1] Furthermore, none of the circumstances set forth in MCL 722.4(2), which relate to emancipation by operation of law, existed in this case. Defendant does not argue on appeal that his conduct fell outside the confines of MCL 750.145c(2). As set forth by this Court in *Brian Hill*, 269 Mich App at 525, "a criminal defendant may not defend on the basis that a statute is unconstitutionally vague where the defendant's conduct is fairly within the constitutional scope of the statute."

Miranda[2] violation when he requested counsel and the officers ignored his request. Defendant also contends that Sergeant Michael Kasher and Officer Jim Davis of the Norton Shores police department admitted violating the sequestration order at the suppression hearing by speaking with each other about the case and asserts on that basis that the trial court should have excluded their testimony. Further, defendant argues that the trial court abused its discretion by giving little weight to the substantial polygraph testimony offered by defendant. Consequently, defendant maintains that all statements made and evidence seized after police officers entered his home should have been suppressed.

We review a trial court's findings of fact during a suppression hearing for clear error, "giving deference to the trial court's resolution of factual issues." *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001). "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Swirles (After Remand)*, 218 Mich App 133, 136; 553 NW2d 357 (1996). However, we review "de novo the trial court's ultimate decision on a motion to suppress." *Frohriep*, 247 Mich App at 702. We also review de novo whether a defendant was " 'in custody' " at the time the defendant made statements to the police. *People v Herndon*, 246 Mich App 371, 395; 633 NW2d 376 (2001) (citation omitted). "[T]rial courts have discretion to order sequestration of witnesses and discretion in instances of violation of such an order to exclude or to allow the testimony of the offending witness." *People v Nixten*, 160 Mich App 203, 209-210; 408 NW2d 77 (1987) (citations omitted). Thus, we

[2] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

review such decisions for an abuse of discretion. *People v Solak*, 146 Mich App 659, 669; 382 NW2d 495 (1985). A trial court abuses its discretion when it selects an outcome that was not in the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). We also review for an abuse of discretion the trial court's consideration of polygraph-examination results in weighing a defendant's credibility. See *People v Cress*, 468 Mich 678, 694; 664 NW2d 174 (2003).

The entry by police officers into a person's home without a warrant and without consent or exigent circumstances is illegal. *People v Dillard*, 115 Mich App 640, 641; 321 NW2d 757 (1982). As stated by the Court in *People v Brown*, 127 Mich App 436, 440-441; 339 NW2d 38 (1983):

> Individuals are constitutionally protected from being subjected to unreasonable searches and seizures. All evidence obtained in violation of this protection is inadmissible in a state court. A warrantless search and seizure is per se unreasonable unless shown to fall within one of the various exceptions to the warrant requirement. Consent is one such exception. When consent is alleged, the burden is on the prosecution to prove by clear and positive evidence that the consent was unequivocal and specific, freely and intelligently given. Whether a consent is valid is a question of fact to be decided upon the evidence and all reasonable inferences drawn from it. The totality of the circumstances must be examined. . . . Conduct itself can, under proper circumstances, be sufficient to constitute consent. [Citations omitted.]

"[W]hether consent was given is primarily a question of credibility." *Id*. at 443. " '[I]f resolution of a disputed factual question turns on the credibility of witnesses or the weight of the evidence, we will defer to the trial court, which had a superior opportunity to evaluate

these matters.' " *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000) (citation omitted). In addition, a defendant has a right against self-incrimination and to counsel, pursuant to the Fifth Amendment of the United States Constitution, US Const, Am V. In *Miranda*, 384 US at 444, the United States Supreme Court held:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean 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. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.

Miranda warnings are not required unless an individual is subjected to custodial interrogation. *People v M L Hill*, 429 Mich 382, 384-391; 415 NW2d 193 (1987). In determining whether a person is effectively "in custody," the pertinent inquiry is whether there is restraint on freedom of movement in any significant way such as of the degree associated with a formal arrest. *People v Mayes (After Remand)*, 202 Mich App 181, 190; 508 NW2d 161 (1993). Custody must be determined on the basis of how a reasonable person in the suspect's situation would perceive his or her circumstances and whether the reasonable person would believe that he or she was free to leave. *Id.*; see also

People v Roark, 214 Mich App 421, 423; 543 NW2d 23 (1995). Whether an individual is effectively "in custody" is based on the totality of the circumstances. *Roark*, 214 Mich App at 423.

Statements made by a defendant during a custodial interrogation are inadmissible unless the defendant voluntarily, knowingly, and intelligently waived his or her right against self-incrimination. *People v Garwood*, 205 Mich App 553, 555-556; 517 NW2d 843 (1994). Voluntariness is determined by examining the totality of the circumstances surrounding a statement to establish if it was the product of an essentially free and unconstrained decision by its maker. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). Volunteered statements as well as evidence voluntarily given are admissible. *Miranda*, 384 US at 478; *People v Oswald (After Remand)*, 188 Mich App 1, 7; 469 NW2d 306 (1991).

With regard to the sequestration of witnesses, one of "the purposes of the sequestration of a witness is to prevent him from 'coloring' his testimony to conform with the testimony of another." *People v Stanley*, 71 Mich App 56, 61; 246 NW2d 418 (1976). Officer Davis and Sergeant Kasher each clearly testified that their testimony was not colored to conform with the testimony of the other. In light of this record evidence, we conclude that the trial court's decision to not exclude the testimony of Officer Davis and Sergeant Kasher was not outside the range of reasonable and principled outcomes. As a result, the trial court did not abuse its discretion. Furthermore, defendant's argument related to the polygraph examinations is not persuasive. The results of a polygraph examination should only be considered "with regard to the general credibility of the examinee[,] not as to the truth or falsehood of any

particular statement." *People v Barbara*, 400 Mich 352, 413; 255 NW2d 171 (1977). Thus, the trial court was entitled to use its discretion in considering how much weight to give the polygraph examinations. And matters of credibility are best resolved by the trial court. *Sexton*, 461 Mich at 752. Thus, the trial court's decision to give little weight to the polygraph examinations is not outside of the range of reasonable and principled outcomes.

This issue involved disputed factual questions, which turned on the credibility of the witnesses or the weight of the evidence. In such circumstances, this Court " 'will defer to the trial court, which had a superior opportunity to evaluate these matters.' " *Id*. (citation omitted). Here, the trial court ultimately concluded that the officers' version of the events was closer to the truth. The officers testified that defendant's consent to their entry of his home was unequivocal and specific, as well as freely and intelligently given. Their testimony is supported by defendant's conduct—he opened the door further and stepped backward for the officers to enter. In addition, based on the officers' testimony, defendant was not deprived of his freedom of movement in any significant way while the officers were interviewing him. A reasonable person in defendant's position would believe that he was free to leave, and therefore defendant was clearly not in custody. See *Herndon*, 246 Mich App at 395-396; *Mayes*, 202 Mich App at 190. Moreover, the officers testified that defendant never requested his counsel. Because defendant was not in custody and never even requested counsel, there was no *Miranda* violation. In addition, according to the officers, defendant's statements to the police were voluntary and defendant voluntarily gave them the evidence. Thus, defendant's statements and the evidence obtained were admissible, *Miranda*, 384 US at 478; *Oswald*, 188 Mich

App at 7, and the trial court did not err by denying defendant's motion to suppress.

D

Finally, defendant argues that the trial court abused its discretion when it declined to make a downward departure from defendant's sentencing guidelines range on the basis of the mitigating circumstances in the case. The minimum sentencing guidelines were scored at 84 to 280 months' imprisonment on each count. But defendant was sentenced to a minimum sentence of 7 years, or 84 months, on each count. Therefore, defendant was sentenced within the minimum guidelines range. Although there was no downward departure from the guidelines range, the trial court sentenced defendant at the very bottom of the guidelines range. Based on the record before us, the trial court correctly considered the totality of the circumstances and determined that a downward departure from the guidelines range was not justified. Under the circumstances and considering that there was no error in the scoring of the guidelines or reliance on inaccurate information, we affirm defendant's sentence. MCL 769.34(10); *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006).

Affirmed.

SAWYER, P.J., and WHITBECK and WILDER, JJ., concurred.

PEOPLE v REID (ON REMAND)

Docket No. 286784. Submitted December 13, 2010, at Lansing. Decided May 10, 2011, at 9:05 a.m.

Michael D. Reid was charged in the Wayne Circuit Court with felony drug possession and the misdemeanor of operating a motor vehicle while intoxicated. On the day of trial, the prosecutor moved to dismiss the drug-possession charge. The court, Vera Massey Jones, J., granted the motion, leaving only the misdemeanor charge. The jury convicted defendant of the misdemeanor charge. Defendant appealed, alleging that the circuit court did not possess jurisdiction to try him on the misdemeanor charge after the accompanying felony charge had been dismissed. The Court of Appeals, DONOFRIO, P.J., and SAWYER and OWENS, JJ., agreed with defendant and reversed the conviction, holding that the circuit court had erred by trying defendant on the misdemeanor charge rather than remanding the matter to the district court for trial. 288 Mich App 661 (2010). The Supreme Court, in lieu of granting leave to appeal, reversed the decision of the Court of Appeals, holding that the circuit court was vested with jurisdiction over the misdemeanor charge because defendant had been charged with a felony and a misdemeanor that arose out of the same criminal transaction and, once jurisdiction had properly attached, any doubt was to be resolved in favor of retaining jurisdiction. The Supreme Court stated that any legislative intent to divest jurisdiction once it has properly attached must be clearly and unambiguously stated and that, although MCL 600.8311(a) provides that the district court shall have jurisdiction over misdemeanors punishable by not more than one year in jail, it did not expressly divest the circuit court of jurisdiction in the circumstances of this case. The Supreme Court remanded the matter to the Court of Appeals for consideration of defendant's remaining issues. 488 Mich 917 (2010).

On remand, the Court of Appeals *held*:

1. The circuit court did not abuse its discretion by denying defendant's motion to suppress the result of his blood alcohol test. Defendant had an ample opportunity under MCL 257.625a(6)(d) to obtain an independent analysis of his blood sample under the facts of this case before the state police destroyed the sample. Any prejudice

from failing to obtain an independent test stemmed from defendant's failure to promptly request such a test, not because the delay in charging him precluded him from promptly requesting a test.

2. Defendant failed to show any due process violation to support his claim that the prosecution deliberately waited to bring charges in order to obtain a tactical advantage against defendant.

3. The verdict was not against the great weight of the evidence.

4. The prosecutor, after the jury was sworn but before opening statements, moved to amend the information to state that the charge related to operating a motor vehicle "while under the influence of alcohol and/or a controlled substance." The amendment was to add the claim regarding alcohol, not to add a claim regarding a controlled substance. Thus, there was no merit to defendant's claim that he was prejudiced by the alleged adding of a claim regarding a controlled substance.

5. Defendant waived any issue regarding the instructions to the jury regarding intoxication by expressly approving the instruction given.

Affirmed.

CONSTITUTIONAL LAW — DUE PROCESS — DELAY IN BRINGING CHARGES.

A defendant, to be entitled to dismissal on the basis that the prosecutor's delay in charging the defendant violated the defendant's right to due process of law, must show that the delay caused actual and substantial prejudice to the defendant's right to a fair trial and an intent by the prosecutor to gain a tactical advantage.

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

Rubin & Shulman, PLC (by *Allan S. Rubin* and *Neil B. Pioch*), for defendant.

ON REMAND

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

PER CURIAM. This case is once again before us, now on remand by the Michigan Supreme Court. In our original

opinion, we concluded that the circuit court did not possess the jurisdiction to try defendant on a misdemeanor charge when the accompanying felony charge had been dismissed before the beginning of trial. *People v Reid*, 288 Mich App 661; 795 NW2d 159 (2010). The Supreme Court, in lieu of granting leave to appeal, reversed our decision and remanded the matter to us to consider issues previously raised by defendant but not addressed in our original opinion. *People v Reid*, 488 Mich 917 (2010). We consider those issues and now affirm defendant's conviction of operating a motor vehicle while intoxicated (OWI).[1]

Defendant first argues that the trial court erred by denying his motion to suppress the result of his blood alcohol test as well as his motion to dismiss. We disagree.

Defendant's motion to suppress was based on an argument that he was deprived of his right under MCL 257.625a(6) to have an independent chemical test performed on the blood sample. We disagree. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

MCL 257.625a(6)(d) provides that a defendant in an OWI case be given a "reasonable opportunity" to obtain an independent analysis of his or her blood sample:

> A chemical test described in this subsection shall be administered at the request of a peace officer having reasonable grounds to believe the person has committed a crime described in [MCL 257.625c(1)]. A person who takes a chemical test administered at a peace officer's request as provided in this section shall be given a reasonable opportunity to have a person of his or her own choosing administer 1 of the chemical tests described in this subsection

[1] MCL 257.625(1)

> within a reasonable time after his or her detention. The test results are admissible and shall be considered with other admissible evidence in determining the defendant's innocence or guilt. If the person charged is administered a chemical test by a person of his or her own choosing, the person charged is responsible for obtaining a chemical analysis of the test sample.

In this case, a sample of defendant's blood was drawn following his arrest on November 13, 2005. The sample was destroyed by the state police crime lab in February 2008 pursuant to a policy providing for the destruction of samples two years after their receipt unless there is a request to preserve the samples longer. There is no indication that, at any time during the more than two-year period that the crime lab was storing defendant's blood sample, defendant made a request for an independent analysis that was denied. While it is true that defendant may not have been particularly motivated to have an independent test of his blood sample performed until after he was actually charged with a crime, he was charged on August 3, 2007. While this was almost two years after his initial arrest, it was still approximately six months before the blood sample was actually destroyed. We conclude that defendant had more than an ample opportunity to have his blood sample independently tested and, therefore, the trial court did not abuse its discretion by denying defendant's motion to suppress the test results.

This brings us to a second argument that defendant raises under this issue: whether the delay in charging defendant violated his right to due process of law. We review this question de novo. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999). For a defendant to be entitled to dismissal on this basis, the defendant must show that the delay caused "actual and substantial prejudice to the defendant's right to a fair trial and an

intent by the prosecution to gain a tactical advantage." *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000), overruled in part on other grounds by *People v Miller*, 482 Mich 540, 561 n 26 (2008). We are not persuaded that defendant has made such a showing in this case.

Defendant argues that there was prejudice because of his inability to obtain an independent analysis of his blood sample. But as already discussed, the sample was not destroyed until approximately six months after defendant was eventually charged. Defendant had more than two years to obtain independent testing of the blood sample, including for approximately six months after he was actually charged. Any prejudice from failing to obtain an independent test stemmed from defendant's failure to promptly request such a test, not because the delay in charging him precluded him from requesting a test.

Defendant also argues that the prosecution gained a tactical advantage as a result of the delay in bringing charges because the prosecutor knew that the Michigan State Police would have already destroyed the videotape of the traffic stop, thus depriving defendant of potentially exculpatory evidence from the videotape. But this argument also fails. First, defendant merely speculates that this was the reason for the delay. Indeed, defendant is unable to establish that a videotape ever existed. The arresting officer, Trooper Christopher Bommarito, testified that he could not recall whether the police car that he was driving that evening had a video camera. On the basis of the fact that there was a blank space under "video" on his police report, he concluded that there "might not have been a video" because the normal practice is to write the car number in that spot if the car is equipped with video equipment. He further testified

that, even if a video had existed, it would have been taped over after 60 days. A second officer, Trooper Korey Rowe, who arrived at the scene at approximately the time defendant's vehicle was stopped, did have video equipment in his car. But that video was presumably turned in and subsequently taped over under the 60-day-rotation policy.

But defendant does not show that the prosecution deliberately waited to bring charges so that the tapes would be unavailable. Indeed, the prosecutor did not wait merely two months to bring charges, but almost two years. Not only is it mere speculation that the videotape would have been helpful to defendant and further speculation that the prosecutor waited to bring charges until any such tape would have been reused under the 60-day-rotation policy, that speculation falls apart in light of the fact that the prosecutor then waited an additional 18 months or so to bring charges. It would seem that if the prosecutor's motivation in delaying the charges was to wait for any videotape to be reused, the charges would have been brought much sooner than was the case.

For these reasons, we conclude that defendant has not shown a due process violation arising from the delay in charging him.

Next, defendant argues that the jury's verdict that he was intoxicated was against the great weight of the evidence. We disagree. Because defendant did not move for a new trial, his unpreserved great-weight-of-the-evidence argument is reviewed for plain error. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). A verdict is against the great weight of the evidence if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow it to stand. *Id.* at 218-219.

In this case, there was substantial evidence of defendant's guilt. Trooper Bommarito testified regarding defendant's physical abilities, including defendant's failing of field sobriety tests, at the time of the traffic stop. Additionally, a lab technician testified regarding the results of the blood tests, the level of alcohol and drugs in defendant's blood system, and the effects that amount of alcohol and drugs would have had on defendant's ability to drive. In light of this evidence, the jury could reasonably have concluded that defendant was guilty.

Defendant next argues that he was unfairly prejudiced when the prosecutor was permitted to amend the information after the jury was empaneled. Specifically, defendant argues that the prosecutor should not have been allowed to change the theory of the case from operating a motor vehicle while under the influence of alcohol to operating "while under the influence of alcohol and/or a controlled substance" because defendant had prepared his defense to defend against alcohol charges only, with a blood alcohol content of only 0.02 percent. We disagree.

Defendant concedes that he did not object in the trial court to the amendment and, therefore, we review this issue for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The record does reflect that, after the jury was sworn but before opening statements, the prosecutor moved to amend the information to state "while under the influence of alcohol and/or a controlled substance." But the record also reflects that, when the trial court read the information to the prospective jurors at the beginning of jury selection, the information stated "while under the influence of a controlled substance." Therefore, the amendment was to add the claim regarding alcohol, not

to add a claim regarding a controlled substance. Because defendant's argument is premised on adding the claim of a controlled substance and this did not happen, there is no plain error to correct.

Finally, defendant argues that the trial court erred by instructing the jury on intoxication. At trial, however, defense counsel expressly approved the instruction given. Therefore, this issue is waived. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000).

Affirmed.

DONOFRIO, P.J., and SAWYER and OWENS, JJ., concurred.

CITY OF RIVERVIEW v STATE OF MICHIGAN

Docket No. 296431. Submitted May 3, 2011, at Lansing. Decided May 12, 2011, at 9:00 a.m. Leave to appeal denied, 491 Mich 885.

The city of Riverview brought an action in the Court of Claims against the state of Michigan and the Michigan Department of Environmental Quality (MDEQ), seeking money damages and declaratory relief with regard to the MDEQ's issuance of National Pollutant Discharge Elimination System permits for storm water discharges from municipal separate storm sewer systems. Plaintiff asserted that the challenged permits violate the first and second sentences of Const 1963, art 9, § 29, commonly known as the Headlee Amendment. Claims under the first sentence relate to the maintenance of support (MOS) of existing required activities or services, while the second sentence sets forth a prohibition on unfunded mandates (POUM) in connection with newly required activities or services. Defendants sought dismissal of the action on the ground that the Court of Claims lacked subject-matter jurisdiction to decide a Headlee Amendment case. The Court of Claims, Paula J. M. Manderfield, J., agreed with defendants and entered an order dismissing the action. Plaintiff appealed, contending that the Court of Claims erred as a matter of law when it dismissed plaintiff's Headlee Amendment MOS complaint seeking money damages under Const 1963, art 9, § 29 for unfunded mandates by the MDEQ.

The Court of Appeals *held*:

1. The Court of Claims properly determined that it lacked jurisdiction to decide a Headlee Amendment case. The statutory grant of jurisdiction to the Court of Claims in MCL 600.6419 specifies contract or tort claims, not constitutional claims like a Headlee Amendment action. The Court of Claims' status as the tribunal specially authorized to award damages against the state does not make it a natural forum for Headlee Amendment cases, including MOS claims that include a prayer for damages because money damages are, at best, an aberrant remedy for a violation of Const 1963, art 9, § 29.

2. The constitutional grant of jurisdiction to the Court of Appeals to hear Headlee Amendment cases, Const 1963, art 9,

§ 32, which the Legislature recognized and broadened by providing that an action under Const 1963, art 9, § 32 may be commenced in the Court of Appeals or in the circuit court in the county in which venue is proper, at the option of the party commencing the action, MCL 600.308a(1), are properly construed to exclude other tribunals. The specific grant of jurisdiction to the Court of Appeals and the circuit court operate as an exception to the general grant of jurisdiction to the Court of Claims to decide claims against the state contained in MCL 600.6419.

Affirmed.

COURTS — COURT OF CLAIMS — JURISDICTION — CONSTITUTIONAL LAW.

The Court of Claims does not have subject-matter jurisdiction to decide actions seeking to enforce the provisions of Const 1963, art 9, §§ 25 through 31, commonly known as the Headlee Amendment.

Pentiuk, Couvreur & Kobiljak, P.C. (by *Randall A. Pentiuk* and *Kerry L. Morgan*), for plaintiff.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Todd B. Adams* and *Tonatzin M. Alfaro Maiz*, Assistant Attorneys General, for defendants.

Before: DONOFRIO, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM. Plaintiff, the city of Riverview, appeals as of right a Court of Claims' order dismissing this case for lack of jurisdiction. Because the Court of Claims correctly determined that it lacked jurisdiction to decide a Headlee Amendment case, we affirm.

I

The Court of Claims' opinion and order dismissing this case included a concise statement of the underlying facts:

This case arises from the Michigan Department of Environmental Quality's ("the MDEQ's") issuance of National Pollutant Discharge Elimination System permits ("NPDES permits") for storm water discharges from municipal separate storm sewer systems. Plaintiff seeks money damages as well as declaratory relief based on Plaintiff's assertion that the challenged permits violate the first and second sentences of Article 9, Section 29 of the Michigan Constitution, commonly known as the Headlee Amendment.

* * *

Plaintiff is a municipality, and is the owner and operator of a small municipal separate storm sewer system.

In 1990, the U.S. Environmental Protection Agency ("the EPA") [p]romulgated a Phase I Stormwater Program to address bodies of water impaired by pollution and that, therefore, do not meet water quality standards. The Phase I Program concerned medium and large municipal separate storm sewer systems, and required the owners and operators of such systems, through the use of NPDES permits, to implement programs and practices to control polluted stormwater runoff. Permits were issued in 2003 in connection with the Phase One Stormwater Program.

In 1999, the EPA issued the Phase II Stormwater Program, expanding the program to certain small municipal separate storm sewer systems. In compliance with these federal programs, in 2003 Michigan implemented a Phase II Stormwater Program for owners and/or operators of small municipal separate storm sewer systems. In 2007, Michigan began the procedure for issuance of NPDES permits. Following periods for public comment and a series of meetings held with stakeholders, the MDEQ issued two NPDES permits (a Jurisdictional General Permit and a Watershed General Permit) in May 2008.

In May 2009, Plaintiff filed [*City of Riverview v MDEQ*] Case No. 09-712-CZ, in the Ingham County Circuit Court (still pending), alleging violations of the Headlee Amendment and various state statutes, and seeking declaratory

> and injunctive relief. In August, 2009, Plaintiff filed the present case, seeking money damages and declaratory relief[.] Plaintiff presumably filed this second action because this Court has exclusive jurisdiction to hear claims against the state seeking money damages.

Defendants moved for summary disposition in the Court of Claims on the ground that the Court of Claims lacked subject-matter jurisdiction. The court noted that the caselaw did not squarely resolve the issue, then reviewed the applicable constitutional and statutory authorities and concluded that it lacked jurisdiction.

II

Plaintiff's sole issue on appeal is whether the Court of Claims erred as a matter of law when it dismissed, for lack of jurisdiction, plaintiff's Headlee Amendment "maintenance of support" (MOS) complaint seeking money damages under Const 1963, art 9, § 29 for unfunded mandates by defendant MDEQ. This issue was raised in and decided by the Court of Claims and thus it is preserved for appellate review. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Further, "a challenge to subject-matter jurisdiction may be raised at any time, and presents a question of law that we review de novo." *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 708-709; 742 NW2d 399 (2007). Statutory interpretation likewise presents a question of law, calling for review de novo. See *Thompson v Thompson*, 261 Mich App 353, 358; 683 NW2d 250 (2004).

III

A court must be vigilant in respecting the limits of its jurisdiction. *Straus v Governor*, 230 Mich App 222, 227; 583 NW2d 520 (1998). The Legislature vested the Court of Claims with "exclusive" jurisdiction over "all claims and

demands, liquidated and unliquidated, ex contractu and ex delicto," brought against "the state and any of its departments, commissions, boards, institutions, arms, or agencies." MCL 600.6419(1)(a). But MCL 600.6419(4) adds that the Court of Claims chapter of the Revised Judicature Act does not deprive the circuit court of jurisdiction over certain actions, including "actions against state agencies based upon the statutes of this state in such case made and provided, which expressly confer jurisdiction thereof upon the circuit court . . . ." At issue is whether the broad statutory grant of jurisdiction to the Court of Claims extends to Headlee Amendment claims, or whether constitutional or statutory law confines such cases to other fora.

The Headlee Amendment to the Michigan Constitution, enacted by voter initiative in 1978, places certain limits on the Legislature's authority to impose costs on local units of government. It provides, in pertinent part, as follows:

> 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.]

The Headlee Amendment additionally grants this Court original jurisdiction to hear and decide Headlee Amendment claims: "Any taxpayer[1] of the state shall have

[1] That a municipality constitutes a "taxpayer" for purposes of vindicating its taxpayers' rights appears not in doubt. See *Ferndale Sch Dist v Royal Oak Twp Sch Dist No 8*, 293 Mich 1, 9; 291 NW 199 (1940) ("In

standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article . . . ." Const 1963, art 9, § 32.

The statutory grant of jurisdiction to the Court of Appeals recognizes the constitutional grant of jurisdiction to the Court of Appeals and adds a grant of jurisdiction to the circuit court: "An action under section 32 of article 9 of the state constitution of 1963 may be commenced in the court of appeals, or in the circuit court in the county in which venue is proper, at the option of the party commencing the action." MCL 600.308a(1). MCL 600.308a(1) does not treat the constitutional grant to the Court of Appeals of original jurisdiction to decide Headlee Amendment claims as granting *exclusive* jurisdiction. MCL 600.308a(5) further provides, "The court of appeals may refer an action to the circuit court or to the tax tribunal to determine and report its findings of fact if substantial fact finding is necessary to decide the action." It seems significant that this latter provision envisions a role for the Tax Tribunal, which joins the Court of Claims as a forum not mentioned in the language of MCL 600.308a(1) addressing jurisdiction over Headlee Amendment claims; however, the explanation is that Headlee Amendment issues are apt at times to be of a sort over which the Tax Tribunal, whose membership is configured "to relate primarily to questions concerning the factual underpinnings of taxes," *Romulus City Treasurer v Wayne Co Drain Comm'r*, 413 Mich 728, 737; 322 NW2d 152 (1982), is particularly competent to review.

Returning to the language of Const 1963, art 9, § 29 quoted earlier in this opinion, the first of the two sentences quoted relates to maintenance of support (MOS) of existing required activities or services, while

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litigation brought by a city the taxpayer is heard through the accredited representative of the city . . . .") (quotation marks and citation omitted).

the second sets forth a prohibition on unfunded mandates (POUM) in connection with newly required activities or services. See *Judicial Attorneys Ass'n v Michigan*, 460 Mich 590, 595; 597 NW2d 113 (1999). Actions alleging a violation of this constitutional provision must carefully distinguish between MOS and POUM claims. MCR 2.112(M).

Plaintiff asserts both kinds of claim, but concedes that the Court of Claims lacks jurisdiction over the POUM claim on the ground that such a claim cannot include a claim for damages. Plaintiff contends, however, that the Court of Claims has jurisdiction concurrent with that of the circuit court over MOS claims.

In *Wayne Co Chief Executive v Governor*, 230 Mich App 258; 583 NW2d 512 (1998), this Court stated as follows:

> We hold that money damages are neither a necessary nor proper remedy in a suit in which a violation of the second sentence of § 29 of the Headlee Amendment [a POUM claim] is established. We further hold that the Court of Claims lacks subject-matter jurisdiction to hear Headlee Amendment claims, because money damages are, at best, an aberrant remedy for a violation of § 29 and the Court of Claims does not have subject-matter jurisdiction absent a claim for money damages. [*Id.* at 261-262.]

Defendants cite the latter holding, whereby this Court marginalized the relevance of damages in connection with Headlee Amendment claims and stated broadly that the Court of Claims lacks jurisdiction to hear Headlee Amendment claims. But plaintiff points out that *Wayne Co Chief Executive* concerned a POUM claim only, which rendered any implication therein that the Court of Claims' lack of jurisdiction to hear Headlee Amendment cases extended to MOS claims mere dicta.

Oakland Co v Michigan, 456 Mich 144; 566 NW2d 616 (1997), originated in the Court of Claims, see *id.* at 148,

and raised a MOS claim, *id.* at 152. A three-member plurality of the Supreme Court remanded the case to the Court of Claims for further proceedings, *id.* at 168 (KELLY, J., joined by CAVANAGH and BOYLE, JJ.), but expressly declined to reach the question "whether the Court of Claims has jurisdiction over this claim," *id.* at 167.

Livingston Co v Dep't of Mgt & Budget, 430 Mich 635; 425 NW2d 65 (1988), also concerned a MOS claim originally brought in the Court of Claims, *id.* at 638-639, and the Supreme Court expressed no concern over the participation of that tribunal, but apparently jurisdiction was not challenged in that case.

A matter that a tribunal merely assumes in the course of rendering a decision, without deliberation or analysis, does not thereby set forth binding precedent. See *Rory v Continental Ins Co*, 473 Mich 457, 482; 703 NW2d 23 (2005) (implications, in dicta and without analysis, that public policy requires treating "adhesion contracts" specially did not establish any such rule); *People v Douglas* (*On Remand*), 191 Mich App 660, 662; 478 NW2d 737 (1991) (assumptions made by this Court and the parties in a prior opinion that were not properly raised as issues for legal determination before the Court have no precedential value.) Because in both *Oakland Co* and *Livingston Co* the Supreme Court assumed, without deciding, that jurisdiction was proper in the Court of Claims, those cases do not squarely answer that question for present purposes.

We conclude that this case is best resolved by building on the dicta in *Wayne Co Chief Executive*, 230 Mich App at 261-262, concerning the ancillary nature of monetary relief in Headlee Amendment cases and the role of the Court of Claims. Anticipating the pronouncement in *Wayne Co Chief Executive*, *id.* at 261, that "money damages are, at best, an aberrant remedy for a violation of § 29" of the Headlee Amendment, our Supreme Court

observed in *Durant v Michigan*, 456 Mich 175, 204; 566 NW2d 272 (1997), that "monetary relief typically will not be necessary in future § 29 cases . . . ."[2] Accordingly, the Court of Claims' status as the tribunal specially authorized to award damages against the state does not make it a natural forum for Headlee Amendment cases, including MOS claims that include a prayer for damages. Further, the statutory grant of jurisdiction to the Court of Claims specifies claims and demands *ex contractu* and *ex delicto*, meaning contract or tort claims. As defendants point out, the underlying Headlee Amendment action is not one sounding in contract or tort, but is instead a constitutional claim.

We additionally opine that the constitutional and legislative grant of jurisdiction to the Court of Appeals and the circuit court should be construed to exclude other tribunals. Again, the Michigan Constitution confers jurisdiction for Headlee Amendment claims on the Court of Appeals, Const 1963, art 9, § 32, which the Legislature recognized and broadened by providing that "[a]n action under section 32 of article 9 of the state constitution of 1963 may be commenced in the court of appeals, or in the circuit court in the county in which venue is proper, at the option of the party commencing the action." MCL 600.308a(1). Plaintiff maintains that the latter language seems permissive, using the word "may" and including no statement that the jurisdiction thus authorized is exclusive. But the language of exclusivity does not naturally comport with language authorizing a taxpayer to select one of two tribunals in which to commence an action. Further, if a taxpayer bringing a Headlee MOS action can bypass the tribunals consti-

[2] The Court concluded that monetary damages were appropriate in that case, owing to the state's "prolonged recalcitrance" in connection with the underlying dispute. *Id*.

tutionally and statutorily authorized for such cases and proceed in the Court of Claims, arguably the taxpayer could also proceed in the Tax Tribunal, or, if the damages sought are below the jurisdictional limitation, the district court. When a specific statutory provision differs from a related general one, the specific one controls. *Gebhardt v O'Rourke*, 444 Mich 535, 542-543; 510 NW2d 900 (1994). Accordingly, the specific grant of jurisdiction to the Court of Appeals and the circuit court should thus be understood to operate as an exception to the general grant of jurisdiction to the Court of Claims to decide claims against the state.[3]

Comporting with this reasoning is our Supreme Court's recognition of "the maxim *expressio unius est exclusio alterius*; that the express mention in a statute of one thing implies the exclusion of other similar things." *Bradley v Saranac Community Sch Bd of Ed*, 455 Mich 285, 298; 565 NW2d 650 (1997). The specification of the Court of Appeals and the circuit court as tribunals authorized to decide Headlee Amendment claims impliedly excludes other tribunals.

IV

The Court of Claims properly determined that it lacked jurisdiction to decide a Headlee Amendment case.

Affirmed. Defendants, being the prevailing parties, may tax costs pursuant to MCR 7.219.

DONOFRIO, P.J., and BORRELLO and BECKERING, JJ., concurred.

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[3] Likewise the specific grant of jurisdiction to the Tax Tribunal to decide claims for property tax refunds, MCL 205.731(b), or that of the district court to decide claims for damages not exceeding $25,000, MCL 600.8301(1).

PEOPLE v KISSNER

Docket No. 296766. Submitted May 3, 2011, at Lansing. Decided May 12, 2011, at 9:05 a.m. Leave to appeal denied, 490 Mich 893.

Donald L. Kissner was convicted by a jury in the Shiawassee Circuit Court, Janet M. Boes, J., of tampering with evidence, MCL 750.483a(6)(a), and attempted obstruction of justice, MCL 750.92; MCL 750.505. The charges arose from defendant's filing of a motion for relief from judgment and an affidavit in support of the motion after defendant was convicted by a jury in the Shiawassee Circuit Court of burning real property. The notarized motion and affidavit contained false statements by defendant that were designed to support his claim that the judge who conducted the trial on the charge of burning real property, Gerald Lostracco, J., had erred in failing to disqualify himself sua sponte on the basis of alleged personal bias against defendant. The statements included false claims that defendant was an ex-boyfriend of the judge's daughter and had possibly fathered a child by the daughter and that defendant had been to the judge's home on several occasions, including one during which the judge had chased defendant out of the home with a baseball bat. Defendant appealed, alleging that the evidence was insufficient to support the convictions for tampering with evidence and attempted obstruction of justice and that Judge Lostracco's failure to appoint counsel for defendant after he filed the motion for relief from judgment and the affidavit and requested appointed counsel constituted a violation of MCR 6.505(A) and deprived defendant of his right to due process of law.

The Court of Appeals *held*:

1. The prosecution presented sufficient evidence to support the conviction for tampering with evidence. Defendant was convicted under MCL 750.483a(6)(a), which lists possible punishments for a violation of MCL 750.483a(5)(b), which provides that a person shall not offer evidence at an official proceeding that he or she recklessly disregards as false. Defendant did not dispute that he offered evidence that was false and that he recklessly disregarded its falsity. Filing the motion and affidavit with the court constituted an "official proceeding" as defined in MCL 750.483a(11)(a).

2. The prosecution presented sufficient evidence to support the conviction for attempted obstruction of justice. By filing the motion and affidavit requesting that the trial court grant him a new trial on the basis of the false information found in the documents, defendant performed an act leading to interference with the orderly administration of justice. Obstruction of justice is committed when an effort is made to thwart or impede the administration of justice.

3. To the extent that defendant's argument that Judge Lostracco's failure to appoint counsel for defendant after he filed his motion for relief from judgment and the affidavit constituted a violation of MCR 6.505(A) and deprived defendant of the right to due process, defendant should have raised the issue in an appeal of Judge Lostracco's ruling regarding the motion for relief from judgment. To the extent that defendant's allegation could be viewed as a claim that evidence was improperly admitted at trial, his claim lacks merit. No evidence was admitted as a result of a violation of defendant's due-process right to the assistance of counsel because there is no constitutional right to an appointed attorney in state postconviction proceedings. Although Judge Lostracco failed to appoint counsel after defendant requested representation, in violation of MCR 6.505(A), the trial court in the instant case properly struck all references to Judge Lostracco's testimony regarding the hearing on defendant's motion for relief from judgment and appropriately instructed the jury to disregard the testimony. Any potential error arising from the introduction of Judge Lostracco's testimony regarding the hearing was properly rectified and reversal is not warranted.

Affirmed.

1. CRIMINAL LAW — TAMPERING WITH EVIDENCE — WORDS AND PHRASES — OFFICIAL PROCEEDING.

The clause "authorized to hear evidence under oath" in the phrase "a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath" in MCL 750.483a(11)(a) merely specifies the type of agency or official before which the proceeding must be heard in order for the proceeding to be considered an "official proceeding" and does not limit an official proceeding to only include a proceeding in which the agency or official hears evidence under oath.

2. CRIMINAL LAW — OBSTRUCTION OF JUSTICE.

Obstruction of justice is generally understood as an interference with the orderly administration of justice; it is impeding or obstructing those who seek justice in a court or those who have

duties or powers of administering justice therein; it is committed when the effort is made to thwart or impede the administration of justice.

3. CONSTITUTIONAL LAW — CRIMINAL LAW — RIGHT TO APPOINTED ATTORNEY — POSTCONVICTION PROCEEDINGS.

There is no constitutional right to an appointed attorney in state postconviction proceedings.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Randy O. Colbry*, Prosecuting Attorney, and *Anica Letica*, Assistant Attorney General, for the people.

Ronald D. Ambrose for defendant.

Before: DONOFRIO, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM. Defendant appeals as of right his convictions by a jury of tampering with evidence, MCL 750.483a(6)(a), and attempted obstruction of justice, MCL 750.92; MCL 750.505. Because sufficient evidence supports defendant's convictions and the trial court admitted no evidence in violation of either MCR 6.505(A) or defendant's due-process right to the assistance of counsel, we affirm.

I

In August 2004, Judge Gerald Lostracco, a Shiawassee Circuit Court judge, presided over a jury trial in which defendant was convicted of burning real property, MCL 750.73, and sentenced as a third-offense habitual offender, MCL 769.11, to 11 to 20 years in prison.[1] In August 2008, after having exhausted his

[1] This Court considered defendant's appeal of his sentence for burning real property in *People v Kissner*, unpublished opinion per curiam of the

appellate rights, defendant filed a motion for relief from judgment concerning his conviction for burning real property claiming that Judge Lostracco should have disqualified himself from the 2004 trial. The motion stated, in pertinent part, "The trial court erred in failing to *sua sponte* disqualify himself based on personal bias against the defendant where the defendant was [an] ex-boyfriend to and possibly fathered a child by the judge's daughter." Defendant also stated "that he is indigent and requests appointment of counsel in this matter pursuant to MCR 6.505(A)."

Although defendant stated that an accompanying brief would provide facts supporting each ground for relief, no brief in support of the motion is included in the trial-court record. However, defendant filed with the motion an affidavit in support of the motion, that stated, in pertinent part:

> (3) That I was personally involved in a romantic relationship, from the summer of 1996 to around November or December of 1998, with Misty Lostracco, who is the daughter of my judge;
>
> (4) That I met Misty Lostracco at [a] local hang-out called "the pits" near the parking lot of the Owosso Theater;
>
> (5) That I have been to the home of Judge Lostracco to visit Misty Lostracco;
>
> (6) That I have stayed the night at Judge Lostracco's home with his permission on several occasions;
>
> (7) That on one occasion, around October of 1998, Judge Lostracco came home to find Misty and I making-out and partially undressed, Judge Lostracco then chased me out of his home and into my vehicle with a baseball bat;

Court of Appeals, issued December 20, 2005 (Docket No. 258333), and *People v Kissner*, unpublished opinion per curiam of the Court of Appeals, issued September 18, 2007 (Docket No. 271977).

> (8) That Misty Lostracco became pregnant shortly after our break-up[.] No paternity tests have been performed and I am not sure the child is mine;
>
> (9) That there were sexual relations between Misty and I during the time we were seeing each other;
>
> (10) That Judge Lostracco personally knew me by name and appearance;
>
> (11) That I told my trial attorney, Douglas Corwin Jr., prior to trial at a supplemental hearing about the relationship with the Judge's daughter and about the incident with the baseball bat. Defense counsel told me it was nothing to worry about and did not thereafter file a motion for judicial disqualification.
>
> I declare under penalty of perjury that the above statements are True to the best of my knowledge, information, and belief.

Defendant signed both the affidavit and the motion for relief from judgment, and the parties stipulated that Geraldine Harris, a notary with the Michigan Department of Corrections, notarized defendant's signature on the motion and the affidavit, but did not have defendant swear to the truthfulness of the contents.

Judge Lostracco testified in the present case that he did not have a daughter named Misty. Although Judge Lostracco has a daughter, she would have turned 11 years old in the summer of 1996, when defendant alleged his relationship with Misty Lostracco began. Further, Judge Lostracco testified that his daughter had never been pregnant or had a child, was not married, and had recently graduated from college and was working. Judge Lostracco explained that he first became familiar with defendant in late 2001 when defendant appeared before him during court proceedings. Judge Lostracco maintained that he had never seen or had any acquaintance with defendant before that time. He denied ever allowing defendant to come to

his home or chasing defendant with a baseball bat. Judge Lostracco also testified that defendant's statements in his affidavit that he knew Judge Lostracco and his daughter personally were completely false.

Douglas Corwin, Jr., defendant's attorney during the 2004 trial, testified that during his preparation for that trial and in the course of the trial, defendant never stated that he had a relationship with Judge Lostracco's daughter or that he had a physical confrontation with Judge Lostracco. Further, defendant never asked Corwin to file a motion to disqualify Judge Lostracco from hearing the arson case. Corwin testified that defendant's claims that he had told Corwin about his relationship with Judge Lostracco's daughter and that Judge Lostracco had confronted him with a baseball bat were untrue.

Corwin also testified that initially he had been appointed as defendant's counsel in the present case, but at the preliminary examination and in defendant's presence, the trial court had granted his request to withdraw as counsel.[2] According to Corwin, at the end of the preliminary examination he explained to defendant that he was no longer his attorney and that the court would appoint a new attorney for defendant. At this point, defendant began commenting on the charges arising from his filing of the motion for relief from judgment and affidavit, stating, "Geez, they can't take a f—king joke, can they?"

Sergeant Mark Pendergraff of the Michigan State Police interviewed defendant as part of his investigation in the case. Defendant told Pendergraff that he had

[2] Corwin requested to be relieved as defendant's trial counsel because of the potential that he would be called as a witness in the matter and because defendant had previously filed a claim charging him with ineffective assistance of counsel.

signed both the motion for relief from judgment and the affidavit and mailed a copy of each to Judge Lostracco and the Shiawassee County Prosecuting Attorney. When asked, defendant stated that all the information contained in each document, and every statement of the affidavit, was true. Defendant also claimed that he knew someone who could verify his relationship with Misty Lostracco, but he refused to give Pendergraff any names. As part of his investigation, Pendergraff attempted to locate any person named Misty Lostracco, but he could find no one named Misty or Melissa Lostracco in the entire United States. Further, Pendergraff found no indication that any person named Misty Lostracco had lived in Michigan between 1996 and 1998.

In January 2009, the prosecutor charged defendant with one count of tampering with evidence, MCL 750.483a(6)(a). At a competency examination, the trial court found defendant competent to stand trial. Approximately one month later, the prosecutor also charged defendant with one count of attempted obstruction of justice, MCL 750.92; MCL 750.505.

At trial, Judge Lostracco testified that he held a hearing on October 6, 2008, regarding defendant's motion for relief from judgment. Although defendant had requested counsel in advance of the hearing, Judge Lostracco had declined the request, reasoning that defendant was not entitled to counsel because he had exhausted his appeal as of right. Judge Lostracco stated that defendant had acknowledged under oath that the documents filed with the court in relation to the motion for relief from judgment were his documents.

After the close of proofs at trial, defendant moved for a directed verdict on both counts, arguing that all evidence regarding the October 6, 2008, hearing should

be struck because defendant had not been appointed counsel pursuant to MCR 6.505(A) and that the remaining evidence was insufficient to find defendant guilty on either count. The trial court denied defendant's motion for a directed verdict, concluding that the "official proceeding" had begun when defendant filed his motion and affidavit. However, the trial court struck the portion of Judge Lostracco's testimony concerning the October 6, 2008, hearing. When instructing the jury, the trial court stated:

> Judge Lostracco testified about a court hearing held on October 6, 2008, at which Mr. Kissner participated by telephone, was sworn and gave certain testimony. I am striking all references to defendant's testimony given by telephone on October 6, 2008, and you are not to consider that testimony in reaching your verdict. You may consider the remainder of Judge Lostracco's testimony.

A jury convicted defendant of both counts on August 12, 2009. Defendant now appeals as of right.

