MICHIGAN APPEALS REPORTS

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COURT OF APPEALS

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COURT OF APPEALS CASES

PEOPLE v BARBEE

Docket No. 337515. Submitted June 12, 2018, at Detroit. Decided June 26, 2018, at 9:00 a.m.

Keenan Barbee was convicted after a bench trial in the Wayne Circuit Court of being a felon in possession of a firearm, MCL 750.224f; being a felon in possession of ammunition, MCL 750.224f; possessing a firearm during the commission of a felony, MCL 750.227b; and carrying a concealed weapon, MCL 750.227. Police officers discovered the firearm when they noticed a parked car with its engine running and headlights on while on routine patrol at night. The officers pulled alongside the driver's side of the vehicle and shined their flashlights at the car, revealing that a woman was behind the wheel and that defendant was sitting in the front passenger seat. According to the police, defendant looked shocked and leaned back in his seat, appeared to pull something out from his waist area with his right hand, and leaned forward as if he were attempting to place something on the floor under his seat, which led the officers to believe that defendant might be armed. When one of the officers got out of the police cruiser, defendant jumped out of the car. Once defendant was detained, an officer went to the passenger side of the car, shone his flashlight inside the vehicle at the floorboard, and saw the back of a gun handle partly under the seat. The gun was seized, and defendant was arrested. Defendant testified that he had no knowledge that the gun was in the car, that he had never possessed the weapon on his person, that he did not see the gun in the vehicle, and that he did not own the firearm. At trial, defense counsel attempted to argue that evidence of the gun should be suppressed, considering that the officers lacked probable cause to stop and search the vehicle; however, the trial court, Catherine L. Heise, J., refused to consider the argument because counsel had failed to challenge the search and seizure in a pretrial motion. Defendant appealed.

The Court of Appeals *held*:

1. Defense counsel was not ineffective for not filing a pretrial motion to suppress the firearm. Under the open-view doctrine, when a law enforcement officer observes incriminating evidence or unlawful activity from a vantage point that is not within a

constitutionally protected area, no search occurs for purposes of the Fourth Amendment, and the information gleaned as a result can form the basis of probable cause or reasonable suspicion to proceed further. Defendant had no reasonable expectation of privacy regarding his movements in a car that was parked on a public street, and therefore the police did not trespass when they pulled up to the vehicle and looked inside. The fact that a flashlight was used to see into the vehicle does not change this conclusion because the use of artificial means to illuminate a darkened area does not transform conduct that would not have been a search by daylight into a search that triggers Fourth Amendment protections. Because filing a pretrial motion to suppress the firearm would have been futile, defense counsel was not ineffective for failing to do so.

2. There was sufficient evidence to support defendant's convictions. Despite the lack of any direct evidence that defendant physically possessed the gun, there was sufficient circumstantial evidence from which it could be reasonably inferred that defendant had actually possessed the gun before and at the time the police pulled up next to the vehicle in which defendant was a passenger. The police testimony describing defendant's suspicious movements and his startled appearance when the officers stopped, his conduct in immediately jumping out of the vehicle, and the discovery of the weapon partway under the passenger seat, which location would be consistent with the nature of defendant's movements that suggested he had placed something under his seat, gave rise to a reasonable inference that defendant had physically handled and possessed the firearm.

Affirmed.

Judge JANSEN concurred in the result only.

1. EVIDENCE — CONSTITUTIONAL LAW — SEARCHES AND SEIZURES — OPEN-VIEW DOCTRINE.

Under the open-view doctrine, when a law enforcement officer observes incriminating evidence or unlawful activity from a vantage point that is not within a constitutionally protected area, no search occurs for purposes of the Fourth Amendment, and the information gleaned as a result can form the basis of probable cause or reasonable suspicion to proceed further.

2. EVIDENCE — CONSTITUTIONAL LAW — SEARCHES AND SEIZURES — OPEN-VIEW DOCTRINE — REASONABLE EXPECTATION OF PRIVACY — VEHICLES.

A person does not have a reasonable expectation of privacy for purposes of the Fourth Amendment when in a vehicle that is parked on a public street.

3. EVIDENCE — CONSTITUTIONAL LAW — SEARCHES AND SEIZURES — OPEN-VIEW DOCTRINE — USE OF ARTIFICIAL ILLUMINATION.

The use of artificial means to illuminate a darkened area does not transform conduct that would not have been a search by daylight into a search that triggers Fourth Amendment protections.

Joseph L. Stewart for defendant.

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

MURPHY, P.J. In a bench trial, defendant was convicted of being a felon in possession of a firearm (felon-in-possession), MCL 750.224f, being a felon in possession of ammunition, MCL 750.224f, possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and carrying a concealed weapon (CCW), MCL 750.227. He was sentenced to one to five years' imprisonment for each of the convictions, except for the felony-firearm conviction, for which he was sentenced to two years' imprisonment. We affirm.

Shortly after midnight on July 8, 2016, police officers on routine patrol in a marked cruiser observed a parked car with its engine running and headlights on, and the officers pulled alongside the driver's side of the vehicle. The officers shined their flashlights at the car, observing that a woman was behind the wheel and that defendant was sitting in the front passenger seat. There was police testimony that defendant looked shocked and leaned back in his seat, appearing to pull something out from his waist area with his right hand, followed by defendant's leaning forward as if he were attempting to place something on the floor under his seat. The officers found the movements suspicious, leading the police to believe that defendant may be armed. When one of the officers exited the police cruiser, defendant immediately jumped out of the pas-

senger seat and car, holding a stack of money. Upon defendant's being detained, an officer went to the passenger side of the car, shined his flashlight inside the vehicle at the floorboard, and observed the back of a gun handle partly under the seat, giving rise to an inference, considering defendant's movements, that defendant had put the firearm in that spot in a frantic attempt to conceal it under the seat. The gun was seized, and defendant was arrested. Defendant testified that he had no knowledge that the gun was in the car, that he had never possessed the weapon on his person, that he did not see the gun in the vehicle, and that he did not own the firearm.

At the bench trial, defense counsel attempted to argue that evidence of the gun should be suppressed, considering that the officers lacked probable cause to stop and search the vehicle; however, the trial court refused to consider the argument because counsel had failed to challenge the search and seizure in a pretrial motion. On appeal, defendant argues that defense counsel was ineffective for not filing a pretrial motion to suppress the firearm and that there was insufficient evidence to support the convictions. We disagree.

With respect to the claim of ineffective assistance of counsel, defendant argues that the car was lawfully parked in front of his home, that he and the driver were quietly saying goodnight, that they had an expectation of privacy, that there was no indication by the officers that the neighborhood was rampant with criminal activity, and that "the police did not provide a single reason for coming up on defendant's car so clandestinely and shining their flashlights into it[.]" Defendant contends that the plain-view doctrine could not be invoked because the doctrine requires that an officer be in a place where he or she had a right to be,

and the police in the instant case had no right to pull up within a couple feet of the car and then shine their flashlights inside. Defendant maintains that the officers needed to have some articulable suspicion of criminal activity being afoot to proceed as they did, and there was none. Defendant appears to accept that a police officer may generally, but not always, use a flashlight, but only if the officer was rightfully and lawfully positioned when doing so.

Defendant makes clear that his argument is not that his movements, i.e., leaning back, appearing to pull something from his waist area, and then leaning forward as if to put something under the seat, did not give rise to probable cause or reasonable suspicion to temporarily detain him, nor does he appear to contend that it was improper to shine the flashlight on the passenger-side floorboard where the gun was found. Rather, the entire premise of defendant's argument is that it was unconstitutional for the police to be in the position from which they initially saw defendant's movements; therefore, counsel was ineffective for not filing a pretrial motion to suppress the gun.

Defendant's argument is couched, at least in part, in terms of the plain-view doctrine, and in *People v Champion*, 452 Mich 92, 101; 549 NW2d 849 (1996), the Supreme Court observed:

> The plain view doctrine allows police officers to seize, without a warrant, items in plain view if the officers are lawfully in a position from which they view the item, and if the item's incriminating character is immediately apparent. A fundamental characteristic of the doctrine is that it is exclusively a seizure rationale. No searching, no matter how minimal, may be done under the auspices of the plain view doctrine. [Citations omitted.]

As can be gleaned from this passage, the plain-view doctrine is not technically applicable to the specific argument being made by defendant. Defendant's argument is more akin to cases involving whether the police can gather incriminating information from a particular vantage point to then justify a search or search warrant based on the information, or whether police conduct at that vantage point in gathering the information is itself a search implicating Fourth Amendment protections. We are addressing an argument that falls under what has been coined the "open view doctrine." In *State v Clark*, 124 Idaho 308, 311-313; 859 P2d 344 (App, 1993), the Idaho Court of Appeals gave the following helpful explanation:

> Both parties here urge application of a "plain view" analysis. . . . However, we conclude that the plain view doctrine is not the proper framework for analysis of [the officer's] . . . observation through the [mobile home's] corner window, for the plain view doctrine addresses the validity of warrantless *seizures*, not searches.
>
> . . . [T]he United States Supreme Court [has] clarified that the plain view doctrine is a constitutionally recognized justification only for warrantless seizures, not warrantless searches[.]
>
> * * *
>
> . . . [T]he plain view doctrine refers only to the circumstances where an officer has a prior justification for an intrusion into a constitutionally protected area or activity and in the course of that intrusion spots and seizes incriminating evidence. . . . Accordingly, it is warrantless *seizures* of readily visible items, not warrantless *searches*, that are limited by the criteria delineated under the plain view doctrine.
>
> The validity of a law enforcement officer's mere observation of objects or activities requires a different analysis. If the officer intruded into an area where a privacy

> interest exists in order to gain the view, the intrusion must be justified by one of the recognized exceptions to the warrant requirement. However, a policeman's mere observation from a vantage point that does not infringe upon a privacy interest, of something open to public view, normally implicates no Fourth Amendment constraints because observation of items readily visible to the public is not a "search." . . . What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.
>
> This Court and others have used the term "open view doctrine" to refer to this rule that no Fourth Amendment "search" occurs where a law enforcement officer observes incriminating evidence or unlawful activity from a nonintrusive vantage point. *State v Ramirez*, 121 Idaho 319, 322[; 824 P2d 894 (Idaho App, 1992)] (officer's view into a car in a public parking lot) . . . . The "open view" terminology distinguishes the analysis applicable to warrantless observations from the legally distinct "plain view" doctrine applicable to seizures.
>
> The open view analysis must be applied to determine whether [the officer's] view through the corner window was an unreasonable search prohibited by the Fourth Amendment. . . . If his vantage point was not within a constitutionally protected area, his observation using only his normal vision to see that which was open to public gaze, was permissible under the open view doctrine. [Citations and quotation marks omitted.]

The Idaho court relied, in part, on *Texas v Brown*, 460 US 730, 739; 103 S Ct 1535; 75 L Ed 2d 502 (1983), wherein the United States Supreme Court indicated that the plain-view doctrine provides a basis to seize an item when the officer's access to the object had some previous justification under the Fourth Amendment. The Court cautioned that it is important to distinguish "plain view" justifying a seizure of an object from an officer's observation of an item left in plain or open sight, the latter of which does not involve a Fourth

Amendment search. *Id*. at 738 n 4. The information gleaned as a result of observation of an object in plain or open sight can form the basis of probable cause or reasonable suspicion to proceed further. *Id*. The concept of open view was noted recently by our Supreme Court in *People v Frederick*, 500 Mich 228, 237 n 4; 895 NW2d 541 (2017):

> For example, looking into the windows of a home from a sidewalk or other public area is not a search. But it *is* information-gathering, such that, if the police trespass on the home's curtilage and peer through the windows from that vantage point, they have conducted a search. The trespass converts conduct that would not otherwise constitute a search into a search.[1]

Accordingly, the more precise question here is whether the police conducted a search that implicated Fourth Amendment protections by simply pulling up to the vehicle in which defendant was a passenger and observing movements taking place inside the car aided with flashlights. Stated otherwise, the issue is whether defendant's movements inside the car were in "open view." In turn, as we will explain, the analysis requires a determination whether defendant had a reasonable expectation of privacy or whether the officers' conduct constituted a trespass for purposes of information gathering.

In *Frederick*, 500 Mich 228, the Michigan Supreme Court examined whether police conduct amounted to permissible "knock and talks" or warrantless searches in violation of the Fourth Amendment when police made early morning unscheduled visits to the two

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[1] See also *Florida v Riley*, 488 US 445; 109 S Ct 693; 102 L Ed 2d 835 (1989) (examining whether officer's observation of partially covered greenhouse in a backyard from the vantage point of a helicopter was a search under the Fourth Amendment).

defendants' homes, obtained consents to search, and discovered marijuana-related products in each home. The Court held:

> Because these knock and talks were outside the scope of the implied license [to go up to a house and knock on a door], the officers trespassed on Fourth-Amendment-protected property. And because the officers trespassed while seeking information, they performed illegal searches. Finally, because of these illegal searches, the defendants' consent—even if voluntary—is nonetheless invalid unless it was sufficiently attenuated from the illegality. [*Id*. at 244.]

As part of the analysis, the *Frederick* Court acknowledged the decision in *Florida v Jardines*, 569 US 1; 133 S Ct 1409; 185 L Ed 2d 495 (2013), in which the police went to the front door of a house with a trained police dog who explored the area and alerted officers of the smell of drugs, which information was then used to obtain a search warrant. *Frederick*, 500 Mich at 234-236. Our Supreme Court noted that the *Jardines* Court held that introducing a trained police dog to explore around the outside of a home in hopes of discovering incriminating information went beyond any customary invitation typically applicable to a limited licensee (knock promptly, wait briefly for response, and then leave unless invited to linger longer), thereby trespassing on property protected by the Fourth Amendment. *Frederick*, 500 Mich at 236. The *Frederick* Court observed that the rule emanating from *Jardines* is that a trespass plus an attempt to gather information constitutes a search and thus implicates Fourth Amendment protections. *Id*. Our Supreme Court also noted that the expectation-of-privacy analysis for purposes of the Fourth Amendment set forth in *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967), along with the property-rights or trespass analysis pertain-

ing to the Fourth Amendment, are both part of Fourth Amendment jurisprudence subject to consideration. *Frederick*, 500 Mich at 235 n 2.

We hold that there was no reasonable expectation of privacy by defendant relative to his movements in the car parked on a public street and that there was no trespass by the police when they pulled up to the vehicle and looked inside. Therefore, the Fourth Amendment was not implicated and there was no search when the police pulled alongside the parked car and observed defendant's movements therein. There plainly was no trespass, and defendant, while arguing that the officers' conduct was intrusive, makes no claim of a trespass. Defendant does maintain that he and his female companion had a reasonable expectation of privacy. We disagree. In *Brown*, 460 US at 740, the United States Supreme Court ruled:

> . . . [T]he fact that [the officer] changed his position and bent down at an angle so he could see what was inside Brown's car . . . is irrelevant to Fourth Amendment analysis. The general public could peer into the interior of Brown's automobile from any number of angles; there is no reason [the officer] should be precluded from observing as an officer what would be entirely visible to him as a private citizen. There is no legitimate expectation of privacy shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers. In short, the conduct that enabled [the officer] to observe the interior of Brown's car and of his open glove compartment was not a search within the meaning of the Fourth Amendment. [Citations, quotation marks, and brackets omitted.][2]

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[2] See also *State v Harris*, 98 Ohio App 3d 543, 547; 649 NE2d 7 (1994) (holding that a person generally has no reasonable expectation of privacy in a public area, as there is always a risk that others will see things in open view, and while a defendant "may have a subjective

Accordingly, we conclude that defendant did not have a reasonable or legitimate expectation of privacy in the vehicle that was parked on a public street. To the extent that defendant's argument encompasses employment of the flashlights by the officers, it is unavailing. See *Brown*, 460 US at 740 ("Numerous . . . courts have agreed that the use of artificial means to illuminate a darkened area simply does not constitute a search, and thus triggers no Fourth Amendment protection."); *People v Custer (On Remand)*, 248 Mich App 552, 562; 640 NW2d 576 (2001) (holding that if a police officer's observation would not have constituted a search had it taken place in the daylight, then the fact that the officer used a flashlight to see through the nighttime darkness does not transform any observation into a search).[3]

In sum, because filing a pretrial motion to suppress the gun would have been futile, defense counsel was not ineffective, as counsel is not required to file meritless or futile motions. *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011).

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expectation of privacy in his car while parked in a business lot, it is not one which this court, or more importantly, society is prepared to recognize as reasonable") (quotation marks and citation omitted); *State v Ramirez*, 121 Idaho 319, 322; 824 P2d 894 (App, 1991) (holding that a car located in the parking lot of a bar is readily subject to observation by members of the public, and there exists no cognizable right to privacy in that portion of the vehicle's interior that may be viewed from outside the car by either an inquisitive passerby or a diligent police officer).

[3] Although defendant's argument does not reach the issues, we conclude that defendant's suspicious movements inside the car justified, minimally, a brief *Terry* detention for purposes of investigating the possibility of criminal activity being afoot. *People v Custer*, 465 Mich 319, 326-327; 630 NW2d 870 (2001), citing *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). And the officer's observation of the back of the gun handle was from a lawful position regardless of the use of the flashlight, *Custer*, 248 Mich App at 562, thereby implicating, at this juncture, the plain-view doctrine, *Champion*, 452 Mich at 101, allowing for the seizure of the gun.

Defendant next argues that there was insufficient evidence to prove beyond a reasonable doubt that he had ever possessed the gun. Again, we disagree. Viewing the direct and circumstantial evidence in a light most favorable to the prosecution, *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012); *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002), adhering to the principle that we must not interfere with the trier of fact's role in assessing the weight of the evidence and the credibility of the witnesses, *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992), appreciating that circumstantial evidence and reasonable inferences arising from such evidence can constitute satisfactory proof of an element of a crime, *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), including firearm possession, *People v Johnson*, 293 Mich App 79, 83; 808 NW2d 815 (2011), and resolving all conflicts in the evidence in favor of the prosecution, *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008), we hold that there was sufficient evidence for the trial court to find beyond a reasonable doubt that defendant possessed the gun.[4]

Despite the lack of any direct evidence that defendant physically possessed the gun, we hold that there existed sufficient circumstantial evidence from which it could be reasonably inferred that defendant had actually possessed the gun before and at the time the police pulled up next to the vehicle in which defendant was a passenger. See *People v Minch*, 493 Mich 87, 91;

[4] "Possession" is an element of felon-in-possession, MCL 750.224f; *People v Bass*, 317 Mich App 241, 268-269; 893 NW2d 140 (2016), and felony-firearm, MCL 750.227b; *People v Peals*, 476 Mich 636, 640; 720 NW2d 196 (2006); *Johnson*, 293 Mich App at 82-83, and the "carrying" element of CCW has been equated to possession, *People v Butler*, 413 Mich 377, 390 n 11; 319 NW2d 540 (1982).

825 NW2d 560 (2012) (explaining that possession of a firearm can be either actual or constructive).[5] The police testimony describing defendant's suspicious movements and his startled appearance when the officers stopped, his conduct in immediately jumping out of the vehicle, and the discovery of the weapon partway under the passenger seat, which location would be consistent with the nature of defendant's movements that suggested he had placed something under his seat, gave rise to a reasonable inference that defendant had physically handled and possessed the firearm. The evidence was sufficient to support the verdicts.

Affirmed.

RONAYNE KRAUSE, J., concurred with MURPHY, P.J.

JANSEN, J. (*concurring*). I concur in the result only.

[5] It appears from the trial court's written opinion and comments from the bench that the court found that defendant had actually possessed the gun, absent any reliance on constructive possession.

PEOPLE v CRAWFORD (ON REMAND)

Docket No. 330215. Submitted March 14, 2018, at Lansing. Decided June 26, 2018, at 9:05 a.m. Vacated in part 503 Mich 990 (2019).

Antonio W. Crawford was convicted after a jury trial in the Muskegon Circuit Court of two counts of armed robbery, MCL 750.529, and sentenced to concurrent prison terms of 9½ to 32 years. Testimony elicited by the prosecution indicated that defendant, who was attending a graduation party, had learned through Facebook about a video game that two teenagers were selling from a hospital, a location they chose because it had wireless Internet service, and that defendant told people at the party he was going to go get the game. Defendant, who did not know the sellers, went to the hospital, introduced himself using the name of a personal rival, and told them he wanted to buy the game but first needed to break two 20-dollar bills, which he told them he could do at his house. The three biked to a house, and after defendant chatted with the sellers outside the house, he convinced them to hand him the game and their cell phones, which defendant expressed an interest in trading. Defendant began walking toward the house, then ran away and pointed a gun at the sellers when they tried to stop him. Before trial, defendant, who had initially told the police that he had an alibi, instead provided a statement indicating that he had gone to the hospital to use the bathroom and, while there, two people approached him seeking to buy drugs, then seeking to sell a video game. The statement claimed that defendant had returned the game to the people after telling them he was not interested. At trial, the prosecution introduced evidence that defendant had previously robbed a teenager by attacking him from behind and taking his MP3 player and headphones, explaining that evidence of this 2011 incident was relevant to show intent and motive. Defendant appealed as of right, and the Court of Appeals affirmed his convictions and sentences, holding that although the other-acts evidence was not similar enough to the charged acts to support an inference of a common plan, scheme, or system, it was sufficiently similar to be admissible for showing intent. *People v Crawford*, unpublished per curiam opinion of the Court of Appeals, issued May 16, 2017 (Docket No. 330215). Defendant appealed in the

Supreme Court, which, in lieu of granting leave to appeal, vacated the part of the Court of Appeals judgment holding that the other-acts evidence was properly admitted to show intent and remanded the case to the Court of Appeals for reconsideration, under *People v Denson*, 500 Mich 385 (2017), of "whether the other-acts evidence was relevant to show the necessary intent for armed robbery and not merely propensity for wrongdoing." 501 Mich 974 (2018). The Supreme Court denied leave to appeal in all other respects.

The Court of Appeals *held*:

1. MRE 404(b)(1) provides that although evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith, it may be admissible for other purposes, including proof of intent. In *Denson*, the Supreme Court examined MRE 404(b) in the context of other-acts evidence that was admitted on the basis of similarity and for the purpose of rebutting the defendant's claims of self-defense and defense of others. The *Denson* Court used the four-prong test set forth in *People v VanderVliet*, 444 Mich 52 (1993), which requires a court to determine whether the prosecution has articulated a proper noncharacter purpose for admission of the other-acts evidence, whether the other-acts evidence is logically relevant, whether the probative value of the other-acts evidence is substantially outweighed by the danger of unfair prejudice, and whether to provide a limiting instruction under MRE 105 if requested to do so. Evidence is logically relevant if it is material and has probative value. Other-acts evidence is material if it is related to a fact that is of consequence in the case, meaning that the fact sought to be proven must truly be at issue. Evidence is probative if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. In the context of other-acts evidence, the court must determine whether the prosecution has established some intermediate inference, other than the improper inference of character, which in turn is probative of the ultimate issues in the case. If not, the evidence is inadmissible. In making this determination, a court must examine the similarity between the other act and the charged offense. The degree of similarity that is required between a defendant's other act and the charged offense depends on the manner in which the prosecution intends to use the other-acts evidence. When other acts are offered to show intent, logical relevance dictates only that the charged crime and the proffered other acts are of the same general category.

2. The trial court did not abuse its discretion by admitting evidence of the 2011 robbery. First, admission of the other-acts evidence served the proper purpose of showing defendant's intent. There was evidence that defendant had told someone at the party that he was leaving in order to get the video game; on the other hand, defendant told the police that he went to the hospital simply to use a bathroom and coincidentally ran into the sellers. As part of the prosecution's attempt to prove that defendant acted with the intent to permanently deprive the sellers of their property, which is an element of armed robbery, the prosecution was not limited to presenting evidence pertaining to the immediate point at which defendant walked off with the cell phones and video game. Second, the evidence of the 2011 robbery committed by defendant was material to a fact that was of consequence at trial, namely, defendant's intent to permanently deprive the victims of their property. Further, because evidence of the 2011 robbery made it more probable than without the evidence that defendant acted with the necessary intent to steal, the prosecution established the proper intermediate inference of intent arising from the other-acts evidence, and not the improper inference of character or propensity to commit the crime. When other acts are offered to show intent, logical relevance dictates only that the charged crime and the proffered other acts are of the same general category, and both crimes involved using the element of surprise to rob teenage victims of electronic devices. For purposes of establishing an intermediate inference of intent, the two offenses were sufficiently similar. Third, evidence of the 2011 robbery had significant probative value with respect to the issue of proving defendant's intent, and the probative value was not substantially outweighed by the danger of unfair prejudice given that the other-acts evidence did not inject considerations such as jury bias, shock, or anger. Finally, any error in the trial court's ruling was harmless given that the testimony of the two victims was consistent, that defendant provided the police with conflicting accounts, and that testimony indicated that defendant forced one of the victims to deny on camera that defendant had participated in the crime.

Affirmed.

Judge MARKEY, concurring in part and dissenting in part, would have held that the trial court abused its discretion by admitting the other-acts evidence because the evidence of the prior robbery was only marginally probative of defendant's intent regarding the charged armed robbery given that the other-acts evidence sought to negate defendant's statement of innocent

intent regarding his conduct *before* the robbery occurred, a point at which defendant's intent was of little consequence, and because she believed the other-acts evidence only operated to show defendant's intent through the prohibited inference of propensity. However, she concurred in the result reached by the majority because she agreed that the error was harmless.

1. EVIDENCE — OTHER-ACTS EVIDENCE — RELEVANCE — SIMILARITY — PROOF OF INTENT.

To determine whether evidence of a defendant's other crimes, wrongs, or acts is admissible under MRE 404(b), a court must determine whether the prosecution has established some intermediate inference, other than the improper inference that a defendant was acting in conformity with his or her character, which in turn is probative of the ultimate issues in the case; in making this determination, a court must examine the similarity between the other act and the charged offense; the degree of similarity that is required between a defendant's other act and the charged offense depends on the manner in which the prosecution intends to use the other-acts evidence; when other acts are offered to show intent, logical relevance dictates only that the charged crime and the proffered other acts are of the same general category.

2. EVIDENCE — OTHER-ACTS EVIDENCE — RELEVANCE — PROOF OF INTENT — TIMING.

In using other-acts evidence to establish that a defendant acted with the requisite intent to commit a robbery, the prosecution is not limited to presenting evidence pertaining to the immediate point at which the defendant acted to permanently deprive the victim of his or her property.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Dale J. Hilson*, Muskegon County Prosecutor, and *Charles F. Justian*, Chief Appellate Attorney, for the people.

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

ON REMAND

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

MURPHY, J. Defendant was convicted after a jury trial of two counts of armed robbery, MCL 750.529, and sentenced to concurrent prison terms of 9½ to 32 years. Defendant appealed as of right, and this panel affirmed his convictions and sentences. *People v Crawford*, unpublished per curiam opinion of the Court of Appeals, issued May 16, 2017 (Docket No. 330215). In lieu of granting leave to appeal, our Supreme Court vacated solely that part of our judgment which held that other-acts evidence of a prior robbery was properly admitted to show intent. *People v Crawford*, 501 Mich 974 (2018). The Supreme Court directed us to reconsider, under *People v Denson*, 500 Mich 385; 902 NW2d 306 (2017), "whether the other-acts evidence was relevant to show the necessary intent for armed robbery and not merely propensity for wrongdoing." *Crawford*, 501 Mich at 974. Leave to appeal was denied in all other respects. *Id*. We hold that evidence of the 2011 robbery served the proper purpose of showing "intent," MRE 404(b)(1), that it was logically relevant, MRE 401 and MRE 402, and that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, MRE 403. See *Denson*, 500 Mich at 398, quoting *People v Vander-Vliet*, 444 Mich 52, 55; 508 NW2d 114 (1993). Moreover, assuming error, it was harmless. MCL 769.26; *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Accordingly, we once again affirm.

We begin our discussion with the pertinent testimony elicited by the prosecution at trial. Jaeden Kammers posted on his Facebook page that he had a video game for sale. Kammers and a friend, Daniel Ribon, later rode their bikes to Hackley Hospital because it had wireless Internet service and they wished to send a message about the game to a friend, Jainautica Watkins, who was attending a graduation party. From the hospital, a message was sent by Kammers, and Watkins re-

sponded using his cell phone, indicating that he was interested in purchasing the video game. Watkins allowed defendant, who was also present at the graduation party, to use his cell phone to check Facebook. Defendant, using Watkins's cell phone, began communicating with Kammers. Defendant learned about the video game and the presence of Kammers at Hackley Hospital. He then left the graduation party, telling Watkins, "I'm gonna go get that game." Defendant went to the hospital, meeting Kammers and Ribon at that location. Defendant, who was unknown to both Kammers and Ribon, falsely identified himself, giving the name of a personal rival. Defendant indicated a desire to purchase the game but claimed that he first needed to break a couple of 20-dollar bills. He supposedly was unsuccessful in doing so at the hospital. Defendant next informed Kammers and Ribon that he could get change at his house, and the three of them biked to a house. Defendant did not go inside, and he engaged Kammers and Ribon in friendly conversation outside the house. Kammers and Ribon allowed defendant to examine the video game and their cell phones after defendant suggested the possibility of trading phones. With the game and phones in hand, defendant began walking toward the house, leading Kammers and Ribon to believe that he was going to get money inside. Defendant instead started to run away, and upon an attempt by Kammers and Ribon to stop him, defendant pointed a gun at the pair, asking whether they were "tryin' to do something."

On the day before the trial began, defendant, who had earlier told the police that he had an alibi, provided a new statement to the police, indicating that defendant had been at the graduation party on the day

of the offense, that he left the party after about 30 minutes, that he walked to nearby Hackley Hospital to use a bathroom, that he inadvertently bumped into Kammers and Ribon at the hospital, with the two making a request to purchase drugs from defendant, and that defendant refused to sell them any drugs. Defendant further asserted that Kammers and Ribon then pulled out a video game and asked him whether he was interested in buying it, and that defendant looked at the game, but then returned it to them, declining to purchase the game because he did not have the required gaming system. Defendant additionally claimed that, upon request, he allowed Kammers and Ribon to look at defendant's cell phone, that they returned his phone to him, and that he then left. Defendant's statement effectively constituted a claim that he went to the hospital with innocent intent, lacking any plan or intent to rob Kammers and Ribon, and that he indeed did not rob them.

With respect to the other-acts evidence, the 2011 robbery committed by defendant entailed defendant walking behind the 15-year-old victim, suddenly attacking the teenager from the rear, physically assaulting him, and then stealing the victim's MP3 player and headphones. The prosecutor successfully argued in favor of the introduction of the other-acts evidence, maintaining, in part, that it was admissible to show intent and motive, especially in light of defendant's most recent statement that he had an innocent interaction with Kammers and Ribon at Hackley Hospital.

We review for an abuse of discretion a trial court's decision to admit evidence. *Denson*, 500 Mich at 396. "However, whether a rule or statute precludes admission of evidence is a preliminary question of law that this Court reviews de novo." *Id*. When a trial court

admits evidence that is inadmissible as a matter of law, the court necessarily abuses its discretion. *Id*.

MCL 750.529, Michigan's armed robbery statute, sets forth the nature of the crime, providing, in pertinent part, as follows:

> A person who engages in conduct proscribed under section 530 and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years.

As indicated in this statutory language, MCL 750.529 incorporates by reference MCL 750.530, which is the general robbery statute, and which provides:

> (1) A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.
>
> (2) As used in this section, "in the course of committing a larceny" includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.

Armed robbery is a specific-intent crime, requiring proof that the defendant intended to permanently deprive the owner of his or her property. *People v Harverson*, 291 Mich App 171, 177-178, 178 n 2; 804 NW2d 757 (2010); *People v Williams*, 288 Mich App 67, 72 n 3, 76; 792 NW2d 384 (2010), aff'd 491 Mich 164 (2012); *People v Lee*, 243 Mich App 163, 168; 622 NW2d

71 (2000); *People v Parker*, 230 Mich App 337, 344; 584 NW2d 336 (1998); *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995); M Crim JI 18.1 (setting forth the elements of armed robbery and defining the "larceny" component as the "taking and movement of someone else's property or money with the intent to take it away from that person permanently"). Accordingly, the prosecution in the instant case was required to establish beyond a reasonable doubt that defendant intended to permanently deprive the two victims of their property.

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, *intent*, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [Emphasis added.]

In *Denson*, our Supreme Court examined MRE 404(b) in the context of other-acts evidence that was admitted on the basis of similarity and for the purpose of rebutting the defendant's claims of self-defense and defense of others. The Court reviewed the test for admitting other-acts evidence under MRE 404(b), citing the *VanderVliet* factors. *Denson*, 500 Mich at 398. With respect to the first prong, the *Denson* Court stated:

> Under the first prong of the *VanderVliet* test, the question is whether the prosecution has articulated a proper noncharacter purpose for admission of the other-acts evidence. The prosecution bears the burden of establishing that purpose. MRE 404(b) prohibits the admission

> of other-acts evidence when the prosecution's only theory of relevance is that the other act demonstrates the defendant's inclination for wrongdoing in general and thus indicates that the defendant committed the conduct in question. On the other hand, such other-acts evidence may be admissible whenever it is also relevant to a noncharacter purpose, such as one of the purposes specifically enumerated in MRE 404(b)(1).
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> * * *
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> . . . [W]e have warned that a common pitfall in MRE 404(b) cases is that trial courts tend to admit other-acts evidence merely because the proponent has articulated a permissible purpose. The "mechanical recitation" of a permissible purpose, without explaining how the evidence relates to the recited purpose, is insufficient to justify admission under MRE 404(b). It is incumbent on a trial court to vigilantly weed out character evidence that is disguised as something else. In other words, merely *reciting* a proper purpose does not actually demonstrate the *existence* of a proper purpose for the particular other-acts evidence at issue and does not automatically render the evidence admissible. Rather, in order to determine whether an articulated purpose is, in fact, merely a front for the improper admission of other-acts evidence, the trial court must closely scrutinize the logical relevance of the evidence under the second prong of the *VanderVliet* test. [*Denson*, 500 Mich at 398-400 (citations, quotation marks, and brackets omitted).]

The second prong of the *VanderVliet* test—logical relevance—implicates MRE 401 and MRE 402 and is the "touchstone" relative to the admissibility of other-acts evidence. *Denson*, 500 Mich at 400-401.[1] "Other-acts evidence is logically relevant if two components

[1] MRE 401 and MRE 402 provide, respectively, as follows:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the

are present: materiality and probative value." *Id*. at 401. Concerning "materiality," it requires other-acts evidence to be related to a fact that is of consequence in the case, meaning that the fact sought to be proven must truly be at issue. *Id*. In relation to materiality, the *Denson* Court noted that the prosecution has the burden to prove all the elements of a charged crime beyond a reasonable doubt. *Id*. With respect to probative value, the Supreme Court explained:

> The prosecution must demonstrate the probative value of the other-acts evidence. . . .
>
> Evidence is probative if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Generally, the threshold is minimal: any tendency is sufficient probative force. In the context of prior acts evidence, however, MRE 404(b) stands as a sentinel at the gate: the proffered evidence truly must be probative of something *other* than the defendant's propensity to commit the crime. Thus, although the prosecution might claim a permissible purpose for the evidence under MRE 404(b), the prosecution must also *explain how* the evidence is relevant to that purpose without relying on a propensity inference. Ultimately, the court must determine whether the prosecution has established some intermediate inference, other than the improper inference of character, which in turn is probative of the ultimate issues in the case. If not, the evidence is inadmissible.
>
> In evaluating whether the prosecution has provided an intermediate inference other than an impermissible character inference, we examine the similarity between a

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determination of the action more probable or less probable than it would be without the evidence. [MRE 401.]

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible. [MRE 402.]

> defendant's other act and the charged offense. In this case, we note that the prosecution sought to admit the other-acts evidence *particularly* based on the alleged similarities between the 2002 incident and the charged offense. The degree of similarity that is required between a defendant's other act and the charged offense depends on the manner in which the prosecution intends to use the other-acts evidence. [*Id*. at 401-403 (citations, quotation marks, ellipsis, and brackets omitted).]

We note that "[w]hen other acts are offered to show *intent*, logical relevance dictates only that the charged crime and the proffered other acts are of the same general category." *VanderVliet*, 444 Mich at 79-80 (emphasis added; quotation marks and citation omitted). "The level of similarity required when disproving innocent intent is less than when proving modus operandi." *Id*. at 80 n 36; see also *People v Mardlin*, 487 Mich 609, 622; 790 NW2d 607 (2010).

The third prong of the *VanderVliet* test provides that the probative value of the other-acts evidence cannot be substantially outweighed by the danger of unfair prejudice. *Denson*, 500 Mich at 398. The *Denson* Court did not find it necessary to construe and discuss this prong because it concluded that the other-acts evidence was inadmissible on the ground that it was not logically relevant to a permissible purpose. *Id*. at 409 n 13. The third prong simply requires the trial court to "employ the balancing process under [MRE] 403." *VanderVliet*, 444 Mich at 74-75. MRE 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The fourth and final *VanderVliet* prong states that "the trial court, upon request, may provide a limiting

instruction under [MRE] 105." *VanderVliet*, 444 Mich at 75; see also *Denson*, 500 Mich at 398.

Here, the evidence suggests that defendant's plan was to engage Kammers and Ribon in an unthreatening manner and with friendly banter, all as part of a ruse to have the unsuspecting pair lower their guards, which obviously occurred when Kammers and Ribon voluntarily handed the game and their cell phones to defendant. Indeed, Kammers and Ribon were not even concerned when defendant initially began to walk away from them with their property. Subterfuge and deception were revealed when defendant provided Kammers and Ribon with a false name at the hospital. Under these circumstances, we believe that the crime first began unfolding when defendant met Kammers and Ribon at Hackley Hospital. Thus, defendant's conduct and interactions with the victims associated with events at Hackley Hospital, placing Kammers and Ribon at ease and making them susceptible to robbery, can be viewed as occurring in the course of committing a larceny or during the commission of a larceny, even though the period was somewhat protracted. MCL 750.529; MCL 750.530.

Regardless, as indicated earlier, the prosecution was required to prove that defendant acted with the intent to permanently deprive Kammers and Ribon of their property, i.e., that defendant intended to rob them or steal from them. As part of attempting to satisfy that burden of proof, the prosecution was certainly entitled to present evidence showing that defendant had formed the requisite intent to steal as early as the graduation party when he was using Watkins's cell phone. Importantly, the prosecution was not limited to proving intent solely by way of evidence pertaining to the immediate point at which defendant walked off

with the cell phones and video game.[2] The intent to commit a crime can be developed or exist long before an offense is actually committed. Thus, for example, if there is testimony that a perpetrator was overheard stating an intent to kill a particular person and that person was murdered a week later, the testimony can be used to establish an intent to kill in a murder prosecution, with the testimony being critical on the issue of intent despite the lapse of time between the perpetrator's statement and the killing. In the instant case, there was evidence that defendant told Watkins at the graduation party that he was leaving in order to "go get that game" and that defendant was just stringing Kammers and Ribon along while at the hospital, using a false identity. On the other hand, in defendant's statement given to police right before trial, defendant claimed that he went to the hospital simply to use a bathroom and coincidentally ran into Kammers and Ribon. Stated otherwise, defendant asserted a completely innocent intent in going to Hackley Hospital. In light of this conflicting evidence, we conclude, as to the first prong of the *VanderVliet* test, that admission of the other-acts evidence served the proper purpose of showing defendant's "intent," MRE 404(b)(1), even if it was developed earlier than when he and the victims were at the house.

With respect to logical relevance, the second *VanderVliet* prong, the evidence of the 2011 robbery committed by defendant was material to a fact that was of consequence at trial, i.e., defendant's intent to permanently deprive the victims of their property, which is an element of the crime of armed robbery. *Denson*, 500 Mich at 401; *Harverson*, 291 Mich App at 177-178, 178 n 2. The second component of logical

[2] We note that $5 was also taken by defendant.

relevance—probative value—requires an assessment, in the context of this case, of whether the 2011 robbery made it more probable than without the evidence that defendant acted with the necessary intent to steal. *Denson*, 500 Mich at 401-402. We conclude that the prosecution established the proper intermediate inference of "intent" arising from the other-acts evidence, and not the improper inference of character or propensity to commit the crime. *Id*. at 402. As indicated earlier, the *Denson* Court explained that "[i]n evaluating whether the prosecution has provided an intermediate inference other than an impermissible character inference, we examine the similarity between a defendant's other act and the charged offense," with the required degree of similarity being dependent "on the manner in which the prosecution intends to use the other-acts evidence." *Id*. at 402-403. And, as also mentioned earlier, "[w]hen other acts are offered to show *intent*, logical relevance dictates only that the charged crime and the proffered other acts are of the same general category." *VanderVliet*, 444 Mich at 79-80 (emphasis added; quotation marks and citation omitted).

Both offenses involved the robbery of electronic devices or personal property associated with electronic devices: an MP3 player and headphones in the 2011 robbery and a video game and cell phones in the instant prosecution. Also, both crimes involved teenage victims. Although different in character, both robberies involved the element of surprise, with defendant suddenly and unexpectedly pouncing on the victim from behind in the 2011 robbery and, here, defendant lulling Kammers and Ribon into a false sense of security before suddenly and unexpectedly walking off with their property. We recognize that there are also differences between the two offenses, given that the 2011 robbery entailed an actual physical assault and bat-

tery and the instant offense did not and that a gun was displayed in the charged offense but not in connection with the 2011 robbery. That said, defendant used his cunning to avoid the need to physically assault and injure Kammers and Ribon, while still revealing an intent to employ violence if necessary when he flashed and pointed the gun at Kammers and Ribon. For purposes of establishing an intermediate inference of "intent," we rule that the two offenses were sufficiently similar. In sum, with regard to probative value, the other-acts evidence pertaining to the 2011 robbery made it more probable than without the evidence that defendant acted with the requisite intent to permanently deprive Kammers and Ribon of their property.

Finally, we conclude, under the balancing test set forth in MRE 403, i.e., the third *VanderVliet* factor, that the probative value of the 2011 robbery on the issue of intent was not substantially outweighed by the danger of unfair prejudice. MRE 403 "does not prohibit prejudicial evidence; only evidence that is unfairly so." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). And "[e]vidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Id*. "In other words, where a probability exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect, a situation arises in which the danger of 'prejudice' exists." *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995) (quotation marks and citation omitted). "All evidence offered by the parties is 'prejudicial' to some extent, but the fear of prejudice does not generally render the evidence inadmissible." *Id*. at 75. Unfairness might arise when the other-acts evidence injects considerations extraneous to the merits of a

case, e.g., a jury's bias, shock, sympathy, or anger. *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005). "Unfairness might not exist where . . . the critical evidence supporting a party's position on a key issue raises the danger of prejudice within the meaning of MRE 403 . . . but the proponent of this evidence has no less prejudicial means by which the substance of this evidence can be admitted." *Mills*, 450 Mich at 76 (quotation marks and citation omitted). "[T]he prosecution may offer all relevant evidence, subject to MRE 403, on every element [of an offense]," given that the elements of an offense "are always at issue." *Id*. at 71.

We conclude that the other-acts evidence had significant probative value with respect to the issue of proving defendant's intent. And even if the probative value was not that great, it cannot be said that the probative value was *substantially* outweighed by the danger of *unfair* prejudice. We cannot find that the other-acts evidence injected considerations of jury bias, shock, or anger, or that it was given undue or preemptive weight by the jury.

In sum, the trial court did not abuse its discretion or otherwise err in admitting the other-acts evidence regarding the 2011 robbery. Moreover, as we indicated in the previous opinion in this case, assuming error in the trial court's ruling, it was harmless. *Crawford*, unpub op at 6 n 3. Given that the testimony of the two victims was consistent, that defendant provided the police with conflicting accounts, having first claimed an alibi but then later acknowledging that he met with Kammers and Ribon, and that there was testimony that defendant confronted Kammers after the crime and essentially forced him to deny on camera defendant's participation in the crime, all of which was untainted evidence, we hold that defendant has not

shown that it is more probable than not that a different outcome would have resulted without the assumed evidentiary error; there was no miscarriage of justice. MCL 769.26; *Lukity*, 460 Mich at 495-496.

Affirmed.

METER, J., concurred with MURPHY, J.

MARKEY, P.J. (*concurring in part and dissenting in part*). I concur in the result reached by the majority, but I respectfully disagree that the other-acts evidence in this case, a 2011 robbery that defendant committed, was relevant to prove the proper purpose of defendant's intent without operating through the propensity inference that MRE 404(b) prohibits. According, I conclude, as our Supreme Court did in *People v Crawford*, 458 Mich 376, 397; 582 NW2d 785 (1998), that "[b]ecause MRE 404(b) expressly prohibits the use of prior bad acts to demonstrate a defendant's propensity to form a certain mens rea, . . . the trial court abused its discretion in admitting evidence of the defendant's prior" robbery. Nevertheless, I agree with the majority and this Court's prior opinion that the error of admitting the other-acts evidence was harmless. *People v Crawford*, unpublished per curiam opinion of the Court of Appeals, issued May 16, 2017 (Docket No. 330215), p 6 n 3, citing *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Following a jury trial, defendant was convicted of two counts of armed robbery, MCL 750.529, and the trial court sentenced him to concurrent terms of 9½ to 32 years' imprisonment. On his appeal by right, this Court affirmed defendant's convictions and sentences. In lieu of granting leave to appeal, our Supreme Court vacated the part of this Court's opinion "addressing

whether the other-acts was probative of defendant's intent" and remanded this case to this Court for reconsideration in light of *People v Denson*, 500 Mich 385 (2017). *People v Crawford*, 501 Mich 974 (2018). This Court was directed to "reconsider whether the other-acts evidence was relevant to show the necessary intent for armed robbery and not merely propensity for wrongdoing." *Id*. In all other respects, the Court denied defendant leave to appeal. *Id*.

On reconsideration, I conclude that the trial court abused its discretion by admitting the other-acts evidence. The evidence of the prior robbery was only marginally probative of defendant's intent regarding the charged armed robbery, and I believe it only operated to show his intent through the prohibited inference of propensity. The evidence sought to negate defendant's statement of innocent intent regarding his conduct *before* the robbery occurred, a point at which defendant's intent was of little consequence. More important, the prosecution did not establish a logical intermediate inference, other than propensity, through which the evidence was material and probative of the necessary intent for robbery.

"MRE 404(b) prohibits the admission of other-acts evidence when the prosecution's only theory of relevance is that the other act demonstrates the defendant's inclination for wrongdoing in general and thus indicates that the defendant committed the conduct in question." *People v Denson*, 500 Mich 385, 398; 902 NW2d 306 (2017). Also, the prosecution bears the burden of articulating a proper noncharacter purpose for the other-acts evidence. *Id*. More is required than a rote incantation of a permissible purpose; the prosecution must explain how the evidence relates to the proper purpose other than through propensity. *Id*. at

400. "[M]erely *reciting* a proper purpose does not actually demonstrate the *existence* of a proper purpose for the particular other-acts evidence at issue and does not automatically render the evidence admissible." *Id*.

The *Denson* Court further stressed that trial courts must closely scrutinize the logical link between the other-acts evidence and the asserted proper, nonpropensity purpose. Indeed, logical relevance is the "touchstone" of admissibility of other-acts evidence, which requires showing both materiality and probative value. *Id*. at 400-401. "Materiality is the requirement that the other-acts evidence be related to" a consequential fact. *Id*. at 401. Evidence has probative value when it is relevant, "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; see also *Denson*, 500 Mich at 401-402. The prosecution must assert not only a proper purpose for the evidence but also "*explain how* the evidence is relevant to that purpose *without relying on a propensity inference*." *Denson*, 500 Mich at 402 (emphasis added). I conclude the prosecution failed to articulate an intermediate, nonpropensity inference through which the prior robbery tended to prove defendant's intent in this case.

The intent necessary for the offense of armed robbery is the intent necessary to commit larceny. *People v Williams*, 288 Mich App 67, 76; 792 NW2d 384 (2010). The intent necessary to commit larceny is supplied by the common law, which is the intent to steal another's property or to permanently deprive the owner of his or her property. *People v March*, 499 Mich 389, 401; 886 NW2d 396 (2016); *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010). By definition, the

necessary intent for robbery must exist while the defendant is "in the course of committing a larceny," MCL 750.530(1), which "includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property." MCL 750.530(2). In other words, defendant's intent *before* attempting to commit a larceny is not a fact necessary to prove the offense of robbery but may, of course, be probative of defendant's future intent while "in the course of committing a larceny." MCL 750.530.

In my view, the prosecution has failed to meet its burden of showing that the other-acts evidence is logically relevant to the asserted proper purpose of intent through some intermediate inference other than propensity. *Denson*, 500 Mich at 402. The prosecution contended that the other-acts evidence was relevant to show a scheme, plan, or system of doing an act. But this Court determined that there were insufficient similarities between the charged offense and the prior act for the other-acts evidence to be admitted under this theory. See *Crawford*, unpub op at 5-6; see also *Denson*, 500 Mich at 403 ("If the prosecution creates a theory of relevance based on the alleged similarity between a defendant's other act and the charged offense, we require a 'striking similarity' between the two acts to find the other act admissible.").

The majority concludes "that admission of the other-acts evidence served the proper purpose of showing defendant's 'intent' " and also "that the prosecutor established the proper intermediate inference of 'intent' arising from the other-acts evidence, and not the improper inference of character or propensity to commit the crime." In other words, "intent" serves both as

the proper fact sought be proved and the intermediate nonpropensity inference to get to that proper fact. The majority finds support in *People v VanderVliet*, 444 Mich 52, 79-80; 508 NW2d 114 (1993), in which the Court opined that "[w]hen other acts are offered to show *intent*, logical relevance dictates only that the charged crime and the proffered other acts are of the same general category" (emphasis added; quotation marks and citation omitted), and also noted that *mens rea* or lack of accident are permissible intermediate inferences, *id*. at 87. But *VanderVliet* also instructs that a proper MRE 404(b) purpose, such as intent, may not be proved when it is proved through the prohibited inference arising from character or propensity. *Id*. at 63-64.

I simply do not agree that the prior robbery shows defendant's "intent" by any inference other than that defendant has the propensity to commit such crimes. As explained by the Court in *Crawford*, 458 Mich at 392-393, other-acts evidence may prove intent through the nonpropensity theory of the "doctrine of chances" or "doctrine of objective improbability." See also *VanderVliet*, 444 Mich at 79 n 35. This theory "rests on the premise that 'the more often the defendant commits an actus reus, the less is the likelihood that the defendant acted accidentally or innocently.' " *Crawford*, 458 Mich at 393 (citation omitted). But because intent in some form is almost always an element of the crime, merely asserting that the other-acts evidence will prove intent is insufficient and must be closely scrutinized by courts. See *id*. at 394; *Denson*, 500 Mich at 400. For evidence to be admissible under the theory of the doctrine of chances to prove intent, there must be a close factual nexus in terms of similarity between the evidence and the charged offense. *Crawford*, 458 Mich at 395, nn 12 & 13. "If the prosecution creates a

theory of relevance based on the alleged similarity between a defendant's other act and the charged offense, we require a 'striking similarity' between the two acts to find the other act admissible." *Denson*, 500 Mich at 403. In this case, the prior robbery is logically relevant to defendant's intent only if, because the two events are so similar, it may be inferred that defendant possessed the intent to commit robbery on each occasion. But this Court held in our prior opinion that the two robberies were not sufficiently similar to be admitted on this basis. *Crawford*, unpub op at 5-6. In my opinion, merely asserting that "intent" is both the proper purpose and the noncharacter intermediate inference of the prior robbery does not render it admissible.

Despite my disagreement with the majority concerning admissibility, I concur that the error in this case was harmless. Under the harmless-error rule, "the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *Lukity*, 460 Mich at 495. In sum, "nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *Id*. at 495-496, quoting MCL 769.26.

Unlike in *Denson*, 500 Mich at 410, the untainted evidence of defendant's guilt in this case was overwhelming. At trial, the testimony of Kammers and Ribon regarding the robbery was generally consistent. Kammers and Ribon identified defendant as the perpetrator at trial and throughout the investigation. Kammers testified that defendant had identified him-

self as Hicks, and other evidence showed that Hicks looked nothing like defendant and that there was animosity between defendant and Hicks. One witness testified that defendant would use Hicks's name because defendant would not care if Hicks got into trouble.

Further, evidence of defendant's own actions indicated consciousness of guilt. Defendant gave the police conflicting statements regarding his whereabouts and conduct on August 9, 2014. Defendant made a late statement that placed him at Hackley Hospital meeting the victims concerning a video game they had for sale. Further testimony showed that, before trial, defendant approached Kammers and asked him to state on camera that defendant was not the person who robbed him and that the police had given him defendant's name. Consequently, it does not affirmatively appear more probable than not that the error in the admission of evidence of the 2011 robbery was outcome-determinative. *Lukity*, 460 Mich at 495-496. Therefore, I would again affirm defendant's convictions and sentences.

PEOPLE v ZITKA

PEOPLE v HERNANDEZ-ZITKA

Docket Nos. 338064 and 338065. Submitted May 8, 2018, at Lansing. Decided May 10, 2018. Approved for publication June 26, 2018, at 9:10 a.m.

Bruce A. Zitka and Susan Hernandez-Zitka were each charged in the Ingham Circuit Court with three counts of conducting a gambling operation without a license, MCL 432.218(1)(a), and three counts of using a computer to commit a crime, MCL 752.796 and MCL 752.797(3)(e). Defendants owned and operated three Internet lounges in Muskegon County—The Landing Strip, The Lucky Mouse, and Fast Lane—in which customers opened accounts to wager on and play games online. The Michigan Gaming Control Board investigated defendants' lounges to determine whether illegal gambling was taking place at those businesses, but the board halted its investigation when the Norton Shores Police Department began its own investigation of alleged gambling activities at The Landing Strip. Following that investigation, the Norton Shores city attorney brought a civil-nuisance-abatement action in the Muskegon Circuit Court against The Landing Strip, alleging violations of the local zoning code. Defendants and the city attorney stipulated to the charges being dismissed in exchange for defendants agreeing to operate The Landing Strip without violation of any applicable gambling laws or ordinances "as it is currently operating." The board then resumed its investigation of all three lounges before later filing criminal charges against defendants in the Ingham Circuit Court. In binding defendants over on the charges, 54-A District Court Judge Hugh Clarke determined that the offense of using a computer to commit a crime was a specific-intent crime, while conducting a gambling operation without a license was a general-intent crime. Defendants moved to quash in the Ingham Circuit Court, arguing that both offenses were specific-intent crimes and that because the stipulated order of dismissal of the civil case was a judicial determination that defendants were operating the lounge legally, defendants were acting under a mistake of law that negated the *mens rea* element of both offenses. Ingham Circuit Court Judge William E. Collette

granted the motion, reasoning that the prosecution was collaterally estopped from bringing the charges because the attorney general could have intervened in the earlier civil litigation but chose not to do so. The prosecution appealed.

The Court of Appeals *held*:

1. Collateral estoppel generally precludes relitigation of an issue in a subsequent proceeding when that issue has previously been the subject of a final judgment in an earlier proceeding. Collateral estoppel applies when (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment; (2) the same parties had a full and fair opportunity to litigate the issue; and (3) there was mutuality of estoppel, which requires that the party seeking to invoke the doctrine establish that his or her adversary was a party to, or in privy with a party to, the previous action. The application of collateral estoppel in the civil-to-criminal context—that is, cross-over estoppel—is exercised cautiously because of the fundamental procedural differences in criminal and civil actions. In this case, the civil litigation concerned defendants' compliance with local zoning laws in its operation of The Landing Strip, and the legality of its operations at each lounge was not at issue. Accordingly, the issue whether defendants violated state criminal laws was not actually litigated in the civil proceeding. Because the state had no protectable interest in the civil action involving a local zoning ordinance and there was no coordination between the city attorney's office and attorney general's office, the prosecution was not a party to, or in privy with a party to, the civil action. Finally, it would be contrary to sound public policy to apply collateral estoppel given that the purposes of the two proceedings were fundamentally different. For that reason, the circuit court abused its discretion by granting defendants' motion to quash and dismissing the cases on the basis of collateral estoppel.

2. A specific-intent crime requires a particular criminal intent beyond the act done, whereas a general-intent crime merely requires the intent to perform the physical act itself. Courts will infer an element of criminal intent when an offense is silent regarding *mens rea* unless the statute contains an express or implied indication that the legislative body intended that strict criminal liability be imposed. MCL 432.218(1)(a) provides that a person is guilty of a felony and shall be barred from receiving or maintaining a license for conducting a gambling operation when wagering is used or to be used without a license issued by the board. The statute does not contain an express or implied indication that the Legislature intended that strict liability be

imposed. Instead, the statute's use of the term "conducting" indicates that the *mens rea* element was the intent to perform the act of "conducting," which is consistent with a general-intent crime. Accordingly, the district court erred by concluding that MCL 432.218(1)(a) was a specific-intent crime.

3. Neither mistake-of-law nor entrapment by estoppel were valid defenses to the charged crimes. Neither defense applied to the MCL 432.218(1)(a) charges in these cases because that offense is a general-intent crime, and defendants' alleged belief that they were operating the lounges in compliance with the law was immaterial to whether they committed the offense. Neither defense applied to the MCL 752.796 and MCL 752.797(3)(e) charges because defendants' claimed reliance on the city attorney's agreement in the stipulated order that operations at The Landing Strip complied with state gambling laws was not reasonable. Accordingly, the circuit court erred by granting defendants' motion to quash on the basis of collateral estoppel.

Reversed and remanded.

CRIMINAL LAW — CONDUCTING A GAMBLING OPERATION WITHOUT A LICENSE — *MENS REA* — GENERAL-INTENT CRIME.

MCL 432.218(1)(a)—which provides that a person is guilty of a felony and shall be barred from receiving or maintaining a license for conducting a gambling operation when wagering is used or to be used without a license issued by the Michigan Gaming Control Board—is a general-intent crime, the *mens rea* element of which is the intent to perform the act of "conducting."

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *Daniel C. Grano*, Assistant Attorney General, for the people.

Dodge & Dodge, PC (by *David A. Dodge*) for defendants.

Before: METER, P.J., and GADOLA and TUKEL, JJ.

GADOLA, J. At issue in these consolidated appeals are the charges brought against each defendant for three counts of conducting a gambling operation without a license, MCL 432.218(1)(a), and three counts of using a

computer to commit a crime, MCL 752.796 and MCL 752.797(3)(e). After conducting a preliminary examination, the district court found that probable cause existed to bind over defendants, Bruce H. Zitka and Susan Hernandez-Zitka, to the circuit court. The circuit court, however, entered orders granting defendants' motions to quash the amended information and dismissing all charges. The prosecution appeals as of right, and we reverse and remand for further proceedings.

I. FACTUAL BACKGROUND

Defendants own and operate three Internet lounges located in Muskegon County: The Landing Strip, The Lucky Mouse, and Fast Lane. At these establishments, customers can open accounts to wager on and play games online, including slot and lottery-type games. On April 14, 2015, the Michigan Gaming Control Board (MGCB) began an investigation to determine whether illegal gambling activities were taking place at the lounges. The MGCB interrupted this investigation, however, when the Norton Shores Police Department began its own independent investigation of allegations that unlawful gambling activities were taking place at The Landing Strip. The city attorney for Norton Shores subsequently filed in the Muskegon Circuit Court a civil-nuisance-abatement action against The Landing Strip under the local zoning code. The parties ultimately agreed to dismissal of that case, and the court entered a stipulated order of dismissal on January 28, 2016, stating in part, "Defendants agree to operate the Landing Strip LLC without violation of any applicable gambling laws or ordinances *as it is currently operating*."[1] (Emphasis added.)

[1] Although this provision of the stipulated order was referred to in the Ingham Circuit Court in the present action and in the parties' briefs on

Following the conclusion of the civil lawsuit, the MGCB resumed its investigation of the three lounges in February 2016. As a result of this investigation, defendants were each charged with three counts of conducting a gambling operation without a license, MCL 432.218(1)(a), and three counts of using a computer to commit a crime, MCL 752.796 and MCL 752.797(3)(e). The amended information alleges an offense period extending from February 1, 2016, through October 31, 2016. The district court conducted a two-day preliminary examination and, on January 27, 2017, issued an opinion and order determining that probable cause supported the charges and binding over the cases to the Ingham Circuit Court. In reaching this conclusion, the district court determined that the offense of using a computer to commit a crime, MCL 752.796 and MCL 752.797(3)(e), is a specific-intent crime, while conducting a gambling operation without a license, MCL 432.218(1)(a), constitutes a general-intent crime. With respect to the Muskegon Circuit Court's stipulated order of dismissal, the district court was "not persuaded that the . . . [order], in a civil proceeding, is particularly helpful here in relation to the probable cause standard."

In the Ingham Circuit Court, defendants filed identical motions to quash, arguing that the district court erred by determining that the offense of conducting a gambling operation without a license was a general-intent crime as opposed to a specific-intent crime. Defendants further asserted that because the stipulated order dismissing the civil case reflected a judicial determination that defendants were operating legally,

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appeal, the Muskegon Circuit Court record is not part of the record before this Court. However, the parties do not dispute the nature of the civil case or the contents of the relevant provision of the stipulated order.

defendants were acting under a mistake of law that negated the *mens rea* elements of both offenses. The circuit court granted defendants' motions to quash and stated on the record as follows:

> My opinion is based upon the fact that the Attorney General of this state, in part, has the authority to intervene in any litigation that they want to that would be something that relates to state law, I believe they could have gone back to the circuit judge in this case and asked to intervene and have this reargued in some fashion as to its applicability.
>
> This appears to be a situation where apparently the Attorney General's office and their other agencies were so aggrieved by these poor people that they felt it necessary to investigate for months and months as to whether they existed. They could have walked right in and seen. But in my opinion, when a circuit judge of — is it Muskegon?
>
> * * *
>
> . . . [The Muskegon Circuit Court judge] has the right to make these rulings and put these rulings in effect. But as I have seen in my cases, I have been chastised. I have been appealed. I have even had people come in here and consent to things and your office appealed that because the consent was wrong. I am just amazed. These cases are dismissed.

II. STANDARD OF REVIEW

A trial court's decision regarding a motion to quash an information is reviewed for an abuse of discretion. *People v Miller*, 288 Mich App 207, 209; 795 NW2d 156 (2010). An abuse of discretion occurs when a decision "falls outside the range of reasonable and principled outcomes," *People v Waterstone*, 296 Mich App 121, 131-132; 818 NW2d 432 (2012), and "[a] trial court necessarily abuses its discretion when it makes an

error of law," *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013). "To the extent that a lower court's decision on a motion to quash the information is based on an interpretation of the law, appellate review of the interpretation is de novo." *Miller*, 288 Mich App at 209.

III. DISCUSSION

A. COLLATERAL ESTOPPEL

The prosecution contends that the circuit court abused its discretion by determining that the charges brought against defendants were barred pursuant to collateral estoppel in light of the stipulated order of dismissal in the civil case. We agree.

The doctrine of collateral estoppel generally precludes relitigation of an issue in a subsequent proceeding when that issue has previously been the subject of a final judgment in an earlier proceeding. *Porter v Royal Oak*, 214 Mich App 478, 485; 542 NW2d 905 (1995). Collateral estoppel applies when the following three conditions are satisfied: "(1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full [and fair] opportunity to litigate the issue; and (3) there must be mutuality of estoppel." *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004) (quotation marks and citations omitted; alteration in original). Mutuality of estoppel requires that the party seeking to invoke the doctrine establish that his or her adversary was either a party to, or in privy with a party to, the previous action. *Id*. at 684.

In the vast majority of cases, parties seek to apply collateral estoppel in the context of two civil proceedings. However, our Supreme Court has recognized the

concept of "cross-over estoppel," i.e., "the application of collateral estoppel in the civil-to-criminal context." *People v Trakhtenberg*, 493 Mich 38, 48; 826 NW2d 136 (2012), citing *People v Gates*, 434 Mich 146, 155; 452 NW2d 627 (1990). Yet, in light of the fundamental procedural differences in the civil versus criminal contexts, the Supreme Court has advised exercising caution in applying cross-over estoppel. See *Trakhtenberg*, 493 Mich at 48 ("[W]e must hesitate to apply collateral estoppel in the reverse situation—when the government seeks to apply collateral estoppel to preclude a *criminal* defendant's claim of ineffective assistance of counsel in light of a prior *civil* judgment that defense counsel did not commit malpractice."); *Gates*, 434 Mich at 157 ("[S]uch procedural differences raise serious doubt about the soundness of applying 'cross-over estoppel' in situations such as this case presents.").

The first prong of the collateral-estoppel analysis requires that the ultimate issue to be determined in the subsequent action be the same as that involved in the first action. *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 529; 866 NW2d 817 (2014). Specifically, the common ultimate issues "must be identical, and not merely similar," and additionally "must have been both actually and necessarily litigated." *Id*. In order for an issue to be "actually litigated," it must have been submitted to and determined by the trier of fact. *Id*., citing *VanDeventer v Mich Nat'l Bank*, 172 Mich App 456, 463; 432 NW2d 338 (1988).

Under the present circumstances, the previous civil litigation initiated by the Norton Shores city attorney in the Muskegon Circuit Court concerned defendants' compliance with local zoning laws in operating The Landing Strip. Accordingly, the legality of defendants' operations

under the state criminal laws was not at issue, nor was their operation of The Lucky Mouse or Fast Lane. Further, no issue in the civil litigation was submitted to or determined by the fact-finder; rather, the parties negotiated and stipulated to dismissal of the action. The stipulated order stated, in part, that "[d]efendants agree to operate the Landing Strip LLC without violation of any applicable gambling laws or ordinances *as it is currently operating*." (Emphasis added.) But because the scope of the civil action was limited to defendants' compliance with local ordinances in their operation of The Landing Strip, the interpretation of this provision must be similarly confined. Accordingly, we conclude that the issue whether defendants violated state criminal laws by conducting an unlicensed gambling operation was not actually litigated in the civil proceeding.

For collateral estoppel to apply, it is also required that the same parties, or parties in privy, had a full and fair opportunity to litigate the issue. *Monat*, 469 Mich at 682-683. "A party is one who was directly interested in the subject matter and had a right to defend or to control the proceedings and to appeal from the judgment, while a privy is one who, after the judgment, has an interest in the matter affected by the judgment through one of the parties . . . ." *Rental Props Owners Ass'n*, 308 Mich App at 529-530. The circuit court correctly noted that the state attorney general is authorized to intervene in any state court action "whenever such intervention is necessary in order to protect any right or interest of the state, or of the people of the state." MCL 14.101. However, in the civil action in the Muskegon Circuit Court, the state had no protectable interest. The case involved a city zoning ordinance, a matter of solely local concern, and there was no coordination between the city attorney's office and the attorney general's office or the MGCB in the civil nuisance

action. See *In re Certified Question*, 465 Mich 537, 545; 638 NW2d 409 (2002) ("Just as the authority of counties to sue in matters of local interest cannot be used to undermine the authority of the state to sue in matters of state interest, the authority of the state to sue in matters of state interest cannot be used to undermine the authority of political subdivisions to sue in matters solely of local interest.").[2] Accordingly, the prosecution was neither a party to nor a party in privy to the civil action.

Further, our Supreme Court has declined to apply collateral estoppel in instances when the purposes of the two proceedings are "so fundamentally different that application . . . of collateral estoppel would be contrary to sound public policy." See *Gates*, 434 Mich at 161. For example, in *Gates*, the Supreme Court declined to hold that a prior determination of no jurisdiction in a child protective proceeding operated to collaterally estop subsequent criminal charges. *Id*. at 162. Likewise, in *People v Windsor*, 207 Mich App 221, 223; 523 NW2d 881 (1994), this Court declined to apply a determination of no wrongdoing reached by the Michigan Employment Security Commission to collaterally estop a criminal action involving the same defendant. We therefore conclude that the circuit court abused its discretion by granting the motion to quash and by dismissing the cases on the basis of collateral estoppel.

B. *MENS REA*

The prosecution next contends that conducting an unlicensed gambling operation, MCL 432.218(1)(a), is

[2] *In re Certified Question* involved the interpretation of MCL 14.28, which grants the attorney general the authority to represent and intervene in actions on behalf of the state, as supplemented by the authority granted in MCL 14.101.

a strict-liability offense as opposed to a general-intent offense as determined by the district court. This argument is relevant to the grounds underlying defendants' motion to quash. The essence of defendants' argument in that motion was that—like the offense of using a computer to commit a crime, MCL 752.796 and MCL 752.797(3)(e)—conducting an unlicensed gambling operation is a specific-intent offense and that defendants' *mens rea* for both charges was negated by a mistake of law. Because the circuit court did not rule on the merits of this position, it is unpreserved. See *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007) ("For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court."). Nonetheless, if an issue is raised before the trial court and is pursued on appeal, this Court is not foreclosed from reviewing it even if it was not decided by the trial court. *Loutts v Loutts*, 298 Mich App 21, 23-24; 826 NW2d 152 (2012).

To determine the intent element required to commit a criminal offense, this Court must evaluate the mental state set forth in the relevant statute. *People v Fennell*, 260 Mich App 261, 266; 677 NW2d 66 (2004). "A crime requiring a particular criminal intent beyond the act done is generally considered a specific intent crime; whereas, a general intent crime merely requires 'the intent to perform the physical act itself.' " *Id*., quoting *People v Disimone*, 251 Mich App 605, 610; 650 NW2d 436 (2002). In relevant part, the statute at issue in this case, MCL 432.218, provides:

> (1) A person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $100,00.00, or both, and shall be barred from receiving or maintaining a license for doing any of the following:

> (a) Conducting a gambling operation where wagering is used or to be used without a license issued by the [MGCB].

This language does not expressly indicate a degree of intent, nor does the statute further define the term "conducting." Therefore, the *mens rea* required to violate MCL 432.218(1)(a) is a matter of statutory interpretation.

When interpreting the meaning of a statute, the Court's primary goal is "to ascertain and give effect to the intent of the Legislature." *People v Thomas*, 263 Mich App 70, 73; 687 NW2d 598 (2004) (quotation marks and citations omitted). If the statutory language is clear and unambiguous, it must be enforced as written in accordance with its plain and ordinary meaning. *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008). "However, if a statute is susceptible to more than one interpretation, judicial construction is proper to determine legislative intent. Statutory language should be construed reasonably, keeping in mind the purpose of the act." *Thomas*, 263 Mich App at 73 (quotation marks and citations omitted).

Though MCL 432.218(1)(a) is silent with respect to intent, there is no clear indication that the Legislature sought to discard the *mens rea* requirement. See *People v Kowalski*, 489 Mich 488, 499; 803 NW2d 200 (2011). "[C]ourts will infer an element of criminal intent when an offense is silent regarding *mens rea* unless the statute contains an express or implied indication that the legislative body intended that strict criminal liability be imposed." *People v Likine*, 492 Mich 367, 391-392; 823 NW2d 50 (2012) (quotation marks and citations omitted). For example, in *Likine*, our Supreme Court construed the statute as imposing strict liability because the Legislature had amended that statute to eliminate the terms "refus[al] or neglect," words which

implied an element of intent. *Id*. at 392 (alteration in original). In contrast, the Supreme Court confronted in *Kowalski* a criminal statute that incorporated the element of "encouraging." *Kowalski*, 489 Mich at 499. The Supreme Court determined that although the statute was silent with respect to *mens rea*, it nonetheless had a *mens rea* element, that being "the intent to do the physical act of encouraging." *Id*. at 500. Further, by completing an act, an accused "is presumed to intend the natural consequences of his [actions] . . . ." *Id*. (quotation marks and citation omitted; alteration in original).

MCL 432.218(1)(a) does not contain an express or implied indication that the Legislature intended that strict criminal liability be imposed. As in *Kowalski*, the statute's use of the term "conducting" evidences an intention that the *mens rea* element of MCL 432.218(1)(a) be the intent to perform the act of "conducting." Although the prosecution correctly argues that "the presumption in favor of imposing criminal intent as an element does not invariably apply to public-welfare or regulatory offenses," *People v Janes*, 302 Mich App 34, 47; 836 NW2d 883 (2013), citing *Staples v United States*, 511 US 600, 606; 114 S Ct 1793; 128 L Ed 2d 608 (1994), there is no evidence here that the Legislature intended that strict criminal liability be imposed. Indeed, by attaching a specific-intent element to other subdivisions of MCL 432.218(1), the Legislature demonstrated that its objective was not to impose strict liability for violations of MCL 432.218(1). See MCL 432.218(1)(c) through (e).

The language of MCL 432.218(1)(a) is consistent with that of a general-intent crime as opposed to a specific-intent crime. As noted, Subdivisions (c) through (e) of MCL 432.218(1) include express ele-

ments of specific intent, such as "knowingly" and "willfully," thus requiring criminal intent beyond the physical act done. See *People v Gould*, 225 Mich App 79, 85; 570 NW2d 140 (1997) ("[S]pecific intent crimes would be limited only to those crimes which are required to be committed either 'purposefully' or 'knowingly' . . . ."), quoting *People v Lerma*, 66 Mich App 566, 569; 239 NW2d 424 (1976) (quotation marks omitted). The statutory scheme as a whole evinces the Legislature's awareness of language that can be used to heighten a crime's *mens rea* element to that of a specific-intent crime. However, with respect to MCL 432.218(1)(a), the Legislature chose to use language consistent with a general-intent crime.

C. MISTAKE OF LAW

Finally, defendants argued in their motion to quash that they were operating under a mistake of law, negating the specific intent they claimed was required under the offenses charged. Specifically, they maintain that they relied on the Norton Shores city attorney's agreement in the stipulated order of dismissal that The Landing Strip would be operated in compliance with any gambling laws or ordinances "as it [was] currently operating." While defendants characterize this argument as a mistake-of-law defense, the prosecution contends it is properly viewed as a theory of entrapment by estoppel. Under either of these two fundamentally similar analyses, we conclude that defendants' argument fails.

This Court has held that a defense of entrapment by estoppel applies when the defendant establishes by a preponderance of the evidence that

> (1) a government official (2) told the defendant that certain criminal conduct was legal, (3) the defendant

> actually relied on the government official's statements, (4) and the defendant's reliance was in good faith and reasonable in light of the identity of the government official, the point of law represented, and the substance of the official's statement. [*People v Woods*, 241 Mich App 545, 558; 616 NW2d 211 (2000), quoting *United States v West Indies Transp, Inc*, 127 F3d 299, 313 (CA 3, 1997) (quotation marks omitted).]

Similarly, defendants cite federal caselaw describing the mistake-of-law defense: " 'In order to assert a defense of a mistake of law based upon a good faith reliance on the representations of public officials, the Appellants must demonstrate that they received communications from public officials in a situation in which reliance would have been justified.' " *United States v Stagman*, 446 F2d 489, 491 (CA 6, 1971), quoting *United States v Gebhart*, 441 F2d 1261, 1263 (CA 6, 1971).

Initially, we note that defendants' mistake-of-law argument has no effect on the charges brought under MCL 432.218(1)(a) because we have determined this is a general-intent offense. Defendants therefore need not have intended to violate the law but rather simply have intended to perform the act of "conducting" an unlicensed gambling operation. See *People v Beaudin*, 417 Mich 570, 573-574; 339 NW2d 461 (1983). Accordingly, defendants' alleged belief that they were operating their establishments in compliance with the law is immaterial to a determination of whether they committed this offense.

Defendants' argument is equally unavailing with respect to the specific-intent charges brought under MCL 752.796 and MCL 752.797(3)(e). Entrapment-by-estoppel and mistake-of-law defenses both require that the alleged reliance on a public official's representation be "reasonable" or "justified." Defendants are unable to

meet this requirement. They claim reliance on the Norton Shores city attorney's agreement in the stipulated order that operations at The Landing Strip were in compliance with applicable gambling laws and ordinances. It cannot be said that a statement by a city attorney in a civil suit involving a local ordinance could be authoritative on a matter of criminal state law such that reliance on it was reasonable. The statement was not made by the attorney general's office, by the MGCB, or by a county prosecutor. Rather, it was made pursuant to a stipulated agreement regarding a civil suit made by an entity with limited authority. Additionally, the civil case involved only The Landing Strip and not the other two businesses involved in the present criminal actions. Although defendants imply that all three establishments operated in the same manner, it does not appear that all were within the city limits of Norton Shores or that the city attorney would have possessed knowledge regarding the operations in the other two establishments. For these reasons, we conclude that neither a mistake-of-law nor an entrapment-by-estoppel defense is applicable.

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

METER, P.J., and TUKEL, J., concurred with GADOLA, J.

In re PAROLE OF SPEARS

Docket No. 340914. Submitted May 1, 2018, at Detroit. Decided May 10, 2018. Approved for publication June 26, 2018, at 9:15 a.m.

In 2006, Ronald N. Spears pleaded guilty in the Monroe Circuit Court, Michael W. LaBeau, J., to one count of malicious destruction of a building, MCL 750.380(3)(a), and was sentenced as a fourth-offense habitual offender, MCL 769.12, to 92 to 450 months' imprisonment. In 2014, the Michigan Parole Board (the Board) granted defendant parole. The Monroe County prosecutor sought leave to appeal the Board's decision in the circuit court. The Board rescinded its grant of parole, and the appeal was dismissed. However, in early 2016, the Board again granted defendant parole, and the prosecutor appealed in the circuit court. The court, Daniel S. White, J., reversed the Board's grant of parole, holding that the Board violated its duty to consider all relevant facts before granting defendant parole because the Board failed to prepare a "current and meaningful" transition accountability plan (TAP). In 2017, the Board again granted defendant parole. The prosecutor again appealed, and the court, Daniel S. White, J., reversed the Board's grant of parole, holding that defendant's 2014 TAP was "almost identical" to defendant's 2013 TAP, which the court had previously held was neither "current nor robust" when it reversed the Board's 2016 grant of parole to defendant, and thus the Board violated Mich Admin Code, R 791.7715(2)(c)(iii). Therefore, the court concluded that the Board had "failed to consider a current and meaningful TAP despite the requirements of" *In re Parole of Haeger*, 294 Mich App 549 (2011), and 2008 PA 245. The Board sought leave to appeal in the Court of Appeals, and the Court of Appeals granted the application.

The Court of Appeals *held*:

When challenging the Board's decision granting a prisoner parole, the prosecutor, as the challenging party, has the burden to show either that the Board's decision was a clear abuse of discretion or was in violation of the Michigan Constitution, a statute, an administrative rule, or a written agency regulation. Mich Admin Code, R 791.7715(1), provides, in relevant part, that

a prisoner shall not be released on parole until the Board has considered all relevant facts and circumstances, including the prisoner's probability of parole as determined by the parole guidelines. Mich Admin Code, R 791.7715(2)(c)(iii) provides that the Board may consider a prisoner's readiness for release as evinced by his or her development of a suitable and realistic parole plan. In 2008, the Michigan Department of Corrections (the DOC) implemented the Michigan Prisoner ReEntry Initiative (MPRI), which required that the DOC and the Board prepare and consider a TAP for each prisoner. In 2016, the DOC transitioned from the MPRI model to the Michigan Offender Success Model. The new model requires a case plan for each prisoner; however, the new model continues to require a TAP that integrates the prisoner's transition from prison to the community by developing phases in the transition process. *In re Parole of Elias*, 294 Mich App 507 (2011), outlined that a TAP has four elements: needs, goals, tasks, and activities. *Haeger* explained that once the Board had rendered a decision regarding a defendant's parole, the Board must issue in writing a sufficient explanation for its decision to allow meaningful appellate review and to inform the prisoner of specific recommendations for corrective action if necessary to facilitate release. The *Haeger* Court held that the Board had abused its discretion when it granted parole to the defendant in the absence of a TAP and other important records that the Board was required to consider before granting or denying that defendant parole; however, the *Haeger* Court did not provide objective criteria for what constituted a "meaningful" TAP. Therefore, pursuant to *Haeger*, review of a Board's decision to grant parole should not focus on whether the TAP is current or robust; rather, review should begin by determining whether the Board reviewed a TAP that was prepared for the defendant. In this case, the record revealed that the Board demonstrated that a TAP was prepared for defendant: a "Manager Version" of defendant's "TAP/Case Plan" identified, among other things, defendant's risk inventory, goals, tasks, and activities, and a second form titled "Program Classification Report" included a "TAP Update," which showed that defendant had participated in two programs during 2015 and 2016. The record also showed that the DOC prepared plans regarding defendant's potential parole release, including identifying a specific residence for defendant and how defendant's mental health needs would be addressed. Accordingly, there was no basis for the circuit court to conclude that the Board had violated Mich Admin Code, R 791.7715(2)(c)(iii). Additionally, while the circuit court observed the similarity between defendant's 2014 TAP and 2013 TAP, the court merely

declared that those documents were insufficient without providing any further explanation. Moreover, the circuit court seemingly ignored defendant's Program Classification Report, concluding without explanation that defendant's TAP could only be encompassed on a single form or document. Failure to consider defendant's Program Classification Report was tantamount to ignoring a significant portion of the record. Furthermore, it was error for the circuit court to have relied on 2008 PA 245, § 403(8) to reach its conclusion that defendant's TAP was not "current," because, as demonstrated by defendant's Program Classification Report, defendant's TAP was updated as recently as October 2016, which was only seven months before the Board voted to grant defendant parole. Finally, the circuit court erred to the extent it held that the Court of Appeals had set forth standards in *Haeger* relative to a defendant's TAP; the Court of Appeals merely articulated in *Haeger* that a TAP, among other relevant documents, must be considered by the Board before granting or denying parole. Finally, the prosecutor failed to provide a statutory basis or cite caselaw to support the assertion that the absence of signatures on defendant's 2014 TAP and Program Classification Report should warrant concern or be afforded any weight when reviewing the Board's decision to grant parole. Accordingly, the circuit court erred when it held that the Board had abused its discretion by failing to consider a "meaningful" TAP.

Reversed and remanded for reinstatement of the order granting parole.

Michael C. Brown, Assistant Prosecuting Attorney, for the Monroe County Prosecutor.

H. Steven Langschwager, Assistant Attorney General, for the Michigan Parole Board.

Before: BORRELLO, P.J., and SAWYER and JANSEN, JJ.

BORRELLO, P.J. Intervenor-appellant, the Michigan Parole Board (the Board), appeals by leave granted[1] the circuit court's order reversing the Board's grant of

[1] *In re Parole of Spears*, unpublished order of the Court of Appeals, entered December 21, 2017 (Docket No. 340914).

parole to defendant, Ronald Neil Spears. The circuit court's order was entered after appellee, the Monroe County prosecutor (the prosecutor), appealed by leave granted the Board's grant of parole to defendant in the circuit court. For the reasons set forth in this opinion, we reverse and remand the matter to the trial court for entry of an order reinstating parole.

I. BACKGROUND

This appeal arises from defendant's 2006 plea of *nolo contendere* to one count of malicious destruction of a building between $1,000 and $20,000, MCL 750.380(3)(a). Defendant was sentenced, as a fourth-offense habitual offender, MCL 769.12, to 92 to 450 months' imprisonment for his conviction. The Board initially granted defendant parole in 2014; however, the Board rescinded its grant of parole after the prosecutor sought leave to appeal the Board's decision in the circuit court. The Board granted defendant parole again in early 2016; however, following an appeal by the prosecutor, the circuit court ruled that the Board violated its duty to consider all relevant facts before granting defendant parole because the Board failed "to prepare a current and meaningful transition accountability plan," otherwise known as a "TAP," and therefore, the circuit court reversed the Board's grant of parole.

In 2017, the Board again granted parole to defendant, and again, the prosecutor sought leave to appeal the Board's grant of parole. The circuit court granted the prosecutor's application for leave to appeal and ultimately entered an order reversing the Board's grant of parole to defendant. In its order, the circuit court took issue with defendant's "2014 TAP" because it was "almost identical" to defendant's "2013 TAP,"

which the circuit court had previously held was "neither current nor robust" when the circuit court reversed the Board's 2016 grant of parole to defendant. The circuit court went on to explain that in its 2016 order, it reversed the Board's grant of parole to defendant because the Board had "violated Michigan Administrative Code, Rule 791.7715(1)(2) [sic], [by] failing to consider a proper TAP . . . ." Therefore, the circuit court ruled that "[t]he matter before [it] [was] for all intents and purposes identical to that which was ruled upon by [the circuit court]" in 2016 and that the Board had "failed to consider a current and meaningful TAP despite the requirements of In re Heger[2] [sic] and public acts [sic] 245 of 208 [sic]." The Board then sought leave to appeal in this Court, which, as previously indicated, was granted.

II. ANALYSIS

On appeal, the Board argues that the circuit court erred when it made de novo findings of fact, specifically, that defendant's 2014 TAP was "insufficient" without specifying any particularized defects in that document. Further, the Board contends that defendant's 2014 TAP identifies needs and goals that were taken from "the COMPAS instrument," otherwise known as a Corrections Offender Management Program for Alternative Sanctions report, and that defendant's program recommendations and completed programs are tasks that are detailed on defendant's CSX-175 form, a form that is also designated as "the 'Program Classification Report (TAP).' " Moreover, the Board contends that the circuit court failed to articulate a standard by which a TAP could be determined to be "meaningful." And, the Board further argues, de-

[2] *In re Parole of Haeger*, 294 Mich App 549; 813 NW2d 313 (2011).

spite the circuit court's characterization that the 2014 TAP was not current, the 2014 TAP was updated with the relevant "programming information." Therefore, the Board concludes, the circuit court erred when it held that the Board had violated Mich Admin Code, R 791.7715(2)(c)(iii).

The prosecutor contends that the circuit court acted properly when it reversed the Board's grant of parole because, among other reasons, the Board violated its duty to consider all relevant facts and circumstances when it failed to "consider a current and meaningful" TAP. The prosecutor also argues that a CSX-175 form is not a TAP and that even if this Court were to consider it as such, then that form is not a current, meaningful, or robust TAP that meets the requirements as set forth by this Court in *In re Parole of Elias*, 294 Mich App 507, 538; 811 NW2d 541 (2011).

"Judicial review of the Board's decision to grant parole is limited to the abuse-of-discretion standard." *Id*. "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *Id*.

"Either the prosecutor or the victim of an offense may appeal in the circuit court when the Board grants a prisoner parole." *Id*., citing MCL 791.234(11) and *Morales v Parole Bd*, 260 Mich App 29, 35; 676 NW2d 221 (2003). The prosecutor, as the challenging party, "has the burden to show either that the Board's decision was 'a clear abuse of discretion' or was 'in violation of the Michigan Constitution, a statute, an administrative rule, or a written agency regulation.' " *Elias*, 294 Mich App at 538, quoting MCR 7.104(D)(5).[3] Addition-

[3] The court rule cited in *Elias* was subsequently renumbered. The content of that court rule may now be found at MCR 7.118(H)(3).

ally, "a reviewing court may not substitute its judgment for that of the Board." *Elias*, 294 Mich App at 538-539.

Generally, " 'matters of parole lie solely within the broad discretion of the [Board] . . . .' " *Elias*, 294 Mich App at 521, quoting *Jones v Dep't of Corrections*, 468 Mich 646, 652; 664 NW2d 717 (2003) (alteration in original). The Board should consider a prisoner's sentencing offense when determining whether to grant parole to a prisoner, but "the Board must also look to the prisoner's rehabilitation and evolution throughout his or her incarceration." *Elias*, 294 Mich App at 544. However, "the Legislature has clearly imposed certain statutory restrictions on the Board's exercise of its discretion." *Id*. at 521-522. "Statutorily mandated parole guidelines form the backbone of the parole-decision process." *Id*. at 512.

Caselaw derived from statutory authority holds that the Board may not "grant parole unless it 'has satisfactory evidence that arrangements have been made for . . . employment . . . , for the prisoner's education, or for the prisoner's care if the prisoner is mentally or physically ill or incapacitated.' " *Id*. at 522, quoting MCL 791.233(1)(e). Further, " '[a] prisoner shall not be given liberty on parole until the board has reasonable assurance, after consideration of all of the facts and circumstances, including the prisoner's mental and social attitude, that the prisoner will not become a menace to society or to the public safety.' " *Elias*, 294 Mich App at 522, quoting MCL 791.233(1)(a) (alteration in original).

"The [Michigan Department of Corrections (DOC)] regulations further direct the Board to consider 'all relevant facts and circumstances, including the prisoner's probability of parole as determined by the parole

guidelines . . . .' " *In re Parole of Haeger*, 294 Mich App 549, 554; 813 NW2d 313 (2011), quoting Mich Admin Code, R 791.7715(1). "Mich Admin Code, R 791.7715(2)(c)(iii) provides that the Board may consider a prisoner's 'readiness for release' as evinced by his or her '[d]evelopment of a suitable and realistic parole plan.' " *Haeger*, 294 Mich App at 576, quoting Mich Admin Code, R 791.7715(2)(c)(iii) (alteration in original).

At the time this Court decided *Haeger* we noted that "the DOC recently implemented the Michigan Prisoner ReEntry Initiative (MPRI), which [was] designed to promote public safety and reduce the likelihood of parolee recidivism" and to improve "decision making at critical decision points," including "when the Board is considering whether to release a prisoner from incarceration on parole." *Haeger*, 294 Mich App at 555, quoting *Elias*, 294 Mich App at 519, and DOC Policy Directive 03.02.100, ¶ C, p 1 (quotation marks omitted). Thus:

> Under the MPRI, the DOC and the Board are now required to prepare and consider additional reports, in particular the transition accountability plan TAP [sic]. The TAP "succinctly describe[s] . . . exactly what is expected for offender success." *The MPRI Model: Policy Statements and Recommendations*, Michigan Prisoner ReEntry Initiative, January 2006, p 5. A DOC staff member "must formulate a TAP with each prisoner, mostly to assist the prisoner's reentry into society, but also to assist the Board in rendering its parole decision." *Elias*, 294 Mich App at 519-520. The TAP analyzes the prisoner's risk factors, sets goals to decrease those risks, and establishes a plan for the prisoner to reach his or her goals. *Id*. [*Haeger*, 294 Mich App at 555 (citation omitted; third alteration in original).]

This Court explained in *Haeger* that the DOC had "used TAPs to assist prisoners in reaching this goal"

since 2005 and that "the development of TAPs is 'the lynchpin' of the MPRI model." *Id*. at 576-577. Moreover, this Court explained:

> In the 2008 appropriations act for the DOC, 2008 PA 245, § 403(8), the Legislature made the DOC's 2009 appropriation contingent on the imposition of a TAP requirement, stating that the DOC "shall ensure that each prisoner develops a [TAP] at intake in order to successfully reenter the community after release from prison. Each prisoner's [TAP] shall be reviewed at least once each year to assure adequate progress." [*Id*. at 577 (alterations in original).]

In *Elias*, this Court observed that a TAP has four elements:

> ➢ ***Needs*** are criminogenic factors that contribute to risk and are individually assessed using the COMPAS risk assessment instrument.
>
> ➢ ***Goals*** are designed to mitigate each criminogenic need.
>
> ➢ ***Tasks*** are developed with each offender to meet the goals defined in the plan.
>
> ➢ ***Activities*** are created with each offender to break each task down into manageable steps. [*Elias*, 294 Mich App at 520 (citation omitted).]

As of May 2016, the DOC has transitioned from the MPRI model to "The Michigan Offender Success Model," which requires a "Case Plan" for each prisoner and a TAP that "integrates the prisoner's transition from prison to the community by developing phases in the transition process."[4] According to defendant's DOC records, a "Manager Version" overview of defendant's 2013 to 2014 "TAP/Case Plan" identified defendant's

[4] Michigan Department of Corrections, *The Michigan Offender Success Model*, <http://www.michigan.gov/documents/corrections/Michigan_Prisoner_Reentry_Model_05.2012._454416_7.pdf> (accessed March 8, 2018) [https://perma.cc/QVJ3-DWU6].

"Risk Inventory," "Client Strengths," "Client Interests," "Client Needs Summary," and "TAP/Case Plan Goals, Tasks and Activities." Specifically, under defendant's "TAP/Case Plan Goals," defendant was assigned various goals related to his "Client Needs," including maintaining sobriety, developing prosocial relationship activities within his community, and seeking mental health counseling. A second record, listed on a form titled "Program Classification Report" with the designation of CSX-175, showed a "TAP Update" pertaining to defendant starting a "WorkKeys Career" program on October 11, 2016, and under another "TAP Update" that defendant had completed a program called "VPP Moderate" between July 2015 and October 2015.

Review of the record in this case reveals that before the Board voted on whether defendant should be granted parole, defendant underwent an evaluation conducted by a "Qualified Mental Health Professional," and the evaluation indicated that defendant did not "express homicidal ideation." Similarly, the DOC prepared plans regarding defendant's potential parole release that included identifying a specific residence for defendant and how defendant's mental health needs would be addressed. Ultimately, the Board granted defendant parole in 2017. However, the circuit court reversed the Board's grant of parole to defendant because, among other reasons, the Board had "failed to consider a current and meaningful TAP despite the requirements of [*Haeger*] and [2008 PA 245]." In its opinion, the circuit court failed to explain what exactly constituted a "meaningful" TAP, focusing instead on how defendant's 2014 TAP was "almost identical" to a 2013 TAP that had been prepared for defendant and that the circuit court had previously held to be "neither current nor robust." Hence, by classifying the TAP as "neither current nor robust," the circuit court seem-

ingly created its own standards not set forth in statute or adopted by this Court in *Haeger*. By contrast, in *Haeger*, this Court explained that once the Board had rendered a decision regarding a defendant's parole, the Board "must issue in writing a sufficient explanation for its decision to allow *meaningful* appellate review and to inform the prisoner of specific recommendations for corrective action if necessary to facilitate release." *Haeger*, 294 Mich App at 556 (quotation marks and citations omitted; emphasis added). Accordingly, in *Haeger*, this Court held that the Board's grant of parole to the defendant was "in violation of controlling administrative rules and agency regulations" because the defendant's file lacked "case summary reports produced following Board interviews, any reports produced following in-reach services, or any TAP that may have been developed with [the defendant]," and "the Board or the DOC, or both, failed to maintain careful records documenting [the defendant's] participation in services and completion of steps necessary for parole." *Haeger*, 294 Mich App at 578, 581. Therefore, this Court did not provide objective criteria for what constituted a "meaningful" TAP in *Haeger*; rather, it concluded that the Board abused its discretion when it granted parole to a defendant in the absence of a TAP and other important records that the Board was required to consider before granting or denying that defendant parole. See *id*. at 581.

Hence, pursuant to our decision in *Haeger*, review of the Board's decision should not focus on whether the TAP is current or robust; rather, review should begin by determining whether the Board reviewed a TAP that was prepared for this defendant. In this case, the record clearly reveals that the Board demonstrated that a TAP was prepared for this defendant. Hence, we cannot find a basis for the circuit court to have con-

cluded that the Board had failed to consider defendant's readiness for release based on defendant's "suitable and realistic parole plan." *Haeger*, 294 Mich App at 576, quoting Mich Admin Code, R 791.7715(2)(c)(iii). While we note that the circuit court observed the similarity between defendant's 2013 TAP and 2014 TAP, the circuit court merely declared that those documents were insufficient without providing any further explanation. Further, the circuit court seemingly ignored defendant's Program Classification Report, concluding without explanation that defendant's TAP could only be encompassed on a single form or document. That form specifically recorded multiple fields with the designation of "TAP Update," with the most recent update showing that defendant began a "WorkKeys Career" program as recently as October 2016. Thus, even if we were to conclude that defendant's document entitled "2014 TAP" was somehow deficient because it only provided defendant's "Needs" and "Goals," we cannot ignore that the Board provided ample documentation of defendant's TAP-related "Tasks" and "Activities" on defendant's Program Classification Report. Hence, the circuit court should have considered and addressed defendant's Program Classification Report before reaching its conclusions. Failure to do so was tantamount to ignoring a significant portion of the record.

The circuit court also held that the Board had failed to consider a "current" TAP per the requirements of 2008 PA 245, which was an appropriations act encompassing the fiscal year ending in 2009 for the DOC. 2008 PA 245, § 403(8) provides, in relevant part:

> The department shall ensure that each prisoner develops a transition accountability plan at intake in order to successfully reenter the community after release from

> prison. Each prisoner's transition accountability plan shall be reviewed at least once each year to assure adequate progress.

This Court considered the text of 2008 PA 245, § 403(8) in *Haeger* in the broader context of a discussion regarding how the DOC had used TAPs since 2005 and how TAPs were central to the MPRI model. *Haeger*, 294 Mich App at 576-577. This Court relied on Mich Admin Code, R 791.7715(2)(c)(iii), with regard to the Board being able to consider a prisoner's development " 'of a suitable and realistic parole plan' " when it evaluated whether that prisoner was ready for parole. *Haeger*, 294 Mich App at 576, quoting Mich Admin Code, R 791.7715(2)(c)(iii). Therefore, in *Haeger*, this Court merely noted the specific conditions imposed as part of the appropriations act to help underscore the ubiquitous nature of TAPs in order to highlight the importance of the absence of a TAP in the defendant's records. *Haeger*, 294 Mich App at 576-577, 581. Accordingly, it was error for the circuit court to have relied on 2008 PA 245, § 403(8) to reach its conclusion that defendant's TAP was not "current," because, as demonstrated by defendant's Program Classification Report, defendant's TAP was updated as recently as October 2016, which was only seven months before the Board voted to grant defendant parole.

Regardless of whether we would have concluded that defendant's 2014 TAP was deficient, the circuit court erred to the extent it held that this Court has set forth standards relative to a defendant's TAP. The closest this Court has come to articulating any standard relating to a TAP for a potential parolee is that a TAP, among other relevant documents, must be considered by the Board before granting or denying parole. *Haeger*, 294 Mich App at 581. Additionally, unlike the

facts before this Court in *Haeger*, this case does not present us with a situation in which defendant's TAP was absent from the record or in which the Board contended that an essentially blank form constituted defendant's TAP. Rather, the entirety of defendant's TAP was recounted across multiple forms, and the Board specifically directed the circuit court to those relevant records. Therefore, the circuit court erred when it held that the Board had abused its discretion by failing to consider a "meaningful" TAP.

In reaching our conclusions we are mindful of the prosecutor's arguments that defendant's 2014 TAP and Program Classification Report suffer from infirmities due to the absence of signatures on those records from either defendant or his "Case Manager." However, the prosecutor fails to explain a statutory basis or cite caselaw to inform this Court why those irregularities should warrant concern or be afforded any weight when reviewing the Board's decision to grant defendant parole. The prosecutor merely asserts that these defects demonstrate that the Board failed to review defendant's TAP before it granted him parole. Yet that inference is entirely undone by the fact that in defendant's June 1, 2017 Case Summary Report, the Board specifically noted that defendant completed "VPP" with "gains in all treatment targets." As discussed earlier, defendant's Program Classification Report specifically listed defendant's completion of a program called "VPP Moderate" between July 2015 and October 2015.[5] Therefore, the circuit court, by injecting its own

[5] We note in reaching this conclusion the prosecutor's contention, as previously explained, that the circuit court did not err because defendant's Program Classification Report on the CSX-175 form is not a TAP and that even if this Court construes that record as a TAP, then it is not a "current, meaningful or robust TAP that meets the requirements of *In re Elias*." As the party appealing the Board's grant of parole to

criteria into defendant's TAP, effectively substituted its judgment for that of the Board's when it reversed the Board's grant of parole to defendant.

Given our resolution of this issue, we need not address the Board's other contentions on appeal. See *Agnone v Home-Owners Ins Co*, 310 Mich App 522, 534 n 8; 871 NW2d 732 (2015) (explaining that given the resolution of the issue and this Court's reversal of the trial court's grant of summary disposition in favor of plaintiff, this Court did not need to address the defendant's remaining claims of error).

Reversed and remanded for reinstatement of the order granting parole. We do not retain jurisdiction.

SAWYER and JANSEN, JJ., concurred with BORRELLO, P.J.

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defendant, it is the prosecutor's burden to demonstrate how the Board clearly abused its discretion. *Elias*, 294 Mich App at 538. Yet, beyond recounting this Court's observations about the characteristics and elements of a TAP in *Elias*, the prosecutor has failed to elaborate what would constitute a "meaningful" or "robust" TAP. Moreover, the prosecutor has also, without explanation, arrived at the conclusion that a TAP must consist of an all-encompassing individual document. Hence, the prosecutor's arguments fail for the same reasons as stated earlier.

In re CMR KACZKOWSKI, Minor

Docket No. 341138. Submitted June 13, 2018, at Detroit. Decided June 28, 2018, at 9:00 a.m.

The respondent-mother appealed an order entered in the Macomb Circuit Court, Family Division, terminating her parental rights to a minor child, CMRK, under MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), and (j). The initial petition recounted respondent's history with Child Protective Services and included information pertaining to the murder of respondent's other child. Specifically, the petition stated that respondent's husband had been convicted of murdering respondent's other child and yet respondent was still married to him. The petition also indicated that respondent was in a relationship with JK, a man alleged to be CMRK's biological father, who was prohibited from having contact with minors following his conviction of child molestation in Oklahoma. CMRK was removed from respondent's care and placed in foster care. The Department of Health and Human Services (DHHS) filed a supplemental petition against respondent alleging that respondent had recurring and severe depression and failed to attend counseling sessions or follow through with DHHS service contracts. The supplemental petition alleged that respondent continued to have contact with JK and, at times, the contact occurred when CMRK was present. Although no order expressly prohibiting respondent from having contact with JK was found in the record, respondent was aware that she was not supposed to have contact with him or allow him around CMRK. After a bench trial, the referee recommended that respondent's parental rights be terminated. Tracey A. Yokich, J., adopted the referee's recommendation, and respondent's parental rights were terminated. Respondent appealed.

The Court of Appeals *held*:

1. Termination of parental rights is proper under MCL 712A.19b(3)(c)(*ii*) when the parent has received recommendations to rectify other conditions that caused the child to come within the trial court's jurisdiction, the parent has received notice and a hearing and a reasonable opportunity to rectify the conditions and has not done so, and there is no reasonable likelihood

that the conditions will be rectified within a reasonable time given the child's age. The trial court cited MCL 712A.19b(3)(c)(*ii*) as a reason for termination but failed to identify the other conditions that supported termination. Under the facts of the case, however, the error was harmless.

2. Terminating an individual's parental rights requires a trial court to find by clear and convincing evidence that at least one of the statutory grounds for termination listed in MCL 712A.19b(3) has been met. Termination is proper under MCL 712A.19b(3)(c)(*i*) when the conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age. Despite respondent's denials, and in spite of the fact that many of the concerns in the initial petition had been addressed, substantial evidence showed that respondent had continued to voluntarily associate with JK and had allowed CMRK to be around JK even after adjudication. Respondent engaged in this conduct even though she was repeatedly reminded and understood that neither she nor CMRK was allowed any contact with JK. Therefore, the trial court did not clearly err by finding that the conditions leading up to the adjudication had not been rectified and would not be rectified within a reasonable time, supporting termination under MCL 712A.19b(3)(c)(*i*).

3. Termination is appropriate under MCL 712A.19b(3)(g) when the parent, regardless of intent, fails to provide proper care or custody for the child and there is no reasonable expectation that a parent will be able to provide proper care or custody within a reasonable time considering the child's age. A parent's failure to participate in and benefit from a service plan is evidence that the parent will not be able to provide a child with proper care and custody. Respondent's continued voluntary contact with JK after she learned the full extent of his criminal history and her failure to refrain from contact with JK after being directed to so refrain was evidence that respondent had not benefited from her service plan. MCL 712A.19b(3)(j) states that termination is proper when there is a reasonable likelihood, based on the parent's conduct or capacity, that the child will be harmed if he or she is returned to the parent's home. A parent's failure to comply with the terms and conditions of a service plan is evidence that the child will be harmed if returned to the parent's home. Respondent's failure to take adequate precautions to keep CMRK safe from JK supported a conclusion that there was a reasonable likelihood that CMRK would be harmed if returned to respondent's home. In addition, respondent's continued mental health issues and her refusal to

consider taking psychotropic medications as a means of achieving emotional stability further supported the trial court's findings that termination was also proper under MCL 712A.19b(3)(g) and (j).

4. According to MCL 712A.19b(5), if a trial court finds that there are grounds for the termination of parental rights and that termination is in the child's best interests, the trial court must terminate the parent's parental rights and order that any additional efforts at reunification not be made. Factors to consider when determining whether termination is in a child's best interests include the child's bond to the parent; the parent's parenting ability; the child's need for permanency, stability, and finality; and the advantages of a foster home over the parent's home. In this case, termination was proper because at the time of the termination hearing, CMRK had been in foster care for approximately 2½ years and, although respondent loved CMRK, respondent had made little, if any, progress toward addressing the main reasons the court took jurisdiction over CMRK. The caseworker had stated that termination would provide CMRK with the permanency she needed—CMRK was doing well in foster care, had bonded with her foster siblings, and CMRK's foster parents were willing to adopt her. Moreover, respondent was unlikely to improve her parenting skills within a reasonable time, and alternatives to termination, such as guardianship, had been explored without success. Accordingly, the evidence supported the trial court's determination that termination of respondent's parental rights was in CMRK's best interests.

Affirmed.

Eric J. Smith, Prosecuting Attorney, *Joshua D. Abbott*, Chief Appellate Attorney, and *John Paul Hunt*, Assistant Prosecuting Attorney, for the Department of Human Services.

Thomas A. Casey for respondent.

Christine Piatkowski PLC (by *Christine Piatkowski*) as lawyer-guardian ad litem.

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

PER CURIAM. Respondent-mother appeals as of right the trial court's order terminating her parental rights to the minor child under MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), and (j). Respondent's husband—the child's legal father—voluntarily released his parental rights. He is not a party to this appeal, and he is allegedly not the child's biological father. We affirm.

This case arises, in part, out of the murder of another one of respondent's children. That child was murdered by respondent's husband before the birth of the child in this case. Respondent's husband is incarcerated for the murder. The initial petition recited respondent's prior history with Child Protective Services (CPS), including the death of the other child at the hands of respondent's husband and the fact that respondent had never filed for divorce from her husband despite the fact that he was convicted of murdering respondent's other child. The petition indicated that respondent was currently in a relationship with JK—who was alleged to be the instant child's biological father—despite that he was prohibited from having contact with minors after a prior conviction for child molestation in Oklahoma. The petition also included allegations concerning respondent's poor housing conditions and her mental instability.

Following a hearing, the child was removed from respondent's care and placed in foster care. Respondent was allowed supervised visitation. Respondent's treatment plan, designed so that she could continue to be a parent to her child, required respondent to attend a parenting program, submit to random drug screens, undergo a complete psychological evaluation, and participate in mental health services. She completed the psychological evaluation and the parenting program,

had negative drug screens, and began full-time employment and unsupervised visitations with her child.

Shortly thereafter, the guardian ad litem (GAL) filed a petition to suspend respondent's visitation and to terminate respondent's parental rights. The petition alleged that respondent was having continued contact with JK and that, at times, this contact occurred with the child present. At the time respondent and JK met, and throughout at least the initial period of the instant matter, JK was on probation in Oklahoma for committing the offense of lewd molestation[1] against a family member. Respondent denied knowing the truth about the specific crime for which JK was on probation but did know that he was on probation.

We are concerned that we cannot find any order in the record specifically naming JK and explicitly directing respondent to refrain from contact with him, and we are deeply concerned that JK's violation of the orders imposed on him may have been held against respondent. However, the evidence shows that respondent was aware that she was not supposed to have contact with him nor allow him around her child. The relevant factual dispute is whether she actually did. Respondent had sufficient income, suitable housing, a lawful lifestyle, and conducted herself properly with the child. There were concerns that respondent lacked self-control and emotional stability, that she had an alleged history of being in the presence of unsafe individuals, and that she had not benefited from counseling despite mostly participating in the services offered.

"In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in

[1] We presume this to be a violation of Okla Stat Ann, tit 21, § 1123, a felony.

MCL 712A.19b(3) has been met." *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). We review for clear error a trial court's ruling that a statutory ground for termination has been proved by clear and convincing evidence. *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011). "A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made." *Id*.

The trial court found that grounds for terminating respondent's parental rights were established under MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), and (j), which authorize termination of parental rights under the following circumstances:

> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:
>
> (*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
>
> (*ii*) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
>
> * * *
>
> (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no

> reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.
>
> * * *
>
> (j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

The trial court cited § 19b(3)(c)(*ii*) as a reason for termination, but neither the trial court nor the parties have identified what "other conditions" supported termination. We therefore cannot find a basis for termination on that ground to be established. However, under the circumstances of this case, either the error is harmless or the trial court simply misspoke. *In re Powers Minors*, 244 Mich App 111, 118; 624 NW2d 472 (2000).

Many of the above concerns have been corrected. Respondent's husband is incarcerated, and he relinquished his parental rights. Therefore, we fail to perceive the threat he poses to the child. It appears that respondent's housing is stable, even if it is not perfect; her income is sufficient; and her employment has been reasonably steady despite setbacks outside her control. Respondent also completed parenting classes, and she completed two psychological evaluations. There was no dispute that respondent and the child were bonded to each other, and for the most part, respondent appeared to interact appropriately with the child. Furthermore, there was some indication in the record that JK's violation of the orders imposed upon him may have been held against respondent, which would be contrary to law. It is absolutely impermissible for any person to be held responsible for *someone else's* violation of an order.

In other words, a no-contact order issued against JK to have no contact with respondent is an order against JK and only JK. It is simply impossible for *respondent* to violate a no-contact order issued against *JK*.

Nevertheless, the concern with respondent's ongoing relationship with JK is an entirely appropriate concern. The record is replete with indications that such an order was actually communicated to respondent on many occasions and that she comprehended it. There are numerous references to respondent's having been told multiple times by the court, the agency, and the GAL that neither she nor her child were to associate with JK. While respondent may not be faulted for other individuals' violations of orders against them, her own violations of an order against her are highly significant.

Additionally, there was concern that despite participating in services, respondent did not benefit from those services, or at least did not benefit sufficiently. Respondent's therapist testified that she continued to lack insight and that she was unable or unwilling to take responsibility for her actions. The therapist also testified that respondent had shown an increase in her rage and an inability to control herself. The therapist expressed concern about respondent's continued contact with JK and opined that respondent's continued poor decisions in choosing relationships with abusive men presented a risk to the child's safety. Respondent's caseworker expressed these same concerns and noted that respondent had obtained a second psychological evaluation, which indicated that she was likely to have problems with anger management, impulsiveness, and acting out.

Although the trial court did not specifically make this finding, we agree with the GAL's argument that the credibility of the witnesses was critical to the trial court's findings. We are required to defer to any such

credibility assessments. MCR 2.613(C); *McGonegal v McGonegal*, 46 Mich 66, 67; 8 NW 724 (1881). Despite respondent's denials, substantial evidence was presented that respondent had continued to voluntarily associate with JK and had allowed the child to be around him. She continued to remain in contact with JK, contrary to court orders and despite repeated reminders that neither she nor the child was allowed to have any contact with him. The trial court was entitled to give credence to the testimony of respondent's therapist and caseworker. In combination, we cannot find clear error in the trial court's findings that the gravamen of the conditions that led to the adjudication had not been rectified and would not be rectified within a reasonable time. Therefore, the trial court did not clearly err by finding that the evidence supported termination of respondent's parental rights under § 19b(3)(c)(*i*).

The evidence also supports the trial court's reliance on § 19b(3)(g) and (j) as additional grounds for termination. "A parent's failure to participate in and benefit from a service plan is evidence that the parent will not be able to provide a child proper care and custody." *In re White*, 303 Mich App 701, 710; 846 NW2d 61 (2014). "Similarly, a parent's failure to comply with the terms and conditions of his or her service plan is evidence that the child will be harmed if returned to the parent's home." *Id*. at 711. Respondent's continued voluntary contact with JK despite being ordered to refrain from contact and after being made aware of the full extent of JK's criminal history supports a finding that she has not benefited from her service plan. Consequently, a finding that respondent was failing to take adequate precautions to keep the child safe from JK also supports a conclusion that there is a reasonable likelihood, based on respondent's conduct or capacity, that the

child will be harmed if returned to respondent's home. The testimony indicating that respondent has continuing mental health issues, including anger management issues, and that she refuses to consider psychotropic medications as an option for achieving emotional stability further supports the trial court's findings that grounds for termination were established under § 19b(3)(g) and (j).

Respondent also argues that the trial court erred by finding that termination of her parental rights was in the child's best interests. "If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). Whether termination of parental rights is in a child's best interests is determined by a preponderance of the evidence. *In re Moss*, 301 Mich App 76, 83; 836 NW2d 182 (2013). Factors to be considered include "the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *Id*. at 41-42 (citations omitted). A court may also consider whether it is likely "that the child could be returned to her parents' home within the foreseeable future, if at all." *In re Frey*, 297 Mich App 242, 249; 824 NW2d 569 (2012).