II

Defendant argues that the evidence presented at trial was insufficient to establish beyond a reasonable doubt that he was guilty of tampering with evidence and attempted obstruction of justice. This Court reviews de novo a claim of insufficient evidence in a criminal trial. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). Statutory interpretation is a question of law that this Court considers de novo on appeal. *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003).

When reviewing a claim that the evidence presented was insufficient to support the defendant's conviction, this Court must view the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find beyond a reasonable doubt that

the prosecution established the essential elements of the crime. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). As a result, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). However, to establish that the evidence presented was sufficient to support the defendant's conviction, "the prosecutor need not negate every reasonable theory consistent with innocence." *Id*. "The evidence is sufficient if the prosecution proves its theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant may provide." *People v Wolford*, 189 Mich App 478, 480; 473 NW2d 767 (1991).

The prosecution need not present direct evidence linking a defendant to the crime in order to provide sufficient evidence to support a conviction; "[c]ircumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense." *Id*. A fact-finder may infer a defendant's intent from all the facts and circumstances. *Id*. "Questions of credibility are left to the trier of fact and will not be resolved anew by this Court." *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Furthermore, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

A. TAMPERING WITH EVIDENCE

The prosecution presented sufficient evidence to support defendant's conviction for tampering with evidence. Defendant was convicted under MCL 750.483a(6)(a),

which lists possible punishments for a violation of MCL 750.483a(5). MCL 750.483a(5) states:

> A person shall not do any of the following:
>
> (a) Knowingly and intentionally remove, alter, conceal, destroy, or otherwise tamper with evidence to be offered in a present or future official proceeding.
>
> (b) Offer evidence at an official proceeding that he or she recklessly disregards as false.

Defendant acknowledges in his brief on appeal that the information he provided in his motion for relief from judgment and affidavit was false. He does not dispute that he recklessly disregarded its falsity. He also does not dispute that the affidavit constituted "evidence." Instead, defendant merely argues that he cannot be guilty of tampering with evidence because he did not offer the evidence at an official proceeding. In making this claim, defendant seems to indicate that the allegedly wrongful action at issue was his act of signing the motion and affidavit in front of a notary. According to defendant, because the notary did not "hear evidence" and was not "taking testimony or deposition in that proceeding," but was simply witnessing his signature, defendant's act of signing the motion and affidavit did not constitute a judicial proceeding.

Defendant's argument raises a question of statutory interpretation. In *People v Chavis*, 468 Mich 84, 92; 658 NW2d 469 (2003), our Supreme Court stated:

> When interpreting a statute, our goal is to ascertain and give effect to the intent of the Legislature. *People v Koonce*, 466 Mich 515, 518; 648 NW2d 153 (2002). We begin by reviewing the plain language of the statute. If the language is clear and unambiguous, no further construction is necessary, and the statute is enforced as written. *Id.; Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001).

"Pursuant to MCL 8.3a, undefined statutory terms are to be given their plain and ordinary meaning, unless the undefined word or phrase is a term of art." *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007). " 'Moreover, words and phrases used in an act should be read in context with the entire act and assigned such meanings as to harmonize with the act as a whole.' " *People v Couzens*, 480 Mich 240, 249; 747 NW2d 849 (2008) (citation omitted).

It appears that defendant's understanding of the term "official proceeding," as used in the statute, is more restrictive than the Legislature intended. MCL 750.483a(11)(a) defines "official proceeding" as "a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding." Although defendant appears to argue that his signing of the motion and affidavit constituted the "proceeding" in question, Black's Law Dictionary (7th ed) indicates that the definition of "proceeding" is much broader. Black's defines "proceeding," in pertinent part, as "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment," and as "[a]ny procedural means for seeking redress from a tribunal or agency." Accordingly, the term "proceeding" encompasses the entirety of a lawsuit, from its commencement to its conclusion.

Further, the requirement that a proceeding must be "heard before a legislative, judicial, administrative, or other government agency or official" does not restrict an "official proceeding" to merely a judicial session in which both parties are present in a courtroom. Instead,

Random House Webster's College Dictionary (2d ed, 1997) defines the term "hear," as used in relation to an official proceeding, as "to give a formal, official, or judicial hearing to (something); consider officially, as a judge, sovereign, teacher, or assembly: *to hear a case*" and as "to take or listen to the evidence or testimony of (someone): *to hear the defendant*." Accordingly, a proceeding constitutes an "official proceeding" pursuant to MCL 750.483a(11)(a) when it is officially considered by a judicial official authorized to hear evidence under oath.

MCL 750.483a(11)(a) does not limit an "official proceeding" to only include a proceeding in which the agency or official hears evidence under oath, as defendant appears to contend. In the phrase "a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath," the clause "authorized to hear evidence under oath" merely specifies the type of agency or official before which the proceeding must be heard in order for the proceeding to be considered an "official proceeding."

The parties do not dispute that Judge Lostracco is a judicial official who is authorized to hear evidence under oath. Further, defendant submitted the affidavit in question concurrently with the mailing and filing of his motion for relief from judgment, and he does not dispute that he intended that the affidavit be considered in support of this motion. By filing his motion for relief from judgment, defendant commenced the proceeding for relief from judgment, on which Judge Lostracco officially considered and ruled. Accordingly, filing the motion and affidavit with the court constituted an "official proceeding" as defined in MCL 750.483a(11)(a).

In light of the determination that defendant's filing of the motion and affidavit with the court constituted an "official proceeding," we conclude that defendant

has failed to establish that the evidence was insufficient to support his conviction for tampering with evidence. Again, defendant acknowledges that the information he provided in his motion for relief from judgment and affidavit was false, and he does not dispute that he recklessly disregarded the falsity of the information provided in the affidavit when he filed it with the court and that the affidavit constituted "evidence."

Further, the evidence presented at trial established that defendant filed an affidavit in the Shiawassee Circuit Court claiming that he had been in a romantic relationship with Judge Lostracco's daughter Misty from 1996 to 1998 with Judge Lostracco's knowledge and had possibly fathered Misty's child. The evidence also showed that defendant filed this affidavit in reckless disregard of the fact that Judge Lostracco did not know defendant until 2001, that he did not have a daughter named Misty, that his daughter was between 10 and 13 years old at the time of defendant's claimed relationship with Misty, and that his daughter had never been pregnant. In addition, the evidence establishes that defendant offered the affidavit in support of his motion for relief from judgment and stated in the affidavit, "I declare under penalty of perjury that the above statements are True to the best of my knowledge, information, and belief."[3] Accordingly, the evidence was sufficient to support defendant's conviction for tampering with evidence.

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[3] In the context of arguing that defendant was not engaged in an "official proceeding" when signing the affidavit, defendant mentioned that the notary who notarized defendant's affidavit was not engaged in hearing evidence because her "role in the present case was one of merely witnessing or attesting to a signature." However, defendant never alleged that the affidavit did not constitute evidence because the notary merely notarized defendant's signature on the affidavit and did not have him swear to the truthfulness of the contents. Because defendant failed to properly establish any claim of error with regard to this issue, we need not address it. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

B. ATTEMPTED OBSTRUCTION OF JUSTICE

The prosecution also presented sufficient evidence to uphold defendant's conviction for attempted obstruction of justice. First, defendant argues that he should not have been convicted of attempted obstruction of justice because "attempt" offenses do not exist at common law. However, such an offense does exist at common law and, thus, defendant's contention lacks merit. See *People v Youngs*, 122 Mich 292, 293; 81 NW 114 (1899) (discussing the elements of an attempt at common law). Regardless, MCL 750.92 establishes criminal liability when an individual attempts to commit a crime and performs an act leading toward the commission of that offense, even if the individual fails in, or is otherwise stopped from perpetrating, the offense.[4]

Next, defendant argues that the filing of the motion for relief from judgment and the affidavit did not constitute an attempted obstruction of justice because it did not rise to the level of an offense that interferes with public justice. In *People v Thomas*, 438 Mich 448, 455-456; 475 NW2d 288 (1991), our Supreme Court explained:

> Obstruction of justice is generally understood as an interference with the orderly administration of justice. This Court, in *People v Ormsby*, 310 Mich 291, 300; 17 NW2d 187 (1945), defined obstruction of justice as " 'impeding or obstructing those who seek justice in a court, or those who have duties or powers of administering justice

[4] MCL 750.92 states:

> Any person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same, when no express provision is made by law for the punishment of such attempt, shall be punished . . . .

> therein.' " In *People v Coleman*, 350 Mich 268, 274; 86 NW2d 281 (1957), this Court stated that obstruction of justice is "committed when the effort is made to thwart or impede the administration of justice."

The *Thomas* Court recognized that "at common law obstruction of justice was not a single offense but a category of offenses that interfered with public justice" and that a defendant's conduct must be recognized as constituting one of the offenses falling within the category "obstruction of justice" to warrant a charge of obstruction of justice. *Id.* at 456-458. While the *Thomas* Court only acknowledged the 22 offenses listed in 4 Blackstone, Commentaries (1890), pp 161-177, as indicative of the offenses that interfered with public justice, *Thomas*, 438 Mich at 457 n 5, this Court recognized that the *Thomas* Court did not intend to limit obstruction of justice to include only the offenses listed in Blackstone. *People v Vallance*, 216 Mich App 415, 418-419; 548 NW2d 718 (1996).

Accordingly, defendant would have attempted to obstruct justice if he performed an act leading to interference with the orderly administration of justice by filing the motion and affidavit. Defendant did not provide any argument to support his contention that merely filing these documents did not fall within the category of offenses constituting obstruction of justice. In any event, the evidence presented at trial was sufficient to establish that defendant attempted to obstruct justice when he filed the motion and affidavit.

A jury had convicted defendant of burning real property, and this Court upheld his conviction on appeal. Considered in the light most favorable to the prosecution, the evidence indicated that although defendant knew that the information contained in the motion and affidavit was false, he still filed the motion

and affidavit after he had exhausted his appellate rights in an attempt to have the trial court grant him a new trial. By filing the motion and affidavit requesting that the Shiawassee Circuit Court grant him a new trial on the basis of the false information found in these documents, defendant performed an act leading to interference with the orderly administration of justice. The evidence presented at trial was sufficient to convict defendant of attempted obstruction of justice.

III

Defendant next argues that the trial court's failure to appoint counsel for defendant after he filed the motion for relief from judgment and the affidavit constituted a violation of the court rules and deprived defendant of his right to due process. After the close of proofs at trial, defendant moved for a directed verdict, arguing that all evidence regarding the October 6, 2008, hearing should be struck because defendant had not been appointed counsel pursuant to MCR 6.505(A) and that the remaining evidence was insufficient to find defendant guilty on either count. Although the trial court denied defendant's motion for a directed verdict, the trial court also struck the portion of Judge Lostracco's testimony concerning the October 6, 2008, hearing. Defendant did not challenge the trial court's decision to strike Judge Lostracco's testimony as a means of addressing the error arising from the failure to provide counsel to defendant at the October 6, 2008, hearing. As a result, defendant's claim of error is unpreserved. This Court reviews unpreserved claims of error for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

Although defendant presents this issue as a due-process violation arising from a failure to receive ap-

pointed counsel, he does not allege that he was deprived of counsel in the present case. Instead, defendant alleges that he was denied due process when Judge Lostracco failed to appoint counsel to represent him in a *separate* proceeding, namely, the hearing regarding defendant's motion for relief from judgment. In other words, defendant's argument appears to be that because Judge Lostracco failed to appoint counsel to represent him regarding his motion for relief from judgment, his convictions for tampering with evidence and attempted obstruction of justice should be reversed, even though these convictions arise from a separate criminal proceeding. To the extent that defendant's argument can be construed as an appeal of Judge Lostracco's refusal to appoint him counsel in the hearing regarding the motion for relief from judgment, defendant should have raised the issue in an appeal of Judge Lostracco's ruling regarding the motion for relief from judgment.

Additionally, to the extent that defendant's allegation could instead be viewed as a claim that evidence was improperly admitted at trial, his claim of error still lacks merit. No evidence was admitted as a result of a violation of defendant's due-process right to the assistance of counsel because there is no constitutional right to an appointed attorney in state postconviction proceedings. *People v Walters*, 463 Mich 717, 721; 624 NW2d 922 (2001). Although Judge Lostracco failed to appoint counsel after defendant requested representation, in violation of MCR 6.505(A),[5] the trial court properly struck all references

[5] MCR 6.505(A) states:

> Appointment of Counsel. If the defendant has requested appointment of counsel, and the court has determined that the defendant is indigent, the court may appoint counsel for the defendant at any time during the proceedings under this subchapter. Counsel must be appointed if the court directs that oral argument or an evidentiary hearing be held.

to Judge Lostracco's testimony regarding the October 6, 2008, hearing and appropriately instructed the jurors to disregard the testimony. See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998) (noting that jurors are presumed to follow their instructions). Any potential error arising from the introduction of Judge Lostracco's testimony regarding the hearing was properly rectified and reversal of defendant's convictions is unwarranted.

IV

We affirm defendant's convictions for tampering with evidence and attempted obstruction of justice. The evidence presented at trial indicated that defendant offered evidence at an official proceeding that he recklessly disregarded as false when he submitted the affidavit to the Shiawassee Circuit Court. That evidence was sufficient to establish a cause of action for tampering with evidence. The evidence presented at trial that defendant filed the motion for relief from judgment in an attempt to have the trial court grant him a new trial, even though he knew the information contained in the motion and supporting affidavit was false, was also sufficient to support defendant's conviction for attempted obstruction of justice.

Because the trial court appropriately struck Judge Lostracco's testimony regarding the October 6, 2008, hearing, the trial court admitted no evidence at trial in violation of either MCR 6.505(A) or defendant's due-process right to the assistance of counsel. Any error arising from the introduction of Judge Lostracco's testimony regarding the hearing was properly rectified and reversal of defendant's convictions is not warranted.

Affirmed. We do not retain jurisdiction.

DONOFRIO, P.J., and BORRELLO and BECKERING JJ., concurred.

BURLESON v DEPARTMENT OF ENVIRONMENTAL QUALITY

Docket No. 292916. Submitted December 10, 2010, at Lansing. Decided May 12, 2011, at 9:10 a.m. Leave to appeal denied, 490 Mich 917.

Bobby Burleson sought review in the Ingham Circuit Court of a declaratory ruling by the Department of Environmental Quality (DEQ) (now the Department of Natural Resources and Environment) regarding the extent of the DEQ's regulatory authority under the Great Lakes submerged lands act (GLSLA), MCL 324.32501 *et seq.*, which is part 325 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*. Burleson wished to construct a home on land bordering Lake Michigan and sought a permit under part 353 of NREPA, MCL 324.35301 *et seq*., which relates to sand dune protection. The DEQ refused to grant the permit, maintaining that Burleson was required to also obtain a permit under part 325. Burleson argued that no additional permit was necessary because the proposed building site was higher than the relevant elevation above sea level specified in MCL 324.32502, which petitioner maintained was the limit of the DEQ's jurisdiction over the land under part 325. Petitioner had requested a declaratory ruling from the DEQ related to this issue, and the DEQ concluded that its regulatory authority was not limited to the elevations identified in the statute as the ordinary high-water mark, but extended to the natural ordinary high-water mark or that point where the continuous presence and action of water on the land leaves a distinct mark. The court, Paula J. M. Manderfield, J., affirmed the DEQ's interpretation of the statute. Burleson appealed by leave granted.

The Court of Appeals *held*:

The limit of the DEQ's jurisdiction under the GLSLA is the natural ordinary high-water mark. MCL 324.32502 defines the ordinary high-water mark for each of the Great Lakes as an elevation above sea level according to the International Great Lakes Datum of 1955. The DEQ improperly interpreted the statute when it concluded that the Legislature intended the phrases "natural ordinary high-water mark" and the "ordinary high-water mark" to encompass different meanings, thereby providing jurisdiction beyond the elevations identified in the statute.

Instead, the DEQ's regulatory authority under the statute was defined by the elevations listed in the statute, and the phrase "natural ordinary high-water mark" refers to the specified elevations identified in the statute as measured by the land in its natural state, unaltered by humans. Thus, the circuit court erred by affirming the DEQ's declaratory ruling.

Reversed and remanded.

GLEICHER, J., dissenting, stated that the phrases "natural ordinary high-water mark" and "ordinary high-water mark" have different meanings. The Legislature's purposeful inclusion of the word "natural" in MCL 324.32502 demonstrated that it did not intend to limit the DEQ's regulatory jurisdiction under the GLSLA to fixed elevations because the Great Lakes' shorelines are constantly changing. The GLSLA unambiguously directs that it should be interpreted in a manner that preserves and protects the Great Lakes. Accordingly, the circuit court's order upholding the DEQ's declaratory ruling should have been upheld.

WATERS AND WATERCOURSES — GREAT LAKES — BEACHES — REGULATORY AUTHORITY OF DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT — NATURAL ORDINARY HIGH-WATER MARK.

The state's jurisdiction under the Great Lakes submerged lands act, MCL 324.32501 *et seq.*, extends to the ordinary high-water mark, that is, the elevation above sea level specified in MCL 324.32502 for each of the Great Lakes; the phrase "natural ordinary high-water mark" in the statute refers to the specified elevations as measured by the land in its natural state, unaltered by humans, and does not extend the jurisdiction of the Department of Natural Resources and Environment to land at a higher elevation.

Warner Norcross & Judd, LLP (by *Matthew T. Nelson*, *William C. Fulkerson*, and *Scott M. Watson*), for Bobby Burleson.

Bill Schuette, Attorney General, and *Louis B. Reinwasser*, Assistant Attorney General, for the Department of Environmental Equality.

Amici Curiae:

McClelland & Anderson, L.L.P. (by *Gregory L. McClelland* and *David E. Pierson*), for the Michigan Association of Realtors.

McClelland & Anderson, L.L.P. (by *Gregory L. McClelland* and *David E. Pierson*), for the Michigan Association Home Builders.

Richard K. Norton for the Michigan Association of Planning.

Before: MURPHY, C.J., and METER and GLEICHER, JJ.

METER, J. Petitioner appeals by leave granted from a circuit court order that affirmed respondent's declaratory ruling that its jurisdiction as set forth in MCL 324.32502, a provision of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*., extends to the natural ordinary high-water mark produced by the action of water against the shore. We agree with petitioner that respondent has misconstrued MCL 324.32502 and that respondent's jurisdiction extends instead to the specific elevations delineated in the statute. Accordingly, we reverse.

Petitioner wishes to construct a home on land that he owns on the shore of Lake Michigan at the Indiana border. According to his site plans, the house will be built at a minimum elevation of 585 feet above sea level, roughly 150 feet away from the water's edge. The property lies within a critical dune area, so petitioner applied to respondent, the Michigan Department of Environmental Quality (MDEQ),[1] for a permit under part 353 of NREPA, MCL 324.35301 *et seq*. Respondent refused to issue the permit, insisting that petitioner was also required to obtain a permit under part 325 of NREPA, also known as the Great Lakes submerged

[1] The MDEQ became part of the Michigan Department of Natural Resources and Environment on January 17, 2010. Executive Order No. 2009-45. For purposes of this case, however, the parties have continued referring to respondent as the MDEQ.

lands act (GLSLA), MCL 324.32501 *et seq*. Petitioner argues that MCL 324.32502 does not give respondent jurisdiction over the land on which he wishes to build.

The key statutory provision provides:

> The lands covered and affected by this part are all of the unpatented lake bottomlands and unpatented made lands in the Great Lakes, including the bays and harbors of the Great Lakes, belonging to the state or held in trust by it, including those lands that have been artificially filled in. The waters covered and affected by this part are all of the waters of the Great Lakes within the boundaries of the state. This part shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section, to provide for the sale, lease, exchange, or other disposition of unpatented lands and the private or public use of waters over patented and unpatented lands, and to permit the filling in of patented submerged lands whenever it is determined by the department that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state will not be impaired by those agreements for use, sales, lease, or other disposition. *The word "land" or "lands" as used in this part refers to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the bays and harbors of the great lakes lying below and lakeward of the natural ordinary high-water mark*, but this part does not affect property rights secured by virtue of a swamp land grant or rights acquired by accretions occurring through natural means or reliction. *For purposes of this part, the ordinary high-water mark shall be at the following elevations above sea level, international Great Lakes datum of 1955:* Lake Superior, 601.5 feet; *Lakes Michigan and Huron, 579.8 feet*; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet. [MCL 324.32502 (emphasis added).]

Petitioner requested a declaratory ruling from respondent to address the shoreline elevation along Lake

Michigan that constitutes the limit of respondent's jurisdiction for purposes of MCL 324.32502. Respondent's declaratory ruling stated that its jurisdiction is based on the natural ordinary high-water mark (NOHWM), which is distinct from the ordinary high-water mark (OHWM). The OHWM for Lake Michigan is statutorily set at 579.8 feet of elevation above sea level, but respondent, citing *Glass v Goeckel*, 473 Mich 667, 693; 703 NW2d 58 (2005), ruled that the NOHWM is found at the point where the "presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic." Respondent ruled that the NOHWM is coterminous with the public trust that applies to littoral lands.[2]

Petitioner appealed in the Ingham Circuit Court, arguing that the Legislature expressly limited respondent's jurisdiction to lands lakeward of 579.8 feet in elevation. The circuit court upheld the declaratory ruling, finding respondent's interpretation of the statute more logical than petitioner's proposed interpretation. This appeal followed.

Statutory interpretation is a question of law that we review de novo. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 102; 754 NW2d 259 (2008). An agency's interpretation is not binding on a court. *Id*. at 103. However, "the construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons." *Id*. (quo-

[2] "Littoral" refers to land along a lake or seashore, while "riparian" properly refers only to land along rivers. *Thies v Howland*, 424 Mich 282, 288 n 2; 380 NW2d 463 (1985). Historically, however, the term "riparian" has often been used to refer to both types of land. *Id*.; see also *Glass*, 473 Mich at 672 n 1.

tation marks and citations omitted). Still, the agency's interpretation may not conflict with the intent of the Legislature as statutorily expressed, and "respectful consideration" does not mean "deference." *Id.* at 103, 108.

Respondent has jurisdiction to require permits under part 325 of the GLSLA concerning lands "lying below and lakeward of the natural ordinary high-water mark . . . ." MCL 324.32502. Because there is no provision defining the phrase "natural ordinary high-water mark," statutory interpretation is necessary. The main goal of statutory interpretation is to give effect to the intent of the Legislature. *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008). When statutory language is unambiguous, the Legislature is presumed to have intended the plain meaning of the statute. *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 591; 735 NW2d 644 (2007).

Unless defined in the statute, each word or phrase in a statute should be given its plain meaning. *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008). "A lay dictionary may be consulted to define a common word or phrase that lacks a unique legal meaning." *Id*. This Court should also presume that each statutory word or phrase has some meaning and thus avoid rendering any part of a statute nugatory. See *Robinson v City of Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010). The various parts of the statute must be read in the context of the whole statute to produce a harmonious whole. See, e.g., *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009), and *Haliw v Sterling Hts*, 471 Mich 700, 706; 691 NW2d 753 (2005).

Again, the statute at issue states, in part:

> This part shall be construed so as to preserve and protect the interests of the general public in the lands and

> waters described in this section . . . . The word "land" or "lands" as used in this part refers to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the bays and harbors of the great lakes lying below and lakeward of the *natural ordinary high-water mark*, but this part does not affect property rights secured by virtue of a swamp land grant or rights acquired by accretions occurring through natural means or reliction. For purposes of this part, the *ordinary high-water mark* shall be at the following elevations above sea level, international Great Lakes datum of 1955: Lake Superior, 601.5 feet; Lakes Michigan and Huron, 579.8 feet; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet. [MCL 324.32502 (emphasis added).]

The parties agree that the "natural ordinary high-water mark" constitutes the limit of respondent's jurisdiction under part 325. However, they differ regarding the proper interpretation of that phrase. In its declaratory ruling, respondent stated that the elevations specified in the last sentence of MCL 324.32502 are not used to express the NOHWM, only the OHWM. Respondent concluded that the NOHWM must be different from the OHWM because otherwise the word "natural" would be rendered superfluous. Respondent noted that the statute exempts from its jurisdiction lands formed by reliction. The declaratory ruling explained that reliction is the gradual recession of water in a sea, lake, or stream, leaving permanently dry land. Thus, land that has become permanently dry is not subject to respondent's jurisdiction. Respondent argued that this idea is incompatible with a rigid determination that its jurisdiction extends to a certain elevation.

Respondent's declaratory ruling went on to state that the purpose of MCL 324.32502 was to protect the rights contained in the public trust and, therefore, that the NOHWM in the statute is the same as the "ordinary high-water mark" discussed by the Supreme Court in

Glass. Respondent noted the language in the statute stating that it "shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section" and to ensure that the "public trust in the state will not be impaired . . . ." MCL 324.32502. Respondent indicated that because the *Glass* Court held that the public trust is not limited by the elevations specified in MCL 324.32502, and because that statute is intended to preserve the public trust, respondent's jurisdiction should not be limited to the specified elevations, either.

We cannot agree with respondent's interpretation. A number of considerations lead us to conclude that the circuit court erred by affirming respondent's declaratory ruling. First, it strains credulity and common sense to conclude that phrases as similar as "natural ordinary high-water mark" and "ordinary high-water mark," employed within the same statutory paragraph, were intended by the Legislature to encompass the very different meanings that respondent sets forth.

Second, respondent's interpretation would pose serious difficulties concerning *why* the statutory elevations were included in MCL 324.32502 in the first instance. Respondent contends that the elevations are relevant for regulating activities such as dredging, beach maintenance, and the mowing and removal of vegetation. See MCL 324.32512, MCL 324.32501(b), MCL 324.32512a(3), MCL 324.32513(2)(b), and MCL 324.32516. However, most of these "uses" for the elevations were added many years after the elevations were codified. See 2003 PA 14 and 1968 PA 57 (amending former MCL 322.702 to add the elevations). Although one of the uses cited by respondent was in effect in 1968, before the 1968 amendment that added the elevations, the language containing the elevations was proposed in 1967. See former MCL 322.712

through 322.715, as added by 1968 PA 3, and HB 2621 of 1967 (enacted as 1968 PA 57). It again strains credulity to conclude that the Legislature included the elevations in the proposed statute for purposes that were not yet in existence.[3]

Third, had the Legislature meant to apply respondent's definition to the NOHWM, it could easily have added language explicitly doing so. Indeed, the Inland Lakes and Streams Act (ILASA), enacted two years before the amendments of the GLSLA that added the elevations were introduced, defined the phrase "ordinary high-water mark" in this manner. Former MCL 281.732(b), as added by 1965 PA 291; see MCL 324.30101(m).

Fourth, petitioner argues persuasively that the reference to reliction in the statute tends to negate respondent's interpretation. MCL 324.32502 states that "this part does not affect property rights secured by virtue of a swamp land grant or rights acquired by accretions occurring through natural means or reliction." If the NOHWM were independent of the listed elevations and defined in accordance with respondent's interpretation, then the "reliction exception" would be superfluous because relicted lands would, by definition, fall outside the boundary of the NOHWM as defined by respondent.

Fifth, that the *Glass* Court held that the public trust is not limited by the elevations in MCL 324.32502 does not give us license to apply respondent's definition to the NOHWM in the instant case. The *Glass* Court stated:

> Moreover, the [GLSLA] never purports to establish the boundaries of the public trust. Rather, the GLSLA estab-

[3] The dissent reasons that the phrase "ordinary high-water mark" was employed in other sections of the GLSLA when the Legislature enacted MCL 324.32502 in 1995; we note, however, that the elevations were actually added in 1968 and so any credible argument based on this line of reasoning should use 1968 as a reference point.

> lishes the scope of the regulatory authority that the Legislature exercises, pursuant to the public trust doctrine. Indeed, most sections of the act merely regulate the use of land below the ordinary high water mark. [*Glass*, 473 Mich at 683.]

In other words, the scope of respondent's regulatory authority under the GLSLA is not *automatically equivalent* to the scope of the public trust. We conclude that the pertinent statutory wording and the legislative history make clear that the scope of respondent's regulatory authority under the GLSLA should be defined using the listed elevations.

Finally, we conclude that the term "natural" in the statute has an alternative, and reasonable, purpose. The ILASA provides guidance regarding how this adjective should be applied in the context of the present case. Former MCL 281.732(b), as added by 1965 PA 291, stated:

> "Ordinary high water mark" means the line between upland and lake or stream bottom land which persists through successive changes in water levels, and below which the presence and action of the water is so common or recurrent as to mark upon the soil a character, distinct from that which occurs on the upland, as to the soil itself, the configuration of the surface of the soil and the vegetation. In case of an inland lake for which a level has been established by law, it means the high established level. *In case of permanent removal or abandonment of a dam resulting in the water returning to its natural level it means the natural ordinary high water mark*. [Emphasis added.]

The current version of the ILASA contains similar language in MCL 324.30101(m). The ILASA uses the phrase "natural ordinary high water mark" to refer to the specifically defined "[o]rdinary high water mark" as it would exist without alteration by humans. In addition, *Random House Webster's College Dictionary* (1997) defines "natural" as "existing in or formed by nature . . . ." When considering MCL 324.32502, it is logical to conclude that

the Legislature, in defining the phrase "ordinary high-water mark" using specific elevations and, within the same paragraph, modifying that phrase with the adjective "natural," intended the phrase "natural ordinary high-water mark" to refer to the specified elevations as measured by the land in its natural state, unaltered by humans.[4] We adopt this logical conclusion.

In light of the foregoing considerations, we reverse the decision of the circuit court.

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

MURPHY, C.J., concurred with METER, J.

GLEICHER, J. (*dissenting*). This case turns on whether the Michigan Legislature intended that state regulation of our Great Lakes shorelines extends to the natural ordinary high-water mark. The majority circumscribes the state's regulatory jurisdiction to fixed elevations above sea level defined by the International Great Lakes Datum (IGLD) for the year 1955, a level that MCL 324.32502 labels an "ordinary high-water mark." Because the Legislature deliberately inserted the word "natural" to delineate the scope of the state's ordinary high-water mark jurisdiction, I respectfully dissent.

In 1995, our Legislature enacted in MCL 324.32501 *et seq*., the Great Lakes submerged lands act (GLSLA). "[T]he GLSLA establishes the scope of the regulatory authority that the Legislature exercises, pursuant to the public trust doctrine." *Glass v Goeckel*, 473 Mich 667, 683; 703 NW2d 58 (2005). MCL 324.32502, part of

[4] A party that filed an amicus curiae brief makes certain arguments concerning how and when the elevations should be measured. We leave this question for another day, when the issue is ripe for review and has been fully briefed by the parties to the appeal.

the GLSLA, commences with a broad designation of "[t]he lands covered and affected" by the act, generally describing them as "all of the unpatented lake bottomlands and unpatented made lands in the Great Lakes, including the bays and harbors of the Great Lakes, belonging to the state or held in trust by it, including those lands that have been artificially filled in." The GLSLA then sets forth the core principles governing its interpretation:

> This part shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section, to provide for the sale, lease, exchange, or other disposition of unpatented lands and the private or public use of waters over patented and unpatented lands, and to permit the filling in of patented submerged lands whenever it is determined by the department that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state will not be impaired by those agreements for use, sales, lease, or other disposition. [MCL 324.32502.]

This sentence underscores the Legislature's intent that the state serve as a steward of the shores of our Great Lakes. The sentence's first clause posits, "This part shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section . . . ." I cannot envision a clearer directive. The second clause recognizes the interests of private littoral owners, but establishes no rights or entitlements. It merely states that the GLSLA "provide[s] for the sale, lease, exchange, or other disposition of unpatented lands and the private or public use of waters over patented and unpatented lands . . . ." The third clause returns to the public interest theme introduced in the first clause, reiterating that although

private owners possess a property right to fill in "patented submerged lands," the exercise of this and other property rights remains contingent on the state's determination

> that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state will not be impaired by those agreements for use, sales, lease, or other disposition.

Preservation of the precious Great Lakes as a public resource animates the Legislature's prescribed construction of the GLSLA.

My construction of the next two sentences of MCL 324.32502 flows directly from the principles guiding the GLSLA's interpretation. After establishing the act's general purview, the Legislature set forth the reach of the state's jurisdiction as follows:

> The word "land" or "lands" as used in this part refers to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the bays and harbors of the great lakes *lying below and lakeward of the natural ordinary high-water mark*, but this part does not affect property rights secured by virtue of a swamp land grant or rights acquired by accretions occurring through natural means or reliction. [*Id*. (emphasis added).]

This language contains no hint of ambiguity. The sentence clearly expresses the meaning that the natural ordinary high-water mark determines the state's regulatory authority. The Legislature selected the natural ordinary high-water mark as the boundary line of state jurisdiction because this reference point most securely safeguards the public's interest in the shores of the Great Lakes.

The natural ordinary high-water mark delineates a distinct point on the land created by the continuous

action of water and evidenced by physical characteristics including the appearance of the soil surface, vegetation changes, and the presence of debris. *Glass*, 473 Mich at 691; 33 CFR 329.11(a)(1). In *Glass*, the Michigan Supreme Court observed that the term "ordinary high-water mark" derives from "the common law of the sea," which governs waters with regular high and low tides. *Glass*, 473 Mich at 690. Despite the absence of tides in the lakes surrounding Michigan, the common law has long applied the term to the Great Lakes in light of the recurrent and sometimes substantial fluctuation in their water levels. *Id*. at 691, 693. The Supreme Court described as follows the legal pedigree of the ordinary high-water mark:

> The concepts behind the term "ordinary high water mark" have remained constant since the state first entered the Union up to the present: boundaries on water are dynamic and water levels in the Great Lakes fluctuate. In light of this, the aforementioned factors will serve to identify the high water mark, but the precise location of the ordinary high water mark at any given site on the shores of our Great Lakes remains a question of fact. [*Id*. at 693-694.]

The natural ordinary high-water mark may prove difficult to locate on a shoreline, but it occupies a firmly entrenched position in the common law.[1]

My interpretation of the term "natural ordinary high-water mark" derives from bedrock principles of statutory construction:

> The Court's responsibility in interpreting a statute is to determine and give effect to the Legislature's intent. The statute's words are the most reliable indicator of the Legislature's intent and should be interpreted based on

[1] The parties do not dispute that neither Bobby Burleson nor the Department of Environmental Quality has sought to ascertain the location of the natural ordinary high-water mark on Burleson's property.

> their ordinary meaning and the context within which they are used in the statute. Once the Court discerns the Legislature's intent, no further judicial construction is required or permitted because the Legislature is presumed to have intended the meaning it plainly expressed. [*People v Lowe*, 484 Mich 718, 721-722; 773 NW2d 1 (2009) (quotation marks and citation omitted).]

Each word of a statute is "presumed to be made use of for some purpose, and, so far as possible, effect must be given to every clause and sentence." *Univ of Mich Bd of Regents v Auditor General*, 167 Mich 444, 450; 132 NW 1037 (1911). This Court may not substitute or redefine a word chosen by the Legislature or assume that the Legislature mistakenly used one word or phrase instead of another. *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW 217 (1931); *People v Crucible Steel Co of America*, 150 Mich 563, 567; 114 NW 350 (1907).

> A well recognized rule for construction of statutes is that when words are adopted having a settled, definite and well known meaning at common law it is to be assumed they are used with the sense and meaning which they had at common law unless a contrary intent is plainly shown. [*People v Covelesky*, 217 Mich 90, 100; 185 NW 770 (1921).]

In addition,

> [a]ll words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning. [MCL 8.3a.]

In the GLSLA, the Legislature unambiguously selected the "natural ordinary high-water mark" as the boundary for "[t]he lands covered and affected" by the act. The Legislature's incorporation of the modifier "natural" signaled its intent that benchmarks created

by nature, such as eroded soil and altered patterns of vegetation, demarcate the extent of the jurisdiction of the Department of Environmental Quality (DEQ). And given that the term "natural ordinary high-water mark" represents both a centuries-old legal term of art and a concept well known to surveyors, I presume that the Legislature understood the meaning and significance of the language it included in MCL 324.32502.[2]

The last sentence of MCL 324.32502 reads: "For purposes of this part, the ordinary high-water mark shall be at the following elevations above sea level, international Great Lakes datum of 1955: Lake Superior, 601.5 feet; Lakes Michigan and Huron, 579.8 feet; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet." With this sentence, the Legislature introduced a concept distinct from the *natural* ordinary high-water mark. Invoking the IGLD of 1955, the Legislature established a specific reference point for the term "ordinary high-water mark." In my view, a basic understanding of the IGLD of 1955 facilitates a construction of this sentence and illuminates the intended distinction between the natural ordinary high-water mark and the ordinary high-water mark.

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[2] A 1959 Michigan regulation reinforces my conclusion that the Legislature purposefully chose the term "natural" to delimit the state's ordinary high-water mark jurisdiction:

> "Ordinary high water line" shall refer to that *natural* line between the upland and the lake bottom land which persists through periodic changes in water levels and below which the character of the natural soil and vegetation and the profile of the surface of the soil have been affected and worked upon by the waters of the lake at high stages as to make them distinct in character from the upland. This character of the soil, surface shape, or vegetation may be somewhat altered during exposure at low stages in the fluctuations of the water levels, but will be reestablished with the return of high stages. When the soil, vegetation, or shape of the surface have been directly or indirectly altered by man's activity, the ordinary high water line shall be located where it would have occurred had such alteration not taken place. [1959 AACS, R 299.371(a) (emphasis added).]

The IGLD represents "a reference system used for expressing elevations in the Great Lakes area." *State v Trudeau*, 139 Wis 2d 91, 107 n 7; 408 NW2d 337 (1987). A November 1991 "update letter" concerning Great Lakes levels authored by the United States Army Corps of Engineers explains the IGLD as follows:

> What is IGLD 1985?
>
> Because of movement of the earth's crust, the "datum" or elevation reference system used to define water levels within the Great Lakes-St. Lawrence River system must be adjusted every 25 to 35 years. The current datum is known as the International Great Lakes Datum, 1955 (IGLD 1955). The date of the new datum, 1985, is the central year of the period 1982-1988 during which water level information was collected for preparing the datum revision.
>
> Why is a revised datum required?
>
> Water levels gaging responsibility for the Great Lakes-St. Lawrence River system is shared by the United States and Canada. The harmonious use of these waters requires international coordination of many aspects of their management. The most basic requirement for coordinated management is a common elevation reference or "datum" by which water levels can be measured. [US Army Corps of Engineers, Great Lakes Levels, Update Letter No. 76, November 4, 1991, available at <http://www.lre.usace.armymil/_kd/Items/actions.cfm?action=Show&item_id=3371&destination=ShowItem> (accessed April 20, 2011).]

The "ordinary high-water mark" numbers listed in MCL 324.32502 correspond to each Great Lake's water-surface elevation above sea level, as reported in the 1955 datum. These numbers supply a readily available, unchanging plane of reference for lake elevations, which the Legislature designated "ordinary high-water mark[s]."

I believe it defies logic to equate a static number representing lake-water elevation in 1955 with a "natural" ordinary high-water mark that expressly controls the state's jurisdiction. Instead, the 1955 lake levels and the natural ordinary high-water mark are conceptually distinct. A permanently set elevation linked to 1955 water levels constitutes an artificial location with no connection to "natural" benchmarks. In contrast, the contour of the land surrounding the natural ordinary high-water mark predictably shifts with time, producing ever-changing elevations. Moreover, lake-water elevations above sea level defined by the IGLD embody a vertical plane, while the site of a natural high-water mark suggests a horizontal reference. The natural ordinary high-water mark represents a discernible intersection between the water and the shoreline. But "[t]he most ordinary effect of a large body of water is to change the shore line by deposits or erosion gradually and imperceptibly." *Hilt v Weber*, 252 Mich 198, 219; 233 NW 159 (1930). Because the topography of the Great Lakes shoreline constantly changes, as wind and waves move sand and soil, a fixed elevation may or may not reflect a location landward of the *natural* ordinary high-water mark. Due to shifting shorelines and varying beach elevations, a static elevation of 579.8 feet may denote the top of a sand dune in one year, while being underwater the next.

Unlike the majority, I credit our Legislature with awareness of the critical difference between a natural ordinary high-water mark impressed on the land notwithstanding varying water levels and shifting shore topography and unchanging numbers signifying lake-water elevations. Consequently, it does not strain my "credulity and common sense to conclude that phrases as similar as 'natural ordinary high-water mark' and 'ordinary high-water mark,' employed within the same

statutory paragraph, were intended by the Legislature to encompass" very different meanings. *Ante* at 551. Rather, I believe that the Legislature inserted the word "natural" because it intended to distinguish between an unchanging line in the sand and the reality of our dynamic Great Lakes shorelines. Because a fundamental difference exists between the meanings of the two terms, I cannot accept that the Legislature accidentally inserted the word "natural" into MCL 324.32502 to describe the lands subject to state jurisdiction or that the Legislature inadvertently omitted the word "natural" from the statute's last sentence.

Nor do I find troubling the specter of "serious difficulties concerning *why* the statutory elevations were included in MCL 324.32502 in the first instance." *Ante* at 551. As the majority recognizes, the Legislature employed the term "ordinary high-water mark" elsewhere in the GLSLA. When the Legislature enacted MCL 324.32502 in 1995, the term "ordinary high-water mark" appeared in at least two other sections of the GLSLA: MCL 324.32503(3), as amended by 2002 PA 148 ("The department shall not enter into a lease or deed of unpatented lands that permits drilling for exploration purposes unless the drilling operations originate from locations above and inland of the ordinary high-water mark."), and MCL 324.32513(2)(a)(*ii*), as amended by 2003 PA 163 ("For . . . a permit for . . . the mowing of vegetation in excess of what is allowed in section 32512(2)(a)(*ii*), in the area between the ordinary high-water mark and the water's edge, a fee of $50.00.").[3]

[3] It also seems reasonable to conclude that when the Legislature enacted the GLSLA, it intended that future regulatory provisions would use the ordinary high-water mark instead of the natural ordinary high-water mark. Indeed, this is precisely what occurred when the Legislature enacted MCL 324.32501(b), MCL 324.32512, MCL 324.32512a(3), MCL 324.32513, and MCL 324.32516.

Furthermore, I disagree with the majority's analysis of the portion of the statutory language addressing property rights acquired "by accretions occurring through natural means or reliction." MCL 324.32502. After defining the word "land" in the penultimate sentence of MCL 324.32502 as including "patented lands in the Great Lakes and the bays and harbors of the great lakes lying below and lakeward of the natural ordinary high-water mark," the Legislature added "but this part does not affect property rights secured by virtue of a swamp land grant or rights acquired by accretions occurring through natural means or reliction." The majority opines, "If the [natural ordinary high-water mark] were independent of the listed elevations and defined in accordance with [the DEQ's] interpretation, then the 'reliction exception' would be superfluous because relicted lands would, by definition, fall outside the boundary of the [natural ordinary high-water mark] as defined by [the DEQ]." *Ante* at 552. However, the majority has read out of the statute the words "affect property rights." Littoral owners possess property rights in land *subject to state regulation*. Regardless of whether the surface of a property owner's fast land expands with reliction or contracts through erosion, exercise of state regulatory powers does not negate ownership. See Abrams, *Walking the beach to the core of sovereignty: The historic basis for the public trust doctrine applied in* Glass v Goeckel, 40 U Mich J L Reform 861, 899-902 (2007). As the Supreme Court observed in *Glass*, the state's "status as trustee does not permit the state, through any of its branches of government, to secure to itself property rights held by littoral owners." *Glass*, 473 Mich at 694. Relicted land below the natural ordinary high-water mark may remain subject to private ownership. But "land-use regulation does not effect a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land."

Nollan v California Coastal Comm, 483 US 825, 834; 107 S Ct 3141; 97 L Ed 2d 677 (1987) (quotation marks and citation omitted). Just as "public rights may overlap with private title," *Glass*, 473 Mich at 700, the state's regulatory jurisdiction may overlie property rights. In my view, the language "this part does not affect property rights secured by virtue of a swamp land grant or rights acquired by accretions occurring through natural means or reliction" in MCL 324.32502 means simply that, irrespective of the location of the natural ordinary high-water mark, relicted land remains the property of the fee owner, rather than vesting in the state.

Finally, I agree with Burleson that the use of a fixed elevation enhances predictable regulatory boundaries. Yet by selecting the word "natural," the Legislature opted to link the state's regulatory realm to the reality of an ever-changing environment. In accordance with the Legislature's command that preservation and protection of the Great Lakes must guide interpretation of the GLSLA, I reject the idea that the Legislature intended that an elevation corresponding to the water's edge in 1955 would forever limit the state's ability to protect our beaches.

I would affirm the circuit court's order upholding the DEQ's declaratory ruling.

AUTO CLUB GROUP INSURANCE ASSOCIATION v ANDRZEJEWSKI

Docket No. 297551. Submitted March 3, 2011, at Grand Rapids. Decided May 17, 2011, at 9:00 a.m.

Auto Club Group Insurance Association brought an action in the Kent Circuit Court against Nicolas J. Andrzejewski, a minor, by his next friend, Darrell L. Andrzejewski; Darrell L. and Kristen Andrzejewski; Matthew Volk, a minor, by his next friend, Lori Volk; Lori Volk; and others, seeking a declaratory judgment regarding its obligations under a homeowner's insurance policy issued to Darrell and Kristen Andrzejewski that included liability insurance coverage. The declaratory judgment was sought as a result of an underlying tort action brought by Matthew Volk, by his next friend, Lori Volk, against Nicolas Andrzejewski and his parents, Darrell and Kristen Andrzejewski, seeking damages for injuries sustained by Mathew when he and Nicolas played against each other during a basketball game at a YMCA. As a result of the incident wherein Matthew was injured, delinquency proceedings were brought against Nicolas and, following the entry of a plea of nolo contendere, he had been adjudicated a delinquent. Auto Club sought summary disposition on the basis that the "intentional acts" exclusion and the "criminal acts" exclusion in the policy excluded liability coverage. The court, George S. Buth, J., granted summary disposition and entered a declaratory judgment in favor of Auto Club, holding that the actions of Nicolas were criminal in nature and intentional, as those terms were used in the insurance policy. The Andrzejewski defendants appealed.

The Court of Appeals *held*:

1. The criminal-acts exclusion precluded coverage for bodily injury or property damage resulting from (1) a criminal act or omission committed by anyone or (2) an act or omission, criminal in nature, committed by an insured person, even if the insured person lacked the mental capacity to appreciate the criminal nature or wrongfulness of the act or omission, or conform his or her conduct to the requirements of the law, or form the necessary intent under the law. The exclusion applied whether or not anyone, including the insured person, was charged with a crime,

was convicted of a crime by a court, jury, or plea of nolo contendere, or entered a plea of guilty, whether or not accepted by the court.

2. The criminal-acts exclusion precluded coverage because Nicolas committed an act criminal in nature. His intentional, nonconsensual contact with, and the resulting injury inflicted upon, Matthew satisfies the elements of the misdemeanor crimes of aggravated assault, MCL 750.81a(1), or assault and battery, MCL 750.81. Moreover, Nicolas admitted that he committed an intentional, unconsented, and harmful or offensive touching.

3. The activity underlying the juvenile adjudication was criminal in nature because it amounted to a violation of a criminal statute, even though the violation was resolved in a delinquency proceeding rather than a criminal proceeding.

Affirmed.

JUVENILE LAW — DELINQUENCY PROCEEDINGS — ACTS CRIMINAL IN NATURE.

A court must find that a juvenile has committed an act that, if committed by an adult, would violate any municipal ordinance or law of the state or of the United States in order for the juvenile to be adjudicated a delinquent; such an act is criminal in nature, even though the violation is resolved in delinquency proceedings rather than criminal proceedings (MCL 712A.2[a][1]).

Cunningham Dalman, P.C. (by *Kenneth B. Breese* and *Kenneth M. Horjus*), and *Gross & Nemeth, P.L.C.* (by *Mary T. Nemeth*), for Auto Club Group Insurance Association.

Fisher & Dickinson P.C. (by *Todd R. Dickinson*) for Darrell L., Kristen, and Nicolas J. Andrzejewski.

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

PER CURIAM. In this case involving personal injury insurance coverage, defendants Nicolas Andrzejewski and his parents, Darrell L. Andrzejewski and Kristen Andrzejewski, appeal as of right the trial court's grant of summary disposition under MCR 2.116(C)(10) in favor of plaintiff, Auto Club Group Insurance Association. We affirm.

Nicolas Andrzejewski was 13 years old at the time of the incident in which defendant Matthew Volk, also 13 years old, was injured. The injury occurred on March 28, 2008, during the course of a basketball game on "Teen Night" at the Grandville YMCA.

Nick and Matt were on opposing teams in a half-court game where the number of players on each team varied from four to seven per team and there was no restriction on substitutions. Matt and Nick guarded each other throughout the game. Matt claimed that Nick was "playing dirty" and that Nick had grabbed his shirt eight or ten times during the game. Matt also said that Nick grabbed his arm four or five times to take the ball away, elbowed him four or five times, threw the basketball hard at his chest twice, and unsuccessfully tried to trip him three to five times. Matt did not recall how he was injured. Nick claims that Matt pushed him in the back as he bent over to pick up a ball. Nick testified that he "got mad" and put Matt in a headlock. As Matt struggled to get out, he fell forward and hit his head on the ground. Matt's friends stated that Nick threw a punch at Matt. Matt's friends also stated that Nick then put Matt in a headlock, picked Matt up, and threw Matt onto the gym floor. After Matt's head hit the floor, he began to have a seizure.

Matt was taken by ambulance to the emergency room. He suffered an acute head injury with associated seizures, two hematomas on his head, soft-tissue injuries, a bruised or fractured iliac crest of his hip bone, photophobia, and postconcussion syndrome.

As a result of this incident, the prosecutor filed a delinquency petition requesting the Kent Circuit Court, Family Division, to take temporary custody of Nick, as a juvenile who violated Michigan's aggravated-assault statute, MCL 750.81a(1). Jurisdiction was subsequently

transferred to Ottawa County, where Nick and his family lived at the time. A plea of nolo contendere was entered for Nick and the referee entered a juvenile adjudication and disposition, ordering that Nick be made a temporary ward of the court, be placed in the Ottawa County Juvenile Detention Center for 10 to 14 days, and serve 56 hours of community service.

In 2009, Matt, by his next friend, Lori Volk, his mother, filed suit against Nick and his parents (hereafter defendants).[1] The complaint alleged that Nick was overly aggressive and acted intentionally, recklessly, carelessly, negligently, unlawfully, and maliciously toward Matt. Defendants were insured under a homeowner's insurance policy issued by plaintiff, which included liability insurance coverage.

Plaintiff is currently defending the underlying tort action brought by Matt and his mother against defendants under a reservation of rights set forth in a letter dated August 24, 2009. Plaintiff's reservation-of-rights letter set forth three separate grounds for denying coverage for the claims asserted against defendants: (1) there was no "occurrence" as defined in the policy; (2) the "intentional acts" exclusion set forth in ¶ 5 of the exclusions under part II, liability coverage was applicable; and (3) the "criminal acts" exclusion set forth in ¶ 10 of the exclusions under part II, liability coverage was applicable.

Plaintiff brought the present action seeking a declaratory judgment regarding its obligations under the policy and filed a motion for summary disposition. The circuit court granted the motion, finding that Nick's

[1] Matthew Volk and his mother also brought suit against the YMCA of Greater Grand Rapids and Mark Ellermets (the father of one of Nick's friends, who drove Nick to the game). However, the YMCA and Ellermets are not parties to this appeal.

actions were criminal in nature and intentional, as those terms were used within the insurance policy. The circuit court subsequently entered a declaratory judgment. Defendants now appeal, arguing that the trial court erred and that Nick's actions were not criminal in nature or intentional. We disagree.

A trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). This Court reviews the motion by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Id*. Summary disposition is properly granted only if there is "no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* A genuine issue regarding a material fact exists "when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

The guidelines for enforcing exclusionary clauses are summarized in *Century Surety Co v Charron*, 230 Mich App 79, 83; 583 NW2d 486 (1998):

> Exclusionary clauses in insurance policies are strictly construed in favor of the insured. Coverage under a policy is lost if any exclusion in the policy applies to an insured's particular claims. Clear and specific exclusions must be given effect because an insurance company cannot be liable for a risk it did not assume.

When reviewing an exclusionary clause, this Court must read the contract as a whole to effectuate the overall intent of the parties. *Pacific Employers Ins Co v Mich Mut Ins Co*, 452 Mich 218, 224; 549 NW2d 872 (1996). Where the language is clear and unambiguous,

the insurance policy must be enforced as written. *Century Surety Co*, 230 Mich App at 82-83.

The policy states (bold in original):

> **We** will pay damages for which an **insured person** is legally liable because of bodily injury . . . caused by an occurrence covered by this Policy.
>
> **We** will defend any suit with lawyers of our choice or settle any claim for these damages as **we** think appropriate. **We** will not defend or settle: any suit unless it arises from an **occurrence** covered by this Policy . . . .

"Occurrence" is defined in the Auto Club policy as follows:

> 1. **Occurrence** means an **accident**, including injurious exposure to conditions, which results, during the policy term, in **bodily injury** or **property damage**.
>
> 2. **Accident** means a fortuitous event or chance happening that is neither reasonably anticipated nor reasonably foreseen from the standpoint of both any **insured person** and any person suffering injury or damages as a result.

The pertinent exclusions provided as follows:

> BODILY INJURY AND PROPERTY DAMAGE NOT COVERED
>
> Under Part II, we will not cover:
>
> * * *
>
> 5. **bodily injury** or **property damage** resulting from an act or omission by an **insured person** which is intended or could reasonably be expected to cause **bodily injury** or **property damage**. This exclusion applies even if the **bodily injury** or **property damage** is different from, or greater than, that which is expected or intended.
>
> * * *

> 10. **bodily injury** or **property damage** resulting from:
>
> a. a criminal act or omission committed by anyone; or
>
> b. an act or omission, criminal in nature, committed by an **insured person** even if the **insured person** lacked the mental capacity to:
>
> (1) appreciate the criminal nature or wrongfulness of the act or omission; or
>
> (2) conform his or her conduct to the requirements of the law; or
>
> (3) form the necessary intent under the law.
>
> This exclusion will apply whether or not anyone, including the **insured person**:
>
> a. is charged with a crime;
>
> b. is convicted of a crime whether by a court, jury or plea of nolo contendere; or
>
> c. enters a plea of guilty whether or not accepted by the court[.]

We find that plaintiff's criminal-acts exclusion precludes coverage because Nick committed "an act . . . criminal in nature," i.e., his intentional, nonconsensual contact with, and the resulting injury inflicted upon, Matt satisfies the elements of the misdemeanor crimes of aggravated assault, MCL 750.81a(1), or assault and battery, MCL 750.81. Moreover, by Nick's own admission, he committed an intentional, unconsented, and harmful or offensive touching.

To the extent that defendants rely on the Michigan Supreme Court's decision in *Allstate Ins Co v McCarn (After Remand)*, 471 Mich 283; 683 NW2d 656 (2004), we find their argument without merit. In that case, the Supreme Court was interpreting an insurance contract provision that stated: " 'We do not cover any bodily injury or property damage intended by, or which may

reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person.' " *Id*. at 289. Under the particular language of the *McCarn* contract, that exclusion applied when the bodily injury or property damage was intended or occurred as a reasonable expectation of *intentional or criminal acts or omissions*. Unlike the language in *McCarn* that combined the two types of conduct into one paragraph, the contract language at issue here lays out distinct exclusions, including a separate paragraph for "intentional acts" as opposed to "criminal acts." Thus, the *McCarn* decision's two-pronged test based on the language of that particular joint exclusion does not apply in this case. Contrary to defendants' contentions, there is no requirement here that a criminal act be "intended or . . . reasonably . . . expected to cause bodily injury or property damage." To be excluded under the "criminal acts" exclusion, the bodily injury or property damage need only result from "a criminal act or omission" or "an act or omission, criminal in nature, committed by an insured person[.]" And further, the exclusion applies whether the insured person "is charged with a crime"; "is convicted of a crime whether by a court, jury or plea of nolo contendre"; or "enters a plea of guilty whether or not accepted by the court[.]" We conclude that the exclusion clearly applies, by its own terms, regardless of the actor's intent or expectations.

Defendants argue that Nick's actions cannot be considered "criminal in nature" because "the proceedings against Nick under the Juvenile Code were not criminal proceedings." We agree that the proceeding against Nick was a delinquency, rather than a criminal, proceeding. MCL 712A.1(2) provides that "[e]xcept as otherwise provided [not applicable here], proceedings under this chapter are not criminal proceedings." However, for a juvenile to be adjudicated a delinquent, the

court must find that "the juvenile has violated any municipal ordinance or law of the state or of the United States," MCL 712A.2(a)(1), such as the Michigan law against aggravated assault. The court in such a case must find that the juvenile committed an act that, if committed by an adult, would constitute the crime of aggravated assault. That act must, therefore, necessarily be in the nature of a crime, or "criminal in nature." As stated by (now Chief) Justice YOUNG in his concurrence in *People v Luckett*, 485 Mich 1076, 1076-1077 (2010), "the activity underlying a juvenile adjudication is criminal in nature because it amounts to a violation of a criminal statute, even though that violation is not resolved in a 'criminal proceeding.' " Therefore, this argument is without merit.

Affirmed.

GLEICHER, P.J., and WHITBECK and OWENS, JJ., concurred.

NORRIS v CITY OF LINCOLN PARK POLICE OFFICERS

Docket No. 295378. Submitted March 3, 2011, at Detroit. Decided March 10, 2011. Approved for publication May 17, 2011, at 9:05 a.m. Leave to appeal denied, 490 Mich 917.

Ronnie L. Norris and Karen S. Norris brought an action in the Wayne Circuit Court against Lincoln Park Police Officers Veronica Malkowski and Dean Vann and Lincoln Park Police Lieutenant Brian Hawk, alleging abuse of process, gross negligence, intentional infliction of emotional distress, and malicious prosecution. Ronnie had been driving a vehicle on I-75 at a high rate of speed on three tires and a rim and failed to comply when Malkowski and Vann signaled for him to stop. Ronnie eventually stopped his vehicle when a semitrailer stopped in front of him. After stopping, Ronnie failed to respond to Malkowski's commands to exit his vehicle and actively resisted when she attempted to remove him from the vehicle. Vann deployed a police canine in an attempt to force Ronnie's compliance. Eventually Malkowski removed Ronnie from the vehicle with the assistance of two civilians. Ronnie claimed that he had been in the midst of an epileptic seizure. He was acquitted of the related charges that were brought against him and brought suit alleging that he was injured by the officers' actions. Defendants moved for summary disposition. The trial court, Jeanne Stempien, J., granted summary disposition in favor of Malkowski and Hawk on the basis of governmental immunity, but denied summary disposition with regard to Vann, concluding that there were factual issues surrounding his use of the canine that precluded summary disposition. Vann appealed.

The Court of Appeals *held*:

1. An officer's decision regarding the type of action necessary to effectuate an arrest is only actionable if the officer engaged in wanton or malicious conduct or demonstrated a reckless indifference to the common dictates of humanity. Vann's use of the police canine was a discretionary action that was used in light of Ronnie's repeated failure to cooperate with police commands and, on the record presented, the trial court erred by concluding that the use of the canine violated the Lincoln Park Police Department's canine policy. Vann's actions were undertaken during the course of his employment, he acted within the scope of his authority, the acts were performed in

good faith, and his decision regarding the type of action necessary to effectuate the arrest constituted discretionary action. Thus, he was entitled to governmental immunity with regard to plaintiffs' intentional tort claims.

2. A party cannot avoid the dismissal of a cause of action through artful pleading. Thus, elements of intentional torts may not be transformed into gross negligence claims. Plaintiffs' claim of gross negligence was premised on the officers' alleged assault of Ronnie, an intentional tort claim with regard to which defendant was entitled to governmental immunity. Accordingly, the trial court erred by denying Vann's motion for summary disposition with regard to the gross negligence claim.

Reversed and remanded for entry of an order granting Vann's motion for summary disposition.

Reid & Reid, P.C. (by *Daniel J. Reid*), and the *Law Office of J. L. Hawkins & Associates, PLLC* (by *Johnny L. Hawkins*), for Ronnie L. and Karen S. Norris.

Plunkett Cooney (by *Mary Massaron Ross* and *Hilary A. Ballentine*) for Dean Vann.

Before: SAWYER, P.J., and MARKEY and FORT HOOD, JJ.

PER CURIAM. Defendant, Lincoln Park Police Officer Dean Vann, appeals as of right the trial court's order denying his motion for summary disposition based on governmental immunity.[1] We reverse.

On April 5, 2007, Officers Malkowski and Vann received a police bulletin concerning a dark color Jeep traveling southbound on I-75 and being driven at a high rate of speed on three tires and a rim. The vehicle was being driven by plaintiff. Sparks were flying off the vehicle

[1] The trial court granted summary disposition in favor of defendants Lincoln Park Police Officer Veronica Malkowski and Lincoln Park Police Lieutenant Brian Hawk, and that ruling is not at issue in this appeal. Plaintiffs are husband and wife. The claims raised by plaintiff Karen Norris are derivative of her husband's claims. Therefore, the singular term "plaintiff" refers to Ronnie Norris only.

as a result of its condition and speed. The officers were unable to stop the vehicle for three miles despite activating lights and sirens. A semitrailer in front of plaintiff slowed to a stop, and plaintiff then stopped his vehicle. Officer Malkowski positioned her vehicle behind plaintiff to prevent his escape. The officers approached plaintiff's vehicle, and Officer Malkowski gave verbal commands to plaintiff to exit his vehicle. Plaintiff looked at her and looked away. Officer Malkowski again commanded plaintiff to shut off the engine and exit the vehicle. After plaintiff failed to respond to three commands, Officer Malkowski opened the door and attempted to pull him out, but he kicked at her with his feet, assaulted her with his hands, and actively resisted her. Officer Vann of the K-9 unit advised that he was going to get his dog, Aegis. Officer Vann testified that he ordered plaintiff out of the vehicle and advised that he would deploy the dog, but plaintiff did not comply. The dog began to bark and bite at plaintiff who began to kick and swat at the dog. Officer Vann told plaintiff to stop engaging the dog, and he would call the dog off. After 15 seconds, Officer Vann called Aegis back to him.

While Officer Vann approached with the dog, Officer Malkowski heard plaintiff begin to spin the wheels on his car in an attempt to escape. She ran to the passenger side of the vehicle to remove the keys to prevent flight and injury to the officers. Plaintiff kicked at the dog and tried to avoid it by moving toward the center console. Officer Malkowski yelled at him to stop resisting and tried to grab plaintiff's coat to remove him from the vehicle. Once again, plaintiff began to strike Officer Malkowski and broke her glasses. At that point, two civilians ran up to her and asked if she needed assistance, and she accepted. The three pulled plaintiff from the car. Plaintiff was on his back with his hands beneath his body. He had to be rolled onto his stomach to be placed

in handcuffs. During the incident, plaintiff looked straight ahead and did not verbally respond to commands. Although officers were aware of epilepsy that may cause seizures including involuntary movements, they were unaware of temporal lobe epilepsy and the staring spells that may accompany an episode of temporal lobe epilepsy. The officers did not notice any medical alert information on plaintiff's key chain.

Plaintiff asserted that he had no recollection of the incident, but testified that he now feared dogs and police officers and suffered from posttraumatic stress disorder. Although plaintiff acknowledged a history of epilepsy, he testified that the episodes he experienced caused him to "freeze." He testified that he remembered driving on I-75, hitting a pothole, and waking up in the back of a police vehicle. He passed out again in the back of the police vehicle and woke up in a holding cell. Plaintiff's neurologist, Dr. Eric Zimmerman, testified that although plaintiff's condition may cause him to "freeze," it was common for a person coming out of a seizure to be agitated or combative.

Plaintiffs filed suit alleging abuse of process,[2] gross negligence, intentional infliction of emotional distress, and malicious prosecution against Officers Malkowski and Vann and Lincoln Park Police Lieutenant Brian Hawk. The trial court granted defendants' motion for summary disposition regarding defendants Malkowski and Hawk, concluding that they were entitled to immunity. The trial court held that there were factual issues regarding gross negligence and the intentional torts related to the conduct of Officer Vann. The trial court also held that the deployment of the dog was contrary to the Lincoln Park Police Department's policies and proce-

[2] Although this count was entitled "abuse of process", it alleged assault and battery.

dures for canine use. Defendant Vann appeals as of right the denial of his motion for summary disposition premised on governmental immunity. See MCR 7.202(6)(a)(v) and 7.203(A)(1).

The availability of governmental immunity presents a question of law that is reviewed de novo, and the decision to grant or deny summary disposition is also reviewed de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). If there are no material facts in dispute or if reasonable minds could not differ regarding the legal effect of the facts, the issue of governmental immunity is resolved as an issue of law. *Id*. A governmental agency is immune from tort liability when performing a governmental function unless a statutory exception applies. *Jackson Co Drain Comm'r v Village of Stockbridge*, 270 Mich App 273, 282; 717 NW2d 391 (2006).

Officer Vann alleges that the trial court erred by denying summary disposition because he was entitled to summary disposition on the basis of governmental immunity. We agree.

In *Odom v Wayne Co*, 482 Mich 459, 468, 480; 760 NW2d 217 (2008), the Supreme Court concluded that lower-level employees are entitled to qualified immunity from tort liability for intentional torts when the acts were undertaken during the course of employment and the employee acted or reasonably believed that he or she was acting in the scope of his or her authority, the acts were performed in good faith or without malice, and the acts were discretionary, not ministerial. The good faith element is subjective in nature, and it protects a defendant's honest belief and conduct taken in good faith with the cloak of immunity. *Id*. at 481-482. Discretionary acts are those that require personal deliberation, resolution, and judgment. "Granting immunity to an employee engaged in discretionary acts allows the employee to resolve problems without constant fear of legal repercussions." *Id*. at 476.

A police officer's determination regarding the type of action to take, whether an immediate arrest, the pursuit of a suspect, or the need to wait for backup assistance, constitutes discretionary action entitled to immunity. *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 659-660; 363 NW2d 641 (1984). A police officer's decisions regarding how to respond to a citizen, how to safely defuse a situation, and how to effectuate the lawful arrest of a citizen who resists are also clearly discretionary. See *Oliver v Smith*, 290 Mich App 678, 689-690; 810 NW2d 57 (2010). Once the decision to arrest is made, it must be performed in a proper manner. *Ross*, 420 Mich at 660. With regard to the execution of an arrest, "[a]n action may lie only if the officer has utilized wanton or malicious conduct or demonstrated a reckless indifference to the common dictates of humanity." *Dickey v Fluhart*, 146 Mich App 268, 276; 380 NW2d 76 (1985). When addressing a claim of assault and battery that allegedly occurred during the making of an arrest, discretion must be reposed in the law enforcement officer concerning the means necessary to apprehend the alleged offender and to keep him secure after the apprehension. *Firestone v Rice*, 71 Mich 377, 384; 38 NW 885 (1888). Furthermore, "this discretion cannot be passed upon by a court or jury unless it has been abused through malice or wantonness or a reckless indifference to the common dictates of humanity." *Id*. Accordingly, the trial court must address a preliminary question of law. Good faith means acting without malice. See *Armstrong v Ross Twp*, 82 Mich App 77, 85-86; 266 NW2d 674 (1978).

Police officers are not required to take unnecessary risks in the performance of their duties. See *People v Otto*, 91 Mich App 444, 451; 284 NW2d 273 (1979). Police officers work in a "milieu of criminal activity where every decision is fraught with uncertainty." *White v Beasley*, 453 Mich 308, 321; 552 NW2d 1 (1996) (opinion by BRICKLEY,

C.J.) (quotation marks and citation omitted). In light of the unusual and extraordinary nature of police work, it is improper to second-guess the exercise of a police officer's discretionary professional duty with the benefit of 20/20 hindsight. *Id*.

In the present case, the intentional tort claims are barred by governmental immunity. See *Odom*, 482 Mich at 468, 480; *Ross*, 420 Mich at 659-660. Police dispatch received multiple 911 calls concerning a vehicle with sparks flying from the rear end. Upon receipt of the police bulletin of a vehicle travelling on the freeway on three tires and one rim at a rate of 80 miles per hour, Officers Malkowski and Vann pursued the vehicle driven by plaintiff. The officers were unable to stop the vehicle for three miles despite activating both lights and sirens until a semitrailer pulled in front of plaintiff and slowed to a complete stop. Plaintiff did not comply with verbal commands by Officer Malkowski to exit the vehicle and struck and kicked her when she attempted to extract him from the vehicle. Consequently, Officer Vann attempted to achieve cooperation by threatening to release the police dog Aegis. When plaintiff again did not cooperate, the dog was released. Plaintiff began to spin his wheels in attempt to flee and resisted and kicked the police dog. After 15 seconds, the dog was called off. Once again, plaintiff fought with Officer Malkowski who was only able to remove plaintiff from the vehicle and effectuate an arrest with the aid of two civilians.[3]

Officer Vann's actions were undertaken during the course of his employment, he acted within the scope of

[3] The trial court commented that the use of civilians was contrary to police policy. There was no evidence in the lower court record to verify that assertion. Furthermore, private persons may make an arrest for felonies committed in their presence or if summoned by a peace officer to assist the officer in making an arrest. See MCL 764.16.

his authority, the acts were performed in good faith, and the decision regarding the type of action necessary to effectuate the arrest constituted discretionary action.

The trial court concluded that there were factual issues precluding summary disposition because of the use of the dog, the release of the dog into a confined space, and the violation of the department's canine policies. An officer's decision regarding the type of action necessary to effectuate an arrest is only actionable if the officer engaged in wanton or malicious conduct or demonstrated a reckless indifference to the common dictates of humanity. In the present case, the officers testified that plaintiff was repeatedly uncooperative. After viewing the assault of Officer Malkowski, Officer Vann made a decision to utilize the police dog. Officer Vann testified that the use of a police dog can aid certain situations, such as the use of a barking dog in instances of crowd control. When it became apparent that plaintiff would also resist the police dog, Officer Vann called the dog back after 15 seconds. Without the dog to contend with, plaintiff began to once again resist Officer Malkowski who was now present at the passenger side of the vehicle. The action taken was discretionary police judgment. The conclusion that the use of the police dog was contrary to police policies and procedures is not supported by the record. The Lincoln Park Police Department's K-9 policy delineates the specific uses for the dog, but also allows for use of the dog for "any other assignment the handler feels the dog is capable of handling." Therefore, the trial court erred by holding that factual issues prevented the application of qualified immunity for the intentional tort claims.[4]

[4] In the deposition of Officer Vann, plaintiff's counsel asserted that Officer Vann should have attempted to remove plaintiff because he was taller and larger than Officer Malkowski, a petite female. Counsel also

The trial court also erred by denying defendant Vann's motion for summary disposition regarding the claim of gross negligence. A party's choice of label for a cause of action is not dispositive. We are not bound by the choice of label because to do so "would exalt form over substance." *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). A party cannot avoid the dismissal of a cause of action through artful pleading. *Maiden v Rozwood*, 461 Mich 109, 135; 597 NW2d 817 (1999). The gravamen of a plaintiff's action is determined by examining the entire claim. *Id*. The courts must look beyond the procedural labels in the complaint and determine the exact nature of the claim. *MacDonald v Barbarotto*, 161 Mich App 542, 547; 411 NW2d 747 (1987). A review of the amended complaint reveals that the claim of gross negligence is premised on the alleged assault of plaintiff. Elements of intentional torts may not be transformed into gross negligence claims. *VanVorous v Burmeister*, 262 Mich App 467, 483; 687 NW2d 132 (2004). Accordingly, the trial court erred by denying the motion for summary disposition of the gross negligence count for failure to state a claim. *Id*. at 483-484.

Reversed and remanded for entry of an order granting defendant Vann's motion for summary disposition. We do not retain jurisdiction.

SAWYER, P.J., and MARKEY and FORT HOOD, JJ., concurred.

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asserted that Officer Vann did not want to get his "hands dirty." It is improper to second-guess the exercise of a police officer's discretionary professional duty with the benefit of hindsight. *White*, 453 Mich at 321 (opinion by BRICKLEY, C.J.).

PEOPLE v JACKSON

Docket No. 285532. Submitted February 3, 2011, at Detroit. Decided May 17, 2011, at 9:10 a.m. Leave to appeal denied, 490 Mich 882.

Andre L. Jackson was convicted by a jury in the Wayne Circuit Court, Leonard Townsend, J., of first-degree premeditated murder, conspiracy to commit murder, assault with intent to commit murder, and possession of a firearm during the commission of a felony. Defendant appealed.

The Court of Appeals *held*:

1. The evidence was sufficient to support defendant's convictions.

2. The prosecution's failure to disclose to defendant a transcript of one of the victim's prior statements given pursuant to an investigative subpoena violated MCR 6.201. However, there was no due-process violation because, when the trial court discovered the omission of the transcript from the discovery materials, the trial court precluded the prosecution from using the transcript in its case-in-chief. Defense counsel was then given an opportunity to review the transcript, and defendant did not argue or suggest in the trial court or on appeal that the transcript contained any exculpatory material. The trial court did not abuse its discretion by fashioning the remedy it employed for the discovery violation.

3. The trial court did not plainly err when, after it had dismissed a juror who disclosed that she was too stressed and overwhelmed to continue with the trial, it proceeded with the trial without questioning the remaining jurors to determine whether the dismissed juror may have said or done anything to taint them. The trial court's questioning of the juror before dismissing her had failed to reveal any information or circumstances suggesting that the remaining jurors were exposed to improper influences or that their ability to render a fair and impartial verdict was compromised.

4. Defendant failed to establish that inadmissible hearsay was admitted or plain constitutional error occurred when a police officer testified regarding the substance of one of the victim's responses to questions the officer asked in an interview conducted in a hospital while the victim was unable to speak. In order to answer

the officer's questions, the victim responded by either squeezing the hand of a nurse to indicate a "yes" response or by not squeezing the nurse's hand to indicate a "no" response, and the nurse relayed to the officer whether the victim had indicated yes or no. The nurse's reports to the officer of the victim's responses fell within the language-conduit rule, which provides that the statements of an interpreter are not hearsay because they are considered to be the statements of the declarant and the interpreter is considered an agent of the declarant and not an additional declarant. In determining whether statements made through an interpreter are admissible under the language-conduit rule, a court should consider (1) whether actions taken after the conversation were consistent with the statements translated, (2) the interpreter's qualifications and language skill, (3) whether the interpreter had any motive to mislead or distort, and (4) which party supplied the interpreter. None of those considerations militated against application of the rule in this case. Defendant did not have a constitutional right to confront the nurse because what she reported was properly considered to be the victim's statements and defendant had an opportunity to cross-examine the victim at trial.

5. The record did not support defendant's claims that the trial court was biased against him and that his counsel provided ineffective assistance.

Affirmed.

1. CONSTITUTIONAL LAW — DUE PROCESS — CRIMINAL LAW — DISCOVERY OF EVIDENCE.

There is no general constitutional right to discovery in a criminal case; however, due process requires the prosecution to disclose evidence in its possession that is exculpatory and material, regardless of whether the defendant requests the evidence.

2. CRIMINAL LAW — EVIDENCE — DISCOVERY OF EVIDENCE.

A party in a criminal action must, upon request, disclose any written or recorded statement pertaining to the case by a lay witness whom the party may call at trial (MCR 6.201[A][2]).

3. CRIMINAL LAW — RIGHT TO FAIR TRIAL — JURY.

A criminal defendant has a constitutional right to a fair trial by an impartial jury; a trial court must take appropriate steps to ensure that jurors will not be exposed to information or influences that could affect their ability to render an impartial verdict, but due process does not require a new trial every time a juror has been placed in a potentially compromising situation (US Const, Am VI; Const 1963, art 1, § 20).

4. CONSTITUTIONAL LAW — CONFRONTATION CLAUSE — LANGUAGE-CONDUIT RULE — HEARSAY — INTERPRETERS.

An interpreter is considered an agent of the declarant, not an additional declarant, under the language-conduit rule, and the interpreter's statements are regarded as the statements of the declarant, without creating an additional layer of hearsay; a court, in considering whether statements made through an interpreter are admissible under the rule, should consider (1) whether actions taken after the conversation were consistent with the statements translated, (2) the interpreter's qualifications and language skill, (3) whether the interpreter had any motive to mislead or distort, and (4) which party supplied the interpreter.

5. TRIAL — JUDICIAL BIAS — VEIL OF JUDICIAL IMPARTIALITY.

A trial judge has wide discretion and power in matters of trial conduct; judicial rulings, as well as a judge's opinions formed during the trial process, are not themselves valid grounds for alleging judicial bias unless there is a deep-seated favoritism or antagonism to the extent that the exercise of fair judgment is impossible; comments that are critical of or hostile to counsel and the parties are generally not sufficient to pierce the heavy presumption of judicial impartiality; the appropriate test to determine whether a trial court's comments or conduct pierced the veil of judicial impartiality is whether the conduct or comments were of such a nature as to unduly influence the jury and deprive the appellant of the right to a fair and impartial trial.

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

Malita Barrett for defendant.

Before: WHITBECK, P.J., and O'CONNELL and WILDER, JJ.

WILDER, J. Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), conspiracy to commit murder, MCL 750.157a, assault with intent to commit murder, MCL 750.83, and pos-

session of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life in prison for the first-degree murder and conspiracy convictions and 225 months to 40 years' imprisonment for the assault conviction, with those sentences to be served concurrently but consecutively to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.[1]

I. FACTUAL BACKGROUND

Defendant's convictions arose from the fatal shooting of Bennie Peterson and the nonfatal shooting of Donteau Dennis on the east side of Detroit during the early morning hours of September 28, 2007. According to the prosecution's evidence, codefendant Quonshay Douglas-Ricardo Mason persuaded Peterson and Dennis to leave Peterson's house under the pretext that they were going to rob a drug addict who was carrying a large amount of cash to purchase drugs. Mason drove Peterson and Dennis, in Peterson's minivan, to a house on Malcolm Street and told Dennis to purchase drugs in the house to use as bait in the robbery. Defendant and codefendant Kainte Hickey had followed Mason in defendant's Jeep. After Dennis left Peterson's minivan to purchase the drugs, Mason and defendant parked their vehicles so that the minivan was blocked in and could not be driven away. Mason then got out of the minivan and defendant got out of his Jeep, and the two of them went to the side of the

[1] Defendant was tried jointly with codefendants Kainte Deshawn Hickey and Quonshay Douglas-Ricardo Mason, who were similarly convicted of first-degree premeditated murder, conspiracy to commit murder, assault with intent to commit murder, and felony-firearm. Codefendant Hickey was also convicted of being a felon in possession of a firearm, MCL 750.224f. We affirmed in codefendants' consolidated appeals in an unpublished opinion per curiam, issued March 8, 2011 (Docket Nos. 285253 and 285254).

minivan and began firing guns at Peterson, who was still inside. At the same time, Hickey emerged from defendant's Jeep and fired several shots at Dennis as he crossed the street. Peterson was killed.

Officer Frank Senter arrived and found Dennis lying wounded in a backyard. Dennis remarked that he did not believe that he would survive and told Officer Senter that Hickey had shot him over a drug debt. Although Officer Senter did not recall hearing Dennis say anything about Peterson, defendant, or Mason, he stated that Dennis made additional statements that Officer Senter could not understand because of Dennis's condition. Later, while Dennis was hospitalized, he gave a statement implicating defendant and Mason in the shooting attack on Peterson. At trial, Dennis again identified defendant and Mason as the persons who shot at Peterson inside the minivan.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the evidence was insufficient to support his convictions. When a defendant challenges the sufficiency of the evidence in a criminal case, this Court considers whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror in finding that the essential elements of the crime were proved beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000); *People v Sexton*, 250 Mich App 211, 222; 646 NW2d 875 (2002). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Nowack*, 462 Mich at 400 (quotation marks and citations omitted). "The credibility of witnesses and the weight accorded to evidence are questions for the jury, and any conflict in the evidence must be resolved in the

prosecutor's favor." *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009).

A conviction of first-degree premeditated murder requires evidence that "the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). Premeditation and deliberation require "sufficient time to allow the defendant to take a second look." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995).

A criminal conspiracy is a partnership in criminal purposes, under which two or more individuals voluntarily agree to effectuate the commission of a criminal offense. *People v Justice* (*After Remand*), 454 Mich 334, 345; 562 NW2d 652 (1997). The individuals must specifically intend to combine to pursue the criminal objective, and the offense is complete upon the formation of the agreement. *Id*. at 345-346. The intent, including knowledge of the intent, must be shared by the individuals. *Id*. at 346. Thus, there must be proof showing that "the parties specifically intended to further, promote, advance, or pursue an unlawful objective." *Id*. at 347. Direct proof of a conspiracy is not required; rather, "proof may be derived from the circumstances, acts, and conduct of the parties." *Id.*

The elements of assault with intent to commit murder are "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996) (quotation marks and citation omitted). The intent to kill may be proved by inference from any facts in evidence. *People v Lawton*, 196 Mich App 341, 350; 492 NW2d 810 (1992). A person is guilty of felony-firearm if the person possesses a firearm during the commission of a felony. MCL 750.227b.

A person who aids or abets the commission of a crime may be convicted as if he or she directly committed the crime. *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001).

> "To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement." [*Id.* at 495-496, quoting *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995).]

Aiding and abetting describes all forms of assistance rendered to the perpetrator, including any words or deeds that may support, encourage, or incite the commission of a crime. *People v Youngblood*, 165 Mich App 381, 386; 418 NW2d 472 (1988).

In this case, Dennis testified that before they departed Peterson's house, defendant was waiting in a Jeep on the street, positioning himself in a manner that prevented Dennis from seeing whether someone else was inside, and defendant then followed the minivan to Malcolm Street where Mason took Dennis and Peterson. At Malcolm Street, defendant and Mason aligned their respective vehicles so that the minivan was blocked in and could not be driven away. Hickey, whose presence in the Jeep had been concealed by defendant, got out of the Jeep and pursued Dennis with a gun while defendant and Mason both began shooting toward the minivan at Peterson. Viewed in a light most favorable to the prosecution, this evidence supports an inference that defendant, Mason, and Hickey were acting in concert according to a premeditated plan to kill Peterson and Dennis. Their plan involved enticing Peterson

and Dennis to leave Peterson's home under the pretext that they were going to commit a robbery. When they reached the intended location, they acted together to separate Dennis and Peterson so that Mason and defendant could shoot Peterson and Hickey could make a surprise attack on Dennis. This evidence supports defendant's convictions for the first-degree murder of Peterson, conspiracy to commit murder, and aiding and abetting Hickey's assault with intent to murder Dennis. In addition, the evidence that defendant was armed with a gun during these offenses supports his felony-firearm conviction.

Although defendant argues that Dennis was not a credible witness and gave inconsistent statements concerning defendant's involvement, the credibility of his testimony was for the jury to resolve. It was within the jury's province to determine that Dennis's testimony was truthful, notwithstanding some discrepancies in his prior statements. *Harrison*, 283 Mich App at 378.

III. DISCOVERY VIOLATION

Defendant next argues that the prosecutor's failure to disclose a transcript of Dennis's prior statements given pursuant to an investigative subpoena violated his constitutional right to discovery. We disagree.

This Court reviews de novo a defendant's claim of a constitutional due-process violation. *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). "There is no general constitutional right to discovery in a criminal case . . . ." *Weatherford v Bursey*, 429 US 545, 559; 97 S Ct 837; 51 L Ed 2d 30 (1977); see also *People v Banks*, 249 Mich App 247, 254; 642 NW2d 351 (2002). However, due process requires the prosecution to disclose evidence in its possession that is exculpatory and material, regardless of whether the defendant requests

the evidence. *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963); *Schumacher*, 276 Mich App at 176. In addition, MCR 6.201(A)(2) requires that a party in a criminal action, upon request, disclose "any written or recorded statement, including electronically recorded statements, pertaining to the case by a lay witness whom the party may call at trial . . . ." The prosecution concedes that the omission from the discovery materials of the transcript of Dennis's statements given pursuant to the investigative subpoena violated MCR 6.201 but denies that the transcript contained exculpatory evidence that would render the omission a due-process violation.

When the omission of the transcript was discovered at trial, the trial court precluded the prosecution from using the transcript in its case-in-chief. At trial, defense counsel was given an opportunity to review the 30-page transcript. But defense counsel never argued in the trial court that the transcript contained any exculpatory material and, on appeal, does not identify any exculpatory material as well. Accordingly, there was no due-process violation.

The remaining question is whether the trial court abused its discretion by fashioning its remedy for the discovery violation. MCR 6.201(J); *Banks*, 249 Mich App at 252. When determining an appropriate remedy for a discovery violation, "the trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances . . . ." *Banks*, 249 Mich App at 252. 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). Here, the trial court originally precluded the prosecutor from questioning Dennis regarding his statements given pur-

suant to the investigative subpoena. When defense counsel argued that disclosure of the transcript was essential to his cross-examination of Dennis, the trial court gave counsel the opportunity to review it. Defense counsel thereafter continued his cross-examination of Dennis. Under the circumstances, the trial court's remedy was not an abuse of discretion.

IV. JUROR MISCONDUCT

Next, defendant argues that a new trial is required because, following the dismissal of a juror, the trial court failed to question the remaining jurors to determine whether the dismissed juror may have said or done anything to taint the remaining jurors. Because defendant did not object to the trial court's handling of the dismissed juror's request to be excused and because defendant did not request that the court question the remaining jurors, this issue was not preserved. We review unpreserved claims for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750,763-764; 597 NW2d 130 (1999); see also *People v Miller*, 482 Mich 540, 558-559; 759 NW2d 850 (2008) (stating that an unpreserved claim of an irregularity regarding the jury does not entitle a defendant to a new trial unless the defendant was denied the right to an impartial jury).

The United States and Michigan Constitutions guarantee a criminal defendant a fair trial by an impartial jury. US Const, Am VI; Const 1963, art 1, § 20. The trial court must take appropriate steps to ensure that jurors will not be exposed to information or influences that could affect their ability to render an impartial verdict based on the evidence admitted in court. MCR 6.414(B). However, " 'due process does not require a new trial every time a juror has been placed in a potentially

compromising situation.' " *People v Grove*, 455 Mich 439, 472; 566 NW2d 547 (1997), quoting *Smith v Phillips*, 455 US 209, 217; 102 S Ct 940; 71 L Ed 2d 78 (1982); see also *Miller*, 482 Mich at 558-559.

In this case, a juror informed the trial court at the start of the second day of trial that she was too stressed and overwhelmed to continue. The trial court questioned her about what she may have said to the other jurors about her situation, and she indicated only that she had told them that she felt frustrated and had been unable to sleep. Without objection by any party, the trial court dismissed the juror without further questioning and continued the trial without questioning the remaining jurors. We disagree with defendant's argument on appeal that the trial court was obligated to question the remaining jurors to determine whether the dismissed juror may have said or done anything to taint them. The trial court's questioning of the dismissed juror did not reveal any information or circumstances to suggest that the remaining jurors had been exposed to improper influences or that their ability to render a fair and impartial verdict had been compromised. Under the circumstances, the trial court's decision to proceed with the trial without questioning the remaining jurors was not plain error.

V. ADMISSIBILITY OF NURSE OTSUJI'S "STATEMENTS"

At trial, Sergeant William Anderson testified regarding an interview of Dennis that was conducted in the hospital with the assistance of a nurse, Molly Otsuji. Dennis was unable to speak at the time of the interview, so Sergeant Anderson communicated with him by asking yes-or-no questions, to which Dennis responded by either squeezing the hand of Nurse Otsuji to indicate a "yes" response or by not squeezing her hand to indicate

a "no" response. At trial, Sergeant Anderson testified regarding the substance of Dennis's responses, as reported by Nurse Otsuji. Defendant now argues on appeal that Nurse Otsuji's reports of Dennis's responses to Sergeant Anderson's questions were inadmissible hearsay and that the admission of her reports also violated his constitutional right of confrontation because she was not called as a witness at trial.[2]

Although defendant objected to Sergeant Anderson's testimony regarding Nurse Otsuji's reports of Dennis's responses on the ground that the statements were "double hearsay," he did not raise an objection based on the Confrontation Clause or object to the prosecution's failure to produce Nurse Otsuji at trial. Therefore, this issue is preserved only with respect to the hearsay question and not with respect to the constitutional issue. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). This Court reviews preserved evidentiary issues for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). Unpreserved claims of constitutional error are reviewed for plain error affecting substantial rights. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

The Confrontation Clause, US Const, Am VI, states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." See also Const 1963, art 1, § 20. In *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court held that the Sixth Amendment bars testimonial statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. A pretrial statement is testi-

[2] Defendant does not challenge the admissibility of Dennis's hand-signal "statements" to Nurse Otsuji.

monial if the declarant should have reasonably expected the statement to be used in a prosecutorial manner and the statement was made under circumstances that would cause an objective witness reasonably to believe that the statement would be available for use at a later trial. *Id.* at 51-52; *People v Lonsby*, 268 Mich App 375, 377; 707 NW2d 610 (2005).