Although respondent loves her child, the trial court did not clearly err by finding that termination of respondent's parental rights was in the child's best interests. At the time of the termination hearing, the child had been in foster care for approximately 2½ years. Respondent had made little, if any, progress in addressing the main reasons that the court took juris-

diction over the child. Respondent's therapist opined that it was highly unlikely that respondent would ever be emotionally or psychologically stable enough to provide a safe environment for the child. In contrast, the child was doing well in foster care, and her foster parents were willing to adopt her. The caseworker testified that the child was fully adjusted to her foster home and had bonded with her foster siblings. The caseworker also stated that termination would provide the child with the permanency she needed, especially considering that respondent would not be able to improve her deficient parenting skills within a reasonable period of time. The caseworker had explored alternatives to termination, such as a guardianship, but no one else had come forward, and the foster parents were not interested in that option. The evidence supports the trial court's determination that termination of respondent's parental rights was in the child's best interests.

Affirmed.

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

In re KEILLOR, Minors

Docket No. 340395. Submitted May 9, 2018, at Grand Rapids. Decided June 28, 2018, at 9:05 a.m.

The Department of Health and Human Services brought an action in the Wayne Circuit Court, Family Division, alleging that respondent, Kathy Keillor, had physically abused her two minor children, KK-1 and KK-2. Respondent pleaded no contest to the allegations, and the court took jurisdiction over the minor children. Later, a supplemental petition to terminate respondent's parental rights was filed after KK-1 alleged that respondent's live-in boyfriend, who fit the statutory definition of a "nonparent adult," had sexually abused her. The trial court held a trial, and KK-1 provided testimony regarding the alleged sexual abuse. KK-1 testified that while on vacation in California, the nonparent adult slept with KK-1 in one room, and KK-2 and respondent slept in another room. According to KK-1, it was uncommon for the nonparent adult to be in bed with her. KK-1 testified that while she was in bed, she told the nonparent adult that her stomach hurt. She testified that the nonparent adult then rubbed her stomach and began moving his hand lower, "[a]lmost below [her] waist." She testified that she "pulled his hand out" and then went to the bathroom. When asked whether the nonparent adult ever touched her "private parts," KK-1 answered, "Almost." KK-1 also testified that except for this incident in California, nothing like that had ever happened before or since with the nonparent adult. After hearing the evidence, the court found that a preponderance of the evidence supported the existence of sexual abuse by a nonparent adult. The court subsequently terminated respondent's parental rights pursuant to MCL 712A.19b(3)(b)(*iii*) and (j). Respondent appealed.

In opinions by RIORDAN, J., and RONAYNE KRAUSE, P.J., the Court of Appeals *held*:

The trial court did not err by terminating respondent's parental rights.

Affirmed.

RIORDAN, J., authored the lead opinion for affirmance, stating that to terminate parental rights, the trial court must find that at

least one of the statutory grounds for termination in MCL 712A.19b(3) has been proved by clear and convincing evidence. MCL 712A.19b(3)(b)(*iii*) provides, in pertinent part, that the court may terminate a parent's parental rights to a child if the court finds by clear and convincing evidence that a nonparent adult's act caused sexual abuse and a reasonable likelihood exists that the child will suffer abuse by the nonparent adult if returned to the parent's home. MCL 722.622(y) defines "sexual abuse" as engaging in sexual contact or sexual penetration, as those terms are defined in MCL 750.520a, with a child. MCL 750.520a(q) defines "sexual contact" as the intentional touching of the victim's or actor's intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for revenge, to inflict humiliation, or out of anger. MCL 750.520a(f) defines "intimate parts" as the primary genital area, groin, inner thigh, buttock, or breast of a human being. Dictionaries define "groin" as the crease at the junction of the thigh and the trunk, together with the adjacent area. In this case, it was reasonable to infer that the broad area surrounding KK-1's private parts was covered by the definition of "groin," and therefore her testimony established that the nonparent adult touched her "intimate parts." Accordingly, the trial court did not clearly err by determining that the nonparent adult touched KK-1's intimate parts. Additionally, KK-1's testimony established that the nonparent adult's touching could reasonably be construed as being for the purpose of sexual arousal or gratification because it was uncommon for the nonparent to sleep in bed with her and because KK-1 testified that she felt uncomfortable, nauseous, and that her stomach hurt because he was touching her. Consequently, the trial court did not clearly err by finding that clear and convincing evidence supported that the nonparent adult sexually abused KK-1. Finally, the record showed that respondent did not and does not believe that the nonparent adult sexually abused KK-1 and that respondent was still living with the nonparent adult at the time of trial; therefore, the trial court did not clearly err by finding that clear and convincing evidence established that the minor children would suffer sexual abuse by the nonparent adult in the future. In addition, MCL 712A.19b(3)(j) provides that the court may terminate a parent's parental rights to a child if the court finds by clear and convincing evidence that there is a reasonable likelihood based on the conduct or capacity of the child's parent that the child will be harmed if he or she is returned to the home of the

parent. Because termination was proper pursuant to MCL 712A.19b(3)(b)(*iii*), the trial court's termination of respondent's parental rights pursuant to MCL 712A.19b(3)(j) did not need to be considered. However, there was clear and convincing evidence that termination was proper under MCL 712A.19b(3)(j) for the same reasons that termination was proper under MCL 712A.19b(3)(b)(*iii*). Finally, once a statutory basis for termination has been shown by clear and convincing evidence, the court must determine whether termination is in the child's best interests. Best interests are determined on the basis of the preponderance of the evidence. In assessing whether termination of parental rights is in a child's best interests, the trial court should weigh all evidence available to it. In this case, a number of reasons—including respondent's noted disbelief of KK-1's sexual abuse allegations, respondent's allowing the nonparent adult to remain in her house even after those allegations, KK-1's numerous allegations of respondent's physical abuse of her, and the broken bond between the family—prove that the trial court did not clearly err by determining that a preponderance of the evidence supported that termination of respondent's parental rights was in the best interests of the minor children.

RONAYNE KRAUSE, P.J., concurring, agreed with the lead opinion's assessment of the best interests of the children but disagreed that the record adequately established sexual abuse by the nonparent adult and would have held that any act of the nonparent adult perpetrated against the child was irrelevant because the record conclusively established that respondent physically abused the children, which alone was grounds for termination of respondent's parental rights. The court must terminate a parent's parental rights if one statutory ground for termination is properly established, unless the trial court finds that doing so is contrary to the best interests of the children, and therefore respondent's physical abuse of the children was sufficient to affirm the trial court's termination of respondent's parental rights.

MARKEY, J., dissenting, would have held that the trial court clearly erred by finding that MCL 712A.19b(3)(b)(*iii*) was proved by clear and convincing evidence. KK-1's testimony did not establish that "sexual abuse" occurred because the Legislature did not include "stomach" in its list of sexually "intimate parts" in MCL 750.520a(f), and the erroneous finding of sexual abuse by a nonparent residing in respondent's home was so intertwined with the trial court's finding under MCL 712A.19b(3)(j) of likely harm if the children were returned to respondent's care that it rendered

that finding also clearly erroneous. When specifically asked if the nonparent adult had touched her private parts, KK-1 answered, "Almost." Likewise, on cross-examination, KK-1 said that she thought the nonparent adult was moving his hand toward her "private parts," but he never got it there. Accordingly, there was no testimony to find that the nonparent adult touched KK-1's intimate parts. Because there was no evidence that the nonparent adult touched KK-1's "intimate parts" as required by the statute, there also was no evidence to show either that the touching that KK-1 described was for a sexual purpose or to support an inference that the touching was to exact revenge, to humiliate, or out of anger. Rather, the touching or rubbing of KK-1's stomach area occurred only after she complained that her stomach hurt. Accordingly, it was also clear error to find that sexual abuse occurred. Additionally, KK-1 testified that the touching she described was a single incident that had never happened before and that never happened again; therefore, there was no basis to conclude by clear and convincing evidence that another incident would be likely to recur in the future. The trial court relied only on the alleged sexual abuse by a nonparent adult to find both statutory grounds for termination; therefore, to cite physical abuse as a reason to terminate would have been erroneous. Accordingly, Judge MARKEY would have vacated the trial court's order terminating respondent's parental rights and remanded the matter to the trial court for further proceedings.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *B. Eric Restuccia*, Chief Legal Counsel, and *Susan B. Moody*, Assistant Attorney General, for the Department of Health and Human Services.

Law Offices of Roman J. Ficaj (by *Roman J. Ficaj*) for respondent.

Michigan Children's Law Center (by *Rubina S. Mustafa*) for the minor children.

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

RIORDAN, J. Respondent appeals as of right the trial court's order terminating her parental rights to the

minor children, KK-1 and KK-2, pursuant to MCL 712A.19b(3)(b)(*iii*) (a nonparent adult's act caused sexual abuse and a reasonable likelihood exists that the child will suffer abuse by the nonparent adult if returned to the parent's home) and MCL 712A.19b(3)(j) (a reasonable likelihood exists based on the conduct or capacity of the child's parent that the child will be harmed if returned to the home of the parent). We affirm.

I. FACTUAL BACKGROUND

Respondent adopted the minor children in 2011. In 2016, Child Protective Services (CPS) began an investigation into physical abuse of the minor children by respondent. Respondent pleaded no contest to the allegations in the petition on January 5, 2017, and the trial court took jurisdiction over the minor children. Later, a supplemental petition to terminate respondent's parental rights was filed after KK-1 made allegations of sexual abuse by respondent's live-in boyfriend, who fit the statutory definition of a "nonparent adult." See MCL 722.622(v).[1] On August 31, 2017, the trial court held a trial both to adjudicate the new allegations and regarding the request to terminate respondent's parental rights. KK-1 provided testimony regarding the alleged sexual abuse by the nonparent adult.

After hearing the evidence, the trial court adjudicated the new allegations, finding that a preponderance of the evidence supported the existence of sexual abuse by the nonparent adult. The parties then argued regard-

[1] I cite the alpha designations of MCL 722.622, as amended by 2016 PA 35, effective from March 8, 2016 to April 5, 2017, because the alleged sexual abuse in this case occurred sometime during 2016. Although the alphabetical references may have often changed over the years, the substantive definitions have remained the same, so our analysis has not been affected by any amendments.

ing termination of respondent's parental rights and whether termination would be in the best interests of the minor children. The trial court took the issue under advisement, eventually releasing a written opinion terminating respondent's parental rights pursuant to MCL 712A.19b(3)(b)(*iii*) and (j). This appeal followed.

II. STATUTORY GROUNDS

Respondent argues that the trial court clearly erred when it terminated her parental rights to the minor children. I disagree.[2]

A. STANDARD OF REVIEW

"This Court reviews for clear error the trial court's factual findings and ultimate determinations on the statutory grounds for termination." *In re White*, 303 Mich App 701, 709; 846 NW2d 61 (2014). A trial court's findings of fact are clearly erroneous if "we are definitely and firmly convinced that it made a mistake." *Id*. at 709-710. "To terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been proved by clear and convincing evidence." *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011). "[W]e review de novo questions of statutory interpretation." *In re Harper*, 302 Mich App 349, 352; 839 NW2d 44 (2013) (quotation marks and citation omitted).

B. APPLICABLE LAW AND ANALYSIS

The trial court found clear and convincing evidence of statutory grounds for termination under MCL 712A.19b(3)(b)(*iii*), which provides:

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[2] I note that this case is being published at the request of the dissent pursuant to MCR 7.215(A).

(b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:

* * *

(*iii*) A nonparent adult's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse by the nonparent adult in the foreseeable future if placed in the parent's home.

Although MCL 712A.19b does not provide definitions for the pertinent terms "nonparent adult" and "sexual abuse," those terms are found and defined in the Child Protection Law, MCL 722.601 *et seq*. Indeed, § 19b twice refers to and adopts the definition of "sexual abuse" "as that term is defined in section 2 of the child protection law, 1975 PA 238, MCL 722.622." MCL 712A.19b(3)(k)(*ix*) and (m)(*ix*).

MCL 722.622(y) defines "sexual abuse" as follows:

"Sexual abuse" means engaging in sexual contact or sexual penetration as those terms are defined in section 520a of the Michigan penal code, 1931 PA 328, MCL 750.520a, with a child.

In this case, there is no allegation of sexual penetration. The definition of "sexual contact" is as follows:

"Sexual contact" includes the intentional touching of the victim's or actor's *intimate parts* or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, *if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification*, done for a sexual purpose, or in a sexual manner for:

(*i*) Revenge.

(*ii*) To inflict humiliation.

(*iii*) Out of anger. [MCL 750.520a(q) (emphasis added).]

In turn, MCL 750.520a(f) defines "intimate parts" as "includ[ing] the primary genital area, groin, inner thigh, buttock, or breast of a human being." Thus, in order for there to have been grounds for termination pursuant to MCL 712A.19b(3)(b)(*iii*), the trial court must have found clear and convincing evidence that the nonparent adult touched KK-1's "primary genital area, groin, inner thigh, buttock, or breast" in a manner that "can reasonably be construed as being for the purpose of sexual arousal or gratification . . . ." MCL 750.520a(f) and (q).

KK-1 testified that the nonparent adult touched her in an inappropriate manner during a trip to California with respondent. The nonparent adult slept with KK-1 in one room while KK-2 and respondent slept in another room. According to KK-1, it was strange and uncommon for the nonparent adult to be in bed with her. KK-1 provided the following pertinent testimony during direct examination regarding the night the nonparent adult touched her:

Q. All right. Did anything ever happen to you when [the nonparent adult] was sharing a room with you that made you feel bad or uncomfortable?

A. Yes.

* * *

Q. And, and what happened?

A. I was laying next to him and he was touching me.

Q. How was he touching you?

A. With his hand.

Q. And, and how did that come about? Did you ask him to touch you?

A. No.

Q. Okay. What—Were you awake when this happened?

A. Yes.

Q. And, and what—Did you have any kind of conversation with [the nonparent adult] at all before he touched you?

A. No. All I said was my stomach hurt.

Q. And you told that to [him]?

A. Yes.

Q. And after you told him that your stomach hurt, what did he do?

A. He started rubbing my stomach and going a little bit lower.

Q. And what were you wearing at the time?

A. I think I was wearing, I think I was wearing summer pajamas.

* * *

Q. All right. Where was his hand on your body at that time?

A. Almost below my waist.

Q. And then what happened?

A. I pulled his hand out and said you were the reason why my stomach was hurting.

Q. Did he make any comment to you after that?

A. No. I just ran into the bathroom.

Q. What did you mean by that, you're the reason my stomach is hurting?

A. Because it made me feel uncomfortable where he, why he, where he was touching me.

Q. And after you went into the bathroom, how long did you stay there?

A. I stayed there for a couple minutes because I felt like I was gonna throw up.

Q. Did you throw up?

A. No.

* * *

Q. Did [the nonparent adult] ever touch you below your waist?

A. Yeah.

Q. And when did that occur? Before the bathroom or after?

A. Before.

Q. And before the bathroom, when he touched you below your waist, what exactly did he do, if you remember?

A. I don't remember.

Q. Did he ever, do you have—Did he ever touch your private parts?

* * *

A. Almost.

Q. And what do you mean by almost?

A. Like he was right there, but then I pulled his hand out and I went to the top bunk.

On cross-examination, respondent elicited the following testimony from KK-1:

Q. Now, except for this one incident in California where you say he touched you, that never happened before or since, is that right?

A. Yes.

Q. And this happened over a year ago?

A. I'm not sure.

Q. And if I understood you correctly, you said on direct examination that you told him your stomach was hurting?

A. Yes.

Q. And then he started rubbing your stomach and he started going down into your pants—

A. (Interposing) Yes.

Q. Is that right?

A. Yes.

Q. But he never got down to your private parts, is that right?

A. He started to.

Q. He started, but he never got there, right?

A. Yes.

Respondent contends that the testimony could not have established sexual abuse by the nonparent adult because KK-1 never testified that he actually touched her private parts. I disagree because the definition of "intimate parts" cannot be read so narrowly. While one part of the statute defining "intimate parts" refers to the "primary genital area," the definition also includes "groin" as an intimate part. MCL 750.520a(f). *Random House Webster's College Dictionary* (2d ed) defines groin as "the fold or hollow where the thigh joins the abdomen" and "the general region of this fold or hollow." Meanwhile, *The American Heritage Dictionary* (2d ed) defines "groin" as "[t]he crease at the junction of the thigh and the trunk, together with the adjacent area."

Respondent is correct that KK-1 never testified that the nonparent adult actually touched her vagina. However, KK-1 stated that the nonparent adult touched her below her waist, and KK-1 repeatedly said that she had to take his hand "out." It is reasonable to infer that KK-1's use of the word "out" meant that the nonparent adult's hand was in her pants. Further, KK-1 testified

that he "[a]lmost" touched her private parts while lowering his hand downward from her abdomen. Considering the broad area surrounding KK-1's private parts covered by the definition of "groin," KK-1's testimony established that the nonparent adult touched her "intimate parts." MCL 750.520a(f) and (q). It would be unreasonable to conclude that the area below KK-1's waist and pants line but above the opening of her vagina is not an "intimate part" when the definition also includes the "inner thigh." Thus, in my view, the trial court did not clearly err by determining that the nonparent adult touched KK-1's intimate parts. MCL 750.520a(f) and (q).[3]

I also conclude that KK-1's testimony established that the nonparent adult's touching could "reasonably be construed as being for the purpose of sexual arousal or gratification . . . ." MCL 750.520a(q). KK-1 stated that it was uncommon for the nonparent adult to sleep in bed with her, KK-2 and respondent were in another room, and the nonparent adult's touching caused her to be uncomfortable and feel nauseous. KK-1's testimony that she told the nonparent adult her stomach hurt *because* he was touching her suggests that the touching began *before* KK-1 complained of a stomachache. Therefore, the trial court also did not clearly err by finding that the nonparent adult touched KK-1 for the purpose of sexual arousal or gratification. *Id*. Consequently, the trial court did not clearly err by finding that clear and convincing evidence supported that the nonparent adult sexually abused KK-1. MCL 712A.19b(3)(b)(*iii*).

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[3] In contrast, the dissent suggests young children should suffer adverse consequences if they take proactive steps, such as removing an abuser's hand from an intimate part of the body. Thus, MCL 712A.19b(3)(b)(*iii*), following the dissent's reasoning, would not apply to a child who seeks to protect herself during the commission of a sexual assault by an abuser.

In order for termination to be proper pursuant to MCL 712A.19b(3)(b)(*iii*), the trial court also was required to find by clear and convincing evidence "that there is a reasonable likelihood that the child will suffer from injury or abuse by the nonparent adult in the foreseeable future if placed in the parent's home." The record shows that respondent did not and does not believe that the nonparent adult sexually abused KK-1. To wit, at the time of the trial, the nonparent adult was still living in the home with respondent. While respondent asserted that she would have the nonparent adult move out if so ordered by the trial court, I do not believe that the trial court clearly erred by finding otherwise. Provided that the nonparent adult still lives in respondent's house and testimony established that she does not believe KK-1's allegations of sexual abuse, the trial court did not clearly err by finding that clear and convincing evidence established that the minor children would suffer sexual abuse by the nonparent adult in the future. *Id*.

In sum, because termination was proper pursuant to MCL 712A.19b(3)(b)(*iii*), I need not consider the trial court's termination of respondent's parental rights pursuant to Subsection (j), *In re Ellis*, 294 Mich App at 32, but note that, for the same reasons, there was clear and convincing evidence that "[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent," MCL 712A.19b(3)(j).

III. BEST INTERESTS

Respondent argues that the trial court clearly erred by determining that it was in the minor children's best interests to terminate respondent's parental rights. We disagree.

A. STANDARD OF REVIEW AND APPLICABLE LAW

This Court reviews a trial court's determination regarding best interests for clear error. *In re White*, 303 Mich App at 713. "A trial court's decision is clearly erroneous '[i]f although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.' " *In re Olive/Metts Minors*, 297 Mich App 35, 41; 823 NW2d 144 (2012), quoting *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

"Once a statutory basis for termination has been shown by clear and convincing evidence, the court must determine whether termination is in the child's best interests." *In re LaFrance Minors*, 306 Mich App 713, 732-733; 858 NW2d 143 (2014), citing MCL 712A.19b(5). " '[T]he focus at the best-interest stage has always been on the child, not the parent.' " *In re Payne/Pumphrey/Fortson*, 311 Mich App 49, 63; 874 NW2d 205 (2015), quoting *In re Moss*, 301 Mich App 76, 87; 836 NW2d 182 (2013). "Best interests are determined on the basis of the preponderance of the evidence." *In re LaFrance Minors*, 306 Mich App at 733.

In considering the issue of whether termination is in the best interests of the minor child, the trial court is permitted to consider "the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, . . . the advantages of a foster home over the parent's home[,] . . . the length of time the child was in care, the likelihood that the child could be returned to her parents' home within the foreseeable future, if at all, and compliance with the case service plan." *In re Payne/Pumphrey/Fortson*, 311 Mich App at 63-64 (citations and quotation marks omitted). "In assessing whether termination of parental

rights is in a child's best interests, the trial court should weigh all evidence available to it." *Id*. at 63.

B. ANALYSIS

As previously stated, there was testimony that the nonparent adult sexually abused KK-1 while on vacation in California. He did so while sleeping in the same bed with KK-1 while respondent and KK-2 were in a separate room. At trial, testimony established that respondent did not believe KK-1's allegations and could not explain why KK-1 slept alone with the nonparent adult. Furthermore, testimony of the family therapist showed that the bond between respondent and the minor children was broken. To wit, the family therapist stated that KK-1 would not engage with respondent at group sessions and that KK-2 followed her sister's lead. The minor children refused to visit with respondent, and the record established that the minor children were flourishing in their placement with other relatives, who were willing to adopt them. In addition to the allegations of sexual abuse, the record was replete with accusations of serious physical abuse by respondent. Therefore, a number of reasons—including respondent's noted disbelief of KK-1's sexual-abuse allegations, respondent's allowing the nonparent adult to remain in her house even after those allegations, KK-1's numerous allegations of respondent's physical abuse of her, and the broken bond between the family members—prove that the trial court did not clearly err by determining that a preponderance of the evidence supported that termination of respondent's parental rights was in the best interests of the minor children. MCL 712A.19b(5).

Affirmed.

RONAYNE KRAUSE, P.J. (*concurring*). I respectfully concur in affirming the trial court. I am unpersuaded that the evidence in this record adequately establishes that sexual abuse of either child by a nonparent adult actually occurred. However, any act the nonparent adult did or did not perpetrate against the children is irrelevant. If only one statutory ground for termination is properly established, a parent's parental rights *must* be terminated unless the trial court finds that doing so is contrary to the best interests of the children. *In re Powers Minors*, 244 Mich App 111, 118; 624 NW2d 472 (2000); *In re BZ*, 264 Mich App 286, 301; 690 NW2d 505 (2004). On this record, the trial court must be affirmed.

The record conclusively establishes that respondent physically abused the children; she even admitted to beating them with an extension cord and was convicted of third-degree child abuse. The trial court could have left us with more specific factual findings to review, but it is clear that it chose to believe the testimony given by one of the children, which is the prerogative of the trial court, not this Court. *McGonegal v McGonegal*, 46 Mich 66, 67; 8 NW 724 (1881). Considering all the evidence—specifically (1) respondent's bizarre testimony that she would do anything to bring the children home but would have agreed with the children's wishes never to see her again had the one child who stated that she was sexually abused by the nonparent adult withdrawn her allegation of sexual abuse; (2) respondent's apparent lack of concern for the serious trauma the children suffered; (3) the trial court's readily discernable finding that the children would suffer additional harm if returned to respondent, based, in part, on respondent's physical abuse of the child—it is clear that the trial court's decision is amply supported. Additionally, respondent's clear disregard for the children's allegations of sexual abuse further reflects an

equal disregard for their well-being. I find that MCL 712A.19b(3)(j) has been more than adequately established by clear and convincing evidence.

Because I find one statutory ground for termination overwhelmingly established, I would not address the issue of the alleged sexual abuse because doing so is unnecessary. And as can be seen from the lead opinion and the dissenting opinion, it is something about which there can be a serious debate. Not so with the physical abuse: it unequivocally occurred. Only the severity of the physical abuse is at all in question, and again, I defer to the trial court's findings regarding credibility of the witnesses. *McGonegal*, 46 Mich at 67.

Other than the sexual-abuse allegation itself, I agree with the lead opinion's assessment of the best interests of the children. Consequently, I concur in affirming.

MARKEY, J. (*dissenting*). I must dissent in respect to both the majority and concurring opinions. I do not accept the majority's statutory interpretation legerdemain by which "stomach" is added to the statutory definition of "intimate parts" under the aliases of "groin" and "inner thigh" and/or to make it synonymous with any of those words. "In determining the Legislature's intent, we must first look to the language of the statute itself." *In re MKK*, 286 Mich App 546, 556; 781 NW2d 132 (2009). Further, the Legislature is presumed to "be aware of the consequences of its use or omission of statutory language." *Id*. Judges may not read into a clear statute that which is not within the manifest intention of the Legislature as derived from the language of the statute itself. *People v Breidenbach*, 489 Mich 1, 10; 798 NW2d 738 (2011). Further, clear statutory language must be enforced as written. *Velez v Tuma*, 492 Mich 1, 16-17; 821 NW2d 432 (2012). The

Legislature did not include "stomach" in its list of sexually "intimate parts" in MCL 750.520a(f), and this Court may not add it to the statute to reach a desired result in this case. The majority's opinion does exactly that. Consequently, for this reason and for others discussed later in this opinion, I conclude that the trial court clearly erred and would vacate the trial court's order and remand this case to the trial court for further proceedings.

I. STANDARDS OF REVIEW

This Court reviews for clear error the trial court's factual findings regarding both the statutory grounds to terminate parental rights and the trial court's findings regarding the best interests of the children. MCR 3.977(K); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); *In re Olive/Metts Minors*, 297 Mich App 35, 40; 823 NW2d 144 (2012). To be clearly erroneous, a decision must be more than maybe or probably wrong. *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009). This Court will determine a finding is clearly erroneous only when left with the definite and firm conviction that a mistake has been made. *Id*.

This case also presents an issue of statutory interpretation, which this Court reviews de novo. *In re Harper*, 302 Mich App 349, 352; 839 NW2d 44 (2013). "The interpretation and application of a statute in particular circumstances is a question of law this Court reviews de novo." *Detroit Pub Sch v Conn*, 308 Mich App 234, 246; 863 NW2d 373 (2014).

II. ANALYSIS

I conclude that the court clearly erred by finding that MCL 712A.19b(3)(b)(*iii*) was proved by clear and

convincing evidence. Because this Court must recognize the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it, MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989), I accept KK-1's testimony as credible for purposes of my analysis. Her testimony, however, did not establish "sexual abuse" within the meaning of § 19b(3)(b)(*iii*), and the trial court clearly erred in so finding. Further, the erroneous finding of sexual abuse by a nonparent residing in respondent's home is so intertwined with the trial court's finding under MCL 712A.19b(3)(j) of likely harm if the children were returned to respondent's care that it renders this finding also clearly erroneous. So even if terminating respondent's parental rights were in the children's best interests, MCL 712A.19b(5), at least one statutory ground for termination must still be proved by clear and convincing evidence to support such an order. MCL 712A.19b(3); *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003) ("A due-process violation occurs when a state-required breakup of a natural family is founded solely on a 'best interests' analysis that is not supported by the requisite proof of parental unfitness.").[1] I therefore conclude that the trial court's order terminating respondent's parental rights must be vacated.

The trial court found clear and convincing evidence of statutory grounds for termination under MCL 712A.19b(3)(b)(*iii*), which provides:

> (b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:
>
> * * *

[1] Adoptive parents have all the same rights and responsibilities as if they were natural parents. MCL 710.60(1); *Wilson v King*, 298 Mich App 378, 381-382; 827 NW2d 203 (2012).

> (*iii*) A nonparent adult's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse by the nonparent adult in the foreseeable future if placed in the parent's home.

Although MCL 712A.19b does not provide definitions for the pertinent terms "nonparent adult" and "sexual abuse," those terms are found and defined in the Child Protection Law, MCL 722.601 *et seq*. Indeed, § 19b twice refers to and adopts the definition of "sexual abuse" "as that term is defined in section 2 of the child protection law, 1975 PA 238, MCL 722.622." MCL 712A.19b(3)(k)(*ix*) and (m)(*ix*).

MCL 722.622(y) defines "sexual abuse" as follows:

> "Sexual abuse" means engaging in sexual contact or sexual penetration as those terms are defined in section 520a of the Michigan penal code, 1931 PA 328, MCL 750.520a, with a child.

In this case, there is no allegation of sexual penetration, so only "sexual contact" potentially is at issue. The definition of "sexual contact" is as follows:

> "Sexual contact" includes the intentional touching of the victim's or actor's *intimate parts* or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, *if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification*, done for a sexual purpose, or in a sexual manner for:
>
> (*i*) Revenge.
>
> (*ii*) To inflict humiliation.
>
> (*iii*) Out of anger. [MCL 750.520a(q) (emphasis added).]

In turn, MCL 750.520a(f) defines "intimate parts" as "includ[ing] the primary genital area, groin, inner thigh, buttock, or breast of a human being."

In light of these unambiguous statutory terms, establishing "sexual abuse" as used in MCL 712A.19b(3)(b)(*iii*) requires clear and convincing evidence that the nonparent adult, here, Mr. H, intentionally touched KK-1's "intimate parts"—"the primary genital area, groin, inner thigh, buttock, or breast," or the clothing covering her intimate parts, and such touching can reasonably be construed to have been for a sexual purpose or other purpose prohibited by the statute. In this case, accepting KK-1's testimony as credible, I note that the evidence showed Mr. H did not touch KK-1's "primary genital area, groin, inner thigh, buttock, or breast" or her clothing covering those intimate parts. Indeed, KK-1 herself testified that Mr. H rubbed her stomach and her abdomen after KK-1 had said her stomach hurt. She testified that she pulled Mr. H's hand out and that the touching made her feel uncomfortable. She got up and went to the bathroom. She testified that when she came back, Mr. H started to rub her back, but she asked him to stop. She testified that he immediately complied. This is the total extent of the facts underlying the sole claim of sexual abuse or contact.

When specifically asked if Mr. H had touched her "private parts," KK-1 answered, "Almost." She explained, "Like he was right there, but then I pulled his hand out and I went to the top bunk." On cross-examination, KK-1 said that she thought Mr. H was moving his hand toward her "private parts," but he never got it there. In sum, there was no testimony whatsoever to find that Mr. H touched KK-1's "intimate parts," MCL 750.520a(f). Patently, neither the trial court nor this Court may speculate or infer conduct or intent from the record evidence—the majority and the concurrence do just that in reaching their respective decisions. Consequently, it was clear error to

find that "sexual abuse" within the meaning of MCL 712A.19b(3)(b)(*iii*) occurred because there was a lack of evidence that "sexual contact" occurred. See MCL 722.622(y); MCL 750.520a(q).

Moreover, because there was no evidence that Mr. H touched KK-1's "intimate parts" as required by the statute, there also was no evidence to show either that the touching that KK-1 described was for a sexual purpose or to support an inference that the touching was to exact revenge, to humiliate, or out of anger. Rather, the touching or rubbing of KK-1's stomach area occurred only after she complained that her stomach hurt. While the touching may have made KK-1 uncomfortable—and given her age, that's understandable—there was no evidence that Mr. H intended to cause that reaction instead of intending to comfort KK-1. She had just complained that her stomach was hurting. I also note the very important fact that Mr. H was in his late sixties at the time and had lived with respondent and the children by then for many years, indeed, most of their lives. Notably, no other incidents of any similar nature were ever alleged either before or after this one that was raised late in the proceedings and about which KK-1 testified. Consequently, there was no clear and convincing evidence that the touching that KK-1 described was for one of the prohibited statutory purposes. MCL 750.520a(q). For this reason it was also clear error to find that "sexual abuse" within the meaning of MCL 712A.19b(3)(b)(*iii*) occurred—there was a lack of evidence that the touching was for a sexual or other prohibited purpose. See MCL 722.622(y); MCL 750.520a(q).

And, again, KK-1 testified that the touching she described was a single incident that had never hap-

pened before and that never happened again. To establish MCL 712A.19b(3)(b)(*iii*) as a ground for termination, the court must find by clear and convincing evidence that "there is a reasonable likelihood that the child will suffer from . . . [sexual] abuse by the nonparent adult in the foreseeable future if placed in the parent's home." KK-1's testimony described a single touching that she stated had happened once—never before and never since. Parenthetically, I also point out that KK-1's sister had never made such accusations against Mr. H despite living with him most of her life as well. Under these facts, I find no basis to conclude by clear and convincing evidence that such an incident—were it in some way even fairly determined to have been sexual abuse by a nonparent adult—would be likely to recur in the future.

Additionally, the allegations of sexual abuse did not arise until late in the proceedings—at the end of April 2017, according to the supplemental petition. The supplemental petition seeking termination on the basis of the new sexual-abuse allegations was filed on May 8, 2017, and not authorized until a May 22, 2017 pretrial hearing, at which time respondent and Mr. H were served with it. At the time of the pretrial, respondent had not been permitted to visit the children for seven months, initially because the court temporarily suspended visitation pending a psychological examination but later because the children refused to participate, and the court did not order them to do so despite their young ages. Nevertheless, respondent was unquestionably fully compliant with all court orders and with the service provider's treatment plans. In its oral findings after trial, the trial court noted:

> And so, obviously, this is a very difficult case in the sense that the mother is compliant with the service plan,

> but because of the fact that the children won't engage in therapy, they won't engage in activities with the mother, they refuse to return home, they refuse to see the mother, we're not able to reunify. And so, the Court, the Court has to be mindful of that, that notwithstanding the fact that the mother's compliant, a case just can't go on in perpetuity without, without having a permanency plan and some direction.

At trial, respondent testified that if necessary, she would establish a household separate from Mr. H, either by having him move out of the home they owned together or by finding new housing for herself and the children. Specifically, respondent testified that she would separate from Mr. H if necessary to obtain the return of the children. Respondent, however, was never directed to establish a separate home for herself as a condition of having the children returned to her, nor was that issue even discussed with her. So a finding of likely future harm from Mr. H, i.e., that he posed a potential threat to the children, was patently premature where the evidence showed a one-time incident and respondent expressed her willingness to establish a household without Mr. H were that to be a condition for her children's return.

Here, the trial court's finding regarding likely harm under § 19b(3)(j) if the children were returned to respondent's care is so intertwined with the court's erroneous finding of sexual abuse by a nonparent residing in respondent's home that it also is clearly erroneous. MCL 712A.19b(3)(j) provides a ground for termination of parental rights if "[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent."

On this statutory ground, I also part company with the concurring opinion. In its oral opinion from the

bench, the trial court stated that MCL 712A.19b(3)(j) "is also proven by clear and convincing evidence because we have testimony of sexual abuse by the nonparent adult and we have testimony of physical abuse to the child, [KK-1]." But it is settled law that a court speaks through its written orders, not through its oral pronouncements. *In re KMN*, 309 Mich App 274, 287; 870 NW2d 75 (2015). And in its written order terminating parental rights, the trial court wrote:

> It is further ordered that the court finds clear and convincing evidence of a statutory basis for termination of parental rights of the mother pursuant to MCL 712A.19b(3)(b)(*iii*) and (j). The mother's living together partner sexually abused the child [KK-1], and future abuse is reasonably likely as the non-parent adult has not come forward to engage in services. Further, the non-parent adult continues to reside in the home of the mother.
>
> In addition, the children will be harmed if returned to the home of the mother, given that the non-parent adult continues to reside in that home. While the mother is compliant with services, the children refuse to engage with the mother in any activities, and they refuse to return home.

Clearly, in its written order and findings of fact, the trial court relied only on the alleged sexual abuse by a nonparent adult to find both statutory grounds for termination. In her concurring opinion, Judge KRAUSE takes on the role of the trial court—here, relying in large part on facts that apparently had no impact whatsoever on the trial court's written analysis and findings: that respondent, not Mr. H, has previously pled no contest to a charge of child abuse for striking a child with an electrical cord. I suggest that the trial court did not focus on that issue in its order because not only did respondent take full responsibility, she also presented and apparently convinced those provid-

ing services and the court that she understood her mistake and clearly conveyed that she had learned from it. Thus, to cite it as a reason to terminate would have been erroneous. In short, it was patently a nonissue at the point of hearing and had been superseded by the allegation against Mr. H. To now bootstrap that factor as *the* reason to terminate and remove these children from respondent in lieu of remanding for a fair and proper hearing when the trial court did not is, to me, far beyond our role as appellate court judges.

The trial court's finding that clear and convincing evidence supported finding MCL 712A.19b(3)(j) as a ground for termination of respondent's parental rights is clearly erroneous. MCR 3.977(K); *In re Olive/Metts Minors*, 297 Mich App at 40. First, this finding is premised on the findings that Mr. H perpetrated "sexual abuse" on KK-1 and that KK-1 was likely to be sexually abused in the future by Mr. H. For the reasons already discussed, these premises are not supported by clear and convincing evidence; in fact, they are not supported by any evidence!

Moreover, this finding is based on the additional premise that Mr. H would remain in respondent's home. But respondent, who had fully complied with all other requirements of the court, offered to establish a home for the children without Mr. H if the court required it as a condition. But respondent was never directed or even advised to do so. So the court's finding of likely harm to the children from Mr. H if returned to respondent was patently not supported by clear and convincing evidence. MCR 3.977(K). The finding regarding § 19b(3)(j) was more than probably wrong, *In re Williams*, 286 Mich App at 271, because the legal premise on which it was based, "sexual

abuse" by Mr. H, was not supported by any evidence. Further, the "conduct or capacity" of respondent showed that she would abide by the court's direction and would remove Mr. H from her home if directed to do so.

Where, as in this case, petitioner sought termination of parental rights on grounds different from those by which the court originally gained jurisdiction (physical abuse), it is petitioner's burden to prove "on the basis of clear and convincing legally admissible evidence that one or more of the facts alleged in the supplemental petition" are true and come within MCL 712A.19b(3). MCR 3.977(A)(3) and (F)(1)(b). The petitioner bears the burden of establishing the existence of at least one of the grounds for termination of parental rights listed in MCL 712A.19b(3) by clear and convincing evidence. *In re JK*, 468 Mich at 210. In this case, petitioner asserted one ground for termination of parental rights: sexual abuse of KK-1 by respondent and by respondent's housemate, Mr. H. But the evidence utterly failed to show any sexual abuse by respondent, and the testimony with respect to Mr. H was legally insufficient to establish sexual abuse within the meaning of MCL 712A.19b(3)(b)(*iii*). See MCL 722.622(y); MCL 750.520a(q); MCL 750.520a(f). The trial court's finding regarding likely harm under MCL 712A.19b(3)(j) if the children were returned to respondent's care is so dependent on the court's erroneous finding of sexual abuse by a nonparent residing in respondent's home that it also is clearly erroneous. The trial court's decision to terminate, in fact, seems to be based solely on its conclusion that because the children refused to engage in any way with treatment or respondent, its only option was to terminate respondent's parental rights. It should go without saying that such a determination as a basis for termination of parental rights

has no legal basis whatsoever and is a remarkable judicial assault on the parent/child relationship. Many—if not most—children go through a defiant period while maturing: KK-1 was about 13 years old during these proceedings. To cite such defiance in preteen and barely teenage children as the main reason for terminating parental rights is patently wrong and, for us to let it stand, dangerous. Because the evidence did not establish at least one ground for termination of respondent's parental rights, MCL 712A.19b(3), the trial court clearly erred by terminating respondent's parental rights. *In re JK*, 468 Mich at 210; *In re Olive/Metts Minors*, 297 Mich App at 40.

Terminating parental rights and removing children from their parent's care is an enormous responsibility and one which should be undertaken with scrupulous regard to the laws that provide the strict criteria that must be followed. Because the trial court here clearly failed to properly follow the statutory requirements in terminating respondent's parental rights, I would vacate the trial court's order terminating respondent's parental rights and remand this matter to the trial court for further proceedings. I fail to see how remanding for a second hearing under these unusual facts and legal conclusions is anything but a bottom-line threshold to ensure the fair and proper proceedings respondent and these children deserve.

WOODRING v PHOENIX INSURANCE COMPANY

Docket No. 324128. Submitted May 9, 2018, at Grand Rapids. Decided June 28, 2018, at 9:10 a.m. Leave to appeal denied at 504 Mich 873 (2019).

Tamara Woodring brought an action in the Muskegon Circuit Court against Phoenix Insurance Company, seeking personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*., for injuries she sustained when she slipped and fell at a self-serve car wash while washing a vehicle insured by defendant. Defendant moved for summary disposition on the ground that plaintiff's claim was barred by MCL 500.3106(1), which prohibits the recovery of PIP benefits for injuries arising out of the ownership, operation, maintenance, or use of a vehicle that is parked unless an exception applies. The trial court, Timothy G. Hicks, J., denied defendant's motion and instead granted summary disposition in plaintiff's favor under MCR 2.116(I)(2), reasoning that under *Miller v Auto-Owners Ins Co*, 411 Mich 633 (1981), and *Musall v Golcheff*, 174 Mich App 700 (1989), plaintiff was entitled to PIP benefits despite the fact that her car was parked for purposes of MCL 500.3106(1) because she was injured while maintaining her vehicle under MCL 500.3105(1). The court noted that although the Supreme Court had subsequently disavowed *Miller* in part, it had not overruled the case. Defendant applied for leave to appeal in the Court of Appeals, which denied the application. The Supreme Court, in lieu of granting defendant's application for leave to appeal that decision, remanded the case to the Court of Appeals for consideration as on leave granted. 501 Mich 883 (2017).

The Court of Appeals *held*:

1. The trial court did not err by relying on *Miller* and *Musall* in granting plaintiff summary disposition because these cases retain precedential value. *Musall*, which relied in part on *Miller*, held that a plaintiff who was injured by a car-wash wand was entitled to PIP benefits under the no-fault act on the ground that he was engaged in maintenance of the vehicle at the time of the injury. The fact that *Musall* is not binding does not render it without precedential value. While the Court of Appeals is not strictly required under MCR 7.215(J)(1) to follow its uncontra-

dicted opinions decided before November 1, 1990, those opinions are nevertheless entitled to significantly greater deference than are unpublished cases. However, those opinions may not be followed if they conflict with binding precedent from the Supreme Court that conforms to Const 1963, art 6, § 6, including peremptory orders to the extent they can theoretically be understood, even if doing so requires one to seek out other opinions. The Supreme Court order in *LeFevers v State Farm Mut Auto Ins Co*, 493 Mich 960 (2013), stated that its decision in *Frazier v Allstate Ins Co*, 490 Mich 381 (2011), effectively disavowed *Miller* to the extent it was inconsistent with *Frazier*—specifically, that portion of *Miller* addressing the circumstances under which a parked vehicle may still be operated as a motor vehicle and pose a risk of injury, such as opening the door of a parked car into traffic. Nothing in *Frazier* or *LeFevers* directly undermined the holding in *Miller* that the parked-vehicle exception in MCL 500.3106(1) is simply not triggered if an injury is caused by the maintenance of a motor vehicle under MCL 500.3105(1). Accordingly, this holding remained good law, as did the holding in *Musall*.

2. The fact that the word "parked" is not defined in the no-fault act raised the question whether plaintiff's vehicle was parked for purposes of MCL 500.3106(1). A vehicle is not necessarily parked just because it is stopped, halted, standing, or otherwise not presently in motion, as the example of a vehicle stopped at a traffic light makes clear, and the definition of "parking" found in the Michigan Vehicle Code is not workable outside the context of regulating vehicles on a highway. The cases that have addressed the issue have determined a vehicle to be parked if it is both motionless and either being used as something unrelated to being a vehicle or incapable of being readily put back into motion. While plaintiff's vehicle was indeed motionless, it was also still running and clearly not intended to be left alone or to be unoccupied for very long. Therefore, even if the trial court's grant of summary disposition in plaintiff's favor had been improper, the trial court's refusal to grant summary disposition in defendant's favor was properly affirmed because whether the vehicle was parked could only be resolved by posing the question to the trier of fact.

3. The causal connection between the plaintiff's injuries and the maintenance of a motor vehicle as a motor vehicle was more than incidental, fortuitous, or "but for." In contrast to the cases defendant cites in which the plaintiffs allegedly slipped and fell in the general vicinity of a vehicle, plaintiff in this case was actively engaged in performing essential maintenance to the vehicle

pertinent to its use as a motor vehicle. *Musall* remains controlling precedent in this regard and has already determined that such a causal nexus exists on highly similar facts. Unlike the situation in *Williams v Pioneer State Mut Ins Co*, 497 Mich 875 (2014), in which the plaintiff did not put into motion any chain of events that influenced the tree branch that fell and injured her as she was getting into her car, in this case, there was a strong likelihood that the slippery patch on the floor of the car wash was directly caused by the physical acts of maintenance performed by plaintiff, and even if it was not, those physical acts of maintenance directly impaired plaintiff's ability to detect or avoid it, or to prevent herself from actually falling or getting hurt even if avoidance of the slippery patch was impossible. Plaintiff's maintenance of her car did not simply happen to be performed in the wrong place at the wrong time, but in fact had a direct causal influence on her fall and resulting injury.

Affirmed.

Judge RIORDAN, dissenting, would have held that summary disposition should have been granted in favor of defendant because there was no question of fact that the causal connection between plaintiff's injuries and her automobile was merely incidental. Plaintiff slipped and fell because of a condition on the land—specifically, that the floor of the car wash was slippery or icy—and the fact that she might have been washing her vehicle when she stumbled was unquestionably incidental, fortuitous, or "but for."

1. COURTS — COURT RULES — COURT OF APPEALS OPINIONS — FIRST-OUT RULE — PRECEDENTIAL VALUE.

Published opinions issued by the Court of Appeals before November 1, 1990, that have not been contradicted by subsequent cases, while not binding, are entitled to significantly greater deference than are unpublished cases; these opinions, however, may not be followed if they conflict with binding precedent from the Supreme Court that conforms to Const 1963, art 6, § 6, including peremptory orders to the extent they can theoretically be understood, even if doing so requires one to seek out other opinions (MCR 7.215(J)(1)).

2. INSURANCE — NO-FAULT ACT — PERSONAL PROTECTION INSURANCE BENEFITS — PARKED VEHICLES.

MCL 500.3106(1) prohibits the recovery of personal protection insurance benefits for injuries arising out of the ownership, operation, maintenance, or use of a vehicle that is parked unless

an exception applies; the holding in *Miller v Auto-Owners Ins Co*, 411 Mich 633 (1981), that MCL 500.3106(1) does not apply if an injury is caused by the maintenance of a parked motor vehicle under MCL 500.3105(1) remains valid.

3. INSURANCE — NO-FAULT ACT — PERSONAL PROTECTION INSURANCE BENEFITS — MAINTENANCE OF A MOTOR VEHICLE — PARKED VEHICLES — CAR WASHING.

An injury sustained in the course of washing a motor vehicle may be compensable through personal protection insurance as being causally connected to the maintenance of the vehicle for purposes of MCL 500.3105(1) and is not barred by MCL 500.3106(1), which generally prohibits the recovery of benefits for injuries arising out of the ownership, operation, maintenance, or use of a vehicle that is parked.

4. INSURANCE — NO-FAULT ACT — WORDS AND PHRASES — "PARKED."

A vehicle is "parked" for purposes of MCL 500.3106(1) if it is both motionless and either being used as something unrelated to being a vehicle or incapable of being readily put back into motion.

West Michigan Injury Lawyers, PLC (by *Matthew G. Swartz*) for plaintiff.

Law Offices of Catherine A. Gofrank (by *Mary Ann Hart*) for defendant.

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

RONAYNE KRAUSE, P.J. Defendant appeals as on leave granted, pursuant to an order of remand from our Supreme Court, the trial court's denial of summary disposition in defendant's favor and grant of summary disposition in plaintiff's favor. For purposes of the instant appeal, the facts are undisputed. Plaintiff's employer provided her with a vehicle, which was insured by defendant. Plaintiff went to a self-serve spray car wash in early February, parked but left the vehicle running, began washing the vehicle, and as she worked her way around to the rear of the vehicle, she

slipped and fell, suffering serious injuries for which she sought benefits under the no-fault act, MCL 500.3101 *et seq*. It is unknown why plaintiff slipped, or what she slipped on, but she believes it may have been ice. It is undisputed that plaintiff was not entering, occupying, exiting, or touching the vehicle at the time of her fall, although she was using the car wash's sprayer wand. The trial court's denial and grant of summary disposition was based in significant part on the fact that precedent from our Supreme Court, which was confusing, had not clearly overruled precedent from this Court, which was therefore still good law. We agree and affirm.

As an initial matter, the remand order from our Supreme Court reads, in its entirety, as follows:

> By order of September 27, 2016, the application for leave to appeal the March 3, 2015 order of the Court of Appeals was held in abeyance pending the decision in *Spectrum Health Hospitals v Westfield Ins Co* (Docket No. 151419). On order of the Court, the case having been decided on June 30, 2017, 500 Mich [1024] (2017), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted. Among the issues to be considered, the Court of Appeals shall address whether the causal connection between the plaintiff's injuries and the maintenance of a motor vehicle as a motor vehicle is more than incidental, fortuitous, or "but for." *Thornton v Allstate Ins Co*, 425 Mich 643, 659[; 391 NW2d 320] (1986). [*Woodring v Phoenix Ins Co*, order of the Michigan Supreme Court, entered October 5, 2017 (Docket No. 151414).]

The decision in *Spectrum* consisted entirely of an order remanding that case to this Court for reconsideration in light of *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017). That case addresses whether a healthcare provider has a

statutory cause of action against an insurer for the payment of PIP benefits; it does not appear to address any issues relevant to the instant appeal.

Plaintiff argues that the issue specified for consideration by our Supreme Court was not argued in the trial court and, therefore, is allegedly unpreserved. It is true that defendant only mentioned the requirement in its brief and provided no supporting argument whatsoever. However, at the motion hearing, defendant did present an argument to the effect that plaintiff's act of washing her vehicle did not constitute a sufficient causal nexus, but rather that the car wash was "just merely a fortuitous location where the accident happened." Defendant clearly makes a significantly more thorough argument on appeal, but that does not preclude appellate consideration when the issue itself is not wholly novel. See *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). In any event, because we may not disregard explicit and comprehensible instructions given to us by our Supreme Court, plaintiff's argument is misplaced. We will address this issue second.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine whether the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the nonmoving party and grants summary disposition only if the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120. The interpretation and application of statutes, rules, and legal

doctrines is reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

Much of the instant appeal turns on whether this Court's opinion in *Musall v Golcheff*, 174 Mich App 700; 436 NW2d 451 (1989), which held that injuries caused by a car-wash wand were compensable under the no-fault act, is precedentially binding. Defendant argues that it is not binding pursuant to MCR 7.215(J)(1), the "first-out rule," while citing an unpublished opinion that is clearly not binding under MCR 7.215(C)(1). Unpublished cases are significantly less persuasive; this Court may not be strictly bound to follow older published cases, but traditionally regards them as retaining some authority, at least if they were not disputed by some other contemporaneous case. Indeed, MCR 7.215(J)(1) does *not* state, as does MCR 7.215(C)(1), that older cases are not precedentially binding, only that later ones must be followed. In contrast, MCR 7.215(C)(1) explicitly states that unpublished opinions "should not be cited for propositions of law for which there is published authority," whereas no similar restriction applies under MCR 7.215(J)(1). Defendant's argument is therefore unconvincing.

Our Supreme Court "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." *Bradley v Saranac Community Sch Bd of Ed*, 455 Mich 285, 298; 565 NW2d 650 (1997). Interpretation of a court rule follows the general rules of statutory construction. *Grievance Administrator v Underwood*, 462 Mich 188, 193-194; 612 NW2d 116 (2000). We think it reasonable to draw the negative inference that we are not *strictly required* to follow uncontradicted opinions from this Court decided before November 1, 1990, but we think they are nevertheless

considered to be precedent and entitled to significantly greater deference than are unpublished cases. Consequently, we are not impressed by the suggestion that *Musall* has no precedential effect simply because it is an older case.

That being said, this Court may not follow *any* opinion previously decided by this Court, no matter when, to the extent that opinion conflicts with binding precedent from our Supreme Court, which may be essentially anything it issues that conforms to Const 1963, art 6, § 6. *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 369-370; 817 NW2d 504 (2012). This includes peremptory orders to the extent they can theoretically be understood, even if doing so requires one to seek out other opinions, *id*.; see also *People v Crall*, 444 Mich 463, 464 n 8; 510 NW2d 182 (1993); *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 196; 650 NW2d 364 (2002)—notwithstanding, with all due respect, the enormous confusion peremptory orders sow and the frustration they generate. Defendant thus relies on the argument that *LeFevers v State Farm Mut Auto Ins Co*, 493 Mich 960 (2013), and *Frazier v Allstate Ins Co*, 490 Mich 381; 808 NW2d 450 (2011), are controlling because they partially "disavowed" *Miller v Auto-Owners Ins Co*, 411 Mich 633; 309 NW2d 544 (1981), on which *Musall* relied. This convoluted chain thus depends on what exactly "disavowal" means and whether the peremptory orders are comprehensible.

Although no published cases have defined the difference, "disavowal" must mean something distinct from "overruling." See, e.g., *Renny v Dep't of Transp*, 478 Mich 490, 505 n 36; 734 NW2d 518 (2007). It appears clear from usage that disavowal is a pronouncement that a rule of law stated in a case no longer applies

without otherwise touching the result of the prior judgment. See *Ray v Swager*, 501 Mich 52, 72 n 49; 903 NW2d 366 (2017); *Kidder v Ptacin*, 284 Mich App 166, 170-171; 771 NW2d 806 (2009). Disavowal is, therefore, a repudiation that recognizes that a rule of law *has been* overruled as a consequence of some other decision, holding, or pronouncement, without *itself* constituting that overruling.

Because *LeFevers* can be comprehended, it is precedent binding on this Court and thus precludes this Court from relying on any prior decisions in conflict with it. *LeFevers* unambiguously held that *Miller* was disavowed to the extent it conflicts with *Frazier*, which did not itself mention *Miller* at all. However, *LeFevers* only stated that the exact portion of *Miller* that was "disavowed as dicta" was as follows:

> "[MCL 500.3106(b)] recognizes that some parked vehicles may still be operated as motor vehicles, creating a risk of injury from such use as a vehicle. Thus a parked delivery truck may cause injury in the course of raising or lowering its lift or the door of a parked car, when opened into traffic, may cause an accident. Accidents of this type involve the vehicle as a motor vehicle." [*LeFevers*, 493 Mich at 960, quoting *Miller*, 411 Mich at 640.]

That is as far as the order went. We cannot comprehend any holding beyond that, and we think it would be inappropriate to infer anything additional from the order. The fact that *Miller* was only partially "disavowed" necessarily means that the trial court properly found *Miller* to also remain "good law" in part. Indeed, our Supreme Court has even recently cited *Miller* as remaining binding precedent at least in part. See *Kemp v Farm Bureau Gen Ins Co of Mich*, 500 Mich 245, 258 n 36; 901 NW2d 534 (2017).

In *Miller*, our Supreme Court observed that it was incongruous for MCL 500.3105(1) to provide PIP benefits for, *inter alia*, maintenance of a motor vehicle as a motor vehicle, but for MCL 500.3106(1) to simultaneously provide that parked vehicles are generally excluded, because maintenance is usually not performed on vehicles while they are in motion and the exceptions seem irrelevant to maintenance. *Miller*, 411 Mich at 637-638. This is completely logical. Consequently, the *Miller* Court turned to an analysis of the policies underlying the no-fault act and the various provisions of it. *Id*. at 638-641.

In so doing, the Court concluded that the parking exclusion reflected a policy decision that parked cars were generally not operating as motor vehicles except in three general circumstances in which "an accident is nonetheless directly related to its character as a motor vehicle." *Id*. at 640-641. The Court explained:

> The policies underlying § 3105(1) and § 3106 thus are complementary rather than conflicting. Nothing of the policy behind the parking exclusion—to exclude injuries not resulting from the involvement of a vehicle as a motor vehicle—conflicts with the policy of compensating injuries incurred in the course of maintaining (repairing) a motor vehicle. The terms of the parking exclusion should be construed to effectuate the policy they embody and to avoid conflict with another provision whose effect was intended to be complementary.
>
> [The plaintiff's] injury while replacing his shock absorbers clearly involved the maintenance of his vehicle as a motor vehicle. Compensation is thus required by the no-fault act without regard to whether his vehicle might be considered "parked" at the time of injury. [*Id*. at 641.]

Plaintiff accurately points out that the plaintiff in *Frazier* was not engaged in any kind of maintenance, but rather was simply closing the door of the vehicle

after having alighted from the vehicle. *Frazier*, 490 Mich at 386-387. Likewise, it is apparent from this Court's opinion in *LeFevers*, to which we must refer in order to fully comprehend our Supreme Court's order, that the plaintiff in that case was also not engaging in maintenance, but rather attempting to open a trailer liftgate. *LeFevers v State Farm Mut Auto Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued December 13, 2011 (Docket No. 298216), p 2.

Nothing in either *Frazier* or *LeFevers* directly undermines the holding in *Miller* that the parked-vehicle exception in MCL 500.3106(1) is simply not triggered if an injury is caused by the maintenance of a vehicle as a motor vehicle, whether or not the vehicle is in fact parked. Plaintiff's claim is not that her Jeep was being *operated* as a motor vehicle, but rather *maintained* as a motor vehicle. The portion of *Miller* holding that the "parked vehicle" exception is not triggered was, therefore, not apparently affected.

Defendant argues that *Frazier* and *LeFevers* are not the only cases from our Supreme Court that have the effect of overruling the relevant holding of *Miller*. Defendant relies extensively on our Supreme Court's holding that scraping ice off a vehicle's windshield was unrelated to, *inter alia*, maintenance of a motor vehicle as a motor vehicle. *Willer v Titan Ins Co*, 480 Mich 1177 (2008). Notably, however, nothing in *Willer* stated that scraping ice was or was not maintenance; rather, it only addressed causation, which would be a function of MCL 500.3105. Even more notably, it was an appeal from an order of this Court denying an application for leave with no factual discussion. Our Supreme Court's peremptory orders are, after all, only binding to the extent they can be comprehended. Because there are *no* facts in either our Supreme Court's order or this

Court's order from which any hints may be gleaned, nothing in that order can be comprehended as contributing any value whatsoever to an understanding of what does, or does not, constitute "maintenance." It did not mention *Miller* except in a concurring statement, and therefore it appears to have no precedential relevance to *Miller* or any holding relevant in it.

Otherwise, far from overturning it, our Supreme Court has reiterated that *Miller* had determined "that because the injury arose out of 'maintenance' of the vehicle, it was unnecessary to consider whether the vehicle was parked," but rather cautioned "that the *Miller* holding is limited to the narrow circumstances of that case." *Winter v Auto Club of Mich*, 433 Mich 446, 457; 446 NW2d 132 (1989); see also *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 632 n 5; 563 NW2d 683 (1997). It is only otherwise that "[w]here the motor vehicle is parked, the determination whether the injury is covered by the no-fault insurer generally is governed by the provisions of subsection 3106(1) alone." *Putkamer*, 454 Mich at 632. Our Supreme Court further clarified that the no-fault act was fundamentally intended to restrict payment of PIP benefits under MCL 500.3105 to injuries related to the "transportational function" of a motor vehicle, but the vehicle did not necessarily need to be in motion. *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 220-226; 580 NW2d 424 (1998).

Obviously, *Miller* is no longer binding precedent in its entirety. However, its essential holding that "maintenance" of a parked vehicle will, at least under some circumstances, avoid triggering MCL 500.3106(1) does not appear to have been implicitly or explicitly overruled. If anything, it has been reaffirmed, subject only to whatever our Supreme Court meant by "the narrow

circumstances of that case." In the absence of any clarification of that statement, the most rational interpretation is to rely on the policy discussion in *Miller* itself, filtered through the policy discussion in *McKenzie*. The gravamen of *Miller* is that because most forms of vehicular maintenance *literally* cannot be performed unless a vehicle is parked, the word "maintenance" in MCL 500.3105(1) would be rendered nugatory by MCL 500.3106 unless that maintenance avoided triggering MCL 500.3106 altogether. *McKenzie* would suggest that any such maintenance must have some bearing on the "transportational function" of the vehicle.

Clearly, just as Michigan residents are completely expected to have some awareness of the practical implications of snow and ice, any Michigan resident would be aware that keeping their cars clean keeps them running longer and without danger. Given the condition of our roads and the salt used for snow and ice on our roads, cleaning a car is essential to be able to see while driving. Nothing in *McKenzie*, *Winter*, *Putkamer*, *Willer*, *Frazier*, or *LeFevers* is inconsistent with this Court's holding in *Musall* that washing a car does indeed constitute the kind of maintenance that will avoid the operation of MCL 500.3106(1). Consequently, those cases do not implicitly or explicitly overrule *Musall*. It is essential to see out the windows and windshield while driving to avoid risking injury or death to the driver or others.

We additionally note that the word "parked" is not defined in the no-fault act, and in fact only occurs in two sections out of the entirety of Chapter 500, those being MCL 500.3106 and MCL 500.3123. This necessarily raises the question of whether plaintiff's vehicle was even parked at all. While it may seem intuitively obvious, almost every intuitively obvious categoriza-

tion scheme inevitably breaks down into "I know it when I see it," which is precisely the opposite of a definition and thus an open invitation to capriciousness and unpredictability.

In particular, it should be clear that a vehicle is not necessarily parked just because it is stopped, halted, standing, or otherwise not presently in motion. Indeed, our Supreme Court has indicated that a lack of vehicular movement merely triggers a requirement to consider *whether* the vehicle is therefore parked. *Winter*, 433 Mich at 455. In that case, a tow truck "positioned perpendicular to the street with the front wheels against the curb" with the hand brake set was deemed parked while it was being used to assist the plaintiff in lifting and leveling concrete slabs. *Id*. at 448-449, 456. In contrast, it would seem completely unreasonable to conclude that a vehicle that is unambiguously still within the flow of traffic but temporarily motionless should be considered a parked vehicle under the no-fault act. Indeed, this Court has explicitly noted that a vehicle stopped at a traffic light does not constitute a "parked vehicle." *Bachman v Progressive Cas Ins Co*, 135 Mich App 641, 642-643; 354 NW2d 292 (1984).

This Court subsequently applied the definition of "parking" found in MCL 257.38 of the Michigan Vehicle Code, which defines it as " 'standing a vehicle, whether occupied or not, upon a highway, when not loading or unloading except when making necessary repairs.' " *United Southern Assurance Co v Aetna Life & Cas Ins Co*, 189 Mich App 485, 489; 474 NW2d 131 (1991). This Court further noted that this definition was similar to the dictionary definition, and it opined that parking, standing, and stopping at the edge of a highway were synonymous. *Id*. This latter definition is, however, extremely troublesome because it obviously has no

application anywhere other than on an expressway; it would also seem to hold that a vehicle is by definition not parked "when making necessary repairs" even if it is not moving. It would also seem to indicate that a vehicle *is* parked while motionless at a traffic light. It is not workable to apply the definition in MCL 257.38 to vehicles anywhere other than on a highway, given that, by its express terms, it applies exclusively to vehicles "upon a highway." See *Kudek v Detroit Auto Inter-Ins Exch*, 100 Mich App 635, 640-641; 300 NW2d 350 (1980), rev'd on other grounds 414 Mich 956 (1982). It is likewise unworkable simply to treat any vehicle not presently in motion as parked.

The most coherent and succinct standard for determining what constitutes a parked vehicle is whether the vehicle was "in use as a motor vehicle" or more "like 'other stationary roadside objects that can be involved in vehicle accidents'." *Heard v State Farm Mut Auto Ins Co*, 414 Mich 139, 145; 324 NW2d 1 (1982) (citation omitted). Ironically, in *Heard*, neither our Supreme Court nor this Court analyzed why the car, which was at a gasoline station where the plaintiff was pumping gasoline into it, was considered parked in that case; rather, both Courts appear to have presumed so and instead discussed whether it was "involved" in the accident. Insofar as we can determine, the plaintiff in *Heard* asserted that the vehicle had been parked, and the issue was never disputed. Similarly, in *Musall*, this Court treated the vehicle as parked but never analyzed the issue.

A somewhat less clear case is *MacDonald v Mich Mut Ins Co*, 155 Mich App 650; 400 NW2d 305 (1986). Superficially, this Court apparently held that if the wheels were not moving, the vehicle was parked. *Id*. at 655-656. However, a more careful reading of the case

and its context reveals that a trailer was in the process of having its wheels and axle adjusted, and it was fundamental to that particular operation that the wheels be stationary while the trailer box was moved. *Id*. at 653. The plaintiff contended on appeal that the vehicle was not really parked because some slight shifting back and forth of the trailer box occurred; it was in that context that this Court focused on the movement of the wheels. *Id*. at 654-656. It therefore appears that the vehicle in question was in no state whatsoever to be operated and, consequently, was *transportationally* indistinguishable from any other piece of heavy equipment undergoing maintenance. This Court never addressed the maintenance exception to the parked-vehicle exclusion pursuant to *Miller*, however, because the plaintiff was denied benefits under MCL 500.3106(2), not MCL 500.3106(1). *Id*. at 654.

Notably, of the cases that have expressly analyzed what constitutes "parked," the tow truck in *Winter* was being used as a mobile tool, not a vehicle. In *Davis v Auto Owners Ins Co*, 116 Mich App 402, 406-408; 323 NW2d 418 (1982), another tow truck was deemed parked while it was in the process of winching a stranded car out of a ditch—again, clearly being used as a tool. The car at the traffic light in *Bachman*, however, was clearly still being used as a car, and in contrast, the trailer in *MacDonald* was immobilized. The only obvious definition that can be assembled from these examples is that the vehicle is both motionless *and* either being used as something unrelated to being a vehicle or incapable of being readily put back into motion. Plaintiff's vehicle was indeed motionless here, but it was also still running and clearly not intended to be left alone or to be unoccupied for very long. In the event the maintenance exception were to be deemed

inapplicable, we would hold that whether the vehicle was parked can only be resolved by posing the question to the trier of fact, because that is the only proper way to resolve a factual question where no bright-line rule can be easily established and where human intuition must be relied upon. Thus, even if summary disposition in plaintiff's favor were to be found improper, the trial court's refusal to grant summary disposition in defendant's favor must still be affirmed.

Thus, we now turn to our Supreme Court's order to consider "whether the causal connection between the plaintiff's injuries and the maintenance of a motor vehicle as a motor vehicle is more than incidental, fortuitous, or 'but for.' " *Woodring*, 501 Mich at 883. As discussed, *Willer* is utterly barren of any worth to this analysis. It makes a specific reference to "on this record"; however, no record exists that may be readily found. It sets forth essentially no facts, and it is a reversal of an order of this Court denying leave to appeal, which also set forth no facts. Again, our Supreme Court's peremptory orders are only binding to the extent they are comprehensible, and *Willer* simply is not. All we know is that *on the facts of that case, whatever they were*, the plaintiff in *Willer* failed to persuade our Supreme Court that there was a more-than-but-for causal connection between her injuries and the scraping of her windshield.

Defendant additionally cites several cases in which the plaintiffs in those cases allegedly slipped and fell "in the general vicinity of a vehicle" and the plaintiff's injuries were deemed to lack the requisite causal connection. Such a conclusion is obvious and irrelevant. It would naturally follow that merely being near to a vehicle will not spontaneously generate a causal connection to that vehicle. In contrast, plaintiff was

actively engaged in performing essential maintenance to the vehicle pertinent to its use as a motor vehicle. It may have been routine maintenance and not necessarily of immediate urgency to permit it to move at all, but essential maintenance nonetheless. Because *Musall* remains controlling precedent and has already determined that such a causal nexus exists on highly similar facts, we would follow that conclusion even if we did not agree with it.

We respectfully disagree with our dissenting colleague's estimation of *Williams v Pioneer State Mut Ins Co*, 497 Mich 875 (2014). As the Court held in that matter, the tree branch that injured the plaintiff as she was getting into her car was not causally linked to any act or omission of the plaintiff. Although the plaintiff had just removed several other branches from the hood of her car, the branch that injured her was not one of the branches plaintiff removed from the car, it was not struck by or otherwise caused to fall by plaintiff or one of the branches plaintiff removed from the car, it was not struck by the car, and in general plaintiff did not put into motion any chain of events that influenced the branch's falling. *Williams v Pioneer State Mut Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued February 6, 2014 (Docket No. 311008), p 2. In contrast, our dissenting colleague appears to dismiss the strong likelihood that the slippery patch on the floor in the present case was directly caused by the physical acts of maintenance performed by plaintiff, and even if it was not, those physical acts of maintenance directly impaired plaintiff's ability to detect or avoid it, or to prevent herself from actually falling or getting hurt even if avoidance of the slippery patch was impossible. It stands to reason that the tree branch that struck the plaintiff in *Williams* was outside any chain of causation involving the plaintiff or her car.

Plaintiff's maintenance of her car here did not simply happen to be performed in the wrong place at the wrong time, but in fact had a direct causal influence on her fall and resulting injury.

In summary, we conclude that the maintenance exception in *Miller* is still good law, that it applies to the facts in this case, that there would necessarily be a genuine question of material fact for the jury even if the maintenance exception did not apply here, and that there is a sufficient causal nexus between the plaintiff's injuries and the maintenance of a motor vehicle as a motor vehicle. We therefore affirm.

MARKEY, J., concurred with RONAYNE KRAUSE, P.J.

RIORDAN, J. (*dissenting*). I respectfully dissent.

In this action under the no-fault act, MCL 500.3101 *et seq*., defendant appeals by leave granted[1] the trial court's order denying defendant's motion for summary disposition and granting summary disposition in favor of plaintiff. I would reverse the trial court's order and remand with instructions to enter summary disposition in favor of defendant.

Plaintiff fell and was injured while outside her insured vehicle at a car wash. She sought no-fault benefits from defendant, which were denied. Plaintiff sued, claiming that defendant wrongfully refused to pay the claim. Defendant contended that plaintiff's claim was barred by the parked-vehicle exception to the no-fault act, MCL 500.3106(1). Plaintiff responded

[1] We originally denied defendant's application for leave to appeal. *Woodring v Phoenix Ins Co*, unpublished order of the Court of Appeals, entered March 3, 2015 (Docket No. 324128). The Michigan Supreme Court later remanded this case to us to consider as on leave granted. *Woodring v Phoenix Ins Co*, 501 Mich 883 (2017).

that she was injured while performing maintenance to her vehicle, MCL 500.3105(1), so her claim was not affected by the parking exception. The trial court ultimately agreed with plaintiff and granted summary disposition in her favor. This appeal followed.

"This Court . . . reviews de novo decisions on motions for summary disposition brought under MCR 2.116(C)(10)." *Pace v Edel-Harrelson*, 499 Mich 1, 5; 878 NW2d 784 (2016). A motion for summary disposition pursuant to MCR 2.116(C)(10) "tests the factual sufficiency of the complaint . . . ." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). "Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle . . . ." MCL 500.3105(1). Our Supreme Court has held that the plain language of MCL 500.3105(1) "shows that the Legislature . . . chose to provide coverage only where the causal connection between the injury and the use of a motor vehicle as a motor vehicle is more than incidental, fortuitous, or 'but for.' " *Thornton v Allstate Ins Co*, 425 Mich 643, 659; 391 NW2d 320 (1986). See also *Putkamer v Transamerica Ins Co of America*, 454 Mich 626, 634-635; 563 NW2d 683 (1997).

Disregarding the convoluted litany of caselaw discussed by the parties and the majority regarding whether a person washing their car is conducting maintenance and thus exempted from the parked-vehicle exception, summary disposition plainly should have been granted in favor of defendant because there was no question of fact that the causal connection between plaintiff's injuries and her automobile was merely incidental. See *Thornton*, 425 Mich at 659. Plaintiff slipped and fell because of a condition on the

land—the floor of the car wash was slippery or icy. The fact that she may have been washing her vehicle at the time that she may have stumbled upon the allegedly dangerous condition on the land was, without question, "incidental, fortuitous, or 'but for.' " *Id*. Thus, pursuant to the Court's holding in *Thornton*, 425 Mich at 659, summary disposition was required in favor of defendant.

I would reverse and remand for entry of an order granting summary disposition in favor of defendant.[2]

[2] Our Supreme Court decided similarly on the same grounds in *Williams v Pioneer State Mut Ins Co*, 497 Mich 875 (2014), wherein the Court reversed a decision of this Court involving an insured sustaining injury caused by a falling tree branch when entering her car. Although plaintiff in this case makes no argument that she was entering her car, the panel in *Williams v Pioneer State Mut Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued February 6, 2014 (Docket No. 311008), p 5 n 5, alternatively relied on the fact that the insured was conducting maintenance on her car immediately preceding the injury when she was removing other branches from her car. Despite that reasoning, the Michigan Supreme Court still reversed because the causal connection between the insured's injuries and vehicle was too tenuous. *Williams*, 497 Mich at 875-876. I would hold similarly in this case.

GOODWIN v NORTHWEST MICHIGAN FAIR ASSOCIATION

Docket Nos. 333963 and 335292. Submitted June 12, 2018, at Grand Rapids. Decided July 3, 2018, at 9:00 a.m.

Rebecca R. Goodwin (plaintiff), as personal representative of the estate of her six-year-old son Ezekiel D. Goodwin, filed a wrongful-death action in the Grand Traverse Circuit Court against Northwest Michigan Fair Association (defendant); Tad M. Thompson; TMT, Inc.; Meaghan E. Thompson; and Subway Store, seeking to recover damages on behalf of the estate. In August 2012, Ezekiel camped at defendant's fairground with his siblings and with his father, Jeff Goodwin, while attending a fair and participating in 4-H activities and exhibitions. During the fair, people used a private service drive to walk or ride bicycles between the campground area and the animal barns; motor vehicles with a permit also used the service drive. On August 8, 2012, Jeff allowed Ezekiel to ride his bicycle by himself from the campground to one of the barns; Jeff intended to meet Ezekiel at the barn after getting ready. Tad, who did not see Ezekiel sitting on his bicycle in the service drive given that Ezekiel was in his blind spot, ran over and killed Ezekiel when he backed his truck down the road. Plaintiff asserted that the service drive was unreasonably dangerous because defendant allowed motor vehicle traffic on a drive used by pedestrians and bicycle riders. Defendant maintained that Jeff was negligent in his supervision of Ezekiel and moved to name Jeff as a nonparty at fault. The court, Philip E. Rodgers, J., denied the motion, reasoning that the jury could not consider Jeff's potential fault because Jeff was entitled to parental immunity. The trial court later instructed the jury that it could not consider whether Ezekiel's parents were negligent and that 100% of the fault had to be apportioned between defendant and Tad. The jury returned a verdict in favor of plaintiff on a theory of premises liability, and it apportioned fault equally between defendant and Tad. The trial court subsequently awarded plaintiff taxable costs under MCR 2.625 and prejudgment interest under MCL 600.6013(8). Defendant appealed the award of costs and prejudgment interest in Docket No. 333963; in Docket No. 335292, defendant appealed the judgment, and plaintiff cross-appealed.

The Court of Appeals *held*:

1. MCL 600.2956 provides that in most tort actions seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only, not joint; that is, each tortfeasor must not pay damages in an amount greater than his or her allocated percentage of fault. Under MCL 600.6304(1), the fact-finder must determine (1) the total amount of each plaintiff's damages and (2) the total fault of all persons who contributed to the death or injury, regardless of whether the person was or could have been named as a party to the action. Consistently, MCL 600.2957 provides that the fact-finder must consider all persons who contributed to the injury, including nonparties, when allocating fault. Because the allocation of fault is not dependent on a plaintiff's ability to recover against a nonparty at fault, a fact-finder must consider a nonparty's fault for a breach of duty, regardless of whether immunity would preclude the plaintiff from naming the immune person as a party. Assessments of percentages of fault for nonparties are used only to accurately determine the fault of named parties, and if fault is assessed against a nonparty, a finding of fault does not subject the nonparty to liability in that action.

2. A child may maintain a lawsuit against his or her parents for an injury resulting from a parent's negligence except when the alleged negligent act involved an exercise of reasonable parental authority over the child—including negligent parental supervision—or an exercise of reasonable parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care. Before fault may be assessed under the comparative-fault statutes, there must be proof that the person owed a legal duty to the injured party. Parents have a duty to supervise their own children, which includes an obligation to see that the child's behavior does not involve danger to the child or to other persons. In general, unless the parent entrusts the child to another person who agrees to assume the duty to supervise the child, the parent's duty to supervise extends to exercising reasonable care for the safety of the child while on another person's property, including an obligation to protect and guard the child against dangers that are open and obvious to the parent. Whether a duty exists is a separate and distinct inquiry from whether an individual is immune from liability for a breach of that duty; in other words, an immunity does not abrogate a duty. Accordingly, a parent may be named as a nonparty at fault under MCL 600.2957(1) regardless of whether the parent is immune from liability.

3. In this case, while the trial court correctly noted that Ezekiel could not recover against his father for negligent supervision (in other words, parental immunity applied), that inability did not preclude the fact-finder from assessing Jeff's fault for purposes of accurately determining defendant's liability and ensuring that defendant only paid its fair share of the damages. The trial court erred by focusing on whether plaintiff could recover against Jeff because under the comparative-fault statutes, the allocation of fault was not dependent on whether plaintiff could recover damages from Jeff, a nonparty. For that reason, the trial court erred by denying defendant's request to name Jeff as a nonparty. Reversal was required because there was a question of fact whether Jeff breached his duty to supervise Ezekiel and to protect him from open and obvious dangers on the property—that is, the intermittent motor vehicle traffic on the service drive—and whether the breach was a proximate cause of Ezekiel's death. Further, because questions of fact existed, the trial court correctly denied plaintiff's motion for a directed verdict regarding Jeff's fault.

4. A landowner owes a duty to use reasonable care to protect invitees from an unreasonable risk of harm posed by dangerous conditions on the owner's land. Liability, however, does not arise from open and obvious dangers. With regard to adult invitees, whether a danger is open and obvious is judged by an objective standard, considering whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. Children are not held to the same standard as an average adult of ordinary intelligence because they are unable to understand or appreciate dangerous conditions or to protect themselves against those conditions. Instead, children over the age of seven can only be expected to act with that degree of care which a reasonably careful minor of the age, mental capacity, and experience of other similarly situated minors would exercise under the circumstances. Adults are expected to exercise greater vigilance around children, and landowners owe a heightened duty of care to children on their premises, including children who are known trespassers or licensees. Accordingly, a child invitee cannot be held to the same open and obvious danger standard as adult invitees. In that regard, it can be expected that children over the age of seven will conform to a reasonable-child standard in discovering, appreciating, and responding to dangers. In contrast, children under the age of seven are presumptively incapable of committing negligent or criminal acts or intentional torts because they are without discretion, they are unconscious of the nature of their acts, and

they have no appreciation of the attending danger to themselves or others. Accordingly, the open and obvious danger doctrine does not apply to children under the age of seven because children under that age cannot be expected to conform their conduct to a reasonable-child standard. For that reason, a landowner is obligated to exercise reasonable care to protect a child from open and obvious dangers on the property, even if those dangers would be open and obvious to adults and older children. Ezekiel was under the age of seven when he was killed in the accident. For that reason, the trial court did not err by denying defendant's request to instruct the jury on the open and obvious danger doctrine in relation to Ezekiel.

5. The violation of administrative rules and regulations is evidence of negligence that may be submitted to the jury. In this case, the trial court abused its discretion by instructing the jury under M Civ JI 12.05 with regard to the alleged violation of Mich Admin Code R 326.1556(8) but not by instructing the jury with regard to the alleged violation of Mich Admin Code R 326.1558(1).

6. The award of costs under MCR 2.625 and the award of prejudgment interest under MCL 600.6013 were vacated because the underlying judgment was vacated.

Judgment vacated; case remanded for a new trial.

1. NEGLIGENCE — COMPARATIVE-FAULT STATUTES — SEVERAL LIABILITY — ALLOCATION OF LIABILITY TO NONPARTIES AT FAULT.

MCL 600.2956 provides that in most tort actions seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only, not joint; that is, each tortfeasor must not pay damages in an amount greater than his or her allocated percentage of fault; under MCL 600.2957, the fact-finder must consider all persons who contributed to the injury, including nonparties, when allocating fault; because the allocation of fault is not dependent on a plaintiff's ability to recover against a nonparty at fault, a fact-finder must consider a nonparty's fault for a breach of duty, regardless of whether immunity would preclude the plaintiff from naming the immune person as a party.

2. NEGLIGENCE — COMPARATIVE-FAULT STATUTES — SEVERAL LIABILITY — NONPARTIES AT FAULT — PARENTAL IMMUNITY.

A parent may be named as a nonparty at fault under MCL 600.2957(1) regardless of whether the parent is immune from liability.

3. NEGLIGENCE — PREMISES LIABILITY — OPEN AND OBVIOUS DANGERS — CHILDREN UNDER THE AGE OF SEVEN.

A landowner owes a duty to use reasonable care to protect invitees from an unreasonable risk of harm posed by dangerous conditions on the owner's land; while landowners are not liable for injuries that occur to adult invitees from open and obvious dangers, the open and obvious danger doctrine does not apply to children under the age of seven because children under that age cannot be expected to conform their conduct to a reasonable-child standard.

Mark Granzotto, PC (by *Mark Granzotto*) and *Parsons Law Firm PLC* (by *Grant Parsons*) for the Estate of Ezekiel D. Goodwin.

Plunkett Cooney (by *Robert G. Kamenec* and *Karen E. Beach*) for Northwest Michigan Fair Association.

Before: MURRAY, P.J., and HOEKSTRA and GADOLA, JJ.

PER CURIAM. These consolidated appeals involve a wrongful-death action filed by Rebecca Goodwin as personal representative of Ezekiel Goodwin's estate (plaintiff). Following a jury trial, the trial court entered a judgment against defendant Northwest Michigan Fair Association[1] in the amount of $1,000,000. Later, the trial court also entered an order awarding plaintiff taxable costs and prejudgment interest. Defendant now appeals as of right. For the reasons explained in this opinion, we conclude that the trial court erred by denying defendant's request to name Jeff Goodwin as a nonparty at fault and that on the facts of this case,

[1] Plaintiff also sued Tad Thompson, the driver of the vehicle that killed Ezekiel, as well as Thompson's wife and Thompson's employer, TMT, Inc., which operates a Subway restaurant franchise. However, plaintiff reached a settlement with these defendants, and by stipulation of the parties these defendants were dismissed with prejudice. These defendants are not parties to this appeal. As used in this opinion, the term "defendant" refers solely to defendant Northwest Michigan Fair Association.

failure to vacate the jury verdict would be inconsistent with substantial justice. Accordingly, we vacate the judgment in plaintiff's favor, we vacate the award of taxable costs and prejudgment interest, and we remand for a new trial.

I. FACTS

On August 8, 2012, while riding his bike, six-year-old Ezekiel Goodwin was hit by a truck driven by Tad Thompson. The accident occurred on a service drive on defendant's 80-acre fairground property during "fair week," an event featuring a carnival and amusement rides as well as 4-H club animal exhibitions and activities. Children and young adults ranging in age from 5 to 19 years old participated in the 4-H events, and many of the children and their families camped on-site during the week.[2] Between the campground area and the animal barns there was a private service drive, and it was on this service drive that Ezekiel was struck.

During fair week, pedestrians and bicycle riders, including children, used the service drive to travel from the campground area to the barns. Fair organizers were aware that pedestrians and bike riders used the service drive. However, unlike other roads on the property, the service drive was *not* closed to motor vehicle traffic during fair week. Motor vehicle use of the service drive was restricted insofar as only people with passes could drive onto the fairgrounds, and the speed limit on the fairgrounds was 5½ miles per hour. Those with passes included 4-H families, the members of the fair board, and service vehicles related to the fair, including vehicles hauling manure, emptying

[2] The fair rules required children to have "one parent per family on site."

dumpsters, and tending outhouse facilities. Emergency vehicles could also use the drive if necessary. In other words, the service drive saw bicycle and pedestrian traffic as well as "intermittent" motor vehicle traffic during the fair.

Ezekiel and his siblings were participating in 4-H events, and Ezekiel and members of his family—his father Jeff Goodwin, his sister, and his brother—were camping at the fairgrounds. On the morning of August 8, 2012, Jeff allowed Ezekiel to ride his bike, unaccompanied, from the family's campsite to the barns where Ezekiel planned to tend to his pony. Jeff was going to the bathhouse, and after shaving and brushing his teeth, he intended to meet Ezekiel at the barns. As Ezekiel was leaving, Jeff told Ezekiel that he would meet him at the door to the pony stall.[3]

Thompson had a pass to drive on the fairgrounds because he had a daughter participating in 4-H events. On the morning of August 8, 2012, Thompson drove his daughter to the fairgrounds to feed her cow. While driving on the service drive toward the animal barns, Thompson saw Ezekiel riding his bike on the road. After passing Ezekiel, Thompson's daughter reminded him that he forgot to stop at the feed lot. Thompson checked his mirrors and then began to back up. Unbeknownst to Thompson, Ezekiel was behind his truck in a blind spot, where someone of Ezekiel's height would not be visible on a bike. According to an eyewitness to the accident, Ezekiel sat on his bike and appeared to just watch the truck slowly back up into him. Tragically, Ezekiel was pinned beneath the truck, and he later died of his injuries.

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[3] Ezekiel was among the youngest class of 4-H members, known as "clover buds." As a clover bud, Ezekiel could not enter the pony stall unless accompanied by an adult.

Following Ezekiel's death, Ezekiel's mother, Rebecca Goodwin, as the personal representative of Ezekiel's estate, filed the current wrongful-death lawsuit against defendant. Plaintiff's basic theory of the case was that the service drive was unreasonably dangerous because defendant allowed motor vehicle traffic on a path used by pedestrians and bike riders. According to plaintiff, defendant should have banned all motor vehicles, used "spotters" for vehicles, or erected barriers to create a separate bike path.

Notably, defendant maintained that Jeff was negligent in his supervision of Ezekiel, and defendant attempted to name Jeff as a nonparty at fault.[4] The trial court ultimately denied defendant's request, reasoning that the jury could not consider Jeff's potential fault because Jeff was entitled to parental immunity. Consistently with this ruling, the trial court instructed the jury that it could not consider whether Ezekiel's parents were negligent, and the jury was told to apportion 100% of the fault between defendant and Thompson.

Following trial, the jury returned a verdict in favor of plaintiff on a "premises liability/nuisance" theory.[5]

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[4] Initially, Jeff was a named plaintiff in the case. As an individual plaintiff, he alleged a claim of negligent infliction of emotional distress (NIED). He later dropped his NIED claim after admitting that he did not see the accident and that he did not see Ezekiel removed from under the vehicle. Defendant filed its notice of nonparty fault regarding Jeff as soon as Jeff dropped his claim and became a nonparty. See *Salter v Patton*, 261 Mich App 559, 567; 682 NW2d 537 (2004); MCR 2.112(K)(3)(c).

[5] Plaintiff also brought a claim of negligence, but the jury rejected this claim. With regard to the "premises liability/nuisance" count, the jury was instructed on a premises-liability theory consistent with M Civ JI 19.03. The instruction as it related to "nuisance" was likewise premised on the assertion that there was a dangerous condition on the land and that defendant acted negligently by failing to protect Ezekiel from this condition. Despite the added "nuisance" label, the claim was in sub-

With regard to Thompson, the jury concluded that he had been negligent. The jury then apportioned 50% of the fault to defendant and 50% of the fault to Thompson. The jury awarded a total of $2,000,000 in damages. Based on the jury's verdict, the trial court entered an order against defendant for 50% of the damages, i.e., $1,000,000. After trial, the trial court also awarded plaintiff taxable costs under MCR 2.625 and prejudgment interest under MCL 600.6013(8).

Defendant now appeals as of right. Specifically, in Docket No. 335292, defendant challenges the jury verdict and the judgment in plaintiff's favor. Plaintiff has filed a cross-appeal in Docket No. 335292. In Docket No. 333963, defendant challenges the trial court's award of costs and prejudgment interest.

II. NONPARTY AT FAULT

On appeal, defendant first argues that a new trial should be granted because the trial court refused to allow the jury to consider Jeff as a nonparty at fault. Although Jeff is entitled to parental immunity from a lawsuit by Ezekiel or Ezekiel's estate, defendant maintains that this grant of immunity does not eliminate Jeff's parental duty to supervise Ezekiel, and because of this duty, defendant argues that Jeff may be named as a nonparty at fault for purposes of determining defendant's "fair share" of liability. Defendant also argues that there is substantial evidence that Jeff was negligent in his supervision of Ezekiel and that this negligence was a proximate cause of Ezekiel's death.

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stance a premises-liability claim—namely, that Ezekiel was injured because of an unreasonably dangerous condition on defendant's land. See *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692-693; 822 NW2d 254 (2012).

According to defendant, a new trial is required to allow the jury to consider whether Jeff was negligent and to apportion fault to Jeff on the basis of his negligence. We agree.

A. STANDARDS OF REVIEW

"Statutory construction is a question of law subject to review de novo." *Vandonkelaar v Kid's Kourt, LLC*, 290 Mich App 187, 196; 800 NW2d 760 (2010). Likewise, whether a duty exists is a question of law, which is reviewed de novo. *Hill v Sears, Roebuck & Co*, 492 Mich 651, 659; 822 NW2d 190 (2012). If the trial court erred by refusing to allow the jury to consider Jeff's alleged negligence when apportioning fault, reversal is not required unless failure to vacate the jury verdict would be inconsistent with substantial justice. MCR 2.613(A); *Pontiac Sch Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 630; 563 NW2d 693 (1997).

B. ANALYSIS

Traditionally, Michigan followed a joint and several liability approach in tort cases involving multiple tortfeasors. *Kaiser v Allen*, 480 Mich 31, 37; 746 NW2d 92 (2008). Under this approach, "the injured party could either sue all tortfeasors jointly or he could sue any individual tortfeasor severally, and each individual tortfeasor was liable for the entire judgment, although the injured party was entitled to full compensation only once." *Gerling Konzern Allgemeine Versicherungs AG v Lawson*, 472 Mich 44, 49; 693 NW2d 149 (2005). A defendant's liability for the entire judgment existed even when one of the tortfeasors could not be held civilly responsible because of immunity. *Bell v Ren-Pharm, Inc*, 269 Mich App 464, 470; 713 NW2d 285 (2006). "In such a situation, a [defendant] who is not

immune and who is subject to suit is jointly and severally liable for damages arising out of the acts of a person not named as a party because of some immunity protection." *Id*.

However, in 1995, the Legislature enacted tort-reform legislation that "generally abolished joint and several liability and replaced it with fair share liability where each tortfeasor only pays the portion of the total damages award that reflects that tortfeasor's percentage of fault." *Id*. at 467 (quotation marks and citation omitted). These principles of fair-share liability are set forth in the comparative-fault statutes: MCL 600.2956, MCL 600.2957, and MCL 600.6304. *Vandonkelaar*, 290 Mich App at 190 n 1. In particular, under MCL 600.2956, "[e]xcept as provided in section 6304, in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint." In relevant part, MCL 600.2957 provides:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, *regardless of whether the person is, or could have been, named as a party to the action*.
>
> * * *
>
> (3) Sections 2956 to 2960 do not eliminate or diminish a defense or immunity that currently exists, except as expressly provided in those sections. *Assessments of percentages of fault for nonparties are used only to accurately determine the fault of named parties. If fault is assessed*

against a nonparty, a finding of fault does not subject the nonparty to liability in that action and shall not be introduced as evidence of liability in another action. [Emphasis added.]

MCL 600.6304 states:

(1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:

(a) The total amount of each plaintiff's damages.

(b) The percentage of the total fault of *all* persons that contributed to the death or injury, including each plaintiff and each person released from liability under section 2925d, *regardless of whether the person was or could have been named as a party to the action*.

(2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed.

* * *

(4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6) [in medical malpractice cases], *a person shall not be required to pay damages in an amount greater than his or her percentage of fault* as found under subsection (1). . . .

* * *

(8) As used in this section, "fault" includes an act, an omission, conduct, including intentional conduct, a breach

> of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party. [Emphasis added.]

As made plain in these provisions, the fact-finder must "allocate fault among all responsible torfeasors," regardless of whether the tortfeasor was or could have been named as a party to the action, and "each tortfeasor need not pay damages in an amount greater than his allocated percentage of fault." *Gerling*, 472 Mich at 51. See also *Barnett v Hidalgo*, 478 Mich 151, 167; 732 NW2d 472 (2007). However, when there is an assertion that a person's negligence is a proximate cause of the damage sustained by a plaintiff, before fault may be allocated to that person under the comparative-fault statutes, there must be proof that the person owed a legal duty to the injured party. *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18, 21-22; 762 NW2d 911 (2009). "Without owing a duty to the injured party, the 'negligent' actor could not have proximately caused the injury and could not be at 'fault' for purposes of the comparative fault statutes." *Id*. at 22.

1. PARENTAL DUTY TO SUPERVISE

Before fault may be apportioned to Jeff, there must be a threshold determination that Jeff owed Ezekiel a duty. *Id*. at 21-22. "Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person." *Moning v Alfono*, 400 Mich 425, 438-439; 254 NW2d 759 (1977) (citations omitted). Michigan has long recognized that "both nature and the law impose" on parents "the duty of care and watchfulness" with

regard to their children. *Ryan v Towar*, 128 Mich 463, 479; 87 NW 644 (1901). See also *Lyshak v Detroit*, 351 Mich 230, 234; 88 NW2d 596 (1958) (opinion by SMITH, J.). As persons responsible for their children, parents cannot allow their children "too young to understand danger" to wander unattended; rather, parents, as persons with "special dealings" with children, are expected to provide care and protection. *Hoover v Detroit, GH & M R Co*, 188 Mich 313, 321-323; 154 NW 94 (1915) (quotation marks and citation omitted). Stated differently, "parents have a duty to supervise their own children, or determine that their children are of sufficient age and maturity to no longer need such supervision." *Stopczynski v Woodcox*, 258 Mich App 226, 236; 671 NW2d 119 (2003) (quotation marks and citation omitted). This duty to supervise one's child includes an obligation "to see that the child's behavior does not involve danger to the child," 62 Am Jur 2d, Premises Liability, § 227, p 600, or to other persons, *American States Ins Co v Albin*, 118 Mich App 201, 206; 324 NW2d 574 (1982).[6] Parents are expected to exercise "reasonable care" to "control" their minor child, *Reinert v Dolezel*, 147 Mich App 149, 157; 383 NW2d 148 (1985), and to provide "instructions and education" to ensure that the child is aware of dangers to his or her well-being, *McCallister v Sun Valley Pools, Inc*, 100 Mich App 131, 139; 298 NW2d 687 (1980). See also *Rodebaugh v Grand Trunk W R Co*, 4 Mich App 559, 567; 145 NW2d 401 (1966). Generally, unless the

[6] With regard to other persons, "a parent is under a duty to exercise reasonable care . . . to control his minor children [so] as to prevent them from intentionally harming others or from so conducting themselves as to create an unreasonable risk of bodily harm to them if the parent knows or has reason to know that he has the ability to control his children and knows or should know of the necessity and opportunity for exercising such control." *American States*, 118 Mich App at 206.

parent entrusts the child to another person who agrees to assume the duty to supervise the child, the parent's duty to supervise extends to exercising reasonable care for the safety of the child while on the property of another, including an obligation to protect and guard the child against dangers that are open and obvious to the parent.[7] See 62 Am Jur 2d, Premises Liability, § 227 to § 229, pp 600-604; 65A CJS, Negligence, § 537, pp 369-370; *Stopczynski*, 258 Mich App at 236. See also *Powers v Harlow*, 53 Mich 507, 516; 19 NW 257 (1884) (concluding that a father could not be found at fault for a child's injuries on the property of another because a person of "ordinary prudence" in the father's position would not have suspected the danger to the child).

2. PARENTAL IMMUNITY

Although parents undoubtedly have a duty to supervise their children, the law generally does not allow children to recover damages from their parents for a breach of this duty. In particular, "[a]t common law, a minor could not sue his or her parents in tort." *Haddrill v Damon*, 149 Mich App 702, 705; 386 NW2d 643 (1986). The Michigan Supreme Court generally abolished intra-family tort immunity in *Plumley v Klein*, 388 Mich 1, 8; 199 NW2d 169 (1972), holding that a child could maintain a lawsuit against his or her parents for an injury resulting from a parent's negli-

[7] Although parents have a duty to supervise their children, a parent's presence on the property does not abrogate the duty a premises owner owes to children. See *Woodman v Kera, LLC*, 280 Mich App 125, 154; 760 NW2d 641 (2008) (opinion by TALBOT, J.), aff'd 486 Mich 228 (2010); see also 62 Am Jur 2d, Premises Liability, § 227, p 601. "[L]andowners owe a duty to exercise reasonable care to protect children from dangerous conditions on their premises notwithstanding the presence of the children's parents." *Wheeler v Central Mich Inns, Inc*, 292 Mich App 300, 304; 807 NW2d 909 (2011).

gence. However, the *Plumley* Court retained two exceptions to this rule, concluding that parental immunity remained:

> (1) where the alleged negligent act involves an exercise of reasonable parental authority over the child; and (2) where the alleged negligent act involves an exercise of reasonable parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care. [*Id.*]

A claim for negligent parental supervision of a child falls within the first *Plumley* exception, meaning that a parent is granted immunity and a child may not sue a parent for negligent supervision. See *Spikes v Banks*, 231 Mich App 341, 349; 586 NW2d 106 (1998); *McCallister*, 100 Mich App at 139.

3. APPORTIONING FAULT TO IMMUNE PARENTS

In this case, the trial court acknowledged that Jeff, as Ezekiel's parent, generally owed Ezekiel a duty to supervise him; however, the trial court precluded the jury from considering Jeff's alleged negligence, or apportioning fault to Jeff, based on the conclusion that Jeff's entitlement to parental immunity barred the jury's consideration of his fault. In reaching this conclusion, the trial court distinguished between a "duty" and a "legally cognizable duty that can serve as a basis for allocation of fault . . . ." The trial court focused its analysis on whether the comparative-fault statutes allowed for recovery against parents, noting, for instance, that the statutes did not address "what is the legal duty, the duty that you can recover against with respect to a parent and a child in a wrongful death case." In light of the trial court's reasoning, the basic question before us is whether immunity, specifically parental immunity, bars the allocation of fault to an

immune individual under the comparative-fault statutes. In contrast to the trial court's conclusions, given the plain language of the comparative-fault statutes and the distinction between immunity and duty, we conclude that a person entitled to parental immunity may nevertheless be named as a nonparty at fault and allocated fault for purposes of determining a defendant's liability under the comparative-fault statutes.

First of all, the trial court erred by focusing on whether Ezekiel's estate could obtain a recovery against Jeff. Quite simply, under MCL 600.2957 and MCL 600.6304, the allocation of fault is not dependent on whether a plaintiff can recover damages from the nonparty. Following the enactment of tort-reform legislation, the finder of fact must allocate fault among *all* responsible persons, "regardless of whether the person is, or could have been, named as a party to the action." MCL 600.2957(1). See also MCL 600.6304(1)(b). A finding that a nonparty is at fault "does not subject the nonparty to liability in that action . . . ." MCL 600.2957(3). Rather, the sole purpose of assessing the fault of nonparties is to "accurately determine the fault of named parties," MCL 600.2957(3), to ensure that each named defendant-tortfeasor does not "pay damages in an amount greater than his allocated percentage of fault," *Gerling*, 472 Mich at 51. In other words, the nonparty's "liability" to the plaintiff is not at issue under the comparative-fault statutes, and it is immaterial whether a plaintiff could have named the nonparty as a defendant.

There is, accordingly, no merit to the trial court's suggestion that the allocation of fault under MCL 600.2957 and MCL 600.6304 depends on the plaintiff's ability to obtain a recovery against the nonparty at fault; that interpretation has no basis in the statutory

language, and it wholly eviscerates the requirement that a person's fault should be considered "regardless of whether the person is, or could have been, named as a party to the action." MCL 600.2957(1). See also MCL 600.6304(1)(b). Accordingly, while the trial court correctly noted that a child cannot recover against a parent for negligent supervision, this inability to recover damages against a parent in no way precludes an assessment of a parent's fault for purposes of accurately determining a defendant's liability and ensuring that a defendant only pays his or her fair share.[8] Rather than focus on whether a child could "recover" against a parent, the threshold question the trial court should have considered under MCL 600.2957 and MCL 600.6304 was whether Jeff owed a duty to his child. See *Romain*, 483 Mich at 21-22.

Second, to the extent the trial court attempted to analyze the duty question, it erred by injecting the concept of immunity into the threshold duty determination and using the parental-immunity doctrine to determine whether there was a duty that could be considered for purposes of allocating fault. In actuality, a parent may have a duty—and therefore may be allocated fault under MCL 600.2957 and MCL 600.6304—regardless of whether the parent is entitled to immunity. Generally speaking, the question

[8] Before the enactment of the tort-reform statutes, the fact that parental immunity prevented a child from suing a parent for negligent supervision also prevented consideration of a parent's fault in a lawsuit brought by the child or the child's estate. See *Byrne v Schneider's Iron & Metal, Inc*, 190 Mich App 176, 189; 475 NW2d 854 (1991); *Wymer v Holmes*, 144 Mich App 192, 196-197; 375 NW2d 384 (1985). The trial court relied on these cases when ruling that Jeff could not be named as a nonparty at fault. However, these cases did not involve consideration of the statutes that now control the allocation of fault in tort suits, and therefore these cases have no bearing on the propriety of considering parental fault under MCL 600.2957 and MCL 600.6304.

whether a duty exists is a separate and distinct inquiry from whether an individual is immune from liability for a breach of that duty. See *McGoldrick v Holiday Amusements, Inc*, 242 Mich App 286, 298 n 5; 618 NW2d 98 (2000); *Jones v Wilcox*, 190 Mich App 564, 569-570; 476 NW2d 473 (1991). For example, this distinction between duty and immunity was recognized by the Michigan Supreme Court, in the context of governmental immunity, as follows:

> Because immunity necessarily implies that a "wrong" has occurred, we are cognizant that some tort claims, against a governmental agency, will inevitably go unremedied. Although governmental agencies may be under many duties, with regard to services they provide to the public, only those enumerated within the statutorily created exceptions are legally compensable if breached. [*Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 157; 615 NW2d 702 (2000).]

Similarly, in the context of parental immunity, this Court has acknowledged the distinction between a grant of immunity and a determination regarding the existence of a duty, recognizing that "[t]he logical predicate to the [parental] immunity question . . . is an assumption that the [parent's] conduct was negligent, and hence unreasonable; the issue is whether the parent should be shielded from liability for that unreasonable conduct." *Thelen v Thelen*, 174 Mich App 380, 384 n 1; 435 NW2d 495 (1989). See also *Spikes*, 231 Mich App at 348-349. Indeed, while traditionally a parent's negligence was not a basis to reduce a *child's* recovery in a lawsuit against a third-party tortfeasor, a finding of parental negligence—i.e., a determination that a parent breached a duty—has long been considered as a basis to reduce or foreclose a *parent's* recovery in a lawsuit by the parent based on the loss of a child's services, society, and companionship. See

Feldman v Detroit United R, 162 Mich 486, 489; 127 NW 687 (1910); *Byrne*, 190 Mich App at 189.[9] As these cases make plain, while a parent may be immune from a lawsuit by his or her child or the child's estate, a parent nevertheless owes a duty to the child. In other words, contrary to the trial court's attempt to define a parent's duty based on parental immunity, "the availability of an immunity has no bearing on whether a duty exists, but rather focuses on redressability." *Vandonkelaar*, 290 Mich App at 212 (MURRAY, J., dissenting).[10]

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[9] In analyzing the parental-fault question, the trial court indicated that as a matter of public policy, juries should not be allowed to pass judgment on parental decisions. Parental immunity serves a number of purposes, including "preservation of domestic tranquility and family unity, protection of family resources, and recognition of the need to avoid judicial intervention into the core of parenthood and parental discipline . . . ." *Hush v Devilbiss Co*, 77 Mich App 639, 645; 259 NW2d 170 (1977). However, contrary to the trial court's reasoning, there have long been circumstances when a parent's negligence was considered by the finder of fact. See, e.g., *Feldman*, 162 Mich at 489-490; *Byrne*, 190 Mich App at 185-189. More importantly, it would be improper to use policy concerns as a reason to prevent consideration of a parent's fault under MCL 600.2957 and MCL 600.6304. When interpreting statutory language, our obligation is to enforce statutes as written, not "to independently assess what would be most fair or just or best public policy." *Tull v WTF, Inc*, 268 Mich App 24, 36; 706 NW2d 439 (2005) (quotation marks and citations omitted). In other words, the question before us is whether MCL 600.2957 and MCL 600.6304 require consideration of parental fault, not whether consideration of parental fault is the best public policy.

[10] The question of whether immune parents may be named as nonparties at fault was raised in *Vandonkelaar*, 290 Mich App at 191. However, the *Vandonkelaar* majority did not decide the issue. *Id*. at 195. In a dissenting opinion, Judge MURRAY addressed the question of parental immunity in the context of the comparative-fault statutes and concluded that parental immunity does not eliminate parental duty, meaning that this immunity would not preclude consideration of parental fault for purposes of allocating responsibility under the comparative-fault statutes. *Id*. at 209-216 (MURRAY, J., dissenting). We find Judge MURRAY's decision persuasive, and we adopt its reasoning.

Consistently with this distinction between duty and immunity, the comparative-fault statutes make plain that the availability of immunity does not control the existence of a duty that can give rise to an allocation of fault to a nonparty under MCL 600.2957 and MCL 600.6304. That is, while preserving any immunity held by a nonparty, the statutes allow for consideration of a nonparty's fault for a breach of duty, regardless of whether immunity would preclude a plaintiff from naming the immune person as a party. See MCL 600.2957(1); MCL 600.6304(3) and (8). More fully, Judge MURRAY's dissenting opinion in *Vandonkelaar* aptly examines this distinction between immunity and duty as well as the implications of immunity in the comparative-fault statutes as follows:

> Concerning immunity, MCL 600.2957(3) provides:
>
> > Sections 2956 to 2960 [MCL 600.2956 to MCL 600.2960] *do not eliminate or diminish a defense or immunity that currently exists*, except as expressly provided in those sections. Assessments of percentages of fault for nonparties are used only to accurately determine the fault of named parties. If fault is assessed against a nonparty, a finding of fault does not subject the nonparty to liability in that action and shall not be introduced as evidence of liability in another action. [Emphasis supplied.]
>
> By stating that a fact-finder's assessment of the percentage of a nonparty's fault does not eliminate or diminish an immunity, § 2957(3) necessarily presupposes that an immunity does not abrogate a duty. Otherwise, there would be no need to preserve that immunity after fault has been allocated. Put differently, if an immunity were to abrogate a duty, an allocation of fault could never come into play because as *Romain* held, a nonparty's duty is necessary to allocate nonparty fault in the first place. Without an allocation of fault, no predicate would exist to

> eliminate the immunity § 2957(3) otherwise seeks to preserve. [*Vandonkelaar*, 290 Mich App at 212-213 (MURRAY, J., dissenting).]

Overall, given the clear distinction between immunity and duty, and bearing in mind that fault may be apportioned when there is a duty regardless of whether the person may be named as a party, there is simply no basis for the trial court's conclusion that parental immunity prohibits the consideration of a parent's fault under MCL 600.2957 and MCL 600.6304.[11]

4. APPLICATION

Having concluded that a parent can be named as a nonparty at fault notwithstanding the parental-immunity doctrine, the question before us becomes whether Jeff should have been named as a nonparty at fault in this case and, if so, whether the refusal to allow the jury to consider Jeff's alleged negligence warrants a new trial. In this regard, despite defendant's request to include Jeff as a nonparty at fault, the jury was given a verdict form that required it to assign 100% of the fault for Ezekiel's death, and the jury was only given the option of apportioning that fault between defendant and Thompson. Indeed, under M Civ JI 13.09,[12] the trial court affirmatively instructed the jury

[11] While nonbinding, several other jurisdictions have similarly determined that, notwithstanding parental immunity, parents owe their children a duty and that parental negligence may therefore be considered when allocating fault. See, e.g., *Doering v Copper Mountain, Inc*, 259 F3d 1202, 1216 (CA 10, 2001); *Witte v Mundy*, 820 NE2d 128, 133 (Ind, 2005); *Fitzpatrick v Allen*, 24 Kan App 2d 896, 904; 955 P2d 141 (1998); *YH Investments, Inc v Godales*, 690 So 2d 1273, 1278 (Fla, 1997). We find these cases persuasive.

[12] M Civ JI 13.09 states, "You must not consider whether there was negligence on the part of [*name of child*]'s parents, because, under the law, any negligence on the part of the parents cannot affect a claim on

not to consider any negligence by Ezekiel's parents. By denying defendant's request to include Jeff as a nonparty at fault and omitting Jeff's name from the verdict form, the trial court denied defendant one of its primary defenses—namely, that Jeff was negligent in allowing a six-year-old child to ride his bike unescorted on a road open to intermittent motor vehicle traffic.

Moreover, this error cannot be considered harmless given that there was evidence to support the conclusion that Jeff breached a duty to Ezekiel and that this breach of duty was a proximate cause of Ezekiel's death. As Ezekiel's parent, Jeff owed Ezekiel a duty of supervision and a duty to protect him from open and obvious dangers on the property. *Lyshak*, 351 Mich at 234 (opinion by SMITH, J.); *Stopczynski*, 258 Mich App at 236; 62 Am Jur 2d, Premises Liability, § 227, pp 600-601. In this case, the purportedly dangerous condition on defendant's property was the mixed-use nature of the service drive, i.e., intermittent motor vehicle traffic on a road that campers also used to traverse from the campgrounds to the barns on their bikes or on foot. Faced with this mixed-use roadway, Jeff allowed six-year-old Ezekiel to ride his bike alone from the family's campsite to the barn.[13] Jeff's only justification for this decision was his assertion that he believed there was an unwritten rule that the service drive was a "bike path" that was not open to traffic during the fair. Indeed, Jeff testified that he would never have let his six-year-old ride a bike alone on a

behalf of the child." This instruction is inapplicable when a parent is named as a nonparty at fault. See M Civ JI 13.09, use note.

[13] Jeff never denied that he was responsible for supervising Ezekiel, and testimony from parents and organizers confirmed that parents were generally responsible for their children while at the fair. Indeed, several parents described entrusting their children to other adults if they could not supervise them personally.

road that was open for traffic; rather, Jeff stated that he would have accompanied Ezekiel to the barn.

However, despite Jeff's claim that he thought the road was closed to motor vehicle traffic, in his trial testimony, Jeff conceded that, though "rare," he actually saw motor vehicles on the service drive. Additionally, he knew that there were "official" vehicles going to the barns, and more than once, Jeff saw an unofficial red convertible parked at the barn with hay in its trunk. Aside from seeing the "rare" vehicle on the road, Jeff also acknowledged that there were no signs or barriers prohibiting vehicles from driving on the service road, that numerous vehicles were parked along the service drive (though Jeff asserted that he did not believe these vehicles would move), and that, more generally, campers with vehicles parked on the campgrounds could come and go with their vehicles during the week. Likewise, other campers testified that they used the road to walk and ride to the barn, but they also confirmed that they saw vehicles using the drive, including garbage trucks, a backhoe or other vehicles gathering manure, golf carts, "Gators," and people coming to tend to the portable toilets. The testimony of the fair organizers also indicated that, unlike other roadways on the property, the service drive was not closed to motor vehicles.

Given Jeff's admissions and the other evidence of vehicles using the road, Jeff clearly knew—or would have been reasonably expected to know—that there was intermittent motor vehicle traffic on the service drive. Yet Jeff allowed a six-year-old to ride on the service drive unaccompanied. Bearing in mind "the immaturity, inexperience and carelessness of children," *Moning*, 400 Mich at 446, reasonable minds could well conclude that a six-year-old should not have

been on the roadway unsupervised. Cf. *Feldman*, 162 Mich at 490; *Price v Manistique Area Pub Sch*, 54 Mich App 127, 132; 220 NW2d 325 (1974). In other words, Jeff's decision to allow Ezekiel to ride alone could be considered a breach of Jeff's duty to supervise his child. Indeed, plaintiff's theory of the case was that defendant was unreasonable in allowing even intermittent motor vehicle traffic on a road used by child bicyclists; and if such a purportedly dangerous condition poses an "unreasonable risk of harm" sufficient to support a premises-liability claim, see *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012), it is challenging to see how a parent could not be considered negligent in allowing a six-year-old to confront this danger alone when the parent knew or should have known of intermittent motor vehicle traffic on the roadway. See 62 Am Jur 2d, Premises Liability, § 227, pp 600-601. Ultimately, there is a question of fact regarding Jeff's negligence that the jury should have been allowed to resolve.[14] See *Case v Consumers Power Co*, 463 Mich 1,

[14] In the trial court, plaintiff moved for a directed verdict on the issue of Jeff's fault, asserting that naming Jeff as a nonparty at fault was inappropriate as a factual matter because there was no evidence that Jeff was negligent. The trial court denied the motion, concluding that if a parent could be named as a nonparty at fault, there was sufficient evidence of Jeff's fault to submit the matter to a jury. On cross-appeal, plaintiff argues that the trial court erred by denying its motion for a directed verdict, and on appeal, plaintiff argues that any error in failing to allow the jury to consider Jeff's fault was harmless because there was no evidence of negligence. In making these arguments, plaintiff adopts the reasoning of the trial court, noting that after trial, the trial court expressed the opinion that it would be "inconceivable" that a jury would have found Jeff at fault. The trial court's "inconceivable" statement after trial wholly conflicts with the trial court's earlier pronouncement, on the fifth day of trial, that "[i]f we don't address the issue of parental fault and we should have it taints the entire case and it has to be tried again." Setting aside this inconsistency, there are several flaws in the trial court's reasoning and plaintiff's reliance thereon. Most notably, plaintiff's arguments and the trial court's reasoning are premised on the

7; 615 NW2d 17 (2000) ("Ordinarily, it is for the jury to determine whether [an actor's] conduct fell below the general standard of care.").

Further, given the evidence at trial, the jury could also find that this act of negligence constituted a proximate cause of Ezekiel's death. Thompson struck Ezekiel while backing up his truck at a speed of 5 miles per hour. Thompson testified that he checked his mirrors but did not see Ezekiel, and the accident reconstruction indicated that a child of Ezekiel's height would be in a vehicle's blind spot. Rebecca testified that Ezekiel would not have known how to respond to a reversing vehicle, and the eyewitness testimony indicated that Ezekiel just sat on his bike and watched Thompson back up. Taken together, this evidence supports the inference that had Jeff accompanied Ezekiel to provide supervision, the accident would not have occurred because, as an adult, Jeff would have been more visible to Thompson and as Ezekiel's parent, he would have controlled Ezekiel's response to the situation and protected Ezekiel from the obvious danger of a slowly reversing vehicle. Moreover, a car striking a child bicyclist on a mixed-use roadway is a reasonably foreseeable consequence of allowing a six-year-old to

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belief that the service drive was a "bike path," despite the considerable evidence that the service drive was open to intermittent traffic and that Jeff knew or should have known that it was open to traffic. The trial court's characterization of the road as a "bike path" simply ignores the fact that the danger posed by a mixed-use road could easily be considered an open and obvious danger to Jeff. Whether Jeff knew there was traffic on the road, whether the danger of the road was open and obvious, and whether Jeff was negligent under the circumstances are questions for the jury to resolve. See *Case v Consumers Power Co*, 463 Mich 1, 7; 615 NW2d 17 (2000). Therefore, contrary to plaintiff's arguments, the trial court's refusal to allow consideration of Jeff's fault was not harmless, and plaintiff was not entitled to a directed verdict on the question of Jeff's fault. See *Alfieri v Bertorelli*, 295 Mich App 189, 192; 813 NW2d 772 (2012).

ride on the road unsupervised. Therefore, Jeff's failure to supervise may be considered a proximate cause of Ezekiel's death. See generally *Haliw v Sterling Hts*, 464 Mich 297, 310; 627 NW2d 581 (2001) ("Proof of causation requires both cause in fact and legal, or proximate, cause.").

On the whole, there is significant evidence supporting the conclusion that Jeff knew or should have known that the service drive was being used by motor vehicles. In these circumstances, his decision to allow his six-year-old to ride on the road, unsupervised by an adult, can be considered a breach of duty that was a proximate cause of Ezekiel's death. Consequently, defendant was entitled to argue Jeff's fault to the jury, and the jury should have been allowed to apportion fault to Jeff. See MCL 600.2957; MCL 600.6304; *Barnett*, 478 Mich at 170; *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 34; 761 NW2d 151 (2008). Yet, the trial court refused to allow the jury to apportion fault to Jeff and affirmatively instructed the jury not to consider the negligence of Ezekiel's parents. In these circumstances, failure to vacate the judgment in plaintiff's favor and remand for a new trial would be inconsistent with substantial justice.[15] *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 15; 651 NW2d 356 (2002). See also *Case*, 463 Mich at 10 (concluding that

[15] On appeal, defendant's request for relief asks this Court to remand with instructions to enter judgment notwithstanding the verdict (JNOV). Although there is clearly evidence that would allow a jury to hold Jeff at least partially at fault for Ezekiel's accident, there are questions of fact surrounding the use of the road, and the reasonableness of Jeff's conduct should be evaluated by the jury in light of all the circumstances. See *Case*, 463 Mich at 7. Further, even if Jeff was negligent, this would not necessarily absolve defendant of its duty to Ezekiel. See *Wheeler*, 292 Mich App at 304; *Woodman*, 280 Mich App at 154 (opinion by TALBOT, J.); see also 62 Am Jur 2d, Premises Liability, § 227, pp 600-601. Ultimately, a jury should be given the opportunity to

reversal was warranted when jury instructions failed to present one of the defendant's primary defenses to the jury). Consequently, we vacate the judgment in plaintiff's favor and remand for a new trial.

III. OPEN AND OBVIOUS DANGER DOCTRINE

Next, defendant argues that the trial court erred by refusing to instruct the jury on the open and obvious danger doctrine. Specifically, defendant contends that the doctrine should be applied to Ezekiel, meaning that defendant would have no duty to protect or warn Ezekiel of open and obvious hazards.[16] In contrast, plaintiff argues, and the trial court concluded, that the open and obvious danger doctrine does not apply to children under the age of seven.

A. STANDARDS OF REVIEW

Claims of instructional error are reviewed de novo. *Case*, 463 Mich at 6. "The instructions should include

consider the fault of all persons, including Jeff. See *Zaremba*, 280 Mich App at 34. Accordingly, defendant's request for JNOV or some other more conclusive relief is denied.

[16] In the trial court, defendant maintained that the open and obvious danger doctrine applied to Ezekiel's caretaker, meaning that the jury should have been instructed on the doctrine in relation to whether the dangers of the road were open and obvious to Jeff and whether Jeff could be considered at fault for allowing Ezekiel to confront an open and obvious danger. Given its conclusion that Jeff could not be named as a nonparty at fault, the trial court also concluded that the open and obvious danger doctrine had no applicability to Jeff. As discussed, the trial court erred by refusing to allow the jury to consider Jeff's fault. On remand, defendant should be given the opportunity to raise an open and obvious danger defense—and receive an open and obvious danger instruction—in terms of whether *Jeff* was negligent in allowing Ezekiel to ride unaccompanied on the service drive. However, whether the doctrine applies to Jeff is a distinct question from whether it applies to Ezekiel.

all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them." *Id*. "[T]he trial court's determination that a jury instruction is accurate and applicable to the case is reviewed for an abuse of discretion." *Hill v Hoig*, 258 Mich App 538, 540; 672 NW2d 531 (2003). "Instructional error warrants reversal if the error resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be inconsistent with substantial justice." *Cox*, 467 Mich at 8 (quotation marks and citation omitted).

B. ANALYSIS

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Props, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). "With regard to invitees, a landowner owes a duty to use reasonable care to protect invitees from unreasonable risks of harm posed by dangerous conditions on the owner's land." *Hoffner*, 492 Mich at 460. Integral to a landowner's duty to an invitee is whether the defect in question is "open and obvious." *Id*. (quotation marks and citation omitted). Absent special aspects,[17] "[t]he possessor of land 'owes no duty to protect or warn' of dangers that are open and obvious because such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may

[17] "[A]n open and obvious hazard that ordinarily precludes liability can have special aspects that give rise to liability in one of two ways: (1) the hazard is, in and of itself, unreasonably dangerous or (2) the hazard was rendered unreasonably dangerous because it was effectively unavoidable for the injured party." *Bullard v Oakwood Annapolis Hosp*, 308 Mich App 403, 410; 864 NW2d 591 (2014).

then take reasonable measures to avoid." *Id*. at 460-461 (citation omitted). With regard to adult invitees, whether a danger is open and obvious is judged from an objective standard, considering "whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Id*. at 461.

When it comes to children, this Court has recognized that the open and obvious danger doctrine may apply to children as young as 11 years old. *Bragan v Symanzik*, 263 Mich App 324, 326, 328, 335; 687 NW2d 881 (2004). However, when applying the doctrine to minors, children are not held to the same standard as an average adult of ordinary intelligence. *Id*. at 328, 335. As a general matter, the law recognizes that children can only be expected to act with "that degree of care which a *reasonably careful minor* of the age, mental capacity and experience of other similarly situated minors would exercise under the circumstances." *Id*. at 328 (quotation marks and citation omitted). In contrast, adults are expected to "exercise greater vigilance" around children, and landowners owe a "heightened duty of care" to children on their property, including children who are known trespassers or licensees. *Id*. at 328, 333-335. See also *Woodman Kera, LLC*, 280 Mich App 125, 154; 760 NW2d 641 (2008) (opinion by TALBOT, J.) ("Landowners owe minor invitees the highest duty of care."). In particular, when there are children on the land, a landowner is "obligated to anticipate and take into account [the child's] propensities to inquire into or to meddle with conditions which he finds on the land, his inattention, and his inability to understand or appreciate the danger, or to protect himself against it." *Bragan*, 263 Mich App at 330 (quotation marks and citation omitted). Given the unique characteristics of children and the heightened duty that adults owe to children, the *Bragan*

Court concluded that a child invitee cannot be held to the same "open and obvious danger" standard as adult invitees. *Id.* at 335. More fully, this Court reasoned:

> Based on this long history of treating children differently under the law and entitling child trespassers and licensees to a heightened duty of care, we find the instant case legally distinguishable from the line of open and obvious cases involving adult invitees. Landowners owe the greatest duty of care to invitees as a class. Even the Restatement of Torts, upon which Michigan's open and obvious doctrine was originally based, recognizes that child invitees are entitled to greater protection because of their "inability to understand or appreciate the danger, or to protect [themselves] against it." It would, therefore, be illogical to find that child invitees are entitled to less protection than child licensees or trespassers. Furthermore, as minors in Michigan are only held to the standard of care of "a reasonably careful minor," it would be similarly illogical to hold child invitees to the standard of an objective, reasonably prudent person; i.e., an adult. Accordingly, we must consider whether a dangerous condition would be open and obvious to a reasonably careful minor; that is, whether the minor would discover the danger and appreciate the risk of harm. [*Id*. (citations omitted; alteration in original).]

Whether a dangerous condition is open and obvious "in the eyes of a child, and if open and obvious, whether the condition was unreasonably dangerous" in light of the presence of children are ordinarily questions for the fact-finder. *Id*. at 336.

Although *Bragan* applied a reasonable-child version of the open and obvious danger doctrine to children, the Court did so in a case involving an 11-year-old, and the Court did not address whether the doctrine should also be applied to younger children under the age of seven. The age of seven is significant because tradi-

tionally age seven has been treated as a "dividing line" in Michigan. *Burhans v Witbeck*, 375 Mich 253, 255; 134 NW2d 225 (1965). "Children under the age of seven are presumptively incapable of committing negligent or criminal acts or intentional torts." *Bragan*, 263 Mich App at 333-334. See also *Queen Ins Co v Hammond*, 374 Mich 655, 658; 132 NW2d 792 (1965). In comparison, the capabilities of children older than seven pose "a question of fact for the jury, which is to determine it on the basis of whether the child had conducted himself as a child of his age, ability, intelligence and experience would reasonably have been expected to do under like circumstances." *Burhans*, 375 Mich at 255. See also *Woodman*, 486 Mich at 256 (opinion by YOUNG, J.). Under the tender-years rule, the law presumes that children under seven cannot be held accountable because they are "without discretion," *Baker v Alt*, 374 Mich 492, 501; 132 NW2d 614 (1965) (quotation marks and citation omitted), they are "unconscious of the nature of their acts," and they have "no appreciation of attending danger to themselves or others," *Hoover*, 188 Mich at 321. See also *Muscat v Khalil*, 150 Mich App 114, 122; 388 NW2d 267 (1986) (noting that individuals in the tender-years age group lack the "intellectual capacity" to appreciate danger that would be obvious to older individuals). Under these special rules for children, "the common law protects children by creating an incentive to exercise *greater* care for minors because it *limits* a defendant's ability to escape liability on the basis of the child's contributory negligence." *Woodman*, 486 Mich at 257 (opinion by YOUNG, J.). The question before us in this case is whether the presumed incapabilities of children under seven also preclude a finding that it is reasonable to expect children under that age to discover a

dangerous condition, appreciate the danger, and take reasonable measures to avoid it.

Given Michigan's long history of treating children under the age of seven differently under the law, we conclude that the open and obvious danger doctrine is inapplicable to children under the age of seven and that children under that age cannot be expected to conform their conduct to a reasonable-child standard. In other words, while *Bragan*, 263 Mich App at 335, applied a reasonable-child standard to children over seven, this was consistent with long-established caselaw holding that a child over seven is expected to conduct himself "as a child of his age, ability, intelligence and experience would reasonably have been expected to do under like circumstances." *Burhans*, 375 Mich at 255. The open and obvious danger doctrine is premised on the proposition that it is "reasonable to expect" the invitee to discover the danger, *Hoffner*, 492 Mich at 461, and given the capabilities of children over the age of seven, it can be reasonably expected that children over seven will conform their conduct to a reasonable-child standard. In contrast, "the incapacity and irresponsibility" of children under the age of seven have longed been recognized, *Queen Ins Co*, 374 Mich at 658, and in view of this incapacity, there can be no reasonably-careful-minor standard for children under seven, see *Baker*, 374 Mich at 498, 505.

Consequently, in the context of the open and obvious danger doctrine, it is not reasonable to expect that a child under seven will conform to a reasonable-child standard in discovering dangers, appreciating the danger involved, and responding to those dangers. Rather, the law presumes that a child under seven will not appreciate the danger, and therefore a landowner remains obligated to exercise reasonable care to pro-

tect a child under seven from open and obvious dangers on the property, even if those dangers would be open and obvious to adults and older children. This rule is consistent with a landowner's obligation to exercise greater care for minors, *Bragan*, 263 Mich App at 330, and it safeguards children by placing the burden on landowners to protect child-invitees under seven from open and obvious dangers on the property as opposed to expecting small children to protect themselves.[18] See generally *Woodman*, 486 Mich at 257 & n 73 (opinion by YOUNG, J.). Although the imposition of a bright-line rule may seem arbitrary in some cases,[19] the age of seven is the long-established "dividing line" in Michigan. Adhering to this dividing line, we adopt a bright-line rule that landowners cannot reasonably expect children under seven to recognize a dangerous condition, to appreciate the danger, and to exercise any degree of reasonable care in response to that condition.

Given our conclusion that the open and obvious danger doctrine does not apply to children under seven, it is inapplicable to Ezekiel, who was six years old at the time of the accident. Consequently, the trial court did not err by concluding that the open and obvious danger doctrine did not apply to Ezekiel. Defendant is not entitled to relief on this basis.

IV. CAMPGROUND REGULATIONS

Defendant argues that the trial court erred by

[18] This is not to say that a child's conduct is irrelevant at trial. A child's conduct may be admissible as it relates to the question whether a defendant breached a duty to a child. See *Baker*, 374 Mich at 505. We simply hold that the incapability and irresponsibility of children under seven precludes the conclusion that an adult landowner has no duty to protect a tender-years invitee from an open and obvious danger.

[19] For instance, in this case, Ezekiel was only two days shy of his seventh birthday at the time of the accident.

instructing the jury under M Civ JI 12.05 with regard to defendant's alleged violation of Mich Admin Code, R 326.1556(8) and Mich Admin Code, R 326.1558(1). According to defendant, these rules are irrelevant to this case and any violation could not be considered a proximate cause of the accident. We agree that the trial court erred by instructing the jury under M Civ JI 12.05 with regard to the number of campsites (Rule 326.1556(8)); however, we conclude that the trial court did not abuse its discretion in concluding that M Civ JI 12.05 was applicable with regard to the size of the service drive (Rule 326.1558(1)).

"In Michigan, the violation of administrative rules and regulations is evidence of negligence, and therefore when a violation is properly pled it may be submitted to the jury." *Zalut v Andersen & Assoc, Inc*, 186 Mich App 229, 235; 463 NW2d 236 (1990). See also *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 720; 737 NW2d 179 (2007) (applying this rule in a premises-liability case). Specifically, an instruction regarding violations of regulations as evidence of negligence is set forth in M Civ JI 12.05, which states:

> The [*name of state agency*] in Michigan has adopted certain regulations pursuant to authority given to it by a state statute. [Rule / Rules] _____ of [*name of state agency*] [provides / provide] that [*here quote or paraphrase applicable parts of regulation(s) as construed by the courts*].
>
> If you find that defendant violated [this regulation / one or more of these regulations] before or at the time of the occurrence, such [violation / violations] [is / are] evidence of negligence which you should consider, together with all the other evidence, in deciding whether defendant was negligent. If you find that defendant was negligent, you must then decide whether such negligence was a proximate cause of the [injury / damage] to plaintiff.

This instruction should only be given if: (1) the regulation is intended to protect against the injury involved; (2) the plaintiff is within the class intended to be protected by the regulation; and (3) the evidence will support a finding that the violation was a proximate cause of the injury involved. M Civ JI 12.03, use notes; M Civ JI 12.05, use notes. "These factors are necessary to a determination of relevance." *Klanseck v Anderson Sales & Serv, Inc*, 426 Mich 78, 87; 393 NW2d 356 (1986).[20] That is, "[w]hen a party is alleged to have violated [a regulation], the court may apply the factors above in assessing whether the claimed violation is relevant to the facts presented at trial." *Id*. "[R]elevance must be specifically established" before evidence of a violation may be used as evidence of negligence. *Id*. See also *Zalut*, 186 Mich App at 235.

In this case, the two regulations at issue are rules created by the Department of Environmental Quality under its authority to "promulgate rules regarding sanitation and safety standards for campgrounds and public health." MCL 333.12511. First, under Mich Admin Code R 326.1556(8), "[a] campground owner shall ensure that the number of sites in a campground is not more than the number authorized by the license." Regarding defendant's compliance with this regulation, the evidence at trial indicated that there were 399 sites on the campgrounds and that defendant only had a license for 133 campsites. Fair organizers maintained that they had a "temporary" permit for 399 campsites during the fair, and there was evidence that defendant was approved for 399 sites on August 31, 2012. However, a jury could

[20] *Klanseck* involved a violation of a statute, but the factors for assessing the relevance of a statutory violation are the same as those for violation of a regulation.

certainly reject defendant's claim of an undocumented "temporary" license and conclude that defendant was in violation of Rule 326.1556(8) at the time of the accident because defendant had more campsites than allowed by its license.

Nevertheless, a violation of Rule 326.1556(8) is not relevant to this case, and the jury should not have been allowed to consider it. In particular, in the trial court, plaintiff maintained that the excessive number of campsites was relevant because it suggested congestion or overcrowding that would have increased both vehicular and bike traffic. But, first of all, the regulation says nothing about traffic, and it cannot reasonably be supposed that this licensing requirement is designed to prevent traffic accidents. Second, plaintiff's assertion that there were too many people for the campground to handle safely is belied by the fact that defendant was approved for 399 campsites shortly after the accident. In other words, defendant may have violated the regulation by failing to obtain a license for 399 sites before the fair, but the approval shortly after the fair makes plain that it was not an issue of insufficient space or overcrowding that prevented defendant from obtaining a license. Third, and perhaps most importantly, there is no evidence that this purported overcrowding contributed to—let alone proximately caused—Ezekiel's death. Ezekiel was killed in an accident between a single vehicle and a single bike rider. There was no evidence that the service drive was overly crowded with pedestrians, bikes, or moving vehicles at the time of the accident, and there is no evidence that overcrowding contributed to the accident. Quite simply, the license issue was irrelevant, and the jury should not have been allowed to consider the issue. Accordingly, the trial court erred by instruct-

ing the jury under M Civ JI 12.05 with regard to Rule 326.1556(8).[21]

The second regulation at issue is Rule 326.1558(1), which states:

> A campground owner shall provide a road right-of-way that is not less than 20 feet wide. A campground owner shall ensure that the right-of-way is free of obstructions and provides free and easy access to abutting sites. A campground owner shall maintain the traveled portion of the right-of-way in a passable and relatively dust-free condition when the campground is in operation.

Regarding defendant's compliance with this rule, measurements of the service drive indicated that it was 13.5 feet wide, and therefore the jury could conclude that defendant violated its obligation to maintain a "road right-of-way that is not less than 20 feet wide."[22]

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[21] Although the trial court erred, reversal is not required on this basis. M Civ JI 12.05 does not render defendant negligent as a matter of law; rather, it simply allowed the jury to consider a violation of the regulation as evidence of negligence. Even if the jury determined that defendant was in violation of Rule 326.1556(8) on August 8, 2012, it is unlikely such a determination would have affected the outcome of trial. The issue of the number of licensed campsites was a relatively minor issue at trial, and given the weighty issues involved, it seems improbable that a jury would have held defendant liable for the death of child because defendant had too many campsites, particularly when the evidence plainly demonstrated that defendant had the space for those campsites. See *Jimkoski v Shupe*, 282 Mich App 1, 9; 763 NW2d 1 (2008) ("Reversal is not warranted when an instructional error does not affect the outcome of the trial.").

[22] The evidence indicated that the "gravel" portion of the road was 13.5 feet wide. There was a witness who claimed that the "right-of-way" was actually 16 or 20 feet wide and that the traveled portion of the road was smaller than the right-of-way because grass had grown in on some of the gravel. Defendant emphasizes this distinction on appeal and asserts that, while the right-of-way must be 20-feet wide, the traveled portion may be smaller because it is only the "traveled portion" that must be "passable and relatively dust-free" under Rule 326.1558(1). Even assuming that the traveled portion can be smaller than 20-feet

Whether this potential violation was relevant is a close question. In terms of the injury the regulation was designed to protect against, the regulation focuses mainly on providing access to campsites, but the size requirements for the road, the "free and easy" access, the passable-road requirements, and even the "dust-free" caveats can be read as an indication that the regulation is intended to ensure safe road access to the campsites and safe travel while on the road. It is true that nothing in the regulation mentions bikes in particular, and certainly the regulations do not require defendant to maintain a separate bike path. But, it could nevertheless be concluded that the regulation was intended to guard against accidents resulting from insufficient space for a motor vehicle to maneuver while on the campgrounds. Ezekiel, as a camper using the road to travel to and from his campsite, would be within the class of people the road requirements were designed to protect.

The real issue is whether the size of the road can be considered a proximate cause of plaintiff's injuries. Although the question is a close one, the trial court did not abuse its discretion by allowing the jury to consider the issue. The claim in this premises-liability case is that a proximate cause of Ezekiel's injuries was defendant's alleged failure to protect Ezekiel from the unreasonable risks of harm posed by a dangerous condition on defendant's land—namely, a mixed-use roadway on which vehicles, bikes, and pedestrians were allowed to travel. See *Hoffner*, 492 Mich at 460. In this context, though only one of many potential factors, the width of the service drive and defendant's

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wide, a 16-foot right-of-way would not comply with the regulation. See Rule 326.1558(1). Accordingly, a jury could find that defendant violated this provision.

failure to abide by Rule 326.1558(1) could be significant to a determination of whether the service drive was unreasonably dangerous and whether defendant's failure to protect Ezekiel from this unreasonable danger constituted a proximate cause of his injuries. In other words, defendant's decision to allow mixed-use access of the road is a "but-for" cause of Ezekiel's death, and the width of the road is a significant factor bearing on the reasonableness of defendant's decision and the foreseeability of the consequences of defendant's decision for purposes of determining whether defendant may be held legally responsible. See generally *Haliw*, 464 Mich at 310. On the whole, the trial court did not abuse its discretion in instructing the jury under M Civ JI 12.05 with regard to Rule 326.1558(1).

V. TAXABLE COSTS AND PREJUDGMENT INTEREST

Finally, defendant argues, and plaintiff concedes, that if the underlying judgment is vacated, the award of costs and prejudgment interest in plaintiff's favor should also be vacated. We agree. That is, having vacated the underlying judgment, it follows that plaintiff is no longer a "prevailing party," and therefore plaintiff is not entitled to costs under MCR 2.625. See *Ivezaj v Auto Club Ins Ass'n*, 275 Mich App 349, 368; 737 NW2d 807 (2007). Likewise, absent a "judgment" in plaintiff's favor, there is no basis for awarding plaintiff prejudgment interest as the prevailing party under MCL 600.6013(8). See generally *Hunt v Drielick*, 322 Mich App 318, 333-334; 914 NW2d 371 (2017) ("MCL 600.6013 is remedial and primarily intended to compensate prevailing parties for expenses incurred in bringing suits for money damages and for any delay in

receiving those damages."). Consequently, we also vacate the award of costs and prejudgment interest.

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

MURRAY, P.J., and HOEKSTRA and GADOLA, JJ., concurred.

OLSEN v CHIKAMING TOWNSHIP

Docket Nos. 337724 and 337726. Submitted June 12, 2018, at Grand Rapids. Decided July 3, 2018, at 9:05 a.m.

Jude and Reed, LLC (appellant) sought to obtain a nonuse variance from the Chikaming Township Zoning Board of Appeals (ZBA) in order to build a residence on a nonconforming lot it owned. Before holding a hearing on the matter, the township notified others who owned property within a 300-foot radius of the lot as required by MCL 125.3103(2), and several of these landowners appeared at the hearing to argue against the variance. After the ZBA granted the variance, some of the neighboring landowners who had received notice of the hearing, including Martha Cares Olsen, Fritz Olsen, and others (appellees), appealed the ZBA's decision in the Berrien Circuit Court, which permitted appellant to intervene in the circuit court action. The ZBA and appellant moved to dismiss the action for lack of subject-matter jurisdiction, arguing that appellees lacked standing to challenge the decision to grant the variance because they had suffered no special damages and were therefore not aggrieved parties for purposes of the Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq*. The court, Sterling R. Schrock, J., ruled that appellees had standing to appeal and reversed the decision on the ground that the ZBA lacked the authority to grant the variance under the terms of the township's zoning ordinance. In Docket No. 337724, appellant sought leave to appeal the merits of the circuit court decision on various grounds. In Docket No. 337726, appellant appealed by right the ruling that appellees had standing. The Court of Appeals granted the application for leave in Docket No. 337724 and consolidated the cases for appeal.

The Court of Appeals *held*:

1. MCL 125.3605 provides that a decision of a ZBA is final and that a party aggrieved by the decision may appeal in the circuit court for the county in which the property is located. Thus, under the MZEA, a party seeking relief from a decision of a ZBA in the circuit court is not required to demonstrate that he or she has standing but rather that he or she is an "aggrieved" party. The MZEA does not define this term, but in other contexts, the Court

of Appeals has defined "aggrieved party" as "one whose legal right is invaded by an action, or whose pecuniary interest is directly or adversely affected by a judgment or order." In the context of zoning, but before enactment of the MZEA, this Court held that to be aggrieved by a zoning decision, a party must have suffered some special damages not common to other property owners similarly situated. Generally, a neighboring landowner alleging increased traffic volume, loss of aesthetic value, or general economic loss has not sufficiently alleged special damages to become an aggrieved party, because those generalized concerns are not sufficient to demonstrate harm different from that suffered by people in the community generally. In keeping with this interpretation, to demonstrate that one is an aggrieved party under MCL 125.3605, a party must allege and prove that he or she has suffered some special damages not common to other property owners similarly situated. Incidental inconveniences such as increased traffic congestion, general aesthetic and economic losses, population increases, or common environmental changes are insufficient to show that a party is aggrieved. Instead, there must be a unique harm, dissimilar from the effect that other similarly situated property owners may experience. Mere ownership of an adjoining parcel of land is insufficient to show that a party is aggrieved, as is the mere entitlement to notice. In this case, appellees argued before the circuit court that they were aggrieved because they had relied on an earlier variance denial concluding that the lot in question was unbuildable, they had relied on the zoning ordinance to be enforced as written, they were entitled to receive notice of the public hearing before the ZBA as owners of real property within 300 feet of the lot, and they would suffer aesthetic, ecological, practical, and other alleged harms from the grant of the zoning variance. Because these allegations failed to show that appellees would suffer a unique harm different from similarly situated community members, they failed to establish that they were parties aggrieved by the decision of the ZBA under MCL 125.3605. Although the circuit court noted that septic systems and setback requirements specifically affected the property of neighboring landowners, there was no evidence that such damages were more than speculation or anticipation of future harm.

2. The circuit court erred by ruling that appellees had standing to challenge the ZBA decision because they owned real property within 300 feet of appellant's lot and therefore were entitled to notice under MCL 125.3103. Nothing in the MZEA or in Michigan's zoning jurisprudence supports reading "aggrieved party" status into the MZEA's notice requirement, and this

reading of the notice provision runs contrary to this Court's decisions establishing that mere ownership of adjoining property is insufficient to establish a property owner as an aggrieved party. Appellees' reliance on *Brown v East Lansing Zoning Bd of Appeals*, 109 Mich App 688 (1981), to support their "aggrieved" status is misguided in light of the fact that *Brown* involved the application of a previous enabling statute with a more permissive threshold for standing.

3. Appellant did not waive the right to challenge appellees' standing to pursue the appeal in the circuit court by not raising it before the ZBA. Who may seek review of the ZBA decision before the circuit court was a question for initial determination by the circuit court, not the ZBA. Moreover, at the time of the proceedings before the ZBA, the ZBA had not yet granted the variance, and therefore any challenge to appellees' ability to appeal that future decision would have been premature. The cases on which appellees relied for the contrary proposition did not involve the MZEA and were not applicable.

4. Appellees did not have standing to challenge the decision of the ZBA under *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349 (2010) (*LSEA*). Under *LSEA*, a litigant may have standing if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if a statutory scheme implies that the Legislature intended to confer standing on the litigant. *LSEA* was inapplicable in this case, which did not involve general notions of standing but rather application of a specific statutory provision of the MZEA that permits appellate review of a local unit of government's zoning decision when review is sought by a "party aggrieved" by the decision of that local tribunal. Even if the *LSEA* analysis had been applicable, appellees would nonetheless have lacked standing because they did not demonstrate a special injury or right, or substantial interest, that would be detrimentally affected in a manner different from the citizenry at large.

5. In light of the conclusion that appellees were not properly able to invoke the jurisdiction of the circuit court, it was unnecessary to address appellant's additional contentions of error in the circuit court's ruling.

Reversed and remanded for further proceedings.

1. ZONING — MICHIGAN ZONING ENABLING ACT — DECISIONS OF ZONING BOARDS OF APPEALS — APPEALS IN CIRCUIT COURTS — AGGRIEVED PARTIES.

A party seeking relief in the circuit court from a decision of a zoning board of appeals under MCL 125.3605 is not required to demon-

strate that he or she has standing, but rather must demonstrate that he or she is an aggrieved party by alleging and proving that he or she has suffered some special damages not common to other property owners similarly situated; incidental inconveniences such as increased traffic congestion, general aesthetic and economic losses, population increases, or common environmental changes are insufficient to show that a party is aggrieved; instead, there must be a unique harm, dissimilar from the effect that other similarly situated property owners may experience.

2. ZONING — MICHIGAN ZONING ENABLING ACT — DECISIONS OF ZONING BOARDS OF APPEALS — APPEALS IN CIRCUIT COURTS — AGGRIEVED PARTIES — PARTIES ENTITLED TO NOTICE.

The fact that a person is entitled to notice of a public hearing held by a zoning board of appeals because the person owns land within 300 feet of the property at issue does not itself render that person an aggrieved party who may challenge a decision of the board in the circuit court (MCL 125.3103; MCL 125.3605).

Bloom Sluggett, PC (by *Clifford H. Bloom* and *James C. Komondy*) for appellant.

Miller Johnson (by *Sara G. Lachman* and *Patrick M. Jaicomo*) and *McGraw Morris PC* (by *Craig R. Noland*) for appellees.

Before: MURRAY, C.J., and HOEKSTRA and GADOLA, JJ.

GADOLA, J. In Docket No. 337724, appellant, Jude and Reed, LLC, appeals by leave granted the order of the circuit court reversing the determination of the Chikaming Township Zoning Board of Appeals (ZBA) granting appellant's application for a nonuse zoning variance. In Docket No. 337726, appellant appeals as of right the same order of the circuit court. In both appeals, appellant challenges whether appellees[1] are

[1] Appellees, Martha Cares Olsen, Fritz Olsen, and others, are neighboring property owners. In Docket No. 337724, this Court granted the motion of appellees Ronald DeVlam and Michelle DeVlam to be substi-

aggrieved parties who may contest the final order of the ZBA. We reverse and remand.

I. FACTS AND BACKGROUND

In 1957, Preston and Doris Sweet platted a 17-lot subdivision near Lake Michigan called the Merriweather Shores subdivision. In the following years, the Sweets conveyed some of the lots to buyers, while retaining other lots. This case involves Lot 6 of the subdivision. Lot 6 has 118 feet of frontage along Huntington Drive, is 82 feet deep, and has a total area of 9,676 square feet.

The subdivision is located in Chikaming Township. At the time Merriweather Shores was platted, the township did not have a zoning ordinance. The township thereafter enacted a zoning ordinance in 1964, and in 1981, it enacted a new zoning ordinance. The parties agree that at some point after enactment of the 1981 ordinance, Lot 6 was rendered nonconforming because the ordinance required all lots to have a minimum area of 20,000 square feet for buildability. Regarding nonconforming lots, § 4.02(B) of the 1981 ordinance provided:

> If two or more lots or combination of lots and portions of lots with continuous frontage in single ownership are of record at the time of passage or amendment of this ordinance, and if all or part of the lots do not meet the requirements established for lot width and area, the lands involved shall be considered to be an undivided parcel for the purposes of this ordinance and no portion of said parcel shall be used or sold in a manner which diminishes compliance with lot width and area requirements estab-

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tuted as successors in interest for the Zwier Family Trust. *Olsen v Chikaming Twp*, unpublished order of the Court of Appeals, entered May 11, 2017 (Docket No. 337724).

> lished by this ordinance, nor shall any division of any parcel be made which creates a lot with width or area less than the requirements stated in this ordinance.

In 1982, Doris Sweet, as survivor of Preston Sweet, conveyed the remaining lots to herself and to David Sweet as joint tenants with rights of survivorship. The parties do not dispute that in 1989, David Sweet, as survivor of Doris Sweet, conveyed Lots 8 through 10 to unrelated parties but maintained ownership of Lots 6 and 7. In 1996, a prospective buyer, David Zilke, was interested in purchasing Lots 6 and 7 from David Sweet. Combined, Lots 6 and 7 had an area of 19,352 square feet, and Zilke requested a variance from the 20,000 square foot minimum for buildability and from the rear and side setback requirements. The ZBA denied the variance application, and Zilke declined to purchase the property.

In 1998, the township adopted a new zoning ordinance, which remained in effect at the times relevant to this case. In 2011, the Berrien County Treasurer foreclosed on David Sweet's interest in Lot 7 for nonpayment of property taxes, and T&W Holdings, LLC, purchased Lot 7 at a tax foreclosure sale. In 2013, the Berrien County Treasurer foreclosed on David Sweet's interest in Lot 6 for nonpayment of property taxes, and appellant purchased Lot 6 at a tax foreclosure sale.

Seeking to build a residential cottage on Lot 6, appellant filed an application with Chikaming Township for a nonuse variance under § 4.02(C) of the zoning ordinance. Appellant requested a nonuse dimensional variance under § 14.02, which requires all R-1 lots to have a minimum lot area of 20,000 square feet and a rear setback of 50 feet. Lot 6 had square footage of 9,676 and would require a rear setback of 30

feet. Appellant argued that as a nonconforming lot, Lot 6 was eligible for a variance pursuant to § 4.02 and § 4.06 of the zoning ordinance and that without the variance, Lot 6 would be rendered unusable.

Before the ZBA held a hearing to address appellant's application, the township sent notice to property owners who owned property within a 300-foot radius of Lot 6.[2] At the ZBA hearing, some of the neighboring property owners appeared by counsel to argue against the variance. Following public comment and extensive discussion by the ZBA members, the ZBA voted to approve the variance request.

Appellees appealed the ZBA's decision in the circuit court, and the circuit court permitted appellant to intervene in the circuit court action. The ZBA moved to dismiss the circuit court action for lack of subject-matter jurisdiction, arguing that appellees lacked standing to challenge the ZBA's decision to grant the variance. Appellant joined the ZBA in the motion. Appellant and the ZBA argued that only an "aggrieved" party could appeal the ZBA's decision and that appellees were not aggrieved because they could not show that they suffered special damages. At the conclusion of the hearing on the motion, the trial court ruled that appellees had standing to appeal the ZBA decision to the circuit court, explaining:

> I find in this circumstance that the Legislature has a scheme that implies it intended to confer standing on these litigants. The Zoning Enabling Act [MCL 125.3101 *et seq*.] provides, in section 3103, that notice shall be given to persons—all persons who have real property that is assessed within 300 feet of the property that is [the] subject of the request, and it seems to me that in the

[2] MCL 125.3103(2) requires notice of the public hearing to persons to whom property is assessed within 300 feet of the subject property.

> context of the [appellees] challenging the actions of the Zoning Board of Appeals, I—I must find that this notice requirement implies that the Legislature intended to confer standing to those individuals so as to qualify as aggrieved part[ies] for the purposes of the appeal under 3606. . . . [W]ere this not true . . . only an applicant who's denied a variance would have standing to appeal save . . . they can show themselves to otherwise have a special interest, the door would be open to those individuals. But, again, is that only individuals within the 300 feet, or is that any ole person that can show some other—some other interest . . . . [M]y interpretation is that the Legislature wouldn't intend that result to only confer the—the appeal status, particularly as I said, within the context of the Statute indicating that they must give notice to these folks within 300 feet. And also specifically indicating what that notice has to have when and where written comments will be received concerning the request.

The circuit court also noted that the ordinance generally required a 50-foot setback for a septic system, and the ZBA provided appellant with a 20-foot variance for the septic system. The circuit court noted, "[T]hat seems to me that arguably there may be a special interest with respect to that, particularly with the contiguous properties." The circuit court denied the motion to dismiss, concluding that "given the notice Statute, it seems that . . . [t]he Statute implies an intent to confer standing on [appellees]."

After further proceedings, the circuit court reversed the ZBA's decision. The circuit court held that the ZBA did not have authority to grant the variance because appellant did not satisfy § 23.04 of the township's zoning ordinance, which permits the ZBA to grant a variance under specific conditions. Specifically, the circuit court found that any hardship was self-created, explaining:

> In the instant case, this Court finds that the hardship was self-created. Although [appellant and the ZBA] insist that "it was the passage of time and application of the Zoning Ordinance to the existing lots of record that created the hardship," the analysis in *Johnson* [*v Robinson Twp*, 420 Mich 115; 359 NW2d 526 (1984)] does not support that argument. When the 1964 Zoning Ordinance went into effect, Lot 6 was under common ownership and held continuous frontage with Lots 7, 8, 9 and 10 and thus, the lots were deemed as one lot for purposes of the Zoning Ordinance. Accordingly, Lot 6 was not a standalone lot and could not be considered a grandfathered nonconforming lot of record. The Sweets, the prior owners, then violated the Zoning Ordinance when they split Lot 6 and Lot 7 from the remaining lots and as a result, Lot 6 and Lot 7 could not be developed as standalone building sites. Like the plaintiff in *Johnson*, the zoning ordinance preceded the division of the property . . . . Moreover, it is worth noting that the Owner was a sophisticated buyer who was aware of the limitation on Lot 6 when it purchased the property for $6,054.00. The property remains available for use in conjunction with an adjacent parcel. Therefore, the Zoning Board of Appeals erred when they granted the variance because the practical difficulty was one that was produced by the Sweets, the Owner's predecessor in title, and accordingly, Section 23.04.D. was not satisfied.

Appellant claimed an appeal in this Court (Docket No. 337726), challenging the circuit court's determination that appellees were aggrieved parties able to appeal the decision of the ZBA to the circuit court. Appellant also sought leave to appeal the same order of the circuit court (Docket No. 337724), raising additional challenges to the circuit court's ruling. This Court granted appellant's application for leave to appeal and consolidated the appeals.[3]

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[3] *Olsen v Chikaming Twp*, unpublished order of the Court of Appeals, entered July 14, 2017 (Docket No. 337724); *Olsen v Chikaming Twp*, unpublished order of the Court of Appeals, entered July 14, 2017 (Docket No. 337726).

II. ANALYSIS

Appellant first contends that appellees lacked standing to challenge the decision of the ZBA before the circuit court because they are not "aggrieved parties" within the meaning of the Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq*. We agree that appellees are not aggrieved parties within the meaning of the MZEA, and therefore were not able to invoke judicial review by the circuit court of the ZBA's decision granting appellant a nonuse variance.

Municipalities have no inherent power to regulate land use through zoning. *Whitman v Galien Twp*, 288 Mich App 672, 679; 808 NW2d 9 (2010). Our state's Legislature, however, has granted this authority to municipalities through enabling legislation. *Sun Communities v Leroy Twp*, 241 Mich App 665, 669; 617 NW2d 42 (2000). In 2006, our Legislature consolidated three previous zoning enabling acts for cities and villages, townships, and counties into the MZEA. *Whitman*, 288 Mich App at 679. The MZEA grants local units of government authority to regulate land development and use through zoning. *Maple BPA, Inc v Bloomfield Charter Twp*, 302 Mich App 505, 515; 838 NW2d 915 (2013).

The MZEA also provides for judicial review of a local unit of government's zoning decisions. Specifically, § 605 of the MZEA, MCL 125.3605, provides that a decision of a zoning board of appeals is final, subject to appellate review by the circuit court. The circuit court is authorized under the MZEA to review the decision of a ZBA to determine whether the decision of the ZBA (a) complied with the Constitution and laws of this state, (b) was based on proper procedure, (c) was supported by competent, material, and substantial evidence, and (d) represented the ZBA's reasonable exercise of dis-

cretion. MCL 125.3606(1); *Edward C Levy Co v Marine City Zoning Bd of Appeals*, 293 Mich App 333, 340; 810 NW2d 621 (2011).

Our review of a circuit court's decision in an appeal from a decision of a zoning board of appeals is de novo to determine whether the circuit court " 'applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the [ZBA's] factual findings.' " *Hughes v Almena Twp*, 284 Mich App 50, 60; 771 NW2d 453 (2009), quoting *Boyd v Civil Serv Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). In addition, we review de novo issues involving the construction of statutes and ordinances. *Soupal v Shady View, Inc*, 469 Mich 458, 462; 672 NW2d 171 (2003).

We also review de novo the legal question whether a party has standing. *Barclae v Zarb*, 300 Mich App 455, 467; 834 NW2d 100 (2013). We note, however, that the term "standing" generally refers to the right of a plaintiff initially to invoke the power of a trial court to adjudicate a claimed injury. *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 290; 715 NW2d 846 (2006). In this case, appellees did not seek initially to invoke the power of the circuit court, but rather sought appellate review by the circuit court of the decision of the ZBA under § 605 of the MZEA. Section 605 of the MZEA provides:

> The decision of the zoning board of appeals shall be final. A party aggrieved by the decision may appeal to the circuit court for the county in which the property is located as provided under section 606. [MCL 125.3605.]

Thus, under the MZEA, a party seeking relief from a decision of a ZBA is not required to demonstrate "standing" but instead must demonstrate to the circuit

court acting in an appellate context that he or she is an "aggrieved" party. MCL 125.3605.

In discussing the similar provision of MCR 7.203(A), which provides that this Court has jurisdiction of an appeal of right filed by an "aggrieved party," our Supreme Court observed the difference between standing and the comparable interest in an appellate context of being an "aggrieved party," stating that "[t]o be aggrieved, one must have some interest of a pecuniary nature in the outcome of the case and not a mere possibility arising from some unknown and future contingency." *Federated Ins Co*, 475 Mich at 291 (quotation marks and citations omitted).

> An aggrieved party is not one who is merely disappointed over a certain result. Rather, to have standing on appeal, a litigant must have suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court's power. The only difference is a litigant on appeal must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case. [*Id*. at 291-292.]

Thus, the question in this case is more properly framed as not whether appellees had "standing," but specifically whether appellees were "parties aggrieved by the decision" of the ZBA within the meaning of the MZEA and thereby empowered by the MZEA to invoke appellate review of the ZBA's decision by the circuit court. To answer that inquiry, we look first to the provisions of the MZEA. Because the MZEA does not define the term "party aggrieved," we must engage in statutory interpretation, adhering to the well-settled rules governing such an inquiry. In doing so, our "primary goal is to discern the intent of the Legislature by first examining the plain language of the statute." *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311

(2011). "Statutory provisions must be read in the context of the entire act, giving every word its plain and ordinary meaning." *Id*. at 247. "When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted." *Id*.

The relevant statutory language provides that a "party aggrieved by the decision [of the ZBA] may appeal to the circuit court . . . ." MCL 125.3605. We do not assume that language chosen by the Legislature was inadvertent, *Bush v Shabahang*, 484 Mich 156, 169; 772 NW2d 272 (2009), and when interpreting statutory language that previously has been subject to judicial interpretation,[4] we presume that the Legislature used the words in the sense in which they previously have been interpreted, *People v Wright*, 432 Mich 84, 92; 437 NW2d 603 (1989); *People v Powell*, 280 Mich 699, 703; 274 NW 372 (1937).

In other contexts, this Court has defined the term "aggrieved party" as "one whose legal right is invaded by an action, or whose pecuniary interest is directly or adversely affected by a judgment or order." *Dep't of Consumer & Indus Servs v Shah*, 236 Mich App 381, 385; 600 NW2d 406 (1999) (quotation marks and citations omitted). In the context of zoning, but before

[4] We emphasize that we are not referring to the doctrine of "legislative acquiescence," which is highly disfavored in Michigan as an indicator of legislative intent. See *Ray v Swager*, 501 Mich 52, 78 n 63; 903 NW2d 366 (2017), citing *Donajkowski v Alpena Power Co*, 460 Mich 243, 258; 596 NW2d 574 (1999). Under the doctrine of legislative acquiescence, a court assumes that the Legislature tacitly approves a judicial interpretation if the Legislature does not thereafter correct the interpretation by the enactment of new legislation. By contrast, we apply here the established precept of statutory interpretation that when our Legislature enacts a statute including language that already has been subject to judicial interpretation, the Legislature intends the established interpretation of those words.

enactment of the MZEA, this Court interpreted and applied the phrase "aggrieved party" in cases arising under former zoning enabling acts. In doing so, this Court consistently concluded that to be a "party aggrieved" by a zoning decision, the party must have "suffered some special damages not common to other property owners similarly situated[.]" *Unger v Forest Home Twp*, 65 Mich App 614, 617; 237 NW2d 582 (1975), citing *Joseph v Grand Blanc Twp*, 5 Mich App 566, 571; 147 NW2d 458 (1967). Generally, a neighboring landowner alleging increased traffic volume, loss of aesthetic value, or general economic loss has not sufficiently alleged special damages to become an aggrieved party, *Village of Franklin v Southfield*, 101 Mich App 554, 557; 300 NW2d 634 (1980), because those generalized concerns are not sufficient to demonstrate harm different from that suffered by people in the community generally.

In *Unger*, the township granted a building permit for the construction of a condominium. The appellant appealed the decision in the circuit court, and the circuit court dismissed the appeal because the appellant was not an "aggrieved party." This Court affirmed, explaining that the appellant had not alleged facts sufficient to show special damages, alleging only the possibility of increased traffic on the lake and an effect on property values. *Unger*, 65 Mich App at 618. This Court concluded:

> In order to have any status in court to challenge the actions of a zoning board of appeals, a party must be "aggrieved[.]" The plaintiff must allege and prove that he has suffered some special damages not common to other property owners similarly situated[.]
>
> It has been held that the mere increase in traffic in the area is not enough to cause special damages[.] Nor is proof

> of general economic and aesthetic losses sufficient to show special damages[.] [*Id*. at 617 (citations omitted).]

In *Western Mich Univ Bd of Trustees v Brink*, 81 Mich App 99; 265 NW2d 56 (1978), the Kalamazoo Zoning Board of Appeals granted the defendant's petition to expand a nonconforming use and for variances to accommodate the expansion. The plaintiff university owned property within 300 feet of the defendant, and it sought in the circuit court to set aside the petition. This Court affirmed the circuit court's holding that the plaintiff was not an "aggrieved party" entitled to challenge the board's decision, rejecting plaintiff's argument that because it was entitled to notice under the former zoning legislation, it had standing to challenge the board's decision. *Id*. at 102-103. This Court also rejected the plaintiff's argument that it had standing because it was an adjoining property owner, stating:

> We see little reason for abandoning the general rule that third parties will be permitted to appeal to the courts as persons aggrieved if they can show that . . . their property will suffer some special damages as a result of the decision of the board complained of, which is not common to other property owners similarly situated. . . . If the board's decision does not pose a threat of unique harm to the neighbor, then the courts would be ill-served by a rule allowing his suit. [*Id*. at 103 n 1 (quotation marks and citations omitted).]

In *Village of Franklin*, the defendant city council approved a site plan for a residential and commercial development. The village and a property owner challenged the decision in the circuit court, but the circuit court granted summary disposition to the defendant after concluding that the plaintiffs were not aggrieved parties under the former zoning legislation. On appeal, this Court expressly rejected the argument of the plaintiff property owner that she had standing because

she owned land that adjoined the proposed development, holding that the property owner "failed to allege or prove special damages." *Village of Franklin*, 101 Mich App at 557. This Court explained:

> In order for a party to have standing in court to attack the actions of a zoning board of appeals, the party must be an aggrieved party, and standing cannot be based solely on the fact that such party is a resident of the city. In the present case, the circuit court relied on MCL 125.590, which authorizes an appeal to circuit court by a "party aggrieved" by a board of zoning appeals decision. We agree with the circuit court's decision that the present plaintiffs lacked standing because they were not aggrieved parties. [*Id*. at 556-557 (citations omitted).]

Given the long and consistent interpretation of the phrase "aggrieved party" in Michigan zoning jurisprudence, we interpret the phrase "aggrieved party" in § 605 of the MZEA consistently with its historical meaning. Therefore, to demonstrate that one is an aggrieved party under MCL 125.3605, a party must "allege and prove that he [or she] has suffered some special damages not common to other property owners similarly situated[.]" *Unger*, 65 Mich App at 617. Incidental inconveniences such as increased traffic congestion, general aesthetic and economic losses, population increases, or common environmental changes are insufficient to show that a party is aggrieved. See *id*.; *Joseph*, 5 Mich App at 571. Instead, there must be a unique harm, dissimilar from the effect that other similarly situated property owners may experience. See *Brink*, 81 Mich App at 103 n 1. Moreover, mere ownership of an adjoining parcel of land is insufficient to show that a party is aggrieved, *Village of Franklin*, 101 Mich App at 557-558, as is the mere entitlement to notice, *Brink*, 81 Mich App at 102-103.

A review of the record in this case indicates that, contrary to the holding of the circuit court, appellees failed to demonstrate that they were aggrieved parties for purposes of the MZEA. Appellees argued before the circuit court that they were aggrieved because (1) they relied on the 1996 variance denial concluding that Lot 6 was unbuildable, (2) they relied on the zoning ordinance to be enforced as it is written, (3) they were entitled to receive notice of the public hearing before the ZBA as owners of real property within 300 feet of Lot 6, and (4) they would suffer aesthetic, ecological, practical, and other alleged harms from the grant of the zoning variance. These alleged injuries, however, do not establish appellees as aggrieved parties under MCL 125.3605. Aesthetic, ecological, and practical harms are insufficient to show "special damages not common to other property owners similarly situated[.]" *Unger*, 65 Mich App at 617. Similarly, appellees' expectations that the 1998 zoning ordinance would be interpreted in the same manner as the 1981 zoning ordinance, or that the ZBA would arrive at the same decision as the 1996 denial of an altogether different variance request, were not sufficient to show special damages. Because appellees failed to show that they suffered a unique harm different from similarly situated community members, they failed to establish that they are parties aggrieved by the decision of the ZBA.

Although the circuit court noted that septic systems and setback requirements specifically affected the property of neighboring landowners, there is no evidence that such damages are more than speculation or anticipation of future harm. Presumably, appellant would not be permitted to install a septic system that did not satisfy all the requisite county health codes and building requirements. Thus, assuming that appellant obtained the requisite permits, there is nothing to

support the conclusion that adjoining landowners would suffer the harm they anticipate.

The circuit court also held that appellees had standing to challenge the issuance of the nonuse variance because they owned real property within 300 feet of Lot 6 and therefore were entitled to notice under the MZEA. MCL 125.3103 provides in relevant part:

> (1) Except as otherwise provided under this act, if a local unit of government conducts a public hearing required under this act, the local unit of government shall publish notice of the hearing in a newspaper of general circulation in the local unit of government not less than 15 days before the date of the hearing.
>
> (2) Notice required under this act shall be given as provided under subsection (3) to the owners of property that is the subject of the request. Notice shall also be given as provided under subsection (3) to all persons to whom real property is assessed within 300 feet of the property that is the subject of the request and to the occupants of all structures within 300 feet of the subject property regardless of whether the property or structure is located in the zoning jurisdiction.

This statutory notice provision does not confer the status of aggrieved party on appellees. In *Brink*, this Court addressed and rejected this argument, explaining:

> Plaintiff, as an owner of land located within 300 feet of defendant Brink's premises, was entitled to and did receive notice of the proceedings before the Zoning Board of Appeals . . . .
>
> However, plaintiff argues that [notice under] § 11 not only made plaintiff a proper party to any appeal taken by an aggrieved party, but also gave plaintiff itself standing to institute such an appeal, regardless of whether it was an aggrieved party.

> Plaintiff cites no authority for this construction of the statute, and we do not find it persuasive. The "aggrieved party" requirement is a standard limitation in state zoning acts providing for review of zoning board of appeals decisions. This requirement has repeatedly been recognized and applied in the decisions of this Court. Had the Legislature meant to unshoulder this burden from parties in plaintiff's status it could have done so in simple terms. However, § 11 does not speak in terms of standing to seek review, but only of notice and a right to appear . . . . We do not read this language as broadening the class of parties privileged to begin such reviews. [*Brink*, 81 Mich App at 102 (citations omitted).]

As in *Brink*, appellees' entitlement to notice under MCL 125.3103 of the ZBA proceedings does not create "aggrieved party" status for appellees under MCL 125.3605. Nothing in the MZEA or in Michigan's zoning jurisprudence supports reading "aggrieved party" status into the MZEA's notice requirement. Indeed, this reading of the notice provision runs contrary to this Court's decisions establishing that mere ownership of adjoining property is insufficient to establish a property owner as an aggrieved party. Accordingly, the circuit court erred by holding that appellees achieved status as "aggrieved parties" merely because they were entitled to notice under MCL 125.3103.

Appellees rely on *Brown v East Lansing Zoning Bd of Appeals*, 109 Mich App 688; 311 NW2d 828 (1981), to support their "aggrieved" status, but a review of that case indicates that this argument is misguided. In *Brown*, the defendant East Lansing Zoning Board of Appeals granted the intervenor a variance to permit the construction of a duplex. The plaintiffs were neighboring landowners who objected to the construction of the duplex, and they appealed the decision in the circuit court. *Id*. at 690-691. The circuit court held that the plaintiffs were not parties aggrieved by the deci-

sion of the board. *Id*. at 692-693. On appeal, this Court held that the neighboring landowners had standing to appeal the defendant's grant of the variance, explaining:

> In *Village of Franklin* [101 Mich App at 556], this Court expressly relied on the fact that the appeal in that case was taken under [MCL 125.590], which requires a party to be "aggrieved" in order to have standing to appeal. In the present case, on the other hand, plaintiffs' appeal was taken under [MCL 125.585(6)], *which requires only that a person have "an interest affected by the zoning ordinance*." The fact that plaintiffs have an interest affected by defendant's decision to grant the variance is manifest in their active opposition to the variance and their participation in the different hearings. [*Id*. at 699 (emphasis added).]

Brown is unpersuasive here because it involved the application of a more permissive threshold for standing under a previous enabling statute that a person have " 'an interest affected by the zoning ordinance.' " *Id*. In contrast, the cases discussed earlier—*Unger*, 65 Mich App at 617; *Brink*, 81 Mich App at 102; and *Village of Franklin*, 101 Mich App at 556-557—applied the "aggrieved person" threshold. Because the MZEA incorporated the "aggrieved person" threshold, see MCL 125.3605, we align our decision interpreting that language in the MZEA with the body of caselaw interpreting the "aggrieved person" threshold.

We next address appellees' contention that appellant waived the issue of standing by not raising it before the ZBA. Appellees argue that they appeared before the ZBA together with counsel and presented their arguments in that forum without appellant challenging their right to do so and that appellant therefore waived any challenge to appellees' standing to pursue the appeal in the circuit court. Appellees rely on

this Court's opinion in *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523; 695 NW2d 508 (2005), and also in *Frankling v Van Buren Charter Twp*, unpublished per curiam opinion of the Court of Appeals, issued July 15, 2008 (Docket No. 271228). We conclude that appellees' reliance on these cases is misplaced.

Glen Lake did not involve an appeal from a zoning decision of a local unit of government. Rather, *Glen Lake* involved a dispute under the inland-lake-levels part of Michigan's Natural Resources and Environmental Protection Act, MCL 324.30701. In that case, the Glen Lake Association, which earlier had been ordered by the trial court to operate the dam in question so as to maintain the water level of the lake at the ordered level, completely shut off the water flow into the Crystal River while constructing a new dam. A group of riparian property owners and a canoe livery on the river filed suit against the Glen Lake Association. After the trial court entered its order modifying the established lake level, the Association appealed in this Court, arguing that the trial court lacked subject-matter jurisdiction because the property owners did not have standing to bring the action. *Glen Lake*, 264 Mich App at 526-527. This Court recognized that the Association's challenge was actually a challenge to the property owners' legal capacity to sue and that the Association therefore should have raised the challenge in its first responsive pleading in the trial court, but instead the Association had acquiesced in the proceedings, then later attempted to assert the challenge. This Court concluded that because the Association had not challenged plaintiffs' legal capacity to sue in its first responsive pleading, it had waived the issue. *Id*. at 528. The *Glen Lake* decision was thereafter cited by this Court in its unpublished opinion in *Frankling* for

the proposition that "[c]hallenges to standing are waived if not timely raised." *Id*. at 3, citing *Glen Lake*, 264 Mich App at 528.

We find these cases inapplicable here. Initially, we note that neither of these cases involved application of the MZEA or the same language used in the MZEA. *Glen Lake* did not involve an appeal from a zoning decision of a local unit of government. *Frankling*[5] involved the application of MCL 125.293a, a provision of the now-repealed township zoning act, which provided that "a person having an interest affected by the zoning ordinance may appeal" a decision of the board of zoning appeals in the circuit court. Neither *Glen Lake* nor *Frankling* persuades us that appellant in this case was obligated to challenge appellees' right to appeal in the circuit court *before* appellees actually appealed.

Appellees argue that appellant should have challenged their standing when they appeared before the ZBA. Appellant, however, is not challenging the appellees' right to appear at the public hearing before the ZBA and make public comments; rather, appellant is challenging the ability of appellees to thereafter appeal the decision of the ZBA in the circuit court. The ZBA was not the appropriate forum to address whether appellees were empowered to appeal the ZBA's decision as aggrieved parties. The question who may seek review of the ZBA decision before the circuit court is a question for initial determination by the circuit court, not by the ZBA. Moreover, at the time of the proceedings before the ZBA, the ZBA had not yet

[5] We also note that *Frankling* is unpublished, and this Court's unpublished opinions are not binding on this Court. MCR 7.215(C); *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010).

granted the variance and thus any challenge to appellees' ability to appeal that future decision would have been premature.[6] So, although appellees had a right to participate in the ZBA's public hearing, the issue whether appellees were parties "aggrieved by the decision" of the ZBA under the MZEA with the right to appeal the decision of the ZBA in the circuit court was a question properly raised for the first time before the circuit court. Indeed, it could not have been raised any earlier.

Lastly, we address appellees' reliance on our Supreme Court's opinion in *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010) (*LSEA*). Appellees argue that under *LSEA*, they have standing to challenge the decision of the ZBA in this case. We disagree. *LSEA* involved the question whether the teachers in that case had standing to sue the school board for refusing to expel certain students who allegedly had physically assaulted the teachers. In that case, our Supreme Court stated:

> We hold that Michigan standing jurisprudence should be restored to a limited, prudential doctrine that is consistent with Michigan's longstanding historical approach to standing. Under this approach, a litigant has standing whenever there is a legal cause of action. . . . Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if a statutory scheme implies that the Legislature intended to confer standing on the litigant. [*Id*. at 372.]

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[6] And while before the ZBA, appellant could not possibly know of, and object to, the entire universe of possible parties who might in the future appeal a future decision of the ZBA.

LSEA[7] is inapplicable here. As discussed, this case involves not general notions of standing, that is, a plaintiff's right to invoke the power of the trial court regarding a claimed injury by another party, but instead application of a specific statutory provision of the MZEA that permits appellate review of a local unit of government's zoning decision when review is sought by a "party aggrieved" by the decision of that local tribunal. That is, the inquiry whether there is a "legal cause of action" that would justify finding that a plaintiff has standing to initiate an action, see *id*., is not relevant where, as here, our inquiry is whether a party is empowered to seek appellate review under a particular statutory scheme.

But we note that even if the *LSEA* analysis were applicable here, appellees would nonetheless lack standing because, just as they have not demonstrated that they are "aggrieved" within the meaning of the MZEA, they have not demonstrated "a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large" under *LSEA*. See *id*. In either situation, a party must establish that they have special damages different from those of others within the community. Appellees have not done so, asserting only the complaints of anticipated inconvenience and aesthetic disappointment that any member of the community might assert.

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[7] It has been notably observed that in *LSEA*, our Supreme Court overruled the previous understanding of standing in this state, establishing in its place a " 'limited, prudential doctrine' that uncoupled standing from its constitutional moorings," thereby creating a standing doctrine that should itself be overruled. *Ader v Delta College Bd of Trustees*, 493 Mich 887, 888 (2012) (MARKMAN, J., dissenting). As Justice CORRIGAN in her dissent in *LSEA* observed, the standard for standing established in that case is a "broad and amorphous principle that promises to be nearly impossible to apply in a society that operates under the rule of law." *LSEA*, 487 Mich at 417 (CORRIGAN, J., dissenting).

But we reiterate that the inquiry here involves not an application of concepts of standing generally, but a specific assessment of whether, under the MZEA, appellees have established their status as aggrieved parties empowered to challenge a final decision of the ZBA. We conclude that appellees are not parties "aggrieved" under MCL 125.3605, having failed to demonstrate special damages different from those of others within the community. Accordingly, appellees did not have the ability to invoke the jurisdiction of the circuit court, and the circuit court erred by denying the township's and appellant's motion to dismiss the circuit court action. In light of our conclusion that appellees were not properly able to invoke the jurisdiction of the circuit court, it is unnecessary to address appellant's additional contentions of error in the circuit court's ruling.

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

MURRAY, C.J., and HOEKSTRA, J., concurred with GADOLA, J.

VANDERCOOK v AUTO-OWNERS INSURANCE COMPANY

Docket No. 339145. Submitted May 8, 2018, at Lansing. Decided May 24, 2018. Approved for publication July 10, 2018, at 9:00 a.m.

Ryan Vandercook brought an action in the Washtenaw Circuit Court against Auto-Owners Insurance Company, seeking to recover personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*., for injuries he sustained in an automobile accident; the trial court submitted the action to case evaluation under MCR 2.403. In his case evaluation summary, plaintiff listed the disputed benefits and asserted that defendant owed approximately $93,000 for medical expenses and attendant care. Defendant asserted, *inter alia*, in its summary that it had paid all PIP benefits required under the parties' contract. The case evaluation panel awarded plaintiff $45,000. Plaintiff accepted the award but indicated in his signed acceptance that he accepted the award only as to the unpaid bills he had referred to in his case evaluation summary and that his acceptance did not include claims related to wage loss; defendant accepted the award. Defendant moved to settle the order and dismiss the case under MCR 2.403(M). The court, Carol A. Kuhnke, J., denied defendant's motion, reasoning that the parties' acceptance of the case evaluation award had only resolved the claims included in plaintiff's case evaluation summary. Defendant appealed.

The Court of Appeals *held*:

1. MCR 2.403(A)(1) and (3) provide that a trial court may submit to case evaluation any civil action in which the relief sought is primarily money damages or division of property but that the court may exempt such actions from case evaluation under certain circumstances. MCR 2.403(L)(1) requires each party to file a written acceptance or rejection of the panel's evaluation with the alternative dispute resolution clerk within 28 days after service of the panel's evaluation. Even if there are separate awards on multiple claims, the party must either accept or reject the evaluation in its entirety as to a particular opposing party. Under MCR 2.403(M)(1), if all the parties accept the panel's evaluation, judgment will be entered in accordance

with the evaluation, unless the amount of the award is paid within 28 days after being notified of the acceptances, in which case the court must dismiss the action with prejudice. The judgment or dismissal disposes of all claims in the action, except for cases involving the right to PIP benefits for which judgment or dismissal shall not be deemed to dispose of claims that have not accrued as of the date of the case evaluation hearing. MCR 2.403(M)(2), however, provides that if only a part of an action has been submitted to case evaluation pursuant to MCR 2.403(A)(3) and all the parties accept the panel's evaluation, the court must enter an order disposing of only those claims. The general purpose of case evaluation is to expedite and simplify the final settlement of cases to avoid a trial, not to bifurcate litigation or decide it piecemeal. Under MCR 2.403(M)(1), the parties' acceptance of a case evaluation means that all claims in the action must be disposed of by entry of judgment or dismissal. Although MCL 2.403(L)(3) gives parties the option to accept all or part of a case evaluation award when the case involves multiple parties with claims against each other, in an action involving one plaintiff and one defendant, a party must submit all claims to case evaluation and may not limit his or her acceptance of the case evaluation award; a party's attempt to limit his or her acceptance in the latter situation constitutes an acceptance of the award for purposes of MCR 2.403, not a rejection.

2. In this case, plaintiff's complaint did not limit the scope of the action to the disputed benefits he listed in his case evaluation summary. The case evaluation panel considered all the issues raised in plaintiff's complaint because the parties submitted the case to case evaluation, neither party objected under MCR 2.403(C) to case evaluation, and the trial court did not exempt under MCR 2.403(A)(3) any part of plaintiff's action from case evaluation. Plaintiff did not have an option under MCR 2.403(L)(3) to limit his acceptance of the case evaluation award because the action did not involve multiple parties. Accordingly, plaintiff's acceptance of the case evaluation award disposed of all PIP benefit disputes that had accrued before case evaluation, and the trial court should have entered judgment on the award or dismissed the entire action pursuant to MCR 2.403(M)(1). As a result, the trial court erred by allowing defendant to bifurcate his claims in order to file another lawsuit for PIP benefits that accrued before the case evaluation hearing.

Reversed and remanded for further proceedings.

CASE EVALUATION AWARDS — LIMITED ACCEPTANCES — NOT ALLOWED WITHOUT MULTIPLE PARTIES IN LITIGATION.

Under MCR 2.403(M)(1), the parties' acceptance of a case evaluation award means that all claims in the action are deemed disposed of by entry of judgment or dismissal; although MCL 2.403(L)(3) gives parties the option to accept all or part of a case evaluation award when the case involves multiple parties with claims against each other, in an action involving one plaintiff and one defendant, a party must submit all claims to case evaluation and may not limit his or her acceptance of the case evaluation award; a party's attempt to limit his or her acceptance in the latter situation constitutes an acceptance of the award for purposes of MCR 2.403, not a rejection.

Logeman, Iafrate & Logeman, PC (by *Robert E. Logeman* and *Adrienne D. Logeman*) for plaintiff.

Willingham & Coté, PC (by *Kimberlee A. Hillock* and *Torree J. Breen*) for defendant.

Before: METER, P.J., and GADOLA and TUKEL, JJ.

PER CURIAM. Defendant, Auto-Owners Insurance Company, appeals as of right the trial court's determination that the parties' acceptance of the case evaluation award only resolved the claims that were included in plaintiff's case evaluation summary. Defendant asserts that the trial court misinterpreted MCR 2.403 and neglected to consider controlling caselaw for its decision. We agree and, therefore, reverse and remand.

Plaintiff, Ryan Vandercook, sued defendant for breach of a no-fault automobile insurance policy issued by defendant, seeking to recover no-fault personal protection insurance (PIP) benefits for expenses, loss of wages, replacement services, and other benefits related to injuries sustained by plaintiff in an automobile accident on December 23, 2014. Plaintiff also sought declaratory relief to determine his right to PIP benefits and defendant's right to reduction, set offs, or reim-

bursements of paid benefits. The case was submitted for case evaluation. Plaintiff's case evaluation summary listed disputed benefits and asserted that defendant owed approximately $93,000 for medical expenses and family-provided attendant care. Defendant stated in its case evaluation summary that it had properly paid all PIP benefits, and defendant challenged numerous categories of benefits and the specific benefits demanded by plaintiff for, among other things, medical services, attendant care, mileage, and wage loss. Defendant further contended that it had overpaid for services, entitling it to reimbursement. Defendant also claimed a right to setoff because plaintiff received government-provided benefits and had the right to receive other government benefits that he refused to take.

The case evaluation panel considered the case and unanimously awarded plaintiff $45,000. Plaintiff accepted the award but typed into the form that he accepted the award "as to benefits referenced in Plaintiff's Case Evaluation Summary only. Not including wage loss." Defendant also accepted the award, which—because both parties had accepted—had the effect of settling the case for that amount. See MCR 2.403(M). After notification of the parties' mutual acceptance, defendant moved for clarification from the trial court as to whom the proper payees were for payment of the case evaluation award.[1] Plaintiff responded by arguing that he had limited his case evaluation ac-

[1] At the time, this Court's ruling in *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 313 Mich App 50, 54; 880 NW2d 294 (2015), rev'd 500 Mich 191 (2017), was in effect and provided that medical providers had standing to bring a direct claim against an insurer for payment of no-fault benefits. Defendant explained to the trial court that it did not want to pay plaintiff and still remain liable to plaintiff's medical providers if it did so. The Supreme Court did not reverse *Covenant* until months later.

ceptance to the unpaid bills he had referred to in his case evaluation summary. Plaintiff offered no legal argument and cited no rule, statute, or caselaw for his position.

At the hearing on defendant's motion, defendant argued that MCR 2.403 clearly provides that mutual acceptance of a case evaluation award resolves all claims in an action through the date of the case evaluation. Plaintiff countered that he had accepted the case evaluation award with a limited acceptance, which purportedly precluded defendant from refusing to pay plaintiff's providers for those benefits that had accrued and not been in dispute before the date of case evaluation. The trial court denied defendant's motion, ruling that only the claims or damages presented in plaintiff's case evaluation summary were subject to the court rules regarding case evaluation sanctions. The trial court reasoned that "[n]o-fault cases are different because the claim continues to accrue the entire time that the case is pending in some—in some circumstances . . . ." However, the court did not rely on or even address the portion of MCR 2.403(M)(1) that contains an exception for claims involving PIP benefits that have not accrued at the time of the case evaluation. Consequently, the parties were unable to agree on a proposed order to submit to the trial court for entry because defendant contended that MCR 2.403 and controlling caselaw did not permit a party to limit his or her acceptance to anything other than the entirety of the party's claims asserted in the lawsuit.

The parties' failure to agree on the order prompted them each to file motions. Plaintiff moved to set aside the case evaluation, and defendant moved to settle the order and dismiss the case pursuant to MCR 2.403(M). At some point, defendant issued and sent plaintiff a check in the amount of the case evaluation award. At

the hearing on the parties' competing motions, plaintiff announced that on the basis of his limited acceptance of the panel's decision, he had filed a separate lawsuit for the PIP benefits that he claimed were not resolved by the case evaluation award. Defendant argued that the court rule and controlling caselaw did not permit plaintiff's separate lawsuit. The trial court ultimately ruled against defendant, reasoning that the parties' case evaluation acceptance had only resolved the claims included in plaintiff's case evaluation summary. Defendant now appeals.

"The proper interpretation and application of a court rule is a question of law, which this Court reviews de novo." *Haliw v Sterling Hts*, 471 Mich 700, 704; 691 NW2d 753 (2005). The interpretation and application of a court rule is governed by the principles of statutory construction, commencing with an examination of the plain language of the court rule. *Id*. at 704-705. "The intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole." *Id*. at 706. This Court has explained:

> The goal of court rule interpretation is to give effect to the intent of the drafter, the Michigan Supreme Court. The Court must give language that is clear and unambiguous its plain meaning and enforce it as written. Each word, unless defined, is to be given its plain and ordinary meaning, and the Court may consult a dictionary to determine that meaning. [*Varran v Granneman*, 312 Mich App 591, 599; 880 NW2d 242 (2015) (citations omitted).]

Defendant argues that the trial court failed both to follow applicable law and to apply MCR 2.403 correctly. Defendant argues that the trial court, in so doing, denied defendant the finality that case evaluation should afford the parties when they mutually submit

the case for case evaluation and accept the case evaluation panel's decision. We agree.

MCR 2.403, in relevant part, provides:

> (A) Scope and Applicability of Rule.
>
> (1) A court may submit to case evaluation any civil action in which the relief sought is primarily money damages or division of property.
>
> * * *
>
> (3) A court may exempt claims seeking equitable relief from case evaluation for good cause shown on motion or by stipulation of the parties if the court finds that case evaluation of such claims would be inappropriate.
>
> * * *
>
> (I) Submission of Summary and Supporting Documents.
>
> * * *
>
> (3) The case evaluation summary shall consist of a concise summary setting forth that party's factual and legal position on issues presented by the action. . . .
>
> (K) Decision.
>
> * * *
>
> (2) Except as provided in subrule (H)(3), the evaluation must include a separate award as to each plaintiff's claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action. For the purpose of this subrule, all such claims filed by any one party against any other party shall be treated as a single claim.
>
> * * *

(L) Acceptance or Rejection of Evaluation.

(1) Each party shall file a written acceptance or rejection of the panel's evaluation with the [alternative dispute resolution] clerk within 28 days after service of the panel's evaluation. Even if there are separate awards on multiple claims, the party must either accept or reject the evaluation in its entirety as to a particular opposing party. The failure to file a written acceptance or rejection within 28 days constitutes rejection.

* * *

(M) Effect of Acceptance of Evaluation.

(1) If all the parties accept the panel's evaluation, judgment will be entered in accordance with the evaluation, unless the amount of the award is paid within 28 days after notification of the acceptances, in which case the court shall dismiss the action with prejudice. The judgment or dismissal shall be deemed to dispose of all claims in the action and includes all fees, costs, and interest to the date it is entered, except for cases involving rights to personal protection insurance benefits under MCL 500.3101 *et seq*., for which judgment or dismissal shall not be deemed to dispose of claims that have not accrued as of the date of the case evaluation hearing.

(2) If only a part of an action has been submitted to case evaluation pursuant to subrule (A)(3) and all of the parties accept the panel's evaluation, the court shall enter an order disposing of only those claims.

The general purpose of case evaluation under MCR 2.403 "is to expedite and simplify the final settlement of cases to avoid a trial." *Magdich & Assoc, PC v Novi Dev Assoc LLC*, 305 Mich App 272, 276; 851 NW2d 585 (2014) (quotation marks and citation omitted). Further, acceptance of a case evaluation award serves as a final adjudication and is therefore binding on the parties, similar to a consent judgment or settlement agreement. *Id*. at 276-277.

In *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 554-555; 640 NW2d 256 (2002), the Michigan Supreme Court considered the effect of the parties' acceptance of a case evaluation award pursuant to MCR 2.403(M) on claims that allegedly had not been presented in case evaluation. The plaintiff's complaint alleged four breach-of-contract claims against the defendant, with the fourth based on a separate contract. *Id*. at 551. The trial court summarily dismissed the fourth count. *Id*. The case then went to case evaluation, and the parties accepted the award. *Id*. at 551-552. Following case evaluation, the plaintiff contended that it had reserved the right to appeal the summary dismissal of the fourth count and that the parties' case evaluation acceptance resolved only the first three claims. *Id*. at 552. The Michigan Supreme Court held that pursuant to MCR 2.403(M)(1), the parties' acceptance resolved *all* the plaintiff's claims in the action—even those that had been summarily disposed. *Id*. at 555. The Court explained that "allowing bifurcation of the claims within such actions, as plaintiff suggests, would be directly contrary to the language of the rule." *Id.*

Importantly, the *CAM Constr* Court overruled this Court's earlier decisions that had construed MCR 2.403(M)(1) as allowing submission of less than all issues to case evaluation.[2] *Id*. at 556, 557. The Court explained that "[a]llowing the parties involved in the case evaluation process to make such a showing has no basis in the court rule." *Id*. at 556. The Court summarized that the "unambiguous language [of MCR 2.403(M)(1)] evidences our desire to avoid bifurcation of civil actions submitted to case evaluation." *Id*. at

[2] Those Court of Appeals cases interpreted the prior version of MCR 2.403, which the *CAM Constr* Court described as being "less detailed" than the present version. *CAM Constr*, 465 Mich at 556.

557. Simply put, "[i]f all parties accept the panel's evaluation, the case is over." *Id*. As this Court has noted, "[T]he purpose of case evaluation is to resolve the case, not to bifurcate litigation or decide it piecemeal." *Magdich & Assoc*, 305 Mich App at 280.

In this case, the parties agreed to submit the case to case evaluation. Neither party objected to case evaluation under MCR 2.403(C).[3] Further, the trial court did not exempt any aspect of plaintiff's action from case evaluation under MCR 2.403(A)(3). Therefore, the case evaluation panel had the entire case for its consideration and determination.

We hold that plaintiff's claims in this action did not consist of a dispute over only some, but not all, no-fault PIP benefits. Plaintiff's complaint nowhere limited the scope of the adjudication to a specific set or list of disputed benefits. In Count I, plaintiff sought money damages for payment of all expenses for his care, recovery, and rehabilitation; for wage loss; and for replacement services and other PIP benefits. In Count II, plaintiff sought a determination of his right to wage-loss benefits, replacement-service expenses, medical expenses, no-fault interest, attorney fees, and other benefits allegedly owed by defendant. Plaintiff also sought determination by the trial court of whether defendant could reduce, set off, or seek reimbursement for overpaid PIP benefits. Plaintiff's complaint plainly did not limit his civil action to the benefits he listed in his case evaluation summary.

Plaintiff's contention that MCR 2.403 permitted him to limit his acceptance lacks merit. As the Supreme

[3] "MCR 2.403(C)(1) allows a party to file a motion to remove *the matter* from case evaluation." *Magdich & Assoc*, 305 Mich App at 280 (emphasis added). Thus, even this provision would not allow plaintiff to only submit some of his nonequitable claims to case evaluation.

Court's decision in *CAM Constr* makes clear, MCR 2.403 does not permit a party in an action involving one plaintiff against one defendant to (1) submit less than all of his or her claims to case evaluation and (2) limit any acceptance. Only in cases involving multiple parties with claims against each other does MCR 2.403(L)(3) give the parties the option to accept all or part of a case evaluation award. The form used for acceptance and rejection also cannot be construed to permit limited acceptances like that attempted by plaintiff. The form very clearly tracks MCR 2.403(L). Therefore, plaintiff had no option or right to limit his acceptance of the case evaluation award.

MCR 2.403(M)(1) unambiguously describes the effect of acceptance of a case evaluation award. Upon acceptance by both parties, the trial court must enter judgment or dismiss the action with prejudice, and the judgment or dismissal "shall be deemed to dispose of *all claims in the action* . . . ." (Emphasis added.) However, for no-fault cases involving the right to PIP benefits, the trial court's judgment may not dispose of claims that have not accrued as of the date of the case evaluation hearing. But all claims which have accrued at the time of the case evaluation are, as a matter of law, disposed of pursuant to MCR 2.403(M)(1). Accordingly, plaintiff's acceptance of the case evaluation award in this case disposed of all disputes over PIP benefits that had accrued before the date of the case evaluation.

Therefore, the trial court improperly allowed plaintiff to limit his acceptance of the case evaluation award in contravention of the plain language of MCR 2.403. Upon both parties' acceptance of the case evaluation award, MCR 2.403(M)(1) required the trial court to enter judgment or dismiss the entire action—not re-

view plaintiff's case evaluation summary and allow him to bifurcate his claims so that he could file another lawsuit for PIP benefits that had accrued before the date of the case evaluation hearing.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

METER, P.J., and GADOLA and TUKEL, JJ., concurred.

In re RELIABILITY PLANS OF ELECTRIC UTILITIES
FOR 2017–2021

Docket Nos. 340600 and 340607. Submitted May 9, 2018, at Lansing. Decided July 12, 2018, at 9:00 a.m. Reversed and remanded 505 Mich ___ (2020).

In these consolidated appeals, the Association of Businesses Advocating Tariff Equity (ABATE) (Docket No. 340600) and Energy Michigan, Inc. (Docket No. 340607) appealed an order of the Michigan Public Service Commission (MPSC) implementing MCL 460.6w. The MPSC order imposed a local clearing requirement on individual alternative electric suppliers. The local clearing requirement represented the amount of capacity resources that were required to be in the local resource zone in which the electric supplier's demand was served. Before MCL 460.6w was enacted, the MPSC did not impose a local clearing requirement on individual alternative electric suppliers; the Midcontinent Independent System Operator (MISO)—the regional transmission organization responsible for managing the transmission of electric power in a large geographic area—applied the local clearing requirement as a whole to the geographic area covered by the requirement. ABATE and Energy Michigan challenged the MPSC's interpretation of MCL 460.6w as erroneous, and Energy Michigan further asserted that the MPSC order improperly imposed new rules that were not promulgated in compliance with the Administrative Procedures Act (APA), MCL 24.201 *et seq*.

The Court of Appeals *held*:

1. An MPSC decision is ripe for review if it is a threshold determination and resolution of the issue is not dependent on any further decision by the MPSC. Here, the MPSC concluded that a locational requirement on individual alternative electric suppliers was allowed under MCL 460.6w to ensure that all providers contribute to long-term resource adequacy in Michigan. That decision was a threshold determination ripe for consideration because it was not dependent on any further decision by the MPSC.

2. According to the MPSC, MCL 460.6w mandates that it create capacity obligations with a locational requirement and the MPSC, in setting locational capacity obligations, is allowed to require a demonstration by individual electric providers that the

resources that they use to meet their capacity obligations meet a local clearing requirement. But while MCL 460.6w(8)(c) requires the MPSC to determine the local clearing requirement in order to determine capacity obligations, it does not specifically authorize the MPSC to impose the local clearing requirement on individual alternative electric suppliers, and the MPSC's authority cannot be extended by inference. Moreover, reading the statute as a whole leads to the conclusion that the MPSC must impose a local clearing requirement consistently with MISO—that is, on a zonal basis—and not on individual alternative electric suppliers. MCL 460.6w(3) directs the MPSC to establish a capacity charge that a provider must pay if it fails to satisfy the capacity obligations as required under MCL 460.6w(8). MCL 460.6w(6), however, directs that no capacity charge be assessed against an alternative electric supplier who demonstrates that it can meet its capacity obligations through owned or contractual rights to any resource that the MISO allows to meet the capacity obligation of the electric provider. The parties acknowledge that MISO permits an alternative electric supplier to meet its capacity obligations, including the local clearing requirement, by owning or contracting for capacity resources located outside the applicable local resource zone and does not require each alternative electric supplier to demonstrate a proportionate share of the local clearing requirement. Similarly, MCL 460.6w(6) constrains the MPSC from assessing any capacity charge in a manner that conflicts with a federal resource adequacy tariff, and MCL 460.6w(8)(c) requires that the MPSC set any planning reserve margin or local clearing requirements consistently with federal reliability requirements. These provisions militate against the MPSC's imposition of any local clearing requirements beyond what MISO has established, and instead these provisions impose on the MPSC a continuing obligation to observe MISO's general practice of imposing local clearing requirements on a zonal, not an individual, basis. In addition, even if the language of MCL 460.6w was ambiguous and it was necessary to look outside the statute to properly determine legislative intent, the MPSC order conflicted with the legislative intent given that the Legislature rejected statutory language imposing a local clearing requirement on individual alternative electric suppliers in favor of the language adopting the MISO method. Where the Legislature has considered certain language and rejected it in favor of other language, the resulting statutory language should not be held to authorize what the Legislature explicitly rejected.

3. An agency should resort to formal rulemaking under the APA when establishing policies that do not merely interpret or explain the statutes or rules from which the agency derives its

authority but rather establish the substantive standards that implement a program. Energy Michigan's allegations that the MPSC engaged in improper rulemaking primarily related to the MPSC's imposition of a local clearing requirement on individual electric suppliers. Because the statute does not provide the MPSC with the authority to impose a local clearing requirement on individual alternative electric suppliers, it was unnecessary to reach the question whether the MPSC's decision concerning the local clearing requirement resulted in improperly promulgated rules.

Reversed and remanded.

PUBLIC UTILITIES — ALTERNATIVE ELECTRIC SUPPLIERS — IMPOSITION OF A LOCAL CLEARING REQUIREMENT BY THE PUBLIC SERVICE COMMISSION.

The Michigan Public Service Commission (MPSC) has no power that is not expressly conferred by clear and unmistakable statutory language; determining that the MPSC may impose a local clearing requirement on individual alternative electric suppliers under MCL 460.6w would require an improper inference of such authority.

Clark Hill PLC (by *Robert A. Strong* and *Michael J. Pattwell*) for the Association of Businesses Advocating Tariff Equity.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *B. Eric Restuccia*, Chief Legal Counsel, *Ann M. Sherman*, Assistant Solicitor General, and *Steven D. Hughey*, *Spencer A. Sattler*, and *Lauren D. Donofrio*, Assistant Attorneys General, for the Michigan Public Service Commission.

Kelly M. Hall and *Gary A. Gensch, Jr.*, for Consumers Energy Company.

Varnum, LLP (by *Laura Chappelle*, *Tim Lundgren*, and *Brion B. Doyle*) for Energy Michigan, Inc.

Before: METER, P.J., and GADOLA and TUKEL, JJ.

GADOLA, J. In Docket No. 340600, appellant Association of Businesses Advocating Tariff Equity (ABATE)[1] appeals as of right the final order of appellee Michigan Public Service Commission (MPSC) in its Case No. U-18197. In Docket No. 340607, appellant Energy Michigan, Inc. (Energy Michigan)[2] appeals as of right the same order of the MPSC. In each of these consolidated cases,[3] appellants contend that the MPSC erred by determining that it is empowered by the Legislature under 2016 PA 341 (Act 341) to impose a local clearing requirement on individual alternative electric suppliers. In Docket No. 340607, Energy Michigan additionally contends that the MPSC's order purports to impose new rules on electric providers in this state without the required compliance with Michigan's Administrative Procedures Act (APA), MCL 24.201 *et seq*. We reverse and remand.

I. BACKGROUND AND FACTS

At the end of 2016, our Legislature enacted new electric utility legislation that included Act 341. That

[1] ABATE describes itself as "an interest group of large energy users representing its members before regulatory and governmental bodies and other organizations that affect Michigan's energy pricing, reliability, and terms and conditions of service." ABATE Energy, *About ABATE* <https://abate-energy.org> (accessed May 8, 2018) [https://perma.cc/QE6D-DNKD].

[2] Energy Michigan describes itself as a group devoted to the protection and promotion of "alternative and independent power supply, cogeneration, advanced energy industries and their customers . . . ." Energy Michigan, *About Energy Michigan, Inc*. <https://energymichigan.org> (accessed May 8, 2018) [https://perma.cc/LW4E-8UNB]. Energy Michigan intervenes in Michigan Public Service Commission cases affecting those industries. *Id*.

[3] These appeals were consolidated on this Court's own motion. *In re Reliability Plans of Electric Utilities for 2017–2021*, unpublished order of the Court of Appeals, entered November 15, 2017 (Docket Nos. 340600 and 340607).

act added, among other statutory sections, MCL 460.6w. These appeals arise from an order issued by the MPSC as part of its implementation of MCL 460.6w.

By way of background, Michigan's Legislature previously enacted what was known as the Customer Choice and Electricity Reliability Act, MCL 460.10 *et seq*., as enacted by 2000 PA 141 and 2000 PA 142, to "further the deregulation of the electric utility industry." *In re Application of Detroit Edison Co for 2012 Cost Recovery Plan*, 311 Mich App 204, 207 n 2; 874 NW2d 398 (2015). That act permitted customers to buy electricity from alternative electric suppliers instead of limiting customers to purchasing electricity from incumbent utilities, such as appellee Consumers Energy Company (Consumers). *Consumers Energy Co v Pub Serv Comm*, 268 Mich App 171, 173; 707 NW2d 633 (2005). Among the purposes of the act, as amended by Act 341, is the promotion of "financially healthy and competitive utilities in this state." MCL 460.10(b).

Also by way of background, the Midcontinent Independent System Operator (MISO) is the regional transmission organization responsible for managing the transmission of electric power in a large geographic area that spans portions of Michigan and 14 other states. To accomplish this, MISO combines the transmission facilities of several transmission owners into a single transmission system. In addition to the transmission of electricity, MISO's functions include capacity resource planning. MISO has established ten local resource zones; most of Michigan's Lower Peninsula is located in MISO's Local Resource Zone 7, while the Upper Peninsula is located in MISO's Local Resource Zone 2.

Each year MISO establishes for each alternative electric supplier in Michigan the "planning reserve margin requirement."[4] MISO also establishes the "local clearing requirement."[5] Under MISO's system, there generally are no geographic limitations on the capacity resources that may be used by a particular supplier to meet its planning reserve margin requirement. That is, MISO does not impose the local clearing requirement on alternative electric suppliers individually but instead applies the local clearing requirement to the zone as a whole. Each individual electricity supplier is not required by MISO to demonstrate that its energy capacity is located within Michigan, as long as the zone as a whole demonstrates that it has sufficient energy generation located within Michigan to meet federal requirements.

MISO also serves as a mechanism for suppliers to buy and sell electricity capacity through an auction. This allows for the exchange of capacity resources across energy providers and resource zones. The MISO auction is conducted each year for the purchase and sale of capacity for the upcoming year. The auction

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[4] A "planning reserve margin requirement" is

> the amount of capacity equal to the forecasted coincident peak demand that occurs when the appropriate independent system operator footprint peak demand occurs plus a reserve margin that meets an acceptable loss of load expectation as set by the commission or the appropriate independent system operator under subsection (8). [MCL 460.6w(12)(e).]

[5] A "local clearing requirement" is

> the amount of capacity resources required to be in the local resource zone in which the electric provider's demand is served to ensure reliability in that zone as determined by the appropriate independent system operator for the local resource zone in which the electric provider's demand is served and by the commission under subsection (8). [MCL 460.6w(12)(d).]

allows suppliers to buy and sell electricity capacity and acquire enough capacity to meet their planning reserve margin requirement. The auction also allows each zone as a whole to meet the zone's local clearing requirement.

At the end of 2016, our Legislature enacted Act 341, in part adding MCL 460.6w,[6] which imposes resource adequacy requirements on electric service providers in Michigan and imposes certain responsibilities on the MPSC. Under MCL 460.6w(2), the MPSC is required under certain circumstances to establish a "state reliability mechanism." That subsection provides, in relevant part:

> If, by September 30, 2017, the Federal Energy Regulatory Commission does not put into effect a resource adequacy tariff that includes a capacity forward auction or a prevailing state compensation mechanism, then the commission shall establish a state reliability mechanism under subsection (8). [MCL 460.6w(2).]

The parties agree that because the Federal Energy Regulatory Commission did not put into effect the MISO-proposed tariff, the MPSC is required by § 6w(2) to establish a state reliability mechanism. A "state reliability mechanism" is defined by the statute as "a plan adopted by the commission in the absence of a prevailing state compensation mechanism to ensure reliability of the electric grid in this state consistent with subsection (8)." MCL 460.6w(12)(h). The state reliability mechanism is to be established consistently with § 6w(8), which provides, in relevant part, that the MPSC shall:

> (b) Require . . . that each alternative electric supplier, cooperative electric utility, or municipally owned electric

[6] 2016 PA 341, effective April 20, 2017.

utility demonstrate to the commission, in a format determined by the commission, that for the planning year beginning 4 years after the beginning of the current planning year, the alternative electric supplier, cooperative electric utility, or municipally owned electric utility owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable. One or more municipally owned electric utilities may aggregate their capacity resources that are located in the same local resource zone to meet the requirements of this subdivision. One or more cooperative electric utilities may aggregate their capacity resources that are located in the same local resource zone to meet the requirements of this subdivision. A cooperative or municipally owned electric utility may meet the requirements of this subdivision through any resource, including a resource acquired through a capacity forward auction, that the appropriate independent system operator allows to qualify for meeting the local clearing requirement. A cooperative or municipally owned electric utility's payment of an auction price related to a capacity deficiency as part of a capacity forward auction conducted by the appropriate independent system operator does not by itself satisfy the resource adequacy requirements of this section unless the appropriate independent system operator can directly tie that provider's payment to a capacity resource that meets the requirements of this subsection. By the seventh business day of February in 2018, an alternative electric supplier shall demonstrate to the commission, in a format determined by the commission, that for the planning year beginning June 1, 2018, and the subsequent 3 planning years, the alternative electric supplier owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable. If the commission finds an electric provider has failed to demonstrate it can meet a portion or all of its capacity obligation, the commission shall do all of the following:

> (*i*) For alternative electric load, require the payment of a capacity charge that is determined, assessed, and applied in the same manner as under subsection (3) for that portion of the load not covered as set forth in subsections (6) and (7). [MCL 460.6w(8).]

Thus, § 6w(8)(b) requires each alternative electric supplier, cooperative electric utility, and municipally owned electric utility to demonstrate to the MPSC that it has sufficient capacity to meet its "capacity obligations." The statute does not define "capacity obligations," but in § 6w(8)(c), the statute provides that:

> (c) In order to determine the capacity obligations, [the MPSC shall] request that the appropriate independent system operator provide technical assistance in determining the local clearing requirement and planning reserve margin requirement. If the appropriate independent system operator declines, or has not made a determination by October 1 of that year, the commission shall set any required local clearing requirement and planning reserve margin requirement, consistent with federal reliability requirements. [MCL 460.6w(8)(c).]

Section 6w(8)(b) also provides that municipally owned electric utilities are permitted to "aggregate their capacity resources that are located in the same local resource zone to meet the requirements of this subdivision" and that cooperative electric utilities are permitted to "aggregate their capacity resources that are located in the same local resource zone to meet the requirements of this subdivision." Section 6w(8)(b) also permits a cooperative or municipally owned electric utility to "meet the requirements of this subdivision through any resource, including a resource acquired through a capacity forward auction, that [MISO] allows to qualify for meeting the local clearing requirement." Section 6w(8)(b), however, does not include a similar provision for alternative electric suppliers and

is, in fact, silent as to whether alternative electric suppliers may aggregate their capacity resources that are located in the same local resource zone to meet the requirements of the subdivision.

MCL 460.6w(3) directs the MPSC to establish a capacity charge that a provider must pay if it fails to satisfy the capacity obligations established under § 6w(8). Section 6w(6), however, directs that a capacity charge shall not be assessed against an alternative electric supplier who demonstrates

> that it can meet its capacity obligations through owned or contractual rights to any resource that the appropriate independent system operator[7] allows to meet the capacity obligation of the electric provider. The preceding sentence shall not be applied in any way that conflicts with a federal resource adequacy tariff, when applicable. [MCL 460.6w(6).]

After the enactment of Act 341, the MPSC worked collaboratively in a workgroup process to implement MCL 460.6w. On September 15, 2017, the MPSC issued an order in its Case No. U-18197, imposing new requirements on alternative electric suppliers as part of its implementation of MCL 460.6w. In that order, the MPSC determined that MCL 460.6w authorizes it to impose a local clearing requirement on individual alternative electric suppliers.[8] ABATE and Energy

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[7] MCL 460.6w(12)(a) defines the "appropriate independent system operator" as MISO.

[8] This decision was made in the context of competing interests between large public utilities, which contend that alternative electric suppliers are not investing in the energy infrastructure of Michigan and therefore are not contributing to long-term energy reliability in the state, and smaller alternative electric suppliers, which provide lower-cost electricity to customers by relying in part on capacity generated outside of Michigan. Large public utilities contend that their costs are higher because of the investment they make in long-term energy

Michigan challenge this interpretation of MCL 460.6w as erroneous, while Consumers supports the decision of the MPSC. Energy Michigan further challenges the new requirements imposed by the MPSC, contending that the requirements did not comply with the APA and were thus improperly implemented.

II. ANALYSIS

A. RIPENESS

As an initial consideration, we address the assertion by the MPSC and Consumers that the issue in these appeals related to the imposition of a local clearing requirement is not yet ripe for resolution by this Court. The MPSC and Consumers contend that the September 15, 2017 order of the MPSC in Case No. U-18197 did not impose a local clearing requirement on individual alternative electric suppliers but instead merely announced that the MPSC has the authority to do so. The MPSC and Consumers assert that until the MPSC takes the final step of imposing a specific local clearing requirement on an individual alternative electric supplier, the question whether the MPSC has the authority to do so is not ripe for review. We disagree.

The ripeness doctrine requires that an actual injury be sustained by the plaintiff. *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 554; 904 NW2d 192 (2017). "The doctrine of ripeness is designed to prevent 'the adjudication of hypothetical or contingent claims before an actual injury has been sustained.' " *Huntington Woods v Detroit*, 279 Mich App 603, 615; 761 NW2d

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production in Michigan, while alternative electric suppliers contend that if they are required to rely almost exclusively on capacity produced within the state, they will be forced to leave the market in Michigan and consumer choice for electricity will effectively be at an end.

127 (2008), quoting *Mich Chiropractic Council v Comm'r of the Office of Fin & Ins Servs*, 475 Mich 363, 371 n 14; 716 NW2d 561 (2006), overruled on other grounds by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 371 (2010). "A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or may not occur at all." *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 282; 761 NW2d 210 (2008).

To determine whether an issue is ripe for review, we assess "whether the harm asserted has matured sufficiently to warrant judicial intervention." *People v Bosca*, 310 Mich App 1, 56; 871 NW2d 307 (2015) (quotation marks and citations omitted); see also *Dep't of Social Servs v Emmanuel Baptist Preschool*, 434 Mich 380, 412 n 48; 455 NW2d 1 (1990) (CAVANAGH, J., concurring). In making this assessment, this Court must balance any uncertainty about whether a party will actually suffer future injury against the potential hardship of denying anticipatory relief. *People v Robar*, 321 Mich App 106, 128; 910 NW2d 328 (2017). This Court will find an issue ripe for review when it is a "threshold determination," the resolution of which is not dependent on any further decision by the MPSC. *Citizens*, 280 Mich App at 283; see also *Mich United Conservation Clubs v Secretary of State*, 463 Mich 1009 (2001) (holding that a controversy was ripe for review when it involved a "threshold determination" of whether petitions met constitutional prerequisites and was not dependent on the Board of Canvassers' counting or consideration of petitions).

A review of the MPSC's September 15, 2017 order demonstrates that the MPSC has not merely announced that it has the authority to impose a local clearing requirement on individual alternative electric

suppliers; it has announced its decision to assert that authority, leaving open only the methodology of exercising that authority. In its earlier June 15, 2017 order in Case No. U-18197, and reiterated in its September 15, 2017 order, the MPSC stated that "the Commission finds that a locational requirement is required under Section 6w and that a locational requirement applicable to individual LSEs [load serving entities] is allowed as part of the capacity obligations set forth by the Commission pursuant to Section 6w in order to ensure all providers contribute to long-term resource adequacy in the state." The MPSC's September 15, 2017 order further stated that "a properly designed locational requirement applied to individual load serving entities as part of a demonstration that capacity obligations have been met is consistent with [the] requirements [in the statute, the MISO tariff, and applicable caselaw]." In light of these determinations by the MPSC, the alleged harm in these cases does not rest on contingent future events that may not occur as anticipated or at all; the decision to apply a locational requirement to individual alternative electric suppliers has already been made. The only variable remaining is the methodology the MPSC will employ. Thus, there is little uncertainty about whether the asserted harm will occur, and we weigh that factor against the potential hardship of denying anticipatory relief. *Robar*, 321 Mich App at 128.

We conclude that the harm asserted in these cases warrants judicial intervention. As in *Citizens*, the decision of the MPSC in its September 15, 2017 order—that it has the authority to impose a local clearing requirement on individual alternative electric suppliers—is a "threshold determination" ripe for our consideration given that the resolution of the issue is not dependent on any further decision by the MPSC. *Citizens*, 280 Mich

App at 283; see also *Mich United Conservation Clubs*, 463 Mich 1009. We therefore hold that the question whether the MPSC erred by determining that it has statutory authority to impose a local clearing requirement on individual alternative electric suppliers is ripe for our review.

B. STANDARD OF REVIEW

When reviewing an order of the MPSC, this Court generally refers to MCL 462.25, which states:

> All rates, fares, charges, classification and joint rates fixed by the commission and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie, lawful and reasonable until finally found otherwise in an action brought for the purpose pursuant to the provisions of section 26 of this act, or until changed or modified by the commission as provided for in section 24 of this act.

See, e.g., *Attorney General v Pub Serv Comm*, 269 Mich App 473, 479; 713 NW2d 290 (2006). In addition, this Court generally notes that as a reviewing court, we give due deference to the administrative expertise of the MPSC. See, e.g., *Attorney General v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999). In these appeals, however, appellants challenge whether a specific holding of the MPSC in its final order in its Case No. U-18197 exceeds the authority granted to the MPSC by law.

To be valid, a final order of the MPSC must be authorized by law and supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Attorney General v Pub Serv Comm*, 165 Mich App 230, 235; 418 NW2d 660 (1987). Agencies have the authority to interpret the statutes that they administer and enforce. *Clonlara, Inc v State*

Bd of Ed, 442 Mich 230, 240; 501 NW2d 88 (1993). We respectfully consider an agency's interpretation of a statute the agency is empowered to execute and will not overrule that construction absent cogent reasons. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008). But the construction the MPSC gives to a statute is not binding on the courts. *Id*. Ultimately, the statutory language itself is controlling, *id*. at 108, and this Court will neither abandon nor delegate its responsibility to determine legislative intent, *Consumers Energy Co*, 268 Mich App at 174-175. Moreover, we review de novo issues of statutory interpretation, *Uniloy Milacron USA Inc v Dep't of Treasury*, 296 Mich App 93, 96; 815 NW2d 811 (2012), including the MPSC's determinations regarding the scope of its own authority, *Consumers Power Co v Pub Serv Comm*, 460 Mich 148, 157; 596 NW2d 126 (1999); *In re Application of Consumers Energy to Increase Electric Rates (On Remand)*, 316 Mich App 231, 237; 891 NW2d 871 (2016). In sum, when considering the construction given to a statute by an agency, our ultimate concern is the proper construction of the plain language of the statute regardless of the agency's interpretation, *Rovas*, 482 Mich at 108, and our primary obligation is to discern and give effect to the Legislature's intent, *Coldwater v Consumers Energy Co*, 500 Mich 158, 167; 895 NW2d 154 (2017).

C. MCL 460.6w

In its September 15, 2017 order, the MPSC held that MCL 460.6w authorizes it to impose a local clearing requirement on individual alternative electric suppliers. ABATE and Energy Michigan contend that this interpretation of MCL 460.6w is erroneous. We agree with ABATE and Energy Michigan.

The MPSC has no common-law powers and possesses only the authority granted to it by the Legislature. *Consumers Power Co*, 460 Mich at 155. In addition, we strictly construe the statutes that confer power on the MPSC, and that power must be conferred by "clear and unmistakable language." *Id*. at 155-156 (quotation marks and citations omitted). Accordingly, "powers specifically conferred on an agency cannot be extended by inference; . . . no other or greater power was given than that specified." *Herrick Dist Library v Library of Mich*, 293 Mich App 571, 582-583; 810 NW2d 110 (2011) (quotation marks and citations omitted). In addition, when construing the statutes empowering the MPSC, this Court does not weigh the economic or public-policy factors underlying the decisions of the MPSC; those concerns are the province of the Legislature. *Consumers Power Co*, 460 Mich at 156. Instead, our concern is the question of law presented to us: what is "the statutory authority of the [MPSC] in the light of the facts before us . . . ." *Huron Portland Cement Co v Pub Serv Comm*, 351 Mich 255, 262; 88 NW2d 492 (1958).

The MPSC's September 15, 2017 order provides that the order "establishes the format and requirements for electric providers in the state to make demonstrations to the Commission that they have sufficient electric capacity arrangements pursuant to Section 6w of 2016 PA 341 (Act 341)." In that order, the MPSC asserts that it is implementing a law administered by the agency, that it has the authority to impose a methodology on all electric load serving entities active in the state, and specifically states that

> the Commission finds that a locational requirement is required under Section 6w and that a locational requirement applicable to individual [load serving entities] is allowed as part of the capacity obligations set forth by the

> Commission pursuant to Section 6w in order to ensure all providers contribute to long-term resource adequacy in the state.

In the order, the MPSC reasons that because the statute refers to capacity obligations only in the context of the obligations of individual providers, the statute's local clearing requirement should likewise be understood to apply to individual providers. Quoting its earlier order, the MPSC order provides, in relevant part:

> As defined in Section 6w(12)(d), "local clearing requirement" means "the amount of capacity resources required to be in the local resource zone in which the electric provider's demand is served to ensure reliability in that zone as determined by the appropriate independent system operator for the local resource zone in which the electric provider's demand is served and by the commission under subsection (8)." As noted above, in requesting assistance from MISO in determining capacity obligations, the Commission is tasked with requesting technical assistance in determining this local clearing requirement.
>
> Section 6w(8) also requires individual electric providers to demonstrate to the Commission that they can meet capacity obligations. The Commission is directed to require each electric provider to demonstrate that it "owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable" four years into the future. These capacity obligations necessarily include a local clearing requirement.
>
> It is clear that the statute requires the Commission to create capacity obligations, that these capacity obligations include a locational requirement, and that the Commission, in setting locational capacity obligations, is allowed to require a demonstration by individual electric providers that the resources that they use to meet their capacity obligations meet a local clearing requirement. The Commission acknowledges the inter-relatedness of the MISO

> and Section 6w capacity demonstration processes, but also points out that these are distinct activities. These activities should be harmonized to the extent practicable, but the fundamental responsibility of the Commission is to meet Michigan's statutory obligations.
>
> Thus, the Commission finds that a locational requirement is required under Section 6w and that a locational requirement applicable to individual LSEs is allowed as part of the capacity obligations set forth by the Commission pursuant to Section 6w in order to ensure all providers contribute to long-term resource adequacy in the state.

The MPSC and Consumers urge us to read the provisions of MCL 460.6w as bestowing on the MPSC the authority to impose a local clearing requirement on individual alternative electric suppliers. They reason that § 6w(8)(c) suggests that the "capacity obligations" of alternative electric suppliers are required to be based, in part, on the local clearing requirement. The MPSC and Consumers further reason that because § 6w(8)(b) refers to the capacity obligations with respect to each individual electric provider, it must be inferred that the local clearing requirement was meant to be applied to each alternative electric supplier individually.

We cannot follow the urging of the MPSC and Consumers, however, because a review of the statute reveals that no provision of MCL 460.6w clearly and unmistakably authorizes the MPSC to impose a local clearing requirement on individual alternative electric providers. We acknowledge that § 6w(8)(b) provides that each electric provider must demonstrate that it owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or the MPSC, as applicable. Section 6w(8)(c) directs that "[i]n order to determine the capacity obligations," the MPSC must "set

any required local clearing requirement and planning reserve margin requirement, consistent with federal reliability requirements," and seek technical assistance from MISO in doing so. But although § 6w(8)(c) requires the MPSC to determine the local clearing requirement in order to determine capacity obligations, it does not specifically authorize the MPSC to impose the local clearing requirement on alternative electric suppliers individually. Because the MPSC has only the authority granted to it by the Legislature by "clear and unmistakable language," *Consumers Power Co*, 460 Mich at 155-156 (quotation marks and citation omitted), and because authority cannot be extended by inference, *Herrick Dist Library*, 293 Mich App at 582-583, we must decline the invitation to infer that the MPSC has any additional authority.

Moreover, a review of the entire statute suggests that the MPSC is obligated to apply the local clearing requirement in a manner consistent with MISO. A general principle of statutory construction is that a statute must be read as a whole and that a seemingly ambiguous provision may thereby be clarified in the context of the whole statute. *Id*. at 583. A review of the statute as a whole reveals that MCL 460.6w(3) directs the MPSC to establish a capacity charge that a provider must pay if it fails to satisfy the capacity obligations as required under § 6w(8). Section 6w(6), however, directs that no capacity charge be assessed against an alternative electric supplier who demonstrates that "it can meet its capacity obligations through owned or contractual rights to any resource that the appropriate independent system operator [MISO] allows to meet the capacity obligation of the electric provider." MCL 460.6w(6). The parties acknowledge that MISO permits an alternative electric supplier to meet its capacity obligations, including

the local clearing requirement, by owning or contracting for capacity resources located outside the applicable local resource zone and does not require each alternative electric supplier to demonstrate a proportionate share of the local clearing requirement.

Similarly, § 6w(6) constrains the MPSC from assessing any capacity charge in a manner "that conflicts with a federal resource adequacy tariff, when applicable," and § 6w(8)(c) requires that the MPSC set any planning reserve margin or local clearing requirements "consistent with federal reliability requirements." These provisions militate against the MPSC's imposition of any local clearing requirements beyond what MISO has established and instead impose on the MPSC a continuing obligation to observe MISO's general practice of imposing local clearing requirements on a zonal, not an individual, basis. Thus, reading MCL 460.6w as a whole indicates that the MPSC must impose a local clearing requirement on alternative electric suppliers in a manner consistent with MISO—that is, on a zonal basis and not individually.

The MPSC notes that § 6w(8)(b) allows cooperative electric utilities to "aggregate [with other cooperative electric utilities] their capacity resources that are located in the same local resource zone" for purposes of satisfying their capacity obligations. The MPSC further notes that municipally owned electric utilities may aggregate their capacity resources with other municipally owned electric utilities. Those entities may resort to "any resource, including a resource acquired through a capacity forward auction, that [MISO] allows to qualify for meeting the local clearing requirement." In its September 15, 2017 order, the MPSC interpreted § 6w(8) as follows:

> This provision allowing municipally-owned and cooperative electric utilities to aggregate their resources in order [to] meet the requirements of Section 6w(8) clearly implies that these utilities would otherwise be required to meet the requirements on an individual basis. The Commission finds that it would be unreasonable to interpret the statute such that this obligation for individual compliance "for meeting the local clearing requirement" is placed solely on municipally-owned and cooperative utilities under Section 6w. The Commission can find nothing in the law, and no rational basis, to indicate an intent to place a local clearing requirement only on non-profit utilities. Instead, the law is more logically understood to require that all individual utilities be treated similarly in terms of requirements, and that the aggregation option was intended to assist nonprofit utilities (many of which are small) to comply more easily. Thus, this language further supports the Commission's interpretation that a locational requirement is authorized and may be applied to individual electric providers.

The MPSC argues that because § 6w(8)(b) is silent[9] as to whether an alternative electric supplier may similarly aggregate its resources, the intent of the

[9] Actually, the law "is more logically understood" by reference to its own terms. The more logical interpretation of those terms is that the Legislature authorized cooperative or municipally owned electric utilities to aggregate their resources in order to meet the local clearing requirement. We will not infer from the Legislature's failure to impose the local clearing requirement on individual alternative electric suppliers, i.e., the Legislature's *silence*, that it, in fact, intended to impose the local clearing requirement on individual alternative electric suppliers. Given that "Michigan courts determine the Legislature's intent from its *words*, not from its silence," *Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 596 NW2d 574 (1999), the better understanding is, as we have articulated it here, that the Legislature's reference to MISO's standards, which allow the local clearing requirement to be met on a zonal basis, and *no language* imposing the local clearing requirement on individual alternative electric suppliers, means that the MPSC is without authority to impose such a requirement on individual alternative electric suppliers.

statute must be to permit the imposition of a local clearing requirement on individual alternative electric suppliers. Again, however, reaching this conclusion requires the inference that § 6w permits the MPSC to establish a capacity obligation that includes an individual local clearing requirement contrary to that imposed by MISO. Because we must strictly construe the statutes that confer power on the MPSC—power that may not be inferred but instead must be conferred by "clear and unmistakable language"—we conclude that MCL 460.6w does not authorize the MPSC to impose a local clearing requirement upon individual alternative electric suppliers. See *Herrick Dist Library*, 293 Mich App at 582-583.

D. LEGISLATIVE HISTORY

We further conclude that, were it necessary to look outside the language of the statute at issue here to ascertain the intent of the Legislature, the order of the MPSC conflicts with the intent of Act 341 as reflected in that act's legislative history. When construing a statute, this Court is required to give effect to the intent of the Legislature. *Russell v Detroit*, 321 Mich App 628, 637; 909 NW2d 507 (2017). When statutory language is clear, the intent of the Legislature is clear and we will enforce the statute as written. *Id*. We look outside the plain words of the statute only when ambiguity within the statute requires it, and we do not use legislative history to cloud clear statutory text. *In re Certified Question from the United States Court of Appeals for the Sixth Circuit*, 468 Mich 109, 116; 659 NW2d 597 (2003). A statute is ambiguous only if it creates an irreconcilable conflict with another statutory provision or if its language is equally susceptible

to more than one meaning. *Village of Holly v Holly Twp*, 267 Mich App 461, 474; 705 NW2d 532 (2005).