Defendant argues that Nurse Otsuji's reports to Sergeant Anderson were inadmissible hearsay, which is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v McLaughlin*, 258 Mich App 635, 651; 672 NW2d 860 (2003). Defendant further argues that Nurse Otsuji's reports were testimonial in nature and that he never had an opportunity to cross-examine her and, thus, the admission of those statements violated his constitutional right of confrontation. The prosecution responds that Nurse Otsuji's reports were admissible under the "language conduit" rule, under which an interpreter is considered an agent of the declarant, not an additional declarant, and the interpreter's statements are regarded as the statements of the declarant without creating an additional layer of hearsay. See *Hernandez v State*, 291 Ga App 562, 566; 662 SE2d 325 (2008), *United States v Cordero*, 18 F3d 1248, 1252-1253 (CA 5, 1994), and *State v Patino*, 177 Wis 2d 348, 370-371; 502 NW2d 601 (Wis App, 1993).[3]

The language-conduit rule has been applied in the context of a Confrontation Clause challenge to testi-

[3] We are not bound by the decisions of federal courts or courts of other states, but we may consider them to be persuasive authority. *Abela v Gen Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004); *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 559 n 38; 705 NW2d 365 (2005).

mony of a translator's statements. In *Hernandez*, 291 Ga App at 567-568, the Georgia Court of Appeals held that a defendant does not have a constitutional right to confront a translator because the statements of the translator are considered to be the statements of the declarant. The court held that because the translator's statements were considered to be the statements of the declarant, who in that case was the defendant, the statements did not implicate the Confrontation Clause because a defendant has no right to confront himself. *Id.* In determining whether statements made through an interpreter are admissible under the language-conduit rule, a court should consider (1) whether actions taken after the conversation were consistent with the statements translated, (2) the interpreter's qualifications and language skill, (3) whether the interpreter had any motive to mislead or distort, and (4) which party supplied the interpreter. *United States v Nazemian*, 948 F2d 522, 527-528 (CA 9, 1991); see also *People v Gutierrez*, 916 P2d 598, 600-601 (Colo App, 1995).

In this case, Nurse Otsuji's reports to Sergeant Anderson regarding Dennis's hand-signal responses fall within the language-conduit rule. Although Nurse Otsuji was not interpreting a foreign language, she was conveying Dennis's statements by reporting whether he used the signal to indicate "yes" or used the signal to indicate "no." In this sense, Nurse Otsuji functioned as an interpreter by relaying Dennis's responses to Sergeant Anderson. Further, there is no indication that any of the considerations set forth in *Nazemian*, 948 F2d at 527-528, militate against application of the language-conduit rule in this case. Defendant does not assert that Nurse Otsuji was not qualified to assist in the manner that she did, nor does he impute to her any motive to mislead or distort. Although Sergeant Anderson requested Nurse Otsuji's assistance, there is no indication that he purposely selected her for

any reason other than that she was immediately available. Thus, Nurse Otsuji's reports did not constitute an additional layer of hearsay because what she was reporting were the statements actually made by Dennis. Additionally, although the statements that Dennis made with Nurse Otsuji's assistance in response to Sergeant Anderson's questions qualify as testimonial statements, defendant did not have a constitutional right to confront Nurse Otsuji because what she reported were properly considered to be Dennis's statements. Defendant had a full opportunity to cross-examine Dennis, thus satisfying his Confrontation Clause rights.

For these reasons, defendant has failed to establish that Nurse Otsuji's reports were inadmissible hearsay, and he has also failed to establish a plain constitutional error. See *Cordero*, 18 F3d at 1252-1253 (holding that a defendant who did not object to an interpreter's statements failed to establish a plain error affecting the defendant's substantial rights).

VI. JUDICIAL BIAS

Defendant argues that a pattern of rulings and remarks by the trial court[4] establish that the court was biased against him. Because defendant did not raise any claim of judicial bias in the trial court, this issue is not preserved. Therefore, we review this issue for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

A criminal defendant is entitled to a "neutral and detached magistrate." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996) (question marks and

[4] Wayne Circuit Judge Leonard Townsend conducted the trial in this matter, although a different judge of the circuit, Judge David Allen, sentenced defendant.

citation omitted). A defendant claiming judicial bias must overcome "a heavy presumption of judicial impartiality." *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). In general, this Court applies the following analysis to determine whether a trial court's comments or conduct deprived the defendant of a fair trial:

> "Michigan case law provides that a trial judge has wide discretion and power in matters of trial conduct. This power, however, is not unlimited. If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed. The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments 'were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial.' " [*People v Conley*, 270 Mich App 301, 307-308; 715 NW2d 377 (2006), quoting *People v Collier*, 168 Mich App 687, 689; 425 NW2d 118 (1988) (citations omitted).]

Judicial rulings, as well as a judge's opinions formed during the trial process, are not themselves valid grounds for alleging bias "unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible." *Wells*, 238 Mich App at 391. Comments that are critical of or hostile to counsel and the parties are generally not sufficient to pierce the veil of impartiality. *Id.*

In this case, defendant's reliance on various evidentiary rulings does not establish support for his claim of judicial bias. The trial court allowed the prosecutor to present the prior statement of Peterson's girlfriend, Yolanda Bishop, but not any portion that implicated defendant. The court thereafter denied defendant's motion for a mistrial with respect to this matter because no portion of the statement implicating defendant was received. Further, the trial court allowed the prosecutor to use Dennis's prior state-

ment for rehabilitative purposes after the defense attorneys attacked Dennis's credibility. However, the use of Dennis's prior statement in this manner was consistent with MRE 801(d)(1) (prior consistent statement of declarant admissible to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive). Although defendant asserts that the trial court improperly allowed the prosecutor to ask a question of Lekeitha Boutire—who went with Mason to Peterson's house on September 28, 2007—regarding defendant's motive to harm Peterson, without a possible foundation, the record discloses that the trial court specifically instructed the prosecutor to establish her testimony. In accordance with this instruction, the prosecutor elicited that defendant had threatened both Boutire and Peterson at a gas station. In sum, the record discloses that the trial court provided principled reasons, grounded in the evidence and the law, for its evidentiary rulings. Its rulings do not reflect a deep-seated favoritism or antagonism to the extent that the exercise of fair judgment was not possible.

Defendant also argues that it was improper for the trial court to comment that there was no evidence of a robbery or intended robbery on the date of the offense. We agree with defendant that the trial court's statement was factually inaccurate given that Dennis admitted that he and Peterson left with Mason to "hit a lick," which he understood to mean to commit a robbery. However, the court's inaccurate statement did not deprive defendant of a fair trial. The statement was made in response to defense counsel's opening statement characterizing Dennis as a thug, thief, robber, and "stick up man." There was no evidence that Dennis had any history of involvement in theft crimes, and the trial court explained to the jury that the attorneys' statements were not evidence. Considering the limited con-

text in which the court's statements were made, they were not sufficient to pierce the veil of judicial impartiality and deprive defendant of a fair trial.

We also reject defendant's argument that the trial court's decision to schedule the case for trial on March 19, 2008, only 34 days after defendant's preliminary examination, demonstrates that the court was biased against defendant. The trial date was selected to enable defendant and his two codefendants to be tried jointly. Although defendant asserts that his trial counsel did not have time to prepare for trial, there was no objection to the trial date or any request for an adjournment, and the record discloses that defense counsel was well prepared at trial. Defense counsel's cross-examination of prosecution witnesses displayed a thorough knowledge of the differences between their trial testimony and any prior testimony and statements they had given, as well as the details of the police investigation. Defendant does not explain what else counsel could have done if he had more time to prepare.

In sum, the record does not support defendant's claim that the court was biased against him.

VII. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant last argues that he is entitled to a new trial because he was deprived of the effective assistance of counsel. A claim of ineffective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because defendant did not raise a claim of ineffective assistance of counsel in the trial court, pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review of this issue is limited to mistakes apparent on the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). To establish ineffective

assistance of counsel, defendant must show (1) that defense counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's errors, a different outcome would have resulted. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Defendant argues that defense counsel was ineffective because he failed to provide defendant a copy of the discovery materials. First, the record does not indicate what efforts defense counsel may have made to share the discovery materials with defendant, whether by providing him a personal copy of the materials or by conveying the substance of the information to defendant during discussions about the case. Thus, defendant has not established an objectively unreasonable error. Second, although defendant asserts that he could have better assisted counsel in preparing for the case or in deciding what strategy to pursue had counsel shared the discovery materials before trial, he does not explain what he actually would have done differently, either before or at trial, if he had received any discovery materials sooner. Thus, defendant has also failed to establish that he was prejudice by counsel's alleged deficiency.

Defendant also argues that defense counsel was ineffective because he failed to request the addict-informant jury instruction, CJI2d 5.7, with respect to Dennis's testimony, because the first statement Dennis gave that implicated defendant was the statement he made while he was medicated in the hospital. CJI2d 5.7 is a cautionary instruction that advises a jury that testimony given by an addict-informant should be examined closely and considered with special scrutiny. A use note to the instruction provides that it is "to be used where the uncorroborated

testimony of an addict informant is the only evidence linking the accused with the alleged offense."

In this case, the mere fact that Dennis was medicated when he gave a statement in the hospital did not make him an addict-informant. We also disagree with defendant's contention that counsel should have requested a modified version of CJI2d 5.7, reformulated as a "medicated witness" instruction. The special circumstances that would have warranted a cautionary instruction for an addict-informant did not come into play merely because Dennis was receiving physician-ordered medication for his injuries when he gave his statement. Further, the trial court instructed the jury on the various factors it should consider in evaluating a witness's testimony generally, such as whether the witness had any motivation for testifying the way he or she did, whether the witness had an interest in the outcome of the case, whether the witness had something to gain, whether there was any relationship between the witness and any of the parties, whether the witness's testimony was corroborated by other direct or circumstantial evidence, whether the witness made any statements outside of court that were different from the statements made in court, and the witness's demeanor while testifying. Because the addict-informant instruction was not applicable, and the instructions given by the court were sufficient to enable the jury to properly consider Dennis's testimony, defense counsel was not ineffective when he failed to request a modified version of CJI2d 5.7.

Affirmed.

WHITBECK, P.J., and O'CONNELL, J., concurred with WILDER, J.

DAVIS v CHATMAN

Docket No. 299021. Submitted April 8, 2011, at Detroit. Decided May 17, 2011, at 9:15 a.m.

Robert Davis sought leave in the Wayne Circuit Court to file a complaint for quo warranto against Clifford Chatman after he finished in third place when vying for election to one of two available positions on the Highland Park School District Board of Education. Plaintiff alleged that defendant, the second-place finisher, was seeking to usurp and unlawfully hold the school board position because he had not been a resident of the school district for 30 days before the February 9, 2010, filing deadline for the May 2010 election, as required by MCL 168.302. The court, John H. Gillis, Jr., J., granted plaintiff's application for leave to file a complaint for quo warranto and held an evidentiary hearing on the complaint. At the conclusion of the evidentiary hearing, the court concluded that defendant had not resided in the district during the relevant period. Defendant then moved to disqualify Judge Gillis, asserting that Judge Gillis had impermissibly gained personal knowledge of the facts when he drove past defendant's purported residence without prior notice to the parties. The court denied the motion. Defendant then moved for Chief Judge Virgil Smith to disqualify Judge Gillis, but Chief Judge Smith denied the motion. The court entered a judgment granting a writ of quo warranto, ordering that defendant was not entitled to hold the school board position and that all votes cast for him were void. The judgment declared that plaintiff, having the next highest vote total, was a winner of one of the positions. Defendant appealed and moved for a stay of the judgment. In an unpublished order, entered July 15, 2010 (Docket No. 299021), the Court of Appeals stayed that portion of the judgment that recognized plaintiff as a winner of the election and ordered that the board position remain empty while the appeal was pending. The Supreme Court denied plaintiff's application for leave to appeal that order. 487 Mich 859 (2010).

The Court of Appeals *held*:

1. A person may apply to the Attorney General to bring an action for quo warranto alleging the usurpation of an office. If the Attorney General refuses the request, the person may apply

privately to the appropriate court under MCR 3.306(B)(3)(b) for leave to file the action. Plaintiff was not required to provide notice to defendant before seeking leave to file for quo warranto. The notice to which defendant was entitled, and which he received, was service of the application after the trial court granted plaintiff permission to file the pleading. Nor was plaintiff required to attach supporting affidavits to his application given that supporting affidavits are not required by statute (MCL 600.4501) or the court rule. The trial court did not abuse its discretion when it granted plaintiff's application to proceed by quo warranto given that plaintiff had made the appropriate application to the Attorney General, who declined to pursue the matter, and that plaintiff's application disclosed sufficient facts concerning defendant's putative residence to justify further inquiry into his residency status.

2. MCR 2.513(B) permits a trial court sitting as a trier of fact to view the place where a material event occurred, but the court may not exercise that authority without prior notice to the parties. However, reversal was not warranted in this case on the basis of the trial court's viewing of defendant's purported residence because the record made clear that the viewing played no role in the trial court's ultimate decision.

3. A party has the right to demand a jury trial in a quo warranto proceeding, MCR 3.306(E), but a party may waive a jury trial demand by agreement in writing or on the record, MCR 2.509(A)(1). This may include an implied expression of agreement by the conduct of the parties. In this case, defendant's conduct implied acquiescence to a bench trial and amounted to a waiver of his jury demand given that he failed to object to the proceedings, participated in them, and specifically requested that the trial court resolve the issues at hand.

4. Under MCL 168.10, MCL 168.11, and MCL 168.302, to be eligible to seek election to the Highland Park School District Board of Education, at a minimum, defendant had to have been a resident of Highland Park, i.e., habitually sleeping and lodging there, for 30 days before the filing deadline for the election. The trial court did not clearly err by concluding that defendant had failed to meet this requirement in light of the evidence that there was no utility service at defendant's purported residence during that time frame. Other evidence also suggested the residence was vacant. Consequently, the trial court did not abuse its discretion by issuing the writ of quo warranto.

5. When a school board position becomes vacant, MCL 168.311(1) empowers the remaining school board members to appoint a replacement. However, the term of office for a school

board member elected in May does not begin until July 1. Thus, although defendant filed an acceptance of office and took the oath of office after the election, he was not a school board member when the trial court issued its judgment on June 30, 2010. Accordingly, the position did not become vacant as a result of the trial court's order voiding his election, and the board could not appoint a replacement under MCL 168.311(1). Rather, the statute governing quo warranto for usurpation of office, MCL 600.4505, provided the proper remedy empowering the trial court to determine which of the parties was entitled to hold office. Under that statute, the trial court properly decided that plaintiff was entitled to hold the office.

Affirmed.

1. QUO WARRANTO — APPLICATION FOR LEAVE TO FILE ACTION — NOTICE.

A plaintiff privately applying to a court for leave to file an action for quo warranto is not required to first give notice to the defendant; the notice to which the defendant is entitled is service of the application after the court has granted the plaintiff permission to file the pleading (MCR 3.306[B][3][b]).

2. JURY — WAIVER OF JURY DEMAND — ACTIONS FOR QUO WARRANTO.

A party has the right to demand a jury trial in a quo warranto proceeding, but may waive the demand by agreement in writing or on the record, which may include an implied expression of agreement by the conduct of the parties, such as acquiescence in a bench trial (MCR 2.509[A][1], 3.306[E]).

3. ELECTIONS — SCHOOL BOARDS — QUALIFIED ELECTORS — RESIDENCE.

To be eligible to seek election to a school board, an individual must be a qualified and registered elector of the school district by the filing deadline; to be a qualified elector, a person must possess the qualifications of an elector and must have been habitually sleeping and lodging in the city or township for 30 days (MCL 168.10, 168.11, 168.302).

4. ELECTIONS — SCHOOL BOARDS — VACANCIES — TERM OF OFFICE.

The term of office for a school board member elected in May does not begin until July 1, even if the putative election winner has filed an acceptance of office and taken the oath of office; a court order voiding the votes cast for the putative election winner before he or she has taken office does not create a vacancy on the board and the board may thus not appoint a replacement board member (MCL 168.302[b], 168.310[2][f], 168.311[1]).

Marlinga Law Group, PLLC (by *Carl J. Marlinga*), and *Law Offices of Culpepper Kinney* (by *Robert F. Kinney*) for plaintiff.

Peggy K. Madden for defendant.

Amicus Curiae:

Marianne Talon, Corporation Counsel, and *Janet Anderson-Davis*, Assistant Corporation Counsel, for the Wayne County Board of Canvassers.

Before: FORT HOOD, P.J., and MURRAY and GLEICHER, JJ.

MURRAY, J. Two seats were up for election in 2010 on the Highland Park School District Board of Education, one of which was held by plaintiff, Robert Davis. Plaintiff, with Debra J. Humphrey and defendant, Clifford Chatman, was one of seven candidates vying for the school board positions. When plaintiff finished in third place behind defendant, he sought and obtained a judgment granting a writ of quo warranto. As a consequence, defendant's election victory was invalidated and plaintiff was placed into office. Defendant appeals as of right both the order granting plaintiff leave to file the complaint of quo warranto and the judgment granting a writ of quo warranto. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

On January 20, 2010, defendant signed an affidavit of identity with the Highland Park clerk in order to run for one of two school board positions in the upcoming election.[1] Both terms were to commence July 1, 2010. In accordance with election requirements, defendant

[1] The affidavit was filed on January 21, 2010.

claimed on the affidavit of identity that he was a lifetime resident of Wayne County and resided on January 20, 2010, at 56 Louise in Highland Park. On May 4, 2010, the school board election was held, and Humphrey and defendant won the two positions. Plaintiff finished in third place, 23 votes behind defendant (201 votes compared to 178 votes).

Plaintiff, believing that defendant did not reside at 56 Louise and therefore did not meet the residency requirements to be on the ballot for election as a school board member, took steps to initiate quo warranto proceedings against defendant and sought a temporary restraining order (TRO) to prevent defendant from tampering with his residency records. The court granted plaintiff's application for leave to file a complaint for quo warranto and held an evidentiary hearing on the application.

An evidentiary hearing was held over three days where both parties presented witnesses and submitted exhibits. The crux of the matter was whether defendant resided at 56 Louise for 30 days prior to the February 9, 2010, filing deadline. Plaintiff's proofs, which intended to show that the house was unoccupied during the relevant times, primarily involved witnesses' observations of the property, the status of the utilities for the property, and defendant's own address filings with the state.

Plaintiff's eyewitnesses who testified about the condition of the house were John Holloway, Ralph Kinney, and plaintiff himself. Holloway, a retired police chief for the city of Highland Park who lived four houses away from 56 Louise, stated that he saw snow accumulate throughout the winter and first saw signs of occupancy in April 2010. Plaintiff also traveled by the premises over a hundred times (many of which were between January 20 and February 9, 2010) and never saw any lights or other signs of occupancy. For his part, Kinney testified that over the

course of a three-week period in May, he never saw any people but did note that televisions or lights were on at nighttime and that the same two vehicles would be present in front of the house regardless of when he visited. Both plaintiff and Kinney testified that they never saw garbage taken to the curb on the neighborhood's garbage pickup day. Furthermore, plaintiff testified that, after a May 11, 2010, school board meeting, he followed defendant to a residence located at 17315 Lincoln Drive in Southfield.

Plaintiff also presented evidence that the house lacked the necessary and usual utilities that a home would need in order to be habitable. Pashko Memcevic, a DTE Energy employee, testified that the last known customer for 56 Louise was Bianca Heard and that the service was terminated on October 13, 2008. Thus, DTE was not actively supplying electricity or gas to 56 Louise.[2] Memcevic also testified that DTE's records showed no gas usage during this entire time, but Memcevic acknowledged that it was because DTE was unable to obtain any readings.

Furthermore, plaintiff presented the testimony of Khalaila Hines, an employee in the Highland Park Water Department. According to Hines, the water to 56 Louise was turned off on November 25, 2008, and her records showed no water activity any time after the shutoff. Hines indicated, however, that even though there *should* have been no water being supplied to 56 Louise, it would have been possible for water to be supplied illegally if someone had the proper tools and turned the water on at the street.

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[2] While DTE was not actively supplying electricity, its records showed that there was some unauthorized usage. From October 14, 2009, until March 17, 2010, there were 60 kilowatt-hours consumed, with 59 of those being consumed after December 10, 2009. According to Memcevic, this was a negligible amount of electricity, only enough to only constitute three hours of usage.

Plaintiff also relied on the addresses that defendant used in some state records to show that defendant did not reside at 56 Louise. Although defendant changed his voting registration to reflect the 56 Louise address on January 20, 2010, defendant's concealed weapons permit and vehicle registration still reflected, as of the evidentiary hearing, an address of 17315 Lincoln Drive in Southfield.

Defendant, on the other hand, claimed that he, indeed, started residing at 56 Louise in late October 2009. Regarding his prior residential history, defendant testified that he had lived at 17315 Lincoln Drive in Southfield from June 2008 through November 2008, 231 Ferris in Highland Park from November 2008 through April 2009, 11745 Ten Mile Road #202 in Warren from April 2009 through October 2009, and finally at 56 Louise in Highland Park in October 2009.[3] Defendant acknowledged that there was no furnace in 56 Louise, so in order to keep warm he and his landlord/roommate, Chaka Powell,[4] used two electric space heaters. As proof of his tenancy, defendant offered into evidence a lease he signed that commenced on January 1, 2010. Defendant explained that there was no lease agreement for the first couple months that he resided on Louise because he was on "hard times."

While defendant indicated that he started living at 56 Louise in late October 2009, he was not evicted from his Warren apartment until December 28, 2009. Defendant explained that although he had already moved out two

[3] This sworn testimony directly conflicts with defendant's sworn statement in his affidavit of identity that he was a lifelong resident of Wayne County. Warren is in Macomb County, while Southfield is in Oakland County.

[4] Powell had purchased the home in January 2009 through a foreclosure sale from a bank.

months earlier, the Warren apartment complex had to procure this judgment in order for their records to reflect that defendant had vacated the premises.

Before the end of January 2010 or early February 2010, there was no regular mail delivery to 56 Louise. Mark Harvey, the postal carrier for that area, testified that he would hold on to mail addressed to that house because he thought the home was vacant. However, in late January or early February, Harvey was informed by his supervisor to resume delivery because the homeowner had requested it. Harvey explained that, in addition to the home looking like it was vacant, there was no mailbox present to deliver to until after the request to resume delivery occurred. Also of note, Harvey only met defendant for the first time a month before the hearing, which would correlate approximately to the first week of May 2010.

At the conclusion of the evidentiary hearing on June 9, 2010, the trial court summarized the evidence it had received and noted that "[t]he Court has driven by the house yesterday. . . . [T]he house is boarded up, it does not appear to be lived in from the outside." Ultimately, the court concluded that defendant did not reside at 56 Louise during the relevant time period:

> We know from the — both the water people, the water board, and from the DTE Energy, there's no gas, no electricity, there's no water at this house.
>
> So the Court finds that this house is not inhabitable by anyone in the world in its present condition. So this Court finds that Mr. Chatman was not a resident. He had changed his address. He used that address, but he's not inhabiting that house, and residing there within the meaning of the laws. So the Court will grant the TRO.

Nine days later, on June 18, 2010, defendant moved to disqualify the trial court on the basis that he imper-

missibly acquired personal knowledge when he drove past 56 Louise. At a hearing on June 28, 2010, the court denied the motion, stating that "[t]he fact that I drove by wasn't the basis of my decision." Afterward, defendant moved for Wayne Circuit Court Chief Judge Virgil Smith to disqualify the trial court, but Chief Judge Smith denied the motion because defendant failed to show that the trial judge exhibited any bias.

On June 30, 2010, the trial court entered a judgment granting a writ of quo warranto, ordering that defendant was not entitled to hold the school board position and that all votes cast for him were null and void. Furthermore, the judgment declared that plaintiff, having the next highest vote total, was the duly elected winner of the election. The trial court also denied defendant's request for a jury trial, concluding that a determination on the matter had already been made and, in any event, the court did not believe that defendant had a right to a jury trial for this equitable action.

Two weeks into plaintiff's new term, this court entered an order that (1) stayed that portion of the judgment recognizing plaintiff as one of the election winners and (2) ordered that the board seat was to remain empty pending the appeal. *Davis v Chatman*, unpublished order of the Court of Appeals, entered July 15, 2010 (Docket No. 299021). The Supreme Court later denied plaintiff's application for leave to appeal this order. *Davis v Chatman*, 487 Mich 859 (2010). The instant appeal ensued.

II. ANALYSIS

A. LEAVE TO APPLY FOR QUO WARRANTO

Defendant first argues that the trial court erred when it granted plaintiff's application for leave to proceed by quo warranto. "A court's decision whether to

grant or deny an application for leave to proceed by quo warranto is reviewed for an abuse of discretion." *Barrow v Detroit Mayor*, 290 Mich App 530, 539; 802 NW2d 658 (2010). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

"Quo warranto" is a "common-law writ used to inquire into the authority by which a public office is held or a franchise is claimed." Black's Law Dictionary (9th ed). Quo warranto is the only appropriate remedy for determining the proper holder of a public office, see *People v Tisdale*, 1 Doug 59 (Mich, 1843), overruled in part on other grounds, *Petrie v Curtis*, 387 Mich 436, 438-441; 196 NW2d 761 (1972), and *Layle v Adjutant General*, 384 Mich 638, 641; 186 NW2d 559 (1971), including who is the proper holder of the position of school board member, *Williams v Lansing Bd of Ed*, 69 Mich App 654, 659; 245 NW2d 365 (1976). Both the statute and court rule permit a party to bring an action for quo warranto if the Attorney General declines to bring such a suit—as was the case here. MCL 600.4501; MCR 3.306; see, also, *Barrow*, 290 Mich App at 540-541.

Initially, we reject defendant's argument that plaintiff was required to provide notice before seeking leave to file for quo warranto. Neither the relevant court rule (MCR 3.306) nor the statute (MCL 600.4501) contains a notice requirement, and our Supreme Court has found that fact dispositive of this issue:

> It will be observed that the statute does not require notice. There appears to be no necessity for notice. It is the initial step in the proceeding. Its object is to obtain permission to take out a summons in *quo warranto*. Leave of the court is required by the statute to prevent an extravagant use of the writ unless there is some real basis for it. Failure to give notice to the defendant does not deprive him of any

> substantial right. He has his full day in court after leave is granted and summons is served on him. To require notice results in giving the defendant two flings at his defense. If defendant be given notice of the application he will make the same showing that he afterward does on the merits. If the matter is of such a character that the circuit judge would like to hear from defendant before granting leave, he may always make an order requiring him to show cause why leave should not be granted. [*Ferzacca v Freeman*, 240 Mich 682, 684-685; 216 NW 469 (1927).]

While defendant counters that the subsequent enactment of MCR 3.306 abrogated *Ferzacca*, conspicuously absent from that court rule is any mention of notice. Thus, the rationale of *Ferzacca* is still controlling. The notice to which defendant was entitled—and did receive—was service of the application after the court granted plaintiff permission to file the pleading.

Alternatively, defendant urges this Court to find the order granting leave to file for quo warranto deficient on public policy grounds since the application was "unverified" and did not contain supporting affidavits. We decline this invitation, however, since once again neither the relevant statute nor court rule imposes such requirements. If these or other requirements are to be placed into the rules, it would be either by legislation or through the Supreme Court's rulemaking authority. See *People v Jackson*, 487 Mich 783, 797 n 31; 790 NW2d 340 (2010). It would not be through this Court's decision-making.

In any event, this Court has previously stated that the most important considerations in granting leave to file quo warranto are (1) whether an appropriate application was made to the Attorney General and (2) whether the application disclosed sufficient apparent merit to justify further inquiry by quo warranto proceedings. *Grand Rapids v Harper*, 32 Mich App 324, 329; 188 NW2d 668 (1971). It is undisputed that plaintiff made the appropri-

ate application to the Attorney General, who in turn declined to pursue the matter, MCR 3.306(B)(3)(b), which granted plaintiff the ability to file this action. See also MCL 600.4501. Additionally, plaintiff's application disclosed sufficient facts concerning defendant's putative residence justifying further inquiry into defendant's residency status. Accordingly, the trial court's granting leave to file the application was well within the range of principled and reasonable outcomes and so cannot be overturned on appeal.

B. THE COURT'S VIEWING THE PREMISES

Defendant next argues a new hearing is in order because the trial court viewed the premises at 56 Louise without notice to any party. Although our review of a trial court's decision to view a scene is for an abuse of discretion, *Gorelick v Dep't of State Hwys*, 127 Mich App 324, 335; 339 NW2d 635 (1983), defendant did not raise this issue until subsequently requesting the trial court's disqualification. Mindful that review of this unpreserved issue may nonetheless be appropriate in the interests of justice, *Travis v Preston (On Rehearing)*, 249 Mich App 338, 348; 643 NW2d 235 (2002), we conclude that reversal is not warranted since it is abundantly clear that the court's viewing of the premises played no role in its decision. MCR 1.105.

MCR 2.513(B) specifically allows for a trial court sitting as a trier of fact to "view property or a place where a material event occurred."[5] According to current caselaw, however, this authority may not be exercised without prior notice to the parties and may constitute an abuse of discretion if the court relies on its own

[5] Defendant cites *Valentine v Malone*, 269 Mich 619; 257 NW 900 (1934), and *People v Eglar*, 19 Mich App 563; 173 NW2d 5 (1969), but both predate the current rule, MCR 2.513(B).

observations (done without notice to the parties) in rendering its decision. See *Travis*, 249 Mich App at 349. In this case, although it is undisputed that the trial court failed to provide notice of its visit, the court was crystal clear in explaining that its observations had no effect on its decision. And the facts found by the trial court were based on an abundance of evidence that was independent of the drive-by view of the house. For starters, a number of witnesses testified that the home was at least partially boarded-up, a fact confirmed by photographs. In addition, our review of the record reveals that the court based its decision in large part on the home's lack of utilities. Finally, although not dispositive, we note that defendant did not dispute the trial court's observations that the home was boarded-up and from the outside appeared vacant. Consequently, the court had abundant evidentiary support for its decision, and its viewing of the residence did not affect defendant's substantial rights. MCR 1.105.

Before moving on, we note that defendant failed to submit an affidavit as required by MCR 2.003(D) when requesting the court's disqualification under MCR 2.003(C)(1)(c).[6] Thus, he has waived the issue of disqualification. See *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 22-23; 436 NW2d 70 (1989) (the failure to follow the proper procedure in requesting disqualification constitutes a waiver). Even were we to consider this argument as unpreserved, however, reversal would not be appropriate since—as previously noted—the record reveals no prejudice from the court driving by the premises. See *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

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[6] MCR 2.003(C)(1)(c) requires disqualification of a judge where the judge "has personal knowledge of disputed evidentiary facts concerning the proceeding."

C. REQUEST FOR JURY TRIAL

We likewise find meritless defendant's argument that the trial court erred in denying his request for a jury trial. As this claim involves the interpretation and application of a court rule, our review of this issue is de novo. *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 553; 640 NW2d 256 (2002). We construe court rules using the same legal principles governing statutory interpretation, the cardinal rule of which requires enforcement of the meaning expressed in the court rule where its plain language is clear and unambiguous. *Id*. at 553-554.

While a trial court may hear a quo warranto proceeding or permit the matter to proceed to a jury trial, a party has the right to demand a jury trial of this issue. MCR 2.508(B)(1); MCR 3.306(E); see, also, *St Joseph Twp v City of St Joseph*, 373 Mich 1, 5-6; 127 NW2d 858 (1964). The right to a jury trial in a civil action is permissive and not absolute. Const 1963, art 1, § 14; *Marshall Lasser, PC v George*, 252 Mich App 104, 107-108; 651 NW2d 158 (2002). Further, a party may waive a jury trial demand by agreement "in writing or on the record . . . ." MCR 2.509(A)(1).[7] Here, it is undisputed that the parties did not enter into a written agreement to waive the jury demand. However, defendant fully participated in the proceedings at which no jury was present, which is noteworthy since this Court has construed the "on the record" language of MCR 2.509(A)(1) to "encompass[] an expression of agreement implied by the conduct of the parties." *Marshall Lasser*, 252 Mich App at 107. To determine whether the conduct of the parties justifies

[7] Plaintiff claims that defendant waived his right to a jury trial by failing to pay the appropriate fee at the time the demand was filed, as required by MCR 2.508(B)(1). Although the register of actions does not reflect the payment of a fee, we conclude that this matter was otherwise waived for the reasons stated in this opinion.

the inference of a waiver, we look to the totality of the circumstances. *Id*. at 108.

Instructive to our inquiry is *Marshall Lasser*. There, this Court rejected the plaintiff's argument that the trial court erred in proceeding with a bench trial on the issue of damages in the absence of an express withdrawal of the jury demand. *Id*. at 106. Noting that the parties' conduct at five evidentiary hearings on this issue was active and vigorous, we explained that the plaintiff's argument ran contrary to its behavior during the proceedings below:

> Both parties were given notice that the court would be deciding the damage issue. The defendant and the plaintiff's representative were present and both were represented by counsel. There is no indication in the record that plaintiff or defendant ever objected to the bench trial, nor is there any indication that either party proceeded under protest. Under the circumstances of this case, we believe both parties' acquiescence to the bench trial evidenced an agreement to waive the secured right. [*Id.* at 109.]

Similar to the plaintiff in *Marshall Lasser*, we conclude that defendant's conduct clearly implied acquiescence to a bench trial and amounted to a waiver of defendant's jury demand.[8] The following colloquy on the first day of the hearing is illustrative of this conclusion:

> *The Court*: You're asking for a TRO –
>
> * * *
>
> [*Plaintiff's Counsel*]: Actually, what I would like to do, yes, your Honor, but I'd also like to preserve some evidence today so that we don't have to call these witnesses forward

[8] Like *Marshall Lasser*, the fact that this matter proceeded under the label of "evidentiary hearing" is of no moment as we are not bound by labels; to hold otherwise would elevate form over substance. See *Lockwood v Revenue Comm'r*, 357 Mich 517, 558; 98 NW2d 753 (1959).

again on the basic factual issue [of] whether or not [defendant] was an actual resident of the city of Highland Park prior to the election.

We really have no alternative but to ask this Court for a ruling on this, because just relying upon the city clerk or the Secretary of State would not be fruitful, we need the equitable jurisdiction of this Court to actually grant the writ of quo [warranto].

I would ask that the Court either grant the writ today or at least preserve the testimony on the factual issue so that we would be in a position to then ask the Court to grant the writ at a later time.

The Court: What witnesses do you have here today?

[*Plaintiff's Counsel*]: We have six witnesses, people who lived in the neighborhood, and also we have officials from the city of Highland Park as to just the basic things as to whether water or electric is being supplied to the premises; the clerk from the city of Southfield to show the voting records there. All of these witnesses are rather quick, but it's necessary to preserve this testimony.

The Court: Okay.

Any comment?

* * *

[*Defense Counsel*]: My submission to the Court, and I hope that [plaintiff's counsel] is in agreement, I think he is, is that basically, Judge, the issues in this case are pretty simple.

The allegation that is raised by the Plaintiff is that the Defendant did not reside in the city of Highland Park and that he filed a false affidavit.

We have four witnesses to testify. I think that we'll adequately show that he did reside consistent with the law, and *I would ask the Court to try to resolve this matter today so we can go forward*.

I think [plaintiff's counsel] is in agreement. I didn't receive a copy of the complaint, but apparently the com-

> plaint was filed, *but there will be no additional issues in my mind and I believe in* [*plaintiff's counsel's*] *that would be presented to the Court that will be presented today* [sic].
>
> *We'll fully present our issues to the Court, and I believe* [*plaintiff's counsel*] *will as well. So we're prepared to go forward and we'd ask the Court to hear testimony and at that time I would ask the Court to dismiss the petition.* [Emphasis added.]

Thereafter, the parties participated in a three-day hearing in which both presented evidence, and plaintiff continued to make clear that he was seeking not only a TRO, but also a writ of quo warranto. At no time did defendant object that the matter was proceeding without a jury. On the contrary, defendant requested that the court resolve the matter and dismiss the petition. Thus, we conclude that defendant's failure to object to the evidentiary hearing combined with his voluntary participation in the procedure, during which he requested that the court resolve the issues at hand, amounted to a waiver of his demand for a jury trial.

D. JUDGMENT GRANTING WRIT OF QUO WARRANTO

This brings us to defendant's argument that the trial court erred when it granted a writ of quo warranto. We review for an abuse of discretion a trial court's decision in a quo warranto proceeding. *Attorney General ex rel Selby v Macdonald*, 164 Mich 590, 594; 129 NW 1056 (1911); see also *Voorhies v Walker*, 227 Mich 291, 294; 198 NW 994 (1924). But a trial court's findings of fact will not be disturbed unless they are clearly erroneous. *Christiansen v Gerrish Twp*, 239 Mich App 380, 387; 608 NW2d 83 (2000). Clear error exists if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake was made. *Johnson v Johnson*, 276 Mich App 1, 10-11; 739 NW2d 877 (2007) (opinion by FORT HOOD, J.).

As noted earlier in this opinion, actions for quo warranto inquire into the authority by which a public office is held. *Barrow*, 290 Mich App at 540. If such actions are brought against a person for usurpation of office, then the trial court's judgment may determine the right of the defendant to hold the office. MCL 600.4505.

The office in question is a position on the Highland Park School District Board of Education. MCL 168.302, part of the Revised School Code, provides the requirements to run for a position on a school board: "An individual is eligible for election as a school board member if the individual is a citizen of the United States and is a qualified and registered elector of the school district the individual seeks to represent by the filing deadline." MCL 168.10 defines "qualified elector" as "a person who possesses the qualifications of an elector . . . and who has resided in the city or township 30 days." "Residence" is defined by MCL 168.11 as the "place at which a person habitually sleeps, keeps his or her personal effects, and has a regular place of lodging." Thus, in order to be eligible to seek election for the Highland Park School District Board of Education, at a minimum, defendant had to have been habitually sleeping and lodging in Highland Park as of January 10, 2010, i.e., 30 days before the February 9, 2010, filing deadline.

After reviewing the evidence, the trial court explained the basis for its finding that defendant failed to satisfy the residency requirement:

> We had testimony from the third witness, Mr. Pashko Memsevic [sic] from DTE Energy. He said that there hasn't been any official service to that address since October of 2008. That means the house didn't have any gas, didn't have any electricity, which is necessary to make the house

> inhabitable. He said there's — when I questioned, there's about one day of unauthorized usage.
>
> And we had the testimony from Mrs. Hines, from the City of Highland Park Water Department. There's — there hasn't been any water service since November 2008.
>
> * * *
>
> In order to be a resident, you have to actually live in the city, sleep there, et cetera. We know from the — both the water people, the water board, and from the DTE Energy, there's no gas, no electricity, there's no water at this house.

Considering the trial court's superior ability to judge credibility, we cannot conclude that the court erred in holding that defendant had failed to satisfy the statutory residency requirements in light of the evidence. MCR 2.613(C); *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004).

Although defendant claims he satisfied the residency requirements based on his testimony and that of his witnesses, the testimony of his witnesses was inconsistent on the question of when he began residing at 56 Louise. For example, one neighbor claimed, consistently with the testimony of the owner of the residence, that defendant moved in sometime in October 2009. Another neighbor testified, however, that she did not see defendant moving furniture into the home until almost two months later. Similarly, a postal carrier indicated that he withheld mail addressed to defendant because the residence appeared vacant and was without a mailbox until late January or early February 2010, when mail service was requested.

Besides the inconsistent testimony on the issue of when defendant began his residency, conflicting evidence was also presented on the home's utility usage during the period in question. Specifically, while defen-

dant and the owner of the premises asserted their use of electric space heaters during this time frame, utility company representatives testified that the residence had been without electricity, water, and gas since October 2008.[9] Utility records for this period indicated a negligible amount of electricity usage. And, the photographs admitted into evidence revealed 56 Louise to be, at best, a partially boarded-up house that according to other evidence had little, if any, foot traffic during the relevant period. Even reviewing the "cold record" from the evidentiary hearing, we can conclude that there was significant evidence pointing to the conclusion that defendant did not reside at 56 Louise on or before January 10, 2010. As a result of this evidence, we can unequivocally hold that the trial court's findings of fact on this point were not clearly erroneous, and we are not in the position to second-guess what evidence or witnesses were more credible. Consequently, the trial court did not abuse its discretion in issuing the writ of quo warranto.

E. JUDGMENT NAMING PLAINTIFF THE ELECTION WINNER

Finally, we arrive at the most difficult question raised in this case—whether the trial court erred by declaring plaintiff a duly elected member of the school board. This issue involves a question of statutory interpretation, which we review de novo. *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289, 297; 791 NW2d 897 (2010).

Defendant and the amicus curiae, the Wayne County Board of Canvassers, argue that the remaining members of the Highland Park School District Board of Education should appoint a replacement. It is generally

[9] Powell, the owner of the house, testified that he did not illegally divert any utilities into 56 Louise.

true that when a school board member's seat becomes vacant, MCL 168.311(1) empowers the remaining school board members to fill the vacant office by appointment. Specifically, that section provides: "If less than a majority of the offices of school board member of a school district become vacant, the remaining school board members shall fill each vacant office by appointment." MCL 168.311(1). A vacancy triggering the procedure in MCL 168.311(1) occurs when, *inter alia*, a court declares a school board member's election or appointment void. MCL 168.310(2)(f). Relying on these provisions, defendant claims that the trial court lacked authority to declare plaintiff the election winner when defendant had already filed his acceptance and taken his oath of office on May 10, 2010—nearly two months before the court entered its judgment.

This is a sound argument, but is complicated by MCL 168.302(b), which expressly provides that the term of office for a school board member elected in May (as defendant was here) does not begin until July 1 immediately following the election. Thus, notwithstanding defendant's acceptance of office and taking the oath, defendant did not assume office prior to the trial court's order of June 30, 2010. Defendant was therefore not a "school board member" when his election was held void. Buttressing this conclusion is the fact that MCL 168.310(1) requires the administration of the oath of office *before* the member-elect enters upon the duties of office.[10] See, also, *Davis v Wheeler*, 483 Mich 949, 950; 766 NW2d 808 (2009) (YOUNG, J., concurring). Also

[10] In its amicus curiae brief, the Wayne County Board of Canvassers asserts that because defendant filed an acceptance of the office to which he was elected in accordance with MCL 168.309, he was a member of the board upon the administration of his oath. That section, however, refers to a "member-elect" and fails in any way to contradict the instruction in MCL 168.302(b) about when the term of office begins.

noteworthy is that the trial court's judgment at no point created a vacancy since it declared plaintiff the election winner *before* the term of office commenced.[11] And even though this Court stayed the trial court's judgment, *Davis v Chatman*, unpublished order of the Court of Appeals, entered July 15, 2010 (Docket No. 299021), such an action does not fall under any of the enumerated contingencies that qualify as creating a vacancy under MCL 168.310(2)(a) through (i). Consequently, since defendant was not a member of the school board at the time of the court's order, MCL 168.311(1) by its very terms could not supply the Highland Park School District Board of Education with the authority to fill the position created by the writ of quo warranto.

Instead, governing the case are the remedy provisions of the quo warranto statute, MCL 600.4505. Specifically, MCL 600.4505 provides:

> (1) In actions brought against persons for usurpation of office, the judgment may determine the right of the defendant to hold the office. If a party plaintiff alleges that he is entitled to the office, *the court may decide which of the parties is entitled to hold the office*.
>
> (2) If judgment is rendered in favor of a party who is averred to be entitled to the office, he is entitled, after taking the oath of office, and executing any official bond which is required by law, to take the office. [Emphasis added.]

Notably, the fact that a person has yet to assume office is not a bar to this statute's application. *In re Servaas*, 484 Mich 634, 643 n 15; 774 NW2d 46 (2009) (opinion by WEAVER, J.) (rejecting the notion that a quo warranto

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[11] Contrary to the Wayne County Board of Canvassers' argument, *Attorney General ex rel Cook v Burhans*, 304 Mich 108; 7 NW2d 370 (1942), and *Gallagher v Keefe*, 232 Mich App 363; 591 NW2d 297 (1998), are inapposite as both vacancies occurred *after* the officeholder had "acted as such," *Cook*, 304 Mich at 110, or had actually "held office," *Gallagher*, 232 Mich App at 371.

action "may only be brought for 'claims that an officer is *currently* exercising an invalid title to office' ") (citation omitted).

The action brought and decided in this case is precisely the scenario MCL 600.4505(1) contemplates.[12] Plaintiff alleged that defendant was not entitled to office, and the court determined that defendant had failed to satisfy the residency requirements, thereby rendering his election void. Since plaintiff was the runner-up to defendant in the election, the court properly decided that plaintiff was entitled to hold office. The judgment granting the writ of quo warranto complied with the applicable law.

III. CONCLUSION

For the foregoing reasons, we hold that the trial court properly granted plaintiff's petition for leave to file for quo warranto and likewise did not err in granting a writ of quo warranto, determining defendant's election void and finding plaintiff entitled to the office of Highland Park school board member.

Affirmed.

No costs, a public question having been involved. MCR 7.219.

FORT HOOD, P.J., and GLEICHER, J., concurred with MURRAY, J.

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[12] Even if the provisions of MCL 168.311 applied to this case and were in conflict with MCL 600.4505, the latter section would control because it is the more specific statute addressing the circuit court's remedial power in a quo warranto case. *Driver v Naini*, 287 Mich App 339, 351-352; 788 NW2d 848 (2010).

ANZALDUA v NEOGEN CORPORATION

Docket No. 296978. Submitted May 13, 2011, at Lansing. Decided May 17, 2011, at 9:20 a.m.