As discussed, any authority granted by statute to the MPSC must be conferred by "clear and unmistakable language," *Consumers Power Co*, 460 Mich at 155-156, and the "powers specifically conferred on an agency cannot be extended by inference," *Herrick Dist Library*, 293 Mich App at 582-583 (quotation marks and citation omitted). Here, because the language of MCL 460.6w is unambiguous, we interpret the plain language as reflecting the intent of the Legislature without the need to consider the legislative history and conclude that MCL 460.6w contains no clear and unmistakable language granting the MPSC authority to impose a local clearing requirement on individual alternative electric suppliers. The MPSC, however, invites us to interpret the statute as permitting it to assume authority not explicit within the statute. We conclude that even if it were necessary to look beyond the language of the statute to ascertain the intent of the Legislature, the interpretation suggested by the MPSC conflicts with the Legislature's intent when enacting MCL 460.6w as is evident in the legislative history of Act 341.

We note that not all legislative history is equally valuable when attempting to ascertain the legislative intent behind statutory language. *In re Certified Question*, 468 Mich at 115 n 5. Our Supreme Court has instructed that "the highest quality [of] legislative history [is] that [which] relates to an action of the Legislature from which a court may draw reasonable inferences about the Legislature's intent," including "actions of the Legislature in considering various alternatives in language in statutory provisions before settling on the language actually enacted." *Id*.

Here, the legislative process leading to the passage of Act 341 lasted for almost 17 months and involved numerous amendments and bill substitutes. Senate Bill 437 was introduced on July 1, 2015. It proposed substantial amendment of the Michigan Public Service Commission Act, 1939 PA 3, and the Customer Choice and Electricity Reliability Act, as enacted by 2000 PAs 141 and 142. The bill ultimately emerged from the Senate as Senate Substitute 7 (S7), with a new provision that imposed on alternative electric suppliers a capacity obligation and a demonstration process; alternative electric suppliers were required to own or contract for enough capacity resources to meet a percentage of their proportionate share of the local clearing requirement. For example, S7 provided in proposed § 6w(2)(C), in relevant part:

> An alternative electric supplier . . . shall . . . demonstrate to the commission, in a format determined by the commission, that for the planning year, . . . the alternative electric supplier . . . owns or has contractual rights to sufficient dedicated and firm electric capacity to meet the equivalent of 90% of its proportional share of the local clearing requirement . . . .[10]

This version of the bill passed the Senate and was transmitted to the House. On December 15, 2016, the House adopted H4 in place of S7. H4 *removed* the specific language requiring individual alternative electric suppliers to meet a percentage of their proportionate share of the local clearing requirement. H4 also added language to proposed § 6w(6) specifying that an alternative electric supplier could meet its overall capacity obligation with any resource that the appropriate independent system operator (MISO) allows to meet the capacity obligation. The Senate thereafter

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[10] Capitalization altered.

concurred with H4, and the bill was signed into law. The Legislature thereby rejected statutory language imposing the local clearing requirement on individual alternative electric suppliers in favor of statutory language adopting the MISO method of not imposing the local clearing requirement on individual electric providers.

In its September 15, 2017 order, the MPSC stated:

> The Commission acknowledges that previous versions of the legislation included a detailed methodology relative to determining the share of a forward locational requirement each provider would have to demonstrate. What changed . . . is not that a locational requirement went away entirely, but that an explicit methodology was removed and replaced with provisions that leave decisions on the methodology of how to establish the locational requirement up to the Commission. . . . [T]he statute gives the Commission flexibility to determine how best to establish a forward locational requirement and the resources that qualify to meet that requirement.

On appeal, the MPSC suggests that "once the Legislature had MISO's . . . long-term resource adequacy plan to use as a guide, Legislators no longer felt the need to provide their own different plans for how to allocate [local clearing requirements] and PRMR [the planning reserve margin requirement]," as is apparent from "the addition of requirements that the Commission request MISO's assistance in setting capacity determination and deference to MISO's determinations of what resources would qualify." In sum, the MPSC urges us to read into the statute an implied grant of authority to the MPSC to impose a local clearing requirement on individual alternative electric suppliers even though (1) such authority is not clearly and unmistakably granted by the statute, (2) such an interpretation is contrary to the directive of § 6w that

the local clearing requirement be imposed in accordance with MISO's practices, which do not impose the local clearing requirement on individual alternative electric suppliers, and (3) the Legislature rejected language granting such authority to the MPSC, removing it from the final draft of the statute ultimately enacted. We decline the invitation to engage in these interpretive gymnastics and return to our ultimate concern and primary objective when reviewing an agency decision interpreting a statute—that is, to properly construe the statute and to discern and give effect to the Legislature's intent. *Rovas*, 482 Mich at 107-108; *Coldwater*, 500 Mich at 167.

"Where the Legislature has considered certain language and rejected it in favor of other language, the resulting statutory language should not be held to authorize what the Legislature explicitly rejected." *Bush v Shabahang*, 484 Mich 156, 173-174; 772 NW2d 272 (2009), quoting *In re MCI Telecom Complaint*, 460 Mich 396, 415; 596 NW2d 164 (1999) (alteration omitted). We therefore will not interpret the language adopted in MCL 460.6w as authorizing what the Legislature explicitly rejected when enacting that statute.

E. ADMINISTRATIVE PROCEDURES ACT

Energy Michigan also contends that the MPSC, through its September 15, 2017 order, made a series of decisions that are essentially a set of improperly instituted rules. An administrative rule is "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency . . . ." MCL 24.207. An agency should resort to formal APA rulemaking when establishing policies that "do not merely interpret or explain the statute or

rules from which the agency derives its authority," but rather "establish the substantive standards implementing the program." *Faircloth v Family Independence Agency*, 232 Mich App 391, 403-404; 591 NW2d 314 (1998). Under the APA, a "rule" does not include a "rule or order establishing or fixing rates or tariffs," MCL 24.207(c), a "determination, decision, or order in a contested case," MCL 24.207(f), an "interpretive statement" or "guideline," MCL 24.207(h), or a "decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected," MCL 24.207(j). "[I]n order to reflect the APA's preference for policy determinations pursuant to rules, the definition of 'rule' is to be broadly construed, while the exceptions are to be narrowly construed." *AFSCME v Dep't of Mental Health*, 452 Mich 1, 10; 550 NW2d 190 (1996). An agency, however, may not avoid the requirements for promulgating rules by issuing its directives under different labels. See *id*. at 9. Whether an agency policy is invalid because it was not promulgated as a rule under the APA is reviewed de novo by this Court. *In re PSC Guidelines for Transactions Between Affiliates*, 252 Mich App 254, 263; 652 NW2d 1 (2002).

In Docket No. 340607, Energy Michigan contends that the MPSC, in its September 15, 2017 order, determined that it could impose a local clearing requirement on individual alternative electric suppliers and, in essence, enacted rules without complying with the APA. Energy Michigan identifies six such alleged instances, which Energy Michigan notes is not an all-inclusive list:

> a. Establishment of a formula for determining each electric provider's "total capacity obligation that it will be required to demonstrate that it has owned or contracted resources to satisfy."

b. A restriction on the use of the MISO Planning Resource Auction to meet capacity needs, where the Commission states that it "is also allowing electric providers to plan on up to 5% of their portfolio to be acquired through MISO's annual capacity auction" where no such restriction formerly existed.

c. Setting of the capacity obligation for the years 2018 to 2021 on the basis of the electric provider's Peak Load Contribution ("PLC") for 2018, without any means to adjust that obligation during the four years, by requiring that "[t]hese PLC determinations will ultimately drive the total amount of capacity obligation that an AES [alternative electric supplier] will be required to meet in its annual demonstration before the Commission."

d. Imposing a locational requirement for obtaining capacity on individual electric providers which will be required for the 2019 demonstration, by affirming "the Commission's interpretation that a locational requirement is authorized and may be applied to individual electric providers."

e. Asserting authority to reinsert by administrative fiat requirements that were removed from the authorizing statute during the legislative drafting process.

f. And ordering that "[t]he Capacity Demonstration Process and Requirements . . . are approved" without having developed those requirements through the proper rulemaking process. [Citations omitted.]

These allegations of inappropriate rulemaking primarily relate to the MPSC's imposition of a local clearing requirement on individual alternative electric suppliers.[11] Because we determine that the statute

[11] Energy Michigan's challenges under the APA are tied almost entirely to the MPSC's imposition of the local clearing requirement on individual electric suppliers. In its appellate brief replying to the briefing by Consumers Energy, Energy Michigan asserts that "[w]hat Energy Michigan is disputing (setting aside the MPSC's unlawful process for implementing its new rules . . .) is whether or not the Commission has the authority to go beyond MISO's zonal LCR [local

does not provide the MPSC with the authority to impose a local clearing requirement on individual alternative electric suppliers, we conclude that it is unnecessary to reach the related issue whether the MPSC's determination concerning the local clearing requirement resulted in improperly promulgated rules.

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

METER, P.J., and TUKEL, J., concurred with GADOLA, J.

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clearing requirement] and establish a mandatory individual LCR for each electric provider, something that MISO has not done and that is not present in the federal reliability requirements, but would be a new and unique state-level innovation." We agree with Energy Michigan that this is the focus of the parties' dispute and the nearly exclusive focus of the parties' briefing. The challenges under the APA extend beyond the question of the local clearing requirement, but we decline to reach those issues because they are not sufficiently developed in light of the brevity with which all parties treated those challenges.

PEOPLE v LANGLOIS

Docket No. 340477. Submitted July 10, 2018, at Detroit. Decided July 12, 2018, at 9:05 a.m. Leave to appeal denied 503 Mich 933 (2018).

Bruce P. Langlois was charged in the Huron Circuit Court with three counts of the unauthorized practice of a health profession, MCL 333.16294, related to performing veterinary surgery in December 2016 while his license to practice veterinary medicine was revoked. During defendant's preliminary examination, defendant's colleague, Dr. Duane Fitzgerald, who was a licensed veterinarian, testified that defendant performed spay and neuter surgeries and that he did not oversee defendant while defendant performed those surgeries. After defendant was bound over to the circuit court, defendant moved to quash the information on the ground that Dr. Fitzgerald had properly delegated to defendant the surgical tasks that he performed. In response, the prosecution asserted that a delegation defense was unavailable as a matter of law and moved to preclude defendant from presenting that defense to the jury. After an evidentiary hearing, at which Dr. Fitzgerald testified consistently with his preliminary examination testimony, the trial court denied the prosecution's motion. The prosecution appealed.

The Court of Appeals *held*:

Under MCL 333.16294 of the Public Health Code, MCL 333.1101 *et seq*., the unauthorized practice of a health profession, including veterinary medicine, is a felony. MCL 333.18805(3) provides that a "veterinarian" is an individual licensed to engage in the practice of veterinary medicine, and MCL 333.18811(1) provides that persons who are not licensed or otherwise authorized are prohibited from practicing veterinary medicine. MCL 333.16215 provides certain exceptions to MCL 333.16294, including that a licensee who holds a license other than a health profession subfield license may delegate to a licensed or unlicensed individual who is otherwise qualified by education, training, or experience the performance of selected acts, tasks, or functions where the acts, tasks, or functions fall within the scope of practice of the licensee's profession and will be performed under the licensee's supervision; however, a li-

censee shall not delegate an act, task, or function if the act, task, or function, under standards of acceptable and prevailing practice, requires the level of education, skill, and judgment required of the licensee. In this case, unrebutted expert testimony established that the "acceptable and prevailing practice" for veterinary medicine does not allow for the delegation of surgery to an individual who is not licensed at the time. Moreover, because defendant's license was revoked for providing substandard care to animals upon which he performed spay and neuter procedures, defendant did not meet the requirements of a licensee regarding "the level of education, skill, and judgment" required, not only to practice veterinary medicine in general, but to perform the specific task that formed the basis of the charges against him. Additionally, MCL 333.18811(3) prohibits veterinary technicians from performing as surgeons, which suggested a legislative intent that the practice of veterinary surgery not be delegated to individuals who are not validly licensed practitioners of veterinary medicine. Accordingly, because the task of veterinary surgery could not be delegated to defendant as a matter of law, the trial court abused its discretion by denying the prosecution's motion.

Reversed and remanded for further proceedings.

HEALTH — PUBLIC HEALTH CODE — ANIMALS — VETERINARY MEDICINE — DELEGATION OF VETERINARY SURGICAL PROCEDURES TO UNLICENSED INDIVIDUALS.

As a matter of law, the task of performing veterinary surgery may not be delegated to an individual who is not licensed to practice veterinary medicine at the time the surgery is performed (MCL 333.16215(1); MCL 333.16294; MCL 333.18805(3)).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *Robert M. Hayes*, Assistant Attorney General, for the people.

Chapman Law Group (by *Robert J. Andretz*) for defendant.

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

BOONSTRA, J. In this interlocutory appeal, the prosecution appeals by delayed leave granted[1] the trial court's order denying the prosecution's motion in limine to preclude defendant from presenting a delegation defense to the jury. We reverse and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Because this appeal presents a question of law that hinges on statutory interpretation, we will only briefly discuss the factual background of this case. It is undisputed that defendant is a formerly licensed veterinarian whose license to practice veterinary medicine in Michigan was revoked in November 2015.[2] In 2016, the Michigan Bureau of Professional Licensing received complaints that defendant had performed "spay and neuter" surgeries without a valid license. An investigation revealed that defendant owned a business called "Spay Neuter Express." Dr. Duane Fitzgerald, a licensed veterinarian, worked for Spay Neuter Express as an independent contractor and was designated as its attending veterinarian. Dr. Fitzgerald described the business as "an ambulatory service that serves remote areas or rural areas for spaying and neutering people's pets . . . set up in a mobile home that has been converted to a surgical facility."

Defendant was charged with three counts of the unauthorized practice of a health profession, MCL 333.16294, related to performing veterinary surgery in December 2016 while his license to practice veterinary

[1] *People v Langlois*, unpublished order of the Court of Appeals, entered March 15, 2018 (Docket No. 340477).

[2] The revocation was upheld by this Court in 2017. See *Dep't of Licensing & Regulatory Affairs v Langlois*, unpublished per curiam opinion of the Court of Appeals, issued February 14, 2017 (Docket No. 330451).

medicine was revoked. During defendant's preliminary examination, Dr. Fitzgerald testified that on December 16, 2016, defendant performed many of the surgeries that had been scheduled for that day and that he and defendant performed their respective surgeries in the same general area. Dr. Fitzgerald stated that he did not oversee defendant; he agreed that he did nothing to ensure that defendant was performing the procedures properly and that he did not check to see how many procedures defendant had completed. He also believed the animals on which defendant operated were defendant's patients, not his. Dr. Fitzgerald was aware that defendant's veterinary license had been suspended or revoked. He characterized defendant as a competent surgeon who possessed the knowledge and skills to perform veterinary surgery.

After defendant was bound over to the circuit court, he moved to quash the information on the ground that Dr. Fitzgerald, a licensed veterinarian, had properly delegated to defendant the surgical tasks that he performed. In response, the prosecution asserted that a delegation defense was unavailable as a matter of law and moved to preclude defendant from presenting such a defense to the jury. After an evidentiary hearing, at which Dr. Fitzgerald testified consistently with his preliminary-examination testimony, the trial court denied the prosecution's motion, stating that there was not "anything within the statutes or rules that say, 'You cannot perform a surgery' " and that it was "a question for the jury."[3]

This appeal followed. The trial court granted the prosecution's motion for a stay of proceedings pending the resolution of this appeal.

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[3] The trial court also denied defendant's motion to quash on July 17, 2017.

II. STANDARD OF REVIEW

We review for an abuse of discretion a trial court's ruling on a motion in limine. *Bartlett v Sinai Hosp of Detroit*, 149 Mich App 412, 418; 385 NW2d 801 (1986). However, we review de novo as a question of law matters of statutory interpretation. *People v Thomas*, 263 Mich App 70, 73; 687 NW2d 598 (2004). Further, when "delegation of authority . . . [is] a legal nullity, the question of whether [the] defendant's actions constitute illegal conduct is one of law to be decided by the trial court." *People v Ham-Ying*, 142 Mich App 831, 836; 371 NW2d 874 (1985). A trial court abuses its direction when it makes an error of law or operates within an incorrect legal framework. *People v Everett*, 318 Mich App 511, 516; 899 NW2d 94 (2017).

III. ANALYSIS

The prosecution argues that the trial court erred by failing to hold as a matter of law that defendant may not present the defense of delegation in this case. Given the specific acts alleged in this case, the undisputed expert testimony, and the language of the relevant statutes, we agree.

"The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature." *Thomas*, 263 Mich App at 73 (quotation marks and citation omitted). In order to discern legislative intent, this Court first looks to the language of the statute. *People v Borchard-Ruhland*, 460 Mich 278, 284; 597 NW2d 1 (1999). "When construing a statute, the court must presume that every word has some meaning and should avoid any construction that would render any part of the statute surplusage or nugatory," and "[i]f possible, effect should be given to each provision." *Id*. at

285. "This Court must look to the purpose of the statute . . . [and] the harm it is designed to remedy, and apply a reasonable construction that accomplishes the statute's purpose." *People v Stone Transp, Inc*, 241 Mich App 49, 51; 613 NW2d 737 (2000).

Veterinary medicine is an occupation that falls within the purview of the Public Health Code, MCL 333.1101 *et seq*. A veterinarian is "an individual licensed . . . to engage in the practice of veterinary medicine." MCL 333.18805(3). Persons who are not licensed "or otherwise authorized" are prohibited from practicing veterinary medicine. MCL 333.18811(1). MCL 333.18805(2) provides:

> "Practice of veterinary medicine" means:
>
> (a) Prescribing or administering a drug, medicine, treatment, or method of procedure; performing an operation or manipulation; applying an apparatus or appliance; or giving an instruction or demonstration designed to alter an animal from its normal condition.
>
> (b) Curing, ameliorating, correcting, reducing, or modifying a disease, deformity, defect, wound, or injury in or to an animal.
>
> (c) Diagnosing or prognosing, or both, a disease, deformity, or defect in an animal by a test, procedure, manipulation, technique, autopsy, biopsy, or other examination.

Under the Public Health Code, the unauthorized practice of a health profession, including veterinary medicine, is a felony:

> Except as provided in [MCL 333.16215], an individual who practices or holds himself or herself out as practicing a health profession regulated by this article without a license or registration or under a suspended, revoked, lapsed, void, or fraudulently obtained license or registration, or outside the provisions of a limited license or registration, or who

uses as his or her own the license or registration of another person, is guilty of a felony. [MCL 333.16294.]

MCL 333.16215 provides certain exceptions to the statute criminalizing unlicensed practice, stating, in relevant part:

(1) Subject to subsections (2) to (6), a licensee who holds a license other than a health profession subfield license may delegate to a licensed or unlicensed individual who is otherwise qualified by education, training, or experience the performance of selected acts, tasks, or functions where the acts, tasks, or functions fall within the scope of practice of the licensee's profession and will be performed under the licensee's supervision.[4] A licensee shall not delegate an act, task, or function under this section if the act, task, or function, under standards of acceptable and prevailing practice, requires the level of education, skill, and judgment required of the licensee under this article.

* * *

(7) An individual who performs acts, tasks, or functions delegated pursuant to this section does not violate the

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[4] The Public Health Code defines "supervision" as

the overseeing of or participation in the work of another individual by a health professional licensed under this article in circumstances where at least all of the following conditions exist:

(a) The continuous availability of direct communication in person or by radio, telephone, or telecommunication between the supervised individual and a licensed health professional.

(b) The availability of a licensed health professional on a regularly scheduled basis to review the practice of the supervised individual, to provide consultation to the supervised individual, to review records, and to further educate the supervised individual in the performance of the individual's functions.

(c) The provision by the licensed supervising health professional of predetermined procedures and drug protocol. [MCL 333.16109(2).]

> part that regulates the scope of practice of that health profession. [MCL 333.16215(1) and (7).]

Defendant argued in the trial court, and argues on appeal, that there is no specific statute or administrative rule prohibiting the delegation of veterinary tasks (including surgery) to an individual whose license has been suspended, noting that the Board of Veterinary Medicine has promulgated a rule regarding delegation that does not preclude the delegation of tasks to unlicensed individuals. See Mich Admin Code, R 338.4911. Defendant's argument ignores the fact that MCL 333.16215(1) prohibits a licensee from delegating an act, task, or function that, "under standards of acceptable and prevailing practice, requires the level of education, skill, and judgment required of [a] licensee . . . ." At the motion hearing, unrebutted expert testimony by Dr. Dwight McNally, a licensed veterinarian who sits on the State Veterinary Board and was qualified as an expert in veterinary medicine, established that the "acceptable and prevailing practice" for veterinary medicine does not allow for the delegation of surgery to an individual who is not licensed at the time. Moreover, because defendant's license was revoked for providing substandard care to animals upon which he performed spay and neuter procedures,[5] a determination has been made that defendant does not meet the requirements of a licensee regarding "the level of education, skill, and judgment" required, not only to practice veterinary medicine in general, but to perform the specific task that forms the basis of the charges against him.

Our conclusion is supported by the fact that veterinary technicians, who are defined as persons who have obtained licensure as a veterinary technician,

[5] *Langlois*, unpub op at 1-2.

MCL 333.18811(2), and who "practice . . . veterinary medicine based on less comprehensive knowledge and skill than that required of a veterinarian" under the supervision of a veterinarian, MCL 333.18805(1), are explicitly prohibited from performing as a surgeon, MCL 333.18811(3). If a licensed veterinary technician may not perform surgery under delegation, then it follows that an unlicensed person acting as a veterinary technician may not either. While we recognize that practice as a veterinary technician is a "subfield of the practice of veterinary medicine," MCL 333.18808, this suggests a legislative intent that the practice of veterinary surgery not be delegated to individuals who are not validly licensed practitioners of veterinary medicine. See *Stone Transp, Inc*, 241 Mich App at 51.

This Court's reasoning in *Ham-Ying* is both relevant to our conclusion and persuasive. In *Ham-Ying*, 142 Mich App at 833, the question on appeal concerned "the extent to which a licensed physician may delegate tasks to a physician whose license has been suspended." In that case, the defendant-physician's license had been suspended, but he continued to refill prescriptions for patients. *Id*. After being charged with the unauthorized practice of medicine, MCL 333.16294, the "defendant argued that he had been delegated proper authority by a licensed physician to dispense refill maintenance medication pursuant to MCL 333.16215." *Id*. at 834. The *Ham-Ying* Court held that delegation was improper, explaining that although the defendant had the requisite education, training, and experience, the conduct that had led to the suspension of his license demonstrated that he did not possess the requisite judgment of a licensee and that the licensee's duties could not be delegated to him as a matter of law. *Id*. at 836.

We recognize that the Public Health Code is more explicit in stating that the prescribing of controlled substances can only be done by a licensed physician and that such substances may only be dispensed by a licensed physician or pharmacist. See MCL 333.17751. But we conclude that a reasonable construction of the relevant statutory language concerning the practice of veterinary medicine compels the same conclusion. See *Stone Transp, Inc*, 241 Mich App at 51.

We also are not persuaded by defendant's citation of *Dep't of Consumer & Indus Servs v Hoffmann*, 230 Mich App 170; 583 NW2d 260 (1998). In *Hoffmann*, this Court stated without elaboration that a veterinarian could delegate the practice of chiropractic medicine on horses to a licensed chiropractor who did not possess a license to practice veterinary medicine. *Id*. at 179. However, the Court focused its analysis on whether the defendant in that case had, in fact, been properly supervised. *Id*. at 179-180. In any event, the defendant in *Hoffmann* was a properly licensed chiropractor; in other words, the issue was whether a properly licensed healthcare provider could practice his or her form of medical treatment on animals, and the *Hoffmann* Court concluded that one could, if one was qualified to do so by education, skill, and training and was supervised by a licensed veterinarian. *Id*. at 180. That a validly licensed chiropractor may possess "the level of education, skill, and judgment" necessary to perform chiropractic tasks delegated by a veterinarian, MCL 333.16215(1), does not alter our conclusion that defendant did not meet those criteria regarding veterinary surgery under the circumstances of this case. The trial court abused its discretion by denying the prosecution's motion in limine, because Dr. Fitzgerald could not, as a matter of law, delegate the task of

veterinary surgery to defendant. *Bartlett*, 149 Mich App at 418; *Everett*, 318 Mich App at 516.

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

BORRELLO, P.J., and M. J. KELLY, JJ., concurred with BOONSTRA, J.

OAKLAND COUNTY v STATE OF MICHIGAN

Docket No. 341172. Submitted July 10, 2018, at Lansing. Decided July 17, 2018, at 9:00 a.m. Leave to appeal denied 503 Mich 989 (2019).

Oakland County brought an action in the Court of Claims against the state of Michigan, the Department of Licensing and Regulatory Affairs (LARA), and the Michigan Indigent Defense Commission, challenging as unconstitutional the Michigan Indigent Defense Commission Act, MCL 780.981 *et seq*., and the indigent criminal defense (ICD) standards established by the commission and approved by LARA. As originally enacted, the act created the commission, designated it as an autonomous entity within the judicial branch, and tasked the commission with proposing minimum standards for providing effective assistance of counsel for indigent criminal defendants. To that end, in 2016, the commission submitted its initial set of four standards to the Michigan Supreme Court for its review. The Supreme Court conditionally approved those standards, subject to and contingent on certain legislative revisions of the act; the Court stated that its approval would be withdrawn on December 31, 2016, if the Legislature did not revise the act. The Legislature subsequently passed 2016 PA 439, which amended the act and removed the commission from the judicial branch and placed it within the executive branch under LARA. In addition, 2016 PA 439 revised the definition of "ICD system" and provided that the minimum standards established under the act would not infringe the Supreme Court's authority under Const 1963, art 6, §§ 4 and 5. While the Legislature amended the act to address the Supreme Court's concerns, the act was not effective before the Supreme Court's December 31, 2016 deadline. The commission then submitted to LARA proposed standards for guaranteeing the delivery of ICD services: Standard 1 provided minimum standards for continuing legal education (CLE), Standard 2 set standards for an attorney's initial client interview, Standard 3 described standards for investigations and certain expert-witness matters, and Standard 4 provided minimum standards for defense counsel's first appearance and for subsequent appearances at critical stages in the proceedings; LARA approved the commission's proposed minimum standards in May 2017. In conjunction with the standards, the commission published two pamphlets:

(1) *A Guide for Submission of Compliance Plans, Cost Analyses, and Local Share Calculations* (the Guide), which offered general guidelines for compliance plans, and (2) a *Compliance Plan for Indigent Standards 1-4* (the Compliance Plan), which offered instructions and guidelines for filing a plan in compliance with the standards. The county asserted that the act was facially unconstitutional under Article 3, § 2 of Michigan's 1963 Constitution because it violated the Separation of Powers Clause, that the act and the standards were facially unconstitutional under Article 6, §§ 4 and 5 of Michigan's 1963 Constitution because the act improperly permitted LARA to regulate the conduct and minimal qualifications of attorneys who represent indigent criminal defendants, and that the commission had promulgated mandatory rules and procedures in violation of the Administrative Procedures Act, MCL 24.201 *et seq*., when it published the Guide and the Compliance Plan. The parties filed competing motions for summary disposition, and the court, CHRISTOPHER M. MURRAY, J., granted defendants' motion and dismissed the county's action. The county appealed.

The Court of Appeals *held*:

1. Article 3, § 2 of Michigan's 1963 Constitution provides that the powers of government are divided into three branches—legislative, executive, and judicial—and that no person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in the Constitution. The Separation of Powers Clause does not require an absolute separation of the branches of government. Instead, a sharing of power may be constitutionally permissible if 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. Accordingly, some overlap of powers and responsibilities is constitutionally permissible.

2. Under Article 6, §§ 4 and 5 of Michigan's 1963 Constitution, the Michigan Supreme Court possesses the constitutional authority to regulate the practice of law as well as the conduct of attorneys and court proceedings. MCL 780.983(g) provides that the act regulates ICD systems—that is, the local unit or units of government that fund a trial court—rather than the trial courts themselves. The minimum standards are only enforced on the ICD systems, and the act does not authorize the commission to force judiciary compliance with the standards or to control what happens in courts. In addition, MCL 780.985(3) and MCL 780.991(3)(a) of the act specifically recognize that the Michigan Supreme Court has constitutional authority to regulate practice

and procedure in Michigan courts, to exercise general superintending control of the courts, and to make indigency determinations. MCL 780.991(1)(a) does not divest the judiciary of its constitutional authority to establish and enforce minimum standards for delivering effective assistance of counsel to indigent criminal defendants. Any sharing or overlapping of functions required by the act is sufficiently specific and limited such that it does not encroach on the constitutional authority of the judiciary. Because the act does not infringe the judiciary's constitutional authority over the state's courts, the Court of Claims correctly determined that the act was not facially unconstitutional.

3. The county abandoned its argument that Standards 1 and 2 violated the Separation of Powers Clause of Michigan's 1963 Constitution because it failed to support its argument with authority. The 2016 PA 439 amendment of the act transferred the commission from the judicial branch to the executive branch under the supervision of LARA, and it was undisputed that LARA approved the standards. Therefore, it was irrelevant that the Supreme Court's conditional approval of proposed Standards 1 through 4 was automatically withdrawn when the Legislature's revision of the act did not take effect before December 31, 2016. Standard 3 provides that counsel shall request the assistance of experts when it is reasonably necessary to prepare the defense and rebut the prosecution's case and that reasonable requests must be funded as required by law. Standard 3 did not conflict with a trial judge's discretion to permit the appointment of an expert witness or interfere with a trial court's gatekeeping functions under MRE 702; rather, it mandated payment of fees in accordance with the act. Accordingly, the Court of Claims correctly determined that the county had failed to establish that Standard 3 was not authorized by law.

4. Absent a statute's inherent conflict with a court rule, there is no need to determine whether there was an infringement or supplantation of judicial authority. Standard 4 provides that counsel shall be assigned as soon as the defendant is determined to be eligible for ICD services. The standard requires that the indigency determination shall be made and counsel appointed to provide assistance to the defendant as soon as the defendant's liberty is subject to restriction by a magistrate or judge. Further, that representation includes but is not limited to the arraignment on the complaint and warrant. While the United States Constitution does not require the appointment of counsel at arraignment, the Legislature is free to enact such a requirement if Michigan's Constitution does not prohibit it. MCR 6.005(B) re-

quires the arraigning court to determine indigency if the defendant requests a lawyer and claims a financial inability to retain a lawyer, and the subrule also lists factors to be considered by the court in determining indigency. Because Standard 4 did not expressly conflict with the language of MCR 6.005(B), the standard did not infringe the Supreme Court's constitutional authority over practice and procedure. Accordingly, the county's argument that Standard 4 was not authorized by law was without merit.

5. Rules established by an agency are subject to the promulgation requirements set forth in the Administrative Procedures Act (APA), MCL 24.201 *et seq*. MCL 24.207(h) provides that a "rule" does not include a form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory. The label an agency gives to a directive is not determinative of whether it is a rule or a guideline under the APA. Instead, courts must examine the actual action undertaken by the directive to see whether the policy being implemented has the effect of being a rule. The minimum standards established by the commission are not rules for purposes of the APA, and the standards are therefore not subject to APA promulgation requirements. The Guide and the Compliance Plan were also not "rules" for purposes of the APA, and they were therefore not subject to the APA's promulgation requirements because the documents were merely explanatory and did not contain compulsory provisions. Accordingly, the Court of Claims correctly rejected the county's APA violation argument.

Affirmed.

CONSTITUTIONAL LAW — SEPARATION OF POWERS — MICHIGAN INDIGENT DEFENSE COMMISSION ACT.

The Michigan Indigent Defense Commission Act, MCL 780.981 *et seq*., and the indigent criminal defense standards established under the act by the Michigan Indigent Defense Commission do not violate the Separation of Powers Clause of Michigan's 1963 Constitution because the act and standards do not infringe the judiciary's constitutional authority (Const 1963, art 3, § 2; Const 1963, art 6, §§ 4 and 5).

Keith J. Lerminiaux and *Mary Ann Jerge* for Oakland County.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *B. Eric Restuccia*, Chief Legal Counsel, and *Bridget K. Smith*, Assistant Attorney General, for the state of Michigan, the Department of Licensing and Regulatory Affairs, and the Michigan Indigent Defense Commission.

Before: RONAYNE KRAUSE, P.J., and GLEICHER and LETICA, JJ.

PER CURIAM. Oakland County objected to the Legislature's amendment of an act creating the Michigan Indigent Defense Commission (the MIDC Act), giving authority to the executive branch, through the Department of Licensing and Regulatory Affairs (LARA), to set standards for attorneys appointed to represent indigent clients. The bulk of the county's argument revolved around its claim that the MIDC Act, MCL 780.981 *et seq*., and the standards approved by LARA usurped the judiciary's power to manage and control the court system and the legal profession. Although there is some overlap, the limited sharing of powers envisioned by the act does not offend the Separation of Powers Clause of Const 1963, art 3, § 2, and the county is not otherwise entitled to relief. We therefore affirm the Court of Claims' summary dismissal of Oakland County's suit.

I. BACKGROUND

In 2011, the Governor signed an executive order[1] establishing an advisory commission on the defense of indigent criminal defendants. Based on the commission's report, the Legislature passed 2013 PA 93, the MIDC Act. The act created the MIDC and designated it

[1] Executive Order No. 2011-12.

as an autonomous entity within the judicial branch, tasked with proposing minimum standards for providing effective assistance of counsel for indigent criminal defendants.

On January 4, 2016, the MIDC submitted its initial set of four standards to the Michigan Supreme Court for its review. The Supreme Court conditionally approved these standards, "subject to and contingent on legislative revision of the MIDC Act to address provisions that the Court deem[ed] to be of uncertain constitutionality." Administrative Order No. 2016-2, 499 Mich xcviii, xcviii-xcix (2016). Specifically, the Court was concerned that the creation of an "autonomous entity" within the judicial branch unconstitutionally usurped its exclusive authority "to exercise general supervisory control" over judicial-branch employees. *Id*. at xcix, citing MCL 780.985 and Const 1963, art 6, §§ 1, 4, and 7. The Court opined that several of the act's provisions "might contain enforcement mechanisms" that usurp the Supreme Court's control over the court system. AO 2016-2, 499 Mich at xcix. See also Const 1963, art 6, § 4. Specifically, the Court expressed concern with the act's definition of "indigent criminal defense system" (ICDS), which combined trial courts with nonjudicial local governments, and with provisions allowing the autonomous MIDC to "[d]evelop[] and oversee[] the implementation, enforcement, and modification of minimum standards, rules, and procedures to ensure that indigent criminal defense services providing effective assistance of counsel are consistently delivered to all indigent adults in this state" and "to assure compliance with the commission's minimum standards, rules, and procedures." AO-2016-2, 499 Mich at xcix, citing MCL 780.983(f); MCL 780.989(1)(a) and (b) (quotation marks omitted; alterations in original). Moreover, the Court interpreted certain provisions as "ar-

guably allow[ing] the MIDC to regulate the legal profession," a power granted to the judiciary by Const 1963, art 6, § 5. AO 2016-2, 499 Mich at c. The Court indicated that its conditional approval would be automatically withdrawn on December 31, 2016, if the Legislature did not act. AO 2016-2, 499 Mich at c.

The Legislature thereafter amended the MIDC Act, effective January 4, 2017. 2016 PA 439. The Legislature removed the MIDC from the judicial branch and placed it within LARA, an executive-branch agency. MCL 780.985(1); MCL 780.983(b). The Legislature also revised the definition of an ICDS to mean only the local unit of government that funds a trial court (the funding unit), rather than the funding unit *and* the trial court. MCL 780.983(g). The amendments further provided that the minimum standards enacted under the MIDC Act shall not infringe the Supreme Court's authority under Const 1963, art 6, §§ 4 and 5. MCL 780.985(3); MCL 780.991(3)(a).

State Court Administrator Milton L. Mack, Jr., subsequently advised the state's chief judges that the act's amendments "appear to address issues of uncertain constitutionality that were raised by the Court." However, Mack asserted, because the legislative amendments did not take effect by December 31, 2016, the Supreme Court's conditional approval of the MIDC's proposed standards had expired.

On May 22, 2017, LARA approved the MIDC's proposed minimum standards for guaranteeing the delivery of indigent criminal defense (ICD) services (substantively, the same standards that had been conditionally approved by the Supreme Court). See MIDC, *Minimum Standards for Indigent Criminal Defense Services* (2017). Standard 1 provided minimum standards for continuing legal education (CLE) and attor-

ney training. Standard 2 set standards for an attorney's initial client interview. Standard 3 described standards for investigations and for certain expert-witness matters. Standard 4 provided minimum standards for defense counsel's first appearance and for subsequent appearances at critical stages in the proceedings. The act required the ICDSs to submit plans to comply with the act and the standards by November 20, 2017, and gave the MIDC 60 days to review the plans. MCL 780.993(3) and (4); MIDC, *A Guide for Submission of Compliance Plans, Cost Analyses, and Local Share Calculations* (the Guide) (Summer, 2017), p 5.

The MIDC published the Guide "to assist with the preparation of the cost analysis and compliance planning for delivering indigent criminal defense services." The Guide, p 5. The Guide provided that the ICDSs must address "each standard individually" and offered "General Guidelines for Compliance Plans." *Id*. at 6, 8. The MIDC also published a *Compliance Plan for Indigent Standards 1-4* (the Compliance Plan) (2017), containing further "instructions" and "guidelines" regarding the filing of a plan for compliance with the ICD standards.

II. THE LAWSUIT

Oakland County filed suit against the state of Michigan, LARA, and the MIDC, asserting constitutional challenges to the MIDC Act and the approved ICD standards. As the trial court summarized the complaint:

> Count I alleges that the MIDC Act is "facially unconstitutional" under Const 1963, art 3, § 2—the separation of powers clause—because "it empowers LARA to usurp the Michigan Supreme Court's constitutional authority to

> regulate and enforce minimum qualifications and professional standards for attorneys who represent indigent criminal defendants." Count II alleges that both the MIDC Act and the approved standards . . . are "facially unconstitutional" under Const 1963, art 6, § 5 because "they usurp the Michigan Supreme Court's constitutional authority to promulgate rules governing practice and procedure in Michigan Courts." Count III sounds a similar refrain, with the exception being that it asserts the MIDC Act and the approved standards violate Const 1963, art 6, § 4. Lastly, Count IV alleges that the MIDC promulgated "mandatory rules and procedures" in violation of the [Administrative Procedures Act (APA), MCL 24.201 *et seq*.]. The complaint sought declaratory relief and a stay of the enforcement of the approved standards.

In lieu of an answer, defendants sought summary disposition. Defendants denied any conflict between the act and standards and the Supreme Court's constitutional authority. The county asserted that the standards do not regulate the practice and procedure of attorneys and trial courts; rather, the standards regulate the funding units who must pay for ICD services. The act prohibits any minimum standards infringing the Supreme Court's authority, defendants continued. Likewise, the MIDC's minimum standards regulate the funding unit, not the conduct and qualifications of attorneys, the practice of law, or the administration of justice by courts. Defendants argued that the Guide is not subject to the APA because it is not a mandatory rule. Defendants further contended that Oakland County's challenge to possible future standards was not yet ripe.

In response to defendants' motion and in its own cross-motion for summary disposition, the county contended that the act allows the MIDC to regulate the legal profession, a power granted to the judicial branch, in violation of the Separation of Powers

Clause, that is, Const 1963, art 3, § 2. The act and the LARA-approved minimum standards unconstitutionally allow an executive-branch entity to regulate practice and procedure in the courts, the county asserted. And overall, the act and the standards infringe the Supreme Court's exclusive authority to supervise the administration of justice in all state courts under Const 1963, art 6, § 4. The county opined that Standard 4 impermissibly creates a new right to appointed counsel at arraignment. The county alleged conflicts between the Michigan Court Rules and the act and standards regarding indigency determinations and counsel appointments. Specifically, the county complained that the act takes indigency determinations away from the courts and places them with the funding units. The county argued that Standard 3 usurps the judiciary's authority to set standards for the appointment of expert witnesses. Finally, the county contended that the guidelines promulgated by the MIDC are more than educational and contain compulsory provisions, requiring the MIDC to follow the APA procedures before adopting those guidelines.

In response, defendants added that Standard 4 did not create a new right to counsel at arraignment or conflict with the Michigan Court Rules. Standard 3, which requires ICDSs to fund reasonable requests for experts as required by law, likewise does not conflict with the United States Constitution, criminal statutes, or rules of evidence, defendants contended. Overall, defendants emphasized, the MIDC Act was specifically amended to address the Supreme Court's constitutional concerns.

As noted, the trial court granted summary disposition in defendants' favor and dismissed Oakland County's suit. The court rejected the county's facial chal-

lenge to the constitutionality of the MIDC Act. The trial court recognized the Supreme Court's constitutional authority to regulate the practice of law, the conduct of attorneys, and the conduct of court proceedings. But the court noted that Michigan's 1963 Constitution does not require an absolute separation of powers, allowing some overlapping of functions, responsibilities, and powers between the branches. Regarding the county's claim that the MIDC Act improperly permits LARA to regulate the conduct and minimum qualifications of attorneys who represent indigent criminal defendants, the court noted that the county merely pointed to the minimum standards. However, the standards implemented by LARA do not aid in determining whether the MIDC Act is *facially* unconstitutional. The county's separation-of-powers argument lacked merit for that reason alone.

Moreover, the court continued, the MIDC Act at most provides for a permissibly limited sharing or overlapping of functions. The act regulates the funding units, rather than trial courts themselves, and therefore does not encroach on judicial authority. The act expressly recognizes the Supreme Court's constitutional authority over court practice and procedure. It does not permit the MIDC to require the judiciary's compliance with the minimum standards and does not attempt to control what happens in court. The MIDC has no authority over who becomes a licensed attorney; the act merely addresses a county-controlled system to ascertain indigency and provides qualified attorneys to indigent defendants. Court precedent, rather than separate MIDC standards, would be used to determine the quality of representation required by the ICDSs.

The trial court discerned no conflict between the MIDC Act and the Michigan Court Rules. In pertinent

part, MCL 780.991(3)(a) provides that nothing in the act "shall prevent a court from making a determination of indigency for any purpose consistent with [Const 1963, art 6]." Further, MCL 780.991(3)(a) states that "[a] trial court may play a role in this [indigency] determination as part of any [ICDS's] compliance plan under the direction and supervision of the supreme court . . . ." Accordingly, courts are not prevented from making a determination of indigency for any purpose. In the absence of an inherent conflict between the act and a court rule, the court concluded that it was unnecessary to determine whether judicial authority has been infringed or supplanted.

The trial court next addressed Oakland County's challenges to the minimum standards. In relation to the county's contention that Standard 4 improperly requires a defendant to be represented at arraignment, the court noted that the federal Constitution does not *require* the appointment of counsel at the arraignment but that nothing *prohibits* it. A state may afford its citizens greater rights than those required at the federal level. The court determined that the Legislature had done exactly this in MCL 780.991(3)(a), by providing that a determination of indigency shall be made "not later than at the defendant's first appearance in court." Hence, there was no conflict between Standard 4 and the pertinent controlling authorities.

The court found no conflict between Standard 3 and the judiciary's authority to define and regulate practice and procedure. Standard 3 provides that counsel must request the assistance of experts when reasonably necessary and that reasonable requests must be funded as required by law. Because Standard 3 requires funding of experts *as required by law*, the funding requirement is commensurate with the very

authority the county claimed that the MIDC disregarded. Further, Standard 3 does not interfere with the trial court's gatekeeping function.

The trial court noted that the county had failed to specifically analyze Standards 1 and 2, leaving the court to speculate regarding its argument. In any event, the court found no conflict between those standards and any statutes, court rules, or constitutional principles.

Regarding the county's argument that the MIDC was considering granting additional authority to funding units to decide issues regarding the appointment of experts and the determination of indigency, the county had presented no evidence that the MIDC had promulgated standards to implement this strategy. Accordingly, this challenge was not ripe for judicial review. And regarding the county's claim that the MIDC was required to follow the APA, the court found the minimum standards exempt. The trial court rejected that the MIDC had promulgated compulsory rules and procedures disguised as guidelines, accepting instead that the Guide was explanatory, amounting to an exempt guideline or informational pamphlet.

The county now appeals.

III. FACIAL CONSTITUTIONALITY

The county continues to contend that the MIDC Act is facially unconstitutional because it violates the Separation of Powers Clause of Const 1963, art 3, § 2. The county asserts that the act impermissibly infringes the constitutional authority of the Michigan Supreme Court by granting an executive-branch agency broad authority to regulate the minimum qualifications, professional standards, and duties of attorneys who represent indigent criminal defendants.

We review de novo a trial court's resolution of a summary-disposition motion. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). We also review de novo "[w]hether a statute is unconstitutional because it violates the separation-of-powers doctrine . . . ." *In re Petition of Tuscola Co Treasurer for Foreclosure*, 317 Mich App 688, 694; 895 NW2d 569 (2016). Underlying that consideration, we consider de novo the trial court's interpretation of the challenged statutes. *Klooster v City of Charlevoix*, 488 Mich 289, 295; 795 NW2d 578 (2011).

"Statutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Tuscola Co Treasurer*, 317 Mich App at 701 (quotation marks and citation omitted).

> We exercise the power to declare a law unconstitutional with extreme caution, and we never exercise it where serious doubt exists with regard to the conflict. Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity. Therefore, the burden of proving that a statute is unconstitutional rests with the party challenging it . . . . When considering a claim that a statute is unconstitutional, the Court does not inquire into the wisdom of the legislation. [*In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 307-308; 806 NW2d 683 (2011) (quotation marks, brackets, and citations omitted).]

"To make a successful facial challenge to the constitutionality of a statute, the challenger must establish that no set of circumstances exists under which the act would be valid." *Judicial Attorneys Ass'n v Michigan*,

459 Mich 291, 303; 586 NW2d 894 (1998) (quotation marks, brackets, and citations omitted).

Const 1963, art 3, § 2 provides that "[t]he 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." It is beyond dispute that our Supreme Court possesses constitutional authority to regulate the practice of law as well as the conduct of attorneys and court proceedings. See Const 1963, art 6, § 4 ("The supreme court shall have general superintending control over all courts . . . ."); Const 1963, art 6, § 5 ("The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state."). Our Supreme Court "has the power under Const 1963, art 6, § 5, to regulate and discipline the members of the bar of this state," *Grievance Administrator v Lopatin*, 462 Mich 235, 241; 612 NW2d 120 (2000), and possesses constitutional authority to determine rules of practice and procedure in state courts, *McDougall v Schanz*, 461 Mich 15, 26-27; 597 NW2d 148 (1999).

It is also recognized, however, that "the separation-of-powers doctrine does not require an absolute separation of the branches of government[.]" *People v Cameron*, 319 Mich App 215, 232; 900 NW2d 658 (2017), oral argument on the application gtd 501 Mich 986 (2018).

> "While the Constitution provides for three separate branches of government, the boundaries between these branches need not be airtight. In fact, in designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not in-

> tended to operate with absolute independence. The true meaning of the separation-of-powers doctrine is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free Constitution." [*Cameron*, 319 Mich App at 232-233 (brackets omitted), quoting *Makowski v Governor*, 495 Mich 465, 482; 852 NW2d 61 (2014).]

Therefore, " '[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.' " *Cameron*, 319 Mich App at 233, quoting *Hopkins v Parole Bd*, 237 Mich App 629, 636; 604 NW2d 686 (1999); see also *Judicial Attorneys Ass'n*, 459 Mich at 297 ("This Court has established that the separation of powers doctrine does not require so strict a separation as to provide no overlap of responsibilities and powers.").

> It is simply impossible for a judge to do nothing but judge; a legislator to do nothing but legislate; a governor to do nothing but execute the laws. The proper exercise of each of these three great powers of government necessarily includes some ancillary inherent capacity to do things which are normally done by the other departments. [*Judicial Attorneys Ass'n*, 459 Mich at 297 (quotation marks and citation omitted).]

Here, any sharing or overlapping of functions required by the MIDC Act is sufficiently specific and limited that it does not encroach on the constitutional authority of the judiciary. Importantly, the act does not directly regulate trial courts or attorneys. Rather, the act regulates "indigent criminal defense system[s]," statutorily defined as the local unit or units of government that fund a trial court (funding units), rather

than trial courts themselves. MCL 780.983(g). In this respect, as the trial court noted, the act "takes care to not encroach on the authority of the judicial branch." Further, the act repeatedly recognizes the Michigan Supreme Court's constitutional authority to regulate practice and procedure and to exercise general superintending control of Michigan courts. In that regard, MCL 780.985(3) provides that the minimum standards proposed by the MIDC "shall not infringe on the supreme court's authority over practice and procedure in the courts of this state as set forth in [Const 1963, art 6, § 5]." MCL 780.991(3)(a) further provides:

> A trial court may play a role in this [indigency] determination as part of any [ICDS's] compliance plan under the direction and supervision of the supreme court, consistent with [Const 1963, art 6, § 4]. Nothing in this act shall prevent a court from making a determination of indigency for any purpose consistent with [Const 1963, art 6].

As described by the trial court, the act's "express recognition of the constitutional role of the judiciary undercuts (but does not preclude) a facial challenge to the constitutionality of the act on separation-of-powers grounds." See *Straus v Governor*, 459 Mich 526, 543-544; 592 NW2d 53 (1999) (stating that an executive order's express inclusion of the requirements of the constitutional provision that the order was said to violate weighed against finding the order unconstitutional).

Reinforcing the conclusion that the MIDC Act does not impermissibly infringe the constitutional authority of the judiciary is that the act provides for enforcement of the minimum standards only on the ICDSs, not on attorneys or courts. For example, the ICDS, not attorneys or courts, must submit a compliance plan and cost analysis. See MCL 780.993(3). The funding units,

rather than attorneys or courts, are statutorily required to "comply with an approved plan under" the act. MCL 780.997(1). See also MCL 780.995 (providing procedures for resolving a dispute between the MIDC and an ICDS). Further, as the trial court correctly observed, the act contains no provision authorizing the MIDC to force the judiciary to comply with the minimum standards, nor does the act purport to control what happens in courts. The MIDC is granted no authority regarding the licensure of attorneys, nor is it afforded any power to censure or sanction attorneys or judges. Instead, the act makes plain that with information provided by judges, MCL 780.991(1)(a), a county-controlled system is used to determine whether a criminal defendant is indigent and to provide qualified attorneys to represent indigent criminal defendants. See MCL 780.985(3); MCL 780.989(1); MCL 780.991(1). In addition, the act establishes that the quality of representation required of appointed defense attorneys is defined by caselaw regarding the effective assistance of counsel, not by statutory or regulatory standards. See MCL 780.983(c); MCL 780.985(3); MCL 780.989(1); MCL 780.1003(1).

The county challenges the language in MCL 780.991(1)(a) stating that "[t]he delivery of [ICD] services *shall be independent of the judiciary* but ensure that the judges of this state are permitted and encouraged to contribute information and advice concerning that delivery of [ICD] services." (Emphasis added.) The county contends that this language divests the judiciary of its constitutional authority to establish and enforce minimum standards for delivering effective assistance of counsel to indigent criminal defendants. Again, however, MCL 780.991(3)(a) states in its final sentence that "[n]othing in this act shall prevent a court from making a determination of indigency for any purpose consistent with [Const 1963, art 6]."

MCL 780.991(3)(a) also provides that "[a] trial court may play a role in this [indigency] determination as part of any [ICDS's] compliance plan under the direction and supervision of the supreme court, consistent with [Const 1963, art 6, § 4] . . . ." The Legislature has thus recognized the authority of the judicial branch with respect to indigency determinations. Although the exact respective roles of the ICDSs and the trial courts in making indigency determinations is not fully addressed by the parties in this case, it is sufficiently clear from MCL 780.991(3)(a) that the judiciary has not been deprived of its constitutional authority in this area.[2] As the MIDC Act can be readily harmonized with the judiciary's powers, the trial court properly rejected Oakland County's facial attack.

IV. LEGALITY OF MINIMUM STANDARDS

Oakland County also contends that the four minimum standards proposed by the MIDC and approved

[2] The county also refers to the MIDC's development of a proposed standard to make the management and delivery of ICD services independent of the judiciary. The county acknowledges, however, that LARA has not approved any such standard. A minimum standard proposed by the MIDC must be approved by LARA in order to constitute "a final department action subject to judicial review . . . ." MCL 780.985(5). "The doctrine of ripeness is designed to prevent the adjudication of hypothetical or contingent claims before an actual injury has been sustained. A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Huntington Woods v Detroit*, 279 Mich App 603, 615-616; 761 NW2d 127 (2008) (quotation marks and citation omitted). The county's challenge is premised on hypothetical future events and is therefore not ripe for judicial review. In addition, it is important to emphasize that actions taken by the MIDC are not pertinent in determining the constitutionality of the act itself. See *Judicial Attorneys Ass'n*, 459 Mich at 304 (noting that "[t]he constitutionality of an act must rest on the provisions of the act itself" rather than on subsequent actions taken by persons or entities that are affected by the act).

by LARA violate the Separation of Powers Clause and are otherwise not authorized by law.

The county repeatedly points out that the Supreme Court's conditional approval of the standards was automatically withdrawn on December 31, 2016, because the Legislature's revisions of the MIDC Act did not take effect by that date. But the expiration of the Supreme Court's conditional approval is not dispositive because the MIDC was removed from the judicial branch and placed within the executive branch. See MCL 780.985(1); MCL 780.983(b). It is LARA, rather than the Supreme Court, that now decides whether to approve a minimum standard proposed by the MIDC. See MCL 780.983(b); MCL 780.985(4) and (5). It is undisputed that LARA approved the MIDC-proposed standards. Given these developments, the automatic expiration of the Supreme Court's conditional approval (based on the *prior* version of the MIDC Act) fails by itself to establish that the minimum standards are not authorized by law.

The county further asserts that the standards "micromanage attorneys who represent indigent defendants, from their education and training to their duties throughout the entire pendency of a case." But the county fails to flesh out its argument that Standards 1 and 2 are not authorized by law. Instead, the county simply quotes or summarizes portions of each standard and then conclusorily asserts that the standard is unconstitutional under the Separation of Powers Clause because it usurps the Supreme Court's authority. "It is not sufficient for a party simply to announce a position or assert an error and then leave it to up this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain

or reject his position." *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) (quotation marks and citation omitted). "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003).

And the trial court correctly concluded that Oakland County failed to establish that Standard 3 is not authorized by law. As the court noted, "The purportedly offending section of Standard 3 states that 'Counsel shall request the assistance of experts where it is reasonably necessary to prepare the defense and rebut the prosecution's case. Reasonable requests must be funded as required by law.' " The trial court properly explained:

> This standard does not conflict with a trial judge's discretion to permit the appointment of an expert witness. See MCL 775.15; *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003). Rather, the standard notes that experts must be funded "*as required by law*." In other words, the request must be funded "as required by" the very authority which Oakland County accuses the MIDC of disregarding. Nor does Standard 3 in any way interfere with the trial court's gate-keeping functions under MRE 702. There is no evident conflict.

The county's remaining contentions consist of merely generalized assertions that lack sufficient elaboration. The county again contends that the Supreme Court did not delegate its authority to regulate professional standards and duties of indigent defense counsel to the legislative or executive branches. The county suggests that the obligation to regulate attorneys and courts has been "foisted" onto the funding units, which, according to the county, are being statutorily forced to act as proxies for the MIDC even though the funding units lack constitutional authority to regu-

late the conduct of attorneys or to implement or enforce the minimum standards. These aspects of the county's argument, however, challenge the provisions of the act itself and, as already noted, the county's constitutional challenge lacks merit.

V. APPOINTED COUNSEL AT ARRAIGNMENTS

The county raises a more specific challenge to Standard 4, asserting that it requires the appointment of counsel at arraignment even though neither the federal nor the state Constitution demands representation at that stage of criminal proceedings.

Standard 4 provides, in pertinent part:

> Counsel shall be assigned as soon as the defendant is determined to be eligible for [ICD] services. The indigency determination shall be made and counsel appointed to provide assistance to the defendant as soon as the defendant's liberty is subject to restriction by a magistrate or judge. Representation includes but is not limited to the arraignment on the complaint and warrant. Where there are case-specific interim bonds set, counsel at arraignment shall be prepared to make a de novo argument regarding an appropriate bond regardless of, and, indeed, in the face of, an interim bond set prior to arraignment which has no precedential effect on bond-setting at arraignment.

The county again contends that this standard is not authorized by law, and we are again unconvinced. The county asserts that by enacting Standard 4, "[t]he MIDC and LARA created a new constitutional right to counsel at arraignment . . . ." It is true that the federal Constitution does not *require* the appointment of counsel at arraignment. See *People v Green*, 260 Mich App 392, 400; 677 NW2d 363 (2004), overruled on other grounds by *People v Anstey*, 476 Mich 436 (2006);

People v Horton, 98 Mich App 62, 72; 296 NW2d 184 (1980). But this does not mean that the appointment of counsel at arraignment is constitutionally *prohibited*. Absent a state constitutional prohibition, states are free to enact legislative "protections greater than those secured under the United States Constitution . . . ." *People v Harris*, 499 Mich 332, 338; 885 NW2d 832 (2016). The Legislature did so in the MIDC Act. MCL 780.991(3)(a) provides for a determination of indigency, which will lead to the appointment of counsel, "*not later than* at the defendant's first appearance in court." (Emphasis added.) In addition, MCL 780.991(2)(d) provides for continuous representation by the same defense counsel "at every court appearance throughout the pendency of the case."[3] See also MCL 780.991(1)(c) (providing that "[a]ll adults, except those appearing with retained counsel or those who have made an informed waiver of counsel, shall be screened for eligibility under [the MIDC Act], and counsel shall be assigned as soon as an indigent adult is determined to be eligible for [ICD] services").

The county's argument that Standard 4 infringes the Supreme Court's constitutional authority over practice and procedure also lacks merit. Contrary to the county's challenge, Standard 4 does not conflict with the Michigan Court Rules. MCR 6.005(B) requires

[3] MCL 780.991(2)(d) further provides that ICDSs "may exempt ministerial, nonsubstantive tasks, and hearings from" the requirement that the same defense counsel continuously represent and personally appear at every court appearance throughout the case. A comment to Standard 4 states that "an on-duty arraignment attorney" may represent a defendant at an arraignment and that "[t]his appointment may be a limited appearance for arraignment only with subsequent appointment of different counsel for future proceedings. In this manner, actual indigency determinations may still be made during the arraignment." *Minimum Standards for Indigent Criminal Defense Services*, Standard 4, comment 2, p 5.

the arraigning court to determine indigency if the defendant requests a lawyer and claims a financial inability to retain a lawyer, and the rule lists factors to consider in determining indigency. MCR 6.104(E)(3) requires the arraigning court to advise the defendant "of the right to a lawyer at all subsequent court proceedings and, if appropriate, appoint a lawyer[.]" MCR 6.005(A)(1) requires the arraigning court to advise the defendant of the right "to a lawyer's assistance at all subsequent court proceedings," and Subrule (A)(2) provides "that the court will appoint a lawyer at public expense if the defendant wants one and is financially unable to retain one." MCR 6.005(D) provides that the court must promptly appoint a lawyer if the defendant is financially unable to retain a lawyer.

The language of MCR 6.005(B)—providing for a determination of indigency at the arraignment and listing factors to consider in making the indigency determination—does not expressly conflict with the language of Standard 4, requiring the assignment of counsel as soon as the defendant is deemed eligible for ICD services, that the indigency determination be made and counsel appointed as soon as the defendant's liberty is subject to restriction, and that representation includes but is not limited to the arraignment. See *Minimum Standards for Indigent Criminal Defense Services*, Standard 4, pp 4-5. Actual indigency determinations may still be made at the arraignment in conformance with the court rule. It is possible for an on-duty arraignment attorney to represent the defendant but different counsel to be appointed for future proceedings. Court rules providing for advising a defendant concerning his right to counsel at subsequent court proceedings and providing for the prompt appointment of a lawyer likewise do not conflict with the language of Standard 4 providing for representation at

the arraignment. Absent a statute's inherent conflict with a court rule, "there is no need to determine whether there was an infringement or supplantation of judicial . . . authority." *Stenzel v Best Buy Co, Inc*, 320 Mich App 262, 276; 906 NW2d 801 (2017), lv gtd 501 Mich 1042 (2018); see also *Kern v Kern-Koskela*, 320 Mich App 212, 222; 905 NW2d 453 (2017) (noting that "this Court should not lightly presume" an intent to create a conflict that calls into question our Supreme "Court's authority to control practice and procedure in the courts") (quotation marks and citations omitted).[4] The county's challenge thus lacks merit.

VI. ADMINISTRATIVE PROCEDURES ACT

Finally, Oakland County asserts that the MIDC's "rules and procedures" have no force and effect as the MIDC failed to comply with the promulgation requirements of the APA.

The county acknowledges that the minimum standards established by the MIDC are not subject to the requirements of the APA. See MCL 24.207(r) (excluding from the definition of a "rule" under the APA "[a] minimum standard approved or established under authority granted by the [MIDC Act]"); MCL 780.985(4) (providing that "[a]n approved minimum standard for the local delivery of [ICD] services within an [ICDS] is not a rule as defined in section 7 of the [APA]"). The county contends, however, that the MIDC has enacted compulsory rules and procedures disguised as guidelines and instructions without complying with the requirements of the APA.

[4] In both *Stenzel* and *Kern*, this Court addressed a purported conflict between a statute and a court rule, but the principles set forth in those cases apply by analogy here.

In defining a "rule" subject to the requirements of the APA, the Legislature expressly excluded "[a] form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory." MCL 24.207(h).

> The label an agency gives to a directive is not determinative of whether it is a rule or a guideline under the APA. Instead, courts must examine the actual action undertaken by the directive, to see whether the policy being implemented has the effect of being a rule. An agency may not circumvent APA procedural requirements by adopting a guideline in lieu of a rule. [*Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 582; 609 NW2d 593 (2000), aff'd sub nom *Byrne v Michigan*, 463 Mich 652 (2001) (quotation marks, brackets, and citations omitted).]

A review of the MIDC's Guide and Compliance Plan reveals that these documents are merely explanatory and do not contain compulsory provisions. In its introductory section, the Guide states, "These guidelines are designed to assist with the preparation of the cost analysis and compliance planning for delivering [ICD] services." The Guide, p 5. With respect to cost analysis, the Guide states, in relevant part:

> Reasonableness will be stressed and a list or guideline for allowable costs will be provided. **Costs** cannot be excessive. It will be difficult for this guideline to be exhaustive of all possible financial scenarios. To minimize rejections after official submission, systems should contact their MIDC Regional Manager, before submissions, to discuss compliance plan costs that pose situations not addressed in guidelines. [*Id*. at 5-6 (emphasis omitted).]

The Guide later indicates that "a rate of no more than $25 per credit hour" should be used for annual CLE courses. *Id*. at 9.

The Compliance Plan states that "[t]his document includes instructions and a compliance plan structure for the submission and information on how to calculate your request for state funding." The Compliance Plan, p 1. It continues, "The following instructions provide general guidance for the Cost Analysis and, specifically, the enhanced costs to meet the provisions of the four standards. The costs, expenditures, and rates proposed are presumed reasonable; variations will be considered on a case-by-case basis." *Id*. The Compliance Plan indicates that "[r]egistration for CLE hours will be allowed at the rate of $25 per credit hour." *Id*. at 2. It further provides, "If it is necessary to create or alter building space to provide a confidential setting for attorneys and their clients, renovation expenses are allowed up to a maximum of $25,000 per location. Requests exceeding $25,000 will be reviewed with higher due diligence and considered with accompanying documentation for justification." *Id*. Also, "[e]xpenses for investigators will be considered at hourly rates not to exceed $75." *Id*. A tiered level of compensation was provided for experts on the basis of education level and area of expertise. *Id*.

The county mischaracterizes the Guide and the Compliance Plan as creating compulsory provisions. Instead, these documents provide guidance concerning the submission of compliance plans and cost analyses. An emphasis is placed on making the costs reasonable, i.e., not excessive. Although certain amounts are essentially designated as reasonable, it is clear that variations from these amounts will be considered on a case-by-case basis, and ICDSs are encouraged to contact their MIDC regional manager with questions about costs and particular items before submitting their compliance plans and cost analyses. As the trial court noted, "This is indicative of a more flexible,

guiding process as is anticipated by MCL 24.207(h), rather than the imposition of 'rules,' as that term is used in the APA." See *Kent Co Aeronautics Bd*, 239 Mich App at 583 (concluding that certain criteria published by a governmental agency did not create a legal obligation but merely provided advice by way of an explanation and thus did not constitute rules). The APA therefore does not apply.

We affirm.

RONAYNE KRAUSE, P.J., and GLEICHER and LETICA, JJ., concurred.

DeRUITER v BYRON TOWNSHIP

Docket No. 338972. Submitted July 10, 2018, at Grand Rapids. Decided July 17, 2018, at 9:05 a.m. Reversed and remanded 505 Mich ___ (2020).

Christie DeRuiter, a registered qualified medical marijuana patient and a registered primary caregiver to qualifying patients, brought an action in the Kent Circuit Court against Byron Township, alleging that defendant's zoning ordinance, which prohibited registered caregivers from the medical use of marijuana in a commercial property, directly conflicted with the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., and therefore was preempted by the MMMA. Plaintiff grew medical marijuana in an enclosed, locked facility at a commercial location within the township. The township supervisor sent plaintiff a letter advising plaintiff that her activities constituted a zoning violation. Plaintiff brought the instant action for declaratory and injunctive relief, and defendant countersued for enforcement of its ordinance and abatement of the nuisance, seeking a declaratory judgment that its ordinance did not conflict with the MMMA. Both parties moved for summary disposition, and the court, Paul J. Sullivan, J., held that the ordinance directly conflicted with the MMMA and therefore was preempted by the MMMA. Defendant appealed.

The Court of Appeals *held*:

MCL 125.3201(1) of the Michigan Zoning Enabling Act, MCL 125.3101 *et seq*., provides, in pertinent part, that a local unit of government may provide by zoning ordinance for the regulation of land development and regulate the use of land and structures to ensure that use of the land is situated in appropriate locations and to promote public health, safety, and welfare. However, a city ordinance that purports to prohibit what a state statute permits is void. A state statute preempts regulation by an inferior government when the local regulation directly conflicts with the statute or when the statute completely occupies the regulatory field. A direct conflict exists between a local regulation and state statute when the local regulation prohibits what the statute permits. The MMMA governs medical marijuana use. MCL 333.26424(a) and (b) provide immunity from arrest, prosecution, and penalty in any

manner and prohibit the denial of any right or privilege to qualifying medical marijuana patients and registered primary caregivers. MCL 333.26424(b)(1) and (2) grant caregivers the right to possess 2.5 ounces of usable marijuana for each qualifying patient and cultivate and keep 12 marijuana plants for each qualifying patient in an enclosed, locked facility. MCL 333.26423(d) defines "enclosed, locked facility," in pertinent part, as a closet, room, or other comparable, stationary, and fully enclosed area equipped with secured locks or other functioning security devices that permit access only by a registered primary caregiver or registered qualifying patient. MCL 333.26424(b)(1) and (2) and MCL 333.26423(d) are *in pari materia* and must be read together as one law because they are different provisions of a statute that relate to the same subject matter. MCL 333.26424(b)(1) and (2) and MCL 333.26423(d), when read together, grant registered caregivers the rights and privileges to grow medical marijuana without fear of penalties imposed by local governments. The plain language of the MMMA lacks any ambiguity that would require judicial construction to decipher its meaning. The MMMA permits medical use of marijuana, particularly the cultivation of marijuana by registered caregivers, at locations regardless of land-use zoning designations as long as the activity occurs within the statutorily specified enclosed, locked facility. No provision in the MMMA authorizes municipalities to restrict the location of MMMA-compliant medical use of marijuana by caregivers. Nor does the MMMA authorize municipalities to adopt ordinances restricting MMMA-compliant conduct to home occupations in residential locations. In this case, defendant's zoning ordinance improperly restricted the medical use of marijuana by permitting MMMA-compliant activities only as a home occupation within a dwelling or garage in residentially zoned areas within the township. Accordingly, the trial court properly analyzed the interplay between defendant's zoning ordinance and the MMMA and correctly held as a matter of law that the MMMA preempted defendant's home-occupation zoning ordinance because the ordinance directly conflicted with the MMMA by prohibiting what the MMMA permitted and because the ordinance improperly imposed regulations and penalties upon persons who engage in MMMA-compliant medical use of marijuana.

Affirmed.

TOWNSHIPS — ZONING ORDINANCES — MICHIGAN MEDICAL MARIHUANA ACT — LOCATION OF MEDICAL USE OF MARIJUANA.

The Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., permits medical use of marijuana, particularly the cultiva-

tion of marijuana by registered caregivers, at locations regardless of land-use zoning designations as long as the activity occurs within the statutorily specified enclosed, locked facility; no provision in the MMMA authorizes municipalities to restrict the location of MMMA-compliant medical use of marijuana by caregivers or authorizes municipalities to adopt ordinances restricting MMMA-compliant conduct to home occupations in residential locations.

Dodge & Dodge, PC (by *David A. Dodge*) for Christie DeRuiter.

McGraw Morris PC (by *Craig R. Noland* and *Amanda M. Zdarsky*) and *Mika Meyers PLC* (by *Ross A. Leisman* and *Ronald M. Redick*) for Byron Township.

Amici Curiae:

Bauckham, Sparks, Thall, Seeber & Kaufman, PC (by *Robert E. Thall* and *Catherine P. Kaufman*) for the Michigan Townships Association and the Michigan Municipal League.

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

PER CURIAM. Defendant appeals by right the trial court's order granting plaintiff summary disposition and declaring that defendant's ordinance conflicted with the provisions of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*.; therefore, it was preempted. We affirm.

Defendant adopted its zoning ordinance regulations for land development and use under the Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq*. Use of property by a medical marijuana registered caregiver was permitted only under Byron Township Zoning Ordinance (Zoning Ordinance) §§ 3.2.G and H as a "home occupation." Defendant prohibited regis-

tered caregivers from the medical use of marijuana in a commercial property. Zoning Ordinance § 3.2.H.3 required medical marijuana caregivers to submit an application and pay a fee to obtain a township permit before engaging in any medical use of marijuana. Violation of the provisions of the ordinance could result in revocation of the permit, which would require the caregiver to cease all medical marijuana activity until defendant granted a new permit.

Plaintiff, a registered qualified medical marijuana patient and a registered primary caregiver to qualifying patients, grew medical marijuana in an enclosed, locked facility at a commercial location within the township. On March 22, 2016, the township supervisor sent plaintiff a letter advising that plaintiff's medical-marijuana-related activities constituted a zoning violation. The letter ordered plaintiff to cease and desist all medical marijuana activities under threat of an enforcement action by defendant. Not long after, plaintiff sued defendant for declaratory and injunctive relief on the ground that defendant threatened her exercise of her rights and privileges under the MMMA despite her compliance with the MMMA. Plaintiff alleged that defendant's ordinance prohibited what the MMMA permitted. Consequently, it directly conflicted with the MMMA and required that the trial court hold that the MMMA preempted the ordinance.

Defendant countersued for enforcement of its ordinance and abatement of the nuisance. Defendant sought a declaratory judgment that its ordinance did not conflict with the MMMA.

The parties each moved for summary disposition. Both parties asserted that the dispositive issue was whether the MMMA preempted defendant's home-occupation ordinance. Plaintiff argued that the ordi-

nance directly conflicted with the MMMA. Defendant asserted that preemption did not apply because its ordinance only restricted the location where MMMA-compliant activities could occur and did not prohibit them altogether. The trial court held that the ordinance directly conflicted with the MMMA, so the MMMA preempted the ordinance. Defendant now appeals.

"Whether a state statute preempts a local ordinance is a question of statutory interpretation and, therefore, a question of law that we review de novo." *Ter Beek v City of Wyoming*, 297 Mich App 446, 452; 823 NW2d 864 (2012) (*Ter Beek I*), aff'd 495 Mich 1 (2014) (*Ter Beek II*). We also review de novo the trial court's decision to grant or deny a motion for summary disposition in an action for a declaratory judgment. *Lansing Sch Ed Ass'n, MEA/NEA v Lansing Bd of Ed (On Remand)*, 293 Mich App 506, 512-513; 810 NW2d 95 (2011). We review for clear error any of the trial court's factual findings and review de novo the trial court's interpretation of the MMMA. *Michigan v McQueen*, 293 Mich App 644, 653; 811 NW2d 513 (2011) (*McQueen I*).

Defendant argues that the trial court erred by holding that the MMMA preempted its home-occupation ordinance because the ordinance merely regulated land use by restricting the location of medical use of marijuana while allowing patients and caregivers to fully exercise their rights and privileges. We disagree.

"Under Const 1963, art 7, § 22, a Michigan municipality's power to adopt resolutions and ordinances relating to municipal concerns is 'subject to the constitution and law.' " *People v Llewellyn*, 401 Mich 314, 321; 257 NW2d 902 (1977). "Michigan is strongly

committed to the concept of home rule, and constitutional and statutory provisions which grant power to municipalities are to be liberally construed." *Bivens v Grand Rapids*, 443 Mich 391, 400; 505 NW2d 239 (1993) (citations omitted). Local governments may control and regulate matters of local concern so long as their regulations do not conflict with state law. *City of Taylor v Detroit Edison Co*, 475 Mich 109, 117-118; 715 NW2d 28 (2006).

The MZEA provides, in relevant part:

> A local unit of government may provide by zoning ordinance for the regulation of land development and . . . regulate the use of land and structures . . . to ensure that use of the land is situated in appropriate locations and . . . to promote public health, safety, and welfare. [MCL 125.3201(1).]

This Court explained in *Ter Beek I*, 297 Mich App at 453, that

> [a] city ordinance that purports to prohibit what a state statute permits is void. A state statute preempts regulation by an inferior government when the local regulation directly conflicts with the statute or when the statute completely occupies the regulatory field. A direct conflict exists between a local regulation and state statute when the local regulation prohibits what the statute permits. [Quotation marks and citations omitted.]

The MMMA, an initiative law, governs medical marijuana use. "The words of an initiative law are given their ordinary and customary meaning as would have been understood by the voters." *McQueen I*, 293 Mich App at 653 (quotation marks and citation omitted). This Court presumes that the electorate intended the meaning plainly expressed in the statute. *Id*.

Under MCL 333.26427(a), the "medical use of marijuana is allowed under state law to the extent that it is

carried out in accordance with the provisions of [the MMMA]." MCL 333.26423(f), as amended by 2012 PA 512,[1] defined the term "medical use" as follows:

> [T]he acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition.

The MMMA provides immunity from arrest, prosecution, and penalty in any manner and prohibits the denial of any right or privilege to qualifying medical marijuana patients and registered primary caregivers. See MCL 333.26424(a) and (b); *People v Hartwick*, 498 Mich 192, 210-221; 870 NW2d 37 (2015). MCL 333.26424(b)(1) and (2) grant caregivers the right to possess 2.5 ounces of usable marijuana for each qualifying patient and cultivate and keep 12 marijuana plants for each qualifying patient in an enclosed, locked facility. In relevant part, MCL 333.26423(d) defines an "enclosed, locked facility" as "a closet, room, or other comparable, stationary, and fully enclosed area equipped with secured locks or other functioning security devices that permit access only by a registered primary caregiver or registered qualifying patient."

MCL 333.26424(b)(1) and (2) and MCL 333.26423(d) are *in pari materia* and must be read together as one law because they are different provisions of a statute that relate to the same subject matter. *Ter Beek I*, 297

[1] The MMMA was amended by 2016 PA 283, effective December 20, 2016; however, the version of the MMMA in effect at the time the events in this case occurred was the statute as amended by 2012 PA 512. All subsequent citations of the MMMA in this opinion refer to the MMMA as amended by 2012 PA 512.

Mich App at 462. Under MCL 333.26424(d), a rebuttable presumption exists that primary caregivers and their qualified patients are engaged in the medical use of marijuana in accordance with the MMMA if they possess registry identification cards and possess an amount of medical marijuana that does not exceed the MMMA's permissible limits. Under MCL 333.26427(a), primary caregivers and their qualified patients are permitted the medical use of marijuana to the extent their use complies with the MMMA. The MMMA prohibits engagement in the medical use of marijuana in specified locations listed in MCL 333.26427(b), such as on school grounds, in school buses, or on any form of public transportation, as well as in correctional facilities or public places.

The MMMA also provides that "[a]ll other acts . . . inconsistent with this act do not apply to the medical use of marihuana as provided for by this act." MCL 333.26427(e). Therefore, if another law is inconsistent with the MMMA such that it punishes MMMA-compliant medical use of marijuana, the MMMA controls and the person is immune from punishment. *People v Koon*, 494 Mich 1, 7; 832 NW2d 724 (2013).

This Court has noted that if the MMMA's "statutory language is unambiguous, . . . [n]o further judicial construction is required or permitted because we must conclude that the electors intended the meaning clearly expressed." *People v Bylsma*, 315 Mich App 363, 377-378; 889 NW2d 729 (2016) (citation and quotation marks omitted). "Judicial construction of a statute is only permitted when statutory language is ambiguous," which occurs "only if it creates an irreconcilable conflict with another provision or it is equally susceptible to more than one meaning." *Noll v Ritzer (On Remand)*, 317 Mich App 506, 511; 895 NW2d 192

(2016). If the language is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted. *Universal Underwriters Ins Group v Auto Club Ins Ass'n*, 256 Mich App 541, 544; 666 NW2d 294 (2003).

Consequently, a court "may not speculate regarding legislative intent beyond the words expressed in a statute. Hence, nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself." *Detroit Pub Sch v Conn*, 308 Mich App 234, 248; 863 NW2d 373 (2014) (quotation marks and citation omitted). Courts may not infer legislative intent from the absence of action by the Legislature. *McCahan v Brennan*, 492 Mich 730, 749; 822 NW2d 747 (2012). A "legislature legislates by legislating, not by doing nothing, not by keeping silent." *Id*. (quotation marks and citation omitted). Rather, correct interpretation of a statute like the MMMA requires (1) reading it as a whole, (2) reading the statute's words and phrases in the context of the entire legislative scheme, (3) considering both the plain meaning of the critical words and phrases along with their placement and purpose within the statutory scheme, and (4) interpreting the statutory provisions in harmony with the entire statutory scheme. See *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009).

MCL 333.26423(d) essentially provides that caregivers may operate medical marijuana activities so long as they comply with the enclosed, locked facility requirements. MCL 333.26424(b)(1) and (2) and MCL 333.26423(d), when read together, grant registered caregivers the rights and privileges to grow medical marijuana without fear of penalties imposed by local governments. In *Ter Beek II*, 495 Mich at 20, the

Michigan Supreme Court ruled that an ordinance "directly conflicts with the MMMA by permitting what the MMMA expressly prohibits—the imposition of a 'penalty in any manner' on a registered qualifying patient whose medical use of marijuana falls within the scope of [MCL 333.26424(b)]'s immunity." Further, the Michigan Supreme Court clarified in *Ter Beek II*, 495 Mich at 21, that its holding in *Michigan v McQueen*, 493 Mich 135; 828 NW2d 644 (2013) (*McQueen II*), should not be read to authorize a municipality to enjoin a registered qualifying patient from engaging in medical use of marijuana that complied with the MMMA simply by characterizing the conduct as a zoning violation.

The Michigan Supreme Court stated that MCL 333.26427(a) "in no uncertain terms" provides for medical use of marijuana if such use complies with the MMMA and that no other law may interfere with the unambiguous rights conferred by the MMMA. *Ter Beek II*, 495 Mich at 22. Although the Michigan Supreme Court reaffirmed that the MMMA did not create a general right for individuals to grow and distribute medical marijuana, it nevertheless held that the MMMA preempted the city's ordinance because it penalized the plaintiff for engaging in MMMA-compliant medical marijuana use. *Id*. at 24-25.

Recently, in *York Charter Twp v Miller*, 322 Mich App 648, 663-664; 915 NW2d 373 (2018), this Court explained:

> Notably, the MMMA does not grant municipalities authority to adopt ordinances that restrict registered caregivers' rights and privileges under the MMMA. By comparison, the Legislature recently enacted the Medical Marihuana Facilities Licensing Act, MCL 333.27101 *et seq*., and specifically granted municipalities authority to adopt local ordinances including zoning regulations that

> restrict the location, number, and type of facilities within their boundaries. MCL 333.27205. Obviously, had the Legislature intended to authorize municipalities to adopt zoning ordinances restricting the activities of registered medical marijuana caregivers, it could have done so in the MMMA. Despite amending the MMMA twice, the Legislature refrained from incorporating such provisions into the MMMA.

We believe that the plain language of the MMMA lacks any ambiguity that would necessitate judicial construction to decipher its meaning. When the statute is read as a whole, no irreconcilable conflict results that makes the statutory provisions susceptible to more than one meaning. We conclude that the MMMA permits medical use of marijuana, particularly the cultivation of marijuana by registered caregivers, at locations regardless of land-use zoning designations as long as the activity occurs within the statutorily specified enclosed, locked facility. No provision in the MMMA authorizes municipalities to restrict the location of MMMA-compliant medical use of marijuana by caregivers. Nor does the MMMA authorize municipalities to adopt ordinances restricting MMMA-compliant conduct to home occupations in residential locations. So long as caregivers conduct their medical marijuana activities in compliance with the MMMA—including that caregivers cultivate medical marijuana in an "enclosed, locked facility" as defined by MCL 333.26423(d) and do not violate the location prohibitions of MCL 333.26427(b)—such conduct cannot be restricted or penalized.

In this case, defendant's Zoning Ordinance §§ 3.2.G and H improperly restricted the medical use of marijuana by permitting MMMA-compliant activities only as a home occupation within a dwelling or garage in residentially zoned areas within the township. Medical

marijuana home occupations were expressly prohibited in a commercial setting regardless of whether a patient's or caregiver's medical use of marijuana fully complied with the MMMA. Section 3.2.H.3 also required caregivers to obtain a permit by filing an application and paying a fee, and such permits were revocable for noncompliance with the ordinance regardless of whether a patient's or caregiver's medical use of marijuana fully complied with the MMMA. Sections 3.2.G and H plainly prohibited caregivers from conducting noncommercial medical marijuana activities at nonresidential locations. Defendant's Zoning Ordinance § 14.11 imposed serious consequences, including fines and penalties for noncompliance.

We conclude that defendant's home-occupation ordinance, §§ 3.2.G and H, plainly purported to prohibit the exercise of rights and privileges that the MMMA otherwise permits. Defendant's prohibition against noncommercial medical use of marijuana by a caregiver within a commercial building effectively denied plaintiff, as a registered caregiver, the rights and privileges that MCL 333.26424(b) permits in conjunction with MCL 333.26423(d). Accordingly, under *Ter Beek I*, 297 Mich App at 453, defendant's home-occupation ordinance directly conflicted with the MMMA in that regard.

Further, enforcement of defendant's home-occupation ordinance would result in the imposition of sanctions against plaintiff that the MMMA does not permit. See MCL 333.26424(b); see also *Ter Beek I*, 297 Mich App at 455-456. As the Michigan Supreme Court has explained, "[L]ocal zoning regulation enacted pursuant to the MZEA does not save it from preemption." *Ter Beek II*, 495 Mich at 21-22. Therefore, defendant's zoning ordinance's prohibition of registered caregivers'

MMMA-compliant medical use of marijuana in a commercial building was void and preempted by the MMMA. *Ter Beek I*, 297 Mich App at 457.

We believe that the trial court correctly read the MMMA as a whole, analyzed its plain language, and interpreted the MMMA in a reasonable and harmonious manner. The trial court correctly ruled that defendant's home-occupation ordinance prohibited what the MMMA permitted, MMMA-compliant conduct, merely because it occurred in a commercially zoned location. The trial court also correctly decided that defendant's zoning ordinance permitted what the MMMA prohibited by targeting and restricting MMMA-compliant use by adding a layer of restrictions and regulations that interfered with lawful use by imposing a permit requirement that defendant could revoke without regard to plaintiff's MMMA-compliant conduct. Further, the trial court correctly ruled that defendant's zoning ordinance also permitted what the MMMA prohibited by allowing defendant to impose penalties regardless of plaintiff's MMMA-compliant conduct. Accordingly, the trial court did not err by ruling that a direct conflict existed between defendant's ordinance and the MMMA resulting in the MMMA's preemption of plaintiff's home-occupation ordinance.

Defendant's argument that the MMMA does not preempt its ordinance because the MMMA does not occupy the field of zoning fails; the trial court never based its ruling on field preemption of zoning, nor did the trial court need to consider the field-preemption doctrine. Rather, the trial court correctly determined that doctrine inapplicable to this case because the ordinance directly conflicted with the MMMA and was preempted for that reason alone. Moreover, as this Court explained in *Miller*, 322 Mich App at 663-664,

had the Legislature intended to authorize municipalities to adopt ordinances restricting the location where registered medical marijuana caregivers may exercise their rights through zoning ordinances, it could have done so in the MMMA but has refrained from doing so.

Therefore, we hold that the trial court properly analyzed the interplay between defendant's zoning ordinance and the MMMA and correctly held as a matter of law that the MMMA preempted defendant's home-occupation zoning ordinance because the ordinance directly conflicted with the MMMA by prohibiting what the MMMA permitted and because it improperly imposed regulations and penalties upon persons who engage in MMMA-compliant medical use of marijuana.

We affirm.

HOEKSTRA, P.J., and MURPHY and MARKEY, JJ., concurred.

TOMRA OF NORTH AMERICA, INC v DEPARTMENT OF TREASURY

Docket Nos. 336871 and 337663. Submitted April 4, 2018, at Lansing. Decided July 17, 2018, at 9:10 a.m. Affirmed 505 Mich ___ (2020).

TOMRA of North America, Inc., brought two separate actions in the Court of Claims against the Department of Treasury, seeking a refund for use tax and sales tax that plaintiff had paid to defendant on the basis that plaintiff's sales of container-recycling machines and repair parts were exempt from taxation under the General Sales Tax Act (GSTA), MCL 205.51 *et seq*., and the Use Tax Act (UTA), MCL 205.91 *et seq*. Plaintiff moved for summary disposition, seeking a ruling on the question whether plaintiff's container-recycling machines and repair parts perform, or are used in, an industrial-processing activity under the GSTA and UTA. The Court of Claims, MICHAEL J. TALBOT, J., denied plaintiff's motion and instead granted summary disposition in favor of defendant, holding that plaintiff's container-recycling machines and repair parts were not used in an industrial-processing activity and that plaintiff therefore was not entitled to exemption from sales and use tax for the sale and lease of the machines and their repair parts. Plaintiff appealed, and the Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

Entitlement to an exemption under the GSTA is determined by what use the customer makes of the product sold by the taxpayer. MCL 205.54t(7)(a) defines "industrial processing" as the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail. MCL 205.54t(7)(a) further provides that industrial processing begins when tangible personal property begins movement from raw-materials storage to begin industrial processing and ends when finished goods first come to rest in finished goods inventory storage. As set forth under MCL 205.54t(1)(c), the sale of tangible personal property is exempt from sales tax if the tangible personal property is used by the buyer to perform an industrial-processing activity for or on behalf of an industrial processor.

Under MCL 205.54t(4)(b), property that is eligible for an industrial-processing exemption includes machinery, equipment, tools, dies, patterns, foundations for machinery or equipment, or other processing equipment used in an industrial-processing activity and in their repair and maintenance. MCL 205.54t(3) specifies activities that are considered to be industrial processing, including the planning, scheduling, supervision, or control of production or other exempt activities and the design, construction, or maintenance of production or other exempt machinery, equipment, and tooling. MCL 205.54t(6)(a) provides that the storage of raw materials is not to be considered industrial processing. In this case, the Court of Claims concluded that because the cans and bottles to be recycled were not first placed in raw-materials storage before being placed in the machines, whatever function the machines performed could never be considered an industrial-processing activity. However, the plain language of the statute could not be read to mean that no activity qualifies as industrial processing unless it is predated by tangible personal property leaving raw-materials storage. The activities of planning, scheduling, and designing listed in MCL 205.54t(3) are likely to predate tangible personal property beginning movement from raw-materials storage to begin industrial processing; nonetheless, the Legislature intended, as evidenced by the language of MCL 205.54t(3), to include these activities within the definition of industrial processing. Therefore, MCL 205.54t(7)(a) does not foreclose the possibility that industrial processing could occur without the initial step of moving raw materials from storage or when tangible items are never in raw-materials storage. Accordingly, the Court of Claims erred by focusing not on the use to which the products were put, but rather when, and perhaps where, the equipment was used in relation to raw-materials storage.

Reversed and remanded.

K. F. KELLY, J., dissenting, would have held that because the machines were not involved in industrial processing as that term is defined in MCL 205.54t(7)(a), the Court of Claims properly concluded that the machines did not qualify for the industrial-processing exemption. The analysis in this case should have begun and ended with the statutory definition of industrial processing; instead, the majority mistakenly looked to activities specifically listed in MCL 205.54t(3). MCL 205.54t(7)(a) has a temporal requirement that must be met before the activities listed in MCL 205.54t(3) are even considered. In this case, the machines did not perform industrial processing as that term is defined in MCL 205.54t(7)(a) because the machines simply facili-

tate the collection of raw materials. In order to be exempt, the machines must perform an activity at some point after tangible personal property begins movement from raw-materials storage and before the finished goods come to rest in inventory; however, the machines in this case were used before the start of the industrial process and, therefore, the equipment was not exempt. The Court of Claims appropriately recognized that where, as here, there is raw material, the industrial process begins when tangible personal property begins movement from raw-materials storage to begin industrial processing.

TAXATION — GENERAL SALES TAX ACT — WORDS AND PHRASES — INDUSTRIAL PROCESSING.

MCL 205.54t(7)(a) defines "industrial processing" as the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail; MCL 205.54t(7)(a) further provides that industrial processing begins when tangible personal property begins movement from raw-materials storage to begin industrial processing and ends when finished goods first come to rest in finished goods inventory storage; MCL 205.54t(7)(a) cannot be read to mean that no activity qualifies as industrial processing unless it is predated by tangible personal property leaving raw-materials storage; instead, industrial processing could occur without the initial step of moving raw materials from storage or when tangible items are never in raw-materials storage.

Honigman Miller Schwartz & Cohn LLP (by *June Summers Haas* and *Daniel L. Stanley*) for plaintiff.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *Scott L. Damich*, Assistant Attorney General, for defendant.

Before: GADOLA, P.J., and K. F. KELLY and RIORDAN, JJ.

GADOLA, P.J. In these consolidated cases, plaintiff, TOMRA of North America, Inc., appeals as of right the

orders of the Court of Claims granting summary disposition to defendant, the Department of Treasury. In its opinion, the Court of Claims concluded that plaintiff's beverage-container-recycling machines did not qualify for the industrial-processing exemption to tax liability as set forth in the General Sales Tax Act (GSTA), MCL 205.51 *et seq*., and the Use Tax Act (UTA), MCL 205.91 *et seq*. We reverse and remand.

I. FACTS

The facts relevant to this appeal are largely undisputed. Plaintiff sells and leases the container-recycling machines commonly found in grocery stores and also sells repair parts for those machines. These machines accept aluminum cans, glass bottles, and plastic bottles for recycling. When a can or bottle is placed in the machine, the machine reads the universal product code (UPC) and then sorts the accepted cans and bottles. Aluminum cans are crushed; plastic bottles are sorted by color, punctured, and compacted; and glass bottles are sorted by color. All containers are then moved to collection bins and thereafter transported to a recycling facility. At the recycling facility, the containers are dumped onto conveyor belts. Glass bottles are stored, while aluminum cans and plastic bottles are compacted into bales. The recycling facility sells the cans and bottles to manufacturers who remanufacture the materials into other products.

In this case, the parties dispute plaintiff's obligation to pay sales and use tax with respect to the container-recycling machines for the period of March 1, 2011 through December 31, 2011. During that tax period, plaintiff collected sales tax from customers to whom they sold or leased container-recycling machines, and plaintiff paid the sales tax collected to defendant. Simi-

larly, during that tax period, plaintiff paid use tax to defendant related to parts used in repairing the container-recycling machines sold or leased by plaintiff.[1]

Plaintiff thereafter sought a refund of these amounts on the basis that its sales of recycling machines and repair parts were exempt from taxation under the GSTA and UTA. After defendant failed to respond to the refund request, plaintiff filed this action in the Court of Claims. Plaintiff thereafter moved for summary disposition pursuant to MCR 2.116(C)(10), seeking a ruling on the question whether plaintiff's container-recycling machines and repair parts perform, or are used in, an industrial-processing activity under the GSTA and UTA. The Court of Claims denied plaintiff's motion and, pursuant to MCR 2.116(I)(2), instead granted defendant summary disposition, holding that plaintiff's container-recycling machines and repair parts are not used in an industrial-processing activity under the GSTA and the UTA and that plaintiff therefore is not entitled to exemption from sales and use tax for the sale and lease of the machines and their repair parts. Plaintiff now appeals.

II. DISCUSSION

Plaintiff contends that the Court of Claims erred by holding that plaintiff's container-recycling machines and repair parts are not used in an industrial-processing activity under the GSTA and the UTA, and therefore erred by granting summary disposition to defendant. We agree.

We review de novo a trial court's grant or denial of summary disposition. *Hoffner v Lanctoe*, 492 Mich 450,

[1] During this tax period, plaintiff remitted $673,511.65 in sales tax and $24,992.95 in use tax to defendant.

459; 821 NW2d 88 (2012). In reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), we review the record in the same manner as the trial court, considering the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim and is appropriately granted when, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). We also review de novo the proper interpretation of statutes such as the GSTA and the UTA. See *Fradco, Inc v Dep't of Treasury*, 495 Mich 104, 112; 845 NW2d 81 (2014); see also *Granger Land Dev Co v Dep't of Treasury*, 286 Mich App 601, 608; 780 NW2d 611 (2009).

Section 4t of the GSTA, MCL 205.54t, sets forth the industrial-processing exemption from the sales tax.[2] The statute provides, in relevant part:

> (1) The sale of tangible personal property to the following . . . is exempt from the tax under this act:
>
> (a) An industrial processor for use or consumption in industrial processing.
>
> (b) A person, whether or not the person is an industrial processor, if the tangible personal property is intended for ultimate use in and is used in industrial processing by an industrial processor.

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[2] The UTA sets forth parallel provisions in MCL 205.94o such that, as the Court of Claims noted, "whether addressing the GSTA or the UTA, the analysis of the question presented by Plaintiff is the same."

(c) A person, whether or not the person is an industrial processor, if the tangible personal property is used by that person to perform an industrial processing activity for or on behalf of an industrial processor.

* * *

(3) Industrial processing includes the following activities:

* * *

(d) Inspection, quality control, or testing to determine whether particular units of materials or products or processes conform to specified parameters at any time before materials or products first come to rest in finished goods inventory storage.

* * *

(g) Remanufacturing.

* * *

(i) Recycling of used materials for ultimate sale at retail or reuse.

(j) Production material handling.

(k) Storage of in-process materials.

(4) Property that is eligible for an industrial processing exemption includes the following:

* * *

(b) Machinery, equipment, tools, dies, patterns, foundations for machinery or equipment, or other processing equipment used in an industrial processing activity and in their repair and maintenance.

* * *

(6) Industrial processing does not include the following activities:

(a) Purchasing, receiving, or storage of raw materials.

(b) Sales, distribution, warehousing, shipping, or advertising activities.

* * *

(7) As used in this section:

(a) "Industrial processing" means the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail. Industrial processing begins when tangible personal property begins movement from raw materials storage to begin industrial processing and ends when finished goods first come to rest in finished goods inventory storage.

(b) "Industrial processor" means a person who performs the activity of converting or conditioning tangible personal property for ultimate sale at retail or use in the manufacturing of a product to be ultimately sold at retail.

Entitlement to an exemption under the GSTA is determined by what use the customer makes of the product sold by the taxpayer. *Elias Bros Restaurants, Inc v Treasury Dep't*, 452 Mich 144, 154, 156; 549 NW2d 837 (1996); accord *Detroit Edison Co v Dep't of Treasury*, 498 Mich 28, 37; 869 NW2d 810 (2015). Tax exemptions are disfavored, and the burden of proving entitlement to a tax exemption is upon the party asserting the right to the exemption. *Elias Bros*, 452 Mich at 150. Further, tax exemptions are strictly construed against the taxpayer and in favor of the taxing unit. *Ladies Literary Club v Grand Rapids*, 409 Mich 748, 753; 298 NW2d 422 (1980) (citation omitted).

As set forth under MCL 205.54t(1)(c), the sale of tangible personal property is exempt from sales tax if the tangible personal property is used by the buyer to perform an industrial-processing activity for or on behalf of an industrial processor. Under MCL 205.54t(4)(b), property that is eligible for an industrial-processing exemption includes "[m]achinery, equipment, tools, dies, patterns, foundations for machinery or equipment, or other processing equipment used in an industrial processing activity and in their repair and maintenance." In this appeal, the question is whether the container-recycling machines plaintiff sells and leases are machinery used by plaintiff's customers in an "industrial processing activity" within the meaning of the statute.

An "industrial processing activity" is not defined by the statute, but the statute does define "industrial processing" as "the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail." MCL 205.54t(7)(a). MCL 205.54t also specifies activities that are considered to be industrial processing, including, under Subsection (3)(d), the "[i]nspection, quality control, or testing to determine whether particular units of materials or products or processes conform to specified parameters at any time before materials or products first come to rest in finished goods inventory storage"; under Subsection (3)(g), remanufacturing; under Subsection (3)(i), recycling of used materials for ultimate sale at retail or reuse; under Subsection (3)(j), production material handling; and under Subsection (3)(k), storage of in-process materials. The statute also specifies activities that are not included in industrial processing, including, under

Subsection (6)(a), the purchasing, receiving, or storage of raw materials, and under Subsection (6)(b), sales, distribution, warehousing, shipping, or advertising activities.

Subsection (7)(a), in addition to defining industrial processing, also provides that "[i]ndustrial processing begins when tangible personal property begins movement from raw materials storage to begin industrial processing and ends when finished goods first come to rest in finished goods inventory storage." In light of this provision, the Court of Claims in this case concluded that plaintiff's container-recycling machines could not be engaged in an industrial-processing activity because the machines do not perform their task after tangible personal property begins movement from raw-materials storage to begin industrial processing. That is, the tangible personal property in this case that is to be converted or conditioned through industrial processing is the cans and bottles that consumers commonly return to a grocery store. Generally, these cans and bottles are not first placed in "raw materials storage" before the consumer places them in the machines.[3] The Court of Claims concluded that because the cans and bottles were not first placed in raw-materials storage before being placed in the machines, whatever function the machines performed could never be considered an industrial-processing activity. The Court of Claims stated:

> [R]egardless of whether Plaintiff's recycling machines perform tasks that might fit within any specific provision of MCL 205.54t(3) or MCL 205.94*o*(3), because those

[3] One can envision exceptions, such as when the cans and bottles are first collected at some other point, such as at a retailer that does not have a container-recycling machine, before being transported to a location that does have a container-recycling machine.

> activities occur before the industrial process begins, the exemptions found in MCL 205.54t and MCL 205.94o do not apply.

The Court of Claims construed this provision as meaning precisely what it says—that industrial processing begins when tangible personal property begins movement from raw-materials storage to begin industrial processing. We agree. However, the Court of Claims also construed this sentence to mean that industrial processing can *never* occur unless, first, tangible personal property begins movement from raw-materials storage.[4] The statute does not so provide, and we think it unlikely that the Legislature intended that interpretation.

A court's primary task when interpreting a statute is to discern and give effect to the intent of the Legislature. *Ford Motor Co v Dep't of Treasury*, 496 Mich 382, 389; 852 NW2d 786 (2014). In doing so, we first consider the statutory language itself; if the language is unambiguous, we conclude that the Legislature must have intended the clearly expressed meaning and we enforce the statute as written. *Id*. A statute is not ambiguous merely because a term is undefined or has more than one definition, but ambiguity exists when statutory language "is equally susceptible to more than a single meaning." *Klida v Braman*, 278 Mich App 60, 65; 748 NW2d 244 (2008); see also *Marcelle v Taubman*, 224 Mich App 215, 219; 568 NW2d 393 (1997).

Moreover, "what is plain and unambiguous often depends on one's frame of reference," *US Fidelity*

[4] An apt analogy is the statement "The movie starts at 9:00." The statement means what it says—that the movie starts at 9:00. But shall we read into the statement the additional meaning that "the movie starts at no other time than 9:00"? There may, perhaps, also be a 7:00 showing, and another at 11:00.

& Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing), 484 Mich 1, 13; 795 NW2d 101 (2009) (quotation marks and citation omitted); to determine that frame of reference, one must consider the context of the passage by reading it "in relation to the statute as a whole and [to] work in mutual agreement" with the remainder of the statute. *Id*. We therefore read a statute " 'as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined.' " *Book-Gilbert v Greenleaf*, 302 Mich App 538, 541; 840 NW2d 743 (2013), quoting *In re Receivership of 11910 South Francis Rd*, 492 Mich 208, 222; 821 NW2d 503 (2012). In so doing, we "avoid a construction that would render any part of a statute surplusage or nugatory, and '[w]e must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme.' " *People v Redden*, 290 Mich App 65, 76-77; 799 NW2d 184 (2010) (citation omitted). We also note that, although tax exemptions are construed strictly against the taxpayer, *Ladies Literary Club*, 409 Mich at 753, any ambiguity found in a tax statute is construed in favor of the taxpayer, *Signature Villas, LLC v Ann Arbor*, 269 Mich App 694, 702; 714 NW2d 392 (2006).

As noted, MCL 205.54t provides for an industrial-processing exemption for the tax imposed by the GSTA. The statute therefore focuses, of necessity, on which activities fall within the purview of "industrial processing." Indeed, the statute is devoted almost entirely to describing the activities that constitute, or do not constitute, industrial processing.

Among the activities that are specified by the statute as falling within the definition of industrial processing are activities that are unlikely to begin with

"tangible personal property begin[ning] movement from raw materials storage to begin industrial processing . . . ." MCL 205.54t(7)(a). Subsection (3)(e) provides that industrial processing includes "[p]lanning, scheduling, supervision, or control of production or other exempt activities." Subsection (3)(f) provides that industrial processing includes "[d]esign, construction, or maintenance of production or other exempt machinery, equipment, and tooling." Clearly, the activities of planning, scheduling, and designing are likely to predate tangible personal property beginning movement from raw-materials storage to begin industrial processing. Nonetheless, our Legislature clearly intended, as evidenced by the language of these statutory provisions, to include these activities within the definition of industrial processing. We will not, therefore, read the language of Subsection (7)(a)—that "[i]ndustrial processing begins when tangible personal property begins movement from raw materials storage to begin industrial processing"—as a temporal requirement that would render these portions of the statute meaningless. That is, we will not read into the plain language of the statute the stricture that no activity qualifies as industrial processing unless it is predated by tangible personal property leaving raw-materials storage. The statute does not state that industrial processing *must* begin this way but rather states that when tangible personal property begins movement from raw-materials storage to begin industrial processing, one can rest assured that industrial processing has begun.

To discern the intention of the Legislature, statutory provisions should not be read in isolation, which can lead to a distortion of legislative intent. *Robinson v Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). "A provision that may seem ambiguous in isolation often is clarified by the remainder of the statutory scheme."

MidAmerican Energy Co v Dep't of Treasury, 308 Mich App 362, 370; 863 NW2d 387 (2014) (citation and quotation marks omitted). In this case, we observe that Subsection (6) of the statute specifies activities that are not considered industrial processing. Among the activities not considered to be industrial processing is the "storage of raw materials." MCL 205.54t(6)(a). Having made clear that the storage of raw materials is not industrial processing, Subsection (7)(a) then makes clear that once "tangible personal property begins movement from raw materials storage to begin industrial processing," the activity does qualify as industrial processing. Our Legislature thus articulated exactly which activities related to the storage of raw materials are and are not included in industrial processing, thereby providing guidance for determining exactly when in the continuum tangible personal property makes the transition from storage (not exempt) to activities of industrial processing (exempt). This provision does not attempt to foreclose the possibility that industrial processing could occur without the initial step of moving raw materials from storage,[5] or when

[5] We note that our Supreme Court in *Detroit Edison Co*, 498 Mich at 42, reached an analogous conclusion that industrial processing had occurred despite the inability to meet the industrial-processing continuum described in MCL 205.54t. In that case, because the property involved was electricity, our Supreme Court determined that industrial processing was complete when the electricity reached the consumer, despite the fact that "there is simply no point within the electric system at which 'finished goods first come to rest in finished goods inventory storage' before [reaching the consumer]." *Id*. The failure of electricity to come to rest as a finished good in inventory storage did not disqualify the transmission of electricity to consumers from the exemption. Similarly in this case, because of the nature of deposit-return recycling, there is simply no point at which (other than in the hands of the consumer) the cans and bottles are in raw-materials storage. But as in *Detroit Edison Co*, that fact does not create a statutory barrier to entitlement to the exemption for qualifying

tangible items are never in raw-materials storage, and we decline to so expand the provision.

In construing the statute, and in keeping with the statute's intent, our Supreme Court has emphasized that entitlement to an exemption under the GSTA is determined by what use the customer makes of the product sold by the taxpayer. *Elias Bros*, 452 Mich at 154, 156. In reaching its conclusion in this case, the Court of Claims found determinative not the use to which the container-recycling machines were put, but rather when, and perhaps where,[6] the equipment was used in relation to raw-materials storage. In light of our Supreme Court's directive, we remand to the Court of Claims for reconsideration of whether plaintiff is entitled to a tax exemption under the GSTA and UTA.

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

RIORDAN, J., concurred with GADOLA, P.J.

K. F. KELLY, J. (*dissenting*). I respectfully dissent. Because the machines are not involved in "industrial processing" as that term is defined in MCL 205.54t(7)(a), I would affirm the Court of Claims' well-reasoned decision.

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activities that happen to take place at the beginning of the process rather than the end.

[6] If the container-recycling machines were located somewhere less convenient to consumers than grocery stores, such as at a distant recycling facility, the cans and bottles would presumably need to be collected and stored before reaching the machines. Assuming for the sake of argument that the machines are performing tasks that otherwise would be considered an industrial-processing activity, under the Court of Claims' analysis the location of the machines becomes determinative of whether an exemption is warranted, which is contrary to the Supreme Court's determination in *Elias Brothers*.

The analysis in this case should begin and end with the statutory definition of "industrial processing" as set forth in Subsection (7)(a), which provides:

> "Industrial processing" means the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail. *Industrial processing begins when tangible personal property begins movement from raw materials storage to begin industrial processing and ends when finished goods first come to rest in finished goods inventory storage*. [Emphasis added.]

"When a statute specifically defines a given term, that definition alone controls." *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007). However, rather than focusing on the Legislature's definition of "industrial processing" in Subsection (7)(a), the majority mistakenly looks to those activities specifically enumerated in MCL 205.54t(3). Contrary to the majority's conclusion, Subsection (3) does not *expand* the definition specifically set forth in Subsection (7)(a). Rather, as the Court of Claims aptly noted, Subsection (7)(a) has a temporal requirement that must be met before the activities in Subsection (3) are even considered. That is, only after the definition in Subsection (7)(a) is met do the activities set forth in Subsection (3) have any relevance. Those activities must occur within the statutorily defined period in Subsection (7)(a).

The Court of Claims correctly recognized that the machines perform activities before the industrial process begins. The machines may sort, separate, and compress items and, in that regard, some processing necessarily occurs. However, while some processing may occur, the machines do not perform "*industrial* processing" as statutorily defined. Instead, the ma-

chines simply facilitate the collection of raw materials. In order to be exempt, the machines must perform an activity at some point after tangible personal property begins movement from raw-materials storage and before the finished goods first come to rest in inventory. The machines in this case are used *before* the start of the industrial process and, therefore, the equipment is not exempt. Thus, any inspection, quality control, and recycling that the machines perform is irrelevant because those activities take place before the industrial process begins.[1]

The majority erroneously concludes that the Court of Claims made its decision contingent on the existence of raw materials. However, it is clear that the Court of Claims made no such finding. Instead, the Court of Claims appropriately recognized that where, as here, there *is* raw material, then the industrial process begins when tangible personal property begins movement from raw-materials storage to begin industrial processing. In so doing, the Court of Claims was faithful to the definition as set forth by our Legislature.

I find plaintiff's reliance on *Detroit Edison Co v Dep't of Treasury*, 498 Mich 28; 869 NW2d 810 (2015), unavailing. The focus in the *Detroit Edison* case involved electricity. The issue was not whether there was

[1] The record does not reflect whether any of these raw materials are ever, in fact, recycled into a finished product. It is just as likely that they will come to rest in a landfill in the United States or abroad. For example, see Albeck-Ripka, *Your Recycling Gets Recycled, Right? Maybe, or Maybe Not*, New York Times (May 29, 2018), available at <https://www.nytimes.com/2018/05/29/climate/recycling-landfills-plastic-papers.html> [https://perma.cc/28SN-GUTG]; Watson, *China Has Refused to Recycle The West's Plastics. What Now?*, NPR (June 28, 2018), available at <https://www.npr.org/sections/goatsandsoda/2018/06/28/623972937/china-has-refused-to-recycle-the-wests-plastics-what-now> [https://perma.cc/37QC-ZVU3].

raw storage, but whether electricity ever "came to rest" in inventory storage. Our Supreme Court concluded that "industrial processing of electricity does not become complete until final distribution to the *consumer* because there is simply no point within the electric system at which 'finished goods first come to rest in finished goods inventory storage' before that point." *Id*. at 42. Our Supreme Court further concluded that "the nonexempt activities in MCL 205.94o(6)(b) are in no way within the scope of MCL 205.94o(7)(a), and the exempt activity in MCL 205.94o(7)(a) is in no way within the scope of MCL 205.94o(6)(b)." *Id*. at 45. Therefore, as applied to the statutes at issue here, once there is industrial processing as defined in Subsection (7)(a), the exclusions set forth in Subsection (6) no longer apply. The only premise that *Detroit Edison* confirmed was that Subsection (6) does not modify the definition in Subsection (7)(a). Again, the Court of Claims did not rely on Subsection (6), which excluded storage of raw materials as an industrial activity; rather, the Court of Claims relied exclusively on the statutory definition of "industrial processing" in Subsection (7)(a).

Because the machines perform activities that occur before an industrial process begins, I would affirm.

MAGLEY v M&W INCORPORATED

Docket No. 340507. Submitted July 10, 2018, at Grand Rapids. Decided July 17, 2018, at 9:15 a.m.

Charles Magley III brought a tort action in the St. Joseph Circuit Court against M&W Incorporated, a company that repossesses property and sells it on behalf of lienholders, in connection with its repossession of his farm equipment. Plaintiff, a farmer, had a loan with Kellogg Community Credit Union relating to a tractor he owned, and under the terms of the loan and security agreement, the tractor was secured collateral, subject to repossession and sale in the event that plaintiff defaulted on his loan. Plaintiff defaulted on his tractor loan, and on June 28, 2016, acting on Kellogg's behalf, defendant repossessed plaintiff's tractor. When defendant repossessed the tractor, it also took a front-mounted tank and a sprayer that plaintiff had recently attached to the tractor in preparation for his annual herbicide spraying of his crops. Unlike the tractor itself, plaintiff owned the sprayer and the tank outright, and these items were not mentioned in the loan documents. Despite plaintiff's demands for the return of his property, defendant kept plaintiff's items for approximately one month and posted pictures of the tractor, with the sprayer and the tank attached, online as a featured item in an upcoming auction. After plaintiff resolved his loan dispute with Kellogg, defendant eventually released plaintiff's tractor, sprayer, and tank to him. However, by the time the property was released, plaintiff had been deprived of the use of his equipment for a month, he had to pay someone else to spray his crops, and his crops had suffered damage because he had missed the most opportune time for spraying them. Plaintiff filed the current lawsuit against defendant, alleging common-law conversion, statutory conversion, trespass to chattels, and negligence on the ground that defendant had wrongfully repossessed the sprayer and the tank, wrongfully withheld those items from him, and wrongfully posted the items for auction. Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that it had acted lawfully when repossessing the tank and the sprayer and that, if there was any wrongdoing, defendant could not be held liable while acting on Kellogg's behalf on the basis of information provided by Kellogg.

The trial court, Paul E. Stutesman, J., granted defendant's motion for summary disposition under MCR 2.116(C)(10). Plaintiff appealed as of right.

The Court of Appeals *held*:

1. The trial court erred by concluding that defendant could not be held liable while acting on Kellogg's behalf to repossess plaintiff's property on the basis of information provided by Kellogg. Generally, an agent may be held personally liable for his or her own tortious conduct, even when acting on behalf of a principal. However, an agent is only liable for his or her own tortious conduct and cannot be held liable for torts committed by the agent's principal that do not implicate the agent's conduct. With regard to the tort of conversion in particular, a defendant who wrongfully exerts dominion over property is not shielded from liability on the basis that the action was undertaken in good faith on behalf of a third party. While conversion is an intentional tort in the sense that the converter's actions are willful, conversion can be committed unwittingly if the defendant is unaware of the plaintiff's outstanding property interest. Good faith, mistake, and ignorance are not defenses to a claim of conversion. A defendant's actions in reliance on the asserted rights of a third party are only lawful when the third party actually has a legal right to the property. In this case, contrary to the trial court's conclusions, defendant could be held liable for its own torts, including conversion, even if acting on Kellogg's behalf. Although defendant purports to have repossessed plaintiff's property in reliance on Kellogg's "Summary of Account" document and repossession request, a mistaken belief that Kellogg had a right to the items is not a defense. Instead, the question is whether Kellogg truly had a legal right to the property, and it was defendant's obligation to ensure that it exercised only those rights that Kellogg possessed. If Kellogg did not have a legal right to the sprayer and the tank, the fact that defendant acted on Kellogg's behalf is immaterial. Therefore, the existence of an agency relationship did not entitle defendant to summary disposition.

2. The front-mounted tank and the sprayer were not subject to repossession because these items did not qualify as accessions under the terms of the loan and security agreement. Generally, under MCL 440.9609(1)(a), if a borrower defaults on a loan, a secured creditor may take possession of the collateral. However, repossession of property in which a creditor does not have a security interest can constitute conversion. Even if there is a valid security interest in some property, the incidental taking of other property can support a claim for conversion, unless the loan

agreement includes the debtor's consent to the incidental taking. Moreover, a refusal to return property can support a claim for conversion. If property is eventually returned after a period of wrongful detention, the owner may nevertheless be entitled to damages, including damages for the reasonable value of the property's use during the period of detention. In this case, whether Kellogg had a security interest in the tank and the sprayer, and whether plaintiff otherwise agreed to allow Kellogg to take, and retain possession of, the tank and the sprayer, were questions of contractual interpretation. Paragraph 1 of the loan and security agreement between plaintiff and Kellogg provided that plaintiff had given Kellogg a security interest in the property described elsewhere in the document, namely, the tractor, and this security interest included all accessions, defined as things that were attached to or installed in the property at the time of the agreement or in the future. Paragraph 9 of the agreement stated that when plaintiff was in default, Kellogg could demand immediate payment of the outstanding balance of the loan without advance notice and take possession of the property without judicial process. Paragraph 9 also provided that Kellogg would not be responsible for any other property not covered by the agreement that plaintiff left inside the property or that was attached to the property, but that Kellogg would try to return that property to plaintiff or make it available for him to claim. The security agreement did not specifically mention the tank or the sprayer, but both ¶ 1 and ¶ 9 referred to items that are attached to the property, and in this case the tank and the sprayer were attached to the tractor when defendant arrived to repossess the tractor. Although both ¶ 1 and ¶ 9 used the word "attached," under ¶ 1, things "attached to" the tractor were accessions subject to a security interest that could be lawfully repossessed and sold, and ¶ 9 provided that there may be other things "attached to" the secured property that were not covered by the agreement, that these were not subject to a security interest, and that they could be incidentally taken during repossession, but Kellogg was required to make a good-faith attempt to return them to plaintiff or make them available to him to claim. When repossessing property on Kellogg's behalf, defendant was required to abide by these provisions and adhere to the distinction between ¶ 1 and ¶ 9 because defendant's actions were only lawful to the extent that Kellogg had a legal right to the property being repossessed. Whether an item is an accession to property is generally a question of fact. Viewing the evidence in a light most favorable to plaintiff, at a minimum, plaintiff could maintain a conversion claim based on defendant's refusal to return the tank and the

sprayer, and reasonable minds could conclude that these items were not accessions and that defendant had wrongfully exercised dominion over plaintiff's property. There was no merit to defendant's assertion that its actions were lawful regardless of whether the tank and the sprayer were accessions, and defendant was not entitled to summary disposition on this basis. Instead, questions of fact remained as to whether the items were accessions and whether defendant's conduct regarding the items was lawful. Accordingly, the trial court erred by granting defendant's motion for summary disposition.

Reversed and remanded for further proceedings.

TORTS — CONVERSION — DEFENSES — AGENCY.

A defendant who wrongfully exerts dominion over property is not shielded from liability on the basis that the action was undertaken in good faith on behalf of a third party; while conversion is an intentional tort in the sense that the converter's actions are willful, conversion can be committed unwittingly if the defendant is unaware of the plaintiff's outstanding property interest; good faith, mistake, and ignorance are not defenses to a claim of conversion, and a defendant's actions in reliance on the asserted rights of a third party are only lawful when the third party actually has a legal right to the property.

Warner Norcross & Judd LLP (by *Gaëtan Gerville-Réache* and *Adam T. Ratliff*) and *O'Malley Law Office, PC* (by *Luke Nofsinger*) for plaintiff.

Rodenhouse Kuipers, PC (by *C. Christopher Newberg*) for defendant.

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

PER CURIAM. In this tort case arising from the repossession of farm equipment, plaintiff, Charles Magley III, appeals as of right the order granting summary disposition to defendant, M&W Incorporated, under MCR 2.116(C)(10). Because the trial court erred by concluding that defendant could not be held liable when acting as an agent for a third party and material

questions of fact remain regarding the wrongfulness of defendant's conduct, we reverse the grant of summary disposition to defendant and remand for further proceedings.

Plaintiff is a farmer and the owner of a John Deere tractor. Plaintiff had a loan with Kellogg Community Credit Union (Kellogg) relating to the tractor, and under the terms of plaintiff's Loan and Security Agreement with Kellogg, the tractor was secured collateral, subject to repossession and sale in the event that plaintiff defaulted on his loan. Defendant is an "asset recovery" company that repossesses property and sells it on behalf of lienholders. Plaintiff defaulted on his tractor loan, and on June 28, 2016, acting on Kellogg's behalf, defendant repossessed plaintiff's tractor. Notably, when defendant repossessed the tractor, it also took other farm equipment, specifically a "front-mounted tank" and a "sprayer," both of which plaintiff had recently attached to the tractor in preparation for his annual herbicide spraying of his crops. Unlike the tractor itself, plaintiff owned the sprayer and the tank outright, and these items were not mentioned in the loan documents. Despite plaintiff's demands for the return of his property, defendant kept plaintiff's items for approximately one month and posted pictures of the tractor—with the sprayer and the tank attached—on Facebook as a featured item in an upcoming auction. After plaintiff resolved his loan dispute with Kellogg, defendant eventually released plaintiff's tractor, sprayer, and tank to him.[1] However, by the time the property was released, plaintiff had been deprived of

[1] In addition to the tractor, plaintiff also had a loan with Kellogg for a Ford F-350 truck. The truck was also repossessed by defendant and eventually returned to plaintiff. However, the repossession of the truck is not at issue on appeal.

the use of his equipment for a month, he had to pay someone else to spray his crops, and he had suffered damages to his crops because he missed the "most opportune time" for spraying his crops.

Plaintiff filed the current lawsuit against defendant, alleging: (1) common-law conversion, (2) statutory conversion, (3) trespass to chattels, and (4) negligence. Briefly stated, plaintiff alleged that defendant wrongfully repossessed the sprayer and the tank, that defendant wrongfully withheld those items from him, and that defendant wrongfully posted the items for auction, despite plaintiff's demands for the return of his farm equipment. Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that it acted lawfully when repossessing the tank and the sprayer and that, if there was any wrongdoing, defendant could not be held liable while acting on Kellogg's behalf on the basis of information provided by Kellogg. The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10), stating that it agreed with defendant's position. Plaintiff now appeals as of right.

On appeal, plaintiff argues that the trial court erred by concluding that defendant could not be held liable for wrongful conduct while acting on Kellogg's behalf to repossess property. Additionally, plaintiff argues that the tank and the sprayer were not subject to repossession because these items did not qualify as "accessions" within the meaning of the Loan and Security Agreement. Plaintiff acknowledges that, under the Loan and Security Agreement, attached items, even if not accessions, may be taken incidentally to repossession of secured property, but plaintiff argues that defendant's conduct in this case was nevertheless wrongful because defendant made no attempt to return plaintiff's items and refused plaintiff's demands for the return of his property. We agree.

We review de novo a trial court's decision to grant a motion for summary disposition. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). "When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all the evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact." *Sisk-Rathburn v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 425, 427; 760 NW2d 878 (2008). "There is a genuine issue of material fact 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). To the extent this case involves questions concerning the interpretation of a contract or a statute, our review is de novo. *Rodgers v JPMorgan Chase Bank NA*, 315 Mich App 301, 307; 890 NW2d 381 (2016).

The first issue on appeal is whether defendant may be held liable when repossessing property on behalf of Kellogg on the basis of information provided by Kellogg.[2] "Agency in its broadest sense includes every relation in which one person acts for or represents

[2] On appeal, defendant asserts that the trial court's agency ruling was quite narrow—i.e., that the trial court only held that defendant could not be held liable for prematurely taking plaintiff's property insofar as the property was taken on June 28th despite the fact that plaintiff had until June 30th to bring his loan current. However, the trial court more broadly stated that because defendant was an agent acting under Kellogg's orders, only Kellogg could be held liable for "*any* claims for the wrongful conversion or the premature repossession." (Emphasis added.) Given this statement, although the trial court's reasoning is not entirely clear, it appears that the trial court intended for this agency rationale to apply to the premature repossession and "any" other claims of wrongful conversion. Plaintiff does not raise the premature-repossession issue on appeal.

another by his authority." *Saums v Parfet*, 270 Mich 165, 171; 258 NW 235 (1935) (quotation marks and citation omitted). Generally, an agent may be held personally liable for his or her own tortious conduct, even when acting on behalf of a principal. See *Dep't of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 17-18 & n 39; 779 NW2d 237 (2010). More fully, our Supreme Court has quoted with approval from 2 Restatement Agency, 3d, stating:

> An agent is subject to liability to a third party harmed by the agent's tortious conduct. Unless an applicable statute provides otherwise, an actor remains subject to liability although the actor acts as an agent or an employee, with actual or apparent authority, or within the scope of employment. [*Appletree Mktg, LLC*, 485 Mich at 17 n 39, quoting 2 Restatement Agency, 3d, § 7.01, p 115.]

However, under this rule, an agent is only liable for his or her own "tortious conduct" and cannot be held liable for torts committed by "the agent's principal that do not implicate the agent's own conduct[.]" 2 Restatement Agency, 3d, § 7.01, comment *d*, p 120.

Notably, with regard to the tort of conversion in particular, a defendant who wrongfully exerts dominion over property is not shielded from liability on the basis that the action was undertaken in good faith on behalf of a third party. "Conversion, both at common law and under the statute, is defined as any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 303 Mich App 441, 447; 844 NW2d 727 (2013), aff'd 497 Mich 337 (2015) (quotation marks and citation omitted).[3] Conversion is "an inten-

[3] Treble damages for statutory conversion are available under MCL 600.2919a(1)(a), but, in addition to the common-law elements for

tional tort in the sense that the converter's actions are wilful . . . ." *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). However, conversion "can be committed unwittingly if [the defendant is] unaware of the plaintiff's outstanding property interest." *Id*. See also *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233 (2004). Good faith, mistake, and ignorance are not defenses to a claim of conversion. See *Moore v Andrews*, 203 Mich 219, 233; 168 NW 1037 (1918); *Willis v Ed Hudson Towing, Inc*, 109 Mich App 344, 349; 311 NW2d 776 (1981); see also 90 CJS, Trover and Conversion, § 31, pp 29-30. Thus, for example, under the common law, when "an auctioneer receives and takes the property into his possession" from a third party "and sells it, paying over the proceeds, less his commission, he is liable, although he has no knowledge of want of title in the party for whom he sells, and acts in good faith." *Kearney v Clutton*, 101 Mich 106, 111-112; 59 NW 419 (1894). Likewise, in the absence of governmental immunity, a sheriff or court officer is liable for conversion for unlawfully seizing personal property, "even if he or she does so in the execution of a court order." *Aroma Wines & Equip, Inc*, 497 Mich at 353. As one Court succinctly explained: "It is not a defense to say, 'I supposed I had authority to do so.' " *Kenney v Ranney*, 96 Mich 617, 618; 55 NW 982 (1893). Instead, a defendant's actions in reliance on the asserted rights of a third party are only lawful when the third party actually has a "legal right" to the

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conversion, a plaintiff claiming statutory conversion must show that the conversion was for the defendant's "own use." *Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 497 Mich 337, 356; 871 NW2d 136 (2015). "[S]omeone alleging conversion to the defendant's 'own use' under MCL 600.2919a(1)(a) must show that the defendant employed the converted property for some purpose personal to the defendant's interests, even if that purpose is not the object's ordinarily intended purpose." *Id*. at 359.

property. *Gibbons v Farwell*, 63 Mich 344, 349; 29 NW 855 (1886) (emphasis omitted).

It follows that in this case, contrary to the trial court's conclusions, defendant may be held liable for its own torts, including conversion, even if acting on Kellogg's behalf. Although defendant purports to have repossessed plaintiff's property in reliance on Kellogg's "Summary of Account" document and repossession request, a mistaken belief that Kellogg had a right to the items is not a defense.[4] *Moore*, 203 Mich at 233; *Kearney*, 101 Mich at 111-112; *Willis*, 109 Mich App at 349. Instead, the question is whether Kellogg truly had a legal right to the property, *Gibbons*, 63 Mich at 349, and it was defendant's obligation to ensure that it exercised only those rights that Kellogg possessed, see *Kenney*, 96 Mich at 618; *Kane v Hutchisson*, 93 Mich 488, 490; 53 NW 624 (1892). If Kellogg did not have a legal right to the sprayer and the tank, the fact that defendant acted on Kellogg's behalf is immaterial. Therefore, the existence of an agency relationship did not entitle defendant to summary disposition.

Given that defendant acted on behalf of Kellogg, the issue in this case thus becomes whether Kellogg had a legal right to take, and refuse to return, plaintiff's tank and sprayer. Generally, if a borrower defaults on a loan, a secured creditor may take possession of the collateral. MCL 440.9609(1)(a). However, repossession of property in which a creditor does not have a security interest can constitute conversion. See generally

[4] Even if good faith were a defense to conversion, defendant's reliance on the "Summary of Account" as a basis to justify its actions is nevertheless unavailing because the "Summary of Account" document identifies a "tractor" as the item to be repossessed. It is entirely disingenuous to also blindly seize the sprayer and the tank—and to then make no inquiry about the propriety of seizing these items—on the sole basis of the order for the repossession of the "tractor."

Larson v Van Horn, 110 Mich App 369, 379; 313 NW2d 288 (1981). Even if there is a valid security interest in some property, the incidental taking of other property can support a claim for conversion "*unless* the loan agreement includes the debtor's consent to the incidental taking." *Clark v Auto Recovery Bureau Conn, Inc*, 889 F Supp 543, 548 (D Conn, 1994).[5] See also 46 Causes of Action, 2d, 513, § 10; *Kane*, 93 Mich at 490 ("It was the duty of the officer to see that no other articles were taken except those described in his writ."). Moreover, a refusal to return property can support a claim for conversion. *Aroma Wines & Equip, Inc*, 497 Mich at 352. If property is eventually returned after a period of wrongful detention, the owner may nevertheless be entitled to damages, including damages for the reasonable value of the property's use during the period of detention. See *Maycroft v The Jennings Farms*, 209 Mich 187, 192-194; 176 NW 545 (1920); *Central Transp, Inc v Fruehauf Corp*, 139 Mich App 536, 546; 362 NW2d 823 (1984); *Jay Dee Contractors v Fattore Constr Co*, 96 Mich App 519, 523; 293 NW2d 620 (1980); 18 Am Jur 2d, Conversion, § 136, pp 244-245.

In this case, whether Kellogg had a security interest in the tank and the sprayer, and whether plaintiff otherwise agreed to allow Kellogg to take, and retain possession of, the tank and the sprayer, are questions of contractual interpretation. "In interpreting a contract, it is a court's obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning." *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). Contracts must be read as a whole, and words must be

[5] Although nonbinding, authority from other jurisdictions may be considered for its persuasive value. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

considered in context. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 356; 596 NW2d 190 (1999). Courts must "give effect to every word, clause, and phrase, and a construction should be avoided that would render any part of the contract surplusage or nugatory." *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005). "Inartfully worded or clumsily arranged contract terms do not render a contract ambiguous if it fairly admits of one interpretation." *Village of Edmore v Crystal Automation Sys, Inc*, 322 Mich App 244, 262; 911 NW2d 241 (2017). Unambiguous contracts must be enforced as written. *In re Smith Trust*, 480 Mich at 24.

The Loan and Security Agreement between plaintiff and Kellogg contained the following provisions regarding Kellogg's security interest and repossession of property:

> 1. THE SECURITY FOR THE LOAN – You give us what is known as a security interest in the property described in the "Security" section of the Truth in Lending Disclosure that is part of this document ("the Property"). The security interest you give includes all accessions. *Accessions are things which are attached to or installed in the Property now or in the future*. The security interest also includes any replacements for the Property which you buy within 10 days of the Loan and any extensions, renewals or refinancing of the Loan. It also includes any money you receive from selling the Property or from insurance you have on the Property. If the value of the Property declines, you promise to give us more property as security if asked to do so.
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> * * *
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> 9. WHAT HAPPENS IF YOU ARE IN DEFAULT – When you are in default, we may demand immediate payment of the outstanding balance of the Loan without giving you advance notice and take possession of the

> Property. You agree [Kellogg] has the right to take possession of the Property without judicial process if this can be done without breach of the peace. If we ask, you promise to deliver the Property at a time and place we choose. If the property is a motor vehicle or boat, you agree that we may obtain a key or other device necessary to unlock and operate it, when you are in default. We will not be responsible for *any other property not covered by this Agreement* that you leave inside the Property or *that is attached to the Property*. We will try to return that property to you or make it available for you to claim. [Italics added; boldface removed.]

In relevant part, the "Security" section of the Truth in Lending Disclosure identifies plaintiff's John Deere tractor as the collateral for the loan. Under the terms of the agreement, after taking possession of "the Property," Kellogg had the power to "sell it and apply the money to any amounts" plaintiff owed Kellogg.

The security agreement does not specifically mention the tank or the sprayer. However, both ¶ 1 and ¶ 9 refer to items that are "attached to" "the Property," and in this case the tank and the sprayer were attached to the tractor when defendant arrived to repossess the tractor. Significantly, although both ¶ 1 and ¶ 9 use the word "attached," when the contract is read as a whole, it is clear that there are two distinct categories of attached property and that Kellogg's rights with regard to these two categories of attached property are very different. Under ¶ 1, things "attached to" the tractor are accessions subject to a security interest, and these accessions may be lawfully repossessed and sold. See MCL 440.9609(1)(a). However, under ¶ 9 there may be other things "attached to" the secured property that are "not covered by" the Agreement and that are not subject to a security interest. Paragraph 9 makes plain that things attached to the tractor that are not covered by the agreement may be

incidentally taken during repossession insofar as Kellogg disavows any responsibility for these items and promises to "try to return that property to [plaintiff] or make it available for [plaintiff] to claim." But the fact remains that attached property taken incidentally under ¶ 9 is not subject to a security interest, and Kellogg must make a good-faith attempt to return it or make it available to plaintiff to claim.[6] When repossessing property on Kellogg's behalf, defendant must abide by these provisions and adhere to the distinction between ¶ 1 and ¶ 9, because defendant's actions are only lawful to the extent that Kellogg has a legal right to the property being repossessed.

At first glance ¶ 1 and ¶ 9 may seem discordant insofar as they both use the term "attached" to describe two different categories of property. However, these somewhat inartful provisions can be easily harmonized when the contract is read as a whole and the use of the word "attached" is considered in the context of each paragraph. In particular, in ¶ 1 accessions are defined as property "attached to or *installed in* the Property" (emphasis added), while in ¶ 9, the "attached" property not covered by the agreement is grouped with property that plaintiff "leave[s] inside the Property." Clearly, ¶ 1 envisions a more permanent attachment, comparable to installing something, while ¶ 9 contemplates a more temporary attachment on par with leaving something inside the property. Stated differently, the "attached" or "installed" items under ¶ 1 essentially become part of "the Property," and thus these accessions are subject to repossession and sale.[7] In contrast, property that is

[6] Every contract under the UCC "imposes an obligation of good faith in its performance and enforcement." MCL 440.1304.

[7] Indeed, upon default, Kellogg has the right to "take possession of *the Property*" (emphasis added), and "the Property" is the "property de-

"attached to" or left inside the property under ¶ 9 retains its identity, distinct from the secured property, and it can be readily removed without damaging the secured property; consequently, while this property under ¶ 9 may be incidentally taken during repossession, it must be returned to plaintiff because it is not part of the secured collateral. Fairly read, the parties' agreement evinces an understanding of "accessions" consistent with the general rule that "a good that is affixed to another good so that it is easily removable or completely retains its own identity is not an accession." 9 Lawrence's Anderson on the Uniform Commercial Code (3d ed, 1999 revision), § 9-314:4, p 416. See also *Fane v Detroit Library Comm*, 465 Mich 68, 79; 631 NW2d 678 (2001) (concluding in a companion case that a ramp was not an accession to a building when it could be "readily" removed and had a "possible existence" apart from the building); *Continental Cablevision of Mich, Inc v Roseville*, 430 Mich 727, 737; 425 NW2d 53 (1988) (holding that the term "accessions" "implies a transfer of ownership and control over the property attached"). Whether an item is an accession to property is generally a question of fact. See *Lakeside Resort Corp v Sprague*, 274 Mich 426, 432; 264 NW 851 (1936).

On appeal, defendant attempts to ignore the distinction between accessions and nonaccessions. That is, when moving for summary disposition in the trial court, defendant initially argued that the tank and the sprayer were accessions. However, at least for the purposes of this appeal, defendant abandons its assertion that the sprayer and the tank were accessions, and

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scribed in the 'Security' section of the Truth in Lending Disclosure," which in this case is the tractor. Any accessions to the tractor were also properly repossessed because they became part of "the Property" when they were attached to or installed in the tractor.

defendant instead argues that its actions regarding the tank and the sprayer were lawful regardless of whether these items fall under ¶ 1 and ¶ 9. Contrary to this argument, if the tank and the sprayer are covered by ¶ 9, they are not subject to repossession and sale, and, viewing the evidence in a light most favorable to plaintiff, at a minimum, plaintiff could maintain a conversion claim based on defendant's refusal to return these items.[8]

More specifically, reasonable minds could conclude that the tank and the sprayer were not accessions, but separate items with their own identities that could be readily detached without harming the tractor. Indeed, one of the things that is troubling in this case is that defendant disconnected the sprayer from the tractor before transporting the tractor, and yet defendant also loaded the unattached sprayer onto a truck and took it to defendant's place of business. Admittedly, by the time defendant removed the sprayer, the tractor had been driven off plaintiff's property and down the road, and from this it could be concluded that the repossession had already occurred when the sprayer was removed. See *Clark*, 889 F Supp at 547 ("Once a repossession agent has gained sufficient dominion over

[8] On appeal, defendant argues that plaintiff may not challenge defendant's postrepossession conduct on appeal—i.e., defendant's refusal to return the items—because plaintiff did not raise the issue in the trial court. Contrary to this argument, in the trial court, plaintiff consistently maintained that the items were not accessions and that defendant's actions—taking the items, refusing to return them, and posting them for sale—constituted conversion. These issues are properly before this Court. Defendant also argues that plaintiff has attempted to improperly expand the record. While it is true that a litigant may not expand the record on appeal, *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002), defendant does not identify any evidence cited by plaintiff that is not part of lower-court record, and we see no merit to defendant's argument.

collateral to control it, the repossession has been completed.") (quotation marks and citation omitted). But even if the sprayer and the tank could be taken incidentally to the repossession of the tractor, under ¶ 9, defendant had an obligation to try to return the items or to make the items available for plaintiff to claim. Rather than drive the sprayer to its place of business, defendant could have returned the unattached sprayer to plaintiff's property. On the facts of this case, reasonable minds could conclude that defendant wrongfully exercised dominion over plaintiff's property by taking the sprayer rather than returning it to plaintiff. Moreover, by all accounts, plaintiff contacted defendant on numerous occasions demanding the return of his property, and yet defendant refused to return anything.[9]

Rather than return the items, defendant reattached the sprayer to the tractor and posted a picture of the

[9] On appeal, defendant contends that there is no evidence that plaintiff specifically demanded the return of the sprayer and the tank. This argument is legally flawed because, under the agreement, defendant had to try to return those items to plaintiff or to make those items available for plaintiff to claim. The agreement says nothing that would require plaintiff to make a demand for the return of these items. In any event, as a factual matter, among other evidence demonstrating plaintiff's repeated demands for the return of his property, defendant specifically admitted, in response to requests for admissions, that plaintiff attempted to have the sprayer and the tank returned to him as follows:

> Request for Admission 7: Admit Plaintiff attempted to have the implements returned to him after they were removed from his place of business.
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> ANSWER: Defendant objects to this Request because the term "farm implements" is vague, ambiguous, and subject to multiple meanings. In an effort to be responsive, without waiving the prior objection(s), and to the extent that "farm implements" means the sprayer and tank that were affixed to the John Deere tractor at the time of repossession, this Request is ADMITTED. [Boldface removed.]

tractor—with the sprayer and the tank attached—as a featured item in an upcoming auction. Only after plaintiff resolved his loan problem with Kellogg did defendant release the sprayer and the tank to plaintiff, and by that time, plaintiff had been deprived of the use of the items for about a month. Although defendant emphasizes that the items were eventually returned, this does not bar plaintiff's claims. See *Baxter v Woodward*, 191 Mich 379, 385-386; 158 NW 137 (1916). To the contrary, plaintiff may still maintain a claim for conversion, and plaintiff can recover damages for the reasonable value for the loss of use during the period that the items were unlawfully kept from plaintiff. See *Maycroft*, 209 Mich at 192; *Central Transp, Inc*, 139 Mich App at 546; 18 Am Jur 2d, Conversion, § 136, pp 244-245. In sum, there is no merit to defendant's assertion that its actions were lawful regardless of whether the tank and the sprayer were accessions, and defendant was not entitled to summary disposition on this basis. Instead, questions of fact remain as to whether the items were accessions and whether defendant's conduct regarding the items was lawful. See *Lakeside Resort Corp*, 274 Mich at 432; *Kane*, 93 Mich at 490. Accordingly, the trial court erred by granting defendant's motion for summary disposition.

Reversed and remanded for further proceedings. We do not retain jurisdiction. Having prevailed in full, plaintiff may tax costs under MCR 7.219.

HOEKSTRA, P.J., and MURPHY and MARKEY, JJ., concurred.

In re HORTON ESTATE

Docket No. 339737. Submitted July 11, 2018, at Grand Rapids. Decided July 17, 2018, at 9:20 a.m.

Guardianship and Alternatives, Inc. (GAI), court-appointed conservator for decedent Duane F. Horton II, filed a petition for probate and appointment of a personal representative of decedent's estate in the Berrien County Probate Court, nominating GAI to serve as the personal representative. GAI asserted that an electronic document purportedly left by decedent shortly before he committed suicide qualified as his will. Decedent's mother, Lanora Jones, filed a competing petition, nominating herself to serve as the estate's personal representative. Jones asserted that decedent died intestate and that she was decedent's sole heir. After an evidentiary hearing, the probate court, Gary J. Bruce, J., concluded that GAI had presented sufficient evidence that decedent intended the electronic note to constitute his will and that the document was therefore a valid will under the Estates and Protected Individuals Code, MCL 700.1101 *et seq*. Jones appealed.

The Court of Appeals *held*:

The right to make a disposition of property by means of a will is entirely statutory. MCL 700.2502(1) sets forth the specific formalities that are generally required to execute a valid will. However, as expressly stated in MCL 700.2502(1), there are several exceptions to these formal requirements, including an exception for holographic wills under MCL 700.2502(2) and an exception for other writings intended as wills under MCL 700.2503. Any document or writing added upon a document may be deemed a valid will under MCL 700.2503 if the document's proponent establishes by clear and convincing evidence that the decedent intended the document to constitute his or her will, even if the document does not meet the requirements of MCL 700.2502. MCL 700.2503 is an independent exception to the formalities required under MCL 700.2502(1), and MCL 700.2503 does not require a decedent to satisfy—or to attempt to satisfy—any of the requirements for a holographic will under MCL 700.2502(2). Further, under MCL 700.2502(3), a court may consider extrinsic

evidence to discern a decedent's intent. In this case, the trial court did not err by determining that decedent intended for the electronic document in question to constitute his will. The document expressed decedent's testamentary intent when it was written with decedent's death in mind and clearly dictated the distribution of his property. The extrinsic evidence also supported this conclusion. Specifically, a handwritten journal entry directed the reader to an electronic, final "farewell." Decedent left the journal and his phone containing the electronic note in his room; he then left the home and committed suicide. The fact that decedent wrote a note providing for the disposition of his property in anticipation of his impending death supports the conclusion that it was a final document intended to govern the disposition of his property after his death. Overall, considering both the document itself and the extrinsic evidence submitted at the hearing, the trial court did not err by concluding that GAI presented clear and convincing evidence that decedent intended the electronic note to constitute his will, and thus the document constituted a valid will under MCL 700.2503.

Affirmed.

WILLS — ESTATES AND PROTECTED INDIVIDUALS CODE — FORMAL REQUIREMENTS.

Under MCL 700.2503, a document may be deemed a valid will under the Estates and Protected Individuals Code, MCL 700.1101 *et seq*., even if the document does not meet the formal requirements of MCL 700.2502(1) or (2) if the document's proponent establishes by clear and convincing evidence that the decedent intended it to constitute his or her will.

Willis Law (by *Samuel R. Gilbertson*) for Lanora Jones.

Kotz Sangster Wysocki PC (by *John R. Colip* and *Thomas J. Vitale)* for Guardianship and Alternatives, Inc.

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

PER CURIAM. Will contestant Lanora Jones appeals as of right the order of the Berrien County Probate Court recognizing an electronic document as the valid will of her son, Duane Francis Horton II. Because the

trial court did not err by concluding that Guardianship and Alternatives, Inc. (GAI) established by clear and convincing evidence that decedent intended his electronic note to constitute his will, we affirm.

The decedent, Duane Francis Horton II, committed suicide in December 2015 at the age of 21. Before he committed suicide, decedent left an undated, handwritten journal entry. There is no dispute that the journal entry is in decedent's handwriting. The journal entry stated:

> I am truly sorry about this . . . My final note, my farewell is on my phone. The app should be open. If not look on evernote, "Last Note[.]"

The journal entry also provided an e-mail address and password for Evernote.

The "farewell" or "last note" referred to in decedent's journal entry was a typed document that existed only in electronic form. Decedent's full name was typed at the end of the document. No portion of the document was in decedent's handwriting. The document contained apologies and personal sentiments directed to specific individuals, religious comments, requests relating to his funeral arrangements, and many self-deprecating comments. The document also contained one full paragraph regarding the distribution of decedent's property after his death:

> Have my uncle go through my stuff, pick out the stuff that belonged to my dad and/or grandma, and take it. If there is something he doesn't want, feel free to keep it and do with it what you will. My guns (aside from the shotgun that belonged to my dad) are your's to do with what you will. Make sure my car goes to Jody if at all possible. If at all possible, make sure that my trust fund goes to my half-sister Shella, and only her. Not my mother. All of my other stuff is you're do whatever you want with. I do ask

> that anything you well, you give 10% of the money to the church, 50% to my sister Shella, and the remaining 40% is your's to do whatever you want with.

In addition, in a paragraph addressed directly to decedent's uncle, the note contained the following statement: "Anything that I have that belonged to either Dad, or Grandma, is your's to claim and do whatever you want with. If there is anything that you don't want, please make sure Shane and Kara McLean get it." In a paragraph addressed to his half-sister, Shella, decedent also stated that "all" of his "money" was hers.

During decedent's lifetime, he was subject to a conservatorship, and GAI served as his court-appointed conservator. GAI filed a petition for probate and appointment of a personal representative, nominating itself to serve as the personal representative of decedent's estate. GAI maintained that decedent's electronic "farewell" note qualified as decedent's will. Jones filed a competing petition for probate and appointment of a personal representative in which she nominated herself to serve as the personal representative of decedent's estate. In that petition, Jones alleged that decedent died intestate and that she was decedent's sole heir. After an evidentiary hearing involving testimony from several witnesses, the probate court concluded that GAI presented clear and convincing evidence that decedent's electronic note was intended by decedent to constitute his will. Therefore, the probate court recognized the document as a valid will under MCL 700.2503. Jones now appeals as of right.

On appeal, Jones argues that the probate court erred by recognizing decedent's electronic note as a will under MCL 700.2503. Jones characterizes decedent's note as an attempt to make a holographic will under

MCL 700.2502(2), and Jones asserts that, while MCL 700.2503 allows a court to overlook minor, technical deficiencies in a will, it cannot be used to create a will when the document in question meets none of the requirements for a holographic will. Alternatively, as a factual matter, Jones argues that GAI failed to offer clear and convincing evidence that decedent intended the electronic note in this case to constitute his will as required by MCL 700.2503. We disagree.

I. STANDARD OF REVIEW AND RULES OF STATUTORY CONSTRUCTION

We review de novo the interpretation of statutes. *In re Reisman Estate*, 266 Mich App 522, 526; 702 NW2d 658 (2005). The interpretation of the language used in a will is also reviewed de novo as a question of law. *In re Bem Estate*, 247 Mich App 427, 433; 637 NW2d 506 (2001). "We review the probate court's factual findings for clear error." *In re Koehler Estate*, 314 Mich App 667, 673-674; 888 NW2d 432 (2016). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *Id*. at 674 (quotation marks and citation omitted).

Regarding issues of statutory construction, our Supreme Court has explained:

> The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. To do so, we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written. In reviewing the statute's language, every word should be given meaning, and we should 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) (citations omitted).]

II. ANALYSIS

"The right to make a disposition of property by means of a will is entirely statutory." *In re Flury Estate*, 218 Mich App 211, 215; 554 NW2d 39 (1996), mod on other grounds 456 Mich 869 (1997). The Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., governs wills in Michigan. The provisions in EPIC must "be liberally construed and applied to promote its underlying purposes and policies," MCL 700.1201, including to "discover and make effective a decedent's intent in distribution of the decedent's property," MCL 700.1201(b).

In a contested-will case, the proponent of a will bears "the burden of establishing prima facie proof of due execution . . . ." MCL 700.3407(1)(b). Generally, to be valid, a will must be executed in compliance with MCL 700.2502, which provides:

> (1) Except as provided in subsection (2) and in sections 2503, 2506, and 2513, a will is valid only if it is all of the following:
>
> (a) In writing.
>
> (b) Signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction.
>
> (c) Signed by at least 2 individuals, each of whom signed within a reasonable time after he or she witnessed either the signing of the will as described in subdivision (b) or the testator's acknowledgment of that signature or acknowledgment of the will.
>
> (2) A will that does not comply with subsection (1) is valid as a holographic will, whether or not witnessed, if it is dated, and if the testator's signature and the document's material portions are in the testator's handwriting.
>
> (3) Intent that the document constitutes a testator's will can be established by extrinsic evidence, including, for

> a holographic will, portions of the document that are not in the testator's handwriting.

As set forth in MCL 700.2502(1), there are specific formalities that are generally required to execute a valid will. However, as expressly stated in MCL 700.2502(1), there are several exceptions to these formalities, including less formal holographic wills allowed under MCL 700.2502(2) and the exception created by MCL 700.2503.[1] MCL 700.2503 states:

> Although a document or writing added upon a document was not executed in compliance with section 2502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute any of the following:
>
> (a) The decedent's will.
>
> (b) A partial or complete revocation of the decedent's will.
>
> (c) An addition to or an alteration of the decedent's will.
>
> (d) A partial or complete revival of the decedent's formerly revoked will or of a formerly revoked portion of the decedent's will.

"The plain language of MCL 700.2503 establishes that it permits the probate of a will that does not meet the requirements of MCL 700.2502." *In re Attia Estate*, 317 Mich App 705, 711; 895 NW2d 564 (2016). Indeed, other than requiring "a document or writing added upon a document," there are no particular formalities necessary to create a valid will under MCL 700.2503.[2]

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[1] MCL 700.2502(1) also recognizes exceptions as set forth in MCL 700.2506 and MCL 700.2513. These provisions do not apply in this case.

[2] That is not to say that formalities, or lack thereof, are irrelevant in a will contest involving MCL 700.2503. Formalities are considered indicative of intent. 1 Restatement Property, 3d, Wills and Other

Essentially, under MCL 700.2503, *any* document or writing can constitute a valid will provided that "the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute" the decedent's will. MCL 700.2503. In considering the decedent's intent, "EPIC permits the admission of extrinsic evidence in order to determine whether the decedent intended a document to constitute his or her will." *In re Attia Estate*, 317 Mich App at 709. See also MCL 700.2502(3).

In this case, it is undisputed that decedent's typed, electronic note, which was unwitnessed and undated, does not meet either the formal requirements for a will under MCL 700.2502(1) or the requirements of a holographic will under MCL 700.2502(2). Instead, the validity of the will in this case turns on the applicability of MCL 700.2503 and whether the trial court erred by concluding that GAI presented clear and convincing evidence that decedent intended the electronic document to constitute his will. To properly analyze this question, we must first briefly address Jones's characterization of decedent's note as a failed holographic will. In particular, contrary to Jones's attempt to conflate MCL 700.2503 and the holographic-will provision, MCL 700.2503 is an independent exception to the formalities required under MCL 700.2502(1), and MCL 700.2503 does not require a decedent to satisfy—or attempt to satisfy—any of the requirements for a

Donative Transfers, § 3.3, comment *a*. Consequently, an adherence to some formalities, or conversely the extent of the departure from formalities, can be considered when determining whether a document was intended to be a will. See Uniform Probate Code, § 2-503, comment (1997) ("The larger the departure from Section 2-502 formality, the harder it will be to satisfy the court that the instrument reflects the testator's intent.").

holographic will under MCL 700.2502(2).[3] To require a testator to meet any specific formalities notwithstanding MCL 700.2503 "would render MCL 700.2503 inapplicable to the testamentary formalities in MCL 700.2502, which is contrary to the plain language of the statute." *In re Attia Estate*, 317 Mich App at 711. Instead, under MCL 700.2503, while the proposed will must be a document or writing, there are no specific formalities required for execution of the document, and any document or writing can constitute a will, provided that the proponent of the will presents clear and convincing evidence to establish that the decedent intended the document to constitute his or her will. See MCL 700.2503(a).

Turning to the facts of this case, we find no error in the probate court's determination that decedent intended for the electronic document in question to constitute his will. See MCL 700.2503(a). In basic terms, "[a] will is said to be a declaration of a man's mind as to the manner in which he would have his property or estate disposed of after his death." *Byrne v Hume*, 84 Mich 185, 192; 47 NW 679 (1890). A will need not be written in a particular form or use any particular words; for example, a letter or other document, such as a deed, can constitute a will. See, e.g., *In re*

[3] Jones argues on appeal that the holographic-will statute will be rendered meaningless if MCL 700.2503 can be used to circumvent the necessity of all requirements for a formal will under MCL 700.2502(1) as well as all requirements for a holographic will under MCL 700.2502(2). Contrary to this argument, the requirements for a holographic will under MCL 700.2502(2), like the more formal requirements for a will under MCL 700.2502(1), remain a viable—and perhaps more straightforward—means for expressing intent to create a will. See Restatement, § 3.3, comment *a*. MCL 700.2503 simply makes plain that other evidence clearly and convincingly demonstrating intent to adopt a will should not be ignored simply because the decedent failed to comply with formalities. See Restatement, § 3.3, comment *b*.

Merritt's Estate, 286 Mich 83, 89; 281 NW 546 (1938); *In re Dowell's Estate*, 152 Mich 194, 196; 115 NW 972 (1908); *In re High*, 2 Doug 515, 521 (1847). However, in order for a document to be considered a will it must evince testamentary intent, meaning that it must operate to transfer property "only upon and by reason of the death of the maker . . . ." *In re Boucher's Estate*, 329 Mich 569, 571; 46 NW2d 577 (1951). Moreover, the document must be final in nature; that is, "[m]ere drafts" or "a mere unexecuted intention to leave by will is of no effect." *In re Cosgrove's Estate*, 290 Mich 258, 262; 287 NW 456 (1939) (quotation marks and citation omitted). Ultimately, in deciding whether a person intends a document to constitute a will, the question is whether the person intended the document to govern the posthumous distribution of his or her property. See *In re Fowle's Estate*, 292 Mich 500, 504; 290 NW 883 (1940). As noted, whether the decedent intended a document to constitute a will may be shown by extrinsic evidence. *In re Attia Estate*, 317 Mich App at 709; MCL 700.2502(3).

In this case, to determine whether decedent intended his farewell note to constitute a will, the probate court considered the contents of the electronic document[4] as well as extrinsic evidence relating to the circumstances surrounding decedent's death and the discovery of his suicide note as described by witnesses

[4] On appeal, Jones argues that the probate court erred when it accepted a copy of the purported will into evidence as opposed to requiring an original of the document. However, Jones waived this argument in the probate court by expressly stating that she had no objections to the admission of the copy of the document into evidence. See *Landin v Healthsource Saginaw, Inc*, 305 Mich App 519, 545; 854 NW2d 152 (2014). "A party who waives a right is precluded from seeking appellate review based on a denial of that right because waiver eliminates any error." *The Cadle Co v Kentwood*, 285 Mich App 240, 255; 776 NW2d 145 (2009). Therefore, we decline to address this issue.

at the evidentiary hearing. After detailing the evidence presented and assessing witness credibility, the probate court concluded that the evidence "was unrebutted that the deceased hand wrote a note directing the reader to his cell phone with specific instructions as to how to access a document he had written electronically in anticipation of his imminent death by his own hands."[5] Regarding the language of the document itself, the probate court determined that the document unequivocally set forth decedent's wishes regarding the disposition of his property. Finding that decedent clearly and unambiguously expressed his testamentary intent in the electronic document in anticipation of his impending death, the probate court concluded that decedent intended the electronic document to constitute his will.

Reviewing the language of the document de novo, *In re Bem Estate*, 247 Mich App at 433, we agree with the trial court's conclusion that the document expresses

[5] Jones argues that GAI did not present testimony that anyone saw decedent type the suicide note and that, because it was merely in electronic form, someone else could have typed or altered the suicide note. The probate court rejected Jones's argument that the document had been written or altered by someone other than decedent as mere speculation without supporting evidence. Jones does not dispute that the handwritten journal entry was in decedent's handwriting. That journal entry directed its finder to decedent's cell phone. One of the individuals who found and read the electronic note on decedent's cell phone identified the contents of the note at the hearing. She indicated that she "know[s]" what the notes "says" and that she would "[a]bsolutely" recognize if the note had been changed. The probate court expressly found this witness's testimony to be credible. Deferring to the trial court's assessment of credibility, *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993), we conclude that the evidence shows that decedent wrote the electronic note and that it was not altered by anyone else. Contrary to Jones's arguments, the probate court did not clearly err by concluding that the electronic note was written by decedent.

decedent's testamentary intent. On the face of the document, it is apparent that the document was written with decedent's death in mind; indeed, the document is clearly intended to be read after decedent's death. The note contains apologies and explanations for his suicide, comments relating to decedent's views on God and the afterlife, final farewells and advice to loved ones and friends, and it contains requests regarding his funeral. In what is clearly a final note to be read upon decedent's death, the document then clearly dictates the distribution of his property after his death. Cf. *In re High*, 2 Doug at 517-519, 521 (finding that a letter offering parting words to family members, discussing hopes for salvation, and disposing of property after death was a will); *In re Fowle's Estate*, 292 Mich at 504 (concluding that an instrument disposing of property and making provision for burial was a will). Specifically, decedent was clear that he did not want his mother to receive the remains of the trust fund. Decedent stated that the money in his trust fund was for his half-sister and that he wanted his uncle to receive any of his personal belongings that came from his father and grandmother. He left his car to "Jody." All of decedent's "other stuff" was left to the couple with whom decedent had been living.[6] In short, the

[6] On appeal, Jones argues that decedent's suicide note contains precatory language, and, relying on *Crisp v Anderson*, 204 Mich 35, 39; 169 NW 855 (1918), Jones argues that language such as "if at all possible" is insufficient to demonstrate testamentary intent. The probate court rejected this argument, correctly recognizing that decedent used unequivocal language when he used the phrase "[n]ot my mother" and when he stated to his half-sister that "all of my money . . . is yours." Decedent also clearly stated that anything belonging to his grandmother or father was to be given to his uncle, that his car was for "Jody," and that all decedent's "other stuff" was for the couple with whom he had been living. In short, contrary to Jones's argument, decedent clearly provided for the disposition of his property following his death.

note is "distinctly testamentary in character," *In re Fowle's Estate*, 292 Mich at 503, and the document itself provides support for the conclusion that decedent intended for the note to constitute his will.[7]

Extrinsic evidence may also be used to discern a decedent's intent, *In re Attia Estate*, 317 Mich App at 709, and considering the evidence presented at the hearing, we see no clear error in the probate court's findings of fact regarding the circumstances surrounding decedent's death and decedent's intent for the electronic note to constitute his will. In this regard, as detailed by the probate court, the evidence showed that decedent's handwritten journal entry directed the reader to an electronic, final "farewell." Decedent left his journal and his phone containing the electronic note in his room; he then left the home and committed suicide. Given the surrounding circumstances, although the note was undated, the probate court reasonably concluded that the electronic note was written "in anticipation of [decedent's] imminent death by his own hands." The fact that decedent wrote a note providing for disposition of his property in anticipation of his impending death supports the conclusion that it was a final document to govern the disposition of decedent's property after his death. Cf. *In re High*, 2 Doug at 517-519, 521. Moreover, the evidence showed

[7] In disputing the note's validity as a will, Jones specifically emphasizes that the electronic note does not contain a handwritten signature, and Jones asserts that the document should simply be viewed as an informal "note" rather than a "will." However, as discussed, the formalities of MCL 700.2502 are not required for a valid will under MCL 700.2503. See *In re Attia Estate*, 317 Mich App at 711. Moreover, we observe that, although the electronic note does not contain a handwritten signature, decedent ended the document with the more formal use of his full name—"Duane F. Horton II"—which added an element of solemnity to the document, supporting the conclusion that the document was intended as more than a casual note.

that decedent had, at best, a strained relationship with his mother, and the probate court reasoned that Jones's testimony regarding her strained relationship with decedent "actually provides an understanding of the intent of [decedent] when he drafted the cell phone document." In other words, the nature of decedent's relationship with his mother, when read in conjunction with his clear directive that none of his money go to his mother, supports the conclusion that decedent intended for the electronic note to govern the posthumous distribution of his property to ensure that his mother, who would otherwise be his heir, did not inherit from him. We see no clear error in the probate court's factual findings, *In re Koehler Estate*, 314 Mich App at 673-674, and the extrinsic evidence in this case strongly supports the conclusion that decedent intended the electronic note to constitute his will.

Overall, considering both the document itself and the extrinsic evidence submitted at the hearing, the probate court did not err by concluding that GAI presented clear and convincing evidence that decedent intended the electronic note to constitute his will, and thus, the document constitutes a valid will under MCL 700.2503.

Affirmed. Having prevailed in full, GAI may tax costs pursuant to MCR 7.219.

HOEKSTRA, P.J., and MURPHY and MARKEY, JJ., concurred.

PEOPLE v MANSOUR

Docket No. 342316. Submitted July 11, 2018, at Detroit. Decided July 19, 2018, at 9:00 a.m.

Vanessa A. Mansour was charged in the Oakland Circuit Court with one count of delivery or manufacture of 20 marijuana plants or more but fewer than 200 marijuana plants, MCL 333.7401(2)(d)(*ii*), one count of delivery or manufacture of marijuana, MCL 333.7401(2)(d)(*iii*), and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. After receiving a tip, police officers arrived at defendant's home and asked for consent to search the basement. Defendant asked to contact her attorney; defendant's attorney arrived an hour later and gave the officers consent to search the home. A search of the basement revealed 126 marijuana plants, approximately 550 grams of marijuana buds on a drying rack, digital scales, grow lights, and a watering system. The officers also discovered a handgun in a bedroom safe. Defendant was charged as stated and subsequently moved to examine the evidence that had been seized. Defendant requested that an expert conduct an analysis to determine the weight, usability, and moisture content of the marijuana and to determine whether the amount defendant possessed was in compliance with the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. The court granted defendant's motion. Defendant then moved to assert an affirmative defense, arguing that she was a medical marijuana patient entitled to immunity under § 4 of the MMMA, MCL 333.26424, as well as a defense under § 8 of the MMMA, MCL 333.26428. Defendant also moved to dismiss the count of possession with intent to deliver marijuana and the associated felony-firearm count under § 4 of the MMMA; defendant argued that the 550 grams of marijuana was not "usable marihuana" as that term is defined under the MMMA because it was drying, not dried, and therefore that it must be excluded when considering defendant's claim of immunity under § 4 of the MMMA. The prosecution argued that the Court of Appeals' interpretation of § 4 of the MMMA in *People v Carruthers*, 301 Mich App 590 (2013), was controlling and that the holding of *Carruthers* required the trial court to consider the total amount of marijuana

possessed by defendant, not just the total amount of usable marijuana. The court, Michael D. Warren, Jr., J., agreed with the prosecution and denied defendant's motion to dismiss. Defendant appealed.

The Court of Appeals *held*:

At the time of the search of defendant's home, § 4(a) of the MMMA, MCL 333.26424(a), as amended by 2012 PA 512, provided, in relevant part, that a qualifying patient shall not be subject to prosecution for the medical use of marijuana in accordance with the MMMA, provided that the qualifying patient possesses an amount of marijuana that does not exceed 2.5 ounces of usable marijuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marijuana for the qualifying patient, 12 marijuana plants kept in an enclosed, locked facility. In *Carruthers*, the Court of Appeals held that consideration must be given to the total amount of marijuana possessed by the defendant, not just the total amount of usable marijuana, and provided a two-prong analysis. Under the analysis, the question of whether a possessor of marijuana possesses an allowed quantity of usable marijuana is only the beginning of the relevant inquiry under § 4. A further pertinent and necessary inquiry, for purposes of a § 4 analysis, is whether that person possesses any quantity of marijuana that does not constitute usable marijuana under the term-of-art definition of the MMMA. If so, and without regard to the quantity of usable marijuana possessed, the person then does not possess an amount of marijuana that does not exceed 2.5 ounces of usable marijuana under MCL 333.26424(a) and (b)(1). Instead, he or she then possesses an amount of marijuana that is in excess of the permitted amount of usable marijuana. In other words, the language establishing limited immunity in § 4 of the MMMA expressly conditions that immunity on the person possessing no amount of marijuana that does not qualify as usable marijuana under the applicable definitions. Following the Court of Appeals' decision in *Carruthers*, the Legislature amended the MMMA in 2016 PA 283, effective December 20, 2016. Section 4(a) of the MMMA currently provides a qualifying patient with immunity if the patient "possesses an amount of marihuana that does not exceed a combined total of 2.5 ounces of usable marihuana and usable marihuana equivalents . . . ." Therefore, the Legislature retained the previously existing language of that section, including interacting references to the separately defined terms "marihuana" and "usable marihuana," while adding a provision for "usable marihuana equivalents" and for combining the amounts

of usable marijuana and usable marijuana equivalents. Following these legislative amendments, the Court of Appeals decided *People v Manuel*, 319 Mich App 291 (2017), which held that the trial court did not clearly err when it determined that marijuana that was drying, not dried, was not usable under the statutory definition. However, neither the Court of Appeals in *Manuel* nor the trial court in this case ever reached the second prong of the *Carruthers* analysis. Although the MMMA was amended after *Carruthers* to add certain protections relative to the medical use of usable marijuana equivalents, the statutory language interpreted in *Carruthers* remains the same in all pertinent respects. Accordingly, *Carruthers* was binding with respect to that statutory interpretation. In this case, defendant possessed a quantity of marijuana that, according to defendant's own argument, did not constitute usable marijuana. Consequently, under the plain language of the MMMA and *Carruthers*, defendant was not entitled to § 4 immunity. The trial court properly denied defendant's motion to dismiss under § 4 of the MMMA.

Affirmed.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Danielle Walton*, Assistant Prosecuting Attorney, for the people.

Rockind Law (by *Neil Rockind* and *Colin Daniels*) for defendant.

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

BOONSTRA, J. Defendant appeals by leave granted[1] the trial court's order denying her motion to dismiss under § 4 of the Michigan Medical Marihuana[2] Act (MMMA), MCL 333.26421 *et seq*. We affirm.

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[1] *People v Mansour*, unpublished order of the Court of Appeals, entered April 5, 2018 (Docket No. 342316).

[2] " '[B]y convention this Court uses the more common spelling "marijuana" in its opinions.' " *People v Carruthers*, 301 Mich App 590, 593 n 1;

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Acting on a tip from road patrol officers on June 10, 2016, Troy Police Detective Daniel Langbeen and other members of the Oakland County Narcotics Enforcement Team arrived at a "ranch style home" located in Troy. After arriving at the home, Langbeen spoke with defendant, who told him that she lived there with "her husband, and her two children." Langbeen then asked defendant "for consent to search the basement," testifying that "it was obvious to [him] at that point that marijuana—there was marijuana growin' down there." Defendant replied that "she wasn't sure," and she told Detective Langbeen that she wanted to "contact her attorney." Approximately one hour later, defendant's attorney, Barton Morris, arrived at defendant's home; he subsequently told Langbeen that "they had consent to search the home."

The search revealed that the basement contained an "indoor marijuana grow operation." Langbeen testified that there were "126 plants located in three different rooms along with approximately 550 grams of marijuana buds on a drying rack." Additionally, "[t]here were two digital scales, Ziploc bags commonly used to package narcotics for sale, grow lights, and a watering system." Morris subsequently gave Langbeen permission to search the rest of the house; a "Glock 19 9mm handgun" was discovered in a bedroom safe that was unlocked by defendant.

In August 2016, defendant was charged with one count of delivery or manufacture of 20 marijuana plants or more but fewer than 200 marijuana plants, MCL 333.7401(2)(d)(*ii*), and one count of delivery or

837 NW2d 16 (2013), quoting *People v Jones*, 301 Mich App 566, 569 n 1; 837 NW2d 7 (2013). Therefore, we will refer to "marijuana" by that spelling except when quoting from the MMMA.

manufacture of marijuana, MCL 333.7401(2)(d)(*iii*). In October 2017, defendant was additionally charged with two corresponding counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. On November 13, 2017, defendant filed a motion "to examine evidence." Defendant sought to examine the marijuana and marijuana plants seized from her home so that Dr. Frank Telewski[3] could conduct "scientific analyses" to determine "the weight, usability, and moisture content of said marijuana; and whether the amount possessed was in compliance with the [MMMA]." The trial court granted the motion.

On January 8, 2018, defendant filed an assertion of affirmative defense, in which she argued that she was a medical marijuana patient entitled to immunity under § 4 of the MMMA, MCL 333.26424, as well as a defense under § 8 of the MMMA, MCL 333.26428. Defendant also moved to dismiss the count of possession with intent to deliver marijuana and the associated felony-firearm count under § 4 of the MMMA. Defendant's motion made it clear that the "126 marijuana plants" seized from her home were "not being challenged" in that motion; rather, defendant's motion "focus[ed] on the '550 grams' of marijuana" that were on "drying racks" in defendant's basement. Relying on *People v Manuel*, 319 Mich App 291; 901 NW2d 118 (2017), defendant argued that the 550 grams of marijuana was "unusable" because it was "drying," and therefore, the unusable marijuana "must be excluded" when considering defendant's claim of immunity under § 4 of the MMMA.[4]

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[3] Telewski holds a Ph.D. in biology.

[4] In order to ascertain the amount of "usable marijuana," as contemplated by the statute, defendant relied, in part, on an analysis conducted by Telewski. Telewski indicated that he examined the marijuana on

The prosecution argued that this Court's interpretation of § 4 of the MMMA in *People v Carruthers*, 301 Mich App 590, 609; 837 NW2d 16 (2013), was controlling and that the holding of *Carruthers* required the trial court to consider the total amount of marijuana possessed by defendant, not just the total amount of usable marijuana. The trial court agreed with the prosecution, finding *Carruthers* to be "more comprehensive" than *Manuel*. Additionally, the trial court observed that it was "confronted with somewhat contradictory binding cases" and thus would "proceed to follow the first case," i.e., *Carruthers*, rather than *Manuel*. Therefore, the trial court denied defendant's motion to dismiss. This appeal followed.

II. STANDARD OF REVIEW

"We review for an abuse of discretion a circuit court's ruling on a motion to dismiss but review de novo the circuit court's rulings on underlying questions regarding the interpretation of the MMMA, which the people enacted by initiative in November 2008." *People v Bylsma*, 493 Mich 17, 26; 825 NW2d 543 (2012) (citations omitted); *People v Hartwick*, 498 Mich 192, 215; 870 NW2d 37 (2015) ("[Q]uestions of law surrounding the grant or denial of § 4 immunity are reviewed de novo."). "An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes." *People v Daniels*, 311 Mich App 257, 265;

December 21, 2017, weighed it at 484.5 grams, and therefore opined that the marijuana was not "dried" at the time of its seizure because it had lost 12% of its weight (through a loss of moisture) during the 18 months since the marijuana was seized. He further noted the presence of mold on the marijuana, which also indicated that the marijuana was not "dried" when it was seized. Telewski therefore opined that the marijuana was not "usable marijuana" as that term is defined in the MMMA.

874 NW2d 732 (2015). "We review questions of statutory interpretation de novo." *Carruthers*, 301 Mich App at 596.

III. ANALYSIS

On appeal, defendant argues that the trial court erred when it denied her motion to dismiss on the basis of this Court's ruling in *Carruthers*. Rather, defendant argues, *Manuel* controls.

In *People v Kolanek*, 491 Mich 382, 394; 817 NW2d 528 (2012), our Supreme Court explained:

> The MMMA does *not* create a general right for individuals to use and possess marijuana in Michigan. Possession, manufacture, and delivery of marijuana remain punishable offenses under Michigan law. Rather, the MMMA's protections are limited to individuals suffering from serious or debilitating medical conditions or symptoms, to the extent that the individuals' marijuana use "is carried out in accordance with the provisions of [the MMMA]." [Citation omitted; alteration in original.]

In *Hartwick*, the Court further explained:

> A defendant may claim entitlement to immunity for any or all charged offenses. Once a claim of immunity is made, the trial court must conduct an evidentiary hearing to factually determine whether, for each claim of immunity, the defendant has proved each element required for immunity. These elements consist of whether, at the time of the charged offense, the defendant:
>
> (1) was issued and possessed a valid registry identification card,
>
> (2) complied with the requisite volume limitations of § 4(a) and § 4(b),
>
> (3) stored any marijuana plants in an enclosed, locked facility, and

> (4) was engaged in the medical use of marijuana. [*Hartwick*, 498 Mich at 217-218 (citation omitted).]

At the time of the search of defendant's home, § 4(a) of the MMMA provided, in relevant part:

> A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, *provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana*, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount. [MCL 333.26424(a), as amended by 2012 PA 512 (emphasis added).][5]

Similarly, at the time of the search of defendant's home, MCL 333.26423(k), as amended by 2012 PA 512, provided: " 'Usable marihuana' means the dried leaves and flowers of the marihuana plant, and any mixture or preparation thereof, but does not include the seeds, stalks, and roots of the plant." "Marihuana," however, was separately and more broadly defined as follows:

> "Marihuana" means all parts of the plant Cannabis sativa L., growing or not; the seeds of that plant; the resin extracted from any part of the plant; and every compound,

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[5] Section 4(b) of the MMMA similarly provided protections for a "primary caregiver," but "only if the primary caregiver *possesses an amount of marijuana* that does not exceed . . . *2.5 ounces of usable marihuana* for each qualifying patient . . . ." MCL 333.26424(b), as amended by 2012 PA 512 (emphasis added).

> manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin. Marihuana does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted from those stalks, fiber, oil, or cake, or any sterilized seed of the plant that is incapable of germination. Marihuana does not include industrial hemp grown or cultivated, or both, for research purposes under the industrial hemp research act. [MCL 333.26423(e); MCL 333.7106(4).]

In *Carruthers*, this Court concluded that while the marijuana-infused brownies that the defendant possessed "were not usable marijuana under the MMMA," the defendant was not entitled to immunity under § 4 of the MMMA because both § 4(a) and § 4(b) conditioned immunity "on the qualifying patient's or primary caregiver's possessing 'an amount of *marihuana* that does not exceed . . . 2.5 ounces of *usable marihuana* . . . .' " *Carruthers*, 301 Mich App at 608-609, quoting MCL 333.26424(a) and (b)(1). In *Carruthers*, we went on to state, in pertinent part:

> In short, the question of whether a possessor of marijuana possesses an allowed quantity of usable marijuana is only the beginning of the relevant inquiry under § 4. A further pertinent and necessary inquiry, for purposes of a § 4 analysis, is whether that person possesses *any* quantity of marijuana that does *not* constitute usable marijuana under the term-of-art definition of the MMMA. If so, and without regard to the quantity of usable marijuana possessed, the person then does not possess "an amount of *marihuana* that does not exceed . . . 2.5 ounces of *usable marihuana* . . . ." MCL 333.26424(a) and (b)(1) (emphasis added). Instead, he or she then possesses an amount of marijuana that is in excess of the permitted amount of usable marijuana. In other words, the language establishing limited immunity in § 4 of the MMMA expressly

> conditions that immunity on the person possessing *no* amount of marijuana that does not qualify as usable marijuana under the applicable definitions. [*Carruthers*, 301 Mich App at 610.]

Therefore, this Court concluded that "consideration must be given not only to the amount of usable marijuana that is possessed but, additionally, to the amount of marijuana that is possessed." *Id*. at 609.

Following this Court's decision in *Carruthers*, the Legislature amended the MMMA in 2016 PA 283, effective December 20, 2016. Currently, § 4(a) of the MMMA provides a qualifying patient with immunity if the patient "possesses an amount of marihuana that does not exceed a combined total of 2.5 ounces of usable marihuana and usable marihuana equivalents . . . ." MCL 333.26424(a). In other words, the Legislature retained the previously existing language of § 4(a), including interacting references to the separately defined terms "marihuana" and "usable marihuana," while adding a provision for "usable marihuana equivalents" and for combining the amounts of usable marijuana and usable marijuana equivalents.[6] As explained by the Legislature, the amendments of the MMMA were retroactive with respect to "clarifying the quantities and forms of marihuana for which a person is protected from arrest, precluding an interpretation of 'weight' as aggregate weight, and excluding an added inactive substrate component of a preparation in determining the amount of marihuana, medical mari-

[6] The definition of "usable marihuana" was also amended, and MCL 333.26423(n) now provides: " 'Usable marihuana' means the dried leaves, flowers, plant resin, or extract of the marihuana plant, but does not include the seeds, stalks, and roots of the plant." A definition was also provided for the term "usable marihuana equivalent." MCL 333.26423(*o*).

huana, or usable marihuana that constitutes an offense." 2016 PA 283, enacting § 2.

Following these legislative amendments, this Court decided *Manuel*. In *Manuel*, the defendant was "both a qualifying patient and a primary caregiver for five patients, so he was allowed . . . to possess up to 15 ounces, or approximately 425.24 grams, of usable marijuana under the MMMA." *Manuel*, 319 Mich App at 300. The marijuana he possessed was well in excess of that amount, however. The trial court held that "the marijuana . . . was unusable because it was in 'various stages of drying.' " *Id*. at 298. It therefore ruled "that [the] defendant was entitled to § 4 immunity and dismissed the charges against him." *Id*.

The prosecution appealed, arguing that the record did not support the trial court's conclusion that the marijuana was "in various stages of drying" but rather that it "was dried." The prosecution therefore argued that the marijuana constituted usable marijuana and that because the amount was in excess of the allowed amount of usable marijuana, the defendant was not entitled to § 4 immunity. The defendant disagreed, arguing that the record supported the trial court's conclusion that the marijuana was "drying," not dried, that it was therefore not usable marijuana, and that the defendant was therefore entitled to § 4 immunity. In support of that argument, the defendant called upon the same Dr. Telewski whom defendant called upon in the instant case to testify that the marijuana had decreased in weight because of a loss of moisture.[7]

[7] The parties' respective positions were therefore counter to what one might logically have expected. That is, the prosecution argued that the marijuana in question constituted usable marijuana such that it was subject to the protections of the MMMA so long as it was within allowed quantities. Defendant argued, to the contrary, that the marijuana in question did not constitute usable marijuana, which of course is the type

Perhaps not surprisingly given the manner in which the parties had framed the issues on appeal, this Court in *Manuel* defined the "question" before it as "whether this marijuana was 'usable' for purposes of the MMMA." *Manuel*, 319 Mich App at 301. The Court evaluated the trial court's factual conclusion in that regard under a clear-error standard and held as follows:

> Given Telewski's expert testimony that the weight differential of 127 grams was most likely due to a loss of moisture, and defendant's testimony that the harvested marijuana was in various stages of drying because not all of it had been placed in the tins at the same time and had only been in the tins two to three days, we are not definitely and firmly convinced that the trial court made a mistake when it found that the marijuana was in "various stages of drying" and therefore was not usable under the MMMA. Put simply, the marijuana was "drying," not "dried," and therefore was not usable under the statutory definition. [*Id*. at 303.]

Importantly, however, neither the prosecution nor the defendant in *Manuel* cited *Carruthers*. Nor, perhaps largely for that reason, did this Court in *Manuel* cite *Carruthers*. And, consequently, neither the parties nor this Court in *Manuel* ever reached the second prong of the *Carruthers* analysis:

> In short, the question of whether a possessor of marijuana possesses an allowed quantity of usable marijuana is only the beginning of the relevant inquiry under § 4. A further pertinent and necessary inquiry, for purposes of a § 4 analysis, is whether that person possesses *any* quantity of marijuana that does *not* constitute usable marijuana under the term-of-art definition of the MMMA. If so, and without regard to the quantity of usable marijuana

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of marijuana with respect to which the MMMA provides protections, provided that it is possessed within allowed quantities.

> possessed, the person then does not possess "an amount of *marihuana* that does not exceed . . . 2.5 ounces of *usable marihuana* . . . ." MCL 333.26424(a) and (b)(1) (emphasis added). Instead, he or she then possesses an amount of marijuana that is in excess of the permitted amount of usable marijuana. In other words, the language establishing limited immunity in § 4 of the MMMA expressly conditions that immunity on the person possessing *no* amount of marijuana that does not qualify as usable marijuana under the applicable definitions. [*Carruthers*, 301 Mich App at 610.]

We decline defendant's invitation to ignore the second prong of the *Carruthers* analysis because we are bound to apply it. Although the MMMA was amended after *Carruthers* to add certain protections relative to the medical use of usable marijuana equivalents, the statutory language interpreted in *Carruthers* remains today as it was then in all pertinent respects. *Carruthers* is therefore binding with respect to that statutory interpretation.[8] We therefore reiterate the essential holding of *Carruthers* insofar as it relates to the case before us:

> [T]he language establishing limited immunity in § 4 of the MMMA expressly conditions that immunity on the person

[8] "A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule." MCR 7.215(J)(1). We conclude that there is no conflict between *Carruthers* and *Manuel* because *Manuel* simply did not consider the issue that is before us in this case. *Manuel* decided only whether the marijuana in question was " 'drying,' not 'dried,' " *Manuel*, 319 Mich App at 303, and, therefore, whether it constituted usable marijuana. While *Manuel*'s determination that the trial court's factual finding in that regard was not clear error is binding, *id.*; MCR 7.215(J)(1), we are not bound to repeat *Manuel*'s failure to address the second prong of the *Carruthers* analysis. On that issue, *Carruthers* controls; even if *Carruthers* were not controlling, we agree with and adopt its rationale.

> possessing *no* amount of marijuana that does not qualify as usable marijuana under the applicable definitions. [*Carruthers*, 301 Mich App at 610.]

In this case, defendant possessed a quantity of marijuana that, according to defendant's own argument, did not constitute usable marijuana. Consequently, under the plain language of the MMMA and *Carruthers*, defendant is not entitled to § 4 immunity.[9] The trial court was correct to follow *Carruthers* and to deny defendant's motion to dismiss under § 4 of the MMMA.[10]

Affirmed.

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

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[9] Our determination does not affect in any manner defendant's assertion of, or entitlement to, a defense under § 8 of the MMMA.

[10] We therefore do not reach the prosecution's alternative argument relative to the amended definition of "usable marihuana" as set forth in the MMMA.

MARIK v MARIK

Docket No. 333687. Submitted July 12, 2018, at Detroit. Decided July 24, 2018, at 9:00 a.m.

Plaintiff, Kimberly M. Marik, and defendant, Peter B. Marik, divorced in 2011 and were awarded joint legal and physical custody of their minor children. In 2016, defendant filed a motion in the Macomb Circuit Court, Family Division, to change the school enrollment for the children and to modify parenting time. The court conducted a de novo hearing on June 13, 2016, at which the parties presented their arguments on the request to change the children's school enrollment and the request to modify parenting time. During the hearing, the parties were sworn in and questioned briefly by the trial court. At the conclusion of the hearing, the court, Kathryn A. George, J., denied defendant's motion; however, the court did not expressly address whether there was an established custodial environment, whether the requests would change that environment, or whether the requests weighed in favor of the individual best-interest factors under MCL 722.23. Defendant appealed. The Court of Appeals dismissed the appeal in an unpublished order, entered July 12, 2016, concluding that the Court of Appeals lacked jurisdiction because the postjudgment order denying defendant's request to change the children's school enrollment could not be considered an order affecting the custody of a minor under MCR 7.202(6)(a)(iii) and therefore was not a final order. Defendant moved for reconsideration, which the Court of Appeals denied. Defendant sought leave to appeal in the Supreme Court, and the Supreme Court ordered oral argument on the application. 500 Mich 940 (2017). The Supreme Court issued an order vacating the Court of Appeals' dismissal of defendant's appeal and remanding the case to the Court of Appeals. 501 Mich 918 (2017). On February 23, 2018, the Court of Appeals issued an unpublished order holding that the trial court order was a final order appealable by right, and the appeal continued as an appeal of right.

The Court of Appeals *held*:

1. The Child Custody Act, MCL 722.21 *et seq*., applies to all circuit court child custody disputes and actions, whether original

or incidental to other actions. MCL 722.27(1)(c) provides, in relevant part, that the circuit court may, for the best interests of the child, modify or amend its previous judgments or orders for proper cause shown or because of a change of circumstances; MCL 722.27(1)(c) further provides that the court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interests of the child. When deciding whether the requested modification is in the best interests of the child, the threshold determination is whether an established custodial environment exists. If an established custodial environment exists, the trial court must determine whether the requested change would affect the established custodial environment of the child and, dependent on that outcome, ascertain the proper burden of proof to be employed. If the proposed change alters the established custodial environment, the party seeking the change must demonstrate by clear and convincing evidence that the change is in the child's best interests. If the change does not alter the established custodial environment, then the proponent of the change need only demonstrate by a preponderance of the evidence that the requested change is in the child's best interests. The child's best interests are determined by evaluating the factors listed in MCL 722.23. In this case, the trial court erred by failing to conduct a full evidentiary hearing. The court did not allow the parties the opportunity to fully present evidence on the issue of whether changing the children's school was in their best interests. Instead, the parties' attorneys presented their arguments, plaintiff and defendant were placed under oath, and the trial court asked them questions. Because the court failed to conduct a full evidentiary hearing, remand was required. Furthermore, the court failed to determine whether an established custodial environment existed and whether the change of schools would alter that environment. The court determined that a change of schools would not be in the children's best interests, but the court failed to consider any of the best-interest factors in MCL 722.23. Therefore, remand was required.

2. Defendant's claim that the trial court improperly dismissed his objections on a res judicata theory was without merit. Contrary to defendant's contention, the trial court did not improperly rely on a motion to change school systems that defendant had filed in 2012, and defendant's subsequent withdrawal of that request did not evidence the trial court's improper application of the doctrine of res judicata to the issue of school enrollment.

3. MCL 722.27(1)(c) provides, in relevant part, that changes in custody or parenting time may be modified only if the moving party demonstrates that modification is justified by proper cause or because of a change of circumstances. If the requested modification, such as a motion to change custody, alters the child's established custodial environment, then the framework announced in *Vodvarka v Grasmeyer*, 259 Mich App 499 (2003), would apply. However, if the requested modification would not affect the established custodial environment, such as a request to modify parenting time, then a lesser, more flexible understanding of "proper cause" or "change of circumstances" under *Shade v Wright*, 291 Mich App 17 (2010), would apply. In this case, defendant argued that both the change in the children's school enrollment as well as his remarriage and the children's relationship with his wife and her daughter comprised a sufficient change of circumstances to revisit parenting time. Because the trial court failed to determine whether an established custodial environment exists, let alone whether a modification of parenting time would change that environment, remand was also required on this issue.

Vacated and remanded.

O'CONNELL, J., concurring, wrote separately to propose an Inevitable Remand Rule when the trial court fails to make a finding regarding the established custodial environment. Under this rule, when the trial transcript is devoid of a trial court's findings on which party has, or which parties share, the established custodial environment, one of the parties should immediately file a motion to remand with the Court of Appeals. The motion should articulate that the trial court erred and request a remand for an evidentiary hearing for the trial court to decide which party has, or which parties share, the established custodial environment. This rule would expedite the current process, which is a waste of time, damaging to children, expensive to parties, and highly inefficient.

Jaffe, Raitt, Heuer & Weiss, PC (by *Susan S. Lichterman* and *Brian G. Shannon*) for plaintiff.

Scott Bassett for defendant.

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

CAMERON, P.J. Defendant appeals the trial court's order denying his request to change the school enrollment for the parties' minor children and his corresponding request to modify parenting time. Defendant asserts that the trial court erred by denying his motion to change the minor children's school enrollment from a public school near plaintiff's home to a parochial school. Additionally, defendant challenges the trial court's denial of his request for an increase of 18 overnights to his parenting time. We conclude that the trial court failed to address the children's established custodial environment, to describe the applicable burden of proof, and to consider the statutory best-interest factors in deciding the requests as required by our caselaw. Therefore, we vacate and remand to the trial court to properly address these issues.

I. BACKGROUND

The parties divorced in 2011. The judgment of divorce awarded joint legal and physical custody, with plaintiff's home as the minor children's primary residence. As support for his requests, defendant asserts that the children will benefit from attending a different school system. Although defendant does not identify any particular deficiency with regard to the children's current educational environment or in their respective academic performances, he contends that their ability to thrive would increase in a different school system he contends is "better." Defendant implies that the change in school enrollment should also coincide with an increase in his parenting time to include an additional 18 overnights with the minor children. The parties currently share joint physical and legal custody, with plaintiff having 55% of the parenting time with the minor children and defendant enjoying 45% of the available

parenting time. The parenting-time modification requested by defendant would equalize the amount of time the parties have with the minor children.

The trial court conducted a de novo hearing on June 13, 2016, at which the parties presented their arguments on the request to change the children's school enrollment and the request to modify parenting time. During the hearing, the parties were sworn in and questioned briefly by the trial court. At the conclusion of the hearing, the trial court did not expressly address whether there was an established custodial environment, whether the requests would change that environment, or whether the requests weighed in favor of the individual best-interest factors under MCL 722.23. Instead, the trial court stated that

> whether or not we use the clear and convincing standard or the preponderance of the evidence standard in both directions it is my opinion based on everything that I have heard and read that this is something driven by [defendant] who would like to create reasons.
>
> And the reasons that you have come up with . . . really benefit you. There is no problem with your children. They seem to be, as I indicated, thriving.
>
> . . . They are doing well. Their grades are satisfactory. They are young. If there were a problem, then you would know about it.
>
> But in the interim, this is exactly a normal life thing that these children might be doing adequate and next year might do superior. We don't know.
>
> But you are anticipating problems because you see problems within the school system. And I agree with [plaintiff's counsel], find a school system that doesn't have some issues.
>
> And so you would prefer to move into Parochial. It's joint. Legal mother doesn't want it. Most important you gave up your argument years ago and so the children are established in this school.

> I will not interrupt their weeknights when they are doing the way that they are doing and those things that you can work out, you need to work out. If you are not hearing from the district, you will have to communicate with them that you need to be notified of this. Obviously if he is borderline, I think there should be an intelligent discussion about what should occur whether or not additional schooling is a good idea.

At the conclusion of the hearing, the trial court dismissed defendant's objections. Defendant appeals, claiming that the trial court erred when it denied his motion to change the children's school enrollment and modify parenting time.

II. PRESERVATION AND STANDARDS OF REVIEW

"Generally, an issue is not properly preserved if it is not raised before, addressed, or decided by the circuit court or administrative tribunal." *AFSCME Council 25 v Faust Pub Library*, 311 Mich App 449, 462; 875 NW2d 254 (2015) (quotation marks and citation omitted). Defendant filed a motion to change the school enrollment and modify the parenting time for the minor children. Plaintiff filed a response, and the trial court held a hearing. The trial court denied defendant's motion. Accordingly, the issue is generally preserved for appellate review. However, defendant's argument as to the trial court's improper application of res judicata is raised for the first time on appeal and is not preserved.

As discussed in *Lieberman v Orr*, 319 Mich App 68, 76-77; 900 NW2d 130 (2017):

> All custody orders must be affirmed on appeal unless the circuit court's findings were against the great weight of the evidence, the circuit court committed a palpable abuse of discretion, or the circuit court made a clear legal error on a major issue.

> The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law.
>
> The applicable burden of proof presents a question of law that is reviewed de novo on appeal. [Citations and quotation marks omitted.]

Unpreserved issues are reviewed "for plain error." *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id*. (quotation marks and citation omitted).

III. ANALYSIS

A. REQUEST TO CHANGE SCHOOLS

Defendant first challenges the trial court's lack of adherence to procedural requirements in denying his motion to change the children's school enrollment. He asserts that the trial court erred by failing to conduct a full evidentiary hearing and by failing to determine whether an established custodial environment existed for the minor children. We agree.

"The Child Custody Act, MCL 722.21 *et seq*., applies to all circuit court child custody disputes and actions, whether original or incidental to other actions." *Pierron*

v Pierron, 282 Mich App 222, 243; 765 NW2d 345 (2009) (*Pierron I*), aff'd 486 Mich 81 (2010) (quotation marks and citation omitted). The purpose of the Child Custody Act is "to promote the best interests of the child and to provide a stable environment for children that is free of unwarranted custody changes." *Lieberman*, 319 Mich App at 78 (quotation marks and citation omitted). Specifically, MCL 722.27 provides, in relevant part:

> (1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
>
> * * *
>
> (c) Subject to subsection (3), modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age . . . . The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child.

Preliminarily, it is important to remember that the Child Custody Act "provides that when parents share joint legal custody—as the parties do here—the parents shall share decision-making authority as to the important decisions affecting the welfare of the child. However, when the parents cannot agree on an important decision, such as a change of the child's school, the court is responsible for resolving the issue in the best interests of the child." *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010) (*Pierron II*) (quotation marks and citations omitted). The threshold determination is whether an established custodial environment exists.

Pierron I, 282 Mich App at 244. "The established custodial environment is the environment in which over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." *Pierron II*, 486 Mich at 85-86 (quotation marks and citation omitted). "An established custodial environment may exist in more than one home and can be established as a result of a temporary custody order, in violation of a custody order, or in the absence of a custody order." *Pierron I*, 282 Mich App at 244 (quotation marks and citations omitted). An important decision affecting a child's welfare does not necessarily mean the established custodial environment has been modified. *Pierron II*, 486 Mich at 86. There is only a change to the established custodial environment if parenting-time adjustments change "whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort . . . ." *Id*. A court may not change the established custodial environment "unless there is presented clear and convincing evidence that it is in the best interest of the child." *Id*. (quotation marks and citation omitted). If the request to change schools does not change the established custodial environment, "the heightened evidentiary burden is not applicable, and [the] defendant is required to prove by a preponderance of the evidence that the proposed change of schools would be in the best interests of the children . . . ." *Id*. at 89-90. "If, on the other hand, the court finds that no established custodial environment exists, then the court may change custody or enter a new order 'if the party bearing the burden proves by a preponderance of the evidence that the change serves the child's best interests.' " *Pierron I*, 282 Mich App at 245 (citation omitted).

In other words, when making these determinations, trial courts must first address whether an established custodial environment exists. If it does, the trial court must determine whether the requested change would affect the established custodial environment of the child and, dependent on that outcome, ascertain the proper burden of proof to be employed. If the proposed change alters the established custodial environment, the party seeking the change must demonstrate by clear and convincing evidence that the change is in the child's best interests. If the change does not alter the established custodial environment, then the proponent of the change need only demonstrate by a preponderance of the evidence that the requested change is in the child's best interests. *Pierron II*, 486 Mich at 89-90.

The child's best interests are determined by evaluating the factors designated in MCL 722.23. As clarified in *Pierron II*:

> MCL 722.23 requires "the *sum total* of the . . . factors to be considered, evaluated, and determined by the court[.]" (Emphasis added.) In *Parent v Parent*, 282 Mich App 152; 762 NW2d 553 (2009), the Court of Appeals addressed this issue, also in the context of a dispute over a proposed change of school. Recognizing that even though each of the factors might not be relevant to the issue, MCL 722.23 requires consideration of "all" the factors, the Court held that "[t]he trial court must at least make explicit factual findings with regard to the *applicability* of each factor." *Id.* at 157 (emphasis added). We believe that this approach complies with MCL 722.23 and allows for the proper evaluation of whether an important decision is genuinely in the best interests of the children, in accordance with the Child Custody Act. Therefore, we hold that when a trial court is considering a decision that will not modify the established custodial environment, such as the change-of-school issue in this case, it must consider the applicability of all the factors. However, if the trial court determines

> that a particular factor is irrelevant to the immediate issue, it need not make substantive factual findings concerning the factor beyond this determination, but need merely state that conclusion on the record. [*Pierron II*, 486 Mich at 91 (alterations in original).]

While the trial court did not designate it as such, the de novo hearing the court conducted on June 13, 2016, was in essence a *Lombardo*[1] hearing. At a *Lombardo* hearing, the trial court "must consider, evaluate, and determine each of the factors listed at MCL 722.23 for the purpose of resolving disputes concerning important decisions affecting the welfare of the child that arise between joint custodial parents." *Pierron I*, 282 Mich App at 247 (quotation marks and citation omitted).

Defendant initially argues that the trial court erred by failing to conduct a full evidentiary hearing. We agree. The record makes clear that the trial court did not allow the parties an opportunity to fully present evidence on the issue of whether changing the children's school was in their best interests. Instead, the parties' attorneys presented their arguments, plaintiff and defendant were placed under oath, and the trial court asked them questions. We have long held that when the trial court must first answer the threshold question of whether there was a proper cause or change of circumstances, "the court need not necessarily conduct an evidentiary hearing on the topic." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). In this case, however, the trial court was not required to answer this threshold question before considering a request to change schools.[2] Instead, the trial

[1] *Lombardo v Lombardo*, 202 Mich App 151, 160; 507 NW2d 788 (1993).

[2] In this case, as in the *Pierron* cases, there was no prior order regarding the children's enrollment in school, and therefore, defendant

court was tasked with determining the children's established custodial environment, whether the requested change would alter it, and whether the requested change was in the best interests of the minor children. This determination requires an evidentiary hearing in the form of a *Lombardo* hearing. See *Pierron I*, 282 Mich App at 247 ("The court must do so by holding an evidentiary hearing and considering the relevant best-interest factors contained in MCL 722.23."). There was no evidence introduced, no witnesses called, no cross-examination by opposing counsel, and, as stated in more detail later in this opinion, no express consideration of the best-interest factors contained in MCL 722.23. Therefore, we conclude that the trial court failed to conduct a full evidentiary hearing on the request to change the children's school enrollment, and for that reason, remand is required.

Furthermore, even if the hearing itself was adequate, the trial court failed to properly analyze the request to change schools consistently with the Child Custody Act. To begin, the trial court did not determine whether an established custodial environment exists or whether the change of schools would alter that environment. Our Supreme Court has directed that "[w]hen resolving important decisions that affect the welfare of the child, the court must first consider whether the proposed change would modify the established custodial environment." *Pierron II*, 486 Mich at 85. In this case, the trial court failed to consider that question, and this legal error is sufficient to require that we vacate and remand this case to the trial court.

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was not required to show proper cause or a change of circumstances as to the request to change schools. There was, however, a prior interim order involving the 2012–2013 school year, but nothing addressing the current or future enrollment of the minor children.

Moreover, the trial court concluded that, regardless of the legal standard applied, a change of schools would not be in the children's best interests. Even if the trial court would have made a record that the more stringent clear-and-convincing evidence standard was appropriate, it failed to analyze a single best-interest factor under MCL 722.23, which requires "the *sum total* of the . . . factors to be considered, evaluated, and determined by the court[.]" *Pierron II*, 486 Mich at 91 (quotation marks and citation omitted; alterations in original). "[E]ven though each of the factors might not be relevant to the issue, MCL 722.23 requires consideration of 'all' the factors," and "[t]he trial court must at least make explicit factual findings with regard to the *applicability* of each factor." *Pierron II*, 486 Mich at 91 (quotation marks and citation omitted). If a particular factor is irrelevant, then the trial court "need merely state that conclusion on the record." *Id*. The trial court's failure to address any of the factors under MCL 722.23, let alone declare which factors were applicable and which were not, is fatal. On remand the trial court must first determine the issues concerning the established custodial environment and then conduct a full analysis of the best-interest factors.

Defendant's second claim of error—that the trial court improperly dismissed his objections on a res judicata theory—is without merit. Contrary to defendant's contention, the trial court did not improperly rely on a motion to change school systems that defendant had filed in 2012, and defendant's subsequent withdrawal of that request does not evidence the trial court's improper application of the doctrine of res judicata[3] to the issue of school enrollment. Rather, the

[3] "Michigan law defines res judicata broadly to bar litigation in the second action not only of those claims actually litigated in the first

trial court pressed defendant during the hearing to identify how the requested change was in the children's best interests. Defendant's previous withdrawal of a similar motion several years earlier was used by the trial court to question defendant about what had changed in the four-year interim between motions to necessitate the enrollment of the children in a different school system. In noting that the children had been attending their current school for four years, without defendant challenging their current academic placement, the trial court was seeking to obtain an explanation of why a change was now necessary and how it would serve the best interests of the children. The trial court's reference to defendant's prior motion was not to preclude or raise a barrier to a new motion but simply to evaluate the merits of that new motion.

Plaintiff's contention that the children's "graduation" from Kenwood Elementary School at the conclusion of this academic year renders the issue moot is also mistaken. According to plaintiff, the children will conclude fifth grade at Kenwood Elementary School, presumably within the upcoming month. Plaintiff suggests that this renders defendant's issue regarding school enrollment moot because Kenwood Elementary School does not have classes beyond the fifth-grade level and defendant has only taken exception to the children's attendance at this particular school. First, this is a mischaracterization of defendant's argument. Defendant challenged the children's attendance in their current school *district*, with emphasis on issues pertaining to Kenwood Elementary School, due to various alleged financial problems that both the dis-

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action, but also claims arising out of the same transaction that the parties, exercising reasonable diligence, could have litigated but did not." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 11; 672 NW2d 351 (2003).

trict and school were experiencing. Second, when indicating a preference for the children's enrollment in a parochial school, defendant specifically observed that their enrollment could continue in the proposed school until high school, allegedly contributing to greater stability and continuity. It can be anticipated, given the history and evident animosity between plaintiff and defendant, that the need for the children to select a school to attend for middle school will result in new litigation should plaintiff and defendant be unable to agree on a school for their enrollment. However, if the parties cannot agree on a school in which to enroll the minor children, the issue would need to be presented to the trial court for resolution of that specific conflict between the joint legal custodians. *Lombardo*, 202 Mich App at 159.

B. REQUEST TO MODIFY PARENTING TIME

The final issue to be addressed is defendant's request to modify parenting time. Defendant argues that the trial court applied the wrong standard when evaluating his request to add 18 overnights. Specifically, he contends that the trial court improperly relied on *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003), rather than *Shade v Wright*, 291 Mich App 17; 805 NW2d 1 (2010).

Changes in custody or parenting time may be modified only if the moving party demonstrates that modification is justified by proper cause or because of a change of circumstances. MCL 722.27(1)(c). If the requested modification, such as a motion to change custody, alters the child's established custodial environment, the stricter *Vodvarka* framework would apply. *Shade*, 291 Mich App at 25-26. However, "a lesser, more flexible, understanding of 'proper cause' or

'change in circumstances' " is applicable to a request to modify parenting time. *Kaeb v Kaeb*, 309 Mich App 556, 570-571; 873 NW2d 319 (2015). Specifically, "the very normal life change factors that *Vodvarka* finds insufficient to justify a change in custodial environment are precisely the types of considerations that trial courts should take into account in making determinations regarding modification of parenting time." *Shade*, 291 Mich App at 30.

As more recently explicated by this Court in *Kaeb*, 309 Mich App at 570-571:

> Because the imposition, revocation, or modification of a condition on the exercise of parenting time will generally not affect an established custodial environment or alter the frequency or duration of parenting time, we are persuaded that a lesser, more flexible, understanding of "proper cause" or "change in circumstances" should apply to a request to modify or amend a condition on parenting time. As in *Shade*, it is evident that even normal changes to the lives of the parties affected by a parenting-time order may so alter the circumstances attending the initial imposition of a condition that a trial court would be justified in revisiting the propriety of the condition. A condition that was in the child's best interests when the child was in elementary school might not be in the child's best interests after he or she reaches high school. Even ordinary changes in the parties' behavior, status, or living conditions might justify a trial court in finding that a previously imposed condition is no longer in the child's best interests. We conclude that "proper cause" should be construed according to its ordinary understanding when applied to a request to change a condition on parenting time; that is, a party establishes proper cause to revisit the condition if he or she demonstrates that there is an appropriate ground for taking legal action. [Citations omitted.]

In this instance, defendant implies that a change in the children's school enrollment would also constitute

a change in circumstances sufficient to revisit the issue of parenting time. Defendant also suggests that his remarriage and the children's relationship with his wife and her daughter comprise a sufficient change in circumstances to revisit parenting time.

Because the trial court denied defendant's request to alter the children's school enrollment, there existed no change in circumstances on this alleged basis to support defendant's modification of parenting time. However, because we are remanding for further proceedings on the request to change schools, this issue will need to be addressed at that time as well. See *Pierron I*, 282 Mich App at 249 (acknowledging that a change in school enrollment "might require minor modifications to [the] plaintiff's parenting time schedule").

Defendant's alternative basis for the modification of parenting time, his remarriage and the relationship of the children with members of their stepfamily, is sufficient under *Shade* to meet the initial threshold of a change of circumstances to consider the request. Defendant contends, however, that the trial court ignored *Shade* and applied the stricter, and inappropriate, standard imposed by *Vodvarka* in its analysis. Because the trial court failed to determine whether an established custodial environment exists, let alone whether a modification of parenting time would change that environment, remand is also required on this issue.[4]

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[4] We make clear that the trial court in no way expressed its reliance on a referee's analysis, wherein the referee might have properly addressed the established custodial environment and best-interest factors at a hearing. In fact, there is no transcript of the referee's hearing in this case, and the trial court instead reevaluated the evidence, questioned the parties, and made an independent decision based on the parties' briefing and the record.

Whether the *Vodvarka* or *Shade* standard is applied depends on the existence of an established custodial environment and whether the proposed parenting-time change would alter that environment. Specifically:

> In a parenting-time matter, when the proposed change would not affect the established custodial environment, the movant must prove by a preponderance of the evidence that the change is in the best interests of the child. However, . . . when the proposed parenting-time change alters the established custodial environment, the proposal is essentially a change in custody, and *Vodvarka* governs. [*Lieberman*, 319 Mich App at 84 (citation omitted).]

Again, the trial court did not specifically address or discuss the existence of an established custodial environment for the children or the extent to which the best-interest factors were applicable. While the judgment of divorce granted joint physical and legal custody, a trial court must not "presume an established custodial environment by reference only to" the most recent custody order but rather must "look into the actual circumstances of the case." *Curless v Curless*, 137 Mich App 673, 676-677; 357 NW2d 921 (1984). This determination is required before the trial court may make a conclusion on the best-interest factors.

Moreover, a determination of the effect of the parenting-time modification on the custodial environment is necessary to determine the proper standard—*Vodvarka* (clear and convincing evidence) versus *Shade* (preponderance of the evidence)—to be applied in determining the best interests of the children. Although defendant argues that the trial court improperly applied the stricter *Vodvarka* standard, in reality, the trial court opined that under either stan-

dard the best interests of the children were not served by the increase in overnight parenting time with defendant. Specifically, the trial court stated, "Now, whether or not we use the clear and convincing standard or the preponderance of the evidence standard in both directions it is my opinion based on everything that I have heard and read that this is something driven by the Defendant who would like to create reasons." Given the trial court's implication that the requested parenting time would affect the established custodial environment, application of the *Vodvarka* standard would not be misplaced or constitute error. However, the trial court did not reach a conclusion as to whether the *Vodvarka* standard or the *Shade* standard applies to this case, and the standard dictates whether the trial court must address each best-interest factor or may only address those factors in dispute. See *Shade*, 291 Mich App at 31-32 (concluding that "[c]ustody decisions require findings under all of the best-interest factors, but parenting time decisions may be made with findings on only the contested issues").

Therefore, even though the trial court repeatedly sought to focus on and emphasize the best interests of the minor children, it did not expressly address any of the best-interest factors. If, on remand, the trial court concludes that the *Shade* standard applies, then it need only make findings on the contested issues. However, if it concludes that the stricter *Vodvarka* standard applies, then it must address all the best-interest factors.

Vacated and remanded. We do not retain jurisdiction.

JANSEN, J., concurred with CAMERON, P.J.

O'CONNELL, J. (*concurring*). I concur with Judge CAMERON's well-written majority opinion. I write separately to propose an Inevitable Remand Rule. Generally speaking, the controlling issue in any child custody case is the child's established custodial environment (ECE) at the time of the hearing. This is true whether the issue presented is legal custody or physical custody of the minor child. As I stated in *Lieberman v Orr*, 319 Mich App 68, 105; 900 NW2d 130 (2017) (O'CONNELL, J., dissenting), "the controlling consideration is the child's *custodial environment* at the time of the hearing."

When a trial court fails to articulate, with precision, which party has, or which parties share, the ECE and the ECE cannot be discerned from the lower-court record, the Court of Appeals should invoke the Inevitable Remand Rule with the help of a motion from one of the parties. Simply put, on appeal, when the trial transcript is devoid of a trial court's findings on which party has, or which parties share, the ECE, a motion to remand should immediately be filed with the Court of Appeals. The motion should articulate that the trial court erred and request a remand for an evidentiary hearing for the trial court to decide which party has, or which parties share, the ECE. (Needless to say, the motion should not be filed if the trial court has made a finding on the ECE and a party simply disagrees with the trial court findings. Such a motion would be considered frivolous.)

In the present case, the trial court decided a parenting-time issue and a school issue on June 13, 2016, without first deciding the ECE of the minor children. The majority opinion sets forth the framework for this Court's review of the trial court's decision; there is no need to repeat it in this concurring

opinion. (Both the majority and dissenting opinions in *Lieberman*, 319 Mich App 68, have an excellent discussion of this issue.) But, it is now approximately two years since the trial court made its initial decision, and we are remanding this case for a determination of the ECE. Of course, the trial court can consider any change of circumstances in the past two years. Needless to say, for numerous reasons, such a process is a colossal waste of time, damaging to the children, very expensive to the parties, and highly inefficient in deciding child custody matters.

I write this concurring opinion simply to propose and advocate an Inevitable Remand Rule when the trial court fails to make a finding regarding the ECE.

In re PORTUS

Docket No. 337980. Submitted July 10, 2018, at Detroit. Decided July 24, 2018, at 9:05 a.m.

In 1974, respondent, Charles F. Portus, was found not guilty by reason of insanity of charges related to the murder of a child and was committed to the Center for Forensic Psychiatry (CFP). On October 19, 2016, the CFP filed an annual petition in the Oakland Probate Court for a continuing order of involuntary mental health treatment, alleging that respondent continued to be a "person requiring treatment" and that respondent was in need of continuing hospitalization for a period of one year. The court held a hearing regarding the petition, at which respondent's attorney stipulated that respondent was a person requiring treatment but challenged "the type of hospitalization" required, arguing that respondent should be transferred from the CFP to Harbor Point Center. The court, Kathleen A. Ryan, J., entered an order requiring respondent to undergo continuing treatment and hospitalization at the CFP for a period not to exceed one year, subject to the court's later determination regarding the proper placement for respondent's treatment, and scheduled an evidentiary hearing to determine the "burden of proof for placement of a person found to be in need of treatment." Following the hearing, the court concluded that there was no burden of proof with respect to determining the appropriate form of treatment to order for respondent and denied respondent's request to be placed at Harbor Point Center, ordering that respondent remain at the CFP "until further order of the court." The court then entered an amended continuing order for mental health treatment; the order required respondent to be hospitalized at the CFP "until further order of the court" but up to 365 days. Respondent appealed.

The Court of Appeals *held*:

1. MCL 330.1473 provides, in pertinent part, that not less than 14 days before the expiration of a continuing order of involuntary mental health treatment issued under MCL 330.1472a or MCL 330.1485a, a hospital director shall file a petition for a second or continuing order of involuntary mental health treatment if the hospital director or supervisor believes

the individual continues to be a person requiring treatment and that the individual is likely to refuse treatment on a voluntary basis when the order expires. The filing of a petition under MCL 330.1473 before the expiration of a continuing order of involuntary mental health treatment triggers MCL 330.1472a(4), which provides, in pertinent part, that upon receipt of the petition and a finding that the individual continues to be a person requiring treatment, the court shall issue another continuing order for involuntary mental health treatment as provided in MCL 330.1472a(3) for a period not to exceed 1 year. MCL 330.1472a(3) lists the options for involuntary mental health treatment: hospitalization, alternative treatment, assisted outpatient treatment, a combination of hospitalization and alternative treatment, or a combination of hospitalization and assisted outpatient treatment. Therefore, the issuance of a continuing order for involuntary mental health treatment essentially requires the probate court to follow a two-step process: first, the probate court must find that the individual continues to be a person requiring treatment, and second, the probate court must issue another continuing order for involuntary mental health treatment as provided in MCL 330.1472a(3) for a period not to exceed one year. In this case, respondent conceded that he was a person requiring treatment; therefore, the first step was not at issue. As for the second step—determining which treatment option under MCL 330.1472a(3) to order—the statutory framework does not explicitly specify an evidentiary standard or burden of proof that is applicable to the probate court's findings. However, MCL 330.1469a provides guidance for a probate court in making this determination. MCL 330.1469a(1)(a) and (b) provide, in pertinent part, that the probate court must determine (1) whether an alternative treatment program is adequate to meet the individual's treatment needs, (2) whether an alternative treatment program is sufficient to prevent harm that the individual may inflict upon himself or herself or upon others within the near future, and (3) whether an agency or mental health professional is available to supervise the individual's alternative treatment program. MCL 330.1469a(1)(c) requires that the probate court inquire about the individual's desires regarding alternatives to hospitalization. If the court finds that the requirements in MCL 330.1469a(1)(a) and (b) are met with respect to a treatment program that is an alternative to hospitalization, then under MCL 330.1469a(2), the court *shall* issue an order for alternative treatment or combined hospitalization and alternative treatment in accordance with MCL 330.1472a. Accordingly, if the probate court determines that there is an adequate form of alternative

treatment that satisfies the standards in MCL 330.1469a(1)(a) and (b), then the probate court does not have the discretion to order hospitalization as the sole form of treatment. Given that the probate court is statutorily required to make specific determinations before ordering a course of treatment, a court cannot make these determinations in a vacuum or without referring to evidence; some standard of proof is necessary to substantiate a probate court's determinations regarding the appropriate treatment and placement. There is no indication in MCL 330.1469a that some standard of proof other than the default preponderance-of-the-evidence standard should apply; therefore, MCL 330.1469a requires that a preponderance of the evidence support the probate court's findings with respect to its determinations regarding an individual's treatment and placement. The proponent of a particular form of treatment or placement at a specific facility for an individual who has been found to be a person requiring treatment bears the burden of proving by a preponderance of the evidence the facts necessary to persuade the probate court to enter such an order and for the probate court to be legally justified in entering such an order pursuant to the statutory requirements in Chapter 4 of the Mental Health Code, MCL 330.1400 *et seq*. Accordingly, the probate court erred by ruling that there was no applicable burden of proof to its treatment determination and issuing its treatment order without tying it to any evidentiary standard.

2. An error is harmless if it did not affect the outcome of the proceeding. In this case, because the probate court believed that there was no applicable burden or standard of proof and made its findings and conclusions while operating under that belief, the basis on which the probate court made its findings could not be ascertained. Therefore, the probate court's error was not harmless.

3. Respondent argued that MCL 330.1468(2) applies only to petitions filed under MCL 330.1434 and that MCL 330.1468(2) was therefore inapplicable in the instant case because the subject petition was filed pursuant to MCL 330.1473 rather than MCL 330.1434. However, MCL 330.1400(f) defines "involuntary mental health treatment" as "court-ordered hospitalization, alternative treatment, or combined hospitalization and alternative treatment as described in section 468." Because the probate court was specifically directed to look to MCL 330.1468, which sets forth potential treatment options, the probate court did not err by referring to this statute.

4. For purposes of the Mental Health Code, MCL 330.1001 *et seq*., the terms "hospital" and "psychiatric hospital" are both defined as an inpatient program operated by the Department of Health and Human Services for the treatment of individuals with serious mental illness or serious emotional disturbance or a psychiatric hospital or psychiatric unit licensed under MCL 330.1137. In this case, the probate court determined that Harbor Point Center was not a hospital, but the court did not apply any statutory definition in making that determination. Accordingly, the probate court was directed to determine whether the evidence establishes that Harbor Point meets the statutory definition of "hospital" for purposes of the Mental Health Code should the issue arise on remand.

5. The probate court erred by ordering respondent to remain at the CFP "until further order of the court." MCL 330.1476(2) and MCL 330.2050(5) expressly provide a procedural mechanism for discharging an individual who no longer meets the criteria of a person requiring treatment, and this procedural mechanism does not require a court order sanctioning the discharge. Therefore, the court's order requiring that respondent remain at the CFP "until further order of the court" was contrary to those provisions.

Reversed and remanded.

MENTAL HEALTH — CONTINUING ORDER FOR INVOLUNTARY MENTAL HEALTH TREATMENT — TREATMENT AND PLACEMENT OPTIONS — STANDARD OF PROOF.

The issuance of a continuing order for involuntary mental health treatment under MCL 330.1472a(4) essentially requires the probate court to follow a two-step process: first, the probate court must find that the individual continues to be a person requiring treatment, and second, the probate court must issue another continuing order for involuntary mental health treatment as provided in MCL 330.1472a(3) for a period not to exceed one year; MCL 330.1469a provides guidance for a probate court in making the determination of which treatment option under MCL 330.1472a(3) to order; MCL 330.1469a requires that a preponderance of the evidence support the probate court's findings with respect to its determinations regarding an individual's treatment and placement; the proponent of a particular form of treatment or placement at a specific facility for an individual who has been found to be a person requiring treatment bears the burden of proving by a preponderance of the evidence the facts necessary to persuade the probate court to enter such an order and for the probate court to be legally justified in entering such an order

pursuant to the statutory requirements in Chapter 4 of the Mental Health Code, MCL 330.1400 *et seq*.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Matthew A. Fillmore*, Assistant Prosecuting Attorney, for the people.

William Lansat for Charles F. Portus.

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

BORRELLO, P.J. Respondent, Charles Frederick Portus, appeals as of right a probate court order requiring him to remain hospitalized at the Center for Forensic Psychiatry (CFP) and denying his request to be transferred to Harbor Point Center for treatment. For the reasons set forth in this opinion, we reverse the probate court's order and remand this matter for further proceedings consistent with this opinion.

I. BACKGROUND

This appeal arises out of the annual petition for a continuing order of involuntary mental health treatment that was filed by the CFP on October 19, 2016. In this petition, it was alleged that respondent continued to be a "person requiring treatment"[1] and that respondent was in need of continuing hospitalization for a period of one year. The probate court noted that in 1974, respondent was found not guilty by reason of insanity of the murder of a seven-year-old boy. As a result, respondent was committed to the CFP.

[1] See MCL 330.1401 (defining "person requiring treatment" for purposes of Chapter 4 of the Mental Health Code, MCL 330.1400 *et seq*.).

The probate court held a hearing regarding the CFP petition on December 9, 2016. At the hearing, respondent's attorney stipulated that respondent was a person requiring treatment but challenged "the type of hospitalization" required, arguing that respondent should be transferred from the CFP to Harbor Point Center. Consistently with the parties' stipulation, the probate court entered an order requiring respondent to undergo continuing treatment and hospitalization at the CFP for a period not to exceed one year, subject to the court's later determination regarding the proper placement for respondent's treatment. The probate court scheduled an evidentiary hearing and directed the parties to submit briefs stating, among other things, their respective positions concerning "the burden of proof for placement of a person found to be in need of treatment."

Responding to this directive, petitioner argued that under the Mental Health Code, MCL 330.1001 *et seq*., "there is no burden of proof on the petitioner to show clear and convincing evidence or a preponderance of the evidence that [respondent] should continue to be placed at the Center for Forensic Psychiatry." Petitioner further argued that the probate court should exercise its discretion in weighing respondent's "need for treatment, the safety of the public, and what is the less [sic] restrictive setting to accomplish those goals." According to petitioner, the evidentiary standard contained in MCL 330.1465, which provides that "[a] judge or jury shall not find that an individual is a person requiring treatment unless that fact has been established by clear and convincing evidence," only applied to determining whether an individual was a "person requiring treatment." Petitioner argued that respondent had already been determined to be a person requiring treatment pursuant to the parties'

stipulation and that the Mental Health Code did not contain any statutorily required "burden of proof" for determining an individual's placement facility.

Respondent, in contrast, argued that the evidentiary standard in MCL 330.1465 should carry through to the determination regarding the appropriate placement and form of treatment for a person requiring treatment. Respondent also acknowledged that, in the alternative, a preponderance-of-the-evidence standard could potentially apply to the placement determination. Respondent argued, however, that regardless of the standard of proof applied, the burden of proof should remain with petitioner to establish that the CFP was the appropriate placement for respondent.

The probate court addressed this issue at the outset of the evidentiary hearing, concluding as follows:

> [I]t's really up to the judge. There is no burden of proof with regard to the treatment. The burden of proof applies only to whether the person is mentally ill or not. That's already been stipulated to. So now it's just to see if this is the most appropriate treatment.

Following the presentation of witness testimony, exhibits, and oral argument during the evidentiary hearing, the probate court announced its findings and ruling on the record. The probate court denied respondent's request to be placed at Harbor Point Center for treatment, and it ordered that respondent would remain at the CFP "until further order of the court . . . ." An amended continuing order for mental health treatment was entered consistently with the probate court's oral ruling, which ordered respondent to be hospitalized at the CFP "until further order of the court" but up to 365 days. This appeal ensued.

II. STANDARD OF REVIEW

This Court "reviews for an abuse of discretion a probate court's dispositional rulings and reviews for clear error the factual findings underlying a probate court's decision." *In re Bibi Guardianship*, 315 Mich App 323, 328; 890 NW2d 387 (2016). An abuse of discretion occurs when the probate court "chooses an outcome outside the range of reasonable and principled outcomes." *Id*. at 329 (quotation marks and citation omitted). "A probate court's finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *Id*. (quotation marks and citation omitted). We review de novo matters of statutory interpretation. *In re Redd Guardianship*, 321 Mich App 398, 404; 909 NW2d 289 (2017). The probate court "necessarily abuses its discretion when it makes an error of law." *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 552; 886 NW2d 113 (2016).

III. ANALYSIS

On appeal, respondent first argues that the probate court erred by ruling that there was no applicable burden of proof with respect to determining the appropriate form of treatment to order for respondent. This issue appears to be one of first impression and presents this Court with questions of statutory interpretation. "When interpreting statutes, our primary goal is to ascertain and give effect to the intent of the Legislature." *Averill v Dauterman*, 284 Mich App 18, 22; 772 NW2d 797 (2009). In doing so, we first turn to "the specific language of the statute, considering the fair and natural import of the terms employed, in view of the subject matter of the law." *Id*. We must "examine

the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme." *Michigan ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 59; 852 NW2d 103 (2014) (quotation marks and citation omitted).

Proceedings seeking an order of involuntary mental health treatment under the Mental Health Code for an individual on the basis of mental illness, including when such proceedings are instituted following a not-guilty-by-reason-of-insanity verdict, generally are referred to as "civil commitment" proceedings. See, e.g., *People v Dobben*, 440 Mich 679, 690-691; 488 NW2d 726 (1992); *People v Miller*, 440 Mich 631, 640; 489 NW2d 60 (1992); *People v Williams*, 228 Mich App 546, 556-557; 580 NW2d 438 (1998); *In re KB*, 221 Mich App 414, 417; 562 NW2d 208 (1997); *In re Baker*, 117 Mich App 591, 592-593, 595; 324 NW2d 91 (1982); *In re Wagstaff*, 93 Mich App 755, 757; 287 NW2d 339 (1979). The specific procedures for obtaining continuing orders of hospitalization or other forms of treatment based on a person's mental illness are contained in various provisions of Chapter 4 of the Mental Health Code, MCL 330.1400 *et seq*.

In the instant case, respondent's appeal stems from the CFP's petition for a continuing order of involuntary mental health treatment filed pursuant to § 473, MCL 330.1473, which provides, in pertinent part, that "[n]ot less than 14 days before the expiration of [a] . . . continuing order of involuntary mental health treatment issued under [MCL 330.1472a] or [MCL 330.1485a], a hospital director . . . shall file a petition for a second or continuing order of involuntary mental health treatment if the hospital director or supervisor believes the individual continues to be a person requiring treatment and that the individual is likely to refuse

treatment on a voluntary basis when the order expires." The filing of a petition under § 473 before the expiration of a continuing order of involuntary mental health treatment triggers MCL 330.1472a(4), which provides, in relevant part, as follows:

> Upon the receipt of a petition under section 473 before the expiration of a continuing order of involuntary mental health treatment . . . and a finding that the individual continues to be a person requiring treatment, the court shall issue another continuing order for involuntary mental health treatment as provided in [MCL 330.1472a(3)] for a period not to exceed 1 year. The court shall continue to issue consecutive 1-year continuing orders for involuntary mental health treatment under this section until a continuing order expires without a petition having been filed under section 473 or the court finds that the individual is not a person requiring treatment.

MCL 330.1472a(4) directs our attention to § 472a(3), MCL 330.1472a(3), which lists the options for involuntary mental health treatment and imposes time limitations for those orders. Section 472a(3) provides, in relevant part, as follows:

> [T]he court shall issue a continuing order for involuntary mental health treatment that shall be limited in duration as follows:
>
> (a) A continuing order of hospitalization shall not exceed 1 year.
>
> (b) A continuing order of alternative treatment or assisted outpatient treatment shall not exceed 1 year.
>
> (c) A continuing order of combined hospitalization and alternative treatment or hospitalization and assisted outpatient treatment shall not exceed 1 year. The hospitalization portion of a continuing order for combined hospitalization and alternative treatment or hospitalization and assisted outpatient treatment shall not exceed 90 days.

Furthermore, the term "involuntary mental health treatment" is statutorily defined for purposes of Chapter 4 of the Mental Health Code as "court-ordered hospitalization, alternative treatment, or combined hospitalization and alternative treatment as described in section 468." MCL 330.1400(f). Section 468(2), MCL 330.1468(2), provides descriptions of the forms of treatment that may be ordered upon a finding that an individual is a person requiring treatment, and these descriptions correspond to the forms of treatment referred to in MCL 330.1472a(3). Section 468(2) provides, in relevant part, as follows:

> [I]f an individual is found to be a person requiring treatment, the court shall do 1 of the following:
>
> (a) Order the individual hospitalized in a hospital recommended by the community mental health services program or other entity as designated by the department.
>
> (b) Order the individual hospitalized in a private or veterans administration hospital at the request of the individual or his or her family, if private or federal funds are to be utilized and if the hospital agrees. . . .
>
> (c) Order the individual to undergo a program of treatment that is an alternative to hospitalization and that is recommended by the community mental health services program or other entity as designated by the department.
>
> (d) Order the individual to undergo a program of combined hospitalization and alternative treatment or hospitalization and assisted outpatient treatment, as recommended by the community mental health services program or other entity as designated by the department.
>
> (e) Order the individual to receive assisted outpatient treatment through a community mental health services program, or other entity as designated by the department, capable of providing the necessary treatment and services to assist the individual to live and function in the community as specified in the order.