Sharon Anzaldua brought an action in the Ingham Circuit Court against Neogen Corporation, alleging retaliatory discharge in violation of Michigan's public policy. In May 2007, plaintiff had cooperated with a state official who performed a boiler inspection, which led to a citation being issued to defendant. Plaintiff was terminated in June 2007. Plaintiff filed her complaint in May 2009. Defendant moved for summary disposition under MCR 2.116(C)(7) (statute of limitations), (C)(8) (failure to state a claim), and (C)(10) (no genuine issue of material fact). The court, Rosemarie E. Aquilina, J., granted the motion, concluding that the gravamen of plaintiff's complaint essentially alleged that she had been engaged in activity protected under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. Therefore, the court concluded that the WPA provided the exclusive remedy for plaintiff's claim and that her failure to bring her claim within the 90-day period of limitations set forth in MCL 15.363(1) required that summary disposition be granted in defendant's favor. Plaintiff appealed. Defendant cross-appealed, arguing that the trial court had improperly made a finding of fact when deciding the motion for summary disposition.

The Court of Appeals *held*:

1. The WPA provides employees protection from discharge from employment or other retaliation when, among other things, the employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body. The term "inquiry" encompasses an administrative search. Thus, plaintiff was engaged in protected activity under the WPA when she cooperated with a state officer performing a boiler inspection, and her claim was subject to the WPA's exclusive remedy. Plaintiff's attempt to characterize her claim as one for retaliatory termination in violation of public policy, rather than a claim under the WPA, failed. Thus, plaintiff was bound by the 90-day limitations period set forth in the WPA, and the trial court did not err by granting summary disposition in defendant's favor.

2. The trial court's decision to grant summary disposition was not premature even though discovery was not complete because plaintiff did not demonstrate a fair likelihood that further discovery could reveal anything to refute the trial court's correct conclusion that plaintiff's exclusive remedy was under the WPA.

3. Defendant argued on cross-appeal that the trial court improperly made a factual finding that plaintiff was terminated because of her participation in the boiler inspector's investigation. While a trial court may not make findings of fact or credibility determinations when deciding a motion for summary disposition, MCR 2.116(C)(8) requires a trial court to accept all well-pleaded factual allegations as true. Thus, it was apparent that the challenged statement in the trial court's order was a summary of plaintiff's allegations rather than an improper finding of fact. Defendant failed to establish that the trial court's statement was improper.

Affirmed.

1. STATUTES — WHISTLEBLOWERS' PROTECTION ACT — PROTECTED ACTIVITY — INQUIRY.

The Whistleblower's Protection Act provides employees protection from discharge from employment or other retaliation when, among other things, the employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body; an inquiry includes an administrative search (MCL 15.362).

2. STATUTES — WHISTLEBLOWERS' PROTECTION ACT — EXCLUSIVE REMEDY — PERIOD OF LIMITATIONS.

A plaintiff asserting a claim that arises from circumstances that establish a claim for relief under the Whistleblower's Protection Act is subject to that act's exclusive remedy and cannot evade the act's 90-day limitations period by recasting the claim as one for retaliatory discharge in violation of public policy.

Pitt McGehee Palmer Rivers & Golden, PC (by *Robert W. Palmer* and *Beth M. Rivers*), for Sharon Anzaldua.

Oade, Stroud & Kleiman, P.C. (by *Ted W. Stroud*), for Neogen Corporation.

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

PER CURIAM. Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(7) (statute of limitations), (C)(8) (failure to state a claim), and (C)(10) (no genuine issue of material fact). Defendant cross-appeals, arguing that the trial court made an improper finding of fact when deciding its motion. We affirm.

I. FACTS AND PROCEEDINGS

This action arose from defendant's termination of plaintiff's employment in June 2007. In May and June 2007, defendant was in the process of establishing a laboratory for the manufacture of an equine botulism vaccine. The manufacture of this vaccine is regulated by federal and state agencies to avoid safety hazards and security breaches pertaining to the botulism organism used in the manufacturing process. Plaintiff had been selected as the Select Agent Program Alternate Responsible Official in defendant's Lansing facility. Under applicable regulations, no one could be admitted to the restricted laboratory areas (the Bot suite) without the presence and authorization of plaintiff or the primary responsible official. However, these restrictions were not to be in effect until defendant actually received the botulism agent in October 2007.

Plaintiff alleged that she was terminated from her employment with defendant in June 2007 in retaliation for her compliance with a state Department of Labor deputy boiler inspector, Al Ladd. Plaintiff had escorted Ladd through the facility when he arrived for an unannounced inspection on May 3, 2007. The inspector discovered an unregistered boiler in the facility and issued a citation requiring defendant to bring the boiler into conformity with state regulations. When the inspector returned on May 14, 2007, defendant's mainte-

nance manager, Al Meredith, informed plaintiff that Meredith, not plaintiff, would escort Ladd through the facility for the inspection. Meredith instructed plaintiff not to talk to Ladd and to channel all communications through Meredith. Nonetheless, plaintiff accompanied Ladd to the Bot suit and cooperated with him when he asked questions about another unregistered boiler.

Plaintiff filed this action in May 2009, alleging a claim for retaliatory discharge in violation of public policy because she was terminated for complying with her statutory duty to grant Ladd access to the facility to inspect the boilers. Defendant moved for summary disposition under MCR 2.116(C)(7), (8), and (10), arguing that there was no genuine issue of material fact that plaintiff's claim arose under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., that plaintiff had failed to state a cognizable claim independent of the WPA, and that plaintiff's claim was untimely under the WPA's 90-day limitations period, MCL 15.363. Plaintiff denied that she was engaged in protected activity under the WPA and maintained that she had pleaded a valid claim for retaliatory discharge contrary to public policy. The trial court agreed with defendant and granted its motion.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Doe v Roman Catholic Archbishop of the Archdiocese of Detroit*, 264 Mich App 632, 638; 692 NW2d 398 (2004). When reviewing a motion under MCR 2.116(C)(7), a reviewing court must consider all affidavits, pleadings, and other documentary evidence submitted by the parties and construe the pleadings and evidence in favor of the nonmoving party. *Id.* "Absent a disputed question of fact, the determina-

tion whether a cause of action is barred by a statute of limitation is a question of law that this Court reviews de novo." *Id.*

A motion brought under MCR 2.116(C)(8) tests whether the complaint states a claim as a matter of law. *Teel v Meredith*, 284 Mich App 660, 662; 774 NW2d 527 (2009). In reviewing the motion, the court accepts as true all well-pleaded allegations and construes them in a light most favorable to the nonmoving party. *Id.* The motion should be granted if no factual development could possibly justify discovery. *Id.*

A motion under MCR 2.116(C)(10) tests the factual support for a claim and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Driver v Naini*, 287 Mich App 339, 344; 788 NW2d 848 (2010). The nonmoving party may not rest on the allegations in the pleadings, but must set forth, through documentary evidence, specific facts demonstrating a genuine issue for trial. *Id.*

III. ANALYSIS

The WPA provides a remedy for an employee who suffers retaliation for reporting or planning to report a suspected violation of a law, regulation, or rule to a public body. MCL 15.362; MCL 15.363; *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 610; 566 NW2d 571 (1997). The WPA provides that an employer shall not discharge or otherwise retaliate against an employee because the employee "reports or is about to report . . . a violation or a suspected violation of a law or regulation" or because "an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body." MCL 15.362. A prima facie case under the WPA arises when (1) the

plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the adverse employment decision. *Shaw v City of Ecorse*, 283 Mich App 1, 8; 770 NW2d 31 (2009).

The underlying purpose of the WPA is protection of the public. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 378; 563 NW2d 23 (1997). The statute "meets this objective by protecting the whistleblowing employee and by removing barriers that may interdict employee efforts to report violations or suspected violations of the law." *Id.* at 378-379. The WPA is a remedial statute and must be liberally construed to favor the persons that the Legislature intended to benefit. *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 406; 572 NW2d 210 (1998). The WPA provides the exclusive remedy for such retaliatory discharge and consequently preempts common-law public-policy claims arising from the same activity. *Dudewicz v Norris Schmid, Inc*, 443 Mich 68, 70, 78-79; 503 NW2d 645 (1993), overruled in part on other grounds by *Brown v Detroit Mayor*, 478 Mich 589, 595 n 2 (2007). However, if the WPA does not apply, it provides no remedy and there is no preemption. *Driver v Hanley (After Remand)*, 226 Mich App 558, 566; 575 NW2d 31 (1997).

The WPA imposes a 90-day limitations period for a civil action arising from a violation of the act. MCL 15.363(1). In determining whether a statute of limitations applies, this Court looks to the true nature of a complaint, reading the complaint as a whole and looking beyond the parties' labels to determine the exact nature of the claim. *Adams v Adams* (*On Reconsideration*), 276 Mich App 704, 710-711; 742 NW2d 399 (2007). Accordingly, a plaintiff asserting a claim for

termination in violation of public policy that arises from circumstances that establish a claim for relief under the WPA will be subject to the WPA's exclusive remedy and will not be permitted to evade the 90-day limitations period by recasting the claim as a public-policy claim.

Plaintiff argues that she was not engaged in protected activity under the WPA with respect to the boiler inspection because she was not requested by a public body to participate in an "investigation" or "inquiry" as those terms are used in the WPA. The WPA defines a "public body" as including "[a] state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of state government." MCL 15.361(d)(*i*). The deputy boiler inspector, as a state officer, thus falls within the definition of a public body under the WPA. However, plaintiff characterizes Ladd's boiler inspection as a "routine inspection" that cannot be classified as an investigation or inquiry under the WPA. The WPA does not define the terms "investigation" or "inquiry." Terms that are not defined in a statute must be given their plain and ordinary meanings, and it is appropriate to consult a dictionary for definitions. *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004).

Black's Law Dictionary (8th ed), p 844, defines "investigate" as "[t]o inquire into (a matter) systematically" or "[t]o make an official inquiry." It defines "inquiry" in the context of parliamentary law as "[a] request for information, either procedural or substantive" and in the context of international law as fact-finding. *Id.* at 808. *Random House Webster's College Dictionary* (2000) defines "inquiry" as "1. a seeking or request for truth, information, or knowledge. 2. an investigation, as into an incident. 3. a question; query." The general dictionary definition of "inquiry" meshes

with the legal dictionary's definition of the term "administrative search," which is defined in Black's Law Dictionary (8th ed), p 1378, as "[a] search of public or commercial premises carried out by a regulatory authority for the purpose of enforcing compliance with health, safety, or security regulations." The activity of an administrative search thus involves an inquiry as defined in *Random House Webster's College Dictionary* as a seeking or request for truth, information, or knowledge. Reading these definitions together, and in view of the WPA's delineation of protected activity, it is apparent that the term "inquiry" in the WPA encompasses an administrative search such as the inspection carried out here by the boiler inspector. Thus, plaintiff was engaged in protected activity when she cooperated with Ladd's inspection, and her claim was therefore subject to the WPA's exclusive remedy. *Dudewicz*, 443 Mich at 70. Accordingly, plaintiff failed to plead a cognizable public-policy claim independent of the WPA.

Plaintiff's reliance on *Messenger v Dep't of Consumer & Indus Servs*, 238 Mich App 524; 606 NW2d 38 (1999), in support of her argument that the boiler inspection was not an investigation within the meaning of the WPA is misplaced. In *Messenger*, the plaintiff, a licensed physician, was prosecuted for and acquitted of manslaughter for withdrawing life support from his infant son. *Id.* at 527. The plaintiff presented a request under the Freedom of Information Act (FOIA), MCL 15.321 *et seq*., for information that the defendant, the Department of Consumer and Industry Services, had compiled regarding the plaintiff's prosecution. *Messenger*, 238 Mich App at 527. The defendant contended that the information was exempt from disclosure under the Public Health Code (PHC), specifically MCL 333.16238(1), which classified as confidential any information obtained in an investigation before the issuance

of an administrative complaint. *Messenger*, 238 Mich App at 527-528. This Court held that the FOIA exemption did not apply because there had not been an investigation within the meaning of MCL 333.16238(1), explaining:

> The PHC does not expressly define the term "investigation." In the absence of a statutory definition of a term, a court may consult dictionary definitions to determine the common meaning of a word. *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 470; 521 NW2d 831 (1994); *Weisman v US Blades, Inc*, 217 Mich App 565, 568; 552 NW2d 484 (1996). *Random House Webster's College Dictionary* (2d ed.), p 668, defines an "investigation" as "the act or process of investigating or the condition of being investigated" or "a searching inquiry for ascertaining facts; detailed or careful examination." Similarly, to "investigate" is "to search or examine into the particulars of; examine in detail." *Id.* Further, §§ 16221 and 16233 of the PHC, MCL 333.16221, 333.16233, instruct that, during the course of an investigation, the department may hold hearings, take testimony, and administer written, oral, and practical tests to a licensee as investigatory tools.
>
> Applying the general principles of statutory construction and the common meaning of "investigation" to the facts of this case, we find that defendant's conduct did not amount to an "investigation" as contemplated by the PHC. 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. Rather, by its own admission, defendant conducted only an "administrative review," a "monitoring and a preliminary compilation of information," a "preliminary review," and a "preliminary information gathering process . . . limited to non-intrusive measures" that preceded a "formal field investigation." Indeed, defendant's passive efforts at collecting information concerning the manslaughter charges filed against plaintiff consisted of nothing more than obtaining documents from public agencies and monitoring the criminal proceeding. On this record, we

> find that defendant's conduct is properly classified as that which *precedes* a formal "investigation" and does not rise to the level of an "investigation" as contemplated by the PHC. [*Id.* at 534-535 (citations omitted).]

Plaintiff contends that the boiler inspector's visits did not rise to the level of an investigation because they did not involve "a searching inquiry for ascertaining facts" or "a detailed or careful examination of the events surrounding" alleged misconduct. However, we are not persuaded that this Court's construction of the term "investigation" as used in the PHC, MCL 333.16238(1), requires a similarly restrictive interpretation of the terms "investigation" and "inquiry" as used in the WPA. Whereas the WPA's inclusions of protected persons must be construed broadly, *Chandler*, 456 Mich at 406, exemptions from disclosure under the FOIA must be narrowly construed, *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 232; 507 NW2d 422 (1993). Moreover, the WPA's protection is not limited only to persons who participate in investigations, but extends to employees who are requested by a public body to participate in "an investigation, hearing, *or inquiry* held by that public body." MCL 15.362 (emphasis added). Indeed, the *Messenger* Court's construction of the term "investigation" as used in the PHC builds on the term "inquiry"; an investigation encompasses "a searching inquiry for ascertaining facts; detailed or careful examination." This is consistent with the Black's Law Dictionary definition of "investigation" as including an "official inquiry" and to "systematically" inquire into a matter. Read together, these definitions suggest a hierarchy of governmental acquisition of information, with probing or formal investigations being required to apply the FOIA exemption and with less intrusive and less formal inquiries being sufficient to come within the scope of the WPA.

The boiler inspector's inspection fits the definition of "inquiry" in the WPA. Accordingly, an employee who participates in an investigation or inquiry, which includes an administrative search or inspection, is a protected person under the WPA. Consequently, plaintiff's action was subject to the WPA's exclusive remedy and was therefore barred by the 90-day limitations period in that act. *Dudewicz*, 443 Mich at 70; MCL 15.363.

Accordingly, summary disposition was proper under MCR 2.116(C)(7), because plaintiff's claim was untimely, and also under MCR 2.116(C)(8) and (10), because plaintiff failed to plead or support a claim that was not subject to the WPA's exclusive remedy. Because we conclude that the WPA was plaintiff's exclusive remedy, it is unnecessary to consider the merits of plaintiff's public-policy theory.

We also disagree with plaintiff's argument that summary disposition was premature because discovery was not yet complete. "A motion under MCR 2.116(C)(10) is generally premature if discovery has not been completed unless there is no fair likelihood that further discovery will yield support for the nonmoving party's position." *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 33-34; 772 NW2d 801 (2009). Plaintiff argues that further discovery could reveal evidence to support her claim that her termination was motivated by her cooperation with the boiler inspector. However, that was not the basis for the trial court's summary disposition decision. Plaintiff has not demonstrated a fair likelihood that further discovery could reveal anything to refute the trial court's correct conclusion that plaintiff's exclusive remedy was under the WPA and her claim was thus subject to that act's 90-day limitations period.

IV. DEFENDANT'S CROSS-APPEAL

Defendant argues on cross-appeal that the trial court improperly made a finding of fact that plaintiff was terminated because of her participation in the boiler inspector's investigation. Defendant challenges the following emphasized statement that appears in both the trial court's original and amended opinions:

> Plaintiff was requested by a public body to participate in an investigation regarding the boilers in the laboratory. *Because Plaintiff's employment was terminated due to her participation in the investigation*, her exclusive remedy was under the WPA. Plaintiff waited almost two years to file her claim and is therefore, barred by the 90-day statute of limitations for a WPA claim.

A court may not make a finding of fact or weigh credibility when ruling on a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Read in context, however, it is apparent that the challenged statement was not an improper finding of fact, but a summary of plaintiff's allegations. When deciding a motion for summary disposition under MCR 2.116(C)(8), a court must accept as true all well-pleaded allegations. *Teel*, 284 Mich App at 662. Similarly, when deciding a motion under MCR 2.116(C)(10), a court must view the evidence and all reasonable inferences arising from the evidence in a light most favorable to the nonmoving party. *Driver*, 287 Mich App at 344.

Plaintiff alleged that her cooperation with Ladd was the reason defendant terminated her employment. For purposes of defendant's motion, the trial court was obligated to accept that allegation as true to determine whether the gravamen of plaintiff's complaint involved a termination for participating in an investigation or inquiry, which would bring her claim within the WPA.

Viewed in this manner, defendant has failed to establish that the trial court's statement was improper.

Affirmed.

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

STURRUS v DEPARTMENT OF TREASURY

Docket No. 295403. Submitted February 1, 2011, at Lansing. Decided February 8, 2011. Approved for publication May 19, 2011, at 9:00 a.m. Leave to appeal denied, 491 Mich 884.

Plaintiffs, David W. and Nancy J. Sturrus, loaned more than $4 million to Pupler Distributing Company between 1998 and 2002 and, in return, received interest payments of $4,346,680. Plaintiffs reported and paid federal and state taxes on the interest payments for the years 1998 through 2002. Plaintiffs discovered in 2002 that Pupler was a Ponzi scheme and their interest payments stopped, with Pupler owing plaintiffs $5,108,500 in outstanding loans. As a result, plaintiffs claimed a theft-loss deduction of $5,108,500 for their lost investment on their 2002 federal tax return, pursuant to 26 USC 165, and reduced their federal tax liability accordingly. Because the theft-loss deduction was taken after the determination of adjusted gross income, the deduction had no effect on plaintiffs' Michigan income tax liability, which is based on the federal definitions of adjusted gross income. Also in 2002, an involuntary petition was filed in the United States Bankruptcy Court against Pupler. The bankruptcy trustee demanded that plaintiffs return the $4,346,680 in interest payments they had received, plus a 10 percent premium on the interest earned. Plaintiffs and the trustee reached a settlement whereby plaintiffs offset the repayment of interest against their lost investment and plaintiffs submitted a check for $350,000, representing the difference in the two figures. On the basis of this transaction, plaintiffs reported a theft-loss recovery of $4,200,160 (the estimated total amount of their recovered lost investment) on their 2004 federal income tax return. The theft-loss recovery was included in the calculation of their adjusted gross income. Plaintiffs then deducted the amount of the theft-loss recovery from the adjusted gross income of their 2004 Michigan income tax return. Plaintiffs based this action on the federal tax-benefit rule, 26 USC 111(a), which provides that "[g]ross income does not include income attributed to the recovery during the taxable year of any amount deducted in any prior taxable year to the extent such amount did not reduce the amount of tax imposed by this chapter." Defendant, the Department of Treasury, audited plaintiffs' 2004 Michigan income

tax return and found a deficiency on the basis that the tax-benefit rule did not apply and, therefore, the theft-loss recovery deduction was improper. Plaintiffs paid the assessed tax and interest, and brought an action in the Court of Claims, requesting an order that, in part, required defendant to apply the tax-benefit rule and issue a tax refund to plaintiffs. The court, Paula J. M. Manderfield, J., granted summary disposition in favor of plaintiffs, reversed defendant's decision and order of determination, and ordered defendant to issue a tax refund to plaintiffs. Defendant appealed.

The Court of Appeals *held*:

1. The bankruptcy trustee had legal authority to recover the interest payments from plaintiffs.

2. The Income Tax Act MCL 206.1 *et seq*., provides in MCL 206.2 that any term used in the act shall have the same meaning as when used in comparable context in the laws of the United States relating to federal income taxes unless a different meaning is clearly required. It also provides that it is the intention of the act that the income subject to tax be the same as taxable income as defined in the Internal Revenue Code. The Income Tax Act, in MCL 206.30(1), defines "taxable income" as adjusted gross income as defined in the Internal Revenue Code, minus certain specified adjustments. The Internal Revenue Code, 26 USC 62; 26 USC 63, defines both "adjusted gross income" and "taxable income" as gross income minus allowable deductions. The Internal Revenue Code provides that the starting point in calculating adjusted gross income is gross income, 26 USC 62. The tax-benefit rule pertains directly to the calculation of gross income. Therefore, it follows that because the tax-benefit rule is one part of the calculus in determining a taxpayer's federal adjusted gross income, the Income Tax Act's own definition of taxable income necessarily permits plaintiffs to invoke the provisions of the tax-benefit rule if they are applicable to their circumstances. The Court of Claims correctly ruled that the Income Tax Act necessarily incorporates the federal tax-benefit rule.

3. In order for an amount to be excluded from gross income under the tax-benefit rule, it must have previously been claimable as a deduction. Here, plaintiffs' lost investment was not previously deducted on any prior Michigan income tax return. By its very terms, the tax-benefit rule does not permit the deduction plaintiffs sought. The Income Tax Act does not provide for a theft-loss deduction because the theft-loss deduction is not included in the act's definition of adjusted gross income. The Court of Claims erred by ruling that the tax-benefit rule was applicable in this case. Plaintiffs were not entitled to deduct their theft-loss recovery from their 2004 Michigan tax return.

4. The Income Tax Act's recognition of the tax-benefit rule does not render MCL 206.30(1)(s) surplusage or nugatory or create an ambiguity in the law.

Reversed.

TAXATION — INCOME TAX ACT — TAXABLE INCOME — FEDERAL TAX-BENEFIT RULE.

The definition of taxable income in the Income Tax Act recognizes and necessarily permits taxpayers to invoke the provisions of the federal tax-benefit rule, 26 USC 111(a), if they are applicable to their circumstances (MCL 206.30[1]).

Varnum LLP (by *Thomas J. Kenny* and *Marla Schwaller Carew*) for plaintiffs.

Bill Schuette, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Heidi L. Johnson-Mehney*, Assistant Attorney General, for defendant.

Before: MURPHY, C.J., and WHITBECK and MURRAY, JJ.

PER CURIAM. In this dispute over the proper application of the tax-benefit rule, defendant, the Department of Treasury, appeals as of right the Court of Claims' order denying its motion for summary disposition, granting plaintiffs' motion for summary disposition, reversing the Department's decision and order of determination, and compelling the Department to refund plaintiffs $174,214, plus interest. We hold that although the Court of Claims correctly ruled that the Income Tax Act (ITA), MCL 206.1 *et seq*., necessarily incorporates the federal tax-benefit rule, the rule was not applicable in this case. Therefore, we reverse the opinion and order of the Court of Claims.

I. BACKGROUND

This case finds its genesis in plaintiffs' attempt to recover their lost investment in the Pupler Distributing

Company, an organization later discovered to be a Ponzi scheme.[1] Between 1998 and 2002, plaintiffs loaned over $4,000,000 to Pupler and, in return, received interest payments of $4,346,680. Plaintiffs reported and paid federal and state taxes on the interest payments for the years 1998 through 2002.

In late 2002, plaintiffs discovered that Pupler was a Ponzi scheme with no legitimate business purpose. Pupler's interest payments to plaintiffs ceased at that time, with Pupler owing plaintiffs $5,108,500 in outstanding loans. As a result, plaintiffs claimed a theft-loss deduction of $5,108,500 for this lost investment on their 2002 federal tax return pursuant to 26 USC 165, and reduced their federal tax liability accordingly. Notably, the theft-loss deduction is taken "below the line" (i.e., after the determination of adjusted gross income). Consequently, because Michigan tax liability is based on the federal definitions of adjusted gross income,[2] the deduction had no effect on plaintiffs' Michigan income tax liability.

On November 14, 2002, an involuntary petition was filed in the United States Bankruptcy Court against Pupler pursuant to chapter 7 of the bankruptcy code, 11 USC 701 *et seq*. The bankruptcy trustee subsequently demanded that plaintiffs return the $4,346,680 in interest payments they had received from Pupler, plus a 10 percent premium on the interest earned. Plaintiffs eventually entered into a settlement agreement with the bankruptcy trustee permitting them to offset the

[1] A "Ponzi" or "Ponzi scheme" is defined as "a swindle in which a quick return on an initial investment paid out of funds from new investors lures the victim into bigger risks." *Random House Webster's College Dictionary* (2d ed, 1997). It is named after Charles Ponzi, who was the organizer of such a scheme during 1919 and 1920. *Id*.

[2] See MCL 206.30.

repayment of interest against their lost investment in Pupler. However, because the amount of plaintiff's interest repayment plus the premium totaled more than the lost investment, plaintiffs submitted a check in the amount of $350,000, representing the difference in the two figures.

Based on this transaction, plaintiffs reported a theft-loss recovery of $4,200,160 (the estimated total amount of their recovered lost investment) on their 2004 federal income tax return.[3] Notably, a theft-loss recovery is added "above the line" and therefore is included in the calculation of a taxpayer's adjusted gross income. The report of the theft-loss recovery, therefore, had significant Michigan tax liability implications for plaintiffs because, as previously noted, the theft-loss deduction (for their lost principal investment) claimed by plaintiffs in 2002 was taken "below the line" and consequently provided plaintiffs no Michigan tax benefit. Thus, in order to avoid paying taxes twice on the same income, plaintiffs deducted the amount of the theft-loss recovery ($4,200,160) from the adjusted gross income of their 2004 Michigan income tax return. Plaintiffs based this action on the federal "tax benefit rule."[4] Under this adjustment, plaintiffs claimed a Michigan tax refund of $171,348, plus interest.

The Department subsequently audited plaintiffs' 2004 income tax return and issued a notice of intent to assess on the ground that the tax-benefit rule did not apply and,

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[3] Plaintiffs also reported a claim-of-right deduction of $4,346,680 on their federal tax return to account for their interest repayment. When reduced by the theft-loss recovery, plaintiffs claimed a net deduction on their federal taxes of $146,520 for the bankruptcy transaction.

[4] The tax-benefit rule provides that "[g]ross income does not include income attributable to the recovery during the taxable year of any amount deducted in any prior taxable year to the extent such amount did not reduce the amount of tax imposed by this chapter." 26 USC 111(a).

therefore, the theft-loss recovery deduction was improper. Consequently, the Department denied plaintiffs' tax refund claim and found an income tax deficiency of $2,866, plus interest, for the 2004 tax year. At the request of plaintiffs, an informal conference with the Department was held on November 14, 2006. At the conclusion of the conference, the hearing referee recommended that the federal tax-benefit rule be incorporated into Michigan law and that the assessment be canceled. Two years later, however, the director of tax policy overruled that recommendation and affirmed the assessment.

Plaintiffs paid the assessed tax and interest before initiating suit in the Court of Claims on January 28, 2009. In their complaint, plaintiffs requested an order requiring the Department to apply the tax-benefit rule and claim-of-right doctrine and to issue a tax refund. The Department answered in due course, and plaintiffs filed their motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact).

According to plaintiffs, since the federal theft-loss deduction provided no Michigan income tax benefit, the theft-loss recovery was not includable in plaintiff's adjusted gross income under the tax-benefit rule because the ITA specifically incorporates definitions and deductions of the Internal Revenue Code. The Department responded that because plaintiffs failed to prove remission of their interest payment from Pupler to the trustee, who in any event did not have authority to require such a payment, and alternatively, because the ITA did not provide for the application of the tax-benefit rule to theft losses, the court should grant the Department summary disposition under MCR 2.116(I)(2) (opposing party entitled to judgment) and dismiss plaintiffs' complaint.

In a 10-page opinion and order, the Court of Claims held that the tax-benefit rule was applicable based on

an apparent ambiguity in the law. Specifically, the court explained:

> Based simply on the plain language of the Act itself, it appears that the tax benefit rule must be recognized in Michigan. After all, the Act adopts by reference the definitions and principles contained in federal law and the Internal Revenue Code, and the Internal Revenue Code, in turn, incorporates the tax benefit rule. Defendant, however, points to the fact that the Legislature in certain circumstances, explicitly provided in the Act for adjustments to one's taxable income to account for deductions that may be taken on one's federal taxes but not on one's Michigan income tax returns, such as state, city, and property tax refunds. Noting that the Legislature thus knew how to provide for such adjustments when it wanted to, but that it did not provide for such an adjustment based on Michigan's non-recognition of the Theft Loss Deduction, Defendant argues that clearly the Legislature did *not* intend to adopt the tax benefit rule in Michigan's Income Tax Act in such circumstances. This is an equally viable interpretation. [Emphasis in original.]

Noting that such an ambiguity must be construed in plaintiffs' favor, the court found that "the Michigan Income Tax Act itself provides for the recognition of the tax benefit principle." Additionally, the court rejected the Department's argument that plaintiffs failed to remit their interest repayment to the trustee since plaintiffs had offset their interest repayment by the amount of their lost investment. Accordingly, the court granted summary disposition to plaintiffs, reversed the Department's decision and order of determination, and canceled plaintiffs' December 26, 2008, final bill for taxes due. Plaintiffs were therefore entitled to a refund of $174,214, plus interest. The instant appeal ensued.

II. ANALYSIS

On appeal, the Department reiterates its challenge to plaintiffs' eligibility for a tax refund. The Court reviews de

novo an appeal from an order granting a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when the moving party is entitled to judgment as a matter of law because there is no genuine issue of material fact. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing this issue, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Issues of statutory interpretation are also questions of law that we review de novo. *USAA Ins Co v Houston Gen Ins Co*, 220 Mich App 386, 389; 559 NW2d 98 (1996).

A. PLAINTIFFS' PAYMENT TO THE TRUSTEE

Before reaching the merits of the applicability of the tax-benefit rule, we first address the Department's preliminary contention that plaintiffs are not entitled to a refund since they failed to remit to the bankruptcy trustee interest payments received from Pupler. The flaw of this argument is the failure to acknowledge that plaintiffs' actual repayment to the trustee of $350,000 was the difference between the Pupler interest payments and plaintiffs' lost investment. Further, as the lower court observed, the Department failed to submit any evidence calling into question the estimation of plaintiffs' accountant that plaintiffs recovered only $4,200,120 of their lost investment. An opposing party's allegations without documentary support are insufficient to create a genuine issue

of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Additionally, we reject the Department's claim that the bankruptcy trustee lacked the legal authority to recover the interest payments from plaintiffs. In making this argument, the Department asserts that the trustee was only entitled to recover interest payments made within 90 days of the filing of the bankruptcy petition since the trustee found that no fraudulent transfers were made to plaintiffs. See 11 USC 547. The record reveals no such finding by the trustee, however. Instead, the trustee determined that plaintiffs were without fraudulent transfer *liability* because they had no net "Ponzi Profits." In other words, the trustee's determination pertained to the effect of plaintiffs' offsetting their lost investment against the repayment of their interest payments as opposed to any fraudulent transfers per se.

And in any event, it is well established that in the absence of a defense under 11 USC 548(c) a bankruptcy trustee may recover the full amount paid to Ponzi scheme investors under 11 USC 548(a)(1)(A), because the question of intent to defraud is not debatable. See, e.g., *Fisher v Sellis (In re Lake States Commodities, Inc)*, 253 BR 866, 877-878 (ND Ill, 2000); *In re Taubman*, 160 BR 964, 983-984 (SD Ohio, 1993); *In re Agricultural Research & Technology Group, Inc*, 916 F2d 528, 536 (CA 9, 1990); *In re Baker & Getty Fin Servs, Inc*, 98 BR 300, 308 (ND Ohio, 1989). As the Department launches no attack on the trustee's right to recover under that latter section, its challenge to the trustee's legal authority must fail.

B. THE TAX-BENEFIT RULE

We now turn to the central issue in this case: whether the tax-benefit rule permitted plaintiffs to deduct their theft-loss recovery in calculating their tax liability. This

inquiry requires interpretation and application of the ITA. Thus, we begin by examining the specific language of the ITA to give effect to the Legislature's intent. *Renny v Dep't of Transp*, 478 Mich 490, 495; 734 NW2d 518 (2007). Where the language is unambiguous, judicial construction is neither required nor permitted. *Id*.

1. DOES THE ITA RECOGNIZE THE TAX-BENEFIT RULE?

The ITA subjects the "taxable income" of every individual other than a corporation to a state income tax. MCL 206.51(1). Notably, the ITA expressly incorporates federal principles in calculating taxable income so that terms in the ITA have the same meaning as when used in a comparable context in federal law. MCL 206.2 provides, in relevant part:

> (2) Any term used in this act shall have the same meaning as when used in comparable context in the laws of the United States relating to federal income taxes unless a different meaning is clearly required. Any reference in this act to the internal revenue code shall include other provisions of the laws of the United States relating to federal income taxes.
>
> (3) It is the intention of this Act that the income subject to tax be the same as taxable income as defined and applicable to the subject taxpayer in the internal revenue code, except as otherwise provided in this act.

Both "adjusted gross income" and "taxable income" are defined in the Internal Revenue Code (IRC) as gross income minus allowable deductions. 26 USC 62; 26 USC 63. The ITA, in turn, defines "taxable income" as "adjusted gross income as defined in the internal revenue code" minus certain specified adjustments. MCL 206.30(1).

The federal provision under which plaintiffs seek to deduct their theft-loss recovery is the tax-benefit rule.

As noted earlier, that rule provides that "[g]ross income does not include income attributable to the recovery during the taxable year of any amount deducted in any prior taxable year to the extent such amount did not reduce the amount of tax imposed by this chapter." 26 USC 111(a).

Instructive in applying the tax-benefit rule are the cases of *Preston v Dep't of Treasury*, 190 Mich App 491; 476 NW2d 455 (1991), and *Cook v Dep't of Treasury*, 229 Mich App 653; 583 NW2d 696 (1998). In *Preston*, the Court looked to the Legislature's statement of intent in MCL 206.2(3) and concluded that Michigan income tax taxpayers should receive a deduction for a net operating loss (NOL) even though the ITA did not expressly provide for such a deduction.[5] The Court explained that "[b]ecause the Internal Revenue Code defines adjusted gross income to include a deduction for an NOL, it, therefore, follows that the Michigan Income Tax Act allows an NOL deduction . . . ." *Preston*, 190 Mich App at 495.

Cook followed the reasoning of *Preston*, but concluded that the taxpayers in that case were not entitled to a deduction. At issue in *Cook* was whether oil and gas expenses are deductible even though oil and gas proceeds are exempt from tax under the ITA. *Cook*, 229 Mich App at 660. Relying on *Preston*, the Court determined that MCL 206.2(3) requires that a Michigan taxpayer's taxable income be "calculated in the same manner as it would be under the federal IRC, in the absence of an express provision of the Michigan ITA requiring a different result." *Cook*, 229 Mich App at 660. Applying this rationale, the Court held that even though the IRC permitted deductions for oil and gas

[5] The ITA was subsequently amended to provide for such a deduction. MCL 206.30(1)(o) and (p).

expenses, a deduction for these expenses was not proper under the Michigan ITA because the applicable accounting rule in the IRC disallowed deductions for income wholly exempt from taxes imposed by the IRC. *Id*. at 658-660.

From these cases, it is clear that taxable income in Michigan is to be *calculated* using the definitions in the IRC. Indeed, this is precisely what the plain language of MCL 206.2(3) mandates. This is, of course, different than saying taxable income in a Michigan tax return is *identical* to taxable income in a federal tax return.

To determine whether the ITA recognizes the federal tax-benefit rule, then, we must turn to the relevant definitions. Regarding taxable income, the ITA directs that we look to the IRC's definition of adjusted gross income. MCL 206.30(1). That definition provides that the starting point in calculating adjusted gross income is gross income. 26 USC 62. This definition is key because the tax-benefit rule pertains directly to the calculation of gross income. 26 USC 111(a); *Allstate Ins Co v United States*, 936 F2d 1271, 1275 (CA Fed, 1991). Therefore, it follows that since the tax-benefit rule is one part of the calculus in determining a taxpayer's federal adjusted gross income, the ITA's own definition of taxable income necessarily permits plaintiffs to invoke the provisions of the tax-benefit rule if they are applicable to their circumstances.

2. DOES THE TAX-BENEFIT RULE APPLY HERE?

As previously noted, the plain language of the tax-benefit rule permits a taxpayer to exclude from gross income any income that is recovered during the taxable year that was previously deducted in a prior taxable year as long as that previous deduction did not reduce the taxpayer's tax liability under the IRC. 26 USC

111(a). Here, plaintiffs seek to deduct their theft-loss recovery (i.e., the amount of their investment in Pupler recovered in bankruptcy) on their Michigan tax return. The problem is that the lost investment was not previously deducted on any prior Michigan tax return. And "in order for an amount to be excluded from gross income [under the tax-benefit rule], it must have previously been claimable as a deduction." *John Hancock Fin Servs, Inc v United States*, 378 F3d 1302, 1306 (CA Fed, 2004). Thus, by its very terms, the tax-benefit rule does not permit the deduction plaintiffs now seek.

Plaintiffs point out that because they previously claimed a theft-loss deduction on their 2002 federal tax return, the tax-benefit rule is applicable in calculating their 2004 Michigan tax liability because they received no Michigan tax benefit for the deduction. This argument, however, ignores that the theft-loss deduction in 2002 was taken *only* in calculating plaintiffs' federal tax return and reducing their 2002 federal tax liability for that year. Indeed, it is because the theft-loss deduction did result in a reduced tax that plaintiffs could not invoke the tax-benefit rule in calculating their 2004 federal tax return. For somewhat similar reasons, because the ITA does not provide for a theft-loss deduction, the tax-benefit rule does not apply by its very terms.[6] Consequently, plaintiffs' attempt to transpose their 2002 federal theft-loss deduction to their 2004 Michigan tax return is improper because it is not specific figures from a federal tax return but rather the IRC's calculations that the ITA incorporates to determine income subject to tax.

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[6] Michigan law does not provide for a theft-loss deduction. This is so because the theft-loss deduction is taken below the line and consequently is not included in the ITA's definition of adjusted gross income. Neither party disputes this point.

Finally, we need to address the Department's argument that the ITA's implicit recognition of the federal tax-benefit rule renders other provisions of the ITA, in particular MCL 206.30(1)(s), surplusage or nugatory. MCL 206.30(1)(s) permits a deduction for state and city income tax and property tax refunds to the extent that they were included as adjusted gross income on the federal return. According to the Department, this is an application of the tax-benefit rule since a Michigan taxpayer receives no Michigan tax benefit for his federal deductions of these local taxes made in the prior year's federal tax return.

The deduction permitted in MCL 206.30(1)(s), however, would be an exception to the rule enunciated in the analysis above since it would permit a *federal deduction* to trigger the tax-benefit rule to a *Michigan tax return*. Notwithstanding, in this respect the benefit of MCL 206.30(1)(s) is not an application of the tax-benefit rule as implicitly recognized by MCL 206.2, since the tax-benefit rule recognized by MCL 206.2 looks to previous deductions *on a Michigan tax return* in calculating income subject to *state tax*. Thus, MCL 206.2's recognition of the tax-benefit rule does not render MCL 206.30(1)(s) surplusage or nugatory as the Department claims, nor does it create an ambiguity in the law as the Court of Claims ruled.

Nevertheless, the fact that the ITA specifically permits a taxpayer to use a deduction from federal tax returns in calculating Michigan adjusted gross income in certain circumstances (i.e., state and city taxes) and not in others (i.e., the theft-loss deduction) strongly implies that the Legislature did not intend to permit application of the tax-benefit rule to the situation at hand. See *American Federation of State, Co & Muni Employees v Detroit*, 267 Mich App 255, 260; 704 NW2d

712 (2005) ("Michigan recognizes the maxim '*expressio unius est exclusio alterius*; that the express mention in a statute of one thing implies the exclusion of other similar things.' "). In short, the tax-benefit rule is inapplicable in this case.

III. CONCLUSION

In view of the foregoing analysis, we hold that although the ITA necessarily incorporates the federal tax-benefit rule, the rule was not applicable in this case. Plaintiffs were not entitled to deduct their theft-loss recovery from their 2004 Michigan tax return. We are aware that because of our ruling today, plaintiffs will receive no Michigan tax benefit for their losses in a Ponzi scheme and, in fact, must pay additional taxes because of their theft-loss recovery. The proper forum to address this problem, however, is the Legislature and not this Court. *Casco Twp v Secretary of State*, 472 Mich 566, 603; 701 NW2d 102 (2005) (opinion by YOUNG, J.).

The opinion and order of the Court of Claims is hereby reversed.

No costs, a public question being involved.

MURPHY, C.J., and WHITBECK and MURRAY, JJ., concurred.

GERSTENSCHLAGER v GERSTENSCHLAGER

Docket No. 300858. Submitted May 3, 2011, at Detroit. Decided May 19, 2011, at 9:05 a.m.

Plaintiff, Jeffrey C. Gerstenschlager, brought an action for divorce against defendant, Lori L. Gerstenschlager in the Huron Circuit Court. The May 2007 judgment of divorce awarded primary physical custody of the parties' two daughters to plaintiff, who lived in Michigan, but awarded primary physical custody of the parties' son to defendant, who lived in Virginia. In July 2010, plaintiff moved for a change of custody, seeking an order granting him primary physical custody of the parties' son. Following a hearing on the motion, the court found a change in circumstances on the basis of the facts that defendant had taken in boarders and that the parties' son was getting older. The court determined that an established custodial environment existed with defendant and, thus, weighed the statutory best-interest factors, concluding that clear and convincing evidence established that the child's best interests would be served if plaintiff were awarded primary physical custody of the parties' son. The court entered an order to that effect. Defendant appealed.

The Court of Appeals *held*:

Before modifying a child custody order, a court must determine that the moving party has demonstrated proper cause or a change of circumstances sufficient to warrant reconsideration of the custody decision. The fact that a child is growing up and his or her needs and desires may have changed with age does not constitute a change of circumstances sufficient to warrant the reevaluation of a custody arrangement. The circuit court committed clear legal error in determining otherwise. And the circuit court's determination that the presence of the boarders constituted a change of circumstances sufficient to warrant a reevaluation of the custody arrangement was manifestly against the great weight of the evidence given that the record indicated that there was effectively no interaction between the child and the boarders.

Reversed and remanded.

PARENT AND CHILD — CHILD CUSTODY — CHANGE OF CIRCUMSTANCES.

Before modifying a child custody order, a court must determine that the moving party has demonstrated proper cause or a change of circumstances sufficient to warrant reconsideration of the custody decision; the fact that a child is growing up and his or her needs and desires may have changed with age does not constitute a change of circumstances sufficient to warrant the reevaluation of a custody arrangement.

Ferris, Schwedler & Prill, P.C. (by *Gerald M. Prill*), for plaintiff.

Steven S. Vernier for defendant.

Before: SAAD, P.J., and JANSEN and K. F. KELLY, JJ.

PER CURIAM. Defendant appeals by right the circuit court's order changing primary physical custody of the parties' minor son from her to plaintiff. We reverse and remand for further proceedings consistent with this opinion.

I. FACTS

The parties divorced in 2007. The judgment of divorce awarded primary physical custody of the parties' two daughters to plaintiff, who lived in Michigan, but awarded primary physical custody of the parties' son to defendant, who lived in Virginia. The parties initially agreed to this division of parental responsibilities and also agreed that all three children would be together during the summers, residing alternately with each party.

In July 2010, plaintiff moved for a change of custody to allow the parties' son to live with him and join the parties' two daughters under his physical custody. In asserting a change of circumstances, plaintiff alleged that defendant tended to neglect the boy, that defendant had subjected the boy to erratic changes of residence, improper lan-

guage, and improper discipline tactics, and that defendant routinely entertained various overnight male visitors. Plaintiff additionally asserted that the boy wanted to live with him, and that it would be best if the child were united with his sisters.

At the hearing on the motion, defendant testified that she had two boarders living in her house, a police officer and a member of the Air Force. Defendant stated that she screened the boarders through their respective organizations and also obtained and checked their personal references. Defendant explained that she needed the income from the boarders to help satisfy her child-support obligations. Asked about the interaction between the boarders and the child, defendant replied, "Really none."

The circuit court found that the circumstances had changed insofar as defendant had taken in boarders and the child was getting older. Concerning the boarders, the court described their presence as "a big change," and elaborated, "[W]hen you come home you close that door, you have your space and your privacy and you let your hair down and relax. And I think that's kind of hard to do when there's . . . a stranger in the home. That's a huge difference in my opinion." Concerning the child's age, the court explained, "[W]hen they reach the age of 11, 12, 13 year[s] old, . . . the needs of a child change and the desires of a child chang[e], deep felt desires and needs."

The court then declared that an established custodial environment existed with defendant, and recited its attendant duty to weigh the statutory best-interest factors[1] to determine whether clear and convincing evidence warranted a change. After applying the factors, the court determined that clear and convincing evidence established that the child's best interests would be served if plaintiff acquired primary physical custody.