In accordance with this statutory framework, the issuance of a continuing order for involuntary mental health treatment essentially requires the probate court to follow a two-step process. First, the probate court must find "that the individual continues to be a person requiring treatment . . . ." MCL 330.1472a(4). "A judge or jury shall not find *that an individual is a person requiring treatment* unless that fact has been established by *clear and convincing evidence*." MCL 330.1465 (emphasis added). The relevant statutory definition of a "person requiring treatment" is contained in MCL 330.1401.[2] In this case, respondent

[2] MCL 330.1401 provides as follows:

> (1) As used in this chapter, "person requiring treatment" means (a), (b), (c), or (d):
>
> (a) An individual who has mental illness, and who as a result of that mental illness can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure himself, herself, or another individual, and who has engaged in an act or acts or made significant threats that are substantially supportive of the expectation.
>
> (b) An individual who has mental illness, and who as a result of that mental illness is unable to attend to those of his or her basic physical needs such as food, clothing, or shelter that must be attended to in order for the individual to avoid serious harm in the near future, and who has demonstrated that inability by failing to attend to those basic physical needs.
>
> (c) An individual who has mental illness, whose judgment is so impaired by that mental illness that he or she is unable to understand his or her need for treatment, and whose impaired judgment, on the basis of competent clinical opinion, presents a substantial risk of significant physical or mental harm to the individual in the near future or presents a substantial risk of physical harm to others in the near future.
>
> (d) An individual who has mental illness, whose understanding of the need for treatment is impaired to the point that he or she is unlikely to voluntarily participate in or adhere to treatment that has been determined necessary to prevent a relapse or harmful deterioration of his or her condition, and whose noncom-

conceded that he was a "person requiring treatment"; hence, the first step is not at issue.

Second, after the probate court finds that an individual is a person requiring treatment, the probate court "shall issue another continuing order for involuntary mental health treatment as provided in [MCL 330.1472a(3)] for a period not to exceed 1 year." MCL 330.1472a(4). Both § 472a(3) and § 468(2), which is incorporated by reference to the statutory definition of "involuntary mental health treatment," describe the potential treatment options: hospitalization, alternative treatment, assisted outpatient treatment, a combination of hospitalization and alternative treatment, or a combination of hospitalization and assisted outpatient treatment. In determining which treatment option to order, there is statutory guidance for a probate court in MCL 330.1469a,[3] which provides, in relevant part, as follows:

> pliance with treatment has been a factor in the individual's placement in a psychiatric hospital, prison, or jail at least 2 times within the last 48 months or whose noncompliance with treatment has been a factor in the individual's committing 1 or more acts, attempts, or threats of serious violent behavior within the last 48 months. An individual under this subdivision is only eligible to receive assisted outpatient treatment.
>
> (2) An individual whose mental processes have been weakened or impaired by a dementia, an individual with a primary diagnosis of epilepsy, or an individual with alcoholism or other drug dependence is not a person requiring treatment under this chapter unless the individual also meets the criteria specified in subsection (1). An individual described in this subsection may be hospitalized under the informal or formal voluntary hospitalization provisions of this chapter if he or she is considered clinically suitable for hospitalization by the hospital director.

[3] MCL 330.1468(3) also directs the probate court to consider certain factors in "developing an assisted outpatient treatment order . . . ." However, this provision is not implicated in the instant appeal because there was no attempt to seek assisted outpatient treatment for respondent.

(1) Except for a petition filed as described under [MCL 330.1434(6)],[4] before ordering a course of treatment for an individual found to be a person requiring treatment, the court shall review a report on alternatives to hospitalization that was prepared under section 453a not more than 15 days before the court issues the order. After reviewing the report, the court shall do all of the following:

(a) Determine whether a treatment program that is an alternative to hospitalization or that follows an initial period of hospitalization is adequate to meet the individual's treatment needs and is sufficient to prevent harm that the individual may inflict upon himself or herself or upon others within the near future.

(b) Determine whether there is an agency or mental health professional available to supervise the individual's alternative treatment program.

(c) Inquire as to the individual's desires regarding alternatives to hospitalization.

(2) *If the court determines that there is a treatment program that is an alternative to hospitalization that is adequate to meet the individual's treatment needs and prevent harm that the individual may inflict upon himself or herself or upon others within the near future and that an agency or mental health professional is available to supervise the program, the court shall issue an order for alternative treatment or combined hospitalization and alternative treatment in accordance with section 472a*. The order shall state the community mental health services program or, if private arrangements have been made for the reimbursement of mental health treatment services in an alternative setting, the name of the mental health agency or professional that is directed to supervise the individual's alternative treatment program. The order may provide that if an individual refuses to comply with a psychiatrist's order to return to the hospital, a peace officer

[4] This exception is not implicated by the issues raised in this appeal because the instant matter involves a petition filed under MCL 330.1473 rather than a petition filed under MCL 330.1434.

> shall take the individual into protective custody and transport the individual to the hospital selected. [Emphasis added.]

With respect to the report, § 453a, MCL 330.1453a, provides, in pertinent part, as follows:

> [T]he court shall order a report assessing the current availability and appropriateness for the individual of alternatives to hospitalization, including alternatives available following an initial period of court-ordered hospitalization. The report shall be prepared by the community mental health services program, a public or private agency, or another individual found suitable by the court. In deciding which individual or agency should be ordered to prepare the report, the court shall give preference to an agency or individual familiar with the treatment resources in the individual's home community.

Additionally, two more statutes are relevant to our consideration of respondent's first issue on appeal. First, MCL 330.1470 provides as follows:

> Prior to ordering the hospitalization of an individual, the court shall inquire into the adequacy of treatment to be provided to the individual by the hospital. Hospitalization shall not be ordered unless the hospital in which the individual is to be hospitalized can provide him with treatment which is adequate and appropriate to his condition.

Next, MCL 330.1460 provides as follows:

> Counsel for the subject of a petition shall be allowed adequate time for investigation of the matters at issue and for preparation, and shall be permitted to present the evidence that counsel believes necessary to a proper disposition of the proceedings, including evidence as to alternatives to hospitalization.

As noted, the statutory framework does not explicitly specify an evidentiary standard or burden of proof

that is applicable to the probate court's findings during this second phase of the process. Agreeing with petitioner, the probate court ruled that the absence of an evidentiary standard or burden of proof meant that none need be employed. Respondent argued in the probate court and in this Court that, at a minimum, the default standard in civil cases—preponderance of the evidence—applies to the probate court's determination of the form of treatment to order.

As an initial matter, it is necessary for this Court to clarify that although both the parties and the probate court generally framed the issue in terms of the required "burden of proof," there are actually two distinct, but related, concepts at play here: the *burden* of proof and the *standard* of proof.

Typically, the term "burden of proof" refers to "[a] party's duty to prove a disputed assertion or charge" or "a proposition regarding which of two contending litigants loses when there is no evidence on a question or when the answer is simply too difficult to find." *Black's Law Dictionary* (10th ed). "The burden of proof includes both the *burden of persuasion* and the *burden of production*." *Id*. Hence, "[i]n its strict sense the term 'burden of proof' refers to the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a case," and a "secondary use of the term . . . denotes the burden of going forward, i.e., the obligation to respond to a prima facie case established by the opposing party." *Palenkas v Beaumont Hosp*, 432 Mich 527, 550; 443 NW2d 354 (1989) (opinion by ARCHER, J.); see also *id*. at 530 (opinion of the Court).[5] By contrast, the term "standard

[5] The majority concurred in the part of the opinion by Justice ARCHER from which we have quoted. *Palenkas*, 432 Mich at 530 (opinion of the Court).

of proof" has been defined as follows: "[t]he degree or level of proof demanded in a specific case, such as 'beyond a reasonable doubt' or 'by a preponderance of the evidence'; a rule about the quality of the evidence that a party must bring forward to prevail." *Black's Law Dictionary* (10th ed). Therefore, although the parties and the probate court focused on whether there was an applicable "burden" of proof, we first must ascertain the requisite quantum of proof, i.e., the *standard* of proof, on which a probate court must base its decision regarding the form of treatment and placement for an individual found to be a person requiring treatment.

In discerning the applicable standard of proof, we begin by noting that the relevant statutes make clear that the probate court does not have unfettered discretion to choose a form of treatment and placement for an individual found to be a person requiring treatment. The probate court is required to order the preparation of a report on the availability and appropriateness of alternatives to hospitalization for the individual and, after reviewing that report, make particular determinations related to potential alternatives to hospitalization. MCL 330.1453a; MCL 330.1469a(1). Specifically, the probate court must determine (1) whether an alternative treatment program is "adequate to meet the individual's treatment needs," (2) whether an alternative treatment program is "sufficient to prevent harm that the individual may inflict upon himself or herself or upon others within the near future," and (3) whether an agency or mental health professional is "available to supervise the individual's alternative treatment program." MCL 330.1469a(1)(a) and (b). The probate court must also inquire about the "individual's desires regarding alternatives to hospitalization." MCL 330.1469a(1)(c). If the probate court finds that

the requirements in MCL 330.1469a(1)(a) and (b) are met with respect to a treatment program that is an alternative to hospitalization, then "the court *shall* issue an order for alternative treatment or combined hospitalization and alternative treatment in accordance with section 472a." MCL 330.1469a(2) (emphasis added).

Our Supreme Court has explained that "courts should give the ordinary and accepted meaning to the mandatory word 'shall' . . . unless to do so would clearly frustrate legislative intent as evidenced by other statutory language or by reading the statute as a whole." *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982). There is no indication that "shall" was not meant to be given its usual mandatory meaning in MCL 330.1469a(2), and the Legislature therefore gave the probate court a mandatory directive to order some form of alternative treatment when that form of treatment satisfies the standards set forth in MCL 330.1469a(1)(a) and (b). See *Browder*, 413 Mich at 612. Accordingly, if the probate court determines that there is an adequate form of alternative treatment that satisfies the standards in MCL 330.1469a(1)(a) and (b), then the probate court does not have the discretion to order hospitalization as the sole form of treatment. Although we recognize that in those circumstances the probate court may have some degree of discretion to determine the nature of alternative treatment to order or how to structure a combination of hospitalization and alternative treatment, any discretion held by the probate court is certainly not without limit. "[T]his mandatory directive indicates that a standard giving significant discretion to the probate court is not the correct one to use here." *Redd*, 321 Mich App at 409.

Next, given that the probate court is statutorily required to make specific determinations before ordering a course of treatment, a court cannot make these determinations in a vacuum or without referring to evidence. In this case, the probate court, despite ruling that there was no applicable burden of proof, clearly understood that its decision was based on evidence: it held an evidentiary hearing where it heard witness testimony and admitted exhibits. The probate court considered a report on alternatives to hospitalization, and it explained during the course of its oral ruling that it was considering the record evidence. However, the question becomes one regarding the necessary *strength or persuasiveness* of that evidence required to justify the probate court's ultimate factual findings. In other words, there must be a "standard of proof" because without one, a probate court could conceivably justify a factual finding on the basis of "some" or even a "scintilla" of evidence.

As we have previously indicated, although the Legislature provided that clear and convincing evidence is the required standard of proof for the initial finding that an individual is a "person requiring treatment," MCL 330.1465, there is no standard of proof provided in MCL 330.1469a regarding the probate court's findings on the adequacy and suitability of alternative treatments to hospitalization. "We must construe this omission of a provision in one statute that is included in another statute . . . as intentional." *Redd*, 321 Mich App at 408 (quotation marks and citation omitted; ellipsis in original). We therefore conclude that the clear-and-convincing-evidence standard in MCL 330.1465 does not apply to the determination regarding the individual's appropriate form of treatment and placement. "When a statute fails to state the standard that probate courts are to use to establish a particular

fact, the default standard in civil cases—preponderance of the evidence—applies." *Id*. at 409; see also *Mayor of Cadillac v Blackburn*, 306 Mich App 512, 522; 857 NW2d 529 (2014) ("Further, because the statute does not state the quantum of proof necessary . . . , the default standard in civil cases, the preponderance of the evidence, applies."). There is no indication in MCL 330.1469a that some standard of proof other than the default preponderance-of-the-evidence standard should apply, and as we have discussed, some standard of proof is necessary to substantiate a probate court's determinations regarding the appropriate treatment and placement to order. Therefore, we hold that MCL 330.1469a requires that a preponderance of the evidence support the probate court's findings with respect to its determinations regarding an individual's treatment and placement.

Having ascertained the standard of proof required by the statute, we next turn to addressing the allocation of the burden of proof. Again, the statute is silent on this point. Generally, the party who is the proponent of a given position bears the burden of establishing the facts to support that position. *Blackburn*, 306 Mich App at 521. "The party alleging a fact to be true should suffer the consequences of a failure to prove the truth of that allegation." *Kar v Hogan*, 399 Mich 529, 539; 251 NW2d 77 (1976), not followed on other grounds by *In re Karmey Estate*, 468 Mich 68, 69, 73-74 (2003). In accordance with this principle, we hold that the proponent of a particular form of treatment or placement at a specific facility for an individual who has been found to be a person requiring treatment bears the burden of proving by a preponderance of the evidence the facts necessary to persuade the probate court to enter such an order and for the probate court to be legally justified in entering such an order pursuant to the statutory

requirements in Chapter 4 of the Mental Health Code that we have previously discussed.[6]

[6] We note that respondent expressly argued for application of the preponderance-of-the-evidence standard and, understandably, has not argued that applying this standard to the probate court's treatment determination would violate his right to due process. Accordingly, we express no opinion on that issue.

As previously stated, the involuntary hospitalization proceedings at issue in this case are civil proceedings. In reaching this conclusion, we draw guidance from our Supreme Court. Our Supreme Court considers these types of proceedings, through which an individual is involuntarily hospitalized after being found not guilty by reason of insanity of a crime, to be civil in nature. See *Dobben*, 440 Mich at 691 (discussing the CFP's responsibility for "evaluat[ing] and fil[ing] reports where civil commitment is sought subsequent to a finding of not guilty by reason of insanity"); *People v Webb*, 458 Mich 265, 281; 580 NW2d 884 (1998) (explaining that MCL 330.2050, which contains procedures for involuntarily committing persons acquitted of a criminal charge by reason of insanity, is a statute designed to "promote public safety" and "establish[] a procedure for determining whether a person acquitted by reason of insanity can safely be returned to society" because "[p]ersons acquitted by reason of insanity, particularly where the facts are grave, cannot be allowed simply to walk out the front door of the courthouse"). Most importantly, our Supreme Court in *People v McQuillan*, 392 Mich 511, 546-547; 221 NW2d 569 (1974), held that upon completion of a "period of temporary statutory detention" for purposes of examination and observation, "due process and equal protection require that a defendant found not guilty by reason of insanity must have the benefit of commitment and release provisions equal to those available to those civilly committed."

Our Michigan standard, which is now reflected in MCL 330.2050, appears to provide more than the minimum constitutional due-process protection to which a person in respondent's circumstances is entitled under United States Supreme Court precedent. In *Jones v United States*, 463 US 354, 370; 103 S Ct 3043; 77 L Ed 2d 694 (1983), the Court held that under the Due Process Clause, "when a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society." The *Jones* Court explained that in such a case, the initial commitment could be based on the not-guilty-by-reason-of-insanity verdict alone without conducting an additional civil commitment hearing. *Id*. at 366.

Petitioner, in arguing that there is no burden or standard of proof applicable to the probate court's treatment determination, compares the probate court's decision regarding the appropriate form of treatment to a trial court's discretionary sentencing decision in criminal proceedings. Petitioner relies on *In re Portus*, 142 Mich App 799, 803; 371 NW2d 871 (1985), in which this Court held that there was no requirement that a jury determine the appropriate treatment for an individual, although the question whether that individual continued to require treatment was submitted to the jury pursuant to MCL 330.1458.[7] We reasoned that the circumstances of involuntary commitment were "analogous to the criminal setting, where the jury determines the guilt and then the trial judge decides the sentence." *Portus*, 142 Mich App at 803. But petitioner's reliance is misplaced because we made the comparison in *Portus* for the sole purpose of rationalizing why an individual is entitled to a jury determination regarding whether he or she continues to require treatment while not being entitled to a jury determination of the appropriate form of treatment. We did not state that a judge's determination of the appropriate form of treatment is not subject to any standards for supporting that determination.

Moreover, a trial court's sentencing discretion in the criminal context is also not unlimited. For example, although a sentencing court may exercise its discretion to impose a sentence that represents a departure from

[7] MCL 330.1458 currently provides, as it did at the time that *Portus* was decided:

> The subject of a petition may demand that the question of whether he requires treatment or is legally incompetent be heard by a jury. A jury shall consist of 6 persons to be chosen in the same manner as jurors in civil proceedings.

the applicable guidelines range without articulating a substantial and compelling reason, the sentence is still reviewable by an appellate court for "reasonableness." *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015). When reviewing a sentence for reasonableness, an appellate court determines whether the sentencing court abused its discretion by violating the "principle of proportionality," which requires sentences to be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Steanhouse*, 500 Mich 453, 459-460; 902 NW2d 327 (2017) (quotation marks and citation omitted). A sentencing court is still obligated to take the legislative sentencing guidelines into account when sentencing, *id*. at 474-475, and the trial court's factual determinations under the sentencing guidelines must be supported by a preponderance of the evidence, *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). Thus, there is simply no merit in any comparison to criminal sentencing as support for the conclusion that no standard of proof is required to support the probate court's treatment determination.

In sum, the probate court erred by ruling that there was no applicable burden of proof to its treatment determination and issuing its treatment order without tying it to any evidentiary standard.

We cannot conclude that this error was harmless. A lower court's error "is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A). An error is harmless if it did not affect the outcome of the proceeding. *In re Sprint Communications Co, LP, Complaint*, 234 Mich App 22, 42; 592 NW2d 825 (1999).

In this case, because the probate court believed that there was no applicable burden or standard of proof and made its findings and conclusions while operating under that belief, we cannot ascertain on what basis the probate court made its findings. Therefore, the probate court's error was not harmless. *Id*. Moreover, we "defer to the probate court on matters of credibility, and will give broad deference to findings made by the probate court because of its unique vantage point regarding witnesses, their testimony, and other influencing factors not readily available to the reviewing court." *In re Brody Conservatorship*, 321 Mich App 332, 336; 909 NW2d 849 (2017) (quotation marks and citation omitted). Additionally, when a trial court fails to apply the proper legal standards, normally the appropriate appellate remedy is to remand to that trial court for application of the proper legal standards. See *People v Barritt*, 501 Mich 872 (2017).

Respondent also raises three other distinct claims of error on appeal that we must address in order to provide guidance to the probate court on remand.

First, respondent argues that the probate court erred by indicating that after determining respondent was a person requiring treatment, the probate court would look to MCL 330.1468(2) to determine the type of treatment to order. Respondent maintains, and petitioner agrees on appeal, that MCL 330.1468(2) applies only to petitions filed under § 434, MCL 330.1434, and that § 468(2) is therefore inapplicable in the instant case because the subject petition was filed pursuant to MCL 330.1473 rather than MCL 330.1434.

The parties are incorrect. Admittedly, MCL 330.1468(2), which we have previously set forth more completely, begins as follows: "For a petition filed *under section 434*, if an individual is found to be a

person requiring treatment, the court shall do 1 of the following . . . ." (Emphasis added.) As we have already explained, a petition filed under MCL 330.1473 before the expiration of a continuing order triggers MCL 330.1472a(4), which provides that once such a petition has been received and an individual has been found to be a person requiring treatment, "the court shall issue another continuing order for *involuntary mental health treatment* as provided in subsection (3) for a period not to exceed 1 year." (Emphasis added.) However, the term "involuntary mental health treatment" is statutorily defined to mean "court-ordered hospitalization, alternative treatment, or combined hospitalization and alternative treatment *as described in section 468*." MCL 330.1400(f) (emphasis added). Thus, the probate court was specifically directed to look to MCL 330.1468, which sets forth these potential treatment options, and the probate court did not err by referring to this statute.[8]

Next, respondent argues that the probate court erred by concluding that Harbor Point was not a "hospital." With respect to its determination on this point, the probate court stated as follows during the course of announcing its final ruling from the bench:

> [T]he court rejects the stipulation of the prosecutor to the characterization of Harbor Point Center as a hospital, because one, it is not a hospital, it is a direct community

[8] We acknowledge that the relevant portion of MCL 330.1468(2) at issue—"For a petition filed under section 434"—was the result of an amendment that took effect on February 14, 2017, shortly before the evidentiary hearing in this matter. 2016 PA 320. However, this change to the statute does not negate the fact that the forms of treatment described in MCL 330.1468(2) are still expressly incorporated into MCL 330.1472a(4) through the statutory definition of "involuntary mental health treatment" contained in MCL 330.1400(f).

> placement pursuant to the October 13th, 2016 letter of Joseph Corso of the Center for Forensic Psychiatry.

For purposes of the Mental Health Code, the terms "hospital" and "psychiatric hospital" are both defined as "an inpatient program operated by the department for the treatment of individuals with serious mental illness or serious emotional disturbance or a psychiatric hospital or psychiatric unit licensed under [MCL 330.1137]." MCL 330.1100b(7); MCL 330.1100 (stating that the definitions in MCL 330.1100a to MCL 330.1100d apply to the Mental Health Code unless otherwise required by the context). A "psychiatric unit" is "a unit of a general hospital that provides inpatient services for individuals with serious mental illness or serious emotional disturbance," and as used in this definition, " 'general hospital' means a hospital as defined in section 20106 of the public health code, 1978 PA 368, MCL 333.20106."[9] MCL 330.1100c(8). " 'Department' means the department of health and human services." MCL 330.1100a(21). " 'Hospitalization' or 'hospitalize' means to provide treatment for an individual as an inpatient in a hospital." MCL 330.1100b(9).

We cannot find where the probate court applied these statutory definitions in determining whether

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[9] MCL 333.20106(5) has recently been amended, but the changes are not substantive. 2017 PA 167. MCL 333.20106(5) currently provides as follows:

> "Hospital" means a facility offering inpatient, overnight care, and services for observation, diagnosis, and active treatment of an individual with a medical, surgical, obstetric, chronic, or rehabilitative condition requiring the daily direction or supervision of a physician. Hospital does not include a mental health hospital licensed or operated by the department of health and human services or a hospital operated by the department of corrections.

Harbor Point was a "hospital" for purposes of the Mental Health Code. Should this issue arise on remand, the probate court must determine whether the evidence establishes that Harbor Point meets the statutory definition of "hospital" for purposes of the Mental Health Code, because that affects whether placement at Harbor Point is actually "an *alternative to* hospitalization" or "*alternative* treatment" under MCL 330.1468(2) and MCL 330.1469a(1) and (2). (Emphasis added.) It is also important to make proper a determination whether a given facility—Harbor Point in this case—is a "hospital" because under MCL 330.1471, "[p]reference between the department designated hospital and other available hospitals shall be given to the hospital which is located nearest to the individual's residence except when the individual requests otherwise or there are other compelling reasons for an order reversing the preference."

Lastly, respondent argues that the probate court's order that respondent would remain at the CFP "until further order of the court" was contrary to certain statutory provisions in the Mental Health Code that pertain to the release of patients, specifically MCL 330.2050(5) and MCL 330.1476 to MCL 330.1479.

MCL 330.2050(5) provides as follows:

> The release provisions of [MCL 330.1476 to MCL 330.1479] of this act shall apply to a person found to have committed a crime by a court or jury, but who is acquitted by reason of insanity, except that a person shall not be discharged or placed on leave without first being evaluated and recommended for discharge or leave by the department's program for forensic psychiatry, and authorized leave or absence from the hospital may be extended for a period of 5 years.

Thus, MCL 330.2050(5) expressly incorporates the release provisions found in MCL 330.1476 to

MCL 330.1479. Of those provisions, the only one that is applicable to respondent at this juncture is MCL 330.1476, which provides, in relevant part:

> (2) The hospital director shall discharge a patient hospitalized by court order when the patient's mental condition is such that he or she no longer meets the criteria of a person requiring treatment.
>
> (3) If a patient discharged under subsection (1) or (2) has been hospitalized by court order, or if court proceedings are pending, the court shall be notified of the discharge by the hospital.

" 'Discharge' means an absolute, unconditional release of an individual from a facility by action of the facility or a court." MCL 330.1100a(27). " 'Hospital director' means the chief administrative officer of a hospital or his or her designee." MCL 330.1100b(8).

These statutes provide a procedural mechanism for discharging an individual who "no longer meets the criteria of a person requiring treatment," without requiring a court order sanctioning the discharge. MCL 330.1100a(27); MCL 330.1100b(8); MCL 330.1476(2); MCL 330.2050(5). Therefore, the probate court erred by ordering respondent to remain at the CFP "until further order of the court." This language is contrary to MCL 330.1476(2) and MCL 330.2050(5) despite the fact that the probate court's order otherwise complied with the time limitation in MCL 330.1472a(3)(a) by indicating that respondent would be hospitalized for up to 365 days.

On remand, if the probate court determines that respondent must remain hospitalized at the CFP, the probate court shall not include language ordering respondent to remain "until further order of the court." See *People v Carson*, 169 Mich App 343, 344, 346-347; 425 NW2d 548 (1988) (holding that the circuit court's

order was contrary to law when the order restrained the CFP from discharging an individual who had been acquitted by reason of insanity until after a petition had been filed in the circuit court and the individual had been found not to require treatment pursuant to a hearing on the matter).

IV. CONCLUSION

Under the provisions of the Mental Health Code applicable to obtaining continuing orders of involuntary mental health treatment, a probate court's treatment determination must be supported by a preponderance of the evidence. Because the probate court did not apply this standard and instead determined that no evidentiary standard applied, it erred. On remand, the probate court must resolve conflicts in the evidence and make the necessary factual findings under the preponderance-of-the-evidence standard of proof with each party retaining the burden of persuasion with respect to the placement and form of treatment each seeks.

Reversed and remanded. We do not retain jurisdiction.

M. J. KELLY and BOONSTRA, JJ., concurred with BORRELLO, P.J.

TOTAL ARMORED CAR SERVICE, INC v DEPARTMENT OF TREASURY

Docket No. 340495. Submitted July 10, 2018, at Lansing. Decided July 24, 2018, at 9:10 a.m.

Total Armored Car Service, Inc. (TACS) filed a petition in the Michigan Tax Tribunal, challenging the Department of Treasury's disallowance of certain deductions and credits for the years 2009 through 2011. The department conducted an audit and determined that TACS had underpaid its taxes for those tax years by $144,924. The department determined, in part, that the underpayment resulted from a misclassification of items as materials and supplies for deduction under MCL 208.1113(6)(c) and from a miscalculation of the employee compensation credit under MCL 208.1403(2). With regard to materials and supplies, the department determined that TACS had improperly included costs related to operating leases, contract labor, purchased transportation, and outside courier services in that category. With regard to the compensation credit, the department concluded that TACS had erred by calculating the credit on the basis of compensation paid to Michigan residents instead of on the basis of compensation paid to employees for work performed in this state. In its petition, TACS objected to those determinations. TACS additionally argued in the tribunal that its tax liability was not calculated correctly because it had filed its taxes as part of a unitary business group with seven sister corporations when, under *LaBelle Mgt, Inc v Dep't of Treasury*, 315 Mich App 23 (2016), it was actually a single tax entity. The tribunal granted the department's motion for summary disposition, and TACS appealed.

The Court of Appeals *held*:

1. The Michigan Business Tax Act (the BTA), MCL 208.1101 *et seq*., imposes a business income tax, MCL 208.1202, and a modified-gross-receipts tax, MCL 208.1203, against taxpayers who have business activity in Michigan. MCL 208.1113(6)(c) provides that a business may modify its gross-receipts tax base by deducting purchases from other firms, including purchases of inventory acquired during the year, assets acquired during the

tax year that are eligible for depreciation for federal tax purposes, or any other materials and supplies not included in either inventory or depreciable property. Given the dictionary definitions of the terms "material" and "supplies," and that the nonexhaustive list of items of "materials or supplies" in MCL 208.1113(6)(c) contains only tangible and physical examples, the phrase "materials and supplies" means tangible personal property only and does not include services. In this case, the department correctly disallowed certain deductions for materials and supplies under MCL 208.1113(6)(c) because the disallowed items—costs related to operating leases, contract labor, purchased transportation, and outside courier services—were not tangible property. The tribunal correctly affirmed the department's calculation of the gross-receipts deduction for materials and supplies.

2. MCL 208.1403(2) provides that for the 2009 tax year and each year after 2009, a taxpayer may claim a credit against the tax imposed by the BTA equal to 0.370% of the taxpayer's compensation in this state. MCL 208.1107(2) provides that the term "compensation" means all wages, salaries, fees, bonuses, commissions, other payments made in the tax year on behalf of or for the benefit of employees, officers, or directors of the taxpayers, and any earnings that are net earnings from self-employment. Because the Legislature defined the term "compensation" in the BTA as wages, salaries, commissions, and other such payments, the phrase "compensation in this state" means remuneration received in return for services rendered or work performed in this state; the compensation deduction is not calculated on the basis of whether the employee is a resident of the state. In this case, the tribunal reached the correct result by affirming the department's method of calculating TACS's compensation credit under MCL 208.1403(2).

3. The tribunal effectively allowed TACS to amend its petition to address its *LaBelle* argument that it was not a unitary business group and that it should have been taxed as a single tax entity. The tribunal correctly denied TACS's request for relief under *LaBelle*. The procedural posture of the case was inapposite, and TACS failed to challenge the tribunal's stated reasons for not applying the case. Regardless, TACS did not have standing to raise the argument because the company never attempted to file an individual tax return, and, as a result, the department had never addressed the issue.

Affirmed.

1. TAXATION — GROSS-RECEIPTS TAX DEDUCTION — WORDS AND PHRASES — "MATERIALS AND SUPPLIES."

MCL 208.1113(6) provides that a business may modify its gross-receipts tax base by deducting purchases from other firms, including purchases of inventory acquired during the year, assets acquired during the tax year that are eligible for depreciation for federal tax purposes, or any other materials and supplies not included in either inventory or depreciable property; under MCL 208.1113(6)(c), the phrase "materials and supplies" means tangible personal property, not services.

2. TAXATION — COMPENSATION CREDIT — WORDS AND PHRASES — "COMPENSATION IN THIS STATE."

MCL 208.1403(2) provides that for the 2009 tax year and each year after 2009, a taxpayer may claim a credit against the tax imposed by the Michigan Business Tax Act, MCL 208.1101 *et seq*., equal to 0.370% of the taxpayer's compensation in this state; the phrase "compensation in this state" means remuneration received by an employee in return for services rendered or work performed in this state; the credit is not calculated on the basis of whether the employee is a resident of the state.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *B. Eric Restuccia*, Chief Legal Counsel, and *Scott L. Damich*, Assistant Attorney General, for the Department of Treasury.

Fraser Trebilcock Davis & Dunlap, PC (by *Paul V. McCord*) for Total Armored Car Service, Inc.

Before: RONAYNE KRAUSE, P.J., and GLEICHER and LETICA, JJ.

PER CURIAM. Following an audit, the Department of Treasury determined that Total Armored Car Services, Inc. (TACS) had underpaid its taxes in three tax years. TACS filed a petition in the Michigan Tax Tribunal (MTT), challenging the department's disallowance of certain deductions and credits and later adding a claim that it should be treated as a lone tax unit rather than

as a collective taxpayer. The MTT summarily dismissed the petition. We discern no error in the MTT's judgment and affirm.

I. BACKGROUND

In November 2012, the department conducted an audit of TACS's business tax returns for 2008 through 2011 and determined that TACS had underpaid by $144,924 for tax years 2009, 2010, and 2011. Part of this underpayment arose from the misclassification of items as materials and supplies for deduction under MCL 208.1113(6)(c), and part was due to miscalculation of the employee compensation credit provided in MCL 208.1403(2). TACS challenged the auditor's conclusions to no avail. It then filed a petition with the MTT. In addition to the objections raised directly to the audit, TACS noted before the MTT hearing that it had filed its taxes as part of a unitary business group (UBG) with seven sister corporations but that it actually counted as a single tax entity pursuant to *LaBelle Mgt, Inc v Dep't of Treasury*, 315 Mich App 23; 888 NW2d 260 (2016). Accordingly, TACS generally asserted that its tax liability was no longer accurately calculated.

The MTT ultimately granted summary disposition in the department's favor and ordered TACS to pay its tax liability with interest. TACS now appeals.

II. STANDARD OF REVIEW

We review de novo the MTT's decision on a motion for summary disposition. *Moshier v Whitewater Twp*, 277 Mich App 403, 407; 745 NW2d 523 (2007). We also review de novo the MTT's interpretation of statutory provisions. *Id*. However, generally, our review is "lim-

ited to determining whether the tribunal erred in applying the law or adopted a wrong principle . . . ." *Id*. The MTT's "factual findings are conclusive if supported by competent, material, and substantial evidence on the whole record." *Klooster v City of Charlevoix*, 488 Mich 289, 295; 795 NW2d 578 (2011) (quotation marks and citation omitted).

III. MATERIALS AND SUPPLIES DEDUCTION

In tax year 2010, TACS deducted from its gross receipts $12,712,186 in materials and supplies, and it deducted $24,567,291 for tax year 2011.[1] According to the audit report, these deductions included the cost of "repairs and maintenance, gas and oil, parts, rental equipment, lease contract, outside courier services, contract labor and purchased transportation." The department determined that costs "related to operating leases, contract labor, purchased transportation, and outside courier services" were improperly included in this category and adjusted the deductions for 2010 and 2011 accordingly.

TACS contends that the disallowed items are "materials and supplies" deductible from gross receipts under MCL 208.1113(6). The Michigan Business Tax Act (BTA), MCL 208.1101 *et seq*., imposes a business income tax, MCL 208.1201, and a modified-gross-receipts tax, MCL 208.1203, against taxpayers with business activity in Michigan. A business's modified-gross-receipts tax base may be reduced by certain credits and deductions. One deduction is for "purchases from other firms," MCL 208.1113(6), which includes:

[1] In its appellate brief, TACS asserts, contrary to the audit report, that it claimed a deduction of $12,712,186 in 2009 and $24,567,291 in 2010.

> (a) Inventory acquired during the tax year, including freight, shipping, delivery, or engineering charges included in the original contract price for that inventory.
>
> (b) Assets, including the costs of fabrication and installation, acquired during the tax year of a type that are, or under the internal revenue code will become, eligible for depreciation, amortization, or accelerated capital cost recovery for federal income tax purposes.
>
> (c) To the extent not included in inventory or depreciable property, materials and supplies, including repair parts and fuel.

The auditor determined that "Materials and Supplies means tangible personal property," not services such as those reported by TACS. This is consistent with the plain language of MCL 208.1113(6).

Our goal when interpreting statutes is to ascertain the Legislature's intent. *Cook v Dep't of Treasury*, 229 Mich App 653, 658-659; 583 NW2d 696 (1998). The best indicator of that intent is the plain language of the statute. *Ferguson v Lincoln Park*, 264 Mich App 93, 95; 694 NW2d 61 (2004). If the language is clear and unambiguous, we must apply the statute as written. *Id*. at 95-96. In reading and applying the plain language of a statute, we must give effect "to every phrase, clause, and word in the statute. The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) (citation omitted). And when defining words in a statute, "we must consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme." *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008) (quotations marks and citation omitted).

When read as a whole, MCL 208.1113(6) defines the purchases-from-other-firms deduction as inventory ac-

quired in the tax year; assets acquired during the tax year that are eligible for depreciation for federal tax purposes; or any other materials and supplies, such as repair parts or fuel, not included in either inventory or depreciable property. While Subdivisions (a) and (b) include services related to the acquisition of inventory or assets (costs for installation, shipping and engineering); Subdivision (c) includes only tangible items of property not included in inventory or depreciable property. The BTA does not define "materials and supplies." When the Legislature does not provide a definition for the words used in a statute, we may look to dictionary definitions. *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 526; 697 NW2d 895 (2005). The terms "materials and supplies," when used in their noun form as in the statute, are defined as physical items. "Material" means "relating to, derived from, or consisting of matter" and "being of a physical or worldly nature[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed), p 765. "Supplies," in its noun form, means "PROVISIONS" or "STORES." *Id*. at p 1256.[2]

Moreover, the qualifying clause immediately following "materials and supplies"—"including repair parts and fuel"—indicates an intent to limit materials and supplies to tangible property. This phrase, when read in context, provides examples of the type of tangible property that may be included within the meaning of "materials and supplies." While the term "including" suggests a nonexhaustive list of items within the category of "materials or supplies," the examples are both tangible and physical. "Under the statutory construction doctrine known as ejusdem generis, where a

[2] TACS relies on the verb form of "supply" to interpret the statute as including services within the definition of "materials and supplies." TACS thereby takes the word out of its grammatical context.

general term follows a series of specific terms, the general term is interpreted to include only things of the same kind, class, character, or nature as those specifically enumerated." *Neal v Wilkes*, 470 Mich 661, 669; 685 NW2d 648 (2004) (quotation marks and citation omitted). Accordingly, the type of property included in the definition of "materials and supplies" is limited to tangible items.

Given the plain language of MCL 208.1113(6), we discern no error in the MTT's dismissal of TACS's challenge to the department's audit.

IV. COMPENSATION CREDIT

The department also determined that TACS overstated the compensation earned by employees of E.L. Hollingsworth (another member of the UBG) in 2009 and 2010. In 2009, TACS reported a compensation credit of $12,575,339, and in 2010, TACS reported a $10,897,553 compensation credit.[3] These figures were based solely on the residencies of the employees, not "on actual work (miles driven) performed within the state of Michigan." The auditor reasoned that TACS was only entitled to 100% of the compensation credit if 100% of a particular employee's miles were driven in Michigan. By implication, TACS was entitled to a reduced credit when an employee earned a portion of his or her compensation while driving within Michigan but also earned compensation while driving out of state.

The BTA provides a tax credit to reduce a taxpayer's liability for compensation in this state. Specifically, "[f]or the 2009 tax year and each tax year after 2009, . . .

[3] The compensation credit figures cited by TACS in its appellate brief do not match the figures provided in the audit report for the tax years in question.

a taxpayer may claim a credit against the tax imposed by this act equal to 0.370% of the taxpayer's compensation in this state." MCL 208.1403(2). The phrase "compensation in this state" is not defined by statute.

Contrary to the MTT's ruling, the phrase "compensation in this state" is not ambiguous. MCL 208.1107(2) defines "compensation" as "all wages, salaries, fees, bonuses, commissions, other payments made in the tax year on behalf of or for the benefit of employees, officers, or directors of the taxpayers, and any earnings that are net earnings from self-employment . . . ." "Wages," "salaries," and "commissions," by their plain meanings, are payments for work or services performed. See, e.g., *Black's Law Dictionary* (10th ed) (defining "wages" as "[p]ayment for labor or services" and "salary" as "compensation for services"). By defining "compensation" as wages, salaries, commissions, and other such payments, the Legislature recognized that "compensation" is essentially remuneration received in return for services rendered or work performed.

But what did the Legislature intend in using the phrase "compensation *in this state*"? Giving effect to every word of the statute and with the statutory definition of "compensation" in mind, it is clear that the Legislature intended for the credit to apply only to work or services performed in the state of Michigan. When the definition of "compensation" is inserted into the phrase "compensation in this state," it provides that the credit is available for "[remuneration for services or work performed] in this state." Following TACS's proposal, on the other hand, would require us to add terms and conditions into the statute. The statute makes no reference to the residency of the subject employees, nor do the definitions of the specific words used. Ultimately, although the MTT's reasoning

was flawed, it reached the correct result. TACS is therefore not entitled to relief. See *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

TACS further argues, for the first time on appeal, that the services rendered by an employee should "be sourced based upon single items of income," meaning that "[i]f transportation services [were] performed pursuant to an annual or long term contract, the compensation was generated at the time of the creation of the contract and therefore sourced to the state in which the contract was entered." Under this theory, further discovery would be necessary to ascertain where the subject employees entered into their contracts.

We review unpreserved challenges for plain error. To establish an entitlement to relief based on plain error, the injured party "must show (1) that an error occurred, (2) that the error was plain, and (3) that the plain error affected [its] substantial rights." *Henderson v Dep't of Treasury*, 307 Mich App 1, 9; 858 NW2d 733 (2014) (quotations marks and citation omitted). To merit relief, the injured party must show prejudice, i.e., that the error affected the outcome of the MTT proceedings. *Id*.

No error occurred in this regard. The "single items of income" concept simply is not the law of Michigan. Rather, TACS culled it from model regulations drafted by the Multistate Tax Commission. Moreover, TACS has made no calculations to show how this reformation of the law would impact its tax liability. Accordingly, it cannot show that it suffered any prejudice.

V. UBG STATUS

TACS finally challenges the MTT's failure to apply *LaBelle* to deconstruct its UBG and then to order TACS and the department to restart the tax filing process for the years in question.

LaBelle was issued on March 31, 2016, three months before TACS filed its petition, but the opinion's effect was stayed until disposition of the department's application for leave to appeal in the Supreme Court. *LaBelle Mgt, Inc v Dep't of Treasury*, unpublished order of the Court of Appeals, entered May 5, 2016 (Docket No. 324062). The Supreme Court denied leave on January 24, 2017. *LaBelle Mgt, Inc v Dep't of Treasury*, 500 Mich 931 (2017). The department sought summary disposition in this case approximately three months after the Supreme Court's *LaBelle* decision.

TACS contends that the MTT "reversibly erred in denying what, in practical effect, amounted to [its] motion for leave to amend its Petition" to apply *LaBelle*. TACS does not deny that it never directly requested to file an amended petition. It did, however, raise its claims under *LaBelle* in its prehearing statement. The department sought to strike TACS's argument as it had not been raised in the petition. The MTT denied the motion to strike, ordered supplemental briefing on the issue, and actually considered TACS's claim before entering its final judgment. In "practical effect," the MTT allowed TACS "to amend its Petition" as it fully considered the claim.

The MTT also did not err by denying TACS relief under *LaBelle*. In *LaBelle*, 315 Mich App at 30, this Court considered how to define the phrase "owns or controls . . . indirectly" as used in MCL 208.1117(6), the BTA provision defining a UBG. Specifically, MCL 208.1117(6) defines a UBG as

> a group of United States persons, other than a foreign operating entity, 1 of which owns or controls, directly or indirectly, more than 50% of the ownership interest with voting rights or ownership interests that confer comparable rights to voting rights of the other United States persons, and that has business activities or operations

> which result in a flow of value between or among persons included in the [UBG] or has business activities or operations that are integrated with, are dependent upon, or contribute to each other. For purposes of this subsection, flow of value is determined by reviewing the totality of facts and circumstances of business activities and operations.

In *LaBelle*, 315 Mich App at 37, this Court held that indirect ownership means ownership "through an intermediary, not ownership by operation of legal fiction . . . ." (Emphasis omitted.) It followed that because neither the plaintiff nor the related entities owned through an intermediary or otherwise more than 50% of any other entity, the department had improperly characterized the plaintiff as part of a UBG. *Id*. at 37-38.

The procedural posture of *LaBelle* is distinguishable from the case now before us. In that case, the plaintiff corporation had filed an individual business tax return, and during an audit, the department determined that it should have filed a combined return as part of a UBG with two related entities. *Id*. at 26-27. The Court of Claims affirmed the tax deficiency, but this Court reversed because insufficient indirect ownership existed to characterize the plaintiff as part of a UBG. *Id*. at 28, 37-38. Here, TACS sought reconsideration of the MTT's ruling, arguing that the MTT should have ordered it to file amended individual tax returns for the years in question and ordered the department to accept those filings. As the MTT sagely concluded, however, TACS never requested such relief and it was not the MTT's duty to direct TACS on how to prove its case. And TACS's failure to file amended returns, or even to present amended tax returns to the MTT, meant it could not establish prejudice.

The MTT further opined that other pragmatic reasons existed for not applying *LaBelle*. For example, TACS's seven sister corporations were not parties to the lawsuit, and the MTT was hesitant to allow TACS to speak as a representative of all. The other entities may be harmed by the separation, creating a conflict of interest. There was no record indication that any of the other UBG members had taken steps to exhaust their administrative remedies. Moreover, no member of the UBG had attempted to file an individual tax return. Their individual tax liabilities, like TACS's individual tax liability, were hypothetical only. TACS has challenged none of these reasons.

Even if TACS had properly developed its argument, it would not be entitled to relief as its claim is not ripe for adjudication. As TACS has never attempted to file an individual tax return, the department has never determined whether TACS could be an individual taxpayer or whether it must file as part of a UBG. TACS has yet to be aggrieved by the department in this regard. And only aggrieved parties have standing to pursue claims. *Manuel v Gill*, 481 Mich 637, 643; 753 NW2d 48 (2008).

We affirm.

RONAYNE KRAUSE, P.J., and GLEICHER and LETICA, JJ., concurred.

VERMILYA v DELTA COLLEGE BOARD OF TRUSTEES

Docket No. 341229. Submitted July 10, 2018, at Lansing. Decided July 31, 2018, at 9:00 a.m.

Harlan Vermilya and Ann Anklam brought an action in the Saginaw Circuit Court against the Delta College Board of Trustees, alleging multiple violations of the Open Meetings Act (OMA), MCL 15.261 *et seq*. Defendant passed a motion to enter closed session "for the purpose of discussing specific pending litigation with legal counsel" under MCL 15.268(e). Plaintiffs brought suit, alleging, in part, that defendant had failed to name the pending litigation it planned to discuss. Defendant moved for summary disposition, arguing that MCL 15.268(e) has no such requirement. Plaintiff responded that defendant's meeting minutes failed to show the "purpose" for holding a closed-session meeting as required by MCL 15.267(1) and MCL 15.269(1). The court, Robert L. Kaczmarek, J., granted partial summary disposition in favor of plaintiffs under MCR 2.116(I)(2), holding that defendant's failure to identify the "specific pending litigation" it would be discussing in closed session violated MCL 15.267(1) and MCL 15.269(1). Defendant appealed.

The Court of Appeals *held*:

Under the OMA, public bodies must conduct their meetings, make all of their decisions, and conduct their deliberations—when a quorum is present—at meetings open to the public. However, a public body may meet in a closed session for certain enumerated purposes. Under MCL 15.268(e), a public body may meet in a closed session to consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have a detrimental financial effect on the litigating or settlement position of the public body. MCL 15.267(1) lists certain procedural requirements that must be met for a public body to commence a closed session, and MCL 15.269(1) requires, in part, that each public body keep minutes of each meeting showing the purpose or purposes for which a closed session is held. Accordingly, a public body must state on the record the purpose of the closed session before initiating the session. Examining MCL 15.267(1), MCL 15.268(e),

and MCL 15.269(1) together, the Legislature intended for the public body to identify the specific litigation it would be discussing in justifying its decision to close its meeting to the public. While a case name in and of itself may not provide much information, it alerts the public to the existence of litigation and allows for further inquiry. If the Legislature did not intend for the public body to disclose the particular case or cases it would be discussing, there would be no reason for the phrase "specific pending litigation" to contain the word "specific," as the word has no practical effect on the permissible substance of the public body's discussion in a closed session. Accordingly, in this case, defendant violated MCL 15.267(1) and MCL 15.269(1) by not articulating the purpose for calling a closed session in accordance with MCL 15.268(e). The trial court correctly granted plaintiffs summary disposition under MCR 2.116(I)(2).

Affirmed.

STATUTES — OPEN MEETINGS ACT — CLOSED SESSIONS — IDENTIFICATION OF SPECIFIC PENDING LITIGATION.

Under MCL 15.268(e) of the Open Meetings Act, MCL 15.261 *et seq*., a public body may meet in a closed session to consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have a detrimental financial effect on the litigating or settlement position of the public body; a public body must name the pending litigation before entering a closed session.

Kim A. Higgs for plaintiffs.

Cummings, McClorey, Davis & Acho, PLC (by *Elizabeth Rae-O'Donnell* and *Douglas J. Curlew*) and *Braun Kendrick Finkbeiner, PLC* (by *Ellen E. Crane*) for defendant.

Before: RONAYNE KRAUSE, P.J., and GLEICHER and LETICA, JJ.

PER CURIAM. In this action alleging multiple violations of the Open Meetings Act (OMA), MCL 15.261 *et seq*., the trial court issued an opinion and order granting in part and denying in part defendant's motion for summary disposition pursuant to MCR 2.116(C)(8)

(failure to state a claim) and (C)(10) (no genuine issue of material fact). Relevant to this appeal, the court also granted plaintiffs summary disposition in part under MCR 2.116(I)(2) (nonmoving party entitled to judgment), ruling that defendant's failure to identify the "specific pending litigation" it would be discussing in closed session violated MCL 15.267(1) and MCL 15.269(1). Defendant appeals by right. We affirm.

This case arises out of a January 12, 2016 meeting in which defendant passed a motion to enter closed session "for the purpose of discussing specific pending litigation with legal counsel" pursuant to MCL 15.268(e). Plaintiffs brought suit, alleging, in part, that defendant violated the OMA by failing to name the pending litigation it planned to discuss. Defendant moved the trial court for summary disposition, arguing that MCL 15.268(e) had no such requirement. Plaintiffs' position was that defendant's meeting minutes failed to show the "purpose" for holding a closed-session meeting as required by MCL 15.267(1) and MCL 15.269(1). The trial court agreed with plaintiffs.

We review de novo a trial court's decision to grant summary disposition. *Local Area Watch v Grand Rapids*, 262 Mich App 136, 142; 683 NW2d 745 (2004). We also review de novo questions of statutory interpretation. *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125, 133; 860 NW2d 51 (2014).

The foundational principles of statutory interpretation are well established:

> When interpreting a statute, we follow the established rules of statutory construction, the foremost of which is to discern and give effect to the intent of the Legislature. To do so, we begin by examining the most reliable evidence of that intent, the language of the statute itself. If the language of a statute is clear and unambiguous, the

> statute must be enforced as written and no further judicial construction is permitted. Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory. Only when an ambiguity exists in the language of the statute is it proper for a court to go beyond the statutory text to ascertain legislative intent. [*Whitman v City of Burton*, 493 Mich 303, 311-312; 831 NW2d 223 (2013) (citations omitted).]

Additionally, statutory language "cannot be read in a vacuum" and instead "must be read in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute . . . ." *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003) (quotation marks and citation omitted; ellipsis in original).

It is now well established that "the purpose of the OMA is to promote governmental accountability by facilitating public access to official decision making and to provide a means through which the general public may better understand issues and decisions of public concern." *Kitchen v Ferndale City Council*, 253 Mich App 115, 125; 654 NW2d 918 (2002), overruled on other grounds by *Speicher*, 497 Mich 125, citing *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 231; 507 NW2d 422 (1993). See also *Manning v East Tawas*, 234 Mich App 244, 250; 593 NW2d 649 (1999), overruled on other grounds by *Speicher*, 497 Mich 125. "To further the OMA's legislative purposes, the Court of Appeals has historically interpreted the statute broadly, while strictly construing its exemptions and imposing on public bodies the burden of proving that an exemption exists." *Booth Newspapers, Inc*, 444 Mich at 223.

"Under the OMA, public bodies must conduct their meetings, make all of their decisions, and conduct their deliberations (when a quorum is present) at meetings open to the public." *Speicher*, 497 Mich at 134-135, citing MCL 15.263. However, a public body may meet in a closed session[1] for certain enumerated purposes. MCL 15.268. Pertinent to this case, a public body may meet in a closed session "[t]o consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have a detrimental financial effect on the litigating or settlement position of the public body." MCL 15.268(e). This Court has concluded "that [MCL 15.268(e)] exists for the obvious purpose of allowing a public body to prepare for litigation without having to broadcast its trial or settlement strategy to the opposition along with the rest of the general public." *Manning*, 234 Mich App at 251.

Certain procedural requirements must be met for a public body to commence a closed session.

> A ⅔ roll call vote of members elected or appointed and serving is required to call a closed session, except for the closed sessions permitted under section 8(a), (b), (c), (g), (i), and (j). The roll call vote and the purpose or purposes for calling the closed session shall be entered into the minutes of the meeting at which the vote is taken. [MCL 15.267(1).]

Similarly, MCL 15.269(1) requires, in part, that "[e]ach public body shall keep minutes of each meeting showing . . . the purpose or purposes for which a closed session is held." Accordingly, a public body must "state on the record the purpose of the closed session before initiating the closed session."

[1] " 'Closed session' means a meeting or part of a meeting of a public body that is closed to the public." MCL 15.262(c).

Herald Co, Inc v Tax Tribunal, 258 Mich App 78, 86; 669 NW2d 862 (2003), overruled on other grounds by *Speicher*, 497 Mich 125.

Defendant argues, and we agree, that MCL 15.268(e) does not in and of itself require the public body to name the pending litigation it will be discussing in closed session. But statutory language cannot be read in isolation and must be construed in a way that harmonizes the entire act. *G C Timmis*, 468 Mich at 421. Indeed, plaintiffs argued, and the trial court agreed, that defendant violated MCL 15.267(1) and MCL 15.269(1), not MCL 15.268(e), when it failed to identify the "specific pending litigation" it would be discussing. When examining MCL 15.267(1), MCL 15.268(e), and MCL 15.269(1) together, it is clear that the Legislature intended for public bodies to name the pending litigation before entering a closed session.

First, we note that defendant's argument that the OMA requires only that there *be* specific pending litigation would render the word "specific," as used in MCL 15.268(e), redundant and mere surplusage—a result we must avoid whenever possible. See *Whitman*, 493 Mich at 311. When a public body meets to discuss pending litigation, it will necessarily discuss specific cases. Therefore, if the Legislature did not intend for the public body to disclose the particular case or cases it would be discussing, there would be no reason for the phrase "specific pending litigation" to contain the word "specific," as the word has no practical effect on the permissible substance of the public body's discussion in a closed session.

To avoid that interpretation, MCL 15.268(e) must be read in light of the statutory provisions providing that the public body must indicate the "purpose" for calling a closed session. MCL 15.267(1) and MCL 15.269(1). Those provisions contemplate that a public body will

inform the public of the reason for entering a closed session, which requires the public body to identify the applicable closed-session exemption in MCL 15.268. Under MCL 15.268(e), the public body may only meet to discuss "specific pending litigation." Reading the OMA broadly to further the purpose of government accountability, see *Booth Newspapers, Inc*, 444 Mich at 223, we conclude that the Legislature intended for the public body to identify the specific litigation it would be discussing in justifying its decision to close its meeting to the public.

This Court reached a similar conclusion in discussing a different closed-session exemption in *Herald Co, Inc*, 258 Mich App 78. That case concerned MCL 15.268(h), which allows a public body to meet in a closed session "[t]o consider material exempt from discussion or disclosure by state or federal statute." *Id*. at 84. The corresponding state statute was the provision of the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., that exempts from disclosure "[t]rade secrets or commercial or financial information" if certain requirements are met. *Id*. at 84-85, quoting MCL 15.243(1)(f). After reviewing the requirements of MCL 15.267(1) and MCL 15.269(1) concerning closed sessions, this Court determined that

> the plain language of these statutes instruct that when faced with FOIA exempt material as applied to the OMA, the [public body] *must state on the record those documents it deems exempt* under the FOIA together with the associated FOIA exemption justifying the document's nondisclosure, describe those documents unless description would defeat the purpose of the nondisclosure, and complete this process on the record in open session *before conducting the closed hearing*. [*Herald Co, Inc*, 258 Mich App at 86-87 (emphasis added).]

In other words, this Court determined that the public body had to identify the exempt material and applicable statute before entering a closed session, even though such a requirement is not found in the applicable exemption provision alone. This Court impliedly determined that merely reciting the statutory language of the pertinent exemption was insufficient. There is a stronger case for reaching that conclusion with respect to MCL 15.268(e), given that the Legislature only exempted closed-session discussion of "*specific* pending litigation." (Emphasis added.)

The Attorney General's OMA handbook further supports that conclusion. The handbook suggests that every motion to enter a closed session should refer to an exempt purpose set forth in MCL 15.268, and the handbook provides the following example of an appropriate motion: "I move that the Board meet in closed session under section 8(e) of the Open Meetings Act, to consult with our attorney regarding trial or settlement strategy in connection with [*the name of the specific lawsuit*]." Office of the Attorney General, *Open Meetings Act Handbook*, p 11 (emphasis added; brackets in original), available at <https://www.michigan.gov/documents/ag/OMA_handbook_287134_7.pdf> (accessed July 27, 2018) [https://perma.cc/4RYB-LDS7]. We acknowledge that the handbook is not binding authority. Still, as the trial court reasoned, it is telling that the Attorney General naturally read the OMA as requiring the public body to name the specific lawsuit it would be discussing in a closed session.

To the extent the OMA is ambiguous on this issue, "[t]he resolution of an ambiguity or vagueness that achieves a statute's purpose should be favored over the resolution that frustrates its purpose." *City of Fraser v Almeda Univ*, 314 Mich App 79, 95; 886 NW2d 730

(2016) (quotation marks and citation omitted). Allowing a public body to call for a closed session by merely reciting the language of MCL 15.268(e) would not further the purpose of government accountability because the public is given no indication of the "issues and decisions of public concern" that will be addressed in the closed session. See *Kitchen*, 253 Mich App at 125. While a case name in and of itself may not provide much information, it alerts the public to the existence of litigation and allows for further inquiry. For those reasons, defendant violated MCL 15.267(1) and 15.269(1) by not articulating the purpose for calling a closed session in accordance with MCL 15.268(e).[2] The trial court correctly granted plaintiffs summary disposition under MCR 2.116(I)(2) on this issue.

Affirmed.

RONAYNE KRAUSE, P.J., and GLEICHER and LETICA, JJ., concurred.

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[2] Given our resolution of this issue, we decline to examine the caselaw from sister states identified by the parties addressing similar, but distinct, statutory exceptions to holding open meetings.

PEOPLE v PATTON

Docket No. 341105. Submitted May 8, 2018, at Grand Rapids. Decided August 2, 2018, at 9:00 a.m.

In 2009, Nicholas J. Patton pleaded guilty to second-degree criminal sexual conduct, MCL 750.520c(2)(b). Because of the conviction, defendant was subject to the registration requirements of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. In 2017, defendant was charged with violating MCL 28.727(1)(h) for failing to register his cellular telephone number and with violating MCL 28.727(1)(i) for failing to report the e-mail address or addresses assigned to him. Defendant moved to dismiss the charges in the Berrien County Trial Court, arguing that the provisions were unconstitutionally vague and that retroactive application of the provisions violated the Ex Post Facto Clauses of the United States and Michigan Constitutions. The court, Scott Schofield, J., denied the motion. Defendant appealed by leave granted.

The Court of Appeals *held*:

1. A statute is unconstitutionally vague under the United States and Michigan Constitutions if (1) the statute does not provide fair notice of the conduct proscribed, (2) the statute confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed, or (3) the statute's coverage is overly broad and impinges on First Amendment freedoms. A statute is not unconstitutionally vague when the meaning of the words in controversy can be fairly ascertained by referring to judicial decisions, the common law, dictionaries, treatises, or their generally accepted meaning. The correct inquiry is whether the statute is vague as applied to the conduct alleged in the case, not whether the statute may be susceptible to impermissible interpretations. MCL 8.5 provides that acts are severable; that is, if any portion of an act or the application thereof to any person or circumstances is found to be invalid by a court, such invalidity does not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application.

2. MCL 28.727(1)(h) provides that an individual subject to SORA must register all telephone numbers registered to the individual or routinely used by the individual. MCL 28.727(1)(i) similarly provides that an individual subject to SORA must register all e-mail addresses assigned to the individual or routinely used by the individual and all login names or other identifiers used by the individual when using any e-mail address or instant-messaging system. In *People v Solloway*, 316 Mich App 174 (2016), the Court of Appeals concluded that the MCL 28.727(1)(h) and (i) language requiring a registrant to report all "routinely used" telephone numbers and e-mail addresses was unconstitutionally vague and that the defendant could therefore not be prosecuted under that portion of the statute. The *Solloway* holding does not extend to the remainder of those provisions because the Legislature's use of the disjunctive term "or"—which separates the phrases "registered to" and "assigned to" from the phrase "routinely used"—indicates that there are two ways to violate those provisions. Given the common meaning and dictionary definitions of "registered to" and "assigned to," the remainder of Subdivisions (h) and (i) provide fair notice of the conduct proscribed; the remaining provisions are not so overly broad that they infringe a defendant's First Amendment freedoms, and they are not unconstitutionally vague. *Solloway* did not control the outcome of the case because defendant was prosecuted for failing to register his personal telephone number and e-mail address or addresses, not for failing to register those that he routinely used. The trial court correctly severed the "routinely used" language from MCL 28.727(1)(h) and (i) and correctly concluded that the remaining language in Subdivisions (h) and (i) is constitutionally valid.

3. Under US Const, art I, § 10 and Const 1963, art 1, § 10, Michigan may not enact an ex post facto law. A law violates the Ex Post Facto Clauses of the United States and Michigan Constitutions when the law changes the legal consequences of acts completed before its effective date. In examining a sex-offender registry law, the determinative question is whether the Legislature meant to establish civil proceedings, rather than to impose punishment, when enacting the statute. If the intention was to enact a regulatory scheme that is civil and nonpunitive, a court must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the state's intention to deem it civil. Clear proof is necessary to override the stated intent and transform what has been denominated a civil remedy into a criminal penalty.

4. SORA is a civil and nonpunitive regulatory scheme that provides law enforcement and the public with tools to monitor sex offenders. Although SORA contains criminal sanctions for offenders who do not comply with the act's requirements, the sanctions are not so punitive either in purpose or effect as to negate the Legislature's intent to deem it civil; the reporting of telephone numbers and e-mail addresses required by Subdivisions (h) and (i) has not traditionally been regarded in history as punishment. The provisions do not impose an affirmative disability or restraint; rather, Subdivisions (h) and (i) further the proper regulatory scheme of providing tools to monitor sex offenders. The provisions have a rational connection to a nonpunitive purpose, and the telephone and e-mail registration requirements are not excessive with respect to the act's stated civil nonpunitive purpose. Accordingly, the MCL 28.727(1)(h) and (i) requirements that offenders register telephone numbers and e-mail addresses owned or belonging to the offender do not violate the Ex Post Facto Clauses of the United States and Michigan Constitutions. *Does # 1–5 v Snyder*, 834 F 3d 696 (CA 6, 2016), which held that the retroactive application of the SORA provisions restricting where offenders could live, work, and loiter and categorizing them into tiers violates the federal Ex Post Facto Clause, was not persuasive because the provisions challenged in *Does # 1–5* were punitive—that is, they were similar to banishment and public shaming and included geographical restrictions—unlike the nonintrusive restrictions at issue in this case. The trial court correctly rejected defendant's ex post facto challenge.

Affirmed.

1. CRIMINAL LAW — PENALTIES — SEX OFFENDERS REGISTRATION ACT — REGISTRATION — DUE PROCESS — VAGUENESS.

MCL 28.727(1)(h) provides that an individual subject to the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., must register all telephone numbers registered to the individual or routinely used by the individual, and MCL 28.727(1)(i) similarly provides that an individual subject to SORA must register all e-mail addresses assigned to the individual or routinely used by the individual and all login names or other identifiers used by the individual when using any e-mail address or instant-messaging system; while the "routinely used" language in Subdivisions (h) and (i) is unconstitutionally vague, the remainder of the provisions' reporting requirements—that is, telephone numbers "registered to" an offender and e-mail addresses "assigned to" an offender—are constitutionally valid after severing the "routinely used" language from the provisions.

2. CRIMINAL LAW — SEX OFFENDERS REGISTRATION ACT — RETROACTIVE APPLICATION — EX POST FACTO CHALLENGE.

The retroactive application of MCL 28.727(1)(h) and (i) does not violate the Ex Post Facto Clauses of the United States and Michigan Constitutions (US Const, art I, § 10; Const 1963, art 1, § 10).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Michael J. Sepic*, Prosecuting Attorney, and *Aaron J. Mead*, Assistant Prosecuting Attorney, for the people.

Stephanie Farkas for defendant.

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

MARKEY, J. Defendant appeals by leave granted the trial court's order denying his motion to dismiss two counts of violating the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., on the basis that MCL 28.727(1)(h) (requiring reporting "[a]ll telephone numbers registered to the individual or routinely used by the individual") and MCL 28.727(1)(i) (requiring reporting "[a]ll electronic mail addresses and instant message addresses assigned to the individual or routinely used by the individual") are unconstitutionally vague. Following a preliminary examination, defendant was bound over for trial on the charged offenses. After briefing and argument of the parties on the motion to dismiss, the trial court ruled that the SORA requirements at issue are not unconstitutionally vague. The trial court also determined that defendant's ex post facto challenge was meritless and issued an order denying defendant's motion to dismiss. We affirm.

Defendant is subject to the requirements of SORA based on his conviction by guilty plea on November 18,

2009, to second-degree criminal sexual conduct, MCL 750.520c(2)(b); the offense allegedly occurred on June 26, 2009. According to testimony at the preliminary examination in this case, while defendant was on parole for that offense, his parole agent, Jeanice McConomy, received information that defendant had a cellular telephone that he was using to access the Internet, which was a violation of his parole conditions. During a home visit by McConomy on February 16, 2017, defendant initially denied having a cellular telephone. A search of defendant's person, however, revealed a cellular telephone in defendant's pocket that defendant then admitted was his. Defendant admitted that the cellular telephone could access the Internet, but he claimed that he only accessed the Internet to play games. Defendant denied accessing the Internet on the cellular telephone to visit pornographic websites. Defendant also admitted to McConomy that he did not register the cellular telephone or the cellular telephone number as required by SORA, although he did update his address and his employment. McConomy seized the cellular telephone and contacted the police to arrest defendant for a parole violation. McConomy turned the cellular telephone over to Detective Cory Peek of the Berrien County Sheriff's Department.

Detective Peek was received at the preliminary examination as an expert witness qualified in the area of forensic examination of electronic devices. Detective Peek confirmed that the cellular telephone was a "smart phone" that was capable of accessing the Internet. He used a program called Cellebrite to extract information from the cellular telephone. Detective Peek testified that he found "selfies" of defendant on the cellular telephone. He also discovered pornographic pictures, several hundred e-mails—some of which were from dating websites—and an e-mail ac-

count with the name Nicholas Patton associated with it. Detective Peek also discovered a second e-mail address on the cellular telephone. After this testimony, the trial court, sitting as examining magistrate, bound defendant over on both counts.

In defendant's motion to dismiss the charges, he claimed that the SORA provisions that mandated his registration of cellular telephone numbers registered to him or routinely used by him and of any e-mail accounts assigned to him or routinely used by him violated his state and federal due-process rights because the mandates were unconstitutionally vague. He also claimed that the SORA provisions were unconstitutional because they violated the Ex Post Facto Clauses of the federal and state Constitutions.

The prosecution argued that it was not relying on that part of the statutory prohibition of "routinely used" that this Court recently found unconstitutionally vague. See *People v Solloway*, 316 Mich App 174, 187; 891 NW2d 255 (2016). Rather, the prosecution argued that the phrase "routinely used" could be judicially severed from the statute to save it from constitutional infirmity. Thus, the prosecution argued that it was only proceeding under the "register[ed] to" and "assigned to" language of MCL 28.727(1)(h) and (i). The prosecution also argued that the SORA provisions did not violate the Ex Post Facto Clauses because SORA was not punitive. Rather, the prosecution argued, the provisions are part of a civil remedy or protection.

The trial court agreed with the prosecution's arguments, noting "that particular subsection of the statute should not be tossed out because one portion was found to be unconstitutionally vague. So I have no problem with allowing the prosecution to go forward on the portion of the statute . . . that is not unconstitutionally

vague." The trial court also concluded that the statute was not an unconstitutional ex post facto law because the SORA provisions that defendant was accused of violating did not reveal a criminal purpose. Accordingly, the trial court entered its order denying defendant's motion to dismiss. Defendant now appeals by leave granted.

I. STANDARD OF REVIEW

A trial court's decision regarding a motion to dismiss is reviewed for an abuse of discretion, *People v Herndon*, 246 Mich App 371, 389; 633 NW2d 376 (2001), which occurs when the court chooses an outcome that is outside the range of reasonable and principled outcomes, *People v Bass*, 317 Mich App 241, 256; 893 NW2d 140 (2016). This Court reviews de novo the meaning of a statute, *People v Pfaffle*, 246 Mich App 282, 295; 632 NW2d 162 (2001), and also reviews de novo constitutional issues, *Solloway*, 316 Mich App at 184.

II. DISCUSSION

A. DUE PROCESS

We conclude that the trial court properly severed the unconstitutionally vague phrase "routinely used" from MCL 28.727(1)(h) and (i). Consequently, the trial court correctly ruled that the prosecution could continue under the "registered to" and "assigned to" portions of those SORA requirements, which were not unconstitutionally vague. We further hold that the statutory provisions did not violate the Ex Post Facto Clauses of the federal and state Constitutions.

Defendant was charged with violating the reporting requirements of SORA under MCL 28.727, which states, in pertinent part:

> (1) . . . All of the following information shall be obtained or otherwise provided for registration purposes:
>
> * * *
>
> (h) All telephone numbers registered to the individual or routinely used by the individual.
>
> (i) All electronic mail addresses and instant message addresses assigned to the individual or routinely used by the individual and all login names or other identifiers used by the individual when using any electronic mail address or instant messaging system.

Our Supreme Court in *People v Moreno*, 491 Mich 38, 45; 814 NW2d 624 (2012), described pertinent principles of statutory construction applicable in all cases:

> When interpreting statutes, this Court must ascertain and give effect to the intent of the Legislature. The words used in the statute are the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning and the context within which they are used in the statute. In interpreting a statute, this Court avoids constructions that would render any part of the statute surplusage or nugatory. [Quotation marks and citations omitted.]

Defendant first argues that MCL 28.727(1)(h) and (i) are unconstitutionally vague under the Due Process Clauses of the United States and Michigan Constitutions. US Const, Am XIV; Const 1963, art 1, § 17. When reviewing a constitutional challenge to a statute, this Court must construe it to be constitutional unless its unconstitutionality is clearly apparent. *Solloway*, 316 Mich App at 184. A statute is unconstitutionally vague if "(1) it does not provide fair notice of the conduct proscribed, (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether

an offense has been committed, or (3) its coverage is overly broad and impinges on First Amendment Freedoms." *People v Vronko*, 228 Mich App 649, 652; 579 NW2d 138 (1998). A statute is not unconstitutionally vague when "the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises, or their generally accepted meaning." *Id*. at 653. Further, a statute may survive constitutional scrutiny when its words have more than one meaning, and a statute need not define an offense with mathematical precision. *People v Lawhorn*, 320 Mich App 194, 200; 907 NW2d 832 (2017). "The proper inquiry is not whether the statute may be susceptible to impermissible interpretations, but whether the statute is vague as applied to the conduct" alleged in the instant case. *Vronko*, 228 Mich App at 652.

The Legislature has specifically provided for the use of severability when any part of a statute is determined to be invalid if appropriate to avoid rendering the remaining parts of the statute meaningless. To that end, MCL 8.5 states:

> In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say:
>
> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.

In this case, defendant argues, as he did in his motion to dismiss, that on the basis of this Court's

holding in *Solloway*, 316 Mich App at 187, this Court should hold that the part of SORA defendant was charged with violating should be held unconstitutionally vague. The prosecution responded to defendant's motion to dismiss and now argues that *Solloway* is distinguishable because the *Solloway* Court only addressed the words "routinely used" as used in the statute, not the terms "registered to" or "assigned to" as used in MCL 28.727(1)(h) and (i). The prosecution argues that the charges against defendant are based only on the "registered to" and "assigned to" portions of the statute, not the alternative "routinely used" language, and that the trial court properly severed the invalid portions of the statute from the valid remainder to allow the prosecution against defendant to continue. Like the trial court, we agree with the prosecution's argument.

In *Solloway*, the defendant was on probation because of a conviction of fourth-degree criminal sexual conduct, and as a result, he was required to be registered under SORA. *Solloway*, 316 Mich App at 179. The police searched the defendant's house and found a cellular telephone that was *registered in a relative's name*. *Id*. The defendant also admitted that he had an e-mail account *in his father's name that he also had not registered*. *Id*. at 180. The *Solloway* Court found persuasive the case of *Doe v Snyder*, 101 F Supp 3d 672, 688-713 (ED Mich, 2015),[1] which addressed, *inter alia*, the phrase "routinely used" in MCL 28.727(1)(h) and (i). *Solloway*, 316 Mich App at 185-186. After discussing *Doe*, this Court held:

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[1] Opinions of the lower federal courts and foreign jurisdictions are not binding but may be considered persuasive. See *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004); *People v Campbell*, 289 Mich App 533, 535; 798 NW2d 514 (2010).

> In this case, the phrase "routinely used," as found in MCL 28.727(1)(h) and (i) renders those statutory provisions vague. We find the analysis in *Doe*, 101 F Supp 3d at 688-713, persuasive. Given the dictionary definition of "routinely," as discussed in that case, *id*. at 688, it is evident that law enforcement officers and judges could hold different views of how often a telephone number or e-mail address must be used by an individual to be "routinely used" under the statute. We thus agree with the holding in *Doe* and find that the provisions under which defendant was convicted are unconstitutionally vague.
>
> Therefore, defendant's convictions for failing to comply with SORA are vacated. [*Id*. at 187.]

Thus, the *Solloway* Court only held unconstitutionally vague the alternative part of MCL 28.727(1)(h) and (i) requiring registration of "telephone numbers" and "electronic mail addresses and instant message addresses" that are "routinely used" by the person subject to the requirements of SORA. The *Solloway* Court did not address or hold unconstitutionally vague the portions of MCL 28.727(1)(h) and (i) requiring registration of "telephone numbers" and "electronic mail addresses and instant message addresses" that are "registered to" or "assigned to" the person subject to the requirements of SORA. This view of *Solloway* is buttressed by the fact that the Court found *Doe* persuasive, which also only addressed the "routinely used" alternative language of MCL 28.727(1)(h) and (i). Moreover, our interpretation is further supported by the fact that the evidence against the defendant in *Solloway* consisted of a cellular telephone that was registered to a relative, not to the defendant, and an e-mail account that was registered to the defendant's father, not to the defendant. Therefore, the prosecution in *Solloway* could only proceed against the defendant under the "routinely used" alternative language of MCL 28.727(1)(h) and (i). Consequently, *Solloway* is

distinguishable from the facts of the instant case because the evidence showed that defendant personally purchased the cellular telephone; in addition, there were selfies of defendant on the cellular telephone, and at least one of the e-mail addresses found on the cellular telephone was registered in defendant's name. The present case is in direct contrast to the prosecution in *Solloway*, which relied entirely on the "routinely used" alternative language of MCL 28.727(1)(h) and (i), and the evidence only showed that a telephone belonged to a family member and an e-mail account was registered in the name of the defendant's father.

This reasoning is further supported by the language of the statute. It uses the term "or" in separating the phrases "registered to" and "assigned to" from the phrase "routinely used." MCL 28.727(1)(h) and (i). The Legislature's use of the disjunctive term "or" evidences that there are two ways to violate the statute. See *People v Kowalski*, 489 Mich 488, 499; 803 NW2d 200 (2011). That is, defendant could violate MCL 28.727(1)(h) by failing to register a telephone number registered to him; he could separately violate the statute by failing to register a telephone number that he routinely used. The same analysis applies to Subdivision (i) regarding e-mail and instant-message addresses. To conclude that this Court's decision in *Solloway* applied to all the provisions of MCL 28.727(1)(h) and (i) despite being separated by the disjunctive term "or" would render the portions of the statute stating "registered to" and "assigned to" "surplusage or nugatory." *Moreno*, 491 Mich at 45. It would also run contrary to the Legislative directive to sever invalid parts of a statute from the remainder whenever possible. MCL 8.5.

The trial court in this case properly severed the invalid parts of the statute after it concluded that the "routinely used" language of MCL 28.727(1)(h) and (i) was unconstitutionally vague but that the "registered to" and "assigned to" language of the statute regarding phone numbers and e-mail and instant-message accounts was valid. See MCL 8.5; *People v McMurchy*, 249 Mich 147, 158; 228 NW 723 (1930) (explaining that when one part of a statute is held unconstitutional, the remainder of the statute remains valid unless all parts of the statute are so interconnected in meaning that the Legislature would likely not have passed the one part without the other). We conclude that the trial court's ruling was not error. Only a portion of MCL 28.727(1)(h) and (i) is unconstitutionally vague, *Solloway*, 316 Mich App at 187, and the invalid portion articulates a separate, alternative method of violating the statute. The invalid portion is not so interconnected with the other portions as to render them also invalid. Thus, the trial court properly severed the invalid portions and saved the remainder. So, we conclude that the remaining portions of the statute, specifically the "registered to" and "assigned to" language under which the present prosecution is brought, are constitutionally valid. See MCL 8.5; *McMurchy*, 249 Mich at 158.

Moreover, Merriam-Webster's dictionary defines "registered" as "having the owner's name entered in a register" and "recorded as the owner of . . . ." *Merriam-Webster's Collegiate Dictionary* (11th ed). The same source defines "assign" as "to consider to belong to." *Id*. When one applies these definitions to the terms as used in MCL 28.727(1)(h) and (i), it is clear that an offender subject to the SORA reporting requirements must report any telephone number that the offender is the "recorded owner of" or for which the offender's

name is "entered" as the owner. In this case, as discussed above, defendant admitted that he personally purchased the cellular telephone with money he had earned. Accordingly, defendant was the recorded owner of the cellular telephone number or had his name entered as the owner of the cellular telephone number. Also, defendant must report any e-mail addresses "consider[ed] to belong to" him. See MCL 28.727(1)(i) and *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining the term "assign"). In this case, there was at least one e-mail address specifically registered to defendant by name, which must be considered to belong to defendant.

When the terms of MCL 28.727(1)(h) and (i) on which the prosecution in this case is based are considered in light of their common meaning or in consultation with dictionary definitions, it is clear that those portions of the statute are not unconstitutionally vague. See *Solloway*, 316 Mich App at 185; see also *Vronko*, 228 Mich App at 653 ("A statute is not vague if the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises, or their generally accepted meaning."). Defendant was provided fair notice of the conduct proscribed—that he must register any telephone number that he was the recorded owner of, or that his name was entered as the owner of, and he must register any e-mail address assigned to him that would be considered to belong to him. The terms at issue did not provide the trier of fact with unstructured or unlimited discretion to determine whether an offense had been committed. The trier of fact would need to determine only if defendant were the owner of or had his name entered as the owner of any telephone numbers or if any e-mail addresses were considered to belong to defendant.

Finally, the scope of MCL 28.727(1)(h) and (i) after severing the phrase "routinely used" is not so overly broad as to infringe defendant's First Amendment freedoms. Subdivision (h) only applies to telephone numbers owned or entered as being owned by defendant. And Subdivision (i) only applies to e-mail addresses considered to belong to defendant. Considering these factors in light of the facts—(1) that defendant admitted that the cellular telephone was his, (2) that he purchased the cellular telephone with his own money from his employment, (3) that there were selfies of defendant on the cellular telephone, and (4) that at least one e-mail address was directly linked to defendant by name—we conclude that the trial court correctly ruled that the prosecution in this case could be continued based on the "registered to" and "assigned to" terms of MCL 28.727(1)(h) and (i) without application of the "routinely used" provisions of the statute. We hold that because the "registered to" and "assigned to" provisions of MCL 28.727(1)(h) and (i) are separate, severable provisions, they are not unconstitutionally vague.

B. EX POST FACTO LAW

Defendant next argues that application of MCL 28.727(1)(h) and (i) violated the Ex Post Facto Clauses of the United States and Michigan Constitutions. US Const, art I, § 10 states, in relevant part, "No State shall . . . pass any . . . ex post facto Law . . . ." Mich Const 1963, art 1, § 10 states, "No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted."

There are four categories of ex post facto laws: (1) any law that punishes an act that was innocent when the act was committed, (2) any law that makes an act

a more serious criminal offense than when committed, (3) any law that increases the punishment for a crime committed before the law was passed, or (4) any law that allows the prosecution to convict a defendant on less evidence than was required when the act was committed. *People v Callon*, 256 Mich App 312, 317; 662 NW2d 501 (2003), citing *Calder v Bull*, 3 US 386, 390; 1 L Ed 648; 3 Dall 386 (1798) (opinion by Chase, J.). "All ex post facto laws share two elements: (1) they attach legal consequences to acts before their effective date, and (2) they work to the disadvantage of the defendant." *Callon*, 256 Mich App at 318, citing *Weaver v Graham*, 450 US 24, 29; 101 S Ct 960; 67 L Ed 2d 17 (1981). The crucial question in determining whether a law violates the Ex Post Facto Clause " 'is whether the law changes the legal consequences of acts completed before its effective date.' " *Callon*, 256 Mich App at 318, quoting *Carmell v Texas*, 529 US 513, 520; 120 S Ct 1620; 146 L Ed 2d 577 (2000), in turn quoting *Weaver*, 450 US at 31 (quotation marks omitted).

In this case, defendant originally became subject to SORA after his conviction for second-degree criminal sexual conduct in 2009. MCL 28.727(1)(h) and (i) were added to SORA by 2011 PA 18 and became effective July 1, 2011. The 2011 amendments required defendant, who was already subject to SORA, to comply with its new requirements. 2011 PA 17; 2011 PA 18. Thus, the 2011 amended SORA requirements retroactively applied to defendant. See *Does #1-5 v Snyder*, 834 F3d 696, 698 (CA 6, 2016). So, the question becomes whether the retroactive application of new SORA requirements violates the Ex Post Facto Clauses of the United States and Michigan Constitutions.

The United States Supreme Court in *Smith v Doe*, 538 US 84, 92; 123 S Ct 1140; 155 L Ed 2d 164 (2003),

discussing Alaska's sex-offender registry law, set forth a two-step inquiry for determining whether retroactive application of a law violates the Ex Post Facto Clause of the federal Constitution.[2] Under that two-step inquiry, a court must determine

> whether the [L]egislature meant the statute to establish civil proceedings. If the intention of the [L]egislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the Legislature's] intention to deem it civil. [*Id*. (quotation marks and citations omitted).]

Defendant cites *People v Temelkoski*, 307 Mich App 241; 859 NW2d 743 (2014), rev'd 501 Mich 960 (2018), as potentially providing insight to this issue. But that case is clearly distinguishable from the instant case.

In *Temelkoski*, our Supreme Court concluded that the retroactive application of SORA to the defendant was contrary to principles of due process developed in the context of plea bargaining. *Temelkoski*, 501 Mich at 961, citing *Santobello v New York*, 404 US 257, 262; 92 S Ct 495; 30 L Ed 2d 427 (1971). The defendant pleaded guilty in 1994 to one count of second-degree criminal sexual conduct and was sentenced as a youthful trainee under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq*. The version of HTYA in effect when the defendant entered his guilty plea provided that a trainee would not suffer any civil disability or loss of right or privilege because of that assignment. After his plea, the Legislature adopted SORA, which clearly imposes a civil disability. *Temelkoski*, 501 Mich at 961. The Court held that the

[2] "Michigan does not interpret its constitutional provision more expansively than its federal counterpart." *Callon*, 256 Mich App at 317.

"retroactive application of SORA deprived defendant of the benefits under HYTA to which he was entitled and therefore violated his constitutional right to due process." *Id*. The Court reasoned that retroactive application of SORA would "disturb[] settled expectations based on the state of the law" at the time of the defendant's plea, resulting in "manifest injustice" and violating due process. *Id*. (quotation marks and citation omitted). Because the *Temelkoski* Court did not rely on the Ex Post Facto Clause or caselaw applying its principles, it is distinguishable from the instant case.

Applying the principles developed under the United States and Michigan Ex Post Facto Clauses, and specifically guided by *Smith*, 538 US 84, the 2011 amendment at issue in this case is not an ex post facto law. First, the Legislature did not intend SORA to be a criminal punishment. MCL 28.721a provides, in relevant part, "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." Thus, the Legislature's intent by enacting the registration requirements of SORA was to "enact a regulatory scheme that is civil and nonpunitive" by providing law enforcement and the public with tools to monitor sex offenders. *Smith*, 538 US at 92. Thus, although SORA contains criminal sanctions for registrants who violate the act, it is not so different from the Alaska sex-offender registry law reviewed in *Smith*, 538 US 84, to conclude that the intent of Michigan's SORA is punitive. See *Snyder*, 834 F3d at 700-701.

Second, we conclude that MCL 28.727(1)(h) and (i) are not "so punitive either in purpose or effect as to

negate [the Legislature's] intention to deem it civil." *Smith*, 538 US at 92. Defendant urges with respect to this second prong of the *Smith* test that this Court adopt the reasoning of the Sixth Circuit Court of Appeals in *Snyder*, 834 F3d 696. We conclude, however, that *Snyder* is distinguishable from the instant case with regard to this part of the *Smith* test.

In *Snyder*, the Sixth Circuit Court of Appeals addressed whether provisions of SORA constituted punishment in violation of the Ex Post Facto Clause of the United States Constitution. *Id*. at 699-700. The *Snyder* court conducted the two-step inquiry that the Supreme Court applied when analyzing whether the Alaska sex-offender registry law violated the Ex Post Facto Clause. "[T]he test we must apply . . . is quite fixed: an ostensibly civil and regulatory law, such as SORA, does not violate the Ex Post Facto clause unless the plaintiff can show 'by the clearest proof' that 'what has been denominated a civil remedy' is, in fact, 'a criminal penalty[.]' " *Id*. at 700, quoting *Smith*, 538 US at 92. The court first determined that SORA did not evince a punitive intent. *Snyder*, 834 F3d at 700. It then analyzed whether, despite its lack of punitive intent, SORA had the effect of being punitive. *Id*. at 701. The *Snyder* Court then reviewed the five "most relevant" factors as stated in *Smith*, 538 US at 97: (1) whether the law inflicts what has been regarded in our history and traditions as punishment, (2) whether the law imposes an affirmative disability or restraint, (3) whether the law promotes the traditional aims of punishment, (4) whether the law has a rational connection to a nonpunitive purpose, and (5) whether the law is excessive with respect to its purpose. *Snyder*, 834 F3d at 701. After its review, the court concluded that "Michigan's SORA imposes punishment," which "may never be retroactively imposed or increased." *Id*.

at 705. Consequently, the court held that "[t]he retroactive application of SORA's 2006 and 2011 amendments" to the plaintiffs in that case was an unconstitutional violation of the Ex Post Facto Clause. *Id*. at 706.

In reaching its conclusion that SORA's 2006 and 2011 amendments were ex post facto laws, the *Snyder* court observed:

> A regulatory regime that severely restricts where people can live, work, and "loiter," that categorizes them into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, and that requires time-consuming and cumbersome in-person reporting, all supported by—at best—scant evidence that such restrictions serve the professed purpose of keeping Michigan communities safe, is something altogether different from and more troubling than Alaska's first-generation registry law. SORA brands registrants as moral lepers solely on the basis of a prior conviction. It consigns them to years, if not a lifetime, of existence on the margins, not only of society, but often, as the record in this case makes painfully evident, from their own families, with whom, due to school zone restrictions, they may not even live. It directly regulates where registrants may go in their daily lives and compels them to interrupt those lives with great frequency in order to appear in person before law enforcement to report even minor changes to their information. [*Id*. at 705.]

The instant case is distinguishable from *Snyder*[3] because, unlike the plaintiffs in *Snyder*, defendant in this case only challenges the reporting of telephone

[3] "Although state courts are bound by the decisions of the United States Supreme Court construing federal law, there is no similar obligation with respect to decisions of the lower federal courts." *Abela*, 469 Mich at 606 (citation omitted). The decisions of lower federal courts may be considered if the court's analysis and conclusions are persuasive. *Id*. at 607.

numbers and e-mail addresses. As the above quotation from *Snyder* indicates, the court considered additional provisions of SORA—most importantly, the restriction on where offenders could live, work, and loiter, as well as the tier classification based on crime of conviction—to determine that SORA had a punitive effect. In concluding that SORA was akin to punishment, the court noted that SORA, as amended by 2011 PA 18, includes provisions that have "much in common with banishment and public shaming," employ geographical restrictions, "and ha[ve] a number of similarities to parole/probation." *Id*. at 701, 703. Defendant in this case does not challenge the restrictions on where he can live, work, or visit. Nor does defendant challenge the tier system. He only challenges the portion of the 2011 amendments that requires the reporting of telephone numbers and e-mail addresses. The mandated reporting of telephone numbers registered to him and e-mail addresses assigned to him does not have anything in common with banishment, public shaming, or employing geographical restrictions; therefore, we conclude that the provisions of SORA that defendant challenges in this case are not what has been regarded in our history and tradition as punishment.

Additionally, MCL 28.727(1)(h) and (i) do not impose an affirmative disability or restraint. Those subdivisions do not prevent or restrain defendant from having a cellular telephone number or an e-mail address—they only mandate that defendant register them if he does. Further, the subdivisions do not promote the traditional aims of punishment such as incapacitation, retribution, and specific and general deterrence. See *Snyder*, 834 F3d at 704. Again, the reporting requirements of Subdivisions (h) and (i) do not deter an offender from having a cellular telephone or an e-mail

address; they only require that an offender register phones owned or entered as being owned by the offender and any e-mail addresses belonging to the offender. These requirements simply further the proper civil regulatory scheme of "provid[ing] 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." MCL 28.721a; see also *Snyder*, 834 F3d at 700-701.

As just noted, with respect to the fourth "most relevant" factor, see *Snyder*, 834 F3d at 701, citing *Smith*, 538 US at 97, Subdivisions (h) and (i) have a rational connection to a nonpunitive purpose. As stated by the Legislature's statement of intent, the purpose of the telephone number and e-mail address reporting requirements is to give law enforcement and the public the tools necessary to help monitor an offender's behavior. MCL 28.721a. We conclude that registration of phones owned or entered as being owned by an offender and registration of e-mail addresses belonging to an offender are not punitive. As the trial court in this case analogized, every driver in this state must register his or her motor vehicle with the state. Although these requirements may be unpleasant or cause momentary interruption, they are not a punishment for a citizen's choice to own and drive a motor vehicle. Similarly, the same could be said for registering telephone numbers and e-mail addresses to comply with the requirements of MCL 28.727(1)(h) and (i). So, simply requiring registration of telephone numbers and e-mail addresses does not evidence a punitive intent or effect.

The last of the "most relevant" factors, *Smith*, 538 US at 97, is whether the registration requirements are excessive with respect to their stated nonpunitive

purpose? We conclude that they are not. Again, the purpose of MCL 28.727(1)(h) and (i) is to provide tools for monitoring an offender. An offender is required to register telephone numbers and e-mail addresses owned or belonging to the offender. Generally speaking, people do not frequently obtain a new telephone number or e-mail address. Thus, we find that the registration requirements of MCL 28.727(1)(h) and (i) are not excessive with respect to SORA's stated civil nonpunitive purpose. Because defendant in this case only challenges the registration requirements for telephone numbers and e-mail addresses, as opposed to the living and working restrictions and the tier system as did the plaintiffs in *Snyder*, we conclude that *Snyder* provides little guidance to this Court regarding the retroactive application of the requirements of MCL 28.727(1)(h) and (i). We therefore decline to adopt the analysis of *Snyder* as defendant urges.

III. CONCLUSION

In summation, we conclude that the "registered to" and "assigned to" portions of MCL 28.727(1)(h) and (i) are separate provisions that operate independently from the invalid "routinely used" portions of the statute. See MCL 8.5; *McMurchy*, 249 Mich at 158. The "registered to" and "assigned to" portions of MCL 28.727(1)(h) and (i) provide fair notice of the conduct proscribed, do not confer on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed, and their scope is not so overly broad as to infringe constitutional rights. Accordingly, we conclude that the "registered to" and "assigned to" provisions of MCL 28.727(1)(h) and (i) are not unconstitutionally vague. Therefore, the prosecution of this case under MCL 28.727(1)(h) and (i), as

interpreted, may proceed under the constitutionally valid portions of the statute.

We further hold that although MCL 28.727(1)(h) and (i) applied retroactively to defendant, those provisions further a civil regulatory scheme and are not punitive in effect. Therefore, we hold that the "registered to" and "assigned to" provisions of MCL 28.727(1)(h) and (i) do not violate the Ex Post Facto Clauses of the federal and state Constitutions. See *Smith*, 538 US at 92, 97, 105-106.

We affirm and remand for further proceedings. We do not retain jurisdiction.

RONAYNE KRAUSE, P.J., and RIORDAN, J., concurred with MARKEY, J.

PEOPLE v CZUPRYNSKI

Docket No. 336883. Submitted May 9, 2018, at Lansing. Decided August 2, 2018, at 9:05 a.m. Leave to appeal denied 503 Mich 1040 (2019).

Edward M. Czuprynski was convicted following a jury trial in the Bay Circuit Court, M. Randall Jurrens, J., of committing a motor vehicle moving violation and thereby causing a serious impairment of a body function, MCL 257.601d(2). Defendant was driving when he struck a person with his vehicle. A police officer testified that immediately after the accident, defendant seemed drowsy and was slow with his responses. Defendant stated at trial that he had taken a pill to help him "relax" and that it was a "sleeping aid" but "not a sleeping pill." It also was not disputed that defendant had consumed some beer before driving that night. However, the accident victim was dressed in dark clothing, and witnesses stated that the accident victim tried to rush across the street in front of defendant's car. The accident victim also had a 0.19% blood alcohol level. An analysis of the crash-data-retrieval system from defendant's car revealed that defendant had been traveling at a speed of 41 miles per hour, without hitting the brakes, before the crash. The speed limit before the intersection was 35 miles per hour. In addition, the road on which defendant was driving had a blinking yellow light at the time of the crash. The court sentenced defendant to 18 months' probation. Defendant appealed.

The Court of Appeals *held*:

1. MCL 257.601d(2) provides that a person who commits a moving violation while operating a vehicle upon a highway or other place open to the general public, including, but not limited to, an area designated for the parking of motor vehicles, that causes serious impairment of a body function to another person is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500, or both. The first part of MCL 257.601d(2) has two predicates to the causation requirement because "operating a vehicle" is tied to "moving violation" through the word "while." Therefore, neither a moving violation alone nor the operation of a vehicle alone satisfies the statute; rather, both of those predicates must be present in

conjunction with each other—a moving violation while operating a vehicle. MCL 257.601d(2) also has a causation requirement: a moving violation "while operating" a vehicle must "cause" the "serious impairment of a body function." A causal link must exist between the moving violation and the injury, not simply a causal link between the operation of the vehicle and the injury. Accordingly, MCL 257.601d(2) requires that a moving violation together with the operation of a motor vehicle cause the serious impairment of a body function.

2. A criminal defendant is entitled to have a properly instructed jury consider the evidence against him or her. Jury instructions must include all elements of the charged offenses and any material issues, defenses, and theories if there is evidence to support them. An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law. M Crim JI 15.19 provides the jury instruction defining a moving violation causing serious impairment of a body function. M Crim JI 15.19 correctly defines factual and proximate causation, but it misapplies proximate causation to MCL 257.601d(2). MCL 257.601d(2) requires that the moving violation together with operation of the vehicle be the proximate cause of the bodily injury; however, M Crim JI 15.19 tells the jury that operation of the vehicle *alone* must be the proximate cause. Therefore, the instruction is incorrect because criminal liability arises if and only if a moving violation, while driving, causes serious impairment of a body function. In this case, the trial court's instruction to the jury was a verbatim recitation of the model instruction, M Crim JI 15.19, modified to include the specific moving violations charged in this case, as well as the name of the accident victim. The instruction given to the jury in this case relieved the prosecution of proving that the moving violation caused the accident and instead required only that the operation of the motor vehicle caused the accident. Accordingly, the instruction was erroneous.

3. When an error is a preserved, nonconstitutional error, the defendant's conviction will not be reversed unless, after examining the nature of the error in light of the weight and strength of the untainted evidence, it affirmatively appears that it is more probable than not that the error was outcome-determinative. In this case, the jury was confused by the model instruction that the trial court gave and asked the trial court, during the course of deliberations, whether a moving violation would be a criminal offense in all cases. The trial court responded, instructing the jury that one of the elements of the offense was "a moving violation

that is committed that causes a serious impairment of a body function" and referring the jury back to M Crim JI 15.19. Accordingly, the trial court's supplemental instruction told the jury to refer back to an incorrect answer and told the jury that the incorrect portion of the answer defines an element of the offense. Because the jury is obliged to follow the law as given to it by the trial court, the jury necessarily applied an erroneous statement of the law. And in this case, the error almost certainly was outcome-determinative: the model instruction and supplemental instruction relieved the prosecution of the obligation of showing that the moving violation—rather than the mere operation of the vehicle—caused the serious injury, which was a misstatement of the law that was more prejudicial than an omission or incomplete instruction might have been. Even more significantly, the evidence that the moving violation was a factor in causing the injury was controverted in many areas, which created clear factual questions for the jury. It was undisputed that defendant had consumed some beer, that he was speeding through the intersection, and that he had taken a sleeping pill that, although not a controlled substance under Michigan law, causes drowsiness. On the other hand, there was evidence from which a properly instructed fact-finder could have found that the moving violations were not the cause of the accident. The accident took place after sunset, the accident victim had a blood alcohol level of 0.19% and was dressed in black, and witnesses reported that the accident victim ran or rushed into the street ahead of defendant's car before being struck. There was strongly controverted evidence as to the cause of the accident, and the jury was not properly instructed as to the law regarding causation.

4. Defendant asserted that the jury instructions regarding MCL 257.601d(2) failed to require unanimity regarding the moving violation and that the jury should have been instructed that a conviction should have required a *mens rea* reflecting criminal culpability, which were issues that were unpreserved because defendant did not challenge them in the trial court. Unpreserved issues are reviewed for plain error affecting substantial rights. Under *People v Nicolaides*, 148 Mich App 100 (1985), *People v Fullwood*, 51 Mich App 476 (1974), and *People v Goold*, 241 Mich App 333 (2000), when a crime is charged under one statute but there are different possible aggravating elements, the prosecutor must charge a defendant under a single count using alternative theories, but the prosecutor does not have to elect one theory over the other. In this case, defendant was charged with the violation of a single statute: MCL 257.601d(2). Therefore, in light of *Nicolaides*, *Fullwood*, and *Goold*, a general

verdict as to a moving violation, without requiring jury unanimity, was sufficient in this case. Additionally, *People v Pace*, 311 Mich App 1 (2015), analyzed the *mens rea* applicable to a violation of MCL 257.601d(2) and held that negligence need not be proved for a conviction under the statute because the Legislature intended to dispense with the criminal-intent element of committing a moving violation causing serious impairment of a body function and intended to make such a violation a strict-liability offense. Accordingly, because *Pace* was directly on point, defendant's argument that a conviction should have required a *mens rea* reflecting criminal culpability was rejected.

5. Deference is granted to a magistrate's determination of probable cause to issue a search warrant. Only when material misstatements or omissions necessary to the finding of probable cause have been made should a search warrant be invalidated. Reliance on a warrant is reasonable even if the warrant is later invalidated for lack of probable cause, except under three circumstances: (1) if the issuing magistrate or judge is misled by information in the affidavit that the affiant either knew was false or would have known was false except for his or her reckless disregard of the truth; (2) if the issuing judge or magistrate wholly abandons his or her judicial role; or (3) if an officer relies on a warrant based on a "bare bones" affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. In this case, defendant argued that the affidavit in support of the search warrant for defendant's blood draw contained false information and omitted other exculpatory, relevant information such that the blood-draw results should have been suppressed. Defendant's arguments were rejected. The facts that defendant identified as being "exculpatory," which he claimed should have been included in the affidavit, would not have negated a finding of probable cause. Moreover, the officer's reliance on the issuing judge's finding of probable cause nevertheless was objectively reasonable and thus the fruits of the search nevertheless would not be suppressed. The affiant did not mislead the issuing judge, so that exception was not applicable here. There was no argument that the issuing judge in any way abandoned his judicial role. Finally, the affidavit provided more than enough information to render reasonable official belief in the existence of probable cause.

Reversed and remanded for a new trial before a properly instructed jury.

METER, P.J., concurring in part and dissenting in part, concurred in all aspects of the majority opinion aside from the

analysis and conclusion concerning the effect of the trial court's supplemental jury instruction regarding causation. To the extent that the trial court's instructions allowed the jurors to convict defendant if they found that he committed a moving violation and then also found that his operation of the vehicle, *aside from the moving violation*, caused the serious impairment of a body function, this error was adequately rectified when the trial court reinstructed the jurors. By way of its supplemental instruction, the court properly informed the jury that to convict defendant, it needed to find that the moving violation caused a serious impairment of a body function. While the court referred the jurors back to its initial instruction, the court clarified and added to this initial instruction by explicitly stating, two times in the course of its short reply, that the answer to the jurors' question was that a criminal offense involves a moving violation that causes a serious impairment of a body function. Accordingly, Judge METER would have affirmed defendant's conviction because the jury instructions as a whole fairly presented the issues to be tried and sufficiently protected defendant's rights.

CRIMINAL LAW — MOTOR VEHICLES — MOVING VIOLATIONS CAUSING SERIOUS IMPAIRMENT OF A BODY FUNCTION.

MCL 257.601d(2) provides that a person who commits a moving violation while operating a vehicle upon a highway or other place open to the general public, including, but not limited to, an area designated for the parking of motor vehicles, that causes serious impairment of a body function to another person is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500, or both; MCL 257.601d(2) requires that a moving violation together with the operation of a motor vehicle cause the serious impairment of a body function.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *David S. Leyton*, Prosecuting Attorney, and *Rebecca Jurva-Brinn*, Assistant Prosecuting Attorney, for the people.

F. Randall Karfonta for defendant.

Before: METER, P.J., and GADOLA and TUKEL, JJ.

TUKEL, J. Defendant appeals as of right his conviction by a jury of committing a motor vehicle moving

violation and thereby causing a serious impairment of a body function, MCL 257.601d(2). The trial court sentenced him to 18 months' probation. We reverse defendant's conviction and remand for a new trial.

I. FACTS

Defendant was driving on Center Avenue in Hampton Township on June 16, 2015, approaching Scheurmann Road, when he struck James Stivenson with his vehicle. Stivenson broke his legs in eight places, suffered a head injury, and now has difficulty walking. A police officer testified that immediately after the accident, defendant seemed "sleepy, drowsy, . . . [and] acted slow with his responses." The officer testified that defendant did not know what he had hit and "thought somebody had thrown a bag of garbage at him." Defendant stated at trial that he had taken a pill to help him "relax" and that it was a "sleeping aid" but "not a sleeping pill." It also is not disputed that defendant had consumed some beer before driving that night. However, Stivenson was dressed in dark clothing, and witnesses stated that Stivenson tried to rush across the street in front of defendant's car. Stivenson also had a 0.19% blood alcohol level.

An analysis of the crash-data-retrieval system from defendant's car revealed that defendant had been traveling at a speed of 41 miles per hour, without hitting the brakes, before the crash. The speed limit before the intersection was 35 miles per hour. In addition, Center Avenue had a blinking yellow light at the time of the crash. A police officer explained that when a driver is faced with a flashing yellow light, he or she is "supposed to proceed with caution . . . and continue through if it's . . . clear."

Two charges were submitted to the jury: "operating a motor vehicle while visibly impaired causing serious impairment of a body function to another person" (Count I) and "committing a moving violation causing serious impairment of a body function" (Count II). The jury acquitted defendant on Count I but convicted him on Count II, and this appeal followed.

II. PROPRIETY OF MICHIGAN CRIMINAL JURY INSTRUCTION 15.19

Defendant argues that one of the instructions given to the jury—M Crim JI 15.19, defining "moving violation causing serious impairment of a body function"—was erroneous. Defendant also argues that the trial court compounded the error in M Crim JI 15.19, in answer to a jury question during deliberations, when it emphasized the erroneous portion of the instruction. We agree.

We review the proper interpretation of a statute de novo. *People v Barrera*, 278 Mich App 730, 735; 752 NW2d 485 (2008). "[J]ury instructions that involve questions of law are also reviewed de novo." *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006) (quotation marks and citation omitted). When interpreting a statute, it is the court's duty to give effect to the intent of the Legislature as expressed in the actual language used in the statute. *People v Calloway*, 500 Mich 180, 184; 895 NW2d 165 (2017). "It is the role of the judiciary to interpret, not write, the law." *People v Schaefer*, 473 Mich 418, 430; 703 NW2d 774 (2005). If the statutory language is clear and unambiguous, the statute is to be enforced as written. *People v Laney*, 470 Mich 267, 271; 680 NW2d 888 (2004). In those circumstances, judicial construction is neither necessary nor permitted because it is presumed that the Legislature

intended the clear meaning it expressed. *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001).

"The right to a trial by a jury is one of the lodestar concepts of Anglo-American jurisprudence and has historical roots that grow as deep as the Magna Carta of 1215." *People v Antkoviak*, 242 Mich App 424, 441; 619 NW2d 18 (2000). "A criminal defendant is entitled to have a properly instructed jury consider the evidence against him." *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). Jury instructions must include all elements of the charged offenses and any material issues, defenses, and theories if there is evidence to support them. *People v Jackson (On Reconsideration)*, 313 Mich App 409, 421; 884 NW2d 297 (2015), citing *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975). Absent proper instruction, a defendant might be convicted of an "offense" that our Legislature has not, in fact, criminalized. And perhaps most importantly for this case, "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Henderson v Kibbe*, 431 US 145, 155; 97 S Ct 1730; 52 L Ed 2d 203 (1977).

At issue is whether the provided jury instruction adequately informed the jury of what the statute requires for a defendant to have caused the serious impairment of a body function under MCL 257.601d(2).

A. MCL 257.601d(2)

The statute under which defendant was convicted, MCL 257.601d(2), provides:

> A person who commits a moving violation while operating a vehicle upon a highway or other place open to the general public, including, but not limited to, an area designated for the parking of motor vehicles, that causes serious impairment of a body function to another person is

> guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both.

The trial court instructed the jury that to prove the charge, the prosecution had to establish beyond a reasonable doubt the following:

> First, that the defendant committed one or more of the following moving violations: Failing to proceed through a flashing yellow signal with caution or failing to observe an authorized speed or traffic control sign, signal, or device; second, that the defendant's operation of the vehicle caused a serious impairment of a body function to James Scott Stivenson. Again, to cause such injury, the defendant's *operation* of a vehicle must have been a factual cause of the injury. That is, but for the defendant's *operation* of the vehicle, the injury would not have occurred. In addition, *operation* of the vehicle must have been a proximate cause of the injury, that is, the injury must have been a direct and natural result of *operating* the vehicle. [Emphasis added.]

The trial court's instruction was a verbatim recitation of the model instruction, modified to include the specific moving violations charged in this case, as well as the name of the accident victim. See M Crim JI 15.19.

The first part of MCL 257.601d(2) has two predicates to the causation requirement because "operating a vehicle" is tied to "moving violation" through the word "while." Therefore, neither a moving violation alone nor the operation of a vehicle alone satisfies the statute; rather, both of those predicates must be present in conjunction with each other—a moving violation *while* operating a vehicle.

The statute then has a causation requirement. The causation requirement is potentially ambiguous. What is it that must "cause" the injury: the conjoined "moving violation" while "operating a vehicle," or is merely

"operating a vehicle . . . that causes serious impairment of a body function" sufficient? This issue is critical because M Crim JI 15.19 addresses causation as it relates to the operation of a vehicle but does not do so as to the moving violation.

The general rule is that, based on common grammatical usage, "a modifying clause will be construed to modify only the last antecedent unless some language in the statute requires a different interpretation." *People v Small*, 467 Mich 259, 263; 650 NW2d 328 (2002). If read that way, "causes serious impairment of a body function" would modify only "operating a motor vehicle" and would not modify "commits a moving violation." If that is the correct reading, then the moving-violation requirement would not play a part in the causation analysis; that is, the statute would not require that the moving violation give rise to or cause the accident.

In *Schaefer*, 473 Mich 418, our Supreme Court interpreted a different statute as not requiring that the first predicate of that statute, being under the influence of alcohol, be a cause of an accident resulting in an injury. The statute at issue in *Schaefer*, MCL 257.625, addresses Michigan's so-called "OUIL causing death statute," found in Subsection (4). *Id*. at 427-428. MCL 257.625(4) provides that "[a] person, whether licensed or not, who operates a motor vehicle in violation of [various subsections relating to alcohol or controlled substances] *and by the operation of that motor vehicle causes the death of another person is guilty of a crime*." (Emphasis added.) On the basis of that language, the *Schaefer* Court held that the statute has "no causal link between the defendant's intoxication and the victim's death." *Id*. at 431. "Accordingly, it is the defendant's *operation* of the motor vehicle that must cause the victim's death, not the defendant's 'intoxication.' " *Id*.

The operative language of the statute at issue in *Schaefer* is quite different from the language of the statute at issue here. The present statute links the moving violation to the operation of the vehicle and thus requires that those linked elements cause the injury; the statute at issue in *Schaefer*, by contrast, unlinked a defendant's alcohol or drug use from the operation of the vehicle. As the Supreme Court noted in *Schaefer*: "Section 625(4) plainly requires that the victim's death be caused by the defendant's *operation* of the vehicle, not the defendant's *intoxicated* operation. Thus, the manner in which the defendant's intoxication affected his or her operation of the vehicle is unrelated to the causation element of the crime." *Id*. at 433. Here, by contrast, a moving violation "while operating" a vehicle must "cause" the "serious impairment of a body function." MCL 257.601d(2).

Moreover, if the first requirement, the moving violation, does not play a part in the causation analysis, then its occurrence in any particular case could be merely coincidental to the serious impairment of a body function, and yet a defendant would still be guilty of the offense. In other words, it would be the operation of the vehicle that would constitute the critical component of causation, but a defendant nevertheless would not be guilty of an offense unless, at a minimum, it just so happened that he or she also committed a moving violation. Of course, in some cases, such a moving violation could be completely unrelated to the resulting accident and injury. That lack of a causation requirement made sense as part of the overall statutory scheme in *Schaefer* because the Legislature sought to criminalize a status crime—driving while intoxicated. See *id*. at 433 n 46. The provision at issue in *Schaefer* is tailored to the conduct (that is, operating a motor vehicle when the driver has the status of being intoxi-

cated) that the Legislature wished to deter even absent a causation requirement tied to the intoxication.

In this case, however, violation of the statute is not tied to a status offense. Rather, the statute requires that a defendant have committed a particular predicate act—a moving violation. Therefore, on the basis of its language, the statute supports an interpretation that the moving violation and operation of the motor vehicle *together* must cause the serious bodily injury, rather than reading it such that the statute requires only that the operation of the vehicle cause the injury.

The statute's punctuation also supports the idea that the moving violation must be part of the cause of the accident. As the Supreme Court noted in *Small*, 467 Mich at 263, the last-antecedent rule of construction generally controls "unless some language in the statute requires a different interpretation." See also *People v Pinkney*, 501 Mich 259, 283; 912 NW2d 535 (2018) (holding that canons of construction can be overcome if the language of a statute is clear enough). One situation in which the last-antecedent rule of construction is overcome by the drafting of a statute is when the "modifying word or phrase" is "set off by commas." *Small*, 467 Mich at 263 n 4.

In this case, the Legislature set the moving violation and operation requirements apart from the causation clause of MCL 257.601d(2) through a comma immediately preceding the phrase "that causes serious impairment of a body function . . . ." Therefore, under the last-antecedent rule, this causation phrase does not solely apply to the last antecedent. See *id*. As a result, the language and structure of the statute support reading it in this manner:

> A person who, while operating a vehicle upon a highway or other place open to the general public, including,

> but not limited to, an area designated for the parking of motor vehicles, commits a moving violation which in combination with the operation of the vehicle causes serious impairment of a body function to another person, is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both.

On the basis of the analysis set forth, we hold that MCL 257.601d(2) requires that a moving violation together with the operation of a motor vehicle cause the serious impairment of a body function. Thus, the statute plainly requires a causal link between the moving violation and the injury, not simply a causal link between the operation of the vehicle and the injury.

B. CAUSATION

> [I]n the criminal law context, the term "cause" has acquired a unique, technical meaning. Specifically, the term and concept have two parts: factual causation and proximate causation. Factual causation exists if a finder of fact determines that "but for" defendant's conduct the result would not have occurred. A finding of factual causation alone, however, is not sufficient to hold an individual criminally responsible. The prosecution must also establish that the defendant's conduct was a proximate cause of, in this case, the accident or the victim's death.
>
> Proximate causation is a legal construct designed to prevent criminal liability from attaching when the result of the defendant's conduct is viewed as too remote or unnatural. [*People v Feezel*, 486 Mich 184, 194-195; 783 NW2d 67 (2010) (quotation marks and citations omitted).]

M Crim JI 15.19 correctly defines factual and proximate causation, but it misapplies proximate causation to the statute at issue. MCL 257.601d(2) requires that the moving violation together with operation of the

vehicle be the proximate cause of the bodily injury. However, the model instruction tells the jury that operation of the vehicle *alone* must be the proximate cause:

> Again, to cause such injury, the defendant's operation of a vehicle must have been a factual cause of the injury. That is, but for the defendant's operation of the vehicle, the injury would not have occurred. In addition, *operation of the vehicle* must have been a proximate cause of the injury, that is, the injury must have been a direct and natural result of *operating the vehicle*. [Emphasis added.]

That instruction clearly is incorrect. Operation of a vehicle simply means driving. But it is not mere driving, or even driving while committing a moving violation, that triggers criminal liability under the statute. Rather, criminal liability arises if and only if a moving violation, while driving, *causes* serious impairment of a body function.

Put simply, the instruction here relieved the prosecution of proving that the moving violation caused the accident and instead required only that "the operation of the motor vehicle" caused the accident. The instruction thus created a de facto strict-liability offense in which any person who is involved in an accident resulting in a serious injury and who has committed a moving violation is automatically guilty of the criminal offense charged here because, by definition in each case in which that crime is charged, there will have been an accident in which a defendant operated a motor vehicle.

C. HARMLESS ERROR

Because the instruction was erroneous, we must consider whether it was harmless error. See *Schaefer*, 473 Mich at 441-442, citing MCL 769.26. As a pre-

served, nonconstitutional error, "[t]he defendant's conviction will not be reversed unless, after examining the nature of the error in light of the weight and strength of the untainted evidence, it affirmatively appears that it is more probable than not that the error was outcome determinative." *Riddle*, 467 Mich at 124-125. Applying that standard here, the error deprived defendant of a fair trial.

The jury was confused by the model instruction that was given. In the course of deliberations, the jury asked the trial court, "Would a moving violation be a criminal offense in all cases? What makes this criminal?" The trial court responded:

> When a moving violation causes a serious impairment of a body function, seems to answer your question.
>
> I would redirect you back to Criminal Jury Instruction 15.19, which is the full instruction on Count 2, which includes in particular, after defining the two moving violations, what—what constitutes that element of the charge. So, in response to your questions seems to me, a moving violation that is committed that causes a serious impairment of a body function.

The trial court thus instructed the jury that one of the elements of that offense is "a moving violation [which] causes a serious impairment of a body function," or "a moving violation that is committed that causes a serious impairment of a body function."

If the trial court had limited its supplemental instruction to the first and last sentences that it gave, the instruction arguably would have cured the prior error by clarifying that the prosecution was not relieved of proving that the moving violation played at least a part in causing the injury. However, the trial court also referred the jury back to M Crim JI 15.19, which the court identified as "the full instruction on

Count 2, which includes . . . what constitutes that element of the charge." In light of the trial court's supplemental instruction, what we are left with is a mostly correct answer to a jury question but which also tells the jury to refer back to an incorrect answer, and it further tells the jury that the incorrect portion of the answer defines an element of the offense.

The jury was duty-bound to accept the instructions given by the trial court. See M Crim JI 2.1 (oath of jurors). However, a "clarification" that incorporates both a correct and an incorrect statement of the law is no clarification at all. Just as we are duty-bound not to focus on one particular instruction out of context, *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001), so too was the jury required to "consider all of [the trial court's] instructions as a connected series. Taken all together, they are the law [the jury] must follow," M Crim JI 2.24; see also *Griffin v United States*, 502 US 46, 59; 112 S Ct 466; 116 L Ed 2d 371 (1991) ("Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law . . . . When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence."). Being obliged to follow the law as given to it by the trial court, the jury here necessarily applied an erroneous statement of the law.

The question, then, is what effect the error had "after examining the nature of the error in light of the weight and strength of the untainted evidence."

Riddle, 467 Mich at 125. As noted, in conducting that analysis, "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Kibbe*, 431 US at 155. In this case, the error almost certainly was outcome-determinative. During deliberations, the jury asked under what circumstances a moving violation could violate the statute at issue, thus showing that the jury was at a minimum struggling with whether the moving violation here qualified. As noted, the model instruction and the supplemental instruction then relieved the prosecution of the obligation of showing that the moving violation, rather than the mere operation of the car, caused the serious injury. In the words of the *Kibbe* Court, this was "a misstatement of the law," which likely was more prejudicial than an omission or incomplete instruction might have been.

Even more significantly, the evidence that the moving violation was a factor in causing the injury was controverted in many areas, which created clear factual questions for the jury. It was undisputed that defendant had consumed some beer, that he was speeding through the intersection, and that he had taken a sleeping pill that, although not a controlled substance under Michigan law, causes drowsiness. On the other hand, there was evidence from which a properly instructed fact-finder could have found that the moving violations were not the cause of the accident.[1] The accident took place on June 16, 2015. Video evidence showed that the accident occurred at 10:24 p.m., so even in mid-June it would have been about an hour and a half after sunset. The accident victim, who had a blood alcohol level of 0.19%, was dressed in black. One

[1] Or, at a minimum, that there was reasonable doubt that a moving violation caused the accident and injuries.

witness reported that the accident victim ran or rushed into the street ahead of defendant's car before being struck. Another witness, a passenger in a car that was in the lane next to defendant's car, testified that she never saw the accident victim and that if defendant had not struck him, she believed that the car in which she was riding would have hit him instead.

What we are left with, then, is strongly controverted evidence as to the cause of the accident. The jury was not properly instructed as to the law regarding causation. Therefore, under the circumstances presented here, defendant did not receive a fair trial on that issue, and we reverse defendant's conviction and remand for a new trial before a properly instructed jury.

III. ADDITIONAL CLAIMS OF ERROR

We address defendant's other claims of error because they could be important in a new trial.

A. OTHER CHALLENGES TO THE JURY INSTRUCTIONS

Defendant argues that the jury instructions regarding MCL 257.601d(2) failed to require unanimity regarding the moving violation. In other words, defendant asserts that the instructions failed to require that all jurors agree regarding which moving violation—failing to proceed through a flashing yellow signal with caution; or failing to observe an authorized speed or traffic-control sign, signal, or device; or both—defendant committed. Defendant contends that this was erroneous and unconstitutional. We disagree.

Defendant did not preserve this issue by challenging this aspect of the jury instructions in the trial court. This Court reviews unpreserved issues for plain error

affecting substantial rights. *People v Danto*, 294 Mich App 596, 605; 822 NW2d 600 (2011).

In *People v Nicolaides*, 148 Mich App 100, 101; 383 NW2d 620 (1985), the prosecutor charged the defendant, under the version of MCL 257.625 then in effect, with two counts: (1) operating a motor vehicle under the influence of intoxicating liquor and (2) operating a motor vehicle while having a blood alcohol content of 0.10% or higher. The defendant argued that the prosecutor needed to elect between the two counts. *Nicolaides*, 148 Mich App at 101. This Court ruled that the filing of a two-count complaint was "improper, since only one statute is involved." *Id*. at 103. The Court stated, "What the prosecutor may do, however, in the context of a single-count complaint, is to list alternative theories." *Id*. The Court concluded, "At trial, the trier of fact, judge or jury, may then return a *general verdict regarding the charged violation of § 625 of the Michigan Vehicle Code*." *Id*. at 104 (emphasis added).

In making its conclusion, the *Nicolaides* Court relied on *People v Fullwood*, 51 Mich App 476, 481; 215 NW2d 594 (1974). *Nicolaides*, 148 Mich App at 104. In *Fullwood*, 51 Mich App at 481, this Court stated:

> The information, charging alternative counts of premeditated and felony murder, went to the jury. The jury returned a verdict of murder in the first degree. Defendant claims he was entitled to know upon which theory the jury convicted to insure his right to a unanimous verdict and avoid double jeopardy problems. We do not agree.

The Court additionally stated:

> [The] defendant [was not] deprived of his right to a unanimous jury verdict. A general verdict of guilty is erroneous when the offenses charged are separate and distinct in character, provable by substantially different evidence, and punishable by different penalties. The pen-

> alty for felony and premeditated murder, both species of first-degree murder, is the same. Substantially similar evidence proves both crimes, except that a showing of murder in the perpetration of an enumerated felony supplies the premeditation element which the prosecution must otherwise prove. Further, the charged counts are not mutually exclusive; they can and do arise in the same transaction. [*Id*. at 481-482 (citation omitted).]

In *People v Goold*, 241 Mich App 333, 342-343; 615 NW2d 794 (2000), the Court noted that when criminal sexual conduct is charged under one statute but there are different possible aggravating elements, "the prosecutor must charge a defendant under a single count using alternative theories, but the prosecutor does not have to elect one theory over the other."

Defendant was charged with the violation of a single statute: MCL 257.601d(2). Therefore, in light of *Nicolaides*, *Fullwood*, and *Goold*, a general verdict as to a moving violation, without requiring jury unanimity, was sufficient in this case.

Defendant next argues that the jury should have been instructed that a conviction in this case should have required a *mens rea* reflecting criminal culpability, such as negligence or recklessness, and that to allow otherwise offends principles of fairness and due process. Defendant did not challenge this aspect of the jury instructions in the trial court, and our review of this unpreserved issue is for plain error affecting substantial rights. *Danto*, 294 Mich App at 605.

In *People v Pace*, 311 Mich App 1, 4-12; 874 NW2d 164 (2015), this Court analyzed the *mens rea* applicable to a violation of MCL 257.601d(2). The Court unambiguously concluded that negligence need not be proved for a conviction under the statute. *Pace*, 311 Mich App at 12. The Court noted that "the Legislature intended to dispense with the criminal intent element

of committing a moving violation causing serious impairment of a body function, and . . . intended to make such a violation a strict liability offense." *Id*. at 9. The Court found the statute constitutional, even when interpreted in such a manner. *Id*. at 11-12. Accordingly, because *Pace* is directly on point, we must reject defendant's argument. See MCR 7.215(J)(1) (discussing the precedential effect of Court of Appeals opinions).

B. VALIDITY OF THE SEARCH WARRANT

Defendant argues that Hampton Township Police Officer Bryan Benchley made material misstatements and omissions in the affidavit in support of the search warrant for defendant's blood draw. Defendant contends that when the affidavit is corrected, it provides no probable cause for the blood draw.[2] We disagree.

We grant deference to a magistrate's determination of probable cause to issue a search warrant. *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992). The *Russo* Court stated:

> In sum, a search warrant and the underlying affidavit are to be read in a common-sense and realistic manner. Affording deference to the magistrate's decision simply requires that reviewing courts ensure that there is a substantial basis for the magistrate's conclusion that there is a fair probability that contraband or evidence of a

[2] Although the prosecutor argues that this issue is moot in light of the acquittal on Count I, we review it because of the chance that the jurors used the blood-test results in weighing their decision about a moving violation. The intoxication charge submitted to the jury had "visible impairment" as a required element. It is possible that the jurors found no *visible* impairment but nonetheless found the blood-test results to have some probative value regarding whether defendant committed a moving violation, i.e., whether the drug in defendant's system affected his ability to proceed through the blinking yellow light with caution.

> crime will be found in a particular place. [*Id*. (quotation marks and citation omitted).]

Defendant's blood draw revealed the presence of a benzodiazepine, specifically, "321 nanograms per milliliter of [t]emazepam [Restoril]." Benchley testified at trial that, at the scene, he smelled alcohol on defendant and noticed that defendant's eyes were "bloodshot and glossy." Because defendant refused a voluntary blood draw, Benchley obtained a search warrant for a blood sample. Benchley admitted that his affidavit in support of the warrant erroneously attributed to him observations that in fact were made by other officers.

Defendant claims that Benchley made misrepresentations in his affidavit such that the blood-draw results should have been suppressed. In particular, defendant argues that the affidavit contained false information and omitted other exculpatory, relevant information.[3] We reject defendant's arguments. Assuming that the affidavit did contain some incorrect information, defendant ignores the fact that the "correct" information contained in the affidavit was sufficient to support a finding of probable cause. Further, the facts that defendant has identified as being "exculpatory," which he claims should have been included in the affidavit, would not have negated a finding of probable cause. Benchley noted in the affidavit that defendant was observed (1) "swaying,"[4] (2) emitting a "slight" "[o]dor of

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[3] In discussing the search warrant, defendant has relied on the preliminary-examination transcripts. However, he has not submitted these transcripts to this Court. An appellant bears the burden of "furnishing the reviewing court with a record to verify the factual basis of any argument upon which reversal [is] predicated." *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). At any rate, it is possible for us to review this issue even in light of the absence of transcripts.

[4] Defendant contends that the statement about "swaying" was a lie, but the court specifically noted that Sergeant Jeff Short had testified about

alcohol," and (3) having "bloodshot" and "glassy" eyes. The affidavit also noted that defendant admitted to taking an "unknown sleeping pill prior to driving" and admitted that he drove a car that struck a pedestrian. These remaining facts still provided a substantial basis for the magistrate's conclusion regarding a fair probability that evidence of a crime would be found by way of the blood draw. See *Russo*, 439 Mich at 604. Importantly, only when material misstatements or omissions *necessary to the finding of probable cause* have been made should a search warrant be invalidated. *People v Mullen*, 282 Mich App 14, 23-24; 762 NW2d 170 (2008).

Moreover, even if we were to determine on appeal that the search warrant did not establish probable cause, the officer's reliance on the issuing judge's finding of probable cause nevertheless was objectively reasonable and, thus, the fruits of the search nevertheless would not be suppressed. See *People v Goldston*, 470 Mich 523; 682 NW2d 479 (2004).

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defendant's swaying, and defendant does not deny as much on appeal, stating only that Short did not observe defendant "falling asleep" or "falling over." In effect, defendant does not challenge the finding that Short testified about swaying. While it is presumably true that Benchley did not *personally observe* the swaying and, to be completely accurate, should have mentioned that the observation of swaying was made by a fellow officer, it is notable that Benchley was using a preprinted form that allowed for check-mark answers for categories such as "[o]dor of alcohol" and "[b]alance," and the checklist was preceded by the following words: "Affiant has probable cause to believe the above named individual was under the influence of alcohol or controlled substances based on the following observations and/or tests[.]" Benchley was filling out a preprinted form on the basis of his and other officers' observations, and he checked the word "swaying" for the "[b]alance" category. As noted in *Franks v Delaware*, 438 US 154, 165; 98 S Ct 2674; 57 L Ed 2d 667 (1978), "probable cause may be founded upon hearsay." See also *People v Harris*, 191 Mich App 422, 425; 479 NW2d 6 (1991). We cannot agree with defendant's implication that if the affidavit had spelled out that another officer had made the "swaying" observation, probable cause would have been negated, given that the other officer had directly observed defendant just as Benchley had.

Reliance on a warrant is reasonable even if the warrant is later invalidated for lack of probable cause, except under three circumstances: (1) if the issuing magistrate or judge is misled by information in the affidavit that the affiant either knew was false or would have known was false except for his or her reckless disregard of the truth; (2) if the issuing judge or magistrate wholly abandons his or her judicial role; or (3) if an officer relies on a warrant based on a "bare bones" affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. *United States v Leon*, 468 US 897, 915, 923; 104 S Ct 3405; 82 L Ed 2d 677 (1984); *Goldston*, 470 Mich at 531. We already have rejected the claim that the affiant misled the issuing judge, so that exception cannot be applicable here. There is no argument, nor is any possible, that the issuing judge, 74th District Court Judge Timothy Kelly, in any way abandoned his judicial role (in fact, defendant's briefs in this Court and in the trial court never even identified Judge Kelly as the issuing judge, let alone sought to impugn his judicial role). Finally, the affidavit provided more than enough information to render official belief in the existence of probable cause reasonable. Therefore, even if the affidavit failed to establish probable cause, *Leon* and *Goldston* nevertheless mandate upholding the search conducted pursuant to it.

IV. CONCLUSION

For the reasons stated, we reverse defendant's conviction and remand for a new trial before a properly instructed injury. We do not retain jurisdiction.

GADOLA, J., concurred with TUKEL, J.

METER, P.J. (*concurring in part and dissenting in part*). I concur in all aspects of the majority opinion aside from the analysis and conclusion concerning the effect of the trial court's supplemental jury instruction regarding causation. Because I believe that the jury instructions as a whole fairly presented the issues to be tried and sufficiently protected defendant's rights, see *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001), I would affirm defendant's conviction.

MCL 257.601d(2), the statute under which defendant was convicted, states:

> A person who commits a moving violation while operating a vehicle upon a highway or other place open to the general public, including, but not limited to, an area designated for the parking of motor vehicles, that causes serious impairment of a body function to another person is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both.

The statute requires a punishable violation to involve a moving violation that causes a serious impairment of a body function to another person. The trial court, following M Crim JI 15.19, instructed the jury as follows with regard to MCL 257.601d(2):

> The defendant is also charged with the crime of committing a moving violation causing serious impairment of a body function. *To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt: First, that the defendant committed one or more of the following moving violations*: Failing to proceed through a flashing yellow signal with caution or failing to observe an authorized speed or traffic control sign, signal, or device; *second, that the defendant's operation of the vehicle caused a serious impairment of a body function to James Scott Stivenson*. Again, to cause such injury, the defendant's operation of a vehicle must have been a

> factual cause of the injury. That is, but for the defendant's operation of the vehicle, the injury would not have occurred. In addition, operation of the vehicle must have been a proximate cause of the injury, that is, the injury must have been a direct and natural result of operating the vehicle. [Emphasis added.]

To the extent that these instructions allowed the jurors to convict defendant if they found that he committed a moving violation and then also found that his operation of the vehicle, *aside from the moving violation*, caused the serious impairment of a body function, this error was adequately rectified when the trial court reinstructed the jurors. After the start of deliberations, the jury posed the following question: "Would [a] moving violation be a criminal offense in all cases[?] What makes this criminal[?]" The court replied:

> You have another question for us: Would a moving violation be a criminal offense in all cases? What makes this criminal? *When a moving violation causes a serious impairment of a body function, seems to answer your question*.
>
> I would redirect you back to Criminal Jury Instruction 15.19, which is the full instruction on Count 2, which includes in particular, after defining the two moving violations, what—what constitutes that element of the charge. So, *in response to your questions seems to me* [sic], *a moving violation that is committed that causes a serious impairment of a body function*. [Emphasis added.]

We review jury instructions "*in their entirety* to determine if error requiring reversal occurred." *Aldrich*, 246 Mich App at 124 (emphasis added). "The instructions must not be extracted piecemeal to establish error." *Id*. (quotation marks and citation omitted). By way of its supplemental instruction, the court properly informed the jury that to convict defendant, it

needed to find that the moving violation caused a serious impairment of a body function. While it is true that the court referred the jurors back to its initial instruction on Count II, the court *clarified and added to* this initial instruction by explicitly stating, two times in the course of its short reply, that the answer to the jurors' question was that a criminal offense involves a moving violation that causes a serious impairment of a body function. The initial, poorly worded instruction indicated that a conviction would require that defendant's operation of the vehicle caused the injury, and the court, by way of its response, clarified that this "operation" must have consisted of the moving violation. I do not view this situation as one involving a court's having given two conflicting instructions and ordering the jury to follow both. Instead, I view it as a situation in which the court defined and clarified an element of the crime as previously set forth. In other words, the court, in essence, explained that the "operation" of the vehicle as discussed in M Crim JI 15.19 refers to the moving violation. The instructions could have been worded in a more straightforward fashion, but, in my opinion, they "fairly presented the issues to be tried and sufficiently protected . . . defendant's rights." *Aldrich*, 246 Mich App at 124.

I would affirm.

In re RHEA BRODY LIVING TRUST (ON REMAND)

Docket No. 330871. Submitted July 2, 2018, at Lansing. Decided August 7, 2018, at 9:00 a.m. Vacated in part 504 Mich 882 (2019).

Cathy B. Deutchman petitioned the Oakland County Probate Court to remove Robert Brody, her father, from his position as successor trustee for her mother's revocable trust—the Rhea Brody Living Trust. As both the successor trustee and a beneficiary of the trust, Robert allegedly took actions that were detrimental to the trust; that were contrary to Rhea's intent; and that favored Jay Brody (who was Cathy's brother and Robert and Rhea's child) and Jay's heirs, to the detriment of Cathy and her heirs. The court, Daniel A. O'Brien, J., granted Cathy's motion for partial summary disposition, declaring Rhea disabled under the terms of the trust, removing Robert as successor trustee, ordering that specific actions be taken regarding the two family businesses, and granting Robert's request that the case be stayed pending appeal in the Court of Appeals or further order of the probate court. Robert and Jay appealed in the Court of Appeals and argued that Cathy did not have standing to request adjudication of the issues in her petition. The Court of Appeals, O'BRIEN, P.J., and JANSEN, and MURRAY, JJ., ruled that Cathy had standing and had properly petitioned the probate court for relief. 321 Mich App 304 (2017). Robert and Jay sought leave to appeal in the Supreme Court. In lieu of granting leave to appeal, the Supreme Court vacated Part II of the Court of Appeals' opinion and remanded the case to the Court of Appeals for reconsideration of the standing analysis. 501 Mich 1094 (2018).

On remand, the Court of Appeals *held*:

1. MCL 700.1105(c) and MCR 5.125 demonstrate that the identification of interested persons in a trust estate is decidedly flexible and fact-specific. MCL 700.1105(c) indicates that identification of interested persons may vary and shall be determined by the particular purposes of a proceeding and the matters involved in it and by the rules of the Michigan Supreme Court. MCR 5.125 is captioned, "Interested Persons Defined," and the rule identifies who must be served with notice of specific proceedings. MCR 5.125(D) provides that the court shall make a specific determination of interested persons if those individuals are not

defined by statute or court rule, and MCR 5.125(E) expressly authorizes the court, in the interest of justice, to order additional persons to be served with notice of a proceeding even though the individuals do not qualify as interested persons under any of the statutory definitions or under MCR 5.125. In this case, under MCR 5.125(B)(2), Cathy qualified as an interested person because she was a "trust beneficiary" whose interest remained unsatisfied and to whom notice of specific proceedings had to be given under MCR 5.125(C). MCR 5.125(C)(33)(g) states that if the petitioner has a reasonable basis to believe the settlor is an incapacitated individual, notice must be given to those persons who are entitled, under MCL 700.7603(2), to be reasonably informed of the trust's administration. In light of MCR 5.125(C)(33)(g) and MCL 700.7603(2) and the facts of this case, Cathy was an interested person with standing to file the petition.

2. Resolution of the question whether Cathy was an "interested person" with standing to petition for the relief she requested rendered moot the issue concerning whether the phrase "and any other person that has a property right in or claim against a trust estate" modified the terms "child" and "beneficiary" that precede the phrase in MCL 700.1105(c). However, because the Supreme Court expressly stated that the Court of Appeals "should consider" the issue, the "rule of mandate" applied. The "rule of mandate" is the well-accepted principle that a lower court must strictly comply with, and may not exceed the scope of, a remand order. The phrase and the terms at issue appear in the first sentence of MCL 700.1105(c) but cannot be construed in a vacuum. In light of the second sentence of MCL 700.1105(c), whether a "child" or a "beneficiary" is interested in a trust proceeding is dependent on the particular purposes of and matters involved in the proceeding under the facts as they exist at the time that standing is determined. Whether an individual is an interested person does not depend on whether the "child" or "beneficiary" has a property right in or claim against the trust estate. To interpret MCL 700.1105(c) in a way that reads the phrase in question as modifying "child" and "beneficiary" in every case would be unduly restrictive and would directly contravene the legislative intent expressed by the second sentence of the statute. The second sentence of MCL 700.1105(c) demonstrates that the Legislature wished to leave to the sound discretion of the probate court the fact-specific inquiry into who qualifies as an interested person in a probate proceeding. Application of the last-antecedent rule further supports the conclusion that the phrase "and any other person that has a property right in or claim against a trust estate" does not modify "child" or "beneficiary." The last antecedent to the phrase is the word "beneficiary,"

but "beneficiary" is part of the same dependent clause as the phrase in question, separated from the rest of the sentence by commas or semicolons. Therefore, without evidence of a contrary legislative intent, it would be inappropriate to construe the phrase as modifying the word "child," a word that appears before "beneficiary" in the clause. In fact, in grammatical context, the phrase seems to represent a catchall category and not adjectival language intended to modify terms preceding it. The doctrine of *ejusdem generis* also supports this interpretation. The doctrine of *ejusdem generis* states that when general words follow a designation of particular subjects, the general words are ordinarily presumed to be restricted by the particular designation as including only things of the same kind, class, character, or nature as those specifically enumerated. In this case, if anything, the terms "child" and "beneficiary" should be construed as modifying the meaning of the catchall phrase, not the other way around. Whether a "child" or a "beneficiary" is interested in a trust proceeding is dependent on the particular purposes of and matters involved in the proceeding under the facts as they exist at the time that standing is determined and not on whether the "child" or the "beneficiary" has a property right in or a claim against the trust estate.

Affirmed.

TRUSTS — REVOCABLE TRUSTS — INTERESTED PERSONS.

Under MCL 700.1105(c), identification of interested persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, a proceeding and by the Supreme Court rules; MCR 5.125 indicates that the definition of "interested persons" is flexible and fact-specific.

Hertz Schram PC (by *Kenneth F. Silver* and *Daniel W. Rucker*) for Cathy B. Deutchman.

Giarmarco, Mullins & Horton, PC (by *William H. Horton* and *Christopher J. Ryan*) for Robert Brody.

Kemp Klein Law Firm (by *Alan A. May*, *Joseph P. Buttiglieri*, and *Richard Bisio*) for Jay Brody.

Amicus Curiae:

Warner Norcross & Judd LLP (by *David L. J. M. Skidmore* and *Conor B. Dugan*) for the Probate & Estate Planning Section of the State Bar of Michigan.

ON REMAND

Before: O'BRIEN, P.J., MURRAY, C.J., and JANSEN, J.

PER CURIAM. In an order dated June 8, 2018, the Michigan Supreme Court vacated Part II of this Court's prior opinion in this case, *In re Brody Living Trust*, 321 Mich App 304; 910 NW2d 348 (2017) (*Brody I*), and remanded this case to this Court for reconsideration "of its standing analysis." *In re Brody Living Trust*, 501 Mich 1094 (2018) (*Brody II*). Our Supreme Court directed this Court to "consider whether the terms 'child' and 'beneficiary' in MCL 700.1105 are modified by the phrase 'and any other person that has a property right in or claim against a trust estate.' If so, then [this Court] shall consider whether Cathy Deutchman is an 'interested person' under this reading of the statute." *Brody II*, 501 Mich at 1094. Additionally, our Supreme Court instructed that this Court may consider the arguments made in the Supreme Court by the Probate and Estate Planning Section of the State Bar of Michigan regarding whether Cathy has standing "in light of MCR 5.125(C)(33)(g) and MCL 700.7603(2) and is a present (not contingent) beneficiary of the trust." *Id*. We again affirm our prior conclusion that the trial court did not err by concluding that Cathy had standing as a petitioner in this action.

This case arose out of a family dispute involving the Rhea Brody Living Trust. Rhea's husband, Robert Brody, originally appealed the order granting partial summary disposition in favor of Rhea and Robert's daughter, Cathy. As this Court originally articulated in *Brody I*, "the order resolved claims relating to two family businesses, Brody Realty No I, LLC, and Macomb Corporation, declared Rhea Brody disabled pursuant to the terms of the trust, and removed Robert as

successor trustee of the trust." *Brody I*, 321 Mich App at 308. The convoluted factual background of this case can best be boiled down to the fact that Rhea became mentally incapacitated as a result of dementia, and Robert, who is also a beneficiary of the trust, began acting as successor trustee. Allegations were made that Robert took actions that were detrimental to the trust, contrary to Rhea's intent, and favored Jay Brody and his heirs[1] to the detriment of Cathy and her heirs.

In their original appeal to this Court, Robert and Jay argued that Cathy "did not have standing (i.e., she was not a proper party) to request adjudication of the issues in her petition, including Robert's removal as trustee of the Rhea Trust and reversal of actions taken by Robert as trustee." *Id*. at 314. Previously, we concluded that Cathy did have standing under MCL 700.7201 as an "interested person," which is defined in MCL 700.1105(c), because

> [t]here is no dispute that Cathy is Rhea's child. In addition, Cathy is a "beneficiary." Under MCL 700.1103(d)(*i*), a beneficiary includes a "trust beneficiary," defined in MCL 700.7103(*l*)(*i*) as a person with "a present or future beneficial interest in a trust, vested or contingent." The term "beneficial interest" is defined as follows: "A right or expectancy in something (such as a trust or an estate), as opposed to legal title to that thing. For example, a person with a beneficial interest in a trust receives income from the trust but does not hold legal title to the trust property." *Black's Law Dictionary* (10th ed), p 934. The plain language of the trust indicates that Cathy has a future (upon Rhea's death), contingent (assuming no revocation or amendment) interest in the trust property. See Restatement Trusts, 1st, § 56, illustration 7, p 172 (an intervivos trust in which the death of a settlor is a condition precedent establishes a "contingent equitable interest in

[1] Jay is the son of Rhea and Robert.

> remainder"). Specifically, Cathy will receive Rhea's clothing and jewelry. In addition, if Robert predeceases Rhea, then a subtrust composed of 50% of the Rhea Trust's remaining assets is created for Cathy. If Rhea predeceases Robert, then a marital trust and a family trust are created, and under the marital trust, Rhea's descendants are each entitled to net income distributions and any principal necessary for education, health, support, and maintenance. [*Brody I*, 321 Mich App at 317-318.]

We have been directed by our Supreme Court to reexamine our original standing analysis. In particular, our Supreme Court indicated that this Court "should consider whether the terms 'child' and 'beneficiary' in MCL 700.1105[(c)] are modified by the phrase 'and any other person that has a property right in or claim against a trust estate.' " *Brody II*, 501 Mich at 1094. Our Supreme Court further instructed that if this Court answers that question in the affirmative, this Court should then consider whether Cathy qualifies as an "interested person" under such an interpretation of MCL 700.1105(c). *Id*. Finally, our Supreme Court noted that this Court "may also consider" the arguments in an amicus curiae brief submitted in our Supreme Court by the Probate and Estate Planning Section (the Probate Section) of the State Bar of Michigan. Because we find the Probate Section's arguments persuasive, we will consider them first, in the interest of clarity.

Given the broad scope of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., which codifies several complex areas of law, the act contains *many* statutory definitions. Such definitions are not consolidated in any one portion of EPIC, are not universally applicable, sometimes overlap or supersede other definitions within the act, and often contain terms or phrases that are *also* statutorily defined. See, e.g., MCL 700.1102 ("The definitions contained in this

part apply throughout this act unless the context requires otherwise or unless a term defined elsewhere in this act is applicable to a specific article, part, or section."). Accordingly, as a foundational matter, several relevant statutory definitions must be set forth before approaching the principal analysis.

Under MCL 700.7103(*l*)(*i*), the term "trust beneficiary" is defined, in relevant part, as a person who "has a present or future beneficial interest in a trust, vested or contingent." On the other hand, the phrase "qualified trust beneficiary" is defined under MCL 700.7103(g), in pertinent part, as:

> a trust beneficiary to whom 1 or more of the following apply on the date the trust beneficiary's qualification is determined:
>
> (*i*) The trust beneficiary is a distributee *or permissible distributee* of trust income or principal.
>
> * * *
>
> (*iii*) The trust beneficiary *would be* a distributee or permissible distributee of trust income or principal if the trust terminated on that date. [Emphasis added.]

In turn, "distributee" is defined at MCL 700.1103(o), in relevant part, as "a person that receives . . . trust property from the trustee other than as a creditor or purchaser."

The phrase "permissible distributee" is not defined within EPIC, and we are unable to locate any previous authority construing that term. However, in context, the plain meaning seems apparent without resorting to dictionary definitions. See *Bloomfield Twp v Kane*, 302 Mich App 170, 175; 839 NW2d 505 (2013) ("[R]ecourse to dictionary definitions is unnecessary when the Legislature's intent can be determined from reading the statute itself.") (quotation marks and citation omitted).

We conclude that the plain meaning expressed is that a "permissible distributee" is a person who is *permitted*, not *entitled*, to receive trust property from the trustee other than as a creditor or purchaser.

In its brief, the Probate Section posits that this Court reached the correct outcome concerning standing in *Brody I* but did so for the wrong reasons.[2] Specifically, the Probate Section contends that this Court

> made the following errors:
>
> • Disregard[ed] the second sentence of MCL 700.1105(c) and its reference to the importance of considering both "the particular purposes of, and matter[s] involved in, [the] proceeding" and the "supreme court rules."
>
> • Overlook[ed] MCR 5.125 entirely.
>
> • Overlook[ed] MCL 700.7603(1) and (2) entirely.
>
> • Fail[ed] to consider whether Cathy was "a person entitled to be reasonably informed, as referred to in MCL 700.7603(2)," for purposes of MCR 5.125(C)(33).
>
> • Determin[ed] that Cathy was an "interested person" based solely on the fact that she qualified for two of the categories included in the first sentence of MCL 700.1105(c) ("child" and "beneficiary")[.]

The Probate Section also argues that *Brody I* will have unintended downstream consequences. According to the Probate Section, this Court's

> determination that a "child" or a "beneficiary" is *always* an interested person with standing to commence trust proceedings before the probate court is an erroneous construction of EPIC and the Michigan Trust Code that can be expected to interfere seriously with the administration of private citizens' estate planning and trust administration. In light of this *published* decision, "children" and

[2] We note that the arguments raised by the Probate Section were not previously raised by the parties in this Court.

> "beneficiaries" (who would not otherwise qualify as "interested persons" under MCL 700.1105(c), MCR 5.125, and MCL 700.7603(2)) can be expected to rely on [*Brody I*] to pursue trust-related litigation which would not have been permitted prior to [that] decision.[3]

The second sentence of MCL 700.1105(c) provides, "Identification of interested persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, a proceeding, *and by the supreme court rules*." (Emphasis added.) Within Subchapter 5.100 of our court rules, which sets forth rules of pleading and practice that apply in probate court, our Supreme Court has promulgated MCR 5.125, which is captioned, "Interested Persons Defined." In pertinent part, MCR 5.125 provides:

> (B) Special Conditions for Interested Persons.
>
> * * *
>
> (2) Devisee. Only a devisee whose devise remains unsatisfied, *or a trust beneficiary whose beneficial interest remains unsatisfied*, need be notified of specific proceedings under subrule (C).
>
> * * *

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[3] In other words, the practical concern of the Probate Section is that *Brody I*'s construction of MCL 700.1105(c) will undercut several of the characteristics that make revocable grantor trusts desirable as an estate planning tool. The Probate Section is concerned that grantor-settlors who use revocable grantor trusts (or "living" trusts) solely as an estate planning mechanism—seeking to avoid probate, to minimize tax liabilities, and to keep private financial affairs from becoming a matter of public record—will suddenly have to answer to beneficiaries, during the grantor-settlors' lifetimes, for the management of "trust" assets that, for all practical purposes, still belong to the grantor-settlors and are funded into the "trust" only to avoid the need to probate *un*funded assets (via a pour-over will) after death.

(C) Specific Proceedings. Subject to subrules (A) and (B) and MCR 5.105(E),[4] the following provisions apply. When a single petition requests multiple forms of relief, the petitioner must give notice to all persons interested in each type of relief:

* * *

(33) Subject to the provisions of Part 3 of Article VII of the Estates and Protected Individuals Code,[5] *the persons interested in a proceeding affecting a trust* other than those already covered by subrules (C)(6), (C)(28), and (C)(32)[6] are:

(a) the qualified trust beneficiaries affected by the relief requested,

* * *

(d) in a proceeding to appoint a trustee, the proposed trustee,

* * *

(g) if the petitioner has a reasonable basis to believe the settlor is an incapacitated individual, those persons who are entitled to be reasonably informed, as referred to in MCL 700.7603(2).

(D) The court shall make a specific determination of the interested persons if they are not defined by statute or court rule. [Emphasis added.]

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[4] Because MCR 5.105(E) concerns "unborn or unascertained interested persons not represented by a fiduciary or guardian ad litem," it is not relevant in this case.

[5] Part 3 of Article VII of EPIC concerns the representation of parties involved in the proceeding.

[6] Those listed subrules are not seemingly relevant here. Subrule (C)(6) involves proceedings "for examination or approval of an account of a fiduciary," Subrule (C)(28) concerns petitions "for approval of a trust under MCR 2.420," and Subrule (C)(32) addresses "modification or termination of a noncharitable irrevocable trust[.]"

Read in concert, MCL 700.1105(c) and MCR 5.125 demonstrate that the interested-person inquiry is decidedly flexible and fact-specific. The identity of the interested persons can change not only over time but also depends on the nature of the proceedings and the relief requested. Moreover, MCR 5.125(D) unambiguously provides that there may be circumstances in which a probate court must determine whether an individual—one who does *not* qualify as an interested person under any of the statutory definitions or under the other subparts of MCR 5.125—nevertheless qualifies as an interested person under the facts presented in the given case.

In this case, Cathy petitioned for several distinct forms of relief: (1) Robert's removal as successor trustee with Cathy's appointment in his stead, or the appointment of an independent trustee to manage the trust's real estate interests; (2) delivery of all trust records to the new successor trustee along with a full accounting; (3) partial supervision of the trust during the pendency of this action; (4) the rescission of all allegedly improper acts taken by Robert as successor trustee following Rhea's disability, with the funds from such rescinded transactions held in a constructive trust; (5) an order enjoining Robert from committing any future breaches of trust; (6) Robert's removal as manager of Brody Realty, which is owned by the trust; (7) an award of damages to the trust and Brody Realty; (8) surcharge of Robert and Jay for Cathy's attorney fees in this action; and (9) an order enjoining Robert and Jay from wasting or dissipating trust assets. With regard to each of those items of relief requested, we agree with the Probate Section that Cathy qualified as an interested person under MCR 5.125(C)(33)(g) ("if the petitioner has a reasonable basis to believe the

settlor is an incapacitated individual, those persons who are entitled to be reasonably informed, as referred to in MCL 700.7603(2)").

MCL 700.7603(2) provides:

> If the trustee reasonably believes that the settlor of a revocable trust is an incapacitated individual,[7] the trustee shall keep the settlor's designated agent or, if there is no designated agent *or if the sole agent is a trustee, each beneficiary who, if the settlor were then deceased, would be a qualified trust beneficiary* informed of the existence of the trust and reasonably informed of its administration. [Emphasis added.]

In this case, there is no dispute that when Robert—who was acting as Rhea's agent under a durable power of attorney—formally accepted his role as successor trustee in May 2013, he had reason to believe that Rhea was an "incapacitated individual" as a result of her dementia. Nor is there any evidence that she was no longer an incapacitated individual at the time that Cathy instituted these proceedings. Moreover, had Rhea been deceased at that time, Cathy would have been a "qualified trust beneficiary" under MCL 700.7103(g)(*i*) ("The trust beneficiary is a distributee or permissible distributee of trust income or principal."). Under such circumstances, Cathy would also have been entitled to the specific gift of Rhea's jewelry and clothing, and Cathy would also have been entitled to receive a portion of the trust's net income. Therefore, Cathy would qualify as a "distributee" under

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[7] MCL 700.1105(a) provides:

> "Incapacitated individual" means an individual who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, not including minority, to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions.

MCL 700.1103(o). And because she would qualify as a distributee of both trust income and principal in the event of Rhea's death, she would also become a "qualified trust beneficiary" under those circumstances. As a result, Cathy would be entitled to be reasonably informed of the trust and its administration under MCL 700.7603(2), which means she would qualify as an interested person under the definition set forth in MCR 5.125(C)(33)(g).

Consequently, the Probate Section is correct that Cathy qualifies as an interested person in this matter under MCR 5.125(C)(33)(g) and MCL 700.1105(c). As an interested person, she had standing to institute these proceedings. See *In re Rottenberg Living Trust*, 300 Mich App 339, 355; 833 NW2d 384 (2013) (holding, in the context of trust litigation, that an "interested person" had "statutory standing . . . to invoke the probate court's jurisdiction with respect to the administration of [the trust at issue]"). Therefore, even assuming, arguendo, that the construction of MCL 700.1105(c) announced in *Brody I* was erroneous, the proper conclusion regarding Cathy's standing was nevertheless reached.

In light of the foregoing analysis, we would ordinarily decline to address whether the phrase "and any other person that has a property right in or claim against a trust estate" in MCL 700.1105(c) modifies the terms "child" and "beneficiary" because the issue would be moot. See *Garrett v Washington*, 314 Mich App 436, 449; 886 NW2d 762 (2016) ("A matter is moot if this Court's ruling cannot for any reason have a practical legal effect on the existing controversy.") (quotation marks and citations omitted). However, given the circumstances at bar, we will nevertheless address and decide the issue. See *Int'l Business Machines Corp v*

Dep't of Treasury, 316 Mich App 346, 352; 891 NW2d 880 (2016), in which this Court articulated that the "rule of mandate" reflects "the well-accepted principle in our jurisprudence that a lower court must strictly comply with, and may not exceed the scope of, a remand order." The Supreme Court's remand instructions indicated that this Court "should consider" this issue, and when viewed in context, the Supreme Court's use of "should" does not seem permissive.

We conclude that the proposed construction of MCL 700.1105(c) would erroneously restrict the flexible meaning of "interested person" that is conveyed by the statutory language. In pertinent part, the portion of MCL 700.1105(c) that is at issue—the first of its two sentences—provides:

> "Interested person" . . . includes, but is not limited to, the incumbent fiduciary; an heir, devisee, *child*, spouse, creditor, and *beneficiary* and *any other person that has a property right in or claim against a trust estate* or the estate of a decedent, ward, or protected individual; a person that has priority for appointment as personal representative; and a fiduciary representing an interested person. [Emphasis added.]

Such language must not be construed in a vacuum, heedless of context. See *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 318; 645 NW2d 34 (2002) (noting that *potential* ambiguities in statutory language may be resolved by contextual considerations). As noted earlier, the second sentence of MCL 700.1105(c) expressly states that the "[i]dentification of interested persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, a proceeding, and by the supreme court rules." Moreover, in MCR 5.125(D), our Supreme Court has taken a decidedly flexible approach as well. In light

of the several broad legal areas that EPIC covers, such an approach is prudent. It would be unduly restrictive to conclude that the terms "child" and "beneficiary" in MCL 700.1105(c) are necessarily modified—in every case—by the phrase "any other person that has a property right in or claim against a trust estate . . . ." Doing so would directly contravene the legislative intent expressed by the second sentence of MCL 700.1105(c), which demonstrates that the Legislature wished to leave the fact-specific inquiry of who qualifies as an interested person in a given probate proceeding to the sound discretion of the probate court.

That same conclusion is also supported by fundamental principles of grammar, including the last-antecedent rule. "Because the Legislature is presumed to know the rules of grammar, . . . statutory language must be read within its grammatical context unless something else was clearly intended . . . ." *Niles Twp v Berrien Co Bd of Comm'rs*, 261 Mich App 308, 315; 683 NW2d 148 (2004). "Proper syntax provides that commas usually set off words, phrases, and other sentence elements that are parenthetical or independent." *Dale v Beta-C, Inc*, 227 Mich App 57, 69; 574 NW2d 697 (1997). Moreover, "[i]t is a general rule of grammar and of statutory construction that a modifying word or clause is confined solely to the last antecedent, unless a contrary intention appears." *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999).

The "last antecedent" of a given term or phrase is " 'the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence . . . .' " *People v English*, 317 Mich App 607, 614; 897 NW2d 184 (2016) (opinion by WILDER, P.J.), quoting 2A Singer & Singer, Sutherland Statutory Construction (7th ed), § 47:33, pp 494-497. In this instance,

the last word, phrase, or clause that can be made an antecedent of the phrase "and any other person that has a property right in or claim against a trust estate" is the word "beneficiary." Moreover, from a grammatical standpoint, the word "beneficiary" appears in the same dependent clause as the phrase in question, separated from the rest of the sentence by commas or semicolons. Therefore, lacking any clear evidence of a contrary legislative intent—and we find none—it would be inappropriate to construe the phrase "and any other person that has a property right in or claim against a trust estate" as modifying the word "child."

On the contrary, in grammatical context, the phrase in question seems to represent an independent catchall category, not adjectival language that was meant to modify the terms preceding it. Under the canon of construction *ejusdem generis*, when "general words follow a designation of particular subjects, the meaning of the general words will ordinarily be presumed to be and construed as restricted by the particular designation and as including only those things of the same kind, class, character or nature as those specifically enumerated." *Benedict v Dep't of Treasury*, 236 Mich App 559, 564; 601 NW2d 151 (1999) (quotation marks and citation omitted). Therefore, "[w]hen construing a catch-all phrase, courts will interpret it to include only those things of the same type as the preceding specific list." *Sebring v City of Berkley*, 247 Mich App 666, 674; 637 NW2d 552 (2001). In other words, if anything, the terms "child" and "beneficiary" should be construed as modifying the meaning of the catchall phrase "any other person that has a property right in or claim against a trust estate," *not* the other way around.

For those reasons, we reject the proposed construction of MCL 700.1105(c) under which the phrase "any

other person that has a property right in or claim against a trust estate" would be construed as modifying the preceding terms "child" and "beneficiary." In light of the second sentence of MCL 700.1105(c), it seems that whether a "child" or a "beneficiary" is interested in a given trust proceeding is dependent on the particular purposes of, and matters involved in, the proceeding—under the facts as they exist at the time that standing is determined—not whether the given "child" or "beneficiary" has a property right in or claim against the trust estate.

We again affirm our prior conclusion that the trial court did not err by concluding that Cathy had standing as a petitioner in this action.

O'BRIEN, P.J., MURRAY, C.J., and JANSEN, J., concurred.

PEOPLE v VANDERPOOL

Docket No. 337686. Submitted July 13, 2018, at Detroit. Decided August 7, 2018, at 9:05 a.m. Reversed and remanded 505 Mich ___ (2020).

In June 2013, John D. Vanderpool pleaded no contest in the Tuscola Circuit Court to the charge of assaulting a police officer, MCL 750.81d(1), a felony offense. The court, Amy Gierhart, J., sentenced defendant to a two-year term of probation; the probation sentence expired in June 2015, but the court did not enter an order discharging defendant from probation. In September 2015, the trial court extended defendant's probation to June 2016 to account for the time during which warrants had been issued for his arrest for failure to appear at probation appointments and to allow defendant additional time to pay court-ordered costs and fees. During a probation-compliance check in December 2015, defendant was found in possession of heroin; defendant subsequently pleaded no contest to possession of less than 25 grams of a controlled substance, MCL 333.7403(2)(a)(*v*), second or subsequent offense, MCL 333.7413(2), and pleaded guilty of a probation violation. The court sentenced defendant for the two charges and revoked defendant's probation. Defendant sought leave to appeal, which the Court of Appeals granted.

The Court of Appeals *held*:

MCL 771.2(1) provides that a probation sentence for a felony conviction may not exceed five years. Under MCL 771.2(5), a trial court has authority to fix and determine the period and conditions of probation, and the court may amend the order in form or substance at any time; a defendant is not entitled to a hearing before the trial court can amend, modify, or extend an order of probation. In contrast, MCL 771.4 provides that probation-revocation proceedings must commence during the probation period, that is, during the specific probation term that the sentencing court imposed on a particular defendant, not the statutory maximum term of probation; during the probation period, a probation order is revocable by the sentencing court for any violation or attempted violation of a probation condition that the court considers applicable. Unlike revocations under MCL 771.4, MCL 771.2(5) allows probation orders to be modified at any

time and does not refer to the probation period. Accordingly, a trial court retains jurisdiction to modify and extend a probation order at any time within the maximum five-year period allowed under MCL 771.2(1), even after the original probation period expires. While defendant's original probation term had already expired when the trial court extended his probation in September 2015, the one-year probation extension was within the five-year maximum period allowed for felony convictions under MCL 771.2(1). Accordingly, the trial court had jurisdiction to modify defendant's probation in September 2015; the probation-compliance check in December 2015 was therefore proper, and defendant violated the terms of his probation by possessing heroin. The trial court had jurisdiction to revoke defendant's probation because the court initiated the probation-revocation proceedings while the new probation order was in effect.

Affirmed.

O'CONNELL, J., concurring, wrote separately to emphasize that, contrary to the dissent's argument, the characteristics unique to probation proceedings did not support extending the due-process principles governing a criminal trial, which has a more stringent burden of proof, to a postconviction extension of probation. Similarly, while due process requires—because of loss-of-liberty concerns—a preliminary hearing and a final hearing before parole can be revoked, such procedural protections are not required in a hearing to modify or extend probation because there is not a comparable loss of liberty; that is, extending or modifying probation only places a constraint on a defendant's liberty.

JANSEN, J., concurring in part and dissenting in part, agreed with the majority that the trial court had jurisdiction under MCL 771.2(5) to extend defendant's probationary period but disagreed with the majority's conclusion that the trial court correctly extended and later revoked defendant's probation. Due process requires that a criminal defendant is entitled to reasonable notice of the charges against him or her and is entitled to an opportunity to have those charges proved beyond a reasonable doubt by the prosecution. Similarly, a defendant is entitled to a preliminary hearing and a final hearing before the trial court can revoke probation or parole. Because there is no reason not to do so, the due-process principles applicable to criminal prosecutions and probation-revocation hearings—that is, a preliminary hearing and a final hearing—should extend to postconviction proceedings to amend, modify, or extend a probation period. Judge JANSEN would have vacated the trial court's orders extending and subsequently revoking defendant's probation and would have re-

manded to the trial court for further proceedings on the petition to extend defendant's probation.

CRIMINAL LAW — PROBATION — AMENDMENT OR MODIFICATION OF PROBATION — JURISDICTION.

MCL 771.2(1) provides that a probation sentence for a felony conviction may not exceed five years; under MCL 771.2(5), a trial court has authority to fix and determine the period and conditions of probation, and the court may amend the order in form or substance at any time; a trial court retains jurisdiction to modify and extend a probation order at any time within the maximum five-year period allowed under MCL 771.2(1), even after the original probation period expires.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Mark E. Reene*, Prosecuting Attorney, and *Eric F. Wanink*, Chief Assistant Prosecuting Attorney, for the people.

Kufchock & Associates PLC (by *Liane M. Kufchock*) for defendant.

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

CAMERON, P.J. Defendant, John David Vanderpool, appeals the sentences imposed following his conviction of possession of less than 25 grams of a controlled substance (heroin), MCL 333.7403(2)(a)(*v*), second or subsequent offense, MCL 333.7413(2), and for a probation violation. Vanderpool was sentenced to 18 months to 8 years' imprisonment for the possession conviction, with credit for 271 days served, and to 459 days' imprisonment for the probation violation,[1] also with credit for time served. On appeal, Vanderpool contends that his conviction and sentences are invalid because the trial court lacked jurisdiction to modify and extend

[1] The trial court revoked defendant's probation.

probation three months after his initial term of probation had expired. We conclude that the trial court had jurisdiction to modify and extend probation up to the statutory maximum term even after Vanderpool's original probationary period expired. Therefore, we affirm.

I. BACKGROUND

In June 2013, the trial court sentenced Vanderpool to a two-year term of probation after he pleaded *nolo contendere* to assaulting a police officer, MCL 750.81d(1), a felony offense. Vanderpool's probation prohibited him from possessing controlled substances and authorized probation agents to conduct compliance checks and search his property. While on probation, Vanderpool did not consistently report as directed to the probation department and did not pay his court-ordered fines and costs. His probation was set to expire in June 2015, but the trial court did not enter an order discharging him from probation. In September 2015, approximately three months after Vanderpool's probation sentence had expired, Vanderpool's probation officer filed a petition with the trial court to extend probation one year "to allow for the time [Vanderpool] was on warrant status[2] . . . and time to pay his Court ordered fines and fees." Because Vanderpool had not successfully completed probation, the trial court extended Vanderpool's probation to June 2016. On December 30, 2015, probation agents conducting a probation-compliance check found Vanderpool in possession of heroin, resulting in the heroin conviction and the probation revocation at issue in this appeal.

[2] "Warrant status" appears to refer to the period of time during which Vanderpool stopped reporting to the probation department and was subject to a warrant because of his failure to appear.

II. DISCUSSION

Vanderpool argues that the trial court did not have jurisdiction to modify and extend his probationary term in September 2015 because his probation had expired in June 2015. Vanderpool maintains that because his probation was not modified and extended before its expiration, the trial court could not later reinstate his probation and extend the probation period. We disagree. We review de novo questions regarding the trial court's subject-matter jurisdiction and issues of statutory interpretation. *People v Glass*, 288 Mich App 399, 400; 794 NW2d 49 (2010).

A probation sentence for a felony conviction may not exceed five years. MCL 771.2(1). Under MCL 771.2(5),

> [t]he court shall, by order to be entered in the case as the court directs by general rule or in each case, fix and determine the period and conditions of probation. The order is part of the record in the case. The court may amend the order in form or substance *at any time*. [Emphasis added.]

Our Supreme Court addressed the exact issue now before this Court, albeit under the prior version of the probation statute. See *People v Marks*, 340 Mich 495, 498-502; 65 NW2d 698 (1954). The probation statute then read:

> The court shall by order, to be filed or entered in the cause as the court may direct by general rule or in each case fix and determine the period and conditions of probation and such order, whether it is filed or entered, shall be considered as part of the record in the cause and shall be *at all times alterable and amendable*, both in form and in substance, in the court's discretion. [*Id*. at 499, quoting 1948 CL 771.2 (quotation marks omitted; emphasis added).]

After interpreting this provision, the *Marks* Court concluded that trial courts retain jurisdiction to modify

probation at any time within the five-year statutory period, even after the original probation period expires. *Id*. at 501. ("[W]e therefore hold that defendant's rights were not impinged by the alteration in the probation order made within the statutory 5-year period, even though the conditions of the original order had not been violated and its term had expired."). We are now tasked with interpreting the current version of MCL 771.2(5) in light of *Marks*.

The initiation of probation-revocation proceedings under MCL 771.4 and the modification of probation orders under MCL 771.2(5) differ significantly. Probation revocation proceedings must commence during the "probation period." *Glass*, 288 Mich App at 408. The "probation period" is defined as "the specific probation term that the sentencing court has imposed on a particular defendant," not the statutory maximum term of probation. *Id*. at 405. During the "probation period," a probation order is "revocable in any manner the court that imposed probation considers applicable either for a violation or attempted violation of a probation condition . . . ." MCL 771.4. Unlike revocations, MCL 771.2(5) authorizes the modification of probation "at any time," does not refer to the "probation period," and in no way requires that modification occur within that period. If the Legislature has included language in one part of a statute and omitted it from another part, courts should assume that the omission was intentional. *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 565; 741 NW2d 549 (2007). We conclude that the omission of the term "probation period" from MCL 771.2(5) was intentional, and we see no conflict between *Marks* and *Glass*.[3] Therefore, we hold that a

[3] We also fail to see how *Gagnon v Scarpelli*, 411 US 778; 93 S Ct 1756; 36 L Ed 2d 656 (1973), calls *Marks* into question. *Gagnon*, *id*. at 782,

trial court has the authority to modify and extend probation at any time within the statutory maximum period, even after the initial probation period expires.

In this case, the trial court had jurisdiction to extend Vanderpool's probation. The original probation term had expired when the trial court extended Vanderpool's probation, but the one-year extension of probation was within the five-year statutory maximum period allowed for felony convictions under MCL 771.2(1). Importantly, the trial court had not entered an order discharging Vanderpool from probation pursuant to MCL 771.6. Instead, the trial court modified probation two months before the compliance check, so the terms of Vanderpool's original probation were still in effect at that time. Therefore, the compliance check was proper, and Vanderpool's possession of heroin violated his probation. The trial court initiated probation-revocation proceedings after the discovery of the heroin but before Vanderpool's extended probationary period expired. Accordingly, the trial court had jurisdiction to revoke Vanderpool's probation.

The dissent claims that Vanderpool's due-process rights were violated because he was not given notice that his probation was extended or an opportunity to challenge that a probation extension was justified. This assertion is not supported by the record. The court file demonstrates that Vanderpool was given notice

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held that a defendant has a due-process right to a preliminary probable-cause hearing regarding an alleged probation violation and a final hearing before the revocation of probation. This procedure, which is distinct from the procedure to extend probation, was afforded to defendant when he was arraigned on the probation violation and later waived his right to a hearing and pleaded guilty to violating his probation. *Gagnon* cannot be read to create a new substantive due-process right that an evidentiary hearing must take place before a trial judge can modify or extend a probation order.

that his probation had been extended because he reported to his probation agent after his probation extension. The court file reveals that on November 12, 2015—after the probation extension but before the search of his house—Vanderpool's probation agent petitioned the trial court for a bench warrant because Vanderpool violated his probation by testing positive for opiates. A subsequent probation-violation warrant issued on December 3, 2015, further reveals that after Vanderpool was arrested for an unspecified offense on November 18, 2015, he *stopped* "report[ing] on a weekly basis to the probation office" and "[h]is whereabouts [were] unknown at [that] time." Vanderpool's conduct of reporting to his probation agent demonstrates that he was provided notice that he was still on probation when he was later caught with heroin.[4]

Moreover, the dissent claims Vanderpool was entitled to an evidentiary hearing before the trial court was able to make any "amendment, modification, or extension of probation." In other words, the dissent would have this Court establish a rule that probation modifications are to be treated the same as probation violations and revocations, which require an evidentiary hearing. Our courts have continually rejected this position. See, e.g., *Marks*, 340 Mich at 501; *People v Britt*, 202 Mich App 714, 716; 509 NW2d 914 (1993); *People v Kendall*, 142 Mich App 576, 579; 370 NW2d

[4] Further, courts speak through their written orders, and Vanderpool remained under the jurisdiction of the trial court until he completed the terms and conditions of his probation, until he was officially discharged, or until the expiration of the five years. Vanderpool was never discharged from probation, and he never completed the terms and conditions of his probation. In fact, Vanderpool was informed that his probation was being extended. Rather than find a probation violation, the trial court extended Vanderpool's probation to allow him to satisfactorily complete the terms and conditions of his probation.

631 (1985). In short, because the trial court modified Vanderpool's probation within the five-year statutory limit and the revocation occurred while the new probation order was in effect, the trial court had jurisdiction to modify and subsequently revoke Vanderpool's probation.

Affirmed.

O'CONNELL, J. (*concurring*). I concur with Judge Cameron's well-written opinion. I write separately to draw attention to the legal insufficiency of the dissenting opinion.

The dissent agrees that the trial court had the authority to extend probation but takes issue with the procedure for doing so. The dissent contends that the majority failed to address Vanderpool's due-process rights. Neither defendant, John David Vanderpool, nor the dissent identifies a constitutional inadequacy in the procedure for extending or amending probation.

First, the dissent overextends the legal concept stated in *People v Eason*, 435 Mich 228, 233; 458 NW2d 17 (1990), that due process requires the prosecution to provide a defendant with notice of the criminal charges and to prove the statutory elements of the offense beyond a reasonable doubt. This principle is unquestionably true for obtaining a conviction. After a defendant has been convicted, however, "[p]robation is a matter of legislative grace." *People v Glenn-Powers*, 296 Mich App 494, 502; 823 NW2d 127 (2012). Even in a probation-revocation proceeding, a defendant has limited constitutional rights compared to a criminal trial. *People v Breeding*, 284 Mich App 471, 481; 772 NW2d 810 (2009).

In addition, the probation officer, not the prosecution, filed the petition to extend probation, and the

burden of proof for obtaining a conviction is more stringent than the burden of proving a probation violation. A probation officer's primary function is to oversee the probationer's rehabilitation. *Gagnon v Scarpelli*, 411 US 778, 784; 93 S Ct 1756; 36 L Ed 2d 656 (1973). In this case, the probation officer extended probation to account for the time Vanderpool was subject to a bench warrant for failing to participate in a presentence investigation interview after pleading *nolo contendere* to assaulting a police officer, MCL 750.81d(1). Soon after the trial court signed off on the petition to extend probation, the probation officer requested four bench warrants in two months for numerous violations of probation, including possession of heroin, a scale for distribution, and other drug paraphernalia. Only after the probation officer obtained these bench warrants did the prosecution attend hearings regarding the probation violations.[1] Moreover, the prosecution bears the burden of proving a probation violation by a preponderance of the evidence. *Breeding*, 284 Mich App at 487. These characteristics unique to probation do not support the extension of due-process principles governing a criminal trial to a postconviction extension of probation.

Finally, the difference between the *loss* of liberty, following revocation of probation, and a *constraint* on liberty, imposed by the continuation of probation, is significant. In *Gagnon*, 411 US at 781-782, the ruling

[1] The prosecution also filed new charges for possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(*v*), and possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*). Vanderpool waived his rights, including the right to a hearing on the probation violations, before pleading guilty to a single probation violation and possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(*v*). Further, when Vanderpool pleaded guilty to the probation violation, he agreed that he was on probation during the relevant period.

that due process required a preliminary hearing and a final hearing before probation could be revoked arose out of a concern for the defendant's loss of liberty. By contrast, extending probation does not give rise to a comparable loss of liberty. Applying the procedural protections for a probationer facing revocation to an extension or amendment of probation is unwarranted.

Due process is a balancing act. See *Morrissey v Brewer*, 408 US 471, 481; 92 S Ct 2593; 33 L Ed 2d 484 (1972). The procedure for extending or amending probation already satisfies due process. See *People v Marks*, 340 Mich 495, 501; 65 NW2d 698 (1954).

JANSEN, J. (*concurring in part and dissenting in part*). Although I agree with the majority that the trial court had the authority under MCL 771.2(5) to extend defendant's probationary period, I write separately because I believe due process required defendant have notice and an opportunity to be heard before his probationary period was extended.

MCL 771.2(5) permits a trial court to amend, modify, or extend a defendant's probation period. Accordingly, in this case, the trial court had the authority to extend defendant's probation period so long as it did not exceed the five-year statutory maximum period allowed for defendant's felony conviction under MCL 771.2(1). I therefore concur with the majority's opinion in that regard. However, simply because MCL 771.2(5) vests the trial court with the authority to extend his probation period does not mean that defendant is no longer entitled to due process. Because the majority opinion fails to address defendant's due-process rights, I dissent.

Due process for a criminal defendant generally requires reasonable notice of the charges against him or

her and an opportunity to have those charges proved beyond a reasonable doubt by the prosecution. *People v Eason*, 435 Mich 228, 233; 458 NW2d 17 (1990). I believe these principles extend to a postconviction proceeding in which the prosecution files a petition in the trial court seeking to amend, modify, or extend a probation period, particularly if that probation period has technically already expired, as is the case here.[1] Even though a trial court has authority to extend a defendant's probation period under MCL 771.2(5), there must be some reason for doing so: there must be some allegation against the defendant that warrants an amendment, modification, or extension. Therefore, a defendant should be entitled to notice of those allegations and an opportunity to have those allegations proved, or at a minimum substantiated.

I find defendant's reliance on *Gagnon v Scarpelli*, 411 US 778; 93 S Ct 1756; 36 L Ed 2d 656 (1973), to be compelling. As the United States Supreme Court articulated in *Scarpelli*:

> Both the probationer or parolee and the State have interests in the accurate finding of fact and the informed use of discretion—the probationer or parolee to insure that his liberty is not unjustifiably taken away and the

[1] The majority takes the position that the record indicates defendant knew he was still on probation. The majority bases its position on the following: (1) that defendant was aware that he had not yet paid all court-ordered costs and fees; (2) that after his probation had been extended, but before the December 2015 search, defendant's probation agent had petitioned the trial court for a bench warrant because defendant had tested positive for opiates; and (3) that a subsequent bench warrant issued on December 3, 2015, revealed that defendant had been arrested on November 18, 2015, after he stopped reporting to his probation agent on a weekly basis. These facts do not, however, sway my position that due process required that defendant have notice and a hearing before the trial court's entry of an order extending his probation.

> State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community. [*Id*. at 785.]

By extending defendant's probation period, the trial court extended the constraint on his liberty. In my view, due process requires that defendant be made aware of the extension of that constraint before the extension occurs and that the extension is justified.

In *Scarpelli*, *id*. at 786, the United States Supreme Court reiterated that in *Morrissey v Brewer*, 408 US 471; 92 S Ct 2593; 33 L Ed 2d 484 (1972), it had announced that a defendant is entitled to a preliminary hearing and a final hearing before the trial court can revoke probation or parole. In particular, the Supreme Court determined that:

> At the preliminary hearing, a probationer or parolee is entitled to notice of the alleged violations of probation or parole, an opportunity to appear and to present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decision maker, and a written report of the hearing. The final hearing is a less summary one because the decision under consideration is the ultimate decision to revoke rather than a mere determination of probable cause, but the "minimum requirements of due process" include very similar elements:
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> > (a) written notice of the claimed violations of [probation or] parole; (b) disclosure to [the probationer] or parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfind-

> ers as to the evidence relied on and reasons for revoking [probation or] parole. [*Scarpelli*, 411 US at 786, citing and quoting *Morrissey*, 408 US at 487, 489 (citation omitted).]

I find no reason why these principles should not also apply to the amendment, modification, or extension of probation or parole under MCL 771.2(5).

In light of the foregoing, I would vacate the trial court's orders extending and subsequently revoking defendant's probation and remand for proceedings on the petition to extend defendant's probation period that are consistent with defendant's right to due process.

PEOPLE v McFARLANE

Docket No. 336187. Submitted June 5, 2018, at Grand Rapids. Decided June 19, 2018. Approved for publication August 7, 2018, at 9:10 a.m.

Anthony R. McFarlane, Jr., was convicted after a jury trial in the Allegan Circuit Court of first-degree child abuse, MCL 750.136b(2), in connection with injuries suffered by his nine-week-old child that were described by an expert witness for the prosecution as "abusive head trauma." The court, Kevin W. Cronin, J., sentenced defendant to serve 15 to 25 years in prison. Defendant appealed.

The Court of Appeals *held*:

1. The prosecutor presented sufficient evidence to support defendant's conviction of first-degree child abuse. To establish the elements of first-degree child abuse, the prosecution had to prove, in relevant part, that defendant knowingly or intentionally caused serious physical harm to the victim. MCL 750.136b(1)(f) defines "serious physical harm" as "any physical injury to a child that seriously impairs the child's health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut." In this case, the victim's five-year-old half-sister testified that she heard the victim crying and saw defendant shaking her around the time the injuries were alleged to have been inflicted, and an expert who specialized in pediatric child abuse testified that the victim had blood between her brain and her skull, a suspected tibia fracture, and retinal hemorrhages, which could have been caused by someone violently shaking her or throwing her onto a soft surface. The evidence that defendant shook the victim and that his shaking caused her injuries was sufficient to establish that defendant acted intentionally and caused her serious physical harm. Viewing this testimony in the light most favorable to the prosecution, the evidence was sufficient to permit a rational trier of fact to find that each element of first-degree child abuse had been proved beyond a reasonable doubt.

2. The trial court plainly erred to the extent that it allowed a prosecution expert to use the phrase "abusive head trauma" to label the victim's diagnosis, and it erred by allowing the expert to agree that the victim's injuries amounted to "child abuse." However, this error did not require reversal. Under MRE 702, a trial court may permit testimony by an expert witness 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," that the expert's testimony is relevant, and that the testimony should not be excluded under MRE 403. This case required expert medical testimony because it was beyond the ken of ordinary persons to evaluate the medical evidence and assess the nature and extent of the victim's injuries, the timing of those injuries, and the possible mechanisms of injury implicated by the medical evidence in determining whether defendant intentionally injured the victim by inflicting trauma to her brain. Because there was no external evidence of injury to the victim, her injuries involved a diagnosis of shaken-baby syndrome or abusive head trauma. The American Academy of Pediatrics adopted the term "abusive head trauma" in 2009 and defined it to mean the "constellations of injuries that are caused by the directed application of force to an infant or young child, resulting in physical injury to the head and/or its contents." Thus, by definition, the diagnosis involves trauma caused by human agency, which the American Academy of Pediatrics labels abusive. Although a minority of physicians and other scientists believes it is impossible to reliably conclude that a particular child's injuries were the result of inflicted trauma, courts continue to allow experts to offer such a diagnosis on the ground that it is accepted and reliable. It is necessary for an expert to testify about the types of injuries typically observed with head trauma in children and to describe the possible mechanisms of injury involved. Further, a diagnosis that a child's head injuries were not accidental may be made on the basis of physical examination and scientific evidence rather than solely on the history provided by the complainant. Accordingly, a physician may properly offer an opinion that, when the medical evidence is considered along with the child's history, the child's injuries were inflicted rather than caused by accident or disease, because a jury is unlikely to be able to assess the medical evidence. However, in cases involving allegations of abuse, an expert goes too far when he or she diagnoses the injury as "abusive head trauma" or opines that the inflicted trauma amounted to child abuse. The ordinary understanding of the term "abuse"—as opposed to neglect or carelessness—implies a level of willfulness and moral culpability

that implicates the defendant's intent or knowledge when performing the act that caused the head trauma. An expert may not offer an opinion on the intent or criminal responsibility of the accused. In this case, the prosecution's expert did not limit her diagnosis to her belief that the victim's injuries were best explained as inflicted or not accidental; rather, she opined that this case involved a "definite case of abusive head trauma." It was also evident from her testimony that "abusive head trauma" meant child abuse. This testimony strongly suggested that it was the expert's opinion that whoever inflicted the injuries on the victim did so with culpable state of mind; that is, her testimony plainly implicated whether defendant "knowingly or intentionally" caused serious physical harm to the victim within the meaning of MCL 750.136b(2). Because the expert was in no better position than the jury to assess the intent that defendant had when he acted, her belief that his actions were abusive or amounted to child abuse were irrelevant and inadmissible as a matter of law. Consequently, the trial court plainly erred to the extent that it allowed the expert to use the phrase "abusive head trauma" to label her diagnosis rather than a less prejudicial label, such as inflicted or nonaccidental head trauma, and erred by allowing her to agree that the victim's injuries amounted to "child abuse." However, the totality of the evidence strongly supported a conclusion that defendant became angry with the victim, violently shook her out of frustration, and caused the injuries at issue. Given the strength of the evidence, to the extent that the trial court plainly erred by allowing the expert to use the labels "abusive head trauma" and "child abuse," it was unlikely that the error affected the outcome of the trial. Therefore, the error did not warrant relief.

3. Defense counsel's failure to object to the prosecution's expert testimony did not amount to ineffective assistance of counsel. In his closing argument, defense counsel portrayed the expert as biased and untrustworthy, arguing that her testimony was flawed, that she ignored important medical details, that she discounted evidence that led to a contrary diagnosis, and that her testimony was nothing more than her own untrustworthy opinion. Given defense counsel's argument, he might reasonably have refrained from objecting to the expert's diagnosis of abusive head trauma and her references to abuse because her claim that she could diagnose child abuse furthered his argument that she was partial and not worthy of credibility. Because there was a plausible and legitimate strategic reason for defense counsel's decision not to object, it cannot be said that the failure to object fell below an objective standard of reasonableness under prevailing

professional norms. Additionally, it was unlikely that the expert's use of the label "abusive head trauma" affected the outcome of the trial. Accordingly, even if defense counsel should have objected, his failure to do so does not amount to ineffective assistance that warrants a new trial.

4. Defense counsel was not ineffective for failing to object to the evidence regarding the victim's possible tibia fracture as inadmissible under MRE 404(b) and improper for the prosecutor to mention during closing arguments. The evidence that the victim might have suffered a leg fracture at some point before the events at issue was likely inadmissible under MRE 402 or MRE 403. However, defense counsel did not necessarily provide ineffective assistance by failing to object to its admission. The evidence of a fracture was weak, and defense counsel elicited expert testimony that the evidence did not show a fracture or that the fracture was irrelevant to the diagnosis of the symptoms that the victim exhibited on the day at issue. The one defense expert who acknowledged the fracture stated that that type of fracture could have an innocent origin. Defense counsel also used the inconsistent and weak evidence of a fracture to challenge the credibility of the prosecution's experts. On this record, it appears that defense counsel had a legitimate strategic reason for not objecting to testimony about the fracture: he had strong evidence to contradict the evidence, and it allowed him to challenge the credibility of the prosecution's experts. Defendant has not overcome the presumption that counsel employed sound trial strategy.

5. The trial court did not clearly err by finding that the evidence supported a score of 25 points for Offense Variable (OV) 3. Under MCL 777.33(1)(c), a trial court must assess 25 points for OV 3 if it finds that life-threatening or permanent incapacitating injury occurred to a victim. Although there was no expert testimony about the long-term effects of the victim's brain injuries, there was evidence that her injuries were life-threatening. The record showed that she had significant subdural bleeding, repeated seizures, and retinal hemorrhages and that these injuries were severe enough that she was airlifted to a larger hospital.

6. The trial court clearly erred to the extent it relied on evidence that the victim had suffered a leg fracture when scoring OV 7; however, the score of 50 points was supported by the trial court's finding that defendant had used excessive brutality in the commission of the offense. Under MCL 777.37(1)(a), the trial court must assess 50 points under OV 7 if it finds that a "victim was treated with sadism, torture, excessive brutality or similarly egregious conduct designed to substantially increase

the fear and anxiety a victim suffered during the offense." Because the Legislature provided that the brutality must be excessive, the trial court could only assign 50 points if it found that the abuse involved in this case exceeded the brutality that normally encompasses first-degree child abuse. The trial court clearly erred to the extent that it relied on the evidence of a leg fracture in scoring this variable because there was no record evidence tending to connect defendant to the fracture and the jury specifically found that the injury that defendant caused was abusive head trauma. However, the trial court did not clearly err to the extent that it found that the victim was subjected to excessive brutality in the commission of the first-degree child abuse. Under MCL 750.136b(2), to be guilty of the charge, defendant had to cause serious physical harm to the victim, which means any physical injury that seriously impaired her health or physical well-being. Although serious physical harm necessarily includes subdural hemorrhages, a person can commit first-degree child abuse without causing such an injury. And in this case, there was evidence, albeit disputed, that defendant had to have violently shaken or thrown the victim to cause the subdural hematomas and other injuries. The severity of the injuries supported a finding that the victim was treated with brutality in excess of that which necessarily accompanies the commission of first-degree child abuse.

7. The trial court erred by assigning 25 points for OV 13, and this error entitled defendant to resentencing. Under MCL 777.43(1)(c), 25 points are to be assessed for OV 13 if a defendant's offense was part of a "pattern of felonious criminal activity involving 3 or more crimes against a person." Defendant was on bond for felonious assault when he committed the present offense, which, when counted with the sentencing offense, constituted two offenses against a person. The trial court did not make any specific findings with regard to a third felony offense, so it is unclear how it arrived at the score of 25 points for this OV. On this record, the trial court clearly erred to the extent that it found that defendant had committed three felony offenses against a person within the past five years, and subtracting 25 points from defendant's total OV score results in a lower minimum sentence range. Because this error was not preserved for appellate review, defendant could not ordinarily have shown that he was entitled to be resentenced except through a claim of ineffective assistance of counsel during sentencing. On appeal, defendant asserted that his trial counsel was ineffective to the extent that he failed to raise any of the errors he now asserts on appeal. Had defense counsel raised this issue at sentencing, the trial court would have

had to recalculate the total OV score and sentence within the appropriate range. Therefore, defendant established that defense counsel's failure to raise this claim at sentencing fell below an objective standard of reasonableness and prejudiced his sentencing. Accordingly, defendant was entitled to resentencing with zero points assessed under OV 13. Because defendant's remaining claims on appeal were without merit, defense and appellate counsel cannot be faulted for failing to raise those claims.

Conviction affirmed; case remanded for resentencing.

CRIMINAL LAW — EVIDENCE — CHILD ABUSE — EXPERT TESTIMONY — HEAD INJURIES — DIAGNOSES — ABUSIVE HEAD TRAUMA.

At a criminal trial of a defendant accused of child abuse, an expert witness may properly offer an opinion that, when the medical evidence is considered along with the child's history, the child's injuries were inflicted rather than caused by accident or disease; however, an expert may not diagnose the child's injuries as "abusive head trauma" or opine that the inflicted trauma amounted to child abuse (MCL 750.136b(2); MRE 702).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Myrene K. Koch*, Prosecuting Attorney, and *Jonathan K. Blair*, Assistant Prosecuting Attorney, for the people.

Ronald D. Ambrose for defendant.

Anthony R. McFarlane, Jr., *in propria persona*.

Before: MURRAY, C.J., and MARKEY and TUKEL, JJ.

PER CURIAM. Defendant, Anthony Ray McFarlane, Jr., appeals by right his jury conviction of first-degree child abuse involving his then nine-week-old infant, KM. See MCL 750.136b(2). The trial court sentenced defendant to serve 15 to 25 years in prison for his conviction. On appeal, defendant raises several claims of error that he argues warrant a new trial or resentencing. For the reasons explained below, we affirm defendant's conviction but remand for resentencing.

I. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Defendant first argues that the prosecution presented insufficient evidence to support his conviction of first-degree child abuse. This Court reviews a challenge to the sufficiency of the evidence by examining the "record evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009). This Court must resolve all conflicts in the evidence in favor of the prosecution. See *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

B. ANALYSIS

To establish the elements of first-degree child abuse, the prosecution had to prove—in relevant part—that defendant "knowingly or intentionally cause[d] serious physical . . . harm" to KM. MCL 750.136b(2). Serious physical harm means "any physical injury to a child that seriously impairs the child's health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut." MCL 750.136b(1)(f). Because the Legislature provided that the perpetrator must "knowingly or intentionally" cause the serious physical harm, it is not sufficient for the prosecution to prove that a defendant intended to commit the act that caused the physical harm; the prosecution must prove that the "defendant intended to cause serious physical harm or knew that serious physical harm would be

caused by [his or] her act." *People v Maynor*, 470 Mich 289, 291; 683 NW2d 565 (2004).

In this case, the prosecution presented evidence that tended to suggest that defendant injured KM at some point on December 6, 2013, or early in the day on December 7, 2013.

KM's half-sister, KD, who was five years old on the day at issue, testified that she wanted defendant to play with her, but he wanted to play video games. After she began to cry, defendant became angry with her, punished her, and eventually spanked her. She said she went to her room but peeked into the living room when she heard KM crying. She saw defendant shaking KM.

Defendant suggests that KD's testimony was improbable because her timing was off and she failed to earlier disclose the shaking incident. When reviewing challenges to the sufficiency of the evidence, this Court must not interfere with the fact-finder's role in deciding the weight and credibility to give to a witness's testimony—"no matter how inconsistent or vague that testimony might be." *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997); see also *People v Lemmon*, 456 Mich 625, 646-647; 576 NW2d 129 (1998). Rather, this Court must view the evidence in the light most favorable to the prosecution and uphold the verdict if a reasonable finder of fact could have found that the elements were proved beyond a reasonable doubt. See *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Therefore, we cannot disregard KD's testimony; instead, we must make every reasonable inference from her testimony in favor of the verdict. See *id*.

KD's testimony about the timing was not entirely clear. She did at first imply that the shaking incident occurred sometime immediately before defendant took

her to his mother's house, which would have been early on Saturday, December 7, 2013. The children's mother, Dakota Chitwood, testified that KM was already showing signs of fussiness and pain by that time, and Chitwood was home and would likely have been in a position to witness the discipline had it occurred Saturday morning. However, KD later testified that the discipline occurred after she got home from school and before her mother got home from work. From KD's testimony a reasonable finder of fact could infer that the shaking incident occurred on Friday.

The prosecution also presented expert testimony that KM had several injuries. Sarah Brown, D.O., a child abuse pediatrician, testified that KM had blood in the "space between her brain and her skull"—the "subdural space." The bleeding was "all over both sides of her brain." She also had a suspected tibia fracture, and Brown stated that an ophthalmologist observed bleeding in the back of KM's eye, which was referred to as retinal hemorrhages. Brown stated that KM's injuries could have been caused by someone violently shaking KM or by throwing her onto a couch or other soft surface. Brown acknowledged that KM had had a prenatal stroke, which caused the left hemisphere of KM's brain to shrink substantially. But she opined that KM's subdural hematomas and retinal hemorrhages were not attributable to her stroke. There was also testimony that the latter injuries arose during the time frame set forth in KD's testimony. Thus, when Brown's testimony is considered with KD's testimony that she saw defendant shake KM, a jury could reasonably infer that defendant violently shook KM and that his acts caused her to suffer the identified injuries.

Further, it does not matter that the finder of fact must make multiple inferences to establish these ele-

ments. When considering the sufficiency of the evidence, this Court must consider the inferences that can be fairly drawn from the evidence, and "it does not matter that the evidence gives rise to multiple inferences or that an inference gives rise to further inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Finally, the Legislature specifically defined serious physical harm to include subdural hematoma. See MCL 750.136b(1)(f). Therefore, the prosecution presented sufficient evidence to establish defendant's identity as the person who inflicted an act that caused a serious physical injury to KM. See *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008) (noting that "identity is an element of every offense"). The only remaining issue is whether the prosecution presented sufficient evidence to establish that defendant intended to cause serious physical harm or knew that serious physical harm would result. See *Maynor*, 470 Mich at 291, 295.

Because it is difficult to prove an actor's state of mind, the prosecution may rely on minimal circumstantial evidence to prove that the defendant had the required mental state. See *People v Unger*, 278 Mich App 210, 223; 749 NW2d 272 (2008). The evidence that defendant shook KM and that his shaking caused her injuries was sufficient to establish that defendant acted intentionally and caused her serious physical harm. Brown further opined that the acts that caused KM's injuries had to be violent. There was expert opinion to the contrary, but this Court must resolve that dispute in the prosecution's favor. *Wilkens*, 267 Mich App at 738. A reasonable finder of fact could find Brown's testimony credible and find that defendant shook KM violently. It could then further infer from the violence of the act that he either intended to cause her

serious injury or knew that it was likely to do so. See *Unger*, 278 Mich App at 223.

The prosecution presented sufficient evidence to permit a rational trier of fact to find that each element of first-degree child abuse had been proved beyond a reasonable doubt. See *Roper*, 286 Mich App at 83.

II. INVADING THE PROVINCE OF THE JURY

A. STANDARD OF REVIEW

Defendant next argues that the trial court erred when it allowed Brown to testify that she diagnosed KM with "definite pediatric physical abuse." He maintains that Brown's testimony amounted to an opinion that he was guilty. This Court generally reviews a trial court's decision to allow the admission of testimony for an abuse of discretion. See *Roper*, 286 Mich App at 90. However, it is an abuse of discretion to allow testimony that is inadmissible as a matter of law. See *People v Bynum*, 496 Mich 610, 623; 852 NW2d 570 (2014).

This Court reviews de novo whether the trial court properly interpreted and applied the rules of evidence. See *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013). This Court also reviews de novo constitutional questions, *People v Shafier*, 483 Mich 205, 211; 768 NW2d 305 (2009), such as whether the trial court improperly allowed a witness to invade the province of the jury. Because defendant did not object to Brown's testimony on this basis before the trial court, this Court's review is limited to determining whether there was a plain error that affected defendant's substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To establish plain error that warrants relief, the defendant must show that the error

was plain or obvious and affected the outcome of the lower-court proceedings. *Id*.

B. ANALYSIS

A trial court may permit testimony by a "witness qualified as an expert by knowledge, skill, experience, training, or education" 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 . . . ." MRE 702. An expert may offer an opinion at trial if his or her testimony "is based on sufficient facts or data," if the testimony "is the product of reliable principles and methods," and if the witness "has applied the principles and methods reliably to the facts of the case." MRE 702. The trial court must also ensure that the expert's testimony is relevant. *Bynum*, 496 Mich at 624. Even when an expert's testimony is relevant, it remains subject to the limits imposed by MRE 403.[1] *Id*. at 635 n 43.

This case required expert medical testimony because it was beyond the ken of ordinary persons to evaluate the medical evidence and assess the nature and extent of KM's injuries, the timing of those injuries, and the possible mechanisms of injury implicated by the medical evidence. See *People v Kowalski*, 492 Mich 106, 121-122; 821 NW2d 14 (2012) (opinion by MARY BETH KELLY, J.); *id*. at 152 (MARKMAN, J., concurring in part and dissenting in part) (agreeing that proposed expert testimony must involve a matter be-

[1] MRE 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

yond common understanding to be admissible under MRE 702). Moreover, if an expert's opinion is otherwise admissible, it does not become objectionable merely because "it embraces an ultimate issue to be decided by the trier of fact." MRE 704; see also *People v Smith*, 425 Mich 98, 106; 387 NW2d 814 (1986). Nevertheless, there are limits on an expert's authority to offer an opinion that embraces an ultimate issue:

> Although the ultimate issue rule no longer stands in the way of expert testimony stating opinions on crucial questions to be decided by the trier of fact, it is important that the expert witness not be permitted to testify about the requirements of law which apply to the particular facts in the case or to phrase his opinion in terms of a legal conclusion. In the former case, the claim is that the province of the judge is invaded, while in the latter, the contention is that the province of the jury is invaded. [*People v Drossart*, 99 Mich App 66, 75; 297 NW2d 863 (1980).]

As our Supreme Court explained in *People v Peterson*, 450 Mich 349, 374; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995), quoting *People v Beckley*, 434 Mich 691, 721-722; 456 NW2d 391 (1990) (opinion by BRICKLEY, J.), when a jury has been confronted with one of society's most heinous offenses, there is a significant danger that the jury will give extra weight to an expert's testimony:

> "The use of expert testimony in the prosecution of criminal sexual conduct cases is not an ordinary situation. Given the nature of the offense and the terrible consequences of a miscalculation—the consequences when an individual, on many occasions a family member, is falsely accused of one of society's most heinous offenses, or, conversely, when one who commits such a crime would go unpunished and a possible reoccurrence of the act would go unprevented—appropriate safeguards are necessary. *To a jury recognizing the awesome dilemma of whom to*

> *believe, an expert will often represent the only seemingly objective source, offering it a much sought-after hook on which to hang its hat*." [Emphasis added by *Peterson*.]

This case involved whether defendant intentionally injured KM by inflicting trauma to her brain. Because there was no external evidence of injury, her injuries involved a classic diagnosis of shaken-baby syndrome or abusive head trauma. See *Sissoko v State*, 236 Md App 676, 717-725; 182 A3d 874 (2018) (tracing the history of the "shaken baby" and "abusive head trauma" diagnoses from 1860 to the present and discussing at length the modern controversy surrounding the diagnoses). The American Academy of Pediatrics adopted the term "abusive head trauma" in 2009 and defined it to mean the "constellations of injuries that are caused by the directed application of force to an infant or young child, resulting in physical injury to the head and/or its contents." *Id*. at 720 (quotation marks and citations omitted). Thus, by definition, the diagnosis involves trauma caused by human agency, which the American Academy of Pediatrics labels abusive.

It remains the prevailing view in the medical community that there are "some internal findings that are highly correlated with abusive head trauma . . . ." *Id*. at 722. In keeping with this view, a physician may employ a differential diagnosis and conclude that the child's injuries were the result of abusive head trauma:

> [T]he consensus is that no single finding or combination of findings is pathognomonic for abusive head trauma. Rather, a differential diagnosis must be made based upon the totality of the circumstances in each individual case. A congruence of multiple findings, each of which independently correlates with abusive head trauma, narrows the field of potential diagnoses significantly, however, and absent a clinical history of accidental trauma or evidence

> of a disease process consistent with those findings, a diagnosis of abusive head trauma may be made. [*Id*. at 723.]

A minority of physicians and other scientists have identified changes in the understanding of the biomechanics of shaking and evidence that subdural hematomas, retinal hemorrhages, and brain swelling are not unique to head trauma caused by human agency. For that reason, those physicians and scientists believe it is impossible to reliably conclude that a particular child's injuries were the result of inflicted trauma. *Id*. at 725. Although there is a debate about the reliability of such a diagnosis, courts continue to allow experts to offer the diagnosis on the ground that it is accepted and reliable. *Id*. at 726-728 (collecting cases that have generally upheld the admissibility of expert testimony opining that injuries of this nature were inflicted by human agency).

Our Supreme Court has recognized the debate within the medical community about the reliability of a diagnosis of shaken-baby syndrome or abusive head trauma. *People v Ackley*, 497 Mich 381, 391-392; 870 NW2d 858 (2015). It has not, however, considered whether there are any limits on an expert's ability to diagnose abusive head trauma. Still, it has provided general guidance on the limits of expert testimony in analogous circumstances.

As a result of the danger that a jury might give too much weight to an expert's opinion on a matter involving an ultimate issue, our Supreme Court has imposed strict limits on expert testimony that "comes too close" to findings that are left exclusively to the jury. *Peterson*, 450 Mich at 374. For example, in cases involving criminal sexual conduct, an expert may not offer an opinion that the alleged victim had in fact been sexu-

ally abused, may not offer testimony that vouches for the victim's veracity, and may not offer an opinion that the defendant is guilty. See *id*. at 352. The same is true for expert testimony on "battered woman syndrome": the expert may not opine that the complainant was in fact a battered woman, may not testify that the defendant is guilty, and may not comment on the complainant's veracity. See *People v Christel*, 449 Mich 578, 580; 537 NW2d 194 (1995). Although an expert may be necessary to explain characteristics of gang culture, the expert may not offer an opinion that a particular gang member acted in conformity with character traits commonly associated with gang members and may not offer an opinion on the defendant's intent when he acted. See *Bynum*, 496 Mich at 630-634.

It is necessary for an expert to testify about the types of injuries typically observed with head trauma in children and to describe the possible mechanisms of injury involved. See *Kowalski*, 492 Mich at 121-122 (opinion by MARY BETH KELLY, J.); *id*. at 152 (MARKMAN, J., concurring in part and dissenting in part). Further, unlike the case with a diagnosis of sexual assault based on the emotional state and statements of the complainant, see *Smith*, 425 Mich at 112, a diagnosis that a child's head injuries were not accidental may be made on the basis of physical examination and scientific evidence rather than solely on the history provided by the complainant, see *Sissoko*, 236 Md App at 723. Accordingly, contrary to defendant's contention on appeal, a physician may properly offer an opinion that, when the medical evidence is considered along with the child's history, the child's injuries were inflicted rather than caused by accident or disease because a jury is unlikely to be able to assess the medical evidence. See *Smith*, 425 Mich at 106 (recognizing that whether an expert is needed depends on whether an untrained

layman would be qualified to determine the issue without the aid of an expert); *Drossart*, 99 Mich App at 79-82 (stating that the expert may not tell the jury how to decide the case, but may offer an opinion on an ultimate issue if the expert's experience and training is in an area that is largely unfamiliar to the jury). Expressing an opinion that the trauma was inflicted or not accidental does not impermissibly invade the province of the jury because the expert is not expressing an opinion regarding the defendant's guilt or whether the defendant had a culpable state of mind, which the expert may not do. See *Bynum*, 496 Mich at 630-633; *Peterson*, 450 Mich at 374; *Christel*, 449 Mich at 580. Instead, the expert is interpreting the medical evidence and offering the opinion that the trauma was caused by human agency, and the jury is free to reject that opinion on the basis of the evidence adduced at trial, including a contrary opinion by another expert. See *Drossart*, 99 Mich App at 81.

Notwithstanding the propriety of a diagnosis of inflicted trauma, we conclude that in cases involving allegations of abuse, an expert goes too far when he or she diagnoses the injury as "abusive head trauma" or opines that the inflicted trauma amounted to child abuse. The ordinary understanding of the term "abuse"—as opposed to neglect or carelessness—implies a level of willfulness and moral culpability that implicates the defendant's intent or knowledge when performing the act that caused the head trauma. An expert may not offer an opinion on the intent or criminal responsibility of the accused. *Bynum*, 496 Mich at 630-633.

Brown—who was admitted as an expert in child abuse pediatrics—testified generally about the nature of KM's condition and injuries. She described the

possible mechanisms that could cause the injuries and then stated that KM's injuries were inflicted rather than accidental or the result of her preexisting condition. Brown did not limit her diagnosis to her belief that KM's injuries were best explained as inflicted or not accidental; she opined that this case involved a "definite case of abusive head trauma." It was also evident from her testimony that "abusive head trauma" meant child abuse. She repeatedly told the jury that KM's injuries were "caused by definite pediatric physical abuse," and she stated that "we know that abusive head trauma" causes these injuries because people confess to hospital staff and investigators or other family members after inflicting the injuries. She also agreed that KM had suffered previous abuse even though she was only nine weeks old. She further told the prosecutor that she was correct when the prosecutor noted that Brown looked at the totality of the circumstances before concluding that this case involved "child abuse."

Brown's testimony that KM's injuries were caused by "abusive head trauma" or otherwise amounted to "child abuse" strongly suggested that it was her opinion that whoever inflicted the injuries on KM did so with culpable state of mind; that is, her testimony plainly implicated whether defendant "knowingly or intentionally" caused serious physical harm to KM within the meaning of MCL 750.136b(2). Because Brown was in no better position than the jury to assess the intent that defendant had when he acted, her belief that his actions were abusive or amounted to child abuse were irrelevant and inadmissible as a matter of law. See *Drossart*, 99 Mich App at 79-80. Consequently, the trial court plainly erred to the extent that it allowed Brown to use the phrase "abusive head trauma" to label her diagnosis rather than a less

prejudicial label, such as inflicted or nonaccidental head trauma, and erred by allowing her to agree that KM's injuries amounted to "child abuse." See *Carines*, 460 Mich at 763. However, a plain error will not warrant relief unless the defendant demonstrates that the error affected the outcome of the lower-court proceedings. See *id*.

Although Brown opined that KM's injuries were caused by definite pediatric physical abuse, she conceded that she could not say what actually happened to KM. She also testified that there were some people who felt that abusive head trauma was misdiagnosed. Moreover, defense counsel called three witnesses who testified that they did not agree with Brown's diagnosis: Julie Mack, M.D., who was a pediatric radiologist; Douglas Smith, M.D., who was a retired pathologist; and Joseph Sheller, M.D., who was a pediatric neurologist. The experts informed the jury that they did not believe that a medical professional could diagnose abuse. Mack testified that the medical records might give rise to a suspicion of abuse but opined that a medical professional cannot diagnose abuse. Smith also testified that the diagnoses of shaken-baby syndrome or abusive head trauma were founded on flawed studies and that there was great controversy over whether a medical professional could make such diagnoses. Sheller similarly testified that the presence of the symptoms seen in KM would cause a reasonable pediatrician to be concerned about the potential for abuse, but that a suspicion does not mean abuse actually occurred. Sheller stated that the symptoms at issue were not an absolute sign of abuse. Given this testimony, the jury was well aware of the limits on Brown's opinion. Any prejudice occasioned by her characterization of the acts was minimal.

Although the prosecutor mentioned in her closing argument that Brown had characterized the symptoms as having been caused by abuse, she did not argue that the jury should rely on Brown's opinion when deciding whether defendant had the requisite intent to establish first-degree child abuse. Instead, she argued that KD's account of events, the severity of the injuries, and defendant's subsequent actions tended to prove defendant's guilt.

There was evidence that KM became symptomatic while in defendant's care, and KD testified that she saw defendant shake KM at around that same time. The timing and eyewitness account permitted an inference that KM manifested her symptoms at that time because they were inflicted at that moment. A detective also reported that KD had reported that she had heard defendant yell "shut up" to KM. KD stated that defendant punished her when she cried at a time when he wanted to play video games. The evidence tended to suggest that defendant could become angry and frustrated by crying children. Brown also testified that KM's injuries were consistent with having been violently shaken. There was also testimony that defendant warned KD not to tell anyone and threatened to come after a neighbor if she or her husband said anything wrong about his statements to investigators. Defendant's statements suggest that he was conscious of his guilt. See *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996).

The totality of the evidence strongly supported that defendant became angry with KM, violently shook her out of frustration, and caused the injuries at issue. Given the strength of the evidence, to the extent that the trial court plainly erred by allowing Brown to use the labels "abusive head trauma" and "child abuse," we

find it unlikely that the error affected the outcome of the trial. See *Carines*, 460 Mich at 763. Therefore, the error does not warrant relief. *Id*.

C. INEFFECTIVE ASSISTANCE

Defendant also argues that defense counsel's failure to object to Brown's testimony amounted to ineffective assistance. Because the trial court did not hold an evidentiary hearing on defendant's claim that he did not receive the effective assistance of counsel, there are no factual findings to which this Court must defer, and this Court's review is for mistakes that are apparent on the record alone. *Unger*, 278 Mich App at 253. This Court reviews de novo whether defense counsel's acts or omissions fell below an objective standard of reasonableness under prevailing professional norms and whether, without the error, the result of the proceedings would have been different. *Yost*, 278 Mich App at 387. Counsel has wide discretion in matters of trial strategy, and a defendant must overcome a strong presumption that defense counsel represented him competently. *Unger*, 278 Mich App at 242.

In his closing argument, defense counsel portrayed Brown as biased and untrustworthy. He argued to the jury that Brown's testimony was flawed and that she ignored important medical details and discounted evidence that led to a contrary diagnosis because she wanted to "sustain her beliefs." He also stated that Brown's testimony was nothing more than "her opinion," which could not be trusted because she deliberately left out information.

Given defense counsel's argument, he might reasonably have refrained from objecting to Brown's diagnosis of abusive head trauma and her references to abuse because her claim that she could diagnose child abuse

furthered his argument that she was partial and not worthy of credibility. Because there was a plausible and legitimate strategic reason for defense counsel's decision not to object, it cannot be said that the failure to object fell below an objective standard of reasonableness under prevailing professional norms. See *id*. Additionally, as already explained, it is unlikely that Brown's use of the label "abusive head trauma" affected the outcome of the trial. Accordingly, even if defense counsel should have objected, his failure to do so does not amount to ineffective assistance that warrants a new trial. See *id*.

Defendant has not established plain error or ineffective assistance that warrants a new trial.

III. EVIDENCE OF TIBIA FRACTURE

On appeal, defendant argues that defense counsel should have objected to the evidence regarding a possible tibia fracture that KM may have had. He states that the testimony constituted improper other-acts evidence barred by MRE 404(b) and maintains that defense counsel's failure to object to the admission of the evidence amounted to ineffective assistance of counsel. Although defendant states that the testimony was inadmissible, he has not offered any substantive analysis of the evidence at issue. He also implies that the prosecutor's use of the evidence in closing was improper, but again he has not offered any meaningful analysis. To the extent that defendant might be arguing that the trial court plainly erred by allowing the evidence or that the prosecutor engaged in misconduct by arguing the evidence, defendant has abandoned those claims on appeal. See *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). For that reason, we limit our analysis to determining whether defen-

dant has established that defense counsel's handling of this testimony and evidence amounted to ineffective assistance.

At trial, Brown testified that she examined KM's x-rays from her admission to Bronson Hospital and had some concern. She ordered a new bone survey on December 17, 2013. She testified that the new bone survey revealed that KM had a spiral tibia fracture. Although she acknowledged that the report from Bronson stated that KM's bone survey was normal, Brown stated that she recalled from memory that a physician from Bronson diagnosed KM with two fractures, but she could not forensically confirm one fracture. Brown did not otherwise offer any opinion as to when or how the fracture occurred. The prosecution rested after Brown's testimony.

The defense experts thereafter disagreed about whether the x-rays showed a fracture. Mack testified that the x-rays did not reveal a fracture and that even if she were to hypothesize that the films showed a fracture, she would have concluded that the fracture was "weeks old" by the time of the x-rays. Smith did not offer an opinion on the x-rays other than to observe that the interpretations were inconsistent and depended on evidence of a periosteal reaction that was normally found in children who are growing because the periosteum was an active tissue that helps shape the bone during growth. Sheller, by contrast, agreed that the images showed a fracture, but he disregarded it in his opinion because it occurred before the date of the injuries at issue and was for that reason not relevant to his diagnosis.

The evidence that KM might have suffered a fracture at some point before the events at issue was inadmissible under MRE 402, which prohibits the

admission of irrelevant evidence. In the absence of evidence connecting the fracture to defendant, it did not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Indeed, without evidence from which a jury could reasonably find that KM suffered the injury while under defendant's care and that the nature of the injury was consistent with having been inflicted by human agency, the evidence was not even relevant to prove conduct in conformity with character, which would ordinarily be improper under MRE 404(b). See *People v VanderVliet*, 444 Mich 52, 68 & n 20; 508 NW2d 114 (1993) (recognizing that, under MRE 104(a), the trial court must make a preliminary determination that a jury could reasonably find that the defendant committed the other act by a preponderance of the evidence before allowing the admission of the other-acts evidence for a proper purpose). Even to the extent that the evidence might be admissible because Brown relied on it as a component of her differential diagnosis of abusive head trauma, the evidence was likely inadmissible under MRE 403 because it invited speculation by the jury, and the danger of unfair prejudice outweighed whatever marginal relevance the evidence might have had for purposes of the diagnosis. Nevertheless, even though this evidence was likely inadmissible, it does not follow that defense counsel provided ineffective assistance by failing to object to its admission.

As already discussed, this Court must affirmatively entertain the range of possible reasons that defense counsel might not have objected. See *Unger*, 278 Mich App at 242. Defendant must overcome the strong presumption that trial counsel's strategy was reasonable. *Id*.

In this case, the evidence of a tibia fracture was weak, and defense counsel elicited expert testimony that the evidence did not show a fracture or that the fracture was irrelevant to the diagnosis of the symptoms KM exhibited on the day at issue. The one defense expert who acknowledged the fracture stated that that type of fracture could have an innocent origin. Defense counsel also used the inconsistent and weak evidence of a fracture to challenge the credibility of the prosecution's experts. He suggested that the images that showed there was no fracture were deliberately excluded because it did not fit the prosecution's theory of the case.

On this record, it appears that defense counsel had a legitimate strategic reason for not objecting to testimony about the fracture: he had strong evidence to contradict the evidence, and it allowed him to challenge the credibility of the prosecution's experts. Defendant has not overcome the presumption that counsel employed sound trial strategy. See *id*.

IV. OFFENSE VARIABLES 3 AND 7

A. STANDARD OF REVIEW

Defendant next argues the evidence did not show that KM's injuries were life-threatening or permanent, or that he treated her with sadism, torture, excessive brutality, or conduct designed to substantially increase her fear and anxiety. Accordingly, he maintains, the trial court erred when it assigned 25 points under Offense Variable (OV) 3 and assigned 50 points under OV 7.

This Court reviews for clear error a trial court's findings in support of a particular score under the sentencing guidelines but reviews de novo whether the

trial court properly interpreted and applied the sentencing guidelines to the findings. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

B. ANALYSIS

"When calculating the sentencing guidelines, a court may consider all record evidence, including the contents of a [presentence investigation report (PSIR)], plea admissions, and testimony presented at a preliminary examination." *People v McChester*, 310 Mich App 354, 358; 873 NW2d 646 (2015). It may also consider a victim-impact statement in a PSIR or other statement or letter submitted to the court for consideration on sentencing. See, e.g., *People v Earl*, 297 Mich App 104, 109-110; 822 NW2d 271 (2012). Further, the trial court may rely on inferences that arise from the record evidence when making the findings underlying its scoring of offense variables. *Id*. at 109.

A trial court must assess 25 points under OV 3 if it finds that "[l]ife threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c). The trial court found that a score of 25 points was appropriate for OV 3. The trial court mentioned the possibility that the leg fracture might be permanently incapacitating but then indicated that there was not enough testimony to know whether the leg fracture or other injuries would amount to incapacitating injuries. Nevertheless, it found that there were permanently incapacitating injuries to the brain and that the injury to the brain was potentially life-threatening.

To the extent that the trial court found that defendant's actions caused a permanent incapacitating injury to KM, we find it clearly erred. See *Hardy*, 494 Mich at 438. There was no expert testimony about the long-term effects of the injury to KM's brain caused by

her subdural hematomas. The prosecution's own expert, Brown, testified that she did not think they would "ever know if she's having neurological problems" as a result of the injuries she sustained on the day at issue because it "would be very difficult to figure out" whether the effects were from her "prenatal stroke" or from her head injury. She also opined that there would be no long-term effects from the tibia fracture or from her retinal hemorrhage. Nevertheless, there was evidence that KM's injuries were life-threatening.

The record shows that KM had significant subdural bleeding, repeated seizures, and retinal hemorrhages and that these injuries were severe enough that the treating physicians at the hospital where she first reported had her airlifted to a larger hospital. Accordingly, the trial court did not clearly err when it found that KM's injuries were life-threatening and assigned 25 points under OV 3. See MCL 777.33(1)(c).

The trial court also found that defendant used excessive brutality in the commission of the offense. Specifically, it noted the leg fractures and the extent of KM's brain injuries. For that reason, it assigned 50 points under OV 7.

The trial court had to assess 50 points under OV 7 if it found that a "victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). Because the Legislature provided that the brutality must be—in relevant part—excessive, the trial court could only assign 50 points if it found that the abuse involved in this case exceeded the brutality that normally encompasses first-degree child abuse. See *Hardy*, 494 Mich 442-443 (noting that a trial court may normally consider conduct inherent in the crime,

but holding that the Legislature's use of the phrase "designed to substantially *increase* fear" required a showing that the actor engaged in conduct to increase the victim's fear beyond that normally involved in the crime); *People v Steanhouse (On Remand)*, 322 Mich App 233, 240; 911 NW2d 253 (2017) (stating that excessive brutality requires savagery beyond that usual for the crime).

The trial court clearly erred to the extent that it relied on the evidence of a leg fracture in scoring this variable. Even if the trial court found that KM actually suffered a leg fracture, as already discussed, there was no record evidence tending to connect defendant to the fracture. And the jury specifically found that the injury that defendant caused was "abusive head trauma."

However, the trial court did not clearly err to the extent that it found that KM was subjected to excessive brutality in the commission of the first-degree child abuse. To be guilty of the charge, defendant had to cause serious physical harm to KM, see MCL 750.136b(2), which means "any physical injury to a child that seriously impairs the child's health or physical well-being," MCL 750.136b(1)(f). Although serious physical harm necessarily includes subdural hemorrhages, a person can commit first-degree child abuse without causing such an injury. And in this case, there was evidence—albeit disputed—that defendant had to have violently shaken or thrown KM to cause the subdural hematomas and other injuries. The severity of the injuries supported a finding that KM was treated with brutality in excess of that which necessarily accompanies the commission of first-degree child abuse. See MCL 777.37(1)(a).

The trial court did not err when it scored OV 3 and OV 7.

V. CLAIMS SUBMITTED UNDER STANDARD 4

Finally, defendant submitted a brief on his own behalf under Administrative Order No. 2004-6, Standard 4, 471 Mich c, cii (2004), in which he raised numerous claims of error. Defendant did not raise any of the claims before the trial court. Therefore, they are all unpreserved. See *People v Bass*, 317 Mich App 241, 272; 893 NW2d 140 (2016). We review unpreserved claims of error for plain error that affected defendant's substantial rights. *Carines*, 460 Mich at 763. To establish a plain error that warrants relief, a defendant must show that the error was plain or obvious and affected the outcome of the lower-court proceedings. *Id*. To the extent that defendant also argues that his trial and appellate counsel provided ineffective assistance, the trial court did not hold an evidentiary hearing. Therefore, this Court's review is limited to mistakes apparent on the record alone. *Unger*, 278 Mich App at 253.

Defendant argues that the trial court erred by relying on inadmissible evidence to score the sentencing variables. A sentencing hearing is not a criminal trial, and many of the constitutional requirements for criminal trials do not apply to sentencing. For example, the rules of evidence do not apply to sentencing. See *People v Uphaus (On Remand)*, 278 Mich App 174, 183-184; 748 NW2d 899 (2008); MRE 1101(b)(3). As a result, the trial court could properly rely on any and all record evidence in sentencing defendant, including the contents of his presentence investigation report. See *McChester*, 310 Mich App at 358.

Defendant also maintains that the trial court erred by making judicial fact-findings, and he claims that he is entitled to a remand for a hearing as described in *People v Lockridge*, 498 Mich 358, 395-399; 870

NW2d 502 (2015). The trial court sentenced defendant under the now advisory sentencing guidelines. *Id*. at 399. For that reason, it could make findings of fact not found by the jury without violating his rights under the Sixth Amendment. See *People v Biddles*, 316 Mich App 148, 158-161; 896 NW2d 461 (2016). Further, defendant necessarily does not qualify for a remand hearing because those procedures apply only to sentences imposed on or before July 29, 2015. See *Lockridge*, 498 Mich at 397.

Defendant next argues that the trial court erred when it scored OV 10 and OV 13. He claims that there was no evidence to support either score. With regard to OV 10, he also states that victim vulnerability is necessarily subsumed within the offense of child abuse and, for that reason, should not be scored.

The trial court had to assess 10 points under OV 10 if it found that defendant "exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). The fact that the offense of first-degree child abuse applies to children, see MCL 750.136b(1)(a), does not mean that the trial court may not consider the victim's youth for purposes of scoring OV 10; it should unless the Legislature provided otherwise. See *Hardy*, 494 Mich at 441-442. The Legislature did not provide that MCL 777.40(1)(b) does not apply to crimes against children. Accordingly, the trial court could properly consider KM's youthfulness for purposes of scoring OV 10. There was record evidence permitting an inference that defendant violently shook or threw KM when she was just nine weeks of age. That evidence supported a score of 10 points under MCL 777.40.

As for OV 13, the trial court had to assign 25 points under that variable if it found that defendant's offense was part of a "pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). The trial court must count all crimes that occurred within a five-year period, which includes the sentencing offense; further, the court must count all offenses even if the offense did not result in a conviction. MCL 777.43(2)(a). As noted in defendant's PSIR, he was on bond for felonious assault when he committed the present offense, which, when counted with the sentencing offense, constituted two offenses against a person. The trial court did not make any specific findings with regard to a third felony offense, so it is unclear how it arrived at the score of 25 points for this OV. On this record, the trial court clearly erred to the extent that it found that defendant had committed three felony offenses against a person within the past five years. See *Hardy*, 494 Mich at 438.

The trial court calculated defendant's total OV score to be 110, which placed him in cell VI/C of the sentencing grid with a minimum sentence range of 135 to 225 months. See MCL 777.62. After subtracting 25 points, the new score would place him in cell V/C and the new range would be 126 to 210 months. MCL 777.62. The trial court sentenced defendant to serve a minimum sentence of 180 months in prison, which was within the range provided under cell V/C. Because the error was not preserved for appellate review, defendant cannot show that he is entitled to be resentenced unless he does so through a claim of ineffective assistance of counsel during sentencing. See *People v Francisco*, 474 Mich 82, 89 & n 8; 711 NW2d 44 (2006). On appeal, defendant asserts that his trial counsel was ineffective to the extent that he failed to raise any of the errors he now

asserts on appeal.[2] Had defense counsel raised this issue at sentencing, the trial court would have had to recalculate the total OV score and sentence within the appropriate range. Therefore, defendant has established that defense counsel's failure to raise this claim at sentencing fell below an objective standard of reasonableness and prejudiced his sentencing. See *Yost*, 278 Mich App at 387. Accordingly, on this record, we agree that defendant is entitled to resentencing with zero points assessed under OV 13. See *Francisco*, 474 Mich at 92.

Defendant also asserts that his sentence was not proportionate and amounted to cruel and unusual punishment. Because defendant's sentence was within the range provided under the advisory sentencing guidelines, his sentence was "presumptively proportionate, and a proportionate sentence is not cruel or unusual." *People v Bowling*, 299 Mich App 552, 558; 830 NW2d 800 (2013). To overcome the presumption, defendant had to show that there was something unusual about the circumstances of his case that made the sentence disproportionate. *Id*. He has not identified any unusual circumstances beyond arguing that his sentence was invalid as a result of flaws in his trial and sentencing. In any event, defendant can raise this issue before the trial court on remand for resentencing.

Defendant also suggests that the trial court erred when it allowed KD to testify by video in violation of his right to confront the witnesses against him. Defense counsel, however, told the trial court that he

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[2] Because we have concluded that defendant's remaining claims were without merit, defense and appellate counsel cannot be faulted for failing to raise those claims. See *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

had agreed with the prosecutor to allow certain witnesses—lay and expert—to testify via electronic communications. Moreover, defense counsel agreed that one of the witnesses was the mother of KM and KD, Chitwood, who had relocated out of state and was having transportation difficulties. So, he had to have understood that the child witness would also be testifying by video. By agreeing that the witnesses could testify by "any means that is available to allow them to testify," defense counsel waived any claim of error with regard to that procedure. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). See also *People v Buie*, 491 Mich 294, 315; 817 NW2d 33 (2012) ("[I]f the decision constitutes reasonable trial strategy, which is presumed, the right of confrontation may be waived by defense counsel as long as the defendant does not object on the record.").

Defendant also asserts that the trial court erred when it allowed Brown to testify because she was biased, her opinion was not premised on sound science, and she was improperly allowed to offer an opinion on defendant's guilt. As already discussed, although there is disagreement within the medical community about the diagnosis of abusive head trauma, Brown could offer an opinion as to whether KM's injuries were inflicted by human agency. Further, while Brown's use of the term "abusive" to describe the head trauma may have been improper, that error did not warrant relief. Finally, whether Brown held a personal or professional bias was a proper subject for cross-examination; it was not grounds to preclude her from testifying. See *People v Layher*, 464 Mich 756, 764; 631 NW2d 281 (2001) (noting that "evidence of bias is 'almost always relevant' ") (citation omitted).

VI. CONCLUSION

We affirm but remand for resentencing consistent with this opinion. We do not retain jurisdiction.

MURRAY, C.J., and MARKEY and TUKEL, JJ., concurred.

TOWNSHIP OF WILLIAMSTOWN v SANDALWOOD RANCH, LLC

Docket No. 337469. Submitted May 1, 2018, at Lansing. Decided June 19, 2018. Approved for publication August 7, 2018, at 9:15 a.m. Leave to appeal denied 503 Mich 1032 (2019).