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[1] MCL 722.23.

II. STANDARDS OF REVIEW

All custody orders must be affirmed on appeal unless the circuit court's factual findings 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. MCL 722.28; *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). "When a court incorrectly chooses, interprets, or applies the law, it commits legal error that the appellate court is bound to correct." *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994) (opinion by BRICKLEY, J.).

III. CHANGE OF CIRCUMSTANCES

Before modifying a child custody order, the circuit court must determine that the moving party has demonstrated either proper cause or a change of circumstances sufficient to warrant reconsideration of the custody decision. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). To establish a change of circumstances, the moving party must prove, by a preponderance of the evidence, that "since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Vodvarka*, 259 Mich App at 513.

As explained previously, the circuit court determined that a change of circumstances had occurred on the alternative bases that the child was entering his teenage years and thus had changing needs and interests, and that defendant had taken two boarders into her house.

Concerning the child's age, *Vodvarka* advises that "over time there will always be some changes in a child's environment, behavior, and well-being," and thus that "the evidence must demonstrate something

more than the normal life changes (both good and bad) that occur during the life of a child . . . ." *Id*. The fact that a child is growing up, the fact that a child has started high school, and the fact that the child faces scheduling changes related to school and extra-curricular activities "are the type of normal life changes that occur during a child's life and that do not warrant a change in the child's custodial environment." *Shade v Wright*, 291 Mich App 17, 29; 805 NW2d 17 (2010). We conclude that, under the reasoning of *Vodvarka* and *Shade*, the circuit court committed clear legal error in determining that the child's changes in needs and desires in the ordinary course of growing up constituted a change of circumstances sufficient to warrant a re-evaluation of the custody arrangement.

Concerning the presence of two boarders in defendant's house, the circuit court concluded that this had resulted in "a big change" or "huge difference," and supposed that it compromised the child's "space," "privacy," and ability to let his "hair down and relax." But those ramifications on the child's life were not in evidence. Instead, the record evidence established that there was effectively no interaction between the child and the boarders. As defendant elaborated:

> [T]he police officer works full time during the day, he's also a volunteer for the fire department and he loves to go to the fires and emergencies and so he's gone most of the time, we rarely see him.
>
> The [Air Force member] works during the day full time and then he stays in his room mostly. They don't hardly even use the house, they just stay up in their rooms. I told them they're welcome to [use the house], but they don't.

The circuit court expressed no doubts concerning defendant's description of how her boarders conducted themselves, and there was no evidence to contradict it.

Indeed, the only evidence concerning the boarders suggested that their presence in the house was a matter of minimal consequence to the child. The circuit court's determination that the boarders' presence in the home constituted a change of circumstances sufficient to warrant a reevaluation of the custody arrangement was manifestly against the great weight of the evidence.

The circuit court erred by concluding that there was a change of circumstances sufficient to revisit the custody arrangement in this case. We therefore reverse and remand this case to the circuit court with instructions to restore defendant's primary physical custody of the subject child. Because we have reversed on this ground, we need not consider defendant's challenges to the circuit court's best-interests determination.

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

SAAD, P.J., and JANSEN and K. F. KELLY, JJ., concurred.

LYON CHARTER TOWNSHIP v MCDONALD'S USA, LLC

Docket No. 294074. Submitted January 11, 2011, at Detroit. Decided May 24, 2011, at 9:00 a.m. Leave to appeal granted, 491 Mich 874.

Lyon Charter Township brought a condemnation action in the Oakland Circuit Court against McDonald's USA, L.L.C., seeking, pursuant to the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq*., a permanent subsurface water and sewer utility easement under the McDonald's condominium unit in the Lyon Towne Center commercial condominium development for the purpose of extending water and sewer utilities from the Lyon Towne Center area south of highway I-96 to an area north of I-96 to provide utilities for a proposed auto dealership. Milford Road East Development Associates, L.L.C., the developer of the Lyon Towne Center, filed a motion to intervene in the action, claiming an interest in the McDonald's unit pursuant to the Lyon Towne Center Master Deed and Bylaws. The court, Shalina D. Kumar, J., granted the motion. The court granted the easement and awarded $50,000 compensation to McDonald's. The court then entered a stipulated order dismissing McDonald's from the action. Milford Road East Development Associates, L.L.C. (hereafter defendant), continued to seek compensation for its claimed interest in the McDonald's easement. Defendant claimed that the relevant "parcel" affected by the condemnation was the Lyon Towne Center and Lyon Crossing (developed by a related company with common beneficial ownership, Milford Road West Development Associates, L.L.C.), referred to jointly as the Lyon Centers. The court found that plaintiff's taking of the easement made the Lyon Centers less desirable from a competitive standpoint and reduced the value of the Lyon Centers parcel. The court stated that the taking "outpositioned" the Lyon Centers in the marketplace and, thus, defendant sustained a $1,503,520 reduction in value of the Lyon Centers. The court entered a judgment for that amount. Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court correctly determined that defendant's property interests derived from the Lyon Towne Center Master Deed and Bylaws. The trial court erred by concluding that defendant

retained unlimited control over the easement for the extension of the water and sewer lines at issue. The master deed and bylaws granted defendant a limited property interest in the easement, subject to approval by plaintiff.

2. Neither the bylaws nor the Condominium Act, MCL 559.101 *et seq*., state that individual unit owners such as McDonald's are to be the exclusive recipient of condemnation awards. Neither precludes an award to defendant in the event defendant has a compensable interest.

3. The fact that defendant's interest in improvements and utilities is subject to plaintiff's approval does not make defendant's interest not cognizable in an eminent-domain action. The limitation on defendant's interest is a factor to be considered in assessing the value, if any, of the interest taken. That value in turn depends on whether the interest is in the part of the parcel that was acquired in the eminent-domain action.

4. To constitute a "parcel" under the UCPA, MCL 213.51(g), the property at issue must meet all four aspects of the definition of a parcel: (1) an identifiable unit of land, (2) having common beneficial ownership, (3) at least part of which is being acquired, and (4) that can be separately valued.

5. The record does not support the finding that the Lyon Centers is the parcel to be valued because the record does not indicate that the easement was part of the commonly owned parcel. In order for the McDonald's subsurface utility easement to be part of the "parcel" at issue, the easement must be part of the land that is subject to common ownership. Nothing in the record establishes that the specific easement was subject to common ownership. The common beneficial ownership between Milford Road East Development Associates, L.L.C., and Milford Road West Development Associates, L.L.C., is extraneous to the master deed for the Lyon Towne Center development and the master deed for the Lyon Crossing development and is insufficient to grant an interest in the McDonald's easement to the common owners. Because the easement acquired was not part of the land subject to common beneficial ownership, the parcel for valuation under the UCPA in this case includes only property in which the Lyon Towne Center Master Deed grants an interest to defendant. That parcel, at the most, consists of the Lyon Towne Center development or, at a minimum, the McDonald's unit. The record demonstrates that the taking of the easement did not affect the value of any interest defendant may have retained in either property. Defendant's limited right to control improvements in the property pertained only to the Lyon Towne Center, not to Lyon Crossing. The trial

court erred by considering the effect of the easement, if any, on Lyon Crossing. Absent the alleged loss in value attributable to Lyon Crossing, the record contains no indication that the acquisition of the easement resulted in a loss to defendant.

6. Michigan does not recognize under the present set of facts "outpositioning" or "loss of market advantage" as an element of damages under the UCPA.

Reversed and remanded.

BECKERING, J., concurring in parts I and II, except footnote 4, of the majority opinion, agreed with the majority opinion both that defendant retained a compensable, albeit limited, property interest in the easements for water and sewer lines in the Lyon Towne Center property that was separate and distinct from the property interest McDonald's owned in its unit and that Lyon Crossing was not a part of the "parcel" to be valued in this condemnation action. Because defendant's retained property interest in the Lyon Towne Center property did not decrease in value as a result of the taking of the easement, the trial court erred by awarding defendant compensation for the loss of value of Lyon Crossing. Judge BECKERING declined to join in footnote 4 or part III of the majority opinion because there was no need to determine the nature or the extent of the property interest retained by defendant in the Lyon Towne Center property or whether defendant would be entitled to recover damages for any loss caused by "outpositioning" in the marketplace or similar market-value loss suffered by Lyon Crossing. The discussion of those issues in the majority opinion was unnecessary and constituted mere dicta.

1. EMINENT DOMAIN — CONDOMINIUMS — CONDEMNATION AWARDS.

The Michigan Condominium Act provides that a condemnation award must include just compensation to the coowner of the condominium unit subject to condemnation; the act does not provide that a coowner is to be the exclusive recipient of condemnation awards (MCL 559.233[3]).

2. EMINENT DOMAIN — UNIFORM CONDEMNATION PROCEDURES ACT — WORDS AND PHRASES — PARCEL.

A "parcel" for purposes of the Uniform Condemnation Procedures Act is an identifiable unit of land, whether physically contiguous or not, having substantially common beneficial ownership, all or part of which is being acquired, and that can be treated as separate for valuation purposes (MCL 213.51[g]).

Landry, Mazzeo & Dembinski, P.C. (by *Nancy Vayda Dembinski*), for Lyon Charter Township.

Carson Fischer, P.L.C. (by *Robert M. Carson* and *Jeffrey B. Miller*), for Milford Road East Development Associates, L.L.C.

Amici Curiae:

Bauckham, Sparks, Lohrstorfer, Thall & Seeber, P.C. (by *John K. Lohrstorfer*), for the Michigan Townships Association and the Michigan Municipal League Legal Defense Fund.

Before: O'CONNELL, P.J., and SAAD and BECKERING, JJ.

O'CONNELL, P.J. In this condemnation action under the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq*., plaintiff, Lyon Charter Township, appeals as of right the trial court's judgment awarding compensation to the intervening defendant, Milford Road East Development Associates, L.L.C. (hereafter defendant). We reverse and remand.

I. FACTS AND PROCEDURAL HISTORY

In 2002, plaintiff and defendant executed and recorded a planned development agreement for the creation of the Lyon Towne Center commercial development in Lyon Charter Township, Oakland County. A related company, Milford Road West Development Associates, L.L.C., executed and recorded a similar agreement to develop a nearby site called Lyon Crossing. Both Lyon Crossing and Lyon Towne Center are situated south of highway I-96.

Defendant sold condominium units in the Lyon Towne Center to retail businesses; each business became a unit owner/coowner and a member of the condominium association. Defendant sold Unit 11 of Lyon Towne Center to McDonald's USA, L.L.C., for $900,000. Like the other unit owners, McDonald's took

its unit subject to both the Lyon Towne Center Master Deed and Bylaws, which described the benefits and burdens for the unit owners and for defendant. Those benefits and burdens included "Easements and Other Rights Retained by Developer [defendant]":

> The Developer reserves for the benefit of itself, its successors and assigns, . . . permanent easements to use, tap into, enlarge or extend all utility facilities in the Condominium and servient estates, including, without limitation, all communications, water, gas, electric, storm and sanitary sewer lines, sewer systems, drainage systems, provided such easements do not materially impair the use or enjoyment of a Unit, all of which easements shall be for the benefit of any land adjoining the Condominium (or expansion thereof) now owned or hereafter acquired by Developer, its affiliates and its successors or assigns. Developer has no financial obligation to support such easements. [Master Deed, art VIII, § 2a.]

In addition, the master deed stated:

> Developer shall (subject to the Township of Lyon's approval) have the sole discretion to determine the specifications for the utility system and Storm Drainage System . . . . Developer shall (subject to the Township of Lyon's approval) have the sole discretion to determine the location of the roadways, utility system and Storm Drainage System . . . . [Master Deed, art VIII, § 3.]

The bylaws specifically addressed eminent domain:

> In the event of any taking of all or any portion of a Unit or any improvements thereon by eminent domain, the award for such taking shall be paid to the Co-owner of such Unit and the mortgagee thereof, as their interests may appear, notwithstanding any provisions of the Act [Michigan Condominium Act, MCL 559.101 *et seq*.] to the contrary. [Bylaws, art V, § 5(a).]

The bylaws also created restrictions on improvements: "No building, structure or other improvement shall be

constructed within a Condominium Unit or elsewhere within the Condominium Project . . . unless plans and specifications therefor . . . have first been approved in writing by the Developer." Bylaws, art VI, § 3. The same bylaws section reserved to defendant "the absolute right to refuse to approve any plans, or any part thereof, in [defendant's] sole discretion." Bylaws, art VI, § 3(B). The section also stated that "improvements must also receive any necessary approvals from Lyon Township." Bylaws, art VI, § 3(D).

Between 2004 and 2006, a separate entity, Republic West, sought to develop property for a Bob Saks General Motors dealership north of I-96. The original building plan for the auto dealership included a septic system, but subsequent studies indicated that the property was not suitable for a septic system. At the time, no water and sewer lines served the proposed Bob Saks property north of I-96. After various negotiations, plaintiff arranged to extend the water and sewer utilities from the Lyon Towne Center area to provide utilities for the proposed auto dealership. Plaintiff filed a condemnation action against McDonald's, seeking a permanent subsurface water and sewer utility easement under the McDonald's unit.

Defendant filed a motion to intervene in the condemnation action, claiming an interest in the McDonald's unit. Plaintiff opposed defendant's motion. The trial court allowed defendant to intervene. In 2007, the trial court granted the easement and awarded compensation to McDonald's in the amount of $50,000. The trial court then entered a stipulated order dismissing McDonald's from the action.

Defendant continued to seek compensation in the condemnation action, claiming a compensable interest

in the McDonald's easement. Plaintiff sought summary disposition, which the trial court denied. At the subsequent bench trial, both parties presented evidence concerning defendant's interest in the easement and the easement's value. Plaintiff's expert testified that the easement affected only the ownership interest of McDonald's, not any ownership interest of defendant. In contrast, defendant's expert testified that defendant had retained an ownership interest in the easement. He further testified that he deemed Lyon Towne Center and Lyon Crossing to be a single parcel, referred to as Lyon Centers. Defendant's expert continued that plaintiff had taken a property interest from defendant, that the taking had resulted in a loss of marketability and desirability of defendant's property, and that the taking had resulted in defendant's being "outpositioned in the marketplace."[1] He determined that the fair market value of the property before the taking was $15,035,200, and that the value after the taking was $12,028,040. He concluded that the amount of just compensation to defendant for the taking should be $3,007,040.

The trial court found that plaintiff's taking of the water and sewer easement made Lyon Centers "less desirable from a competitive standpoint," and further found that "the effect of the use of the property by Plaintiff was to reduce the value of the Lyon Centers Parcel." The court held: "[T]he taking outpositioned Lyon Centers in the marketplace and, thus, Defendant Milford Road East sustained damages." The court concluded that as a result of the taking, defendant sustained a reduction in the value of Lyon Centers in the amount of $1,503,520. The court entered judgment for defendant in that amount.

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[1] Defendant's expert appraiser determined that because the Lyon Towne Center was almost fully developed as of the date of his valuation, he did not include a change of value for Lyon Towne Center.

II. ANALYSIS

A. NATURE OF THE PROPERTY INTEREST AT ISSUE

This Court outlined the tenets underlying condemnation law in *Chelsea Investment Group LLC v City of Chelsea*, 288 Mich App 239, 261; 792 NW2d 781 (2010):

> Both the Fifth Amendment of the United States Constitution and Const 1963, art 10, § 2 prohibit the taking of private property for public use without just compensation. The Taking Clauses do not prohibit the government's interference with a private individual's property, but require that interferences amounting to a taking be compensated. Typically, the government takes private property through formal condemnation proceedings. [Citations omitted.]

The UCPA governs the procedure for public agencies to acquire property in condemnation proceedings. See, e.g., *Dorman v Clinton Twp*, 269 Mich App 638, 645; 714 NW2d 350 (2006). Property interests compensable under the UCPA include both tangible and intangible property, as well as real and personal property rights. MCL 213.51(i).

In this action, there is no dispute that plaintiff took property for the easement from McDonald's by eminent domain. The disputed issue is whether that taking affected any compensable property interest retained by defendant. See *Adams Outdoor Advertising v East Lansing* (*After Remand*), 463 Mich 17, 24; 614 NW2d 634 (2000) (a preliminary inquiry in a takings action is whether the claimant possesses the interest at issue). The extent of defendant's property rights are found in the master deed and bylaws. This Court must apply the plain terms of those documents as written. See *Rossow v Brentwood Farms Dev, Inc*, 251 Mich App 652, 658-659; 651 NW2d 458 (2002).

The trial court concluded that the master deed and bylaws retained for defendant the right to control improvements in the condominium units. We review the trial court's factual findings for clear error, and we review de novo the trial court's conclusions of law. *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 249; 701 NW2d 144 (2005).

We agree with the trial court that defendant's property interests derive from the master deed and bylaws. We disagree, however, with the court's conclusion that defendant retained unlimited control over the easement for extension of the water and sewer lines at issue. Instead, we find that the master deed and bylaws granted defendant a limited property interest in the easement, subject to approval by Lyon Township. The plain terms of the master deed and bylaws circumscribed defendant's control over improvements and the location of utilities. Both the master deed and the bylaws, as quoted above, expressly stated that defendant's control over utilities was subject to plaintiff's approval.

Plaintiff contends that the bylaws specifically grant coowners[2] the exclusive right to compensation in eminent-domain actions. We disagree. This bylaw provision regarding eminent domain simply recognizes that coowners are entitled to just compensation. Nothing in the provision precludes an award to defendant, in the event defendant has a compensable interest. Similarly, nothing in the Michigan Condominium Act states that a coowner is the exclusive recipient of condemnation awards. Rather, the act states that the condemnation award must "*include* just compensation to the co-owner of the condominium unit . . . ." MCL 559.233(3) (emphasis added).

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[2] Coowners refers to individual unit owners, such as McDonald's.

Plaintiff also argues that because defendant's interest in improvements and utilities is subject to plaintiff's approval, the interest is not cognizable in an eminent-domain action. We disagree. In our view, the limitation on defendant's interest is a factor to be considered in assessing the value, if any, of the interest taken. That value in turn depends on whether the interest is in the part of the parcel that was acquired in the eminent-domain action, as discussed in the following section of this opinion.

B. IDENTIFICATION OF THE PARCEL AT ISSUE

The UCPA defines a "parcel" as "an identifiable unit of land, whether physically contiguous or not, having substantially common beneficial ownership, all or part of which is being acquired, and treated as separate for valuation purposes." MCL 213.51(g). The trial court found that "Lyon Towne Centers [sic] and Lyon Crossings [sic] make up Lyon Centers which is the parcel of land that was allegedly damaged." Specifically, the court determined that because the Lyon Towne Center and the Lyon Crossing are owned by related companies that have common beneficial ownership, and because the damage sustained from the taking of the easement affected both the Lyon Towne Center and the Lyon Crossing, the two developments constitute a "parcel" under the UCPA. Plaintiff challenges this finding and argues that Lyon Crossing is not part of the parcel at issue. We agree.

To constitute a parcel under the UCPA, the property at issue must meet all four aspects of the definition of a parcel: (1) an identifiable unit of land; (2) having common beneficial ownership; (3) at least part of which is being acquired; and (4) that can be separately valued. For the purposes of this opinion, we assume, without

deciding, that the first two aspects of the definition were present, i.e., that the Lyon Towne Center and the Lyon Crossing constitute Lyon Centers, and that Lyon Centers is an identifiable unit of land having common ownership. Even with this assumption, however, the record does not support the finding that Lyon Centers is the parcel to be valued in this condemnation action, because the record does not indicate that the easement was part of the commonly owned parcel.

In order for the McDonald's subsurface utility easement to be part of the parcel at issue, the easement must be part of the land that is subject to common ownership. We find nothing in the record to establish that the specific easement was subject to common ownership. As noted in part II(A) above, any property rights in the easement derive from the Lyon Towne Center Master Deed and Bylaws. The Lyon Towne Center Master Deed grants the benefits and burdens of the deed to the unit owners and *defendant*. In contrast, the master deed for Lyon Crossing grants the benefits and burdens of that deed to the unit owners and Milford Road West Development Associates. Nothing in either deed grants any interest to any parent corporation or related entity.[3] The common beneficial ownership between defendant and Milford Road West Development Associates is extraneous to the deeds and is insufficient to grant an interest in the McDonald's easement to the common owners.

Given that the easement acquired was not part of the land subject to common beneficial ownership, the parcel

[3] Although the same individual signed the master deeds for both developments, the documents indicate that the individual signed the Lyon Towne Center Master Deed on behalf of defendant, and signed the Lyon Crossing Master Deed on behalf of Milford Road West Development Associates. Milford Road West Development Associates is not a party to this litigation.

for valuation under the UCPA in this case includes only property in which the Lyon Towne Center Master Deed grants an interest to defendant. That parcel consists of, at most, the Lyon Towne Center development, or, at a minimum, the McDonald's unit. We need not decide whether the parcel was the entire Lyon Towne Center or was solely the McDonald's unit, because, as discussed below, the record demonstrates that the taking of the easement did not affect the value of any interest defendant may have retained in either property.

C. VALUE OF THE PROPERTY INTEREST AT ISSUE

Defendant's limited right to control improvements in the property pertained only to Lyon Towne Center, not to Lyon Crossing. Accordingly, the trial court erred by considering the effect of the easement, if any, on Lyon Crossing. Absent the alleged loss in value attributable to Lyon Crossing, the record contains no indication that the acquisition of the easement resulted in a loss to defendant. Defendant's expert acknowledged that Lyon Towne Center was almost fully developed as of the date of his valuation, and that his appraisal did not include a change in value for Lyon Towne Center.[4]

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[4] Remarkably, defendant does not claim that it owns any tangible property interest in Lyon Towne Center that was taken by plaintiff. Defendant's only claim is that the master deed and bylaws grant it an intangible property interest to control improvements in Lyon Towne Center. Defendant alleges that plaintiff's condemnation action resulted in a taking of its intangible property interest to control improvements in Lyon Towne Center. Were we to address defendant's claim that it has a cognizable property right that was taken under the just-compensation clause, we would conclude that the developer has no compensable property right that was taken as a result of the township's extension of a public water and sanitary sewer pipeline under the McDonald's property. In our opinion, the township's proper use of its condemnation powers did not affect the developer's "rights to control the development." The developer's only rights originate from the master deed and bylaws

III. THE *BALD MOUNTAIN* OPINION, LOSS OF MARKET ADVANTAGE AND OUTPOSITIONING

A. THE *BALD MOUNTAIN* OPINION

The trial court and the parties attribute considerable significance to this Court's opinion in *Oakland County Bd of Co Rd Comm'rs v Bald Mountain West*, unpublished opinion per curiam of the Court of Appeals, issued February 14, 2008 (Docket No. 275230). *Bald Mountain* was an appeal from a judgment following a jury trial, and the issue presented on appeal was whether the trial court erred by allowing Bald Mountain's appraiser to testify regarding the reduction in value of Bald Mountain's property after a taking for a road extension. *Id*. at 1-2. The appraiser testified that the road extension allowed new competition for Bald Mountain's parcel, and that the competition reduced the value of Bald Mountain's parcel. *Id*. at 3. The appraiser testified that Bald Mountain had been " 'outpositioned' " in the marketplace. *Id*. Specifically, the appraiser testified that Bald Mountain's situation was unique because the taking allowed a road to be built that was superior to an existing road. *Id*. The jury awarded Bald Mountain less than one-half of the amount of compensation recommended by the appraiser. *Id*. at 2. This Court held that the trial court did not abuse its discretion by allowing the appraiser's testimony.

We note that nothing in *Bald Mountain* stands for the proposition that just compensation requires an

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and are contractual rights and obligations between the developer and the unit owners and do not and cannot bind the township. Moreover, these contractual rights remained unaffected by the extension of a subterranean pipeline from a small portion of the McDonald's property to property outside the development.

award for a loss in competitive advantage. Rather, the *Bald Mountain* panel quoted the standard propositions regarding just compensation:

> " '[T]he "just compensation" required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain[.]' " *Butler v State Disbursement Unit*, 275 Mich App 309, 312; 738 NW2d 269 (2007), quoting *Brown v Legal Foundation of Washington*, 538 US 216, 235-236 123 S Ct 1406; 155 L Ed 2d 376 (2003). "The purpose of just compensation is to put property owners in as good a position as they would have been had their property not been taken from them. The public must not be enriched at the property owner's expense, but neither should the property owner be enriched at the public's expense." *Dep't of Transporation v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999) (citation omitted). "[J]ust compensation includes all elements of value that inhere in the property[.]" *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 378; 663 NW2d 436 (2003) (citation omitted). [*Bald Mountain*, unpub op at 2.]

B. PARTIES' ARGUMENTS

Plaintiff maintains that *Bald Mountain* is distinguishable from the present case and contends that defendant should not be allowed to prevent competition by obtaining a condemnation windfall. Plaintiff also challenges the trial court's factual finding that defendant's difficulty in marketing Lyon Crossing was attributable to the Saks dealership's decision to locate on the north side of I-96. In response, defendant argues that the devaluation of defendant's property is compensable in condemnation, both under *Bald Mountain* and under traditional condemnation law.

The brief of amicus curiae Michigan Townships Association labels the compensation award a "new theory of compensation" and warns that affirming the award

would seriously hinder future economic growth, particularly in commercial and industrial markets. We agree.

C. ANALYSIS

In identifying the issues in the case and in formulating its decision, the trial court relied significantly on *Bald Mountain*. Citing *Bald Mountain*, the trial court identified one of the issues as "whether Defendant Milford Road East was outpositioned in the marketplace by the placement of the utility lines north of interstate 96 and east of Milford Road for the benefit of a Bob Saks GM dealership development." In addition, the trial court's opinion appears to attribute the following quote to *Bald Mountain*: " '[A] governmental action in an eminent domain matter which outpositions a landowner in the marketplace is compensable.' "

We cannot locate the quoted provision in the *Bald Mountain* opinion. Moreover, *Bald Mountain* does not support the trial court's holding. As noted previously in part III(A), the *Bald Mountain* opinion does not recognize "outpositioning" as a measure of damages.

The trial court's alternative ground for its ruling appears to be the court's conclusion that Saks should compensate defendant for some of the original cost of installing the utility lines. The court wrote:

> [T]his is a unique case whereby Republic West, LLC and Bob Saks prodded Plaintiff Charter Twp. of Lyon to undertake this condemnation action to obtain the utilities easement. Had Bob Saks and Republic West, LLC not demanded the utilities easement, the Plaintiff Charter Twp. of Lyon would not be subject to this damages claim. Furthermore, the Court notes that Defendant Milford Road East spent over $10,000,000.00 of its own money to bring utilities to Lyon Centers which the Plaintiff thereafter took without their approval and for the benefit [of] the Bob Saks development.

These statements do not justify the exponential enrichment the trial court's compensation award granted to defendant. The award placed defendant well above the amount necessary to put defendant in the position defendant would have been had the water and sewer easement not been taken. The award essentially erased the risk of market competition.

To allow an award for lost competitive advantage would be to allow the first developer in a geographic area to monopolize real estate by placing unreasonably high cost barriers for competitors to tap into public utility lines. One would not expect every person that legally accesses existing sewer lines to reimburse the original developer of the lines for the construction costs of the lines, or to pay the developer for every reduction in the developer's competitive position. Here, similarly, it was incorrect to require that defendant be compensated for a change in the real estate market.

IV. CONCLUSION

We conclude that the trial court erred when it determined that Lyon Centers was the "parcel" at issue in the present case. We also conclude that Lyon Crossing does not have a property interest in the easement located on the McDonald's unit. We further conclude that, under the present set of facts, Michigan law does not recognize "outpositioning" or "loss of market advantage" as an element of damages under the UCPA.

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

SAAD, J., concurred with O'CONNELL, P.J.

BECKERING, J. (*concurring in part*). I concur in parts I and II, excepting footnote 4, of the majority opinion. I

agree that defendant Milford Road East Development Associates, L.L.C. (Milford Road East), retained a compensable, albeit limited, property interest in easements for the water and sewer lines at issue in the Lyon Towne Center property, which was separate and distinct from the property interest owned by McDonald's USA, L.L.C., in Unit 11 of that development. I also agree that, for the reasons set forth in the majority opinion, the record does not support a finding that Lyon Crossing, which is owned by Milford Road West Development Associates, L.L.C. (Milford Road West), is part of the "parcel" to be valued in this condemnation action as that term is defined in the Uniform Condemnation Procedures Act (UCPA), MCL 213.51(g).[1] The relevant determination is whether Milford Road East's retained property interest in the Lyon Towne Center property, as plainly defined by and derived from the Lyon Towne Center Master Deed and Bylaws, suffered any decrease in value resulting from the township's taking of the easement over a portion of the McDonald's property. Because Milford Road East's own expert testified that Lyon Towne Center suffered no change in value as a result of the township's taking of the easement, I join in the majority's conclusion that the trial court erred by awarding Milford Road East compensation for loss in the value of Lyon Crossing.

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[1] To reiterate, as noted in part in the majority opinion, Lyon Towne Center and Lyon Crossing are owned by separate entities, are governed by separate master deeds and bylaws and are subject to separate Planned Development Agreements. Milford Road East owns Lyon Towne Center. Milford Road West owns Lyon Crossing. Although they are related entities in that the same individual signed both master deeds, Milford Road East has no property interest whatsoever in Lyon Crossing, and Milford Road West has no property interest whatsoever in Lyon Towne Center. Most notably, neither entity's deed grants any interest to any parent corporation or related entity, and nothing in the record establishes that the specific easement was subject to common ownership.

Having reached this conclusion, I find there to be no need to determine the nature or extent of the property interest retained by Milford Road East in the Lyon Towne Center property, nor whether Milford Road East would be entitled to recover damages for any loss caused by "outpositioning" in the marketplace or similar market-value loss suffered by Lyon Crossing. While these determinations would have been required had we instead concluded that Lyon Crossing was part of the "parcel" being valued under the UCPA, because we conclude otherwise, any discussion of these issues is unnecessary and hence, constitutes mere dicta. Thus, I respectfully decline to join in footnote 4 or in part III of the majority opinion.

In re TD

Docket No. 294716. Submitted January 12, 2011, at Lansing. Decided May 26, 2011, at 9:00 a.m. Leave to appeal sought.

A Washtenaw Circuit Court jury adjudicated TD, as a juvenile, responsible for committing second-degree criminal sexual conduct. TD successfully completed probation and shortly after reaching age 18, he petitioned the court under MCL 28.728c for relief from the registration requirements of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. The court, Darlene A. O'Brien J., determined that the statute was unconstitutional as applied to TD and issued an order granting him relief from SORA's registration requirements. The prosecutor appealed on behalf of the people of the state of Michigan.

The Court of Appeals *held*:

1. The determination whether governmental action constitutes punishment, for purposes of the constitutional prohibition against cruel or unusual punishment, requires consideration of the totality of the circumstances and particularly the legislative intent, the design of the legislation, the historical treatment of analogous measures, and the effects of the legislation. Under this analysis, the requirement that TD register as a sex offender under SORA did not constitute punishment given that (1) the Legislature's express intent in enacting SORA was to assist in the prevention of and protection against future criminal sexual acts by convicted sex offenders, (2) registration is regulatory and remedial and does not result in the release of previously sealed information, (3) registration is not equivalent to historical practices such as branding, shaming, or banishment, and (4) the negative consequences of registration result from actions taken by the public and are not imposed by the registration requirement itself. The contrary holding reached in *People v Dipiazza*, 286 Mich App 137 (2009), was confined to the specific facts of that case. The trial court erred by holding that the act invalidly imposed a cruel or unusual punishment on TD.

2. Some overlap between the functions and powers of the separate branches of government is permissible. Accordingly, the Legislature did not violate the separation-of-powers doctrine by

prohibiting courts from granting relief to certain offenders from SORA's registration requirements. Courts may still pass on constitutional questions raised as a result of SORA registration.

3. SORA's registration requirements are rationally related to the legitimate governmental interest of enabling members of the public to protect themselves against the commission of criminal sexual acts by convicted sex offenders even if the risk of recidivism is low in the cases of some offenders required to register.

Reversed.

RONAYNE KRAUSE, J., concurring, agreed with the majority that registration under SORA is not a punishment under Michigan law, but expressed concern with the public nature of registration for those like TD, who are charged and found responsible as juveniles. She believed that the majority did not give enough weight to the burden that public registration places on registrants, stated that requiring the registration of people who are demonstrably not dangerous makes it more difficult to regard SORA as the nonpunishment tool that it should be, and urged the Legislature to grant courts discretion in such situations.

1. RAPE — CRIMINAL SEXUAL CONDUCT — JUVENILES — SEX OFFENDERS REGISTRATION ACT — CONSTITUTIONAL LAW — CRUEL OR UNUSUAL PUNISHMENT.

Requiring an individual charged and adjudicated responsible as a juvenile to register as a sex offender under the Sex Offenders Registration Act does not constitute punishment and, therefore, is not unconstitutional as cruel or unusual punishment (Const 1963, art 1, § 16; MCL 28.722[a][*iii*], MCL 28.723).

2. CONSTITUTIONAL LAW — SEPARATION OF POWERS — SEX OFFENDERS REGISTRATION ACT — PROHIBITION AGAINST GRANTING RELIEF FROM REGISTRATION REQUIREMENTS FOR CERTAIN OFFENDERS.

The prohibition of the Sex Offenders Registration Act against granting relief from the registration requirements for certain offenders is within the Legislature's power and does not violate the constitutional separation of powers (MCL 28.728c).

Debra S. Keehn and *Faupel, Fraser & Fessler* (by *Marian L. Faupel*) for TD.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Brian L. Mackie*, Prosecuting Attorney, and *David A. King*, Assistant Prosecuting Attorney, for the people of the state of Michigan.

Amici Curiae:

Kimberly Thomas for the University of Michigan Juvenile Justice Clinic.

Jessie J. Rossman, *Michael J. Steinberg*, and *Kary Moss* for the American Civil Liberties Union Fund of Michigan.

Before: METER, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

METER, P.J. Respondent appeals as of right an order granting petitioner, TD, relief from the registration requirements of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. The trial court found that, as applied to TD, registration under the SORA is cruel or unusual punishment under Michigan's Constitution. We reverse.

In 2007, a jury found that TD had committed second-degree criminal sexual conduct (CSC II) as defined in MCL 750.520c(1)(d)(*ii*) (sexual contact aided or abetted by one or more persons and involving force or coercion). The incident underlying TD's juvenile adjudication occurred in 2006 when he was 15 years old. TD and another male classmate approached a female classmate at school. The case report indicates that TD punched the victim in the back and grabbed at her breast. He then held the victim in a chokehold and pulled her shirt up to expose her breast. TD's accomplice pulled on the victim's belt. In an incident report, the victim relayed that she felt threatened and scared during the attack, and she stated that TD let her go after she bit him on the arm.

After a dispositional hearing, TD was detained in a youth home and placed on probation. TD participated in

a community-based treatment program, as well as group and individual therapy. TD successfully completed his treatment and was released from probation.

Subject to certain exemptions, the SORA provides that juveniles who have been adjudicated as responsible for a "listed offense," see MCL 28.722(e),[1] must register on the public sex-offender registry, MCL 28.722(a)(*iii*); MCL 28.723. CSC II is a listed offense. MCL 28.722(e)(*ix*). CSC II committed under 750.520c(1)(d)(*ii*) is not subject to any exemptions pertaining to juvenile offenses, and thus TD had to fully register under the act after reaching age 18.[2] See MCL 28.728(3)(a).

Shortly after reaching age 18, TD petitioned the trial court for certain relief from the SORA's registration requirements under MCL 28.728c. MCL 28.728c(3) states, "This section is the sole means by which an individual may obtain judicial review of his or her registration requirements under this act." However, TD fell within the statute's mandatory prohibition against granting relief from the registration requirements. MCL 28.728c(14) states that "[t]he court shall not grant a petition filed under this section if any of the following apply . . . ." The statute then lists specific instances in which the offender is not eligible for relief from the SORA's registration requirements. Juveniles adjudicated responsible for CSC II committed under 750.520c(1)(d)(*ii*) are not eligible for relief. MCL 28.728c(14)(c)(*ii*).

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[1] The Legislature amended SORA effective July 1, 2011. 2011 PA 17. Accordingly, some of the statutory citations used in this opinion will change after that date.

[2] As stated in *In re Wentworth*, 251 Mich App 560, 564; 651 NW2d 773 (2002): "In 1999, in response to a federal mandate, the Legislature amended the SORA, adding public notification provisions. . . . A juvenile offender is initially exempt from inclusion within the public database; however, for CSC II violations, that exemption ends when the individual becomes eighteen years old."

The trial court recognized that, under the statute, it did not have discretion to grant TD's request. However, TD also challenged the constitutionality of the SORA's registration requirements, and the trial court agreed that the statute was unconstitutional as applied to TD. TD argued, and the trial court agreed, that the statute results in cruel or unusual punishment under the Michigan Constitution, see Const 1963, art 1, § 16, as applied to him.

We review de novo constitutional issues. *In re Ayres*, 239 Mich App 8, 10; 608 NW2d 132 (1999). The party challenging a statute as unconstitutional bears the burden of proof, and statutes are presumed constitutional. *Id*. "[T]he courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Id*.

In arguing that the SORA results in cruel or unusual punishment as applied to him, TD specifically relies on expert testimony provided at the evidentiary hearing on his petition for relief. TD's expert testified that juvenile offenders can be successfully rehabilitated and pose a low risk of recidivism. TD argues that it is cruel or unusual to subject a rehabilitated, nondangerous juvenile offender such as himself to the stigma of public registration as a sex offender.

Before this Court is obligated to evaluate whether a punishment is cruel or unusual, it must first determine whether the challenged governmental action is actually a form of punishment. *Id*. at 14. This Court has previously considered whether the SORA imposes punishment. In *People v Pennington*, 240 Mich App 188, 191-192; 610 NW2d 608 (2000), this Court considered a challenge to the SORA in which the defendant argued that it violated the constitutional prohibition against ex post facto laws. This Court held that the SORA's

registration requirements are not punishment and, therefore, do not violate the prohibition of ex post facto laws. *Id.* at 193. *Pennington* adopted the reasoning of *Lanni v Engler*, 994 F Supp 849 (ED Mich, 1998), and *Doe v Kelley*, 961 F Supp 1105 (WD Mich, 1997), two federal cases holding that the SORA is directed at protecting the public and that it has no punitive purpose. *Pennington*, 240 Mich App at 193-197. *People v Golba*, 273 Mich App 603; 729 NW2d 916 (2007), also addressed whether the registration requirements of the SORA constituted punishment. In *Golba*, this Court held that requiring the defendant to register as a sex offender on the basis of judicially found facts did not implicate the defendant's right to a jury trial because the SORA does not impose a penalty or punishment. *Id*. at 620-621. *Golba* noted that the SORA promotes awareness of potentially dangerous individuals to members of a community and that this protection of the community is a legitimate governmental interest. *Id*. at 620.

This Court has also considered whether the SORA's registration requirements constitute punishment as applied to juveniles. In *Ayres*, 239 Mich App at 21, this Court concluded that the SORA does not impose punishment. In that case, the 14-year-old respondent was found responsible for CSC II and was ordered to register as a sex offender pursuant to the SORA. *Id*. at 9-10. The respondent challenged this requirement, claiming that it violated the constitutional prohibition against cruel or unusual punishment. *Id*. at 10. The *Ayres* Court adopted the reasoning of the courts in *Lanni* and *Kelley*, quoting language from both indicating that the registration requirements are regulatory and not punitive. *Id*. at 14-18. The *Ayres* Court noted that the SORA " 'does nothing more than create a mechanism for easier public access to compiled information that is otherwise available to the

public only through arduous research in criminal court files.' " *Id*. at 15, quoting *Kelley*, 961 F Supp at 1109.

At first blush, *Ayres* appears controlling in this case because *Ayres* specifically addressed a challenge by a juvenile to the SORA's registration requirements and rejected the defendant's challenge to the SORA as cruel or unusual under the Michigan Constitution. *Ayres*, 239 Mich App at 21. However, even though the *Ayres* respondent was required by the SORA to register as a sex offender, at the time of that opinion juvenile offenders were required to register on a database used only by law enforcement and not available to the public. *Id*. at 18-19. Since *Ayres*, the SORA has been amended to require some juvenile sex offenders to register on the public database upon reaching the age of majority. MCL 28.728. This change casts doubt on the holding of *Ayres*, because the *Ayres* Court partly based its conclusion that the SORA does not impose punishment on the fact that juveniles were not required to register publicly. *Ayres*, 239 Mich App at 18-19.

This Court questioned the holding in *Ayres* in *In re Wentworth*, 251 Mich App 560; 651 NW2d 773 (2002). The juvenile respondent in *Wentworth* was found responsible for CSC II. *Id*. at 561. On appeal, the respondent argued that the SORA's registration requirements violated her due process rights and her right to privacy. *Id*. at 563, 566. After rejecting the respondent's constitutional challenges to the SORA, this Court stated, in dicta, that "the recent amendment of the statute removing . . . confidentiality safeguards [for juveniles] raises questions about the continuing validity of our holding in *Ayres*" concerning the issue of cruel or unusual punishment. *Id*. at 569.

In *People v Dipiazza*, 286 Mich App 137, 146; 778 NW2d 264 (2009), the Court stated that the "essential

underpinning of the conclusion in *Ayres* that the registration requirement imposed by SORA does not punish was the fact that strict statutory guidelines protected the confidentiality of registration data concerning juvenile sex offenders." The *Dipiazza* Court noted that "[t]his premise is no longer valid . . . ." *Id*. The Court thus went on to determine anew whether, in light of the specific facts of *Dipiazza*, the SORA registration requirements were punishment as applied to a juvenile. *Id*. at 147-153.

In *Dipiazza*, the defendant was adjudicated under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq*., for attempted third-degree criminal sexual conduct. *Id.* at 140. When he was 18,[3] the defendant had a consensual sexual relationship with someone who was "nearly 15." *Id*. The defendant and the younger person were later married. *Id.* at 140 n 1. Under the HYTA, all proceedings regarding the criminal charge and disposition are closed to the public as long as the defendant fulfills certain requirements. *Id*. at 141-142. The defendant successfully completed his HYTA program and his case was dismissed, leaving him with no conviction on his record. *Id*. at 140. The SORA was amended, effective October 1, 2004, to exclude individuals such as the defendant in *Dipiazza* from the public-registration requirements. *Id*. at 143. The defendant's offense had occurred before that date, however, and he thus challenged the SORA registration requirements as applied to him, arguing that the requirements constituted cruel or unusual punishment. *Id*. at 140-141.

The Court analyzed whether the registration requirements constituted punishment under the facts of

[3] As noted in *Dipiazza*, 286 Mich App at 141, the "HYTA is essentially a juvenile diversion program for criminal defendants under the age of 21."

that case. *Id*. at 147. It used the test adopted in *Ayres*, stating the following: "[D]etermining whether government action is punishment requires consideration of the totality of circumstances, and particularly (1) legislative intent, (2) design of the legislation, (3) historical treatment of analogous measures, and (4) effects of the legislation." *Id*. at 147 (quotation marks and citations omitted); see also *Ayres*, 239 Mich App at 14-15. Applying these factors to the present case, we find that the SORA does not impose punishment.

Concerning the first factor, we note that the Legislature expressly set forth its intent with regard to the SORA in MCL 28.721a:

> The legislature declares that the sex offenders registration act was enacted pursuant to the legislature's exercise of the police power of the state with the intent to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders. The legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state. The registration requirements of this act are intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger.

The *Dipiazza* Court held that the Legislature's expressed intent was not indicative of a punitive statute because the statute was not meant to "chastise, deter, or discipline" offenders, but to assist in the prevention of and protection against future criminal sexual acts. *Dipiazza*, 286 Mich App at 148. However, the *Dipiazza* Court nevertheless reasoned that the expressed legislative intent did not favor viewing the defendant's regis-

tration as nonpunitive because "[t]he implied purpose of SORA, public safety, is not served by requiring an otherwise law-abiding adult to forever be branded as a sex offender because of a juvenile transgression involving consensual sex during a Romeo and Juliet relationship." *Id*. at 149. The *Dipiazza* Court also emphasized that if the defendant had been assigned to youthful trainee status after October 1, 2004, he would not have been subject to the public-registration requirements. *Id*.

The facts in this case are different. This case did not involve a consensual relationship, TD did not have his conviction discharged under the HYTA, and, unlike in *Dipiazza*, there was no pending or recent amendment that would affect TD's registration obligations and make them appear inequitable. TD committed a predatory sexual offense and poses a more serious danger to the community than the defendant in *Dipiazza*. We find that the first factor, legislative intent, weighs in favor of finding the registration requirements to be nonpunitive because the Legislature specifically set forth a nonpunitive intent in the statute.

When determining whether governmental action is punishment, the next factor to be considered is the design of the legislation. *Id*. at 147. The *Dipiazza* Court recognized that the federal courts, in *Kelley*, 961 F Supp at 1109, and *Lanni*, 994 F Supp at 853, found that the registration requirements were purely regulatory and remedial and that they did not impose any requirement or inflict suffering, disability, or restraint on the registered offender. *Dipiazza*, 286 Mich App at 149. The *Dipiazza* Court disagreed with that assessment, indicating that the SORA created public access to records that were previously sealed and in this way caused the loss of rights or privileges. *Id*. at 150. The Court stated:

> Because MCL 762.14 is designed to prevent youthful trainees from suffering a disability or losses of privileges and rights except with respect to requiring registration, and because there was no public dissemination of the sex offender registry at the time, it seems clear the Legislature did not intend to punish youthful trainees by requiring them to register. The dissemination of nonpublic information through SORA, however, had the opposite effect. The later SORA amendment removing those assigned to trainee status after October 1, 2004, appeared to rectify that issue. [*Id.* at 150-151.] [4]

This reasoning does not apply to the present case. TD was not subject to the guarantees contained in the HYTA against civil disability or the loss of a right or privilege, and his record was never nonpublic according to MCR 3.925(D)(1), which states "Records of the juvenile cases, other than confidential files, must be open to the general public."[5] The second factor, the design of the legislation, weighs in favor of finding that the SORA's registration requirements do not constitute punishment because the notification scheme is regulatory and remedial and does not cause a punitive release of previously sealed information.[6]

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[4] The HYTA specifically mandates that individuals given youthful trainee status "shall not suffer a civil disability or loss of right or privilege . . . ." MCL 762.14(2); see also *Dipiazza*, 286 Mich App at 150. The HYTA then lists registration under the SORA as an exception to this mandate. MCL 762.14(3); see also *Dipiazza*, 286 Mich App at 150. The *Dipiazza* Court viewed this exception as an explicit recognition that the SORA's registration requirements cause a disability and a loss of a right or privilege, at least as applied to a youthful trainee. *Id.*

[5] According to MCR 3.925(E)(2)(c), TD's juvenile record must be destroyed when he becomes 30 years old. However, the fact remains that the record will have been public before that time.

[6] The *Dipiazza* Court also stated:

> That defendant is suffering a disability and a loss of privilege is further confirmed by the fact that there are not strict limitations on public dissemination as there were in *Lanni*. The *Lanni* court noted that the registry limited searches so that a person living in a

This Court next considers the historical treatment of analogous measures when determining whether governmental action is punishment. *Dipiazza*, 286 Mich App at 147. With regard to this factor, the *Dipiazza* Court stated:

> However, no analogous measure exists, nor is there an historical antecedent that relates to requiring a defendant to register as a sex offender when the defendant was a teenager engaged in consensual sex and the defendant was assigned to youthful trainee status after October 1, 1995, but before October 1, 2004. [*Id*. at 151.]

The *Dipiazza* Court's analysis was limited to the specific facts in that case. Therefore, the reasoning and analysis do not apply to TD; his offense was factually distinct.

In *Ayres*, this Court distinguished public registration from historical punishments such as branding, shaming, and banishment because public registration " 'does nothing more than provide for compilation of and public accessibility to information that is already a matter of public record.' " *Ayres*, 239 Mich App at 15, quoting *Kelley*, 961 F Supp at 1110.[7] *Ayres* further noted that the registration requirement does not impose any suffering, restraint, or obligation and stated:

> "The notification provisions themselves do not touch the offender at all. While branding, shaming and banish-

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> particular zip code can only search that zip code on the registry. *Lanni*, [994 F Supp] at 853. Consequently, the court in *Lanni* concluded that a law designed to punish a sex offender would not contain such strict limitations on dissemination. *Id*. Searches on the sex offender registry are no longer limited, however, to the searcher's zip code, but rather the registry provides a searcher with information about every person registered as a sex offender living in every zip code in the state. [*Dipiazza*, 286 Mich App at 151.]

We do not find that this change in the ability to search the registry transforms the SORA into a punitive scheme.

[7] We note, again, that the *Ayres* Court specifically adopted the analyses of *Lanni* and *Kelley* as its own. *Ayres*, 239 Mich App at 18.

> ment certainly impose punishment, providing public access to public information does not. . . . And while public notification may ultimately result in opprobrium and ostracism similar to those caused by these historical sanctions, such effects are clearly not so inevitable as to be deemed to have been imposed by the law itself." [*Ayres*, 239 Mich App at 16, quoting *Kelley*, 961 F Supp at 1110.]

We agree with this analysis and find that factor three, the historical treatment of analogous measures, weighs in favor of finding that the SORA's registration requirements are not punishment because they are not equivalent to historical practices such as branding, shaming, and banishment. *Ayres*, 239 Mich App at 15-16.

Finally, to determine whether the SORA imposes punishment this Court must consider the effects of the legislation. *Dipiazza*, 286 Mich App at 147. The public sex offender registry (PSOR) states that its purpose is "to better assist the public in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders." See *id*. at 151 (quotation marks and citation omitted). The *Dipiazza* Court concluded that registration was an unfair branding under the facts of that case because the defendant was not dangerous and because he had no true conviction by virtue of the HYTA. *Id*. at 152. The Court also concluded that the defendant had been unable to find employment because of his status as a registered sex offender and as a result had suffered emotional and financial consequences. *Id*. at 152-153.

TD's offense did not involve a consensual act, and he was not subject to the HYTA like the defendant in *Dipiazza*. Accordingly, much of the reasoning in *Dipiazza* is inapplicable. Moreover, in analyzing the effects of the legislation, the *Ayres* Court examined *Kelley* and noted that certain consequences of public registration such as harassment, assault, job loss, eviction, and

dislocation are only indirect results of public registration and are not consequences imposed by the law itself. *Ayres*, 239 Mich App at 16, citing *Kelley*, 961 F Supp at 1110-1112. " 'Actions taken by members of the public, lawful or not, can hardly be deemed dispositive of whether legislation's purpose is punishment.' " *Ayres*, 239 Mich App at 16, quoting *Kelley*, 961 F Supp at 1111. We adopt this reasoning and conclude that any consequences flowing from registration are not punishment in the present case.

Because the applicable factors weigh against a conclusion that the registration requirements of the SORA constitute punishment as applied to TD, we hold that the trial court erred in its ruling. We note that the majority of the binding precedent holds that the SORA does not impose punishment, and the *Dipiazza* Court's holding to the contrary appears confined to the specific facts of that case.

TD makes several additional arguments for upholding the trial court's conclusion that the SORA's registration requirements are unconstitutional as applied to this case. TD's arguments have no merit. TD first argues that the SORA's mandatory prohibition against granting relief from the registration requirements to certain offenders violates the doctrine of separation of powers. We note, initially, that the separation-of-powers doctrine does not mandate complete separation, and overlap between the functions and powers of the branches is permissible. *People v Conat*, 238 Mich App 134, 146; 605 NW2d 49 (1999). We further conclude that the statutory requirement that trial courts not grant relief from registration to offenders convicted of certain delineated offenses does not violate the doctrine of separation of powers. The SORA's requirement that certain offenders not be granted relief from registration

is well within the Legislature's power; indeed, the Legislature does not have to grant any sex offender relief from registration. See *O'Donnell v State Farm Mut Auto Ins Co*, 404 Mich 524, 542; 273 NW2d 829 (1979) (discussing the Legislature's power to make choices affecting society). Moreover, courts may still pass on constitutional questions pertaining to the SORA, as we do in our opinion today.

Next, TD argues that the SORA's registration requirements do not bear a rational relationship to any legitimate governmental interest. Rational-basis review "tests only whether the legislation is reasonably related to a legitimate governmental purpose." *TIG Ins Co, Inc v Dep't of Treasury*, 464 Mich 548, 557; 629 NW2d 402 (2001). The SORA was enacted pursuant to the state's police powers to prevent and protect against the commission of criminal sexual acts by convicted sex offenders, MCL 28.721a, and its purpose involves a legitimate governmental interest, see *Golba*, 273 Mich App at 620 ("SORA is a remedial regulatory scheme furthering a legitimate state interest of protecting the public[.]"). Further, a statute is constitutional "if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." *TIG Ins*, 464 Mich at 557 (quotation marks and citation omitted). It is rational to require registration of sex offenders to enable the public to protect themselves, even if the risk of recidivism could be considered low in some cases.

TD next argues that the law is arbitrary and capricious. However, TD has waived this argument by failing to provide pertinent legal citations indicating under what circumstances a court may invalidate a statute for being arbitrary and capricious. See *In re Contempt of Barnett*, 233 Mich App 188, 191; 592 NW2d 431 (1998)

(discussing waiver). At any rate, the Legislature made reasoned policy decisions in crafting the law, and we find nothing arbitrary or capricious in its wording.

Lastly, certain amici curiae have filed a brief to argue that the SORA's registration requirements should be found unconstitutional as applied to TD because they are contrary to numerous public policies. Policy decisions, however, are for the Legislature. *In re Juvenile Commitment Costs*, 240 Mich App 420, 440; 613 NW2d 348 (2000).

Reversed.

M. J. KELLY, J., concurred with METER, P.J.

RONAYNE KRAUSE, J. (*concurring*). I concur with the majority because the majority correctly explains that registration under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., is not "punishment" under Michigan law. Therefore, the trial court impermissibly determined that it constituted "cruel and unusual punishment" in this case. I write separately because I believe the trial court expressed very well-founded concerns that merit further discussion.

Obviously, I do not take any exception to the purposes and legitimacy of SORA's registration requirements. Indeed, I expressly approve of it. See *People v Golba*, 273 Mich App 603, 620; 729 NW2d 916 (2007). My concern is with the public nature of the registration here for a respondent who was charged and "convicted" as a juvenile. Michigan has a public policy, as reflected in our history and our statutes, of protecting juveniles and treating them specially, even when finding them responsible for reprehensible acts. Courts may (and in some cases must) waive jurisdiction and, as a result, minors may be prosecuted as adults. See *People v Conat*, 238 Mich App 134, 139-143; 605 NW2d 49 (1999). However, unless a waiver

occurs, "our justice system [distinguishes] between juvenile delinquency and adult criminal conduct." *In re Wentworth*, 251 Mich App 560, 568; 651 NW2d 773 (2002).

"Evidence regarding the disposition of a juvenile under [chapter XIIA of the Probate Code] and evidence obtained in a dispositional proceeding under [chapter XIIA of the Probate Code] shall not be used against that juvenile for any purpose in any judicial proceeding except in a subsequent case against that juvenile under [chapter XIIA of the Probate Code]." MCL 712A.23.[1] The purpose of this statute is to protect minors from the public being aware of immature mistakes.[2] *People v Smallwood*, 306 Mich 49, 53; 10 NW2d 303 (1943); *Wentworth*, 251 Mich App at 568. The goal of rules sealing or expunging juvenile records "is to prevent a juvenile record from becoming an obstacle to educational, social, or employment oppor-

[1] While TD's "general" records would be "open to the general public," MCR 3.925(D)(1), I disagree with the majority's conclusion that there is no substantive difference between a file available upon request by someone who knows of its existence and takes the trouble to request it and a public database on the Internet available to any idly curious person with no investment of time or energy whatsoever and possibly even by accident. There are degrees of openness, and obscurity is itself a measure of privacy protection, albeit not a complete one.

[2] The trial court found that the assault at issue in this case was more in the nature of juvenile horseplay that got carried away than truly predatory sexual conduct and that it was a fairly low-severity offense. I am unsure that I would be so dismissive of an attack that left the victim so traumatized. But the trial court is in the best position to evaluate the demeanor and credibility of witnesses before it, and it found that TD understood the gravity of his offense, had been impressively courteous and respectful, and presented a very low risk for recidivism. More tellingly, the prosecutor conceded that TD had been offered a plea agreement that would *not* have required him to register as a sex offender, and indeed the prosecutor was of the view that such registration was unnecessary. However, my view in this case is based strictly on TD's status as a juvenile offender. Had TD lacked any mitigating characteristics, the prosecutor could have moved to have him waived to adult court, MCL 712A.4, obviating the instant discussion. The prosecutor did not even attempt to do so here.

tunities." *People v Smith*, 437 Mich 293, 303; 470 NW2d 70 (1991) (opinion by LEVIN, J.). Indeed, "the paramount purpose of the juvenile section of the Probate Code is to provide for the well-being of children." *In re Macomber*, 436 Mich 386, 390; 461 NW2d 671 (1990). In fact, proceedings against juveniles are not even considered criminal proceedings. *Wentworth*, 251 Mich App at 568.

Registration cannot violate the prohibition against cruel or unusual punishment unless it is, in fact, "punishment." *In re Ayres*, 239 Mich App 8, 14; 608 NW2d 132 (1999). While I agree with the majority that *Ayres* remains valid and binding law, I think it is a closer question than does the majority, because at the time of the trial in *Ayres*, the registration database was only available to the public during normal business hours through law enforcement authorities, and information about registrants who had been juvenile offenders was not available to the public at all. See *Ayres*, 239 Mich App at 12, 18-19. Although the *Ayres* Court did adopt the analyses of federal courts holding that sex offender registration and notification was not cruel and unusual punishment, the Court further stated that

> [i]n light of the existence of strict statutory safeguards that protect the confidentiality of registration data concerning juvenile sex offenders, we conclude that the registration requirement imposed by the act, as it pertains to juveniles, neither "punishes" respondent nor offends a basic premise of the juvenile justice system—that a reformed adult should not have to carry the burden of a continuing stigma for youthful offenses. [*Id.* at 21.]

In fact, the *Ayres* Court deemed highly important to its conclusion that registration was not constitutional "punishment" the "fact that public access to registration data regarding juveniles is foreclosed . . . ." *Id.* at 19. But in September 1999, SORA was amended to create a public,

Internet-accessible registry available to anyone, and that registry includes juvenile offenders. *People v Dipiazza*, 286 Mich App 137, 142-143, 146-147; 778 NW2d 264 (2009). I believe that the majority does not give enough weight to the burden that public registration places on registrants. See *id*. at 152-153.[3]

However, the mere fact that a state action is onerous does not, by itself, make that action a "punishment." As I have said, the purpose of SORA is noble and simply cannot be carried out without burdening some individuals. "Unfortunately the scheme has never yet been devised by human invention by which the power to do great good has not been mingled with the power to do some evil." *People v Gallagher*, 4 Mich 244, 255 (1895). The purpose of SORA is to protect the public and help people to protect themselves from predators, thereby reducing recidivism, empowering people, promoting safety in general, and preventing one of the more horrific kinds of crime in particular. It does not purport to have any rehabilitative value for registrants, but at the same time, any harm to registrants is simply incidental. I do not believe we should therefore pretend that no such harm transpires, but the critical problem is simply that registering people who are *demonstrably not dangerous* makes it more difficult conceptually to regard SORA as the nonpunishment tool it should be.

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[3] However, I agree that *Dipiazza* is critically distinguishable because the registrant in *Dipiazza* was technically not convicted of an offense for which registration would have been required, and he factually did not even commit a nonconsensual act. I think it is highly significant that the prosecutor here did not believe TD really needed to be on the registry and that TD was found responsible as a juvenile rather than convicted as an adult. But he has been technically "convicted," MCL 28.722(a)(*iii*), and while this Court should defer to the trial court's factual findings, including that TD engaged in more of a prank than a predation, what he did was not consensual. TD simply has a record that the registrant in *Dipiazza* did not.

This is thrown into sharp relief here, where the burdens of registering run directly contrary to the purposes of our laws regarding juveniles. Even further, when there is good reason to find that the registrant is not a predator and is highly unlikely to be a sexual offender again in the future, requiring his or her registration *actually undermines* the important purpose underlying SORA. It would encourage members of the public to demonize and fear a person who is, it seems, at least no more dangerous than any other member of the public.[4] Simultaneously, it would encourage members of the public to trivialize the predators who really *are* dangerous. Compelling registration of individuals who can with some degree of reliability be determined not to be threats thereby reduces SORA—at least to some extent—from a tool that empowers people and communities to help protect themselves to a pointlessly life-destroying piece of "security theater."[5] Divesting the trial court of the power to relieve persons such as TD from the requirement of registration makes the world *less* safe for all of us.

Nevertheless, this is a policy decision. I believe very strongly that SORA is a vital and powerful tool. I am concerned that its efficacy is drastically impaired by the registration of people known to not be likely predators and of juvenile offenders who were not deemed sufficiently dangerous to warrant even an attempt to have them waived to adult court; the latter undermines the purposes

[4] Again, the prosecutor could have moved to charge TD as an adult because he was at least 14 years old and charged with what would have been a felony for an adult. MCL 712A.4. Had TD been charged with first-degree criminal sexual conduct, the prosecutor could have charged him as an adult without seeking a waiver from the trial court. MCL 764.1f.

[5] "Security theater" refers to undertakings that provide only a feeling of security instead of providing real security. See Schneier, *Beyond Fear: Thinking Sensibly About Security in an Uncertain World* (New York: Copernicus Books, 2003), pp 38-40.

of our juvenile justice system, as well. I strongly urge our Legislature to consider giving our trial courts the means to enhance SORA by exercising discretion to remove from the registry or decline to register people who can be shown to be not dangerous. But I cannot agree with the trial court that TD's registration here constitutes cruel and unusual punishment; it is simply unwise.

SMITH v SMITH

Docket No. 295243. Submitted February 1, 2011, at Grand Rapids. Decided May 26, 2011, at 9:05 a.m. Leave to appeal denied, 490 Mich 1005.

Linda L. Smith (plaintiff) obtained a divorce from Stanley A. Smith (defendant) in the Grand Traverse Circuit Court, Family Division. The parties had entered into a property-settlement agreement that included a division of their retirement accounts. The value of defendant's individual retirement account (IRA) had been calculated using a statement disclosed during discovery, and the value of his IRA had increased substantially by the time the property-settlement agreement was signed. When it entered the divorce judgment, the court, Thomas G. Power, J., concluded that the property-settlement agreement could not be adjusted to take into account the increase in the IRA's value. Plaintiff appealed.

The Court of Appeals *held*:

Property-settlement agreements are generally final and cannot be modified. A court is bound by the terms of the agreement in the absence of fraud, duress, mutual mistake, or severe stress that prevented a party from understanding in a reasonable manner the nature and effect of the act in which he or she was engaged. Parol evidence is generally not admissible to vary or contradict the terms of a clear and unambiguous contract. In this case, the parties used fixed values for all the retirement accounts. Because the terms of the agreement were unambiguous, the trial court was bound by them and the parties were required to live up to their agreement. There was no indication that the parties intended to take into account market fluctuations when dividing the retirement accounts. The increase in the value of defendant's IRA was an extrinsic fact not contained in the property-settlement agreement, and there was no mutual mistake regarding the agreement actually entered into. There was no violation of the full-disclosure provision of the agreement. Stocks fluctuate daily, and the parties could have fixed the values of the accounts at any time or expressly provided that the division of the retirement accounts was subject to modification for market fluctuations.

Affirmed.

DIVORCE — PROPERTY SETTLEMENTS — MODIFICATION — INDIVIDUAL RETIREMENT ACCOUNTS — FLUCTUATION IN VALUE.

Property-settlement agreements are generally final and cannot be modified; a court is bound by the terms of the agreement in the absence of fraud, duress, mutual mistake, or severe stress that prevented a party from understanding in a reasonable manner the nature and effect of the act in which he or she was engaged; parol evidence is generally not admissible to vary or contradict the terms of a clear and unambiguous contract; a change in the value of an individual retirement account following the negotiation of its division in a property-settlement agreement that does not address fluctuations in market value is an extrinsic fact not contained in the agreement and not a mutual mistake permitting modification of the agreement.

Bowerman, Bowden, Ford, Clulo & Luyt, P.C. (by *Kurt M. Bowden*), for plaintiff.

Mallory, Cunningham, Lapka, Scott & Selin, PLLC (by *Keldon K. Scott* and *Carrie E. F. Huff*), for defendant.

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

PER CURIAM. Plaintiff appeals as of right the parties' divorce judgment. We affirm.

Plaintiff and defendant had been married for more than 40 years. During their marriage, they accumulated substantial assets together. Extensive discovery was conducted, and eventually the parties entered into a property-settlement agreement (PSA) on August 25, 2009. The PSA divided all the parties' assets, including all retirement accounts. The value of defendant's individual retirement account (IRA) was calculated using his February 2009 IRA statement, which had been disclosed during discovery. However, by the time the parties negotiated and signed the PSA in August, the value of the IRA had increased by nearly $1.4 million.

Thereafter, plaintiff moved to enter a divorce judgment consistent with the terms of the PSA. In plaintiff's proposed judgment, the following language appeared in the "Retirement Account" section:

> An amount shall be transferred from [defendant's] IRA to [plaintiff's] IRA such that, immediately upon such transfer, the amount remaining in [defendant's] IRA will be equal to the sum of (i) the amount in [plaintiff's] IRA at the time immediately preceding the transfer plus (ii) the amount transferred from [defendant's] IRA to [plaintiff's] IRA plus (iii) $307,955.

The effect of this language would have been that the increase in the value of defendant's IRA was taken into account for the property settlement. Defendant opposed the inclusion of this language and argued that plaintiff was not entitled to share in the increase in his IRA. This provision was not included in the final judgment.

Included in the PSA was a full-disclosure provision. Although the disclosure provision was not spelled out at length in the PSA, it was spelled out in the divorce judgment, which each party signed. Plaintiff argued that the full-disclosure provision required defendant to have informed plaintiff of the increase in value of the IRA.

The trial court concluded that defendant had no duty to disclose the increase in value of the IRA. The court reasoned that defendant had provided plaintiff with a copy of the February 2009 IRA statement and plaintiff could have calculated the present value by applying current market values to the stocks listed in the IRA. The court also found that the PSA could not be adjusted to take into account the increase in the value of the IRA because the parties had used fixed dollar amounts when they negotiated the division of the retirement accounts.

On appeal, plaintiff argues that because each party, under the retirement-accounts section of the PSA, was

awarded half the total value of the retirement accounts and the value of defendant's IRA rose, she is entitled to share in the increase in value.

We review this issue de novo. See *MacInnes v MacInnes*, 260 Mich App 280, 283; 677 NW2d 889 (2004). When a court interprets a contract, the entire contract must be read and construed as a whole. *Duval v Aetna Cas & Surety Co*, 304 Mich 397, 401; 8 NW2d 112 (1943). All the parts must be harmonized as much as possible, and each word of the contract must be given effect, if possible. *Id*. Also, courts may not change or rewrite plain and unambiguous language in a contract under the guise of interpretation because "the parties must live by the words of their agreement." *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 130-131; 743 NW2d 585 (2007).

Property-settlement agreements are, as a general rule, final and cannot be modified. *Zeer v Zeer*, 179 Mich App 622, 624; 446 NW2d 328 (1989). It is well settled that property-settlement agreements are enforceable and that a court is bound by the terms of the agreement in the absence of fraud, duress, mutual mistake, or severe stress that prevented a party from understanding in a reasonable manner the nature and effect of the act in which he or she was engaged. *Keyser v Keyser*, 182 Mich App 268, 269-270; 451 NW2d 587 (1990). Parol evidence is generally not admissible to vary or contradict the terms of a clear and unambiguous contract. *Hamade v Sunoco, Inc (R & M)*, 271 Mich App 145, 166-167; 721 NW2d 233 (2006).

The terms in the retirement-accounts section of the PSA were clear. The parties used fixed values for all the retirement accounts. Defendant was to retain his IRA, and plaintiff was to retain all other retirement accounts. To equalize the value each was receiving, defen-

dant was required to transfer approximately $1.4 million to plaintiff. Because the terms were unambiguous, the trial court was bound by them, *Keyser*, 182 Mich App at 269-270, and the parties were required to live up to the terms of their agreement, *Harbor Park Market*, 277 Mich App at 130-131.

Also, when looking at the PSA as a whole, there is no indication that the parties intended to take into account market fluctuations when dividing the retirement accounts. In the investment-property section, the PSA indicated that the investment accounts would be "divided evenly in kind," which arguably took into account market fluctuations. There was no such language in the retirement-accounts section.

This case bears some similarities to *Marshall v Marshall*, 135 Mich App 702; 355 NW2d 661 (1984). In *Marshall*, the plaintiff owned 28 percent of the stock in a company. *Id*. at 704-705. Before the divorce, another company had entered into a purchase agreement for the stock. *Id*. at 705. The purchase agreement allowed for the stock price to be adjusted for certain factors. *Id*. As part of the property-settlement agreement, the plaintiff was awarded the stock. *Id*. at 704. In exchange, the plaintiff was required to pay the defendant $25,000 within 30 days of the down payment for the stock-purchase agreement and an additional $202,000. *Id*. at 705. The plaintiff's payment obligation was conditioned on the sale of the stock under the stock-purchase agreement. *Id*. at 705-706.

The sale went through; however, the price of the stock decreased. *Id*. at 706. Thus, the plaintiff received less than had originally been contemplated by the parties. *Id*. The plaintiff argued that the $25,000 and $202,000 payments should have been reduced in proportion to the decrease in stock price. *Id*. at 706, 709.

The trial court agreed and modified the payment. *Id*. at 706, 710. The Court of Appeals, however, reversed. *Id*. at 711. The Court stated that the property-settlement agreement only conditioned payment on the sale of the stock, which did in fact occur. *Id*. 709. The Court noted that nothing in the property-settlement agreement addressed what would happen if the price of the stock decreased. *Id*. The Court also stated:

> [T]he burden of presenting evidence to support reformation of the property settlement agreement was on the plaintiff who sought reformation. If the mistake is with respect to an extrinsic fact, reformation is not allowed even though the fact is one which probably would have caused the parties to make a different contract. The reason for this rule is that the court does not make a new contract for the parties.
>
> In the instant case, the only mistake of the parties was with respect to the final purchase price of the stock. Because this information was extrinsic to the property settlement agreement, we do not grant reformation. Stated another way, there was no mistake as to the instrument actually entered into.
>
> It must be assumed that the parties considered the risks of the property settlement agreement that they made, especially in light of testimony that the parties knew the purchase price of the stock could be adjusted. Therefore, we do not believe the trial court had the power to make a new contract for the parties by modifying the property settlement agreement. Hence, we hold the trial court's finding of mutual mistake to be clearly erroneous. [*Id*. at 710-711.]

In the present case, the increase in value of the IRA was an extrinsic fact not contained in the agreement. There was no mistake regarding the agreement actually entered into. Therefore, the parties must be held to their agreement.

Moreover, there was no violation of a duty to disclose. The values of the retirement accounts were stated in

fixed terms. It is well known that stocks fluctuate on a daily basis. The parties were free to fix the values of the accounts at any time. They could have fixed the value at the time the divorce complaint was filed or at the time the divorce judgment was entered. They could have expressly provided that the division of the retirement accounts was subject to modification for market fluctuations. However, they did not do any of this. They negotiated the PSA and established the value of all the accounts, including defendant's IRA. Defendant's IRA was calculated using his February 2009 account statement. Plaintiff had a copy of the statement and was capable of calculating the current market value of the stocks contained in the IRA. By way of her argument today, plaintiff essentially asks us to rewrite the agreement to her advantage, and we cannot do so. *Harbor Park Market*, 277 Mich App at 130-131.

Affirmed.

OWENS, P.J., and MARKEY and METER, JJ., concurred.

EWALD v EWALD

Docket No. 295161. Submitted March 3, 2011, at Detroit. Decided May 26, 2011, at 9:10 a.m.

Plaintiff, Stephen Ewald, and defendant, Kristin Ewald, were granted a divorce in November 2009 in the Tuscola Circuit Court, W. Wallace Kent, Jr., J. The court had issued an initial opinion in July 2009 that divided the marital property and awarded the parties joint legal custody of their two minor children. Their son was to live primarily with plaintiff and their daughter was to live primarily with defendant. Plaintiff was awarded parenting time with his daughter and, because the son had become alienated from defendant during the course of the proceedings, defendant's parenting time with her son was held in abeyance until (1) the parties agreed otherwise, (2) the son's mental health counselor recommended parenting time, or (3) further order of the court. The opinion required plaintiff to pay child support and some of defendant's attorney fees and included a provision giving plaintiff the right to purchase from defendant the marital farmland that she was awarded for its net value within three months of the entry of the judgment. Plaintiff moved for clarification and reconsideration of certain provisions, and the court issued a supplemental decision in September 2009. The court recalculated the child support as if the son was spending significant overnight time with defendant. The court's deviation from the amount determined by application of the Michigan Child Support Formula (MCSF), MCL 552.605(2), had the net effect of reducing defendant's obligation and increasing plaintiff's obligation. The court entered the divorce judgment in November 2009 that reiterated its rulings from the July 2009 opinion regarding the division of marital property. It included temporary spousal support for defendant through the date of the transfer of the farmland to her and stated that defendant was responsible for the medical expenses she incurred during the pendency of the action for elective, uninsured surgery. Plaintiff was also ordered to pay an additional $2,500 of defendant's attorney fees. The parenting-time order was the same as in the July 2009 opinion. The child support ordered was the same amount as provided in the September 2009 supplemental decision when two children are covered by the order but was

increased from the amount provided in the supplemental decision when only one child is covered by the order. Plaintiff appealed with regard to the child support order. Defendant cross-appealed, contending that the award of temporary spousal support was inequitable, the award of attorney fees was inadequate, and the court erred by not ordering plaintiff to pay for her medical expenses incurred for her elective, uninsured surgery.

The Court of Appeals *held*:

1. Trial courts must presumptively follow the MCSF when determining parents' child support obligations. The criteria for deviating from the MCSF, MCL 552.605(2), are mandatory. The Legislature has required trial courts to meticulously set forth the statutory factors when deviating. Anything less fails to fulfill the statutory procedure. The trial court's compliance was not meticulous in this case.

2. The trial court erred as a matter of law by deviating from the MCSF in order to punish plaintiff rather than determining each parent's fair share of child support in light of their combined net income available for child support. The MCSF provides that, except as otherwise permitted by MCL 552.605, courts must order child support in the amount determined by applying the MCSF. Unless rebutted by facts in a specific case, the law presumes that the MCSF sets appropriate levels of support. The factors listed in the MCSF that may justify a deviation do not include the violating or obstructing of a parenting-time order. There is no indication in the Support and Parenting Time Enforcement Act, MCL 552.601 *et seq.*, that abatement of child support is an appropriate or available method of enforcing court-ordered parenting time. The act does not contemplate the suspension of child support as a remedy when the custodial parent has frustrated visitation.

3. The parenting-time offset at issue in this case was required by the MCSF to be calculated on the basis of the actual overnights the son will likely spend with his mother. The record shows that the parties acceded to their son's desire not to visit his mother and the trial court adopted that agreement. There is no evidence to support the trial court's determination that the son's estrangement from his mother was plaintiff's fault. The trial court erred by deviating from the MCSF on the basis of the clearly erroneous finding of fact that plaintiff was at fault for the son's estrangement from defendant. Plaintiff's alleged complicity in alienating the parties' son from his mother is not a circumstance that renders the MCSF unjust or inappropriate so as to allow deviation from the MCSF under MCL 552.605(2). The child support provisions of the judgment of divorce are vacated and the case is remanded for

reconsideration without deviation from the MCSF in light of the parties' income and potential income as affected by the marital-property division.

4. The award of temporary spousal support pending the distribution of the marital property was not inequitable. The trial court did not abuse its discretion by awarding only temporary spousal support.

5. Defendant failed to present evidence in the trial court to establish the amount and reasonableness of the attorney fees she claimed. The matter is remanded for defendant to provide evidence necessary to meet her burden of proof with respect to her financial need and plaintiff's ability to pay attorney fees as well as the amount of fees claimed and their reasonableness.

6. The trial court did not abuse its discretion by ruling that defendant's uninsured, voluntary medical expenses were her own responsibility.

Affirmed in part, vacated in part, and remanded.

1. CHILD SUPPORT — MICHIGAN CHILD SUPPORT FORMULA — DEVIATIONS.

Trial courts must presumptively follow the Michigan Child Support Formula when determining the child support obligations of parents; a court may deviate from the formula only if it determines from the facts of the case that application of the formula would be unjust or inappropriate and sets forth in writing or on the record: (1) the child support amount determined by application of the formula, (2) how the child support order deviates from the formula, (3) the value of property or other support awarded instead of the payment of child support, if applicable, and (4) the reasons why application of the formula would be unjust or inappropriate in the case; the trial court must meticulously set forth the four factors, anything less fails to fulfill the statutory procedures (MCL 552.605[2]).

2. CHILD SUPPORT — MICHIGAN CHILD SUPPORT FORMULA — SUPPORT AND PARENTING TIME ENFORCEMENT ACT — INTERFERENCE WITH PARENTING TIME.

The Support and Parenting Time Enforcement Act does not provide for the enforcement of parenting-time rights by adjusting child support obligations; a parent's alleged interference with the parenting-time rights of the other parent is not a circumstance that would render it unjust or inappropriate under MCL 552.605(2) to apply the parental-time offset contained in the Michigan Child Support Formula so as to permit deviation from the formula (MCL 552.601 *et seq*.; 2008 MCSF 3.03).

3. CHILD SUPPORT — MICHIGAN CHILD SUPPORT FORMULA — PARENTS' INCOME — IMPUTED INCOME.

The Michigan Child Support Formula provides that to the extent that a parent's assets could be, but are not, used to generate regular income, the parent's income includes an imputed reasonable and regular investment return on the assets (2008 MCSF 2.06[A]).

Skinner Professional Law Corporation (by *David R. Skinner* and *Staci M. Richards*) for plaintiff.

Stephens & Moore (by *Phoebe J. Moore*) for defendant.

Before: SAWYER, P.J., and MARKEY and FORT HOOD, JJ.

MARKEY, J. In this divorce action, plaintiff appeals by right the trial court's child support order. We conclude that the trial court erred as a matter of law by deviating from the Michigan Child Support Formula (MCSF), MCL 552.605(2). For the reasons stated in this opinion, we vacate the order for child support in the judgment of divorce and remand for reconsideration without deviation from the MCSF in light of the parties' income as affected by the marital-property division. Defendant cross-appeals, contending that the trial court's award of temporary spousal support was inequitable, that the trial court's award of attorney fees was inadequate, and that the trial court erred by not ordering plaintiff to pay for uninsured medical expenses defendant incurred during the pendency of this action. We affirm these dispositional rulings by the trial court.

I. FACTS AND PROCEEDINGS

The parties were married in December 1993 when they were both in their twenties. The marriage produced two children: a son was born in July 1995, and a

daughter was born in April 1997. Plaintiff filed for divorce on February 14, 2008, and the judgment of divorce was not entered until November 4, 2009. The parties separated before the complaint for divorce was filed when they purchased a separate residence for defendant a short distance from the marital home. The parties' son resided with his father and the daughter lived with her mother. Although initially each child visited regularly with the other parent, the son soon had a falling-out with his mother and no longer visited. Defendant never sought a court order to enforce parenting-time rights, but she sought counseling to resolve relationship issues between them.

Both parties' formal education ended with their graduation from high school. After they were married, plaintiff formed a farm corporation with his parents (Ewald Farms). Plaintiff held a 14 percent interest in the farm corporation and served as its president. Although defendant was a stay-at-home mother, she also worked on the family farming business in the fields and doing bookkeeping and other paperwork. Throughout the marriage, plaintiff farmed and managed the farm corporation. After the parties separated, plaintiff continued farming, and defendant was able to find short-term employment through an employment agency.

During the marriage, the parties' received rental income from Ewald Farms on 365 acres of farmland the parties were able to acquire. Plaintiff also received a small salary from the family farming operation, and many of the family's living expenses were paid by the farm corporation. After trial, the court issued a written opinion on July 23, 2009, addressing disputed issues. The trial court determined that the net value of the marital farmland was $808,106, and that plaintiff's 14 percent interest in Ewald Farms was worth $181,185.

The parties' other assets included the two residences and assorted personal property. The parties do not dispute the valuation of the marital property or its division.

In its July 2009 opinion, the trial court noted that to the extent that its rulings favored defendant, it did so because it found that plaintiff was more at fault than defendant for the breakdown of the marriage relationship. The trial court divided the marital property by awarding plaintiff his interest in Ewald farms and awarding defendant 259 of the parties' 365 acres or 64 percent of the marital farmland. The court gave plaintiff the right to purchase defendant's land from her by paying defendant its net worth of $518,000 within three months of the entry of the judgment.[1]

The court also ruled that the established custodial environment would continue and awarded the parties joint legal custody of the two children: The son would live primarily with his father, and the daughter would live primarily with her mother. Addressing parenting time, the court observed that the parties' son "has been alienated from his mother in the course of these proceedings and has been very defiant about visiting with her." Consequently, the trial court continued the terms of a stipulated order regarding custody and parenting time entered April 3, 2009. That order provided plaintiff parenting time with his daughter, but defendant's parenting time with her son was "held in abeyance until the [son's] counselor recommends parenting time, or until the parties agree otherwise, or until further order of the Court."

Regarding child support, in its July 2009 opinion the court imputed a minimum-wage, annual gross income

[1] Plaintiff was awarded a five-year right of first refusal if he did not meet the purchase deadline and defendant sought to sell the property.

of $15,600 to defendant. The court determined that plaintiff had an annual gross income of $73,970, consisting of a $24,700 farming salary, $36,202 land rentals, and approximately $13,000 in personal expenses paid by the farm corporation. The trial court opined that using this income data the MCSF would require plaintiff to pay defendant, including ordinary medical expenses, $618 a month when two children are being supported and $383 a month for one child. The court recognized that its martial-property division "deprives [plaintiff] of much of the property that he had been farming" and that the income of each of the parties would change significantly. Therefore, the court stated "either party may petition for a support review at that time."

Plaintiff moved for clarification and reconsideration regarding the farmland buyback. Plaintiff further sought reconsideration of child support on the basis that he would incur debt to exercise the farmland buyback while defendant would receive $518,000 capable of being invested to produce income. Plaintiff also requested recalculation of child support because defendant did not exercise parenting time with the parties' son. In response, the trial court issued a supplemental decision on September 24, 2009, in which it ruled that child support would be calculated as if the parities' son spent significant overnight time with defendant. The trial court's deviation from the MCSF had the net effect of reducing defendant's obligation and increasing plaintiff's child support obligation. The court ruled that plaintiff was at fault for the estrangement between the mother and son and that plaintiff "should not be permitted to profit from the acts and behavior in which he engaged which alienated [the son] from his mother." The court also observed that, in light of its other rulings, plaintiff was financially able to pay the amount

of support ordered and that defendant needed that support. The trial court concluded, "[a]s a matter of equity, taking all matters into consideration, and considering the record as a whole, which record supports the finding that [plaintiff] acted wrongfully in alienating [the son] from his mother, the Court deviates from the formula guidelines . . . ." The court then stated:

> While there are two minor children, support shall be paid as if each parent had 103 days parenting time with the child in the custody of the other parent, even recognizing that such is not in [fact] the [case]. Therefore, the support while there are two children shall be in the amount of $571.00 per month child support and ordinary medical in the amount of $47.00 per month payable by Mr. Ewald to Mrs. Ewald. When there is one child remaining, Mr. Ewald shall pay child support in the amount of $618.00 per month child support and ordinary medical in the amount of $23.00 per month. . . . Thus, until [the son] emancipates, the Court orders an amount equal to that which Mr. Ewald would be required to pay if [the son] visited his mother regularly. When [the son] emancipates, Mr. Ewald will no longer be legally obligated for [the son's] child support, and thereafter the ordinary guidelines will be followed.

The trial court's supplemental decision referred to an attached "guideline calculations" that provided that the child support amounts were calculated on the premise that each parent had on average 182.5 overnights. The "guideline calculations" provide that plaintiff pay the same amount of support for two minor children as the court ordered in its supplemental decision, but for only one child, they require plaintiff to pay $867 each month, plus $23 for ordinary medical expenses.

The judgment of divorce was entered November 4, 2009. It reiterated the trial court's rulings from its July 2009 opinion regarding the division of marital property, the terms on which plaintiff could purchase defendant's

share of the farmland, and temporary spousal support through the date of the transfer of the farmland to defendant. The judgment also included the court's ruling that defendant was responsible for medical expenses she incurred for elective, uninsured surgery but awarded her an additional $2,500 in attorney fees over what plaintiff had already paid. The judgment provided that defendant's parenting time with the parties' son be "held in abeyance until such time as (1) the parties agree otherwise, (2) [the son's] mental health counselor/therapist recommends parenting time, or (3) further Order of this Court."

A uniform child support order attached to the judgment provides that plaintiff pay defendant when two children are covered by the order, $571 plus $47 ordinary medical ($618/month), and when only one child is covered by the order, $867 plus $23 ordinary medical ($890/month). The support effective date was July 23, 2009.

II. CHILD SUPPORT

A. STANDARD OF REVIEW

A trial court must presumptively follow the MCSF when determining the child support obligation of parents. MCL 552.605; *Burba v Burba (After Remand)*, 461 Mich 637, 645; 610 NW2d 873 (2000); *Stallworth v Stallworth*, 275 Mich App 282, 284; 738 NW2d 264 (2007). This Court reviews de novo as a question of law whether the trial court has properly applied the MCSF. *Burba*, 461 Mich at 647; *Peterson v Peterson*, 272 Mich App 511, 516; 727 NW2d 393 (2006). The trial court's factual findings underlying its determination regarding child support are reviewed for clear error. MCR 2.613(C); *Stallworth*, 275 Mich App at 284. The trial

court's discretionary rulings permitted by statute and the MCSF are reviewed for an abuse of that discretion. *Borowsky v Borowsky*, 273 Mich App 666, 672; 733 NW2d 71 (2007). An abuse of discretion occurs when a court selects an outcome that is outside the range of reasonable and principled outcomes. *Stallworth*, 275 Mich App at 284. A trial court abuses its discretion when it relies on a legally improper reason for departing from the MCSF in establishing a parent's child support obligation. *Burba*, 461 Mich at 649.

B. ANALYSIS

This case presents an issue of first impression: whether a parent's actions that cause a child to refuse to visit the other parent would render it "unjust or inappropriate" under MCL 552.605(2) to apply the "parental time offset" of 2008 MCSF 3.03, so as to permit deviation from the MCSF. We conclude that the answer is no because the Support and Parenting Time Enforcement Act (the act), MCL 552.601 *et seq*., read as a whole, does not provide for enforcement of parenting-time rights by adjusting child support obligations. Consequently, a parent's alleged interference with the parenting-time rights of the other parent is not a circumstance that would permit deviation from the MCSF under MCL 552.605(2).

Trial courts must presumptively follow the MCSF when determining parents' child support obligations. *Burba*, 461 Mich at 645; *Stallworth*, 275 Mich App at 284. The Legislature provides criteria for deviation in § 5 of the act, MCL 552.605(2):

> Except as otherwise provided in this section, the court shall order child support in an amount determined by application of the child support formula developed by the state friend of the court bureau as required in section 19 of the friend of the court act, MCL 552.519. The court may enter an

> order that deviates from the formula if the court determines from the facts of the case that application of the child support formula would be unjust or inappropriate and sets forth in writing or on the record all of the following:
>
> (a) The child support amount determined by application of the child support formula.
>
> (b) How the child support order deviates from the child support formula.
>
> (c) The value of property or other support awarded instead of the payment of child support, if applicable.
>
> (d) The reasons why application of the child support formula would be unjust or inappropriate in the case.

The criteria for deviating from the MCSF are mandatory. *Burba*, 461 Mich at 644. "The trial court, when it deviates from the formula, must first state the level of child support it would have ordered had it followed the formula . . . ." *Id*. at 645; MCL 552.605(2)(a). Defendant contends that the trial court complied with this criterion by its statement regarding child support in its July 2009 opinion. If true, the trial court's compliance was not meticulous. The Legislature has required trial courts "to meticulously set forth [the statutory] factors when deviating. Anything less fails to fulfill the statutory procedure." *Burba*, 461 Mich at 646.

The trial court also erred as a matter of law by deviating from the MCSF in order to punish plaintiff rather than determining each parent's fair share of child support in light of their combined net income available for child support. 2008 MCSF 3.01(B). "Except as otherwise permitted by MCL 552.605, courts must order child support in the amount determined by applying this formula. Unless rebutted by facts in a specific case, the law presumes that this formula (or 'guideline') sets appropriate levels of support." 2008 MCSF 1.01(B).

Guidance for deviations is found in 2008 MCSF 1.04(D) and 1.04(E):

> 1.04(D) In exercising its discretion to deviate, the court may consider any factor that it determines is relevant.
>
> 1.04(E) Deviation Factors
>
> Strict application of the formula may produce an unjust or inappropriate result in a case when any of the following situations occur:
>
> (1) The child has special needs.
>
> (2) The child has extraordinary educational expenses.
>
> (3) A parent is a minor.
>
> (4) The child's residence income is below the threshold to qualify for public assistance, and at least one parent has sufficient income to pay additional support that will raise the child's standard of living above the public assistance threshold.
>
> (5) A parent has a reduction in the income available to support a child due to extraordinary levels of jointly accumulated debt.
>
> (6) The court awards property in lieu of support for the benefit of the child (§4.03).
>
> (7) A parent is incarcerated with minimal or no income or assets.
>
> (8) A parent has incurred, or is likely to incur, extraordinary medical expenses for either that parent or a dependent.
>
> (9) A parent earns an income of a magnitude not fully taken into consideration by the formula.
>
> (10) A parent receives bonus income in varying amounts or at irregular intervals.
>
> (11) Someone other than the parent can supply reasonable and appropriate health care coverage.
>
> (12) A parent provides substantially all the support for a stepchild, and the stepchild's parents earn no income and are unable to earn income.

(13) A child earns an extraordinary income.

(14) The court orders a parent to pay taxes, mortgage installments, home insurance premiums, telephone or utility bills, etc. before entry of a final judgment or order.

(15) A parent must pay significant amounts of restitution, fines, fees, or costs associated with that parent's conviction or incarceration for a crime other than those related to failing to support children, or a crime against a child in the current case or that child's sibling, other parent, or custodian.

(16) A parent makes payments to a bankruptcy plan or has debt discharged, when either significantly impacts the monies that parent has available to pay support.

(17) A parent provides a substantial amount of a child's day-time care and directly contributes toward a significantly greater share of the child's costs than those reflected by the overnights used to calculate the offset for parental time.

(18) Any other factor the court deems relevant to the best interests of a child.

Although 2008 MCSF 1.04(D) provides that "the court may consider any factor that it determines is relevant" when exercising its discretion to deviate, and 2008 MCSF 1.04(E)(18) provides for a catch-all "best interests" of the child factor, notably absent from the list of possible factors justifying deviation is any mention of the violating or obstructing of a parenting-time order. Likewise, there is no mention in the act that abatement of child support is an appropriate or available method of enforcing court-ordered parenting time. Rather, a parent who has been denied parenting time may obtain "makeup parenting time," MCL 552.642, or a parent violating a parenting-time order may be found in contempt of court. A court may then impose various sanctions, including fines, jail, or probationary terms and conditions. MCL 552.644(2). As this Court observed

in *Rzadkowolski v Pefley*, 237 Mich App 405, 409; 603 NW2d 646 (1999), the act[2] "does not contemplate the suspension of child support as a remedy when the custodial parent has frustrated visitation." The *Rzadkowolski* Court applied a strict separation between parenting-time rights (visitation) and the parent's obligation of support. The Court held:

> Defendant had a duty to support his child. MCL 722.3; MSA 25.244(3). That duty was not abrogated by the fact that [the] plaintiff left the state without permission of the court. To the contrary, [the] defendant's remedy was to seek enforcement of his visitation rights, not to withhold his child support payments. [*Rzadkowolski*, 237 Mich App at 409.]

The parenting-time offset at issue in this case is based on the premise that as "a parent cares for a child overnight, that parent should cover many of the child's unduplicated costs, while the other parent will not have to spend as much money for food, utility, and other costs for the child." 2008 MCSF 3.03(A)(1). The MCSF manual sets forth a mathematical formula for determining the offset utilizing each parent's base child support obligation and average number of overnights. 2008 MCSF 3.03(A)(2).[3] "An offset for parental time generally applies to every

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[2] The act was formerly known as the Support and Visitation Enforcement Act, but was renamed the Support and Parenting Time Enforcement Act. See MCL 552.601, as amended by 1996 PA 25, effective June 1, 1996.

[3] $$\frac{(A_o)^3 (B_s) - (B_o)^3 (A_s)}{(A_o)^3 + (B_o)^3}$$

A_o = Approximate annual number of overnights the children will likely spend with parent A

B_o = Approximate annual number of overnights the children will likely spend with parent B

A_s = Parent A's base support obligation

B_s = Parent B's base support obligation

support determination whether in an initial determination or subsequent modification, whether or not previously given." 2008 MCSF 3.03(B). Moreover, the MCSF requires that the offset be calculated on the basis of *actual* overnights even if that is contrary to an existing order regarding parenting time. 2008 MCSF 3.03(C)(4) provides:

> Credit a parent for overnights a child lawfully and actually spends with that parent including those exercised outside the terms of the currently effective order. This may happen by agreement, or when one parent voluntarily foregoes time granted in the order. Do not consider overnights exercised in violation of an order.
>
> (a) If a parent produces credible evidence that the approximate number exercised differs from the number granted by the custody or parenting time order, credit the number according to the evidence without requiring someone to formally petition to modify the custody or parenting time order.
>
> (b) When the most recent support order deviated based on an agreement to use a number of overnights that differed from actual practice, absent some other change warranting modification, credible evidence of changed practices only includes an order changing the custody or parenting time schedule.

The record in this case shows that the parties acceded to their son's desire to not visit his mother. The trial court adopted the parties' agreement as its order regarding defendant's parenting time, providing that it be held "in abeyance until such time as (1) the parties agree otherwise, (2) [the son's] mental health counselor/therapist recommends parenting time, or (3) further Order of this Court." Consequently, plaintiff could not have violated the court's parenting-time order. Further, the evidence in the

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Note: A negative result means that parent A pays and a positive result means parent B pays.

record is insufficient to support the trial court's determination that the son's "estrangement" from his mother was plaintiff's fault and that plaintiff engaged in "acts and behavior . . . which alienated [the son] from his mother." While the divorce proceeding damaged the relationship between mother and son, there is no evidence that plaintiff acted intentionally to encourage the son's attitude toward defendant. We therefore conclude that the trial court also erred by deviating from the MCSF on the basis of a clearly erroneous finding of fact.

In sum, we conclude the trial court erred because the Support and Parenting Time Enforcement Act does not provide for the enforcement of parenting-time rights by adjusting child support obligations. Other means exist to protect and enforce parenting time. See MCL 552.642 (makeup parenting time); MCL 552.644(2) (contempt sanctions). Michigan cases hold that parental rights (parenting time) are separate from parental obligations (child support). See *Rzadkowolski*, 237 Mich App at 409; see also *In re Beck*, 488 Mich 6, 8, 16; 793 NW2d 562 (2010), holding that a parent's obligation of support continued after parental rights were terminated because "parental rights are distinct from parental obligations," and the parent's duty of support had not been "modified or terminated by a court of competent jurisdiction." In addition, the MCSF specifically directs that the parenting-time offset be based on the *actual* overnights a child spends with a parent. 2008 MCSF 3.03(C)(4). This subsection of the MCSF recognizes that a parent may voluntarily not exercise rights to parenting time, as happened here. In reviewing the list of possible reasons for deviating from the formula that are set forth in 2008 MCSF 1.04(E), all relate to the economic support of the child, either the child's needs or a parent's ability to provide support. None of the listed factors suggests that purported interference with parenting-time rights may serve as a circumstance justi-

fying deviation. In fact, the effect of the trial court's deviation here is to increase the support available for one child at the expense of the support available to the other. So, for all the foregoing reasons, we hold that plaintiff's alleged complicity in alienating the parties' son from his mother is not a circumstance that renders the MCSF "unjust or inappropriate" within the meaning of MCL 552.605(2).

Because we vacate the child support provisions in the judgment of divorce and remand for reconsideration without deviation from the MCSF, we briefly note that the trial court recognized that its division of the martial property would have a significant effect on each party's income so that reconsideration of the amount of child support would be appropriate. The MCSF requires that defendant's income include what is or could be earned from her assets if they were invested. See 2008 MCSF 2.01(C)(5)(income includes interest and dividends); 2008 MCSF 2.06(A)("To the extent a parent's assets could be (but are not) used to generate regular income, a parent's income includes an imputed reasonable and regular investment return on those assets . . . ."). Plaintiff's debt expense to continue his farming operation must be deducted from his gross income to determine his "net income" from his farming operation. 2008 MCSF 2.01(C)(2); 2008 MCSF 2.01(E); see also *Borowsky*, 273 Mich App at 675-677 (applying the 2004 MCSF). Consequently, on remand, the trial court shall reconsider child support in light of the effect of the marital-property division on the parties' income and potential income.

III. SPOUSAL SUPPORT

A. STANDARD OF REVIEW

The award of spousal support is within the discretion of the trial court. MCL 552.23(1); *Berger v Berger*, 277

Mich App 700, 726; 747 NW2d 336 (2008). The trial court's underlying factual findings are reviewed for clear error. MCR 2.613(C). A reviewing court may determine a finding is clearly erroneous only when, on the basis of all the evidence, it is left with a definite and firm conviction that a mistake has been made. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). The appellant has the burden to persuade the reviewing court that a mistake has been committed, failing which the trial court's findings may not be overturned. *Id*. at 804. If the trial court's findings are not clearly erroneous, the reviewing court must then decide whether the dispositional ruling was fair and equitable in light of the facts. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992). The trial court's dispositional ruling must be affirmed unless the reviewing court is firmly convinced that it was inequitable. *Id*.

B. ANALYSIS

Defendant has not shown that any of the trial court's findings were clearly erroneous or that the trial court's dispositional ruling was unfair or inequitable in light of the facts. *Id*. So, the trial court's dispositional ruling must be affirmed. *Berger*, 277 Mich App at 727.

We conclude that most of the spousal-support factors indicate that spousal support is not necessary. Although the marriage lasted a number of years, the parties are still both relatively young, with identical educational levels; each worked at farming all his and her adult life, and each enjoys good health and the ability to work. Although defendant was a stay-at-home mother, she also worked for the farm. The trial court found that the fault of the marital breakdown lay with plaintiff, but this is but one of many factors for the court to consider. *Sparks*, 440 Mich at 158; *Berger*, 277 Mich App at

726-727. In light of the significant award of property to defendant and the other factors noted above, defendant has not established that the award of temporary spousal support pending the distribution of martial property was inequitable. Defendant may invest the $518,000 cash award from the marital-property division to earn income, reduce her living expenses by paying off her mortgage, or fund education or training to pursue higher-paying employment opportunities. Defendant has not presented a persuasive argument that the trial court's dispositional ruling on spousal support was inequitable.

In light of the award of substantial income-producing property to defendant and the fact that both parties are able to support themselves, the trial court did not abuse its discretion by ordering only temporary spousal support through the date that the marital-property division was implemented. Defendant has not established clearly erroneous factual findings or presented a convincing argument that the trial court's dispositional ruling was inequitable.

IV. ATTORNEY FEES

A. STANDARD OF REVIEW

Attorney fees are not recoverable as of right in a divorce action but may be awarded to enable a party to carry on or defend the action. MCL 552.13; MCR 3.206(C)(1). A party seeking attorney fees must establish both financial need and the ability of the other party to pay. MCR 3.206(C)(2)(a); *Woodington v Shokoohi*, 288 Mich App 352, 370; 792 NW2d 63 (2010). This Court reviews a trial court's decision to grant or deny attorney fees for an abuse of discretion; the court's findings of fact on which it bases its decision are

reviewed for clear error. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). The trial court abuses its discretion when its decision results in an outcome that falls outside the range of reasonable and principled outcomes. *Smith v Smith*, 278 Mich App 198, 207; 748 NW2d 258 (2008). "The party requesting the attorney fees has the burden of showing facts sufficient to justify the award." *Woodington*, 288 Mich App at 370. This would include proving both financial need and the ability of the other party to pay, *Smith*, 278 Mich App at 207, as well as the amount of the claimed fees and their reasonableness, *Reed*, 265 Mich App at 165-166.

B. ANALYSIS

Defendant argues that the trial court erred by awarding her only part of the attorney fees she incurred during the divorce proceeding. The record is not clear, but it appears that plaintiff paid for about half of the attorney fees defendant incurred through entry of the judgment of divorce. Defendant asserts that plaintiff should pay all her attorney fees. This is a close question. The record establishes defendant's financial need, at least through the implementation of the marital-property division, and that plaintiff had the ability to pay. The trial court denied defendant's request for the full payment of attorney fees because of the property division and its effect on the parties' income. Considering that we have already determined that the trial court did not clearly err by denying spousal support, we could find in favor of defendant on the basis that a party should not be required to invade assets to satisfy attorney fees when the party is relying on those same assets for support. *Woodington*, 288 Mich App at 370, citing *Gates v Gates*, 256 Mich App 420, 438-439; 664 NW2d 231 (2003).

On the other hand, defendant failed to present evidence in the trial court to establish the amount and reasonableness of the attorney fees claimed. *Reed*, 265 Mich App at 165-166. Consequently, we remand this issue to the trial court for defendant to provide the evidence necessary to meet her burden of proof with respect to her need and plaintiff's ability to pay, *Smith*, 278 Mich App 207, and the amount of the fees claimed and their reasonableness, *Reed*, 265 Mich App at 165-166.

V. MEDICAL EXPENSES

Defendant last asserts error regarding certain medical expenses. We conclude that this claim fails because defendant presents it as a mere conclusory statement without citation to the record, legal authority, or any meaningful argument. See MCR 7.212(C)(7); *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Even if we were to reach the merits of defendant's claim, we would affirm. The expenses that defendant asks plaintiff to pay resulted from a purely elective medical procedure for which there was no health insurance coverage. The trial court did not abuse its discretion by ruling that defendant's uninsured, voluntary medical expenses were her own responsibility. Defendant has not shown any clear error in the trial court's findings of fact, and the court's dispositional ruling is fair and equitable. *Sparks*, 440 Mich at 151-152.

VI. CONCLUSION

We affirm the trial court's dispositional rulings regarding spousal support and medical expenses. For the reasons stated in this opinion, we vacate the order for child support in the judgment of divorce and remand for

reconsideration without deviation from the MCSF in light of the parties' income as affected by the marital-property division, and for determination of the attorney fee issue. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

SAWYER, P.J., and FORT HOOD, J., concurred with MARKEY, J.

PRESTON v DEPARTMENT OF TREASURY

Docket No. 295055. Submitted April 13, 2011, at Lansing. Decided May 26, 2011, at 9:15 a.m. Leave to appeal denied, 490 Mich 893.

Forrest L. Preston brought an action in the Court of Claims, seeking a refund of payments made to the Department of Treasury for income tax deficiencies assessed for the years 2000 and 2001. Preston was a resident of Tennessee and owned 99 percent of Life Care Affiliates II (LCA II), a Tennessee limited partnership. LCA II was a general partner in 22 lower-level partnerships, which owned 27 nursing homes operating in 11 different states. The 22 partnerships were all structured identically, with LCA II owning a 99 percent interest as a general partner and Preston owning a 1 percent interest as a limited partner. One of the lower-level partnerships owned by LCA II was Riverview Medical Investors Limited Partnership (RMI), which, in turn, owned two nursing homes that operated solely in Michigan. The remaining partnerships operated outside of Michigan. During the tax years at issue, RMI reported gains to LCA II, but some of the other lower-level partnerships reported losses. Preston treated the income and losses distributed from LCA II as business income and apportioned it among the states in which LCA II had partnerships. Thus, the income from RMI was offset by the losses from the other partnerships. The Department of Treasury contended that an apportionment including the losses from other states was improper. Preston paid the tax deficiency under protest and then filed a complaint in the Court of Claims, seeking a refund of the monies paid. The court, Rosemarie E. Aquilina, J., granted Preston's motion for summary disposition and ordered defendant to refund Preston's payments, concluding that the businesses were related and intended to operate as a unit. The Department of Treasury appealed.

The Court of Appeals *held*:

If a taxpayer's income-producing activities are confined solely to Michigan, then the taxpayer's entire income must be allocated to Michigan. If a taxpayer has income from business activities that are taxable both in and outside of Michigan, that income is allocated or apportioned according to Michigan's apportionment formula. In order to apply Michigan's apportionment formula,

there must be some sharing or exchange of value not capable of precise identification or measurement. In the absence of an underlying unitary business, multistate apportionment is precluded. Mich Admin Code, R 206.12(16)(a) provides that ordinary income received by a partner is apportioned by the partnership apportionment factors provided in MCL 206.115 to MCL 206.195. In this case, Preston was the partner, not LCA II, and his distributed share of income received from LCA II had to be apportioned by the partnership apportionment factors. Preston cannot be considered an "indirect partner" in the lower-level partnerships, i.e., one who holds an interest in the partnerships through a "pass-thru partner" as those terms are defined by the Internal Revenue Code thereby permitting the Court to ignore LCA II for tax purposes, because those terms are not used in the Income Tax Act, MCL 206.1 *et seq*. In light of the record produced in the Court of Claims, it is clear that there was some sharing or exchange of value not capable of precise identification or measurement in the management of the nursing homes and that there was no genuine issue of material fact regarding whether LCA II was a unitary business. Apportionment was proper.

Affirmed.

1. TAXATION — INCOME TAX — MULTISTATE BUSINESSES — UNITARY BUSINESSES — APPORTIONMENT.

If a taxpayer's income-producing activities are confined solely to Michigan, then the taxpayer's entire income must be allocated to Michigan under the Income Tax Act; if a taxpayer has income from business activities that are taxable both in and outside of Michigan, that income is allocated or apportioned according to Michigan's apportionment formula; in order to apply Michigan's apportionment formula, there must be some sharing or exchange of value not capable of precise identification or measurement; in the absence of an underlying unitary business, multistate apportionment is precluded (MCL 206.102; MCL 206.103).

2. TAXATION — INCOME TAX — WORDS AND PHRASES — FEDERAL TERMINOLOGY — PASS-THRU PARTNERS — INDIRECT PARTNERS.

Any terms used in the Income Tax Act have the same meaning as when used in comparable context in federal law, but incorporation of federal terminology only applies when a term used in the Income Tax Act has been used in a similar context under federal law; the terms "pass-thru partner" and "indirect partner" are not used in the Income Tax Act and, thus, the federal definitions

of those terms are irrelevant to the interpretation of the Michigan act (MCL 206.2[2]; 26 USC 6231[a][9], [10]).

Honigman Miller Schwartz & Cohn LLP (by *June Summers Haas* and *Daniel L. Stanley*) for Forrest L. Preston.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Bradley K. Morton*, Assistant Attorney General, for the Department of Treasury.

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

WILDER, J. Defendant appeals as of right a judgment of the Court of Claims granting plaintiff's motion for summary disposition. Plaintiff filed a complaint in the Court of Claims seeking a refund of payments made to defendant for tax deficiencies assessed for the years 2000 and 2001. The Court of Claims granted plaintiff's motion for summary disposition and ordered defendant to refund the payments. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff is a resident of Tennessee and owns Life Care Affiliates II (LCA II), a Tennessee limited partnership. Plaintiff owns 99 percent of LCA II, 98 percent as a general partner and 1 percent as a limited partner.

LCA II is a general partner in 22 lower-level partnerships that own a total of 27 nursing homes operating in 11 different states. Each of these 22 partnerships is structured in the same fashion, with LCA II owning a 99 percent interest as general partner, and plaintiff owning a 1 percent interest as a limited partner. Ninety-nine percent of the profits and losses from each of the nursing homes are distributed to LCA II as the general

partner of the lower-level partnerships. LCA II then combines the profits and losses distributed from the lower-level partnerships and distributes them to plaintiff based on his 99 percent interest in LCA II. LCA II has no business activity of its own and LCA II's income and other contributions to its tax base are pass-through items from these 22 lower-level partnerships. One of the lower-level partnerships that LCA II and plaintiff own is Riverview Medical Investors Limited Partnership (RMI). RMI, in turn, owns two nursing homes that operate solely in Michigan. The remaining partnerships operate outside of Michigan. LCA II hired another company, Life Care Centers of America, Inc. (LCA),[1] to manage and operate all of the nursing homes.

In 2007, defendant audited plaintiff's individual income tax returns for the years 1998-2001. Following the audit, defendant assessed income tax deficiencies for the years 2000 and 2001, totaling $27,145, plus $11,202.60 in interest because defendant disagreed with plaintiff's apportionment of income and losses from LCA II. During the years at issue, RMI reported gains to LCA II. However, some other partnerships reported losses. When filing his Michigan individual income tax returns for these years, plaintiff treated all the income and losses distributed from LCA II as business income and apportioned it among all the states in which LCA II had partnerships. Thus, the income that RMI reported from the nursing homes in Michigan was offset by losses from other partnerships.

Defendant contends plaintiff was required to apportion all his income derived from RMI to Michigan and is not permitted to apportion income and losses from other partnerships because the other partnerships did not operate in Michigan. Plaintiff requested an infor-

[1] LCA is wholly owned by plaintiff, and plaintiff serves as its CEO.

mal conference with defendant and argued that the income from RMI should be apportioned with income and losses from all the nursing homes because RMI is part of plaintiff's unitary nursing-home business (LCA II), which is conducted and taxable in Michigan and other states.

The hearing referee, who presided over the informal conference, rejected plaintiff's argument and recommended that plaintiff be assessed the tax deficiency as originally determined. Defendant then issued a final bill of taxes due for the amount of $38,347.62, which plaintiff paid under protest. Plaintiff then filed a complaint in the Court of Claims for a refund of monies paid. After conducting discovery, both parties filed motions for summary disposition.

The Court of Claims conducted a hearing on plaintiff's motion for summary disposition, and granted plaintiff's summary disposition motion from the bench. While acknowledging defendant's contention that LCA II was a pass-through entity, nevertheless, the Court of Claims concluded that it was clear that the businesses were all related and that they were intended to operate as one unit, with LCA II serving as the head. Defendant filed a motion for reconsideration, which the Court of Claims denied. This appeal ensued.

On appeal, defendant argues that plaintiff is required to apportion the income that LCA II received from RMI to Michigan because RMI operates exclusively in Michigan. Defendant further asserts that under the Michigan Income Tax Act, MCL 206.1 *et seq.* (MITA), income derived from multistate business activities can only be apportioned if the income arose as part of a "unitary business." Defendant contends that the income LCA II received from the other partnerships cannot be combined and apportioned under the MITA because the

income was received from separate entities that do not operate in Michigan. In short, defendant asserts that plaintiff's income was not derived from a "unitary business," but rather arose from several separate business entities, therefore precluding apportionment. We disagree.

II. STANDARD OF REVIEW

A trial court's decision regarding a motion for summary disposition is reviewed de novo, as are questions involving statutory interpretation. *GMAC LLC v Dep't of Treasury*, 286 Mich App 365, 372; 781 NW2d 310 (2009).

III. DISCUSSION

Although the United States Constitution does not impose a single tax formula on the states, apportionment is often implemented because of the difficulties in trying 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; 103 S Ct 2933; 77 L Ed 2d 545 (1983). To address these difficulties, under what is known as the "unitary business principle," 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.

Pursuant to the MITA, Michigan has adopted an apportionment-based tax scheme. If a taxpayer's income-producing activities are confined solely to Michigan, then the taxpayer's entire income must be allocated to Michigan. MCL 206.102. However, if a taxpayer has income from business activities that are

taxable both in and outside of Michigan, that income is allocated or apportioned according to MITA. MCL 206.103. Income is apportioned to Michigan "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." MCL 206.115. "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.

In order to apply Michigan's apportionment formula 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.' " *Holloway Sand & Gravel Co, Inc v Dep't of Treasury*, 152 Mich App 823, 834-835; 393 NW2d 921 (1986), quoting *Container Corp of America*, 463 US at 166. In the absence of some underlying unitary business, multistate apportionment is precluded. *Holloway*, 152 Mich App at 830. To determine whether there is a unitary business 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.

Defendant advances three main arguments in support of its position that we should disregard the existence of LCA II for tax purposes and preclude plaintiff from apportioning his LCA II income. First, defendant cites Mich Admin Code, R 206.12(16), which 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].

Defendant argues that LCA II is the partner referenced in Rule 206.12(16) and that RMI and the other lower-level partnerships are the partnerships referenced in subsection (a). Therefore, defendant contends LCA II's only Michigan income is its distributive share from RMI. Defendant's interpretation, however, ignores the existence of plaintiff. It looks only at LCA II's distributed share income from the 22 lower-level partnerships and then attempts to place plaintiff in the position of LCA II.

This argument is a strained reading of the administrative rule. By its plain language the rule provides that ordinary income received by a partner is apportioned by the partnership apportionment factors. In this case, plaintiff is the partner, and his distributed share of income received from LCA II is apportioned by the partnership apportionment factors. Although defendant asserts that the approach to apportionment referenced in its brief has been consistently applied, it cites no authority to support this. Rather, it simply cites the existence of Rule 206.12(16)(a).

Defendant next argues that we simply ignore LCA II for tax purposes because plaintiff is an "indirect partner" in all 22 lower-level partnerships, that is, plaintiff holds an interest in the partnerships through a "pass-thru partner." In support of this argument, defendant relies on 26 USC 6231(a)(9) and (10). Under 26 USC 6231(a)(9), " 'pass-thru partner' means a partnership . . . through whom other persons hold an interest in the partnership with respect to which proceedings under this subchapter are conducted." 26 USC 6231(a)(10) provides that " 'indirect partner' means a

person holding an interest in a partnership through 1 or more pass-thru partners." Defendant seeks to borrow the definitions of "indirect partner" and "pass-thru partner" from the federal Internal Revenue Code (IRC) and utilize them in interpreting Michigan Law.

However, MCL 206.2(2) provides that "[a]ny term used in this act shall have the same meaning as when used in comparable context in the laws of the United States . . . ." Thus, MCL 206.2(2) only applies when a term used in the MITA has been used in a similar context under the IRC. Because "indirect-partner" and "pass-thru partner" are terms not used in the MITA, defendant's argument must fail.[2] Notably, this Court previously rejected a similar argument concerning the former Single Business Tax Act, MCL 208.1 *et seq*. See *Kmart Mich Prop Servs, LLC v Dep't of Treasury*, 283 Mich App 647, 655; 770 NW2d 915 (2009).

Finally, defendant argues that the unitary business principle does not apply. We disagree.

In its brief in response to plaintiff's motion for summary disposition, defendant did not argue that the unitary business principle did not apply to LCA II, but argued, as it does on appeal, that the principle is not recognized at all because *Holloway* is not binding.[3]

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[2] Furthermore, 26 USC 6231(a)(9) and (10) only apply to very limited situations. The general rule for partnerships under the IRC is that "[i]n determining his income tax, each partner shall take into account separately his distributive share of the partnership's" gains and losses. 26 USC 702(a). Therefore, under the IRC, in determining his income tax, plaintiff would take into account his gains and losses from LCA II.

[3] Defendant contends that "*Holloway* is not binding on Treasury for the reason that [in that case] the Court of Appeals was addressing a single entity that had two business operations, one in Michigan and one in Texas." Defendant does not explain, or cite any authority that explains, why consideration of a single business entity with two operations should be treated differently than a single entity with 22 operations.

At the motion hearing, defendant's counsel only *argued* that LCA managed the partnerships and that LCA II did not. Thus, the affidavit of Steve Ziegler, chief financial officer of LCA, submitted by plaintiff, went unrebutted. Ziegler asserted that LCA II hired LCA, a company owned and operated by plaintiff, to manage and operate all 22 lower-level partnerships. Ziegler explained that LCA used common operation and management techniques among the nursing homes, resulting in economies of scale. Furthermore, Ziegler stated that the nursing homes have centralized management and their costs are reduced through shared planning and centralized purchasing. Thus, in light of the information in Ziegler's affidavit, it is clear that there is " 'some sharing or exchange of value not capable of precise identification or measurement' " that occurs from the centralized management. *Holloway*, 152 Mich App at 834, quoting *Container Corp of America*, 463 US at 166. Accordingly, there is no genuine issue of material fact regarding whether LCA II is a unitary business, and therefore, apportionment is proper under the MITA.

Affirmed.

METER, P.J., and SAAD, J., concurred with WILDER, 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 June 15, 2011:

MICHIGAN PROPERTIES, LLC v MERIDIAN TOWNSHIP, Docket Nos. 289174, 289175, and 289176. Reported at 292 Mich App 147. The Court orders that the motion for clarification of the April 5, 2011, opinion is hereby granted. The last paragraph of the opinion is amended to state: "Reversed and remanded to the Michigan Tax Tribunal for entry of judgments consistent with this opinion. We do not retain jurisdiction."

The Reporter's Office shall make the change to the opinion during the publishing process.

In all other respects, the opinion remains unchanged.

Order Entered September 15, 2011:

FLORENCE CEMENT COMPANY v VETTRAINO, Docket No. 295090. Reported at 292 Mich 461. The Court orders that the May 3, 2011, opinion is hereby amended. The opinion contained the following clerical errors:

The defendant's last name was misspelled. The correct spelling is "Vettraino."

On page 3, the slip opinion states, "It is undisputed that Comerica provided the remaining $142,000 requested, and that this amount, but only this amount, was paid to Florence, leaving a shortfall of $142,557.27." The shortfall amount should correctly be $114,557.27.

In all other respects, the May 3, 2011, opinion remains unchanged.

Index-Digest

INDEX–DIGEST

ADMINISTRATIVE LAW

See, also, STATUTES 1

RULEMAKING

1. The Legislature has conferred broad powers on the Department of Environmental Quality and has empowered it to prevent any pollution of the waters of the state that the department considers unreasonable and against the public interest (MCL 324.3106). *Michigan Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106.

RULES

2. When analyzing the substantive validity of an administrative rule, Michigan courts employ a three-part test: (1) whether the rule is within the subject matter of the enabling statute, (2) whether it complies with the legislative intent underlying the enabling statute, and (3) whether it is arbitrary or capricious; a rule is within the subject matter of the enabling statute if it is necessary for the efficient exercise of a duty that the Legislature has conferred on the agency. *Michigan Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106.
3. Mich Admin Code, R 323.2196, which requires owners or operators of concentrated animal feeding operations to obtain water-quality permits, is not arbitrary and capricious because the Department of Environmental Quality has broader powers than its federal counterpart and is free to enact more stringent limitations than federal limitations. *Michigan Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106.

ADMINISTRATIVE SEARCHES—*See*

STATUTES 2

AFFIDAVITS

NOTARIZATION

1. An affidavit lacking notarization is invalid and need not be considered by a trial court. *Sherry v East Suburban Football League*, 292 Mich App 23.

AFFIRMATIVE DEFENSES—*See*

TRIAL 5

AGENCIES—*See*

ADMINISTRATIVE LAW 1

CONSTITUTIONAL LAW

See, also, COURTS 1
CRIMINAL LAW 2, 6
RAPE 1

CONFLICT OF LAWS

1. A contract based on the public employment relations act and a related arbitration award that infringe on the judicial branch's inherent constitutional powers may not be enforced to the extent of such encroachment (MCL 423.201 *et seq*.). *American Federation of State, County & Municipal Employees, Council 25 v Wayne County*, 292 Mich App 68.

CONFRONTATION CLAUSE

2. An interpreter is considered an agent of the declarant, not an additional declarant, under the language-conduit rule, and the interpreter's statements are regarded as the statements of the declarant, without creating an additional layer of hearsay; a court, in considering whether statements made through an interpreter are admissible under the rule, should consider (1) whether actions taken after the conversation were consistent with the statements translated, (2) the interpreter's qualifications and language skill, (3) whether the interpreter had any motive to mislead or distort, and (4) which party supplied the interpreter. *People v Jackson*, 292 Mich App 583.

CRIMINAL LAW

3. There is no constitutional right to an appointed attorney in state postconviction proceedings. *People v Kissner*, 292 Mich App 526.

DUE PROCESS

4. A defendant, to be entitled to dismissal on the basis that the prosecutor's delay in charging the defendant violated the defendant's right to due process of law, must show that the delay caused actual and substantial prejudice to the defendant's right to a fair trial and an intent by the prosecutor to gain a tactical advantage. *People v Reid (On Remand)*, 292 Mich App 508.
5. There is no general constitutional right to discovery in a criminal case; however, due process requires the prosecution to disclose evidence in its possession that is

exculpatory and material, regardless of whether the defendant requests the evidence. *People v Jackson*, 292 Mich App 583.

MINORS

6. The provisions of MCL 722.4(2) that provide specific criteria that must be met for a minor to be considered emancipated by operation of law are not unconstitutionally vague. *People v Roberts*, 292 Mich App 492.

MIRANDA WARNINGS

7. The warnings articulated in *Miranda v Arizona*, 384 US 436 (1966), are not required unless the accused is subject to a custodial interrogation; a motorist detained for a routine traffic or investigative stop is ordinarily not in custody for purposes of *Miranda*. *People v Steele*, 292 Mich App 308.

RIGHT TO COUNSEL

8. To succeed in a claim that counsel was ineffective, a defendant generally must show that trial counsel's performance fell below an objective standard of reasonableness and that it is reasonably probable that the result of the proceeding would have been different had it not been for counsel's error; a presumption of prejudice is appropriate, however, without inquiry into the actual conduct of the trial (1) when the defendant was completely denied the assistance of counsel at a critical stage, (2) when the defendant's trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing, or (3) when the circumstances under which the defendant's trial counsel functioned were such that the likelihood that any lawyer, even a fully competent one, could have provided effective assistance were small; but if a defendant does not argue that his or her counsel failed on the whole to subject the prosecution's case to meaningful adversarial testing, but instead argues that discrete acts at specific points in the trial were inadequate, the proper test includes the consideration of whether counsel's conduct affected the outcome of the case (US Const, Am VI; Const 1963, art 1, § 20). *People v Gioglio*, 292 Mich App 173.

9. Law enforcement investigators may not, as part of a custodial interrogation, conceal from a suspect that counsel has been made available to and is at the disposal of the suspect. *People v Crockran*, 292 Mich App 253.

AUTHORITY TO TAKE ACTIONS

1. Where the Legislature has limited the availability to take action to a specific group of individuals, parties cannot grant an entity that falls outside that group the authority to take such action. *Residential Funding Co, LCC v Saurman*, 292 Mich App 321.

CORPORATE VEIL—*See*

CORPORATIONS 1

CORPORATIONS

LIMITED LIABILITY COMPANIES

1. The rules regarding piercing a corporate veil apply in determining whether to pierce the corporate veil of a limited liability company; in order for a corporate veil to be pierced, the corporate entity must be a mere instrumentality of another individual or entity, must have been used to commit a wrong or fraud, and there must have been an unjust injury or loss to the plaintiff. *Florence Cement Co v Vettraino*, 292 Mich App 461.
2. A limited liability company cannot make a distribution if, after giving the distribution effect, the company would not be able to pay its debts as they become due or its assets would be less than its liabilities; a member of a limited liability company who assents to or receives such a distribution is personally liable, jointly and severally, to the limited liability company for the amount of the distribution; a "distribution" is a direct or indirect transfer of money or other property or the incurrence of indebtedness by a limited liability company to or for the benefit of its members or assignees of its members in respect of the members' membership interests (MCL 450.4102[1][g]; MCL 450.4307[1][a] and [b]; MCL 450.4308[1]). *Florence Cement Co v Vettraino*, 292 Mich App 461.

COSTS

APPEAL

1. The Court of Appeals may order that no party is entitled to costs when a public question is involved (MCR 7.216[A][7], 7.219[A]). *City of Bay City v Bay County Treasurer*, 292 Mich App 156.

RECEIVERSHIPS

2. A court may order a party that benefits from a receivership and ultimately establishes a right to the property

protected and preserved by the receivership to pay the costs of the receivership, even if the party did not consent to the receivership or become a party until after the court appointed the receiver (MCR 2.622[D]). *In re Receivership of 11910 South Francis Road (Price v Kosmalski)*, 292 Mich App 294.

COURT CLERKS—*See*

CONSTITUTIONAL LAW 12

COURT OF CLAIMS—*See*

COURTS 1

COURTS

COURT OF CLAIMS

1. The Court of Claims does not have subject-matter jurisdiction to decide actions seeking to enforce the provisions of Const 1963, art 9, §§ 25 through 31, commonly known as the Headlee Amendment. *City of Riverview v State of Michigan*, 292 Mich App 516.

CRIMINAL LAW

See, also, CONSTITUTIONAL LAW 3, 4, 5, 7, 8, 9, 10, 11
JUVENILES 1
RAPE 1

CHILD SEXUALLY ABUSIVE ACTIVITY

1. An individual violates MCL 750.145c(2), which concerns child sexually abusive activity and child sexually abusive material, by preparing to arrange for child sexually abusive material even if the preparations do not actually proceed to the point of involving a child. *People v Aspy*, 292 Mich App 36.

CONSTITUTIONAL LAW

2. The statute prohibiting child sexually abusive activity clearly provides a person of ordinary intelligence a reasonable opportunity to know what is prohibited and what circumstances must exist in order for the affirmative defense that the alleged child victim is a person who is emancipated by operation of law to be applicable (MCL 750.145c). *People v Roberts*, 292 Mich App 492.

EVIDENCE

3. The results of a polygraph examination should only be considered by a trial court with regard to the general

credibility of the examinee and not with regard to the truth or falsehood of any particular statement. *People v Roberts*, 292 Mich App 492.

4. A party in a criminal action must, upon request, disclose any written or recorded statement pertaining to the case by a lay witness whom the party may call at trial (MCR 6.201[A][2]). *People v Jackson*, 292 Mich App 583.

OBSTRUCTION OF JUSTICE

5. Obstruction of justice is generally understood as an interference with the orderly administration of justice; it is impeding or obstructing those who seek justice in a court or those who have duties or powers of administering justice therein; it is committed when the effort is made to thwart or impede the administration of justice. *People v Kissner*, 292 Mich App 526.

RIGHT TO FAIR TRIAL

6. A criminal defendant has a constitutional right to a fair trial by an impartial jury; a trial court must take appropriate steps to ensure that jurors will not be exposed to information or influences that could affect their ability to render an impartial verdict, but due process does not require a new trial every time a juror has been placed in a potentially compromising situation (US Const, Am VI; Const 1963, art 1, § 20). *People v Jackson*, 292 Mich App 583.

SENTENCES

7. Offense variable 10 of the sentencing guidelines relates to the exploitation of vulnerable victims and requires an assessment of 10 points when a defendant exploits a domestic relationship; to qualify as a "domestic relationship," there must be a familial or cohabitating relationship; a current or former dating relationship alone, without these additional characteristics, is not enough warrant the assessment of 10 points for this variable (MCL 777.40[1][6]). *People v Jamison*, 292 Mich App 440.

TAMPERING WITH EVIDENCE

8. The clause "authorized to hear evidence under oath" in the phrase "a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath" in MCL 750.483a(11)(a) merely specifies the type of agency or official before which the proceeding must be heard in order for the proceeding to be considered an "official proceeding"

EMINENT DOMAIN

CONDOMINIUMS

1. The Michigan Condominium Act provides that a condemnation award must include just compensation to the coowner of the condominium unit subject to condemnation; the act does not provide that a coowner is to be the exclusive recipient of condemnation awards (MCL 559.233[3]). *Lyon Charter Twp v McDonald's USA, LLC*, 292 Mich App 660.

UNIFORM CONDEMNATION PROCEDURES ACT

2. A "parcel" for purposes of the Uniform Condemnation Procedures Act is an identifiable unit of land, whether physically contiguous or not, having substantially common beneficial ownership, all or part of which is being acquired, and that can be treated as separate for valuation purposes (MCL 213.51[g]). *Lyon Charter Twp v McDonald's USA, LLC*, 292 Mich App 660.

EMPLOYEES OF GOVERNMENTAL AGENCIES—*See*

GOVERNMENTAL IMMUNITY 1

ENVIRONMENT—*See*

ADMINISTRATIVE LAW 1

EVIDENCE

See, also, CONSTITUTIONAL LAW 5
CRIMINAL LAW 4

EXPERT TESTIMONY

1. *Barr v Farm Bureau General Ins Co*, 292 Mich App 456.

HEARSAY

2. A hearsay statement, in order to be admissible under the "other exceptions" hearsay exception found in MRE 803(24), must demonstrate circumstantial guarantees of trustworthiness equivalent to the categorical exceptions in MRE 803(1) to (23), be relevant to a material fact, be the most probative evidence of that fact reasonably available, and serve the interests of justice by its admission; the trial court should consider the totality of the circumstances, taking into consideration any factors that detract from or add to the reliability of the statement in determining whether a statement has particularized guarantees of trustworthiness. *Augustine v Allstate Ins Co*, 292 Mich App 408.

care, recovery, or rehabilitation; the term "care" includes care that a conservator provides for a person who is unable to manage his or her property and business affairs effectively because of an injury caused by the accident; the conservator's fee is an allowable expense if it was for services that were reasonably necessary for the injured person's care and if the services would not have been required but for the accident (MCL 500.3107[1][a]). *In re Carroll*, 292 Mich App 395.

3. The services that a conservator provides to a person who was so incapacitated by an injury sustained in an automobile accident that he or she can no longer manage his or her own affairs and cannot offer direction to those who might act on his or her behalf may be compensable under MCL 500.3107(1)(a); these services are not replacement services under MCL 500.3107(1)(c). *In re Carroll*, 292 Mich App 395.

INTEGRAL COMPONENTS OF HIGHWAYS—*See*

GOVERNMENTAL IMMUNITY 2

INTENTIONAL TORTS—*See*

GOVERNMENTAL IMMUNITY 1

INTEREST—*See*

LIENS 2

INTERESTS IN INDEBTEDNESS—*See*

MORTGAGES 3

INTERESTS IN MORTGAGES—*See*

MORTGAGES 3

INTERFERENCE WITH ADMINISTRATION OF JUSTICE—*See*

CRIMINAL LAW 5

INTERFERENCE WITH PARENTING TIME—*See*

CHILD SUPPORT 2

INTERNET COMMUNICATIONS—*See*

CRIMINAL LAW 10

INTERPRETERS—*See*

CONSTITUTIONAL LAW 2

PRIMA FACIE CASE

2. A prima facie case of negligence requires the establishment of four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages; in ordinary negligence cases, whether the defendant has breached a duty of care owed to the plaintiff is dependent on foreseeability; the question is whether the defendant's action or inaction created a risk of harm to the plaintiff and whether the resulting harm was foreseeable. *Sherry v East Suburban Football League*, 292 Mich App 23.

PROPERTY OWNERS

3. Property owners generally owe no duty to supervise the minor children of guests on their property; property owners have an affirmative duty to supervise minor guests only when a minor guest is unaccompanied by a parent and the property owner has voluntarily assumed a duty to supervise the minor. *Wheeler v Central Michigan Inns, Inc*, 292 Mich App 300.

order that fully adjudicates the entire action and rules on a subsequent motion for reconsideration, the order granting or denying reconsideration is a verdict for purposes of case evaluation sanctions; a party seeking such sanctions must file and serve its motion for costs within 28 days after entry of the ruling on the motion for reconsideration (MCR 2.403[O][1], [2][c]). *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278.

PRIMA FACIE CASE—*See*

NEGLIGENCE 2

PRIORITY OF CONSTRUCTION LIENS—*See*

LIENS 1

PRIVILEGES—*See*

CONFLICT OF LAWS 1

PRODUCTS LIABILITY

MONETARY LOSSES

1. The phrase "damage to property" in the statute defining a products-liability action is broad enough to include both physical damage to an object and injury or harm to rights or interests associated with an object, as long as the damage was caused by or results from the production of the product; money itself is a form of property; a claim of monetary loss based on alleged misrepresentations regarding the safety and efficacy of a drug constitutes a claim for damage to property for purposes of the statute that provides immunity for products-liability claims against a manufacturer or seller of a drug that was approved for safety and efficacy by the Food and Drug Administration and labeled in compliance with Food and Drug Administration standards (MCL 600.2945[h], 600.2946[5]). *Attorney General v Merck Sharp & Dohme Corp*, 292 Mich App 1.

PHARMACEUTICALS

2. An action is a products-liability action for purposes of the statute that provides immunity for products-liability claims against a manufacturer or seller of a drug that was approved for safety and efficacy by the Food and Drug Administration and labeled in compliance with Food and Drug Administration standards if (1) the action is based on a legal or equitable theory of liability,

(2) the action is brought for the death of a person or for injury to a person or damage to property, and (3) that loss was caused by or resulted from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, inspection, testing, marketing, selling, advertising, packaging, or labeling of a drug product (MCL 600.2945[h] and [i], 600.2946[5]). *Attorney General v Merck Sharp & Dohme Corp*, 292 Mich App 1.

opinions formed during the trial process, are not themselves valid grounds for alleging judicial bias unless there is a deep-seated favoritism or antagonism to the extent that the exercise of fair judgment is impossible; comments that are critical of or hostile to counsel and the parties are generally not sufficient to pierce the heavy presumption of judicial impartiality; the appropriate test to determine whether a trial court's comments or conduct pierced the veil of judicial impartiality is whether the conduct or comments were of such a nature as to unduly influence the jury and deprive the appellant of the right to a fair and impartial trial. *People v Jackson*, 292 Mich App 583.

PLEADINGS

4. Issues that are not raised by the pleadings but are tried by the express or implied consent of the parties are treated as if they had been raised by the pleadings (MCR 2.118[C][1]). *Florence Cement Co v Vettraino*, 292 Mich App 461.
5. A defendant waives an affirmative statute-of-limitations defense by failing to raise it in the defendant's first responsive pleading; the defendant can cure the failure to raise the defense in the first responsive pleading by amending the pleading, but the defendant must, in any event, raise the defense in the trial court to prevent waiver of the defense (MCR 2.111[F][3][a]). *Florence Cement Co v Vettraino*, 292 Mich App 461.

TRIALS—*See*

CRIMINAL LAW 6

TRUSTS

TRUSTEES

1. A trustee authorized to take any action on behalf of the trust is not, as a result of such authority, given an ownership interest in the trust. *Residential Funding Co, LCC v Saurman*, 292 Mich App 321.

UNACCOMPANIED MINOR GUESTS—*See*

NEGLIGENCE 3

UNCAPPING TAXABLE VALUE OF REAL PROPERTY—*See*

TAXATION 5