Williamstown Township filed suit in the Ingham Circuit Court against Sandalwood Ranch, LLC; the owners of Sandalwood Ranch, Alec and Sarah Kolenda; and property owner Love Advertising, Inc., seeking to enjoin the use of an accessory apartment located on the second floor of a barn on the property. The township alleged that the apartment violated a local zoning ordinance and was, therefore, a nuisance per se. A default was entered against Love Advertising. Sandalwood Ranch and the Kolendas answered the complaint, alleging that the apartment was protected under the Right to Farm Act (RTFA), MCL 286.471 *et seq*. In the alternative, they raised estoppel and laches as affirmative defenses, claiming that the township was aware of the apartment when it granted the building permit more than two decades earlier and should be estopped from enforcing the ordinance. The township moved for summary disposition and involuntary dismissal. After an evidentiary hearing, the court, Rosemarie E. Aquilina, J., granted the township's motions for summary disposition and involuntary dismissal and entered a permanent injunction prohibiting use of the apartment as an accessory dwelling. Sandalwood Ranch and the Kolendas appealed.

The Court of Appeals *held*:

1. To assert an affirmative defense under the RTFA, a party must prove that the challenged condition or activity constitutes a farm or farm operation and that the farm or farm operation conforms to the relevant generally accepted agricultural or management practices. Under MCL 286.472(a), the RTFA defines the term "farm" as the land, plants, animals, buildings, structures, including ponds used for agricultural or aquacultural activities, machinery, equipment, and other appurtenances used in the commercial production of farm products. Although the barn containing the apartment was protected under the definition of "farm," that conclusion did not mean that every activity occurring

in the building was shielded from local regulation. Rather, the question was whether use of the apartment in connection with the boarding of horses was a "farm operation," which the RTFA defines in MCL 286.472(b) as the operation and management of a farm or a condition or activity that occurs at any time as *necessary* on the farm in connection with the commercial production, harvesting, and storage of farm products. In this case, Sandalwood Ranch and the Kolendas failed to establish that use of the apartment by a tenant, who could check on the horses at night, was necessary to the horse-boarding business. At best, they showed that having farm assistants living on-site was convenient. Therefore, the trial court properly concluded that use of the apartment as an accessory dwelling did not qualify as a farm operation.

2. Under MCR 2.111(F)(3), a party asserting estoppel or laches must state and provide supporting evidence of the facts that constitute the defense. When a party merely avers the supporting facts but does not provide evidence, the defenses fail. The attorney for Sandalwood Ranch and the Kolendas filed an affidavit attesting to certain facts and referring to certain documents but did not provide the supporting documents themselves. The evidence proffered did not support the allegations that the township gave permission to build the apartment and that the township was aware of the apartment for years and did not object to its use, and there was no evidence of prejudice as the result of any delay in enforcing the zoning regulation. Therefore, the trial court properly rejected the estoppel and laches defenses.

Affirmed.

ZONING — RIGHT TO FARM ACT — FARM OPERATION — NECESSITY — ACCESSORY DWELLINGS.

To assert an affirmative defense under the Right to Farm Act, MCL 286.471 *et seq*., a party must prove that the challenged condition or activity constitutes a farm or farm operation and that the farm or farm operation conforms to the relevant generally accepted agricultural or management practices; the act defines the term "farm operation" in MCL 286.472(b) as the operation and management of a farm or a condition or activity that occurs at any time as necessary on the farm in connection with the commercial production, harvesting, and storage of farm products; use of an accessory apartment by a tenant, who could check on the horses at night, is not necessary to the horse-boarding business and, therefore, does not qualify as a farm operation.

Murphy & Spagnuolo, PC (by *Gary L. Bender*) for Williamstown Township.

Dickinson Wright PLLC (by *Dennis C. Kolenda*) for Sandalwood Ranch, LLC, Alec Kolenda, and Sarah Kolenda.

Before: SHAPIRO, P.J., and M. J. KELLY and O'BRIEN, JJ.

PER CURIAM. Defendants appeal the trial court's order granting plaintiff's motion to dismiss pursuant to MCR 2.504(B)(2) and MCR 2.517, granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(9) and (10), and entering a permanent injunction pursuant to MCR 3.310. For the reasons set forth below, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Defendant Sandalwood Ranch, LLC, operates a commercial horse-boarding facility and riding arena in Williamstown Township (the Township). Defendants Sarah and Alec Kolenda are the principal owners of Sandalwood Ranch.[1] The property contains a house in which the Kolendas reside and a barn with 26 stalls and a riding arena. On a second floor of the barn, above the riding arena, there is an apartment that has three bedrooms, a living room, bathrooms with showers, a dining room, and a kitchen. Defendants rented the apartment to other occupants, who provided some care for the horses.

[1] The property is owned by defendant Love Advertising, which purchased the property at a sheriff's sale and thereafter leased the property to Sandalwood Ranch. Love Advertising was defaulted at the trial court level for failing to answer the complaint and is not a party to this appeal. As used in this opinion, the term "defendants" refers only to Sandalwood Ranch and the Kolendas.

In December 2014, the Township notified the Kolendas that the use of the apartment as a second dwelling violated the Williamstown Township Zoning Ordinance. The letter mistakenly referred to "Section 2.03(7) of the Zoning Ordinance," but it was later made clear that the Township was referring to § 18.02(A)(3), which permits only one farm dwelling per farm.[2] Later, the Township also claimed reliance on § 8.02(AA)(3)(j), which bars living quarters in an arena building. Defendants responded that because the apartment fell within the protections of the Right to Farm Act (RTFA), MCL 286.471 *et seq*., it was not subject to the ordinance. The Township then filed this lawsuit seeking injunctive relief, claiming that because the apartment violates the ordinance, it is a nuisance per se. Following defendants' answer, the Township moved for summary disposition, asserting that the apartment did not fall within the categories protected by the RTFA.

Noting that there were factual matters relevant to its ruling, the trial court scheduled an evidentiary hearing. Defendants presented evidence that the Kolendas each work full-time jobs off the farm but that each morning, they spend three hours on the farm performing the morning tasks of feeding, cleaning, and turning out the horses. Ms. Kolenda testified that when she returns from work around 5:00 or 6:00 p.m., she brings the horses in, and that they hire stable workers to oversee the operation and the horses during the day while she is at work. She explained that it is also necessary to conduct a "night check" at about 10:00 p.m. This check does not involve any care of the horses but is necessary to ensure that the horses are eating and defecating properly and not in distress.

[2] Section 18.02(A)(16) provides for a limited exception to the one-dwelling rule, but defendants have not asserted that it is applicable.

According to Ms. Kolenda, they rented the apartment under an agreement whereby the tenant would perform the night checks in exchange for a reduction in rent. The tenant also agreed to report any unusual sounds or activities during the night that might require attention.

As it relates to this case, the two categories protected by the RTFA are "farms" and "farm operations." Section 2(a) of the RTFA, MCL 286.472(a), defines "farm" as

> the land, plants, animals, buildings, structures, including ponds used for agricultural or aquacultural activities, machinery, equipment, and other appurtenances used in the commercial production of farm products.

The second category, "farm operation," is defined in § 2(b) of the RTFA, MCL 286.472(b), as

> the operation and management of a farm or a condition or activity that occurs at any time as *necessary* on a farm in connection with the commercial production, harvesting, and storage of farm products . . . . [Emphasis added.]

The trial court quickly dispensed with the first issue, noting that the Township has not sought to prevent the use of the building that comprises the barn and arena and that, therefore, Subsection (a) is not implicated. The court concluded that the controlling issue is how the building is used and whether using part of the building as a residence was a protected "farm operation."

Following the hearing, the court found that the apartment was "not necessary in the commercial farming of Sandalwood Ranch." The court issued an opinion from the bench stating, in part, as follows:

> [T]he statute says what it says. . . . I'm ruling in regard to necessary . . . . [S]o one of the things that I did in this case

is looked at the word necessary in Black's Law Dictionary, and when you read necessary, much of what you found in the statute the legislature pulled from Black's Law Dictionary, so I'm going to read a little bit of it to you.[3] I'm not going to belabor the point. You'll be out of here in a few minutes, but I'd like to make my record so whichever of you wishes, you may appeal me.

["]Necessary. This word must be considered in the connection in which it is used as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability or it may import that which is only convenience [sic: convenient], useful, appropriate, suitable, proper, or conducive to the end sought. It is an adjective expressing degrees and may express mere convenience or that which is indispensable or an absolute physical necessity. It may mean something which in the accomplishment of a given object cannot be dispensed with or it may mean something reasonably useful and proper and of greater or lesser benefit or convenience and its force and meaning must be determined with relation to the particular object sought,["] and that part that I underlined, which I think has particular meaning to me was where it says, ["]or that which is indispensable or an absolute physical necessity.["]

The testimony that I heard here today was very interesting to me because something or someone is useful or convenient does not mean they are necessary, so I have to look, I have to ask, is it reasonably needed? Is it necessary? So listening to the testimony, this apartment, how it's used doesn't appear to me that there's any accountability, there's any real regularity, that there's a back-up plan for if a tenant has plans of their own. They certainly do not account to the lessor. If they go away for the holidays, if they're sick, if they go visiting, if they're out to dinner, they're not checking on horses. This is too loose of an arrangement to say that it must be. It's a verbal agreement that does not contain anything about the horses, so if there's a dispute, it becomes a he said/she said

[3] The language quoted is from *Black's Law Dictionary* (6th ed).

> or she said/she said. It may very well be a contract, and we all know there are such things as verbal contracts. This goes beyond a month to month living arrangement. It has other parts of a contract; the care of a horse. It's not just one horse. It's 20 to 30, maybe more at times.
>
> * * *
>
> The problem here is that this apartment is not a necessity. You have two women who come in between certain hours for feeding the animals. That's a necessity. You have a specific arrangement with them. You can call them independent contractors, but I bet if you called them to come in at night, you could have your dinner with your husband, you could have a vacation with your parents, or Christmas dinner, whatever it is you wanted, as your back-up plan. This apartment is not a necessity. It's not necessary in the commercial farming operation of Sandalwood Ranch.

II. ANALYSIS

A. STATUTORY CONSTRUCTION

On appeal, defendants first argue that the trial court erred by concluding that MCL 286.472(b) applied in this case and not MCL 286.472(a). We disagree.[4]

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[4] The trial court's ultimate decision on a motion for involuntary dismissal under MCR 2.504(B)(2) is reviewed de novo, and the underlying findings of fact are reviewed for clear error. *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). Clear error "occurs when the reviewing court is left with a definite and firm conviction that a mistake has been made." *Douglas v Allstate Ins Co*, 492 Mich 241, 256-257; 821 NW2d 472 (2012) (quotation marks and citation omitted). Although plaintiff's motion was brought under both MCR 2.116(C)(9) and (10), we review the motion under MCR 2.116(C)(10) because it is clear that the trial court considered evidence outside the pleadings when it ruled on plaintiff's summary-disposition motion. See *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 506-507; 885 NW2d 861 (2016). When reviewing a motion under MCR 2.116(C)(10), this Court "must consider the pleadings, affidavits, depo-

Defendants do not dispute that Article 18 of the Williamstown Township Zoning Ordinance permits one dwelling per farm, which serves as the principal residence of the owner, operator, or employee(s) of the farm, nor do they dispute that Article 8 of ordinance prohibits living quarters in an arena building.

The RTFA was enacted in 1981 to establish circumstances under which a farm and its operation may not be deemed a public or private nuisance. *Northville Twp v Coyne*, 170 Mich App 446, 448; 429 NW2d 185 (1988); see also *Scholma v Ottawa Co Rd Comm*, 303 Mich App 12, 22; 840 NW2d 186 (2013). The RTFA provides, in relevant part, that "a farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation alleged to be a nuisance conforms to generally accepted agricultural and management practices according to policy determined by the Michigan commission of agriculture." MCL 286.473(1). The RTFA also expressly preempts local laws, including zoning ordinances, that conflict with the RTFA or applicable generally accepted agricultural and management practices (GAAMPs). MCL 286.474(6). The RTFA is an affirmative defense, and to successfully assert it as a defense, a party must prove two conditions: (1) the challenged condition or activity constitutes a "farm" or "farm operation," and (2) the farm or

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sitions, admissions, and other documentary evidence in favor of the party opposing the motion." *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). The motion is properly granted if (1) there is no genuine issue related to any material fact and (2) the moving party is entitled to judgment as a matter of law. See *Klein v HP Pelzer Auto Sys, Inc*, 306 Mich App 67, 75; 854 NW2d 521 (2014). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

farm operation conforms to the relevant GAAMPs. *Lima Twp v Bateson*, 302 Mich App 483, 496; 838 NW2d 898 (2013).

As stated earlier, § 2(a) of the RTFA defines "farm" as

> the land, plants, animals, buildings, structures, including ponds used for agricultural or aquacultural activities, machinery, equipment, and other appurtenances used in the commercial production of farm products.

Defendants contend that the apartment is part of the arena building and that any use of the building falls within the definition of "farm" under § 2(a). Defendants misconstrue the statute. The building itself is protected under § 2(a) given its use as a barn and arena, uses that are plainly agricultural activities. However, this does not mean that every activity within the building is necessarily shielded from local regulation. Such a holding would immunize unlawful activity simply because it occurs in a farm building. Accordingly, like the trial court, we hold that the proper inquiry is whether the use of the apartment in connection with the business of boarding horses is a protected "farm operation" under § 2(b).

Indeed, there is no dispute that the structure itself is not in violation of the ordinance or that the structure was within the definition of "farm" under § 2(a). In dispute, however, is the use of the structure as a residence, which violates the Township ordinance; therefore, to avoid a finding that the use is a nuisance, that use must qualify as a farm operation under the RTFA—that is, it must be "necessary on a farm in connection with the commercial production, harvesting, and storage of farm products," MCL 286.472(b). Accordingly, § 2(b), not § 2(a), is implicated.

Next, defendants argue that even if § 2(b) applies,

the trial court erred by finding that the use of the apartment as a second dwelling on the farm was not *necessary* in connection with the boarding of horses. We disagree.

With respect to statutory interpretation,[5] this Court is required to give effect to the Legislature's intent. *Van Buren Co Ed Ass'n & Decatur Ed Support Personnel Ass'n, MEA/NEA v Decatur Pub Sch*, 309 Mich App 630, 643; 872 NW2d 710 (2015). The Legislature is presumed to intend the meaning clearly expressed, and this Court must give effect to the plain, ordinary, or generally accepted meaning of the Legislature's terms. *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992). If a statute defines a word or phrase, that definition is controlling. *Orthopaedic Assoc of Grand Rapids, PC v Dep't of Treasury*, 300 Mich App 447, 451; 833 NW2d 395 (2013). "A statutory provision is ambiguous only if it irreconcilably conflicts with another provision, or when it is equally susceptible to more than a single meaning." *People v Fawaz*, 299 Mich App 55, 63; 829 NW2d 259 (2012) (quotation marks and citation omitted). Only when ambiguity exists does the Court turn to common canons of construction for aid in construing a statute's meaning. *People v Borchard-Ruhland*, 460 Mich 278, 284-285; 597 NW2d 1 (1999).

There are no published cases interpreting the definition of the word "necessary" as used in the RTFA. Defendants ask us to interpret the word broadly to mean "useful or proper," while plaintiff asks us to interpret the word narrowly to mean "absolutely essential, indispensable, or vital."

The testimony elicited at the evidentiary hearing reveals that the use of the apartment as a second

[5] We review questions of statutory interpretation de novo. *In re Wayne Co Treasurer Petition*, 478 Mich 1, 6; 732 NW2d 458 (2007).

dwelling by a tenant, who can perform the 10:00 p.m. check on the horses, is not necessary to defendants' horse-boarding business. Defendants' first tenant, who rented the apartment in 2013, performed the nightly checks and moved out in the summer of 2013. Afterward, a second tenant stayed in the apartment for a year or a year and a half but did not perform the nightly checks on the horses. Ms. Kolenda testified that they rented the apartment to this second tenant, without a discount, for $950 because they needed the income. After the second tenant moved out, defendants rented out the apartment to tenants who performed the nightly checks until April 2016, when they stopped. The Kolendas' testimony establishes that use of the apartment as a second dwelling by a tenant is a matter of convenience. While we do not accept the plaintiff's contention that "necessary" should be read to mean "absolutely necessary," it is clear that in this case, the rental of the apartment was intended to induce a third party to perform work that defendants had performed in the past and for which they could hire workers without providing a rental apartment. The fact that having a person other than themselves perform the night check provided the Kolendas with a desirable degree of flexibility and time off does not mean that such a tenant is "necessary" for farm operations under the RTFA. And use of the apartment as a source of non-farm income is clearly not an activity necessary to the farming operation. Put simply, defendants' use of the apartment as a second dwelling on the farm is not the type of activity that the RTFA was intended or designed to protect.

Accordingly, the trial court properly determined that the use of the apartment as a second dwelling was not necessary to the operation and management of the farm.

B. AFFIRMATIVE DEFENSES

Next, defendants argue that the equitable doctrines of estoppel and laches preclude plaintiff's case. We hold that the equitable doctrines are inapplicable to the present case where defendants failed to provide factual support for the defenses.[6]

An affirmative defense must state the facts constituting such a defense. MCR 2.111(F)(3). Therefore, a party must assert its defenses and has the burden of providing evidence in support. *Attorney General ex rel Dep't of Environmental Quality v Bulk Petroleum Corp*, 276 Mich App 654, 664; 741 NW2d 857 (2007). Only after such evidence has been introduced does the burden shift to the plaintiff to produce "clear and decisive evidence to negate" the defense. *Palenkas v Beaumont Hosp*, 432 Mich 527, 550; 443 NW2d 354 (1989) (opinion by ARCHER, J.).

Defendants raised the defenses of estoppel and laches in their answer to the complaint. With respect to the defense of estoppel, defendants argued that the Township "is estopped from asserting that the use of the subject apartment violates any provision of its zoning ordinance because the Township, fully aware that the arena would contain the apartment now there, granted to the then-owner of the premises permission to build the arena inclusive of the apartment at issue." With respect to the defense of laches, defendants asserted that the Township "has known for many years, since its construction and before, of the presence of the apartment at issue, but has not, for those many years, taking [sic] any action to restrain the same. Now is much too late."

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[6] This Court reviews de novo the application of equitable doctrines. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005).

In *Lyon Charter Twp v Petty*, 317 Mich App 482, 490; 896 NW2d 477 (2016), vacated in part on other grounds 500 Mich 1010 (2017), this Court stated:

> The doctrine of laches is founded upon long inaction to assert a right, attended by such intermediate change of conditions as renders it inequitable to enforce the right. The application of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim against the defendant. To merit relief under this doctrine, the complaining party must establish prejudice as a result of the delay. Proof of prejudice is essential. [Quotation marks and citations omitted.]

Equitable estoppel arises when:

> (1) a party by representation, admissions, or silence, intentionally or negligently induces another party to believe facts; (2) the other party justifiably relies and acts on this belief; and (3) the other party will be prejudiced if the first party is permitted to deny the existence of the facts. [*Howard Twp Bd of Trustees v Waldo*, 168 Mich App 565, 575; 425 NW2d 180 (1988) (quotation marks and citation omitted).]

"The general rule is that zoning authorities will not be estopped from enforcing their ordinance absent exceptional circumstances." *Id*. "Just as with a laches defense, prejudice is a mandatory element." *Lyon Charter Twp*, 317 Mich App at 491.

In support of their allegations, defendants relied on an affidavit from their counsel and two handwritten sketches attached to the affidavit. Defendants' counsel averred that he had received documents "pertaining to the parcel of land on which sits the structure at issue in this case" pursuant to a Freedom of Information Act (FOIA) request, that he had reviewed the materials, and that he was "competent to authenticate the docu-

ments" attached to the affidavit. He averred in pertinent part as follows:

> 4. Also included among the documents provided in response to the FOIA request were multiple documents showing the title history of the property at issue, which history is summarized at the beginning of the brief submitted by Sandalwood Ranch, LLC, in opposition to the Township's motion for summary disposition.
>
> 5. Two handwritten sketches from the Township's file appear to be part of an application for a permit to build on the premises at issue a barn with an arena. Notations on it indicate that the permit application was from late 1992-1993. The sketches, which appear to have been drafted in the same hand as dated the permit application, make reference to an "upper apartment" with dimensions of 36 x 24 feet and show the placement in the proposed arena of a "24 x 36 apt on 2nd flr." Said sketches are attached hereto as Exhibits B and C.
>
> 6. Nothing in the documents provided by the Township indicates that the apartment was excepted from the permit granted by the Township, nor does anything indicate that, until the Township threatened Sandalwood Ranch with a civil infraction ticket in the Fall of 2014, any township official had expressed any concerns within the township government about the apartment known to be in the arena/barn or that anyone from the Township ever communicated to Sandalwood Ranch, its principals, the owner of the land and structures at issue, or any of that owner's predecessors that the apartment in the arena was of questionable validity under the Township's zoning ordinance.

Although defense counsel averred that he had reviewed documents related to the title history of the property, defendants did not produce the documents. Counsel did produce the handwritten sketches, but he merely provided his interpretation of what the sketches "appeared to be." Defendants did not produce evidence that would support the allegation that plain-

tiff "was fully aware that the arena would contain the apartment now there, granted to the then owner of the premises permission to build the arena inclusive of the apartment at issue," nor did they produce evidence to support the allegation that the Township "has known for many years, since its construction and before, of the presence of the apartment at issue, but has not, for those many years, taking [sic] any action to restrain the same." Further, defendants made no allegation regarding prejudice as a result of any delay.

Therefore, defendants failed to meet the burden of producing evidence to support the affirmative defenses of estoppel and laches.

Affirmed. No costs may be taxed pursuant to MCR 7.319.

SHAPIRO, P.J., and M. J. KELLY and O'BRIEN, JJ., concurred.

PEOPLE v BARRITT

Docket No. 341984. Submitted July 10, 2018, at Detroit. Decided August 9, 2018, at 9:00 a.m. Leave to appeal denied 504 Mich 888 (2019).

John E. Barritt was charged with multiple offenses in the Genesee Circuit Court in connection with the death of his girlfriend, Amy Wienski. In response to a report that Wienski was missing, the Mt. Morris Township Police Department executed a search warrant at the house where she lived with defendant. During the search, defendant arrived at the house in a car driven by Ron Greenway. After initially questioning defendant at the house about Wienski, Calhoun County Sheriff's Department Deputy Brian Gandy requested that defendant go to the police station in Homer for further questioning, rather than continuing the discussions by the house. Deputy Kevin Mahan drove defendant in his police car to the police station. Defendant's hands were unrestrained, but he sat in the back of the police car; the deputies did not tell defendant that he could drive to the department's office with Greenway, even though Greenway also drove to the department's office for questioning at the deputies' request. Police officers escorted defendant from the back of Mahan's police car to the interview room. Gandy and Detective Steve Hinkley interviewed defendant for 90 minutes, and at the end of the interview, defendant was handcuffed and transported to the Mt. Morris Township Police Department. Defendant moved to suppress the statement he made during the interview, arguing that he was in custody at the time he made the statement and that the statement was taken without the provision of the warnings required by *Miranda v Arizona*, 384 US 436 (1966). The court, Geoffrey L. Neithercut, J., granted defendant's motion and suppressed the statements, concluding that because defendant's interrogation occurred at a police station, he was in custody for purposes of *Miranda*. The Court of Appeals granted the prosecution's application for leave to appeal, and the Court, SHAPIRO and GLEICHER, JJ. (K. F. KELLY, P.J., dissenting), affirmed, concluding that although the trial court had applied incorrect legal standards, defendant's statements were correctly suppressed because they were taken while he was in custody but without the provision of *Miranda* warnings. 318 Mich App 662 (2017). In lieu of granting the prosecution's application for leave to appeal, the

Supreme Court vacated that part of the Court of Appeals' holding that had concluded that defendant was subjected to custodial interrogation, and the Supreme Court remanded the case to the trial court for application of the correct legal standards. 501 Mich 872 (2017). On remand, the trial court applied those legal standards and again granted defendant's motion to exclude his statements, concluding that defendant was in custody for *Miranda* purposes when he made the statements. The prosecution appealed by leave granted.

The Court of Appeals *held*:

1. The Fifth Amendment of the United States Constitution and Article 1, § 17 of the 1963 Michigan Constitution guarantee all persons the privilege against self-incrimination. To protect a defendant's privilege against self-incrimination, the police must provide *Miranda* warnings to a defendant before he or she is taken into custody for interrogation. To determine whether a person was in custody for purposes of *Miranda* analysis, a court must consider whether, in light of the objective circumstances of the interrogation, a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave. To that end, a court must examine the totality of the circumstances surrounding the interrogation, including the location of the questioning, the duration of the questioning, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning. With regard to location, while a police station constitutes a police-dominated atmosphere, *Miranda* warnings are not required simply because a person is questioned in such a location or because the questioned person is a suspect. Instead, *Miranda* warnings are only required when there has been such a restriction on a person's freedom as to render him or her in custody. Not all restraints on an individual's freedom of movement are tantamount to custody for purposes of deciding whether a person has been subjected to custodial interrogation under *Miranda*. Accordingly, a reviewing court must determine whether the relevant environment presents the same inherently coercive pressures as the type of stationhouse questioning at issue in *Miranda*.

2. The trial court did not clearly err when it found that the location of the questioning weighed in favor of defendant being in custody when he was questioned because defendant was asked to go to the station for further questioning, defendant was driven to the station in the back of a police car after not being given the option of driving there with Greenway, defendant was escorted

into the station by armed police officers, and he was questioned in a small office at the station in an increasingly hostile atmosphere. The trial court did not clearly err by concluding that the duration of the 90-minute interview was a neutral factor when determining whether defendant was in custody when he was questioned. With regard to statements made during the interview, the trial court did not clearly err when it determined that the accusatory nature of the questioning and the fact that defendant was not informed he was not under arrest until after most of the interview was completed weighed in favor of a finding of custody. Defendant's statements also made it clear that he did not think that he was free to leave during the interview. With regard to the physical-restraint factor, while defendant was not handcuffed for almost the entire interview, he was driven to the station in a marked police car, escorted into the station by armed police officers, and interviewed by armed detectives, all of which constituted restraints on defendant's freedom of movement. In addition, the fact that defendant was not released at the end of the interview weighed in favor of a finding that he was in custody during the interview. Given the totality of the circumstances, a reasonable person in defendant's position would not have felt free to terminate the interview and leave. Because the environment in which defendant was interviewed also presented the same coercive pressure as the type of stationhouse questioning in *Miranda*, defendant was in custody during the interview and his Fifth Amendment rights were violated when he was interviewed without first being advised of his *Miranda* rights.

Affirmed.

BOONSTRA, J., dissenting, disagreed with the majority's conclusion that defendant was in custody during the interview. The trial court's description of the nature and tone of the interview was flawed because it failed to review the video recording of the interview and instead relied only on the transcript. The conversation between defendant and the police officers was casual and friendly for over half the interview. Defendant's references to a need for counsel were equivocal, and defendant did not request that the interview end. While the trial court properly concluded that the lack of handcuffs and unlocked doors in the interview room weighed toward defendant not being in custody, the court erred by relying on other factors—e.g., that defendant was driven in a police car to the station, that he was escorted by armed police officers into the station, that he was always in the presence of at least one police officer during the interview, that the interview became heated, and that a police dog was used as a coercive

tactic—to conclude that the purpose of the officers' actions was to discourage defendant's movement and force him to talk. The mere fact that defendant was not released after the initial questioning did not override the noncustodial nature of the initial questioning. Accordingly, in light of all the objective circumstances surrounding defendant's interrogation, a reasonable person would not have felt that he or she was not at liberty to terminate the interrogation and leave, and the environment surrounding the interrogation was not inherently coercive. Therefore, defendant was not in custody when he was interviewed. Judge BOONSTRA would have reversed the trial court's order granting defendant's motion to suppress.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *David S. Leyton*, Prosecuting Attorney, and *Michael A. Tesner*, Assistant Prosecuting Attorney, for the people.

Jeffrey R. Skinner and *Neil C. Szabo* for defendant.

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

BORRELLO, P.J. The prosecution appeals by leave granted[1] the trial court's opinion and order, following remand from the Michigan Supreme Court, which granted defendant's motion to suppress statements made during a custodial interrogation without being advised of his *Miranda*[2] rights. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

This case arises out of the death of Amy Wienski, defendant's alleged girlfriend. This matter was initially before this Court when the prosecution filed an

[1] *People v Barritt*, unpublished order of the Court of Appeals, entered February 22, 2018 (Docket No. 341984).

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

interlocutory appeal of the trial court's decision to grant defendant's motion to suppress his statements, and this Court affirmed on different grounds. *People v Barritt*, 318 Mich App 662, 671; 899 NW2d 437 (2017), vacated in part 501 Mich 872 (2017). The prosecution filed an application for leave to appeal this Court's prior decision in the Michigan Supreme Court, and in lieu of granting leave to appeal, the Michigan Supreme Court vacated the holding of this Court that defendant was "in custody." *People v Barritt*, 501 Mich 872 (2017). The Michigan Supreme Court determined that this Court had properly concluded that when deciding whether defendant was in custody, the trial court had applied the wrong legal standards. Our Supreme Court remanded the matter to the trial court for application of the correct standards, directing the trial court

> to determine, in light of all of the objective circumstances surrounding the interrogation: (1) whether a reasonable person would have felt that he was not at liberty to terminate the interrogation and leave; and (2) whether the environment presented the same inherently coercive pressures as the type of station house questioning involved in [*Miranda*]. See *Howes v Fields*, 565 US 499, 509; 132 S Ct 1181; 182 L Ed 2d 17 (2012); *Yarborough v Alvarado*, 541 US 652, 663; 124 S Ct 2140; 158 L Ed 2d 938 (2004); *People v Elliott*, 494 Mich 292, 308[; 833 NW2d 284] (2013). [*Barritt*, 501 Mich at 872.]

On remand, the trial court granted defendant's motion to exclude his statements and suppressed the evidence, finding that defendant was in custody for purposes of *Miranda* under the standards set forth in the Michigan Supreme Court order. This interlocutory appeal by the prosecution followed.

On appeal, the prosecution argues that the trial court erred when it granted defendant's motion to suppress because defendant was not in custody for

purposes of *Miranda* when he made the statements and that, therefore, what the prosecution describes as his voluntary, uncoerced, and noncustodial statements are admissible at trial. The prosecution argues that defendant was not in custody for *Miranda* purposes because he voluntarily agreed to accompany the police in a marked vehicle to the station, he voluntarily provided information about the victim, the room where defendant was interviewed was unlocked with people coming and going, the interview only lasted 90 minutes, and defendant continued to speak after he was told he could stop the interview.

II. ANALYSIS

" 'The ultimate question whether a person was "in custody" for purposes of *Miranda* warnings is a mixed question of fact and law, which must be answered independently by the reviewing court after review de novo of the record.' " *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001) (citations omitted). This Court reviews for clear error the trial court's factual findings concerning the circumstances surrounding statements to the police. *Id*. "A finding is clearly erroneous if, after reviewing the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *Id*.

Every person has a constitutional right against self-incrimination. US Const, Am V; Const 1963, art 1, § 17. To effectuate this right, the police must warn a defendant of his or her constitutional rights if the defendant is taken into custody for interrogation. *People v Cortez (On Remand)*, 299 Mich App 679, 691; 832 NW2d 1 (2013) (opinion by METER, J.). Statements made by a defendant to the police during a custodial interrogation are not admissible unless the defendant

voluntarily, knowingly, and intelligently waives the constitutional right against self-incrimination. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005).

It is undisputed that defendant was not advised of his *Miranda* rights when he was questioned by the detectives. The issue now before this Court is whether defendant was in custody for *Miranda* purposes and whether the statements he made to police are, therefore, inadmissible given the lack of *Miranda* warnings.

A. FREEDOM OF MOVEMENT

The Supreme Court has stated that "custody" is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion. In determining whether a person is in custody in this sense, the initial step is to ascertain whether, in light of "the objective circumstances of the interrogation," *Stansbury v California*, 511 US 318, 323, 325; 114 S Ct 1526; 128 L Ed 2d 293 (1994), a "reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave," *Thompson v Keohane*, 516 US 99, 112; 116 S Ct 457; 133 L Ed 2d 383 (1995); *Fields*, 565 US at 509. Further, we have been instructed by the Supreme Court that in order to determine how a suspect would have "gauge[d]" his or her "freedom of movement," courts must examine "all of the circumstances surrounding the interrogation . . . ." *Stansbury*, 511 US at 322, 325. The relevant circumstances are as follows: (1) the location of the questioning, see *Maryland v Shatzer*, 559 US 98, 105-107; 130 S Ct 1213; 175 L Ed 2d 1045 (2010); (2) the duration of the questioning, *Berkemer v McCarty*, 468 US 420, 437-438; 104 S Ct 3138; 82 L Ed 2d 317 (1984); (3) statements made during the interview,

Oregon v Mathiason, 429 US 492, 495; 97 S Ct 711; 50 L Ed 2d 714 (1977); *Yarborough v Alvarado*, 541 US 652, 665; 124 S Ct 2140; 158 L Ed 2d 938 (2004); *Stansbury*, 511 US at 325; (4) the presence or absence of physical restraints during the questioning, *New York v Quarles*, 467 US 649, 655; 104 S Ct 2626; 81 L Ed 2d 550 (1984); and (5) the release of the interviewee at the end of the questioning, *California v Beheler*, 463 US 1121, 1122-1123; 103 S Ct 3517; 77 L Ed 2d 1275 (1983) (as quoted in *Fields*, 565 US at 509). These cases stress that no one circumstance is controlling; rather, a reviewing Court must consider the totality of the circumstances when deciding whether an individual was subjected to custodial interrogation under *Miranda*. *Fields*, 565 US at 517. Hence, we begin our analysis by going through each of the circumstances set forth in Supreme Court caselaw to determine whether defendant was subjected to custodial interrogation. *Fields*, 565 US at 509.

1. LOCATION

In this case, the trial court found, and the parties agreed, that defendant was questioned at a police station. From the descriptions provided by the questioning officers and from what can be gleaned from the taped interview, defendant was questioned in a small police office located within a larger governmental building in Homer, MI. The trial court described it as a "satellite office of the Calhoun County Sheriff's Department . . . ." A police station is a "police-dominated atmosphere" as contemplated by *Miranda*. *Miranda*, 384 US at 445. However, in *Mathiason*, 429 US at 492, 494-496, the Supreme Court reversed the Oregon Supreme Court's conclusion that because defendant's questioning had taken place in a police station, the

interrogation took place in a coercive environment and that defendant was therefore subjected to custodial interrogation. In *Mathiason*, the defendant was a suspect in a burglary. *Id*. At 493. An officer attempted to make contact with the defendant, eventually leaving his card at the defendant's apartment and requesting that the defendant call him, which the defendant did. *Id*. When the defendant called, the officer asked where the defendant would like to meet, and after the defendant offered no preference, the officer suggested the state patrol office. *Id*. The defendant met there with the officer who, on arrival, told the defendant that he was not under arrest but that he should be truthful. *Id*. The defendant confessed after being (wrongfully) told by the officer that his fingerprints were found at the scene. *Id*. In reversing the Oregon Supreme Court's conclusion that the defendant was subjected to custodial interrogation, the United States Supreme Court held:

> In the present case, however, there is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way. He came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a 1/2-hour interview respondent did in fact leave the police station without hindrance. It is clear from these facts that Mathiason was not in custody "or otherwise deprived of his freedom of action in any significant way."
>
> Such a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment." Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime.

> But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited. [*Id*. at 495.]

In this case, the trial court acknowledged that in light of *Mathiason*, the fact that interrogation occurred at a police station was not dispositive. However, the court also stated:

> Still, the location of the questioning in the instant case weighs in favor of a finding that Defendant was in custody. Police officers have an inherent authority that generally elicits respect from the public. The average person that is summoned to a police station to talk with a detective would not feel comfortable leaving the station until the discussion was terminated by that detective. In this case, Defendant was taken to the station house in the back of a police car. He was not allowed to travel to the station with [Ron] Greenway, the person Defendant had ridden with to Wienski's house despite the fact that Greenway too was driving to the station. Defendant was removed from the car and escorted into the station by armed officers. He was then placed in a room for questioning with only police present and a police dog in close proximity. A reasonable person in that situation would not have felt comfortable leaving the station without clear permission from an officer, permission that Defendant never received.

This Court has recognized that "[a] person who is 'cut off from his normal life and companions,' and abruptly transported from the street into a 'police-dominated atmosphere,' may feel coerced into answering questions." *Cortez*, 299 Mich App at 695 (quotation

marks and citations omitted). In *Yarborough*, 541 US at 664, the United States Supreme Court concluded that the state court had reasonably determined that the defendant was not in custody for *Miranda* purposes because the defendant was not transported to the stationhouse by police.

Contrary to the facts set forth in *Yarborough*, here, defendant was transported to the police station by armed police officers, a fact on which the trial court placed a great deal of emphasis. The prosecution argues that this factor does not weigh in favor of finding that defendant was in custody because defendant agreed to speak with the police officers at a location different from Wienski's house. According to the prosecution, defendant arrived at Wienski's house as the passenger in a vehicle driven by another individual, identified as Ron.[3] Defendant asserted that he met Ron the day before and that Ron drove defendant home in exchange for a generator. According to the prosecution, Detective Bryan Gandy asked defendant if he would go to the police station to talk in a "better area" than on the lawn at Wienski's home, and defendant agreed. Deputy Kevin Mahan then "had defendant take a seat" in the back of his patrol vehicle to transport defendant to the satellite office. Mahan did not force defendant into the car or place defendant under arrest. Defendant was not handcuffed during the ride. However, as noted by the trial court, defendant was not offered the opportunity to ride with Ron to the police station. According to the prosecution, the detectives offered defendant a ride "out of convenience," and defendant accepted.

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[3] Although not specifically stated, it appears that Ron is referred to in the trial court's opinion by his last name, Greenway.

The prosecution further argues that despite questioning occurring at the police station, the doors to the office where the questioning took place remained unlocked, which also weighs against a finding of custody. Gandy testified that the office doors locked from the outside, "like a school," so an individual could exit the office freely but that entrance into the office was restricted. During the interrogation video, a knock is heard on the door behind defendant, and one of the detectives stood up, opened the door, and was seemingly handed the drink that defendant was offered. Gandy did not lock the doors once defendant was inside the office. Other people entered and exited the room freely. Defendant is seen in the video watching people enter and exit through the door located behind him. There are sounds of doors being opened and closed in the background of the interrogation video. There were two doors in the office that exited the room and another door to an attached office. Gandy testified that defendant sat next to a door that exited the office. A door is visible in the interrogation video behind defendant and to his right, but the actual door knob is not within the camera's frame for the entirety of the video. At one point, Gandy said that he needed to step out for a minute. In the interrogation video, a uniformed individual left through the door behind defendant, but only the back of his body from the shoulders down is visible. Presumably, this was Gandy. From the background sound of the video, it did not sound like Gandy had to use a key or badge to open the door behind defendant. Gandy returned to the interrogation room, and then Detective Steve Hinkley stepped out.

Although there is evidence that the office doors were unlocked, this does not outweigh the fact that questioning occurred in an office at the police station,

in the constant presence of armed police officers, or that defendant was escorted into the room by armed police officers after being transported in a marked police car. It is unlikely that a reasonable person would believe that they were free to terminate the interview and leave after being transported to the station in a marked vehicle, escorted into the building by armed police officers, and questioned by armed police officers who used an increasingly hostile tone. Additionally, the fact that the police knew that defendant did not have his own vehicle and insisted that he be driven in a police vehicle supports the trial court's finding that the police took defendant into custody off his front lawn.

We recognize that the facts presented in this case are certainly subject to interpretation. However, the prosecution seems to place too great an emphasis on the subjective intent of the officers and defendant in asking us to find that the trial court clearly erred by finding that the evidence favored a finding that defendant was in custody relative to the issue of where the questioning took place. However, caselaw dictates that "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury*, 511 US at 323. This Court has made similar legal pronouncements. In *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999), we wrote, "The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned." See also, *Coomer*, 245 Mich App at 219-220. Applying that standard, we cannot conclude that the trial court clearly erred when it found that the totality of the factors regarding the

location of the questioning weighed in favor of a finding that defendant was in custody.[4]

2. DURATION

Gandy testified that the interview lasted approximately 90 minutes, the same amount of time as the interrogation video. The trial court determined that this was a neutral factor in making a custody determination, a finding in which we concur. The *Yarborough* Court determined that a two-hour interview weighed in favor of a finding of custody. *Yarborough*, 541 US at 665. Conversely, in *Mathiason*, the United States Supreme Court determined that a half-hour interview did not constitute a custodial interrogation. *Mathiason*, 429 US at 495. In *People v Mendez*, 225 Mich App 381, 383; 571 NW2d 528 (1997), the defendant was also interviewed for 90 minutes. This Court concluded that the defendant was not in custody for *Miranda* purposes, likening the facts of the case to *Mathiason* because the defendant voluntarily went to the police station, was informed that he was not under arrest, and was permitted to leave at the end of the interview. *Id*. Lastly, in *Fields*, the defendant was questioned for five to seven hours; the Supreme Court—while stating that the interrogation length lent some support to the defendant's argument that the interrogation was custodial—nonetheless ultimately concluded that the

[4] In reaching this conclusion, we reject the trial court's assertion that "[t]he average person that is summoned to a police station to talk with a detective would not feel comfortable leaving the station until the discussion was terminated by that detective." In this case, the trial court seems to infer that questioning a suspect in a police station, by itself, can provide a legal basis for a finding that a person is in custody. That conclusion runs afoul of *Mathiason*, and we therefore reject that portion of the trial court's analysis. *Mathiason*, 429 US at 494.

interrogation length was not controlling as to whether the defendant was subjected to custodial interrogation. *Fields*, 565 US at 515.

3. STATEMENTS

In *Yarborough*, 541 US at 665, the Supreme Court held that failure to tell a suspect that he or she is free to leave is one factor that can contribute to a finding that a suspect was in custody. The Court stated, "Unlike the officer in *Mathiason*, [the officer] did not tell [defendant] that he was free to leave . . . . These facts weigh in favor of the view that [defendant] was in custody." *Id*. This factor was also acknowledged by Justice MARKMAN when he wrote for the majority in *Elliott*, 494 Mich at 309; however, he concluded that the lack of a similar statement was not pertinent to the defendant because he was already incarcerated. Unlike the facts presented to our Supreme Court in *Elliott*, here, defendant was taken from his front lawn to the back of a patrol car and ultimately to a police station. Hence we find the issue of whether defendant was told he was free to leave relevant in our determination of whether defendant was subjected to custodial interrogation.

Gandy did not recall telling defendant that he was free to leave. He believed that he told defendant that they could finish the interview at any time. However, it was not until the end of the interview and after defendant stated that he needed a lawyer that Hinkley told defendant that he was not under arrest and could finish any time. This weighs in favor of a finding of custody. *Id*.

In addition to finding that the police did not initially tell defendant that he was not under arrest or that he could leave at any time, the trial court also found that

the increasingly accusatory nature of the interview weighed in favor of a finding of custody. See *Tankleff v Senkowski*, 135 F3d 235, 244 (CA 2, 1998) (holding that the officers' increasingly hostile questioning transformed an interrogation into custodial interrogation before the defendant was advised of his *Miranda* rights). And, as we noted earlier in this opinion, "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury*, 511 US at 323. However, "an officer's views concerning the nature of an interrogation, or beliefs concerning the potential culpability of the individual being questioned, may be one among many factors that bear upon the assessment whether that individual was in custody," if the officer's views were "somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave." *Id*. at 325.

Gandy described the interview as relaxed, and certainly in the beginning phases of the interview that appears to be an accurate description. Again, however, we note that while the subjective understandings of the police and suspect can be relevant, they are not controlling. Later in the interview, Gandy testified that there was a point when he started to feel like defendant was not telling the detectives everything that defendant knew. Hinkley asked defendant if he told them everything that he could think of, and defendant said that he did and that "[i]f there's anything else you can think of, please ask." Gandy remembered Hinkley saying "no bull****" to defendant, but asserted that this was not confrontational. The change in tone of the detectives occurred about 53 minutes into the interview. At that point, Hinkley told defendant that he

thought that defendant loved Wienski, but he did not want defendant to "bull****," and that he thought something else had happened. Although Hinkley did not raise his voice, he became increasingly more aggressive toward defendant:

> *Detective Hinkley*: So, here's the deal. Whatever petty bull****, and it's probably petty bull****, we don't care, but you got to be up front with me, man.
>
> * * *
>
> *Detective Hinkley*: And let me be honest with ya. You know that I know a lot more than what I'm saying. Okay? I do. All right? I ain't gonna bull**** ya. . . . I don't think you did anything to her. But, dude, there's some things that you're not telling me or there's some things you're not telling me accurate. All I ask of you is be straight up with me. If it's petty bull****, I don't give a f*** about it. It can go in the wind. It can go in the wind. I don't give a s***.

Hinkley asserted that the police knew that defendant had been driving Wienski's car over the past few days, but defendant denied it. Hinkley said that he did not believe defendant and that the detectives had "been around the block 100 times." Hinkley also said that defendant had "been around the block" because he had been "in the system," referring to defendant's criminal history.[5] The detectives continued to assert that defendant was being untruthful, even though he said he was "being straight up."

> [*Defendant*]: I don't have anything on my chest. That's just it. That's why I'm saying how can I help you? It's like you're trying to tell me I'm doing something or did something or know something. I don't want to do nothin' but try to help to get her back.

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[5] Defendant told the detectives that he had been to court that day on a charge of possession of stolen property.

The detectives continued to disbelieve defendant and asked if defendant would pass a lie-detector test. Defendant said that he would pass but that he would not take one because the detectives were "pointing fingers" at him. After approximately 1 hour and 14 minutes of questioning, defendant said, "Well, I think I need a lawyer now." Hinkley replied that defendant was not under arrest.

> [*Defendant*]: So, if that's the case, we can finish then?
>
> *Detective Hinkley*: We can finish any time. But, what I'm saying to you is, here's the thing, you can finish any time you want. But, what I'm saying to you is . . .
>
> [*Defendant*]: I don't want to not finish if it's going to hurt her, but I'm not gonna continue down this path.

At this point, Hinkley accused defendant of lying several times and told defendant to "man up." After an hour and 17 minutes, defendant said:

> I don't like where this is going, with—it looks like I'm going to have to get a lawyer, because you guys are trying to put something on me and I'm not gonna say anything that would incriminate me for anything.

We concur with the trial court's conclusion that the accusatory nature of the questioning of defendant weighs in favor of a finding of custody. *Tankleff*, 135 F3d at 244. The detectives interrogated defendant by asking questions and making statements that they knew were reasonably likely to elicit an incriminating response. See *People v White*, 493 Mich 187, 195; 828 NW2d 329 (2013). Defendant's statements make it clear that he did not think that he was at liberty to leave. He initially asked how he could help, but after defendant believed that the detectives were accusing him, he asked if they could finish. Seemingly, defen-

dant asked the detectives if they were finished so he would get their permission to leave.

Clearly, Gandy considered defendant a suspect before meeting with him. Although not used as a basis for the trial court's findings, when the police first came upon defendant, they were searching Wienski's home, where defendant stated he resided, pursuant to a search warrant. Although the record is somewhat vague as to the time outline, it does appear that before defendant arrived at the home, Gandy had procured a search warrant of Wienski's home, in part, by naming defendant as a suspect who burned her car. Hence, before Gandy met defendant, he had already identified defendant as a suspect, a fact that may explain the nature and tenor of the questioning. While we acknowledge that Gandy's beliefs are relevant "only to the extent they would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her 'freedom of action,' " *Stansbury*, 511 US at 325, we conclude that the accusatory tone of the questioning would lead a reasonable person to perceive that they were not free to leave until the police approved their departure from the interview. Again, while recognizing that the subjective opinions of the officers do not bear on our determination of whether defendant was in custody, if the officers' views were "somehow manifested to the individual under interrogation[, those views] would have affected how a reasonable person in that position would perceive his or her freedom to leave." *Id*.

After reviewing the facts surrounding the statements by the police and defendant in their totality, we are not left with a definite and firm conviction that a mistake was made by the trial court's finding that a reasonable person would not have believed they were

at liberty to terminate the interview without incident and would, therefore, have reasonably and objectively believed themselves to be in police custody. *Coomer*, 245 Mich App at 219.

4. PHYSICAL RESTRAINTS

There is no dispute that defendant was not initially handcuffed during the interview, and there is no dispute that he was handcuffed at minute 88 of the 90-minute interview for transport from the Calhoun County Sheriff's Department satellite office to the Mount Morris Township Police Department. Before he was handcuffed, defendant had not been formally placed under arrest by the Calhoun County detectives. Generally, the lack of handcuffs weighs against a finding of custody, see *Mathiason*, 429 US at 495; *Yarborough*, 541 US at 664, and the trial court so found. However, after making this finding, the trial court found that there were other restraints present in this case. The trial court noted that defendant's having to ride to the police station in the back of a patrol car and being escorted into the police station by armed police officers were forms of restraint. Additionally, the trial court noted that defendant appeared to be in the presence of at least one armed police officer at all times. Finally, the trial court noted that after the tone of the interview became more heated, another officer told defendant that his police dog, which was present in the room, could "blow you right off your feet" if the officer "sen[t]" him. We examine each of these findings in order.

It is undisputed that defendant was driven to the satellite office in a police vehicle. As found by the trial court, this mode of transportation implies a physical restraint regardless of whether the prosecution's as-

sertion that defendant voluntarily accepted the ride is accurate. No one unambiguously testified that defendant was "escorted" into the station. However, Mahan testified that he let defendant out of the backseat of his car at the station and that defendant "went inside the office with [the] detectives." Gandy testified that he and Hinkley brought defendant inside. There is no indication in the record that the detectives threatened defendant or brandished any weapons during the interview; however, Gandy testified that he and Hinkley were armed during the interview. In viewing the totality of the circumstances, riding to a police station in a marked vehicle, being walked in by armed detectives, and then being interviewed by armed police officers constituted physical restraints on defendant's freedom of movement, and a reasonable person would not feel at liberty to terminate the conversation and leave under such circumstances.

The prosecution asserts that the presence of the canine officer and police dog did not present any restraints on defendant's movement. Seemingly, Hinkley asked Sergeant Brad Hall[6] to enter the office so that he could step out to speak to Gandy. Hinkley asked defendant if he cared about the police dog entering the room, and defendant responded: "No. I like dogs." Hall entered the room with the police dog. Defendant engaged in casual conversation with Hall regarding the police dog:

> *Sergeant* [*Hall*]: He's a good boy. He's pretty friendly.
>
> [*Defendant*]: I bet he has his moments where he isn't.
>
> *Sergeant* [*Hall*]: Oh, he'll blow you right off your feet if I send him.

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[6] Although referred to as "Sergeant Brad" in the interview transcript, Mahan identified the canine officer as Brad Hall at the evidentiary hearing.

[*Defendant*]: Right. I bet.

Sergeant [*Hall*]: Yeah. But, no, he's a good boy.

They continued to talk about the dog's toy, and how Hall used the dog for tracking. However, Hall then told defendant how important it was for defendant to tell the truth:

Sergeant [*Hall*]: So, that's why it's really important. Sometimes people go all hardcore and whatever, and they—they wait until the very last second and it kind of makes 'em look really bad. So, it's best to—best to—to, I don't know, I guess you just want to make sure that—you seem like a really nice guy. You want to make sure that you're as truthful as possible because—because you know, it's going to be rough otherwise. You see what I mean?

[*Defendant*]: Um-hum.

Sergeant [*Hall*]: So, I don't know, that's just the only advice that I can give ya. It's always, always—it's always, always, no matter what situation you're in, it's always best to tell the truth. It's hard to stick with a lie.

After Gandy returned to the office and said that the Mount Morris Township Police Department wished to speak with defendant, Hall asked defendant if there was anything else that he wanted to say after their conversation. Hall said, "I know you got something else there. I can see it written all over your face." And he told defendant: "Just got to say—say the truth. Say what happened."

Some context to the conversation is important to note. The statement regarding the dog being able to "blow defendant off his feet" was made in response to a statement by defendant that the dog could really do some harm. After defendant made that statement, Hall told defendant that the dog would only do what he,

Hall, told the dog to do. We cannot find anything from the tape or the transcripts which would lead us to conclude that the dog was placed in the room as a means of physical control over defendant. Additionally, under these limited facts, we cannot conclude that a reasonable person would believe that the dog was present in the room as a means of physical control. Accordingly, we reject the trial court's finding that the presence of the police dog imposed a physical restraint on defendant's freedom to move. Even if we were to conclude, as suggested by defendant's counsel, that the police brought the dog into the room because defendant was "soft on dogs," we cannot conclude that the dog in any manner imposed a restraint on defendant's freedom. However, we do conclude that the trial court did not clearly err by finding that other physical restraints were placed on defendant, the degree to which favors a finding that defendant was in custody.

5. RELEASE

In *Mathiason*, 429 US at 495, the Supreme Court used the fact that the defendant was allowed to leave the police station at the end of the interview as one of the circumstances that led them to conclude that the defendant had not been in custody. In this case, at the end of defendant's interview, Gandy said that the Mount Morris Township Police Department wanted to talk to defendant, so at that time, Mahan handcuffed defendant and returned defendant to Mahan's patrol car for transport. After that, the following colloquy took place:

> [*Defendant*]: Am I under arrest?
>
> *Detective Gandy*: We're transporting you to another department and that's going to be up to them. But, we can't transport you without being restrained, for safety reasons.

[*Defendant*]: He said yeah, so I am being arrested?

Unidentified Speaker: I didn't say yeah.

[*Defendant*]: I thought you said yeah.

Unidentified Speaker: I didn't say nothin'.[7]

The prosecution argues that this factor weighs against a finding of custody because defendant was not arrested by the sheriff's department that conducted the interview. However, the prosecution also asserts that at the time the handcuffs were placed on defendant, he was in custody for purposes of *Miranda*.[8] Defendant was not released upon termination of the questioning but, rather, was placed in handcuffs and transported to another police department. Because defendant was not released at the end of questioning, this factor weighs in favor of a finding of custody. *Yarborough*, 541 US at 664-665; *Mathiason*, 429 US at 495.

Given the totality of the circumstances surrounding these factors and this Court's review for clear error of the trial court's factual findings concerning the circumstances surrounding statements to the police, we are not left with a definite and firm conviction that a mistake has been made relative to the trial court's factual findings. *Coomer*, 245 Mich App at 219. Further, with regard to the issue of whether defendant was in custody at the time of his interrogation, based on our

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[7] Our review of the audio recording leads us to believe that someone said "yeah" in response to defendant's question of whether he was under arrest.

[8] Presuming an issue exists relative to whether defendant invoked his right to counsel, that issue was outside the scope of remand and was not considered by the trial court. Consequently, there is no record that would permit our review of the issue. Accordingly, we express no opinion as to whether, or when, defendant exercised his right for the presence of counsel.

review of the totality of the circumstances, we concur with the trial court that a reasonable person in defendant's position would not have felt free to terminate the interview and leave. *Fields*, 565 US at 509; *Cortez*, 299 Mich App at 692. Accordingly, defendant was in custody at the time of his interrogation.

B. COERCIVE ENVIRONMENT

As our Supreme Court and the United States Supreme Court have stated, determining whether an individual's freedom of movement was curtailed is the first step in the analysis, not the last. *Elliott*, 494 Mich at 308; *Fields*, 565 US at 509. This point is best illustrated by the Supreme Court's ruling in *Berkemer*, 468 US 420. In *Berkemer*, the Supreme Court held that the roadside questioning of a motorist who was pulled over in a routine traffic stop did not constitute custodial interrogation. *Id*. at 423, 441-442. The Supreme Court held "that 'a traffic stop significantly curtails the "freedom of action" of the driver and the passengers,' and that it is generally 'a crime either to ignore a policeman's signal to stop one's car or, once having stopped, to drive away without permission.' " *Fields*, 565 US at 510, quoting *Berkemer*, 468 US at 436. "[F]ew motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so." *Berkemer*, 468 US at 436. Nevertheless, the Supreme Court held that a person detained as a result of a traffic stop is not in *Miranda* custody because such detention does not "sufficiently impair [the detained person's] free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights." *Id*. at 437. Hence, the temporary, and what the Supreme Court characterized as "relatively nonthreat-

ening," detention that follows a *Terry*[9] stop was insufficient for a finding of custody under *Miranda*. *Id*. What follows then is the idea that not all restraints on an individual's freedom of movement are tantamount to custody for purposes of deciding whether a person has been subjected to custodial interrogation under *Miranda*. The often-quoted statement from *Berkemer* makes the point: "[The Supreme Court] ha[s] decline[d] to accord talismanic power" to the freedom-of-movement inquiry. *Id*. at 437. In all such cases, a reviewing Court must ask the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station-house questioning at issue in *Miranda*. *Fields*, 565 US at 509.

Our Supreme Court remanded this case, instructing the trial court to consider its decision in *Elliott*, 494 Mich 292. *Barritt*, 501 Mich 872. In *Elliott*, Justice MARKMAN, writing for the majority, concluded that the defendant was not "in custody" for *Miranda* purposes. *Elliott*, 494 Mich at 295-296. The defendant was incarcerated for a parole violation, and he was taken to the jail library by a deputy where he was questioned by a parole officer for 15 to 25 minutes. *Id*. at 299, 308. The defendant was not physically restrained, but he was never told that he was free to leave the meeting and return to his jail cell. *Id*. at 308, 309. On the basis of these facts, as well as other considerations, Justice MARKMAN concluded that the inherently coercive pressures present in *Miranda* were not present in *Elliott*. *Id*. at 311. The defendant was not questioned for an extended time by armed police officers using a sharp tone and profanity; rather, the parole officer visited the defendant as part of her job. *Id*. at 311-312. The

[9] *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

defendant did not indicate that he did not want to speak to the parole officer. *Id*. at 312. Justice MARKMAN concluded that these circumstances were "hardly the sort of incommunicado, police-dominated atmosphere involving custodial interrogation and the 'overbearing' of the subject's will toward which *Miranda* was directed." *Id*. at 313.

We acknowledge that Gandy testified that, in his opinion, the police did not coerce defendant to talk. In fact, throughout the beginning of the interrogation video, defendant maintains a relaxed tone and posture, often laughing throughout the conversation. He lightheartedly told a story about Wienski's mom thinking that he had stolen one of her spoons on Thanksgiving. Defendant was asked what he wanted to drink, and he jokingly responded, "Beer. Coke." However, the subjective opinions of the officer aside, the facts as a whole demonstrate that the environment presented what the trial court correctly labeled as "the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." Unlike the defendant in *Elliott* who was incarcerated, from the time the officers saw defendant at Wienski's home, he was always in the company of at least one armed officer. Defendant was on his front lawn when he was told by the police to get into the back of a police car. Defendant's dog had been forcibly removed from the home by animal-control officers, and he had no idea where the dog had been taken or how he would be able to secure the dog's return. He was not able to drive to the police station in the same car that brought him to the house, despite the fact that the police had told defendant's driver to drive to the very same police station. When the police car stopped, testimony indicated that armed detectives led defendant from the police car into the police station. Also, from the testimony of the officers and review of

the video, we conclude that there was never a time when defendant was not being watched by an armed police officer. Defendant did not get to arrange the time of the interview, the place of the interview, or when the interview would conclude. Rather, defendant was told when he was being interviewed, where he was being interviewed, and the tenor of the interview. At the end of the interview defendant was handcuffed and placed in another police vehicle. In sum, defendant was never "free" to any significant degree. Rather, his freedom of movement, along with his choices, had been taken from him by police officers from the time he was told to get into the back of the patrol vehicle.

Hence, this is not a case in which defendant was already in police custody or incarcerated or one in which the defendant was allowed by the police to schedule a time or place for the interview or even select the mode of transportation to the interview. As alluded to in *Elliott*, it is difficult to imagine a setting other than prison in which an individual's freedom of movement is *more* controlled by outside factors. Defendant was not initially told he could leave or terminate the interview. Within a short time of being told he could end the interview at any time, defendant was handcuffed and placed inside another police vehicle for transportation to a different police station. The interview became increasingly accusatory as the detectives asserted that defendant was lying and that he did not tell them everything that he knew. The detectives asked defendant if he would pass a lie detector test, a statement indicative of psychological intimidation. An additional canine officer entered the room, again appealed to defendant's sense of honesty, and encouraged him to tell the truth. Taken together, these facts indicate a coercive environment. "Fidelity to the doctrine announced in *Miranda* requires that it be en-

forced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." *Berkemer*, 468 US at 437. Ultimately, it becomes apparent that this case *is* the type of situation that compels *Miranda* warnings be given.

Accordingly, we conclude that the trial court did not clearly err by finding that a reasonable person in defendant's position would have felt that he was not at liberty to terminate the interrogation and leave, and the environment presented the same coercive pressures as the type of stationhouse questioning in *Miranda*. Therefore, defendant was "in custody," and his Fifth Amendment rights were violated when he was not advised of his *Miranda* rights.

Affirmed.

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

BOONSTRA, J. (*dissenting*). I respectfully dissent. I conclude from my review of the record that, considering the totality of the circumstances, *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001), defendant was not in "custody" at the time of his interrogation. Therefore, I am left with a definite and firm conviction that a mistake has been made, *id*., and would reverse the trial court's order granting defendant's motion to suppress.

As the majority notes, our Supreme Court vacated this Court's prior holding that defendant was in custody and remanded the matter to the trial court

> to determine, in light of all of the objective circumstances surrounding the interrogation: (1) whether a reasonable person would have felt that he was not at liberty to terminate the interrogation and leave; and (2) whether the environment presented the same inherently coercive

> pressures as the type of station house questioning involved in *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). See *Howes v Fields*, 565 US 499, 509; 132 S Ct 1181; 182 L Ed 2d 17 (2012); *Yarborough v Alvarado*, 541 US 652, 663; 124 S Ct 2140; 158 L Ed 2d 938 (2004); *People v Elliott*, 494 Mich 292, 308[; 833 NW2d 284] (2013). [*People v Barritt*, 501 Mich 872 (2017).]

On remand, the trial court again found defendant to have been in custody, and the majority affirms. I agree with much of what the majority gleans from the record, and I agree that certain factors tend to favor a finding that defendant was in custody while other factors tend to favor a finding that defendant was not in custody. But I disagree with certain of the trial court's descriptions and characterizations (some of which are adopted by the majority), and this ultimately compels me to reach a different conclusion.

For example, and as the majority accurately notes, with respect to the "location of the questioning" factor, defendant agreed to speak with police officers at the police station rather than in the yard of his missing girlfriend's home; defendant was transported to the station, unrestrained, in the backseat of a police vehicle. Moreover, the prosecution indicated that detectives offered defendant a ride "out of convenience" and that he accepted. However, the trial court stressed not only that defendant "was not given the opportunity" to ride with Ron Greenway,[1] but even more significantly, that defendant "was not *allowed* to travel to the station with Greenway." (Emphasis added.) In my judgment, this verbiage pejoratively suggests—without support in the record—that police officers denied a request by defendant to travel to the

[1] Greenway had driven defendant to the house that day.

station with Greenway. What the record instead indicates is that officers offered defendant a ride, and he accepted the offer—nothing more, nothing less. Defendant did not have a vehicle of his own, and he did not even know Greenway. Defendant also could have reasonably believed that a ride with Greenway would not have been free of charge. Defendant had just met Greenway the day before and knew him as someone who drove people places for money—or in defendant's case, for a generator. I therefore glean little from the mere fact that defendant traveled to the station with the officers. The trial court further pejoratively characterized defendant's arrival at the police station—again without support in the record—as having been "removed from the car and escorted into the station by armed officers." Defendant was not, however, forcibly dragged from the police vehicle at gunpoint; to the contrary, after accepting the officers' offer of a ride, he then exited the vehicle upon arrival and accompanied them into the building. Again, nothing more, nothing less.

The trial court additionally acknowledged that the subsequent interview took place in an unlocked room (which, as the majority notes, had multiple doors from which people entered and exited freely) and that defendant's freedom of movement within the room was not restrained in any way. The majority properly discounts the balance of the trial court's analysis of this factor. Specifically, it rejected the trial court's suggestion that a police dog was used to intimidate defendant; to the contrary, the record reflects that defendant was a lover of dogs, that the dog became a subject of friendly conversation, and that defendant had a positive interaction with the dog. The majority also states:

> [W]e reject the trial court's assertion that: "[t]he average person that is summoned to a police station to talk with a detective would not feel comfortable leaving the station until the discussion was terminated by that detective." In this case, the trial court seems to infer that questioning a suspect in a police station, by itself, can provide a legal basis for a finding that a person is in custody. That conclusion runs afoul of [*Oregon v Mathiason*, 429 US 492, 97 S Ct 711, 50 L Ed 2d 714 (1977)], and we therefore reject that portion of the trial court's analysis. *Mathiason*, 429 US at 494-495.

I conclude that, absent the taint left by the trial court's pejorative characterizations, there is little left of the "location of the questioning" factor that would weigh in favor of a finding of custody, except for that which the majority has itself rejected.

With regard to the duration of the questioning, the trial court purported to conclude that the 90-minute duration of the interview "does not weigh heavily in either direction," a finding with which the majority concurs. However, the trial court qualified its finding by stating as follows: "What this Court does find concerning about the duration of Defendant's questioning is that it persisted after Defendant twice mentioned a need for an attorney and requested that the interview end."[2] For reasons that I will elaborate upon later, this statement does not, in my judgment, accurately characterize the circumstances or the record. But the fact that the trial court found this "concerning about the duration of [the] questioning" suggests to me that the trial court did not in fact weigh the duration factor neutrally.

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[2] The majority similarly characterizes defendant as having "stated that he needed a lawyer." The majority does not, however, conclude or suggest that defendant unequivocally asserted or was denied his right to counsel.

With regard to the supposedly inculpatory statements made during the interview,[3] I note that I am unable to discern from either the transcript or the video of the interview that defendant confessed to anything or even made a material admission, leaving me wondering whether this is much ado about nothing. I also must place the interview in context. At the time of defendant's interview, it had not been determined that any crime had been committed. To the contrary, the Calhoun County Sheriff's Department conducted a wellness check at the Calhoun County home of defendant's girlfriend, Amy Wienski, after her vehicle was discovered burned and abandoned in Genesee County. Although officers suspected foul play and executed a search warrant at the home, the fate and whereabouts of Wienski were then unknown. While officers were present at the home, defendant (who also lived there) arrived in a vehicle driven by Greenway. Defendant and the officers began conversing in the yard of the home and, as noted, defendant agreed to continue that conversation at the police station.

The trial court acknowledged that defendant was never told during the interview that he was not free to leave and that he was told—albeit late in the interview—that he was not under arrest and that the interview could end at any time. However, the trial court stated:

> The transcript of the interview suggests that the initial questioning was not confrontational. However, as the interview progressed, the hostility in the room quickly escalated as the detectives repeatedly accused Defendant of being untruthful and demanded he change his statement.

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[3] Except as noted, the officers present during the interview were Detective Steve Hinkley and Detective Bryan Gandy, although each of them stepped out of the interview room at times.

The trial court additionally described the interview as becoming "heated" and referred to "the aggressive nature of the questioning." Not exactly.

It is noteworthy in my mind that the trial court made its judgment about the interview based solely on the transcript of the interview and that the trial court opted not to view the video of the interview. The trial court thus denied itself the benefit of the full flavor of the interview, inasmuch as the written transcript does not reflect such factors as tone, volume, atmosphere, and inflection. In my judgment, the failure to view the video of the interview contributed to the trial court errantly describing the nature of the interview.

The video of the interview demonstrates that for in excess of 53 minutes of its 90-minute duration (equating to 56 pages of a 90-page transcript), the discussion between defendant and the police officers was entirely casual, conversational, and even friendly. They discussed such topics as dogs, cars, Wienski's animals (including a coatimundi, a baby mouse, and raccoons), ticks, insulation, and online dating sites, and defendant jokingly responded, "Beer. Coke." when asked what he would like to drink. Defendant repeatedly expressed a desire to help the officers. At the 53:20 mark (page 55) of the interview, defendant stated that he had told the officers everything he could think of, and he told Detective Hinkley, "If there's anything else *you* [Detective Hinkley] can think of, *please ask*." (Emphasis added.) Detective Hinkley then expressed the view that defendant loved Wienski but that something had happened to her and that he believed that defendant had some idea about what had happened. Hinkley later indicated at approximately the 59-minute mark (page 63) of the interview that he had reason to believe that defendant had driven Wienski's

vehicle that weekend and that defendant was not being truthful about whether he had driven the vehicle. But even then the tone and tenor of the conversation remained calm, measured, and at times so soft-spoken that it was difficult to hear on the recording of the interview.[4] It was not aggressive in tone, hostile, demanding, or accusatory of a crime. Rather, officers expressed a belief that defendant had not done anything purposefully to harm Wienski but that perhaps something had happened accidentally and that defendant knew something about what had happened.

As noted, the trial court also indicated that defendant twice "requested a lawyer," and that he "requested that the interview end," but that officers instead "continued to question Defendant" and to "accuse Defendant of lying." The inaccuracy of that description is best revealed, I think, by quoting from the transcript of the interview beginning at the 74:34 minute mark (page 79 of the 90-page transcript):

> *Mr. Barritt*: Well, *I think I need a lawyer now*. You guys are trying to . . .
>
> *Detective Hinkely*: You're not under arrest or anything. You're not under arrest.
>
> *Mr. Barritt*: Well, then why am I here then? I told you everything.
>
> *Detective Hinkley*: Yeah, you're not under arrest for anything.
>
> *Mr. Barritt*: *So, if that's the case, we can finish then*?
>
> *Detective Hinkley*: *We can finish any time*. But what I'm saying to you is, here's the thing, *you can finish any time you want*. But, what I'm saying to you is . . .

[4] Even when officers used profanity, they did so in a soft-spoken and conversational manner, not in an in-your-face or confrontational manner.

Mr. Barritt: *I don't want to not finish it if it's going to hurt her*, but I'm not gonna continue down this path.

Detective Hinkley: Well, here's the deal. You did something? Either you did something to her or an accident happened to her. That's what all this comes down to. It's an accident or you did it on purpose. Okay? I don't think you did it on purpose. I'm pretty sure you didn't do it on purpose because I'm pretty good at reading people. Okay? So, you're in the car, so you're lying about the car. You're lying about the car. Lying, lying, lying. Okay. That's just it, period. Okay? I mean, I know enough, I'm so positive about that, I will call you a liar to your face, and I don't do that to people. Okay? You lied, lied, lied. Okay? So, that means to me either you did something on purpose to her or something accidentally happened to her. Okay? Now, this is a real simple choice for you. Okay? All right? This is an accident or it's on purpose. Okay? You—you got to man up sometime in your life. You've got to man up and you've got to come to some type of reasonable situation from this. *Something happened. You know it happened. I know it happened*. I know you're lying about the car, dude. I know you're lying about the car. I—you're lying about the car, dude. I mean, I'd frickin' put my paycheck—I know you're lying about the car. Okay? So, that makes me—that troubles me about her. *I don't think you did it on purpose. I think it was an accident. All right, dude? I'm—I'm telling you, I'm pretty sure it was an accident. All right. You know it was an accident. I know it was an accident. What happened to her*?

Mr. Barritt: I don't know.

Detective Hinkley: You do know.

Mr. Barritt: I don't know.

Detective Hinkley: You definitely know.

Mr. Barritt: No, I don't.

Detective Gandy: John . . .

Detective Hinkley: Just a second. I got to . . .

Detective Gandy: All right.

Mr. Barritt: I don't like where this is going, with—*it looks like I'm going to have to get a lawyer*, because you guys are trying to put something on me and I'm not gonna say anything that would incriminate me for anything.[5]

Detective Gandy: Okay. (Talking on phone)

[Emphasis added.]

The next approximately 7 minutes of the interview (and 4 pages of the transcript) consists not of continued questioning but of delays (filled with silence or side conversations) and casual discussion between defendant and Sergeant Brad Hall[6] relating to Hall's police dog and defendant's dog. Eventually, the following exchange occurred:

Sergeant Brad: Yeah. Well, sometimes you got to get the other thing taken out. I mean, dogs are pretty important, make sure they're safe. But, probably the most important thing here is that—that we get this taken care of. Right?

Mr. Barritt: Well, yeah, absolutely. I did my part.

Sergeant Brad: Yeah. Well, so, you been helping those guys out pretty good?

Mr. Barritt: Yeah. As best I can.

Sergeant Brad: They're pretty good guys. I'll tell you what, if—if anybody can find her, they can. So, you know,

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[5] The United States Supreme Court has stated that "[f]idelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." *Berkemer v McCarty*, 468 US 420, 437; 104 S Ct 3138; 82 L Ed 2d 317 (1984). These concerns involved the impairment of a defendant's "free exercise of his privilege against self-incrimination." *Id*. The statement from defendant actually exercising that privilege shows that although the interview took place at a police station, defendant did not appear to believe that "questioning [would] continue until he provide[d] his interrogators the answers they seek." *Id*. at 438.

[6] Sergeant Hall was not present for the earlier portion of the interview but entered the interview room to sit with defendant while Detective Hinkley stepped out of the room to speak to Detective Gandy.

they work hard and do a really good job. So, they're working—working for her and doing the best they can to find her and to straighten these things out. So, I been here for a lot of these kind of things. Never in charge—I'm not in charge of nothing. I just stand around, do things, sit here with you while they—while they, you know, discuss other information and things that might've come in, you know, in between and hang out. But, I'll tell you what, the truth always comes out.

Mr. Barritt: Um-hum.

Sergeant Brad: You know what I mean? So, I guess it's one of those things if you—the sooner the truth comes out, the easier it is to—to deal with, you know what I mean?

Mr. Barritt: Um-hum.

Sergeant Brad: So, that's why it's really important. Sometimes people go all hardcore and whatever, and they—they wait until the very last second and it kind of makes 'em look really bad. So, it's best to—best to—to, I don't know, I guess you just want to make sure that—you seem like a really nice guy. You want to make sure that you're as truthful as possible because—because you know, it's going to be rough otherwise. You see what I mean?

Mr. Barritt: Um-hum.

Sergeant Brad: So, I don't know, that's just the only advice that I can give ya. It's always, always, no matter what situation you're in, it's always best to tell the truth. It's hard to stick with a lie.

Mr. Barritt: Um-hum.

Sergeant Brad: And then a lot of things, you know what I mean, when they're in here—when they're in here talking to you, they—they know the answer to 75 percent of the questions they ask.

Mr. Barritt: Um-hum.

Sergeant Brad: So, then they're kind of judging—judging your truthfulness or things that they can verify.

Mr. Barritt: Um-hum.

Sergeant Brad: So—and if you're being truthful, you got nothing to worry about. If not, then you—I don't know, you got something else you need to say, you probably ought—probably ought to get it out.

Mr. Barritt: Um-hum.

Sergeant Brad: Okay? So, there's only one way to straighten these things out, you know? So . . .

At the 87:25 mark (page 87) of the interview, Detective Gandy re-entered the room, and the following colloquy ensued:

Detective Gandy: All right. Well, we got a phone call from Mt. Morris PD. And they want to talk to you.

Mr. Barritt: Okay.

Detective Gandy: All right?

Mr. Barritt: Yup.

Detective Gandy: You are—we're going to meet Mt. Morris PD.

Mr. Barritt: All right. Where?

Detective Gandy: 94 near—and you're going to go with them.

Mr. Barritt: All right.

Sergeant Brad: Listen, John, before you go, is there anything else that you want to tell 'em? We talked for a second. I know you got something else there. I can see it written all over your face.

Mr. Barritt: No.

Sergeant Brad: You can't stick with it forever, bud. You can't even say it.

Mr. Barritt: I don't know what more to say.

Sergeant Brad: Just got to say—say the truth. Say what happened.

Mr. Barritt: I don't know what happened.

Sergeant Brad: Okay.

At that point, defendant was handcuffed[7] for purposes of transporting him to the Mt. Morris Township Police Department for further questioning.

The record thus reflects that defendant's references to a need for counsel were equivocal, that defendant did not request that the interview end, and that defendant in fact indicated that he did not wish for the interview to end if it would hurt Wienski. And, in any event, other than Detective Hinkley asking defendant what had happened (in the context of Detective Hinkley's expressed belief that defendant knew more than he was saying) and Sergeant Hall later advising defendant to tell the truth and asking defendant whether there was anything else he wanted to say, officers did not "continue to question" defendant. Rather, the interview ended.[8]

With regard to the presence or absence of physical restraints during the questioning, the trial court properly found that "the lack of handcuffs and unlocked doors weigh toward a finding that Defendant was not in custody." However, the court went beyond the contours of the factor itself to reiterate its view that defendant had been "required" to ride in the police vehicle, that he was "escorted" into the station "by armed officers," that during the interview he was always "in the presence of at least one armed officer," that the interview became "heated," and that the police

[7] Detective Gandy stated, "[W]e can't transport you without being restrained, for safety reasons."

[8] In any event, the prosecution asserts that "[t]he People do not seek to admit any statements made by Defendant after the point that defendant was restrained or at which he asserted his rights to cease questioning or to have an attorney present. Nonetheless, the statements made by Defendant up to that point in time were voluntary and he was not restrained or in custody. It is those initial statements that the People seek to admit in their case in chief against Defendant."

officers had used a police dog as a coercive tactic. The trial court therefore concluded that "[w]hile not technically a (physical) restraint, there was an obvious threat of force employed by the officers" and that it was reasonable to believe that "the purpose of this threat of force was to discourage Defendant's movement and force him to talk." For the reasons already described, I disagree with those characterizations and therefore with the trial court's employment of them in assessing the "physical restraint" factor.

Finally, the trial court accurately notes that after the interview, "Defendant was handcuffed and transported to the Mt. Morris Police Department where he was formally arrested." And indeed, whether an interviewee is released at the end of the questioning is considered under the caselaw to be one of the factors to consider in assessing whether the interviewee was "in custody." See, e.g., *Howes*, 565 US at 509; *Yarborough*, 541 US at 664. However, I agree with our concurring colleague in this Court's first review of this case that this factor "seems somewhat anomalous, as it does not touch on the events of the interrogation itself." See *People v Barritt*, 318 Mich App 662, 683-684; 899 NW2d 437 (2017) (GLEICHER, J., concurring),[9] citing Pettinato, *The Custody Catch-22: Post-Interrogation Release as a Factor in Determining Miranda Custody*, 65 Ark L Rev 799, 818 (2012) ("One oddity that has resulted from the general lack of clarity in Miranda custody jurisprudence is the consideration of post-interrogation arrest or release in the totality-of-the-circumstances test."). I also do not believe that the mere fact that an interviewee is not released after initial questioning (so that the questioning may con-

[9] Vacated in part 501 Mich 872 (2017).

tinue in another jurisdiction) should override the non-custodial nature of the initial questioning.

For all these reasons and viewing the entirety of the record, I conclude that in light of all the objective circumstances surrounding defendant's interrogation, a reasonable person would not have felt that he or she was not at liberty to terminate the interrogation and leave. *Barritt*, 501 Mich at 872. Moreover, I conclude that the environment surrounding the interrogation did not present the same inherently coercive pressures as the type of stationhouse questioning involved in *Miranda*. *Id*.

Accordingly, I would reverse the trial court's order granting defendant's motion to suppress.

PEOPLE v CRAFT

Docket No. 337754. Submitted August 7, 2018, at Detroit. Decided August 16, 2018, at 9:00 a.m. Leave to appeal denied 503 Mich 949 (2019).

Torrey Craft was convicted following a jury trial in the Wayne Circuit Court of two counts of assault with intent to do great bodily harm less than murder, MCL 750.84; one count of carrying a dangerous weapon with unlawful intent (carrying with intent), MCL 750.226; and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, in connection with a shooting in 2016. When he was interviewed by the police at the scene, Kevin Hollis identified defendant as the shooter, and two other people later identified defendant as the shooter in a six-person police lineup. Defendant was charged with three counts of assault with intent to commit murder, MCL 750.83, and one count each of carrying with intent and felony-firearm. Defendant moved to suppress the lineup identification, arguing that the lineup was impermissibly suggestive and requested an expanded evidentiary hearing on the issue in accordance with *United States v Wade*, 388 US 218 (1967). The court, Vonda R. Evans, J., denied the motion, concluding that although there were some physical differences between the lineup participants, the lineup was not impermissibly suggestive. After the close of proofs, the prosecutor and defense counsel approved the proposed jury instructions without realizing that instructions related to the carrying-with-intent and felony-firearm charges were omitted. After the omission was questioned by the jury during deliberations, the court reinstructed the jury on all five counts. Defendant appealed.

The Court of Appeals *held*:

1. MCR 2.512(C), which provides that a party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict, acts as a restriction on appeal; that is, if a party fails to object to a trial court's instruction, the objection is not preserved for appellate review. However, MCR 2.512(C) does not bar a party from altering its position on the appropriateness of jury instructions during trial proceedings, and a party may argue in favor of

supplemental instructions during trial proceedings even when the party acquiesced to the original instructions.

2. A trial court must instruct the jury on the applicable law, and the instructions must include all elements of the offenses charged against the defendant and any material issues, defenses, and theories that are supported by the evidence. The court rules reflect that a trial court's initial jury instructions are not necessarily written in stone and may need to be supplemented. In that regard, MCR 2.512(B)(1) provides that at any time during the trial, the trial court may, with or without request, instruct the jury on a point of law if the instruction will materially aid the jury in understanding the proceeding and arriving at a just verdict. MCR 2.513(N)(1) similarly provides that after jury deliberations begin, the court may give additional instructions that are appropriate. Accordingly, before a jury returns its verdict, the trial court has authority to supplement its original instructions as long as the instruction is consistent with the accurate determination of the charges; a party's acquiescence to the original instructions does not bar the trial court from supplementing the instructions in such a manner. In this case, the trial court did not abuse its discretion when it reinstructed the jury by rereading all of the instructions it had previously given and by adding the instructions for the two unintentionally omitted offenses; the court averted structural constitutional error by instructing the jury on the two omitted offenses.

3. Defendant was not entitled in the trial court or on appeal to an expanded evidentiary hearing under *Wade* regarding the lineup; defendant failed to explain why the photograph and his lineup counsel's testimony were insufficient for the trial court to decide the issues and failed to explain why the trial testimony of two eyewitnesses—both of whom identified defendant at the lineup as the shooter—was insufficient to address the issue on appeal. The lineup was not impermissibly suggestive because the physical differences between the lineup participants and defendant were not so dramatic as to render it impermissibly suggestive.

Affirmed.

JURY INSTRUCTIONS — SUPPLEMENTAL INSTRUCTIONS — PARTY'S ACQUIESCENCE TO ORIGINAL INSTRUCTIONS NOT A BAR TO SUPPLEMENTAL INSTRUCTIONS.

Before a jury returns its verdict, the trial court has authority to supplement its original instructions as long as the supplemental instructions are consistent with the accurate determination of the

charges; a party's acquiescence to the original instructions does not bar the trial court from supplementing the instructions in such a manner.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Valerie M. Steer*, Assistant Prosecuting Attorney, for the people.

Cecelia Quirindongo Baunsoe for defendant.

Before: SWARTZLE, P.J., and CAVANAGH and M. J. KELLY, JJ.

SWARTZLE, P.J. It is not uncommon for a trial court to supplement its jury instructions during jury deliberations. In fact, our court rules specifically authorize supplemental instructions. Yet, what is not common is for a trial court to fail initially to give *any* instruction on two entire counts, and then to supplement with full instructions on those counts. While not common, such a circumstance is not unconstitutional if corrected before a jury returns its verdict, and a party is not barred from asking for supplemental instructions even if the party had earlier acquiesced to the original, incomplete instructions.

Concluding that the trial court did, in fact, timely correct its initial oversight and finding no other reversible error, we affirm.

I. BACKGROUND

The events leading to defendant's convictions had as their origin a dispute between him and his girlfriend in the summer of 2016. During trial, Kevin Hollis testified that he witnessed the dispute and tried to inter-

vene on the girlfriend's behalf. Defendant became angry at Hollis and expressed a desire to fight with him, but no fight ensued.

Instead, the next day, Hollis was playing catch outside with Calvin Arnold, Jr., and Arnold's stepsons, seven-year-old Amir and nine-year-old Antonio, while Bianca Primm, the boys' mother, watched. Hollis heard someone call his nickname (Bam) and say, "You still wanna[] fight?" and "You still talkin' that scrap shit?" Hollis testified that he recognized defendant and noticed that another man was with defendant, though he could not identify him because his face was covered. Hollis saw defendant produce a rifle and shoot one round toward him. Instead of hitting Hollis, the bullet struck Amir. Defendant and the other man then ran to a waiting vehicle—a "gold, or beige," or "silver" Trailblazer, according to Hollis—and drove away. Amir was taken to the hospital and underwent several surgeries, eventually recovering from his injuries.

Hollis, who had known defendant for more than three years, gave defendant's name to the police and later identified him from a photograph. Police officers went to defendant's last-known address and observed defendant parking a silver Trailblazer. The officers attempted to stop defendant, but he fled in the vehicle and escaped by ditching the vehicle and continuing his flight on foot. Shortly thereafter, officers caught up with defendant and took him into custody.

While in custody, and within two days of the shooting, defendant participated in a live, six-man lineup. Defendant was assigned legal counsel for purposes of the lineup, and his counsel did not object to any portion of the lineup. After viewing the assembled men, both Arnold and Primm identified defendant as the assailant. Defendant was charged with three counts of

assault with intent to commit murder, MCL 750.83; one count of carrying a dangerous weapon with unlawful intent (carrying with intent), MCL 750.226; and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.

Defendant's trial counsel moved to suppress the lineup identification. Defense counsel argued that, notwithstanding the lack of objection by the lineup counsel, the lineup was impermissibly suggestive because: (1) defendant was shorter and smaller than the other men; (2) he had a lighter complexion than the others; and (3) he was one of only two men who wore an orange jumpsuit. Defense counsel requested an expanded evidentiary hearing to present testimony from his lineup counsel, Arnold, Primm, and four detectives. This type of hearing is commonly referred to as a *Wade* hearing, referencing the federal Supreme Court's decision in *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

The trial court held an evidentiary hearing but limited the scope to testimony from the lineup counsel. After hearing the testimony, reviewing a photograph of the lineup, and considering argument from counsel, the trial court held that defendant had not overcome the presumption that the lineup was valid. Referring to the lineup photograph, the trial court noted "that [there] wasn't anything that was significantly off" and that, while there were some physical differences among the lineup participants, "[t]here are height differences that are allowed, and clothing." The trial court concluded, "I cannot find, as a matter of law, that there was anything impermissibly suggestive as to give rise to a substantial likelihood of misidentification."

The trial proceeded before a jury. During trial, Arnold, Primm, and Hollis testified that defendant was

the person who shot Amir. Although Arnold testified that he had seen defendant's name on television following the lineup, both Arnold and Primm testified that their identification of defendant was based on their memory of his face at the time of the shooting, rather than any other outside influence. Arnold was asked whether defendant's attire during the lineup factored into his identification, and Arnold denied that it had.

At the close of proofs, the trial court prepared to instruct the jury. Both the prosecutor and defense counsel approved the proposed instructions, although no one appears to have noticed that there were no instructions for the two firearm-related counts—carrying with intent and felony-firearm. Shortly after the jury began deliberating, it asked the trial court in writing: "There are 5 counts only 3 are in the back of the binder. We thought the last two were dropped. Are we voting on all 5? The verdict form has 5." Recognizing its error, the trial court asked counsel to research whether it could provide instructions to the jury on the omitted counts or, instead, it had to dismiss those counts. After hearing argument, the trial court determined that it could provide the omitted instructions, and the trial court proceeded to reinstruct the jury, this time on all five counts. The jury eventually returned a verdict of guilty on two counts of assault with intent to do great bodily harm less than murder, MCL 750.84 (a lesser-included offense to assault with intent to commit murder), as well as on the two firearm-related counts.

This appeal followed.

II. ANALYSIS

Defendant makes two claims on appeal. First, he asserts that the trial court committed a structural

constitutional error by instructing the jury on the two omitted counts. Second, he argues that the trial court reversibly erred when it narrowed the *Wade* hearing and held that the lineup was not impermissibly suggestive. We consider each claim in turn.

A. SUPPLEMENTING THE JURY INSTRUCTIONS

Defendant's first claim centers on how the trial court instructed the jury. "We review a claim of instructional error involving a question of law de novo, but we review the trial court's determination that a jury instruction applies to the facts of the case for an abuse of discretion." *People v Everett*, 318 Mich App 511, 528; 899 NW2d 94 (2017) (cleaned up).[1] An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Id*. at 516. Our court rules authorize a trial court to supplement its original instructions to the jury, and we review interpretation of these rules de novo. *People v Lacalamita*, 286 Mich App 467, 472; 780 NW2d 311 (2009).

Defendant maintains that the trial court lacked authority to supplement its earlier jury instructions with instructions on the two omitted counts. By agreeing to the original instructions, the prosecutor waived any subsequent argument that the original instructions were somehow lacking or deficient, according to defendant. And by agreeing with the prosecutor and supplementing its earlier instructions, the trial court

[1] This opinion uses the new parenthetical (cleaned up) to improve readability without altering the substance of the quotation. The parenthetical indicates that nonsubstantive clutter such as brackets, internal quotation marks, alterations, and unimportant citations have been omitted from the quotation. See Metzler, *Cleaning Up Quotations*, 18 J App Pract & Process 143 (2017).

committed an instructional error, which, according to defendant, is a structural constitutional error requiring reversal and a new trial. We reject both contentions.

Waiver Is an Appellate Matter. In acquiescing to the original, incomplete instructions, defendant argues that the prosecutor thereby waived the ability subsequently to take the position before the trial court that supplemental instructions were needed. This argument misreads our waiver jurisprudence. Defendant cites as support MCR 2.512(C), which provides, in part, that "[a] party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict." Yet, the "assign as error . . . only if" provision in the court rule does not act as a bar to proceedings in the trial court, but rather as a restriction on appeal. See *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). If a party fails to object to the trial court's instructions, then the party has failed to preserve the objection for *appellate* review. *Id*. The court rule says nothing about whether, during trial court proceedings, a party can alter its position on the appropriateness of jury instructions when a question is subsequently raised.

Defendant's reliance on our Supreme Court's decision in *People v Carter*, 462 Mich 206; 612 NW2d 144 (2000) is similarly unconvincing. The *Carter* decision involved the distinction between waiving and forfeiting an issue in trial court proceedings and how that waiver or forfeiture, as the case may be, would affect appellate review of that issue. See *id*. at 214-216. The decision did not involve the position that defendant asserts here, i.e., that by agreeing to the trial court's original instructions, the prosecutor waived any argument in

the trial court proceedings that *the trial court* could supplement its own instructions. Defendant's other waiver-based authority is similarly unavailing. See, e.g., *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 224; 755 NW2d 686 (2008) (concluding that a party's expression of satisfaction with the trial court's instructions constituted a waiver that precluded appellate review). Thus, the prosecutor did not waive nor was she otherwise estopped from arguing in favor of the supplemental instructions simply because she acquiesced to the original ones.

The Trial Court Averted a Structural Constitutional Error. Defendant next argues that the trial court erred by supplementing its original instructions with instructions on the two omitted counts, and, by doing so, the trial court committed structural constitutional error. While not entirely clear, it appears that defendant's argument is four-fold: (1) the trial court was purportedly barred from providing supplemental instructions on the two counts; (2) had the trial court not supplemented its instructions on the two counts, the jury would have been left with a complete lack of instruction on those counts; (3) any conviction on the hypothetically "uninstructed" counts would have been a structural constitutional error requiring automatic reversal; and (4) because the trial court should not have instructed on those counts, this Court should treat the trial court's supplemental instructions and the jury's subsequent convictions on the two counts as a structural constitutional error. While creative, the argument is ultimately unavailing.

One of the essential roles of the trial court is to present "the case to the jury and to instruct it on the applicable law" with instructions that include "all the elements of the offenses charged against the defendant

and any material issues, defenses, and theories that are supported by the evidence." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). Our court rules reflect that a trial court's initial jury instructions are not necessarily written in stone and that the instructions may need to be supplemented. Specifically, MCR 2.512(B)(1) provides, "At any time during the trial, the court may, with or without request, instruct the jury on a point of law if the instruction will materially aid the jury in understanding the proceedings and arriving at a just verdict." MCR 2.513(N)(1) further states, "After jury deliberations begin, the court may give additional instructions that are appropriate." Thus, the court rules give the trial court broad authority to carry out its duty to instruct the jury properly, and this authority extends to instructing the jury even during deliberations. There is nothing in the court rules that precludes the trial court from supplementing its original instructions with instructions for an entire count, nor is there anything in the rules to suggest that a party's acquiescence to the original instructions somehow acts as a bar to the trial court supplementing its instructions. Indeed, our court rules are intended to give trial courts the appropriate tools to avoid errors in the first place, and correct them in the second place. See *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 52-53; 698 NW2d 900 (2005) (noting that "a trial court has unrestricted discretion to review its previous decision" absent an appellate court's prior holding to the contrary).

As for defendant's argument that the trial court committed a structural constitutional error by instructing the jury on the two counts, we conclude just the opposite—with its supplemental instructions, the trial court did not commit a structural constitutional error, but rather *averted* one. It was clear from the

outset that defendant was being tried on five criminal counts. This was highlighted in the verdict form, which indicated that the jury had to render verdicts on three separate counts of assault with intent to commit murder, one count of carrying with intent, and one count of felony-firearm. Yet, when the jury reviewed the written instructions, it could not find anything covering the latter two counts. It therefore asked the trial court for guidance concerning their deliberations on the latter two counts: Was it to presume those counts had been dismissed or was the omission unintentional?

In response, the trial court concluded that it was appropriate to reinstruct the jury by rereading all of the instructions it had previously given and adding the specific instructions for the two omitted offenses. The supplemental instructions were "responsive to the jury's request and did not serve to mislead the jury in any manner." *People v Katt*, 248 Mich App 282, 311; 639 NW2d 815 (2001). In fact, the trial court could have chosen to give only the instructions on the two omitted offenses, but rather it chose to reinstruct the jury on all of the charges to avoid any prejudice that might have resulted from piecemeal consideration. *Id*. Had the jury returned a guilty verdict on either of the two counts without the additional instructions, the omission would have been a structural error likely warranting reversal. *People v Duncan*, 462 Mich 47, 48; 610 NW2d 551 (2000); cf. *People v Traver*, 502 Mich 23, 40 n 7; 917 NW2d 260 (2018) (noting that it is an open question whether a defendant can waive appellate review of a structural error resulting from conviction on a charge for which there was a complete failure to instruct).

The trial court's decision to reinstruct the jury—one which was made after considerable input from the

parties—was reasonably calculated to protect defendant's right to a properly instructed jury while avoiding the time and costs of a new trial. Given this, the trial court's decision was within the range of reasonable and principled outcomes and was not an abuse of its discretion.

B. THE PRETRIAL LINEUP

Defendant also argues that Arnold and Primm's identifications of defendant should have been excluded at trial because the pretrial lineup was impermissibly suggestive. Defendant argues that the trial court should have granted his request for a *Wade* evidentiary hearing and that such a hearing would have confirmed the impropriety of the identification procedure.

While we review the trial court's decision whether to hold an evidentiary hearing for an abuse of discretion, *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008), the trial court's decision to admit or deny identification evidence is reviewed for clear error, *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *Id*. Defendant was represented by counsel at the pretrial lineup and therefore he "bears the burden of showing that the lineup was impermissibly suggestive." *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996).

First, we conclude that defendant has not met his burden to show an entitlement to an expanded evidentiary hearing under *Wade*. The trial court did conduct an evidentiary hearing regarding the lineup, during which a photograph of the lineup was admitted as evidence and defendant's lineup counsel testified to her impression of the procedure. On appeal, defendant

does not identify any other evidence that was necessary to a determination of the lineup's suggestibility. While defendant's motion before the trial court indicated that he wished to present testimony from Arnold and Primm, as well as four police detectives, both Arnold and Primm testified at trial, and, on appeal, defendant has not explained what testimony he wished to elicit from the detectives. Defendant does not explain why the photograph and his lineup counsel's testimony were insufficient for the trial court to decide the issue, nor does defendant explain why the trial testimony of Arnold and Primm is insufficient for this Court to address the suggestibility of the lineup on appeal. Accordingly, we conclude that defendant was not entitled to an expanded evidentiary hearing when originally requested, nor is he now entitled to this hearing postconviction. See *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009).

Second, we conclude that defendant has not shown that the identification was impermissibly suggestive. Defendant focuses on several factors that he insists rendered the identification procedure impermissibly suggestive. He claims that he was smaller than the other lineup participants, he was one of only two participants in an orange jail jumpsuit, and he had a lighter complexion than the other participants. "Physical differences among the lineup participants do not necessarily render the procedure defective and are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other lineup participants." *Hornsby*, 251 Mich App at 466. Generally, physical differences affect the weight of an identification, not its admissibility. *Id*.

Here, the physical differences were not so dramatic as to render the lineup impermissibly suggestive. De-

fendant has attached to his appellate brief the "Showup & Photo Identification Record" from the lineup. According to this form, defendant was 5' 6" tall and weighed 150 pounds. The other participants in the lineup were, respectively (Participant 1) 5' 5" tall and 195 pounds; (Participant 2) 6' tall and 180 pounds; (Participant 3) 5' 9" tall and 150 pounds; (Participant 4) 6' tall and 185 pounds; and (Participant 5) 5' 9" tall and 135 pounds. While there was some variance between the participants' heights and weights, it was not the type of variance that would make defendant stick out from the grouping. Indeed, defendant ranks somewhere in the lower-middle of the sample based on height and weight. Regarding defendant's complexion, the photograph does not depict any marked differences in complexion among the participants. Moreover, we note no marked variance in the physical build of the subjects in the photograph.

While it is generally preferable to present lineup participants in attire that is not indicative of their confinement (or alternatively to present all lineup participants in jailhouse attire, see, e.g., *United States v Erickson*, 797 F Supp 1387, 1394 (ND Ill, 1992)), in this case, defendant was not the only person in the lineup wearing an orange jumpsuit. Furthermore, both Arnold and Primm testified that their identification of defendant was based solely on his facial features, not on clothing or other physical characteristics. Arnold specifically testified that his identification of defendant was not based on defendant's jumpsuit. In sum, defendant has not shown that the lineup was so suggestive as to distinguish substantially defendant from the other participants.

To the extent that defendant argues that Arnold's and Primm's identifications were based upon factors

external to the lineup, he has not provided evidence in support of that assertion. While defendant argues that Arnold saw defendant's picture on television before making his identification, Arnold's testimony makes clear that he only viewed defendant's name on the news *after* the lineup was conducted. Thus, defendant has provided no evidence of any influence that would render the lineup impermissibly suggestive.

Finally, even if defendant had shown that the lineup was impermissibly suggestive, he has not shown that the error undermined the reliability of the jury's verdict. MCR 2.613(A). Several other pieces of evidence presented at trial tended to establish defendant's identity as the shooter. First, Hollis testified that he had known defendant for three years before the shooting, the two had a disagreement the day before the shooting, and defendant asked Hollis if he wanted to fight before starting to shoot, calling Hollis by his nickname when doing so. On appeal, defendant has not challenged Hollis's identification. Moreover, the record indicates that defendant was seen in a vehicle matching the description of the get-away vehicle shortly after the shooting. The evidence further shows that defendant fled when questioned by police. Defendant's flight is relevant circumstantial evidence of his consciousness of guilt. *Unger*, 278 Mich App at 226.

Given this evidence of defendant's identity, we conclude that any error in the admission of Arnold's and Primm's identification of defendant would have been harmless. To the extent that defendant argues that his lineup counsel was ineffective for failing to object to the lineup procedure, because defendant has not shown that the lineup was impermissibly suggestive or that any suggestiveness undermines the reliability of the jury's verdict, defendant has failed to show that his

lineup counsel was ineffective. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

III. CONCLUSION

Before the jury returns its verdict, the trial court may supplement its instructions in any manner consistent with the accurate determination of the charges. Thus, in the situation presented here, when the trial court unintentionally omitted any instruction on two entire counts, the trial court did not abuse its discretion by providing accurate supplemental instructions addressing each of the charged counts. Because defendant's remaining claim of error is similarly without merit, we affirm his convictions.

CAVANAGH and M. J. KELLY, JJ., concurred with SWARTZLE, P.J.

WAYNE COUNTY v AFSCME LOCAL 3317

Docket No. 339493. Submitted August 8, 2018, at Lansing. Decided August 28, 2018, at 9:00 a.m.

AFSCME Local 3317 (the union) filed unfair labor practice (ULP) complaints with the Michigan Employment Relations Commission (MERC) against Wayne County for activities that occurred over a three-year period, beginning in 2015. Wayne County entered into a collective-bargaining agreement with the union for the period October 1, 2011, through September 30, 2014. In July 2014, the union filed with MERC ULP Charge 1, alleging a failure to bargain in good faith in 2014 as required by MCL 423.215(1) of the public employment relations act (PERA), MCL 423.201 *et seq*. In May 2015, the union again alleged that Wayne County had failed to bargain in good faith in April 2015 (ULP Charge 2). Because it was experiencing a financial emergency, on August 21, 2015, Wayne County entered into a consent agreement with the State Treasurer under the Local Financial Stability and Choice Act (Act 436), MCL 141.1541 *et seq*., as enacted by 2012 PA 436. The consent agreement exempted Wayne County from mandatory collective bargaining under PERA for a period of three years (the collective-bargaining suspension period). That period commenced on September 20, 2015, after a 30-day window had passed that allowed for continued negotiations; the parties did not reach a collective-bargaining agreement during that 30-day period, and the county executive imposed employment terms and conditions on union members on September 21, 2015. In February 2016, the union filed ULP Charge 3 with MERC, alleging that Wayne County had failed to engage in good-faith bargaining during the 30-day window from August 21, 2015 through September 20, 2015. On October 18, 2016, the State Treasurer notified Wayne County that the county had satisfied the terms of the consent agreement and that it was released from the agreement. However, because the release date occurred after the start of Wayne County's then current fiscal year, under the consent agreement and MCL 141.1561, the Act 436 protections remained in place for the 2017 and 2018 two-year budgetary period; as a result, Wayne County's duty to participate in collective bargaining would not be reinstated until October 1, 2018. In November 2016, the union

filed ULP Charge 4, alleging that Wayne County had refused to engage in collective bargaining after the October 2016 release. In tandem with ULP Charge 4, the union also petitioned MERC for mediation, seeking to force Wayne County to reopen collective-bargaining negotiations. Wayne County moved for summary disposition of the four ULP charges, arguing that Act 436 deprived MERC of authority and jurisdiction to hear and resolve ULP Charges 1 through 4, regardless of whether the alleged violations occurred before or during the collective-bargaining suspension period. The administrative law judge recommended denying Wayne County's motion, concluding that Wayne County was subject to mandatory collective bargaining after the October 2016 release and that MERC had jurisdiction to adjudicate ULP charges brought under MCL 423.15(1) of PERA for conduct that occurred during the collective-bargaining suspension period. MERC subsequently dismissed the union's mediation petition, concluding that because the collective-bargaining suspension period was extended to October 1, 2018, MERC was precluded from ordering Wayne County to participate in collective bargaining. With regard to the ULP charges, the ALJ subsequently recommended dismissing ULP Charge 1, noting that it had jurisdiction over the charge and concluding that the union had failed to establish a PERA violation. Before the ALJ reached that decision, Wayne County moved for reconsideration of MERC's earlier decision that had dismissed the union's mediation petition. On reconsideration, MERC denied the motion, reasoning that nothing in Act 436, PERA, or the consent agreement exempted Wayne County from liability for ULPs, the commission retained jurisdiction over ULP charges against a public employer during a collective-bargaining suspension period, and the ULP charges were properly before the ALJ to determine whether the charges stated a claim upon which relief could be granted. Wayne County appealed MERC's determination that it had jurisdiction to adjudicate the ULP charges.

The Court of Appeals *held*:

1. MCL 423.215(1) mandates that a public employer must bargain collectively with the representatives of its employees and that the employer may make and enter into collective-bargaining agreements with those representatives. Violations of MCL 423.210, which sets forth a list of prohibitions and conditions related to public employment, constitute ULPs remediable by MERC because MCL 423.216 vests MERC with exclusive jurisdiction over ULPs.

2. Act 436 was enacted to address financial emergencies involving local governmental units and to provide fiscal stability and accountability for those entities. Under the act, after a multi-tiered review process of a governmental unit's finances is conducted, the governor may declare that a financial emergency exists in that governmental unit. When the governor declares a financial emergency, under MCL 141.1547(1)(a), the governmental unit may enter into a consent agreement with the state treasurer. If the parties are unable to agree on a collective-bargaining agreement within 30 days of the consent agreement, the local government's chief administrative officer may impose employment terms and conditions on the union members. In that regard, both Act 436 and PERA contain provisions excluding the local governmental unit from mandatory collective bargaining for the term of the consent agreement.

3. The subject-matter jurisdiction of an administrative agency to hear and resolve a particular cause or matter is defined by statute. The power and authority conferred on an agency by statute must be by clear and unmistakable language; similarly, the Legislature's divestiture of subject-matter jurisdiction must also be stated clearly and unambiguously in a statute. Under MCL 423.216, MERC has exclusive authority and power to adjudicate ULP charges; the plain language of Act 436 does not divest MERC of that jurisdiction during a financial emergency but instead simply curtails a union's ability to force collective bargaining during that suspension period. Accordingly, MERC has authority to adjudicate ULP charges before, during, and after a collective-bargaining suspension period, regardless of whether the ULP charges concern conduct occurring within or outside the suspension period or whether the charges assert a failure to bargain; any Act 436 limitation on available remedies for ULP violations does not affect MERC's jurisdiction to adjudicate ULP charges. In this case, MERC had jurisdiction to hear all the union's ULP charges even if no remedy existed because of the suspension of mandatory collective bargaining under Act 436, PERA, and the consent agreement.

Affirmed.

ADMINISTRATIVE LAW — MICHIGAN EMPLOYMENT RELATIONS COMMISSION — SUBJECT-MATTER JURISDICTION.

The Local Financial Stability and Choice Act (Act 436), MCL 141.1541 *et seq*., and the public employment relations act (PERA), MCL 423.201 *et seq*., both contain provisions excluding a local governmental unit from mandatory collective bargaining for the

term of a consent agreement during a financial emergency (the collective-bargaining suspension period); the Michigan Employment Relations Commission (MERC) has exclusive authority and power to adjudicate unfair labor practice (ULP) charges; the plain language of Act 436 does not divest MERC of jurisdiction to hear ULP charges during a financial emergency but instead simply curtails a union's ability to force collective bargaining during that suspension period; any Act 436 limitation on available remedies for ULP violations does not affect MERC's jurisdiction to adjudicate the charges before, during, and after a collective-bargaining suspension period, regardless of whether the ULP charges concern conduct occurring within or outside the suspension period or whether the charges assert a failure to bargain.

Bruce A. Campbell, Assistant Corporation Counsel, for Wayne County.

Jamil Akhtar, PC (by *Jamil Akhtar*) for AFSCME Local 3317.

Before: MURPHY, P.J., and GLEICHER and LETICA, JJ.

MURPHY, P.J. In the midst of a financial emergency, respondent, Wayne County (the County), entered into a consent agreement with Michigan's treasurer (the State Treasurer) under the Local Financial Stability and Choice Act (Act 436), MCL 141.1541 *et seq*., as enacted by 2012 PA 436. Pursuant to the consent agreement, the County was temporarily given a reprieve from being subject to mandatory collective bargaining under the public employment relations act (PERA), MCL 423.201 *et seq*., for a period that will ultimately span approximately three years, ending October 1, 2018. The County's position is that the Michigan Employment Relations Commission (MERC) did not and does not have subject-matter jurisdiction to adjudicate unfair labor practice (ULP) charges against the County during the three-year period. Petitioner, AFSCME Local 3317 (the Union), filed various ULP

charges with MERC against the County, all of which, while filed at different times and pertaining to different conduct occurring before and during the three-year period, were pending after the County's obligation to engage in collective bargaining ceased. MERC ruled that the administrative law judge (ALJ) hearing the ULP charges has subject-matter jurisdiction to enter recommended orders on the charges. MERC further concluded that if a particular ULP charge concerned a failure to collectively bargain during the time frame when the County had no obligation to bargain, the proper remedy would be dismissal for failure to state a claim, which is a matter for the ALJ to decide in the first instance, with MERC becoming involved only upon the filing of an exception. The County appeals MERC's decision regarding subject-matter jurisdiction. We hold that nothing in the language of Act 436 reveals a legislative intent to divest MERC of its subject-matter jurisdiction to hear and resolve ULP charges during the period in which a local government is not subject to the requirement that it participate in collective bargaining. Accordingly, we affirm.

Because an understanding of the statutes implicated in this case is necessary to understand the history and background of the litigation between the parties, we begin our discussion by examining the relevant statutory schemes.

I. PUBLIC EMPLOYMENT RELATIONS ACT (PERA)

"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. Our Legislature enacted PERA, and "[t]he supremacy of the provisions of the PERA is predicated on the Constitution . . . and the apparent

legislative intent that . . . PERA be the governing law for public employee labor relations." *Rockwell v Crestwood Sch Dist Bd of Ed*, 393 Mich 616, 630; 227 NW2d 736 (1975); see also *Bank v Mich Ed Ass'n-NEA*, 315 Mich App 496, 500; 892 NW2d 1 (2016) ("PERA governs public-sector labor relations . . . ."). PERA drastically altered labor relations in Michigan with respect to public employees, reflecting legislative goals to protect public employees against ULPs and to provide remedial access to a state-level administrative agency with specialized expertise in ULPs. *Macomb Co v AFSCME Council 25 Locals 411 & 893*, 494 Mich 65, 78; 833 NW2d 225 (2013).

Section 10 of PERA, MCL 423.210, sets forth a list of prohibitions and conditions related to public employment,[1] and "[v]iolations of the provisions of section 10 shall be deemed to be unfair labor practices remediable by [MERC]," MCL 423.216. See *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n/Mich Ed Ass'n*, 458 Mich 540, 550; 581 NW2d 707 (1998) (noting that

[1] MCL 423.210(1) provides:

> A public employer or an officer or agent of a public employer shall not do any of the following:
>
> (a) Interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed in [MCL 423.209].
>
> (b) Initiate, create, dominate, contribute to, or interfere with the formation or administration of any labor organization. . . . A public employer may permit employees to confer with a labor organization during working hours without loss of time or pay.
>
> (c) Discriminate in regard to hire, terms, or other conditions of employment to encourage or discourage membership in a labor organization.
>
> (d) Discriminate against a public employee because he or she has given testimony or instituted proceedings under this act.
>
> (e) *Refuse to bargain collectively* with the representatives of its public employees . . . . [Emphasis added.]

violations of MCL 423.210 constitute ULPs under MCL 423.216). MCL 423.216 vests "MERC with *exclusive jurisdiction* over unfair labor practices." *St Clair Intermediate*, 458 Mich at 550 (emphasis added); see also *Detroit Bd of Ed v Parks*, 417 Mich 268, 283; 335 NW2d 641 (1983); *Lamphere Sch v Lamphere Federation of Teachers*, 400 Mich 104, 118; 252 NW2d 818 (1977); *Rockwell*, 393 Mich at 630; *Bank*, 315 Mich App at 500.

The litigation between the parties in MERC implicated § 15(1) of PERA, MCL 423.215(1), which provides as follows:

> A public employer shall bargain collectively with the representatives of its employees as described in section 11 and may make and enter into collective bargaining agreements with those representatives. Except as otherwise provided in this section, for the purposes of this section, to bargain collectively is to perform 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 to negotiate an agreement, or any question arising under the agreement, and to execute 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 make a concession.

For purposes of § 15(1) of PERA, "[a]fter the parties have met in good faith and bargained over the mandatory subjects placed upon the bargaining table, they have satisfied their statutory duty." *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 55; 214 NW2d 803 (1974).

Accordingly, absent contemplation of Act 436, the County has a mandatory obligation to bargain collectively with unions representing county employees, doing so in good faith with respect to the terms and

conditions of employment, and any ULP charge falls within the exclusive jurisdiction of MERC.

II. LOCAL FINANCIAL STABILITY AND CHOICE ACT (ACT 436)

Act 436 was designed to address financial emergencies involving local governmental units and to provide fiscal stability and accountability for those entities. MCL 141.1543. Under Act 436, the State Treasurer, acting as the "state financial authority" for "municipal governments," which by statutory definition include counties,[2] may conduct, under certain enumerated circumstances, preliminary reviews in order to help determine whether a county is experiencing probable financial stress. MCL 141.1544(1); MCL 141.1542(n) and (u)(*i*). The preliminary-review process entails written notification to a county before the review is commenced, an interim and final report by the State Treasurer, and then a determination by a "local emergency financial assistance loan board" whether "probable financial stress exists for the" county. MCL 141.1544(3).

If probable financial stress is found, Michigan's governor (the Governor) is required to appoint a "review team" for the county. MCL 141.1544(4). The review team then examines the county's financial condition and prepares a written report, which must include statutorily specified information and state whether a "financial emergency" exists in the county. MCL 141.1545(1) to (4). After receiving the report and taking certain designated procedural steps, the Governor must determine whether a financial emergency exists in the county. MCL 141.1546(1) and (2).

If the Governor determines that a financial emergency exists, a county may appeal that decision in the

[2] We shall limit our discussion of Act 436 to its application to financially distressed counties.

Court of Claims, but only when 2/3 of the members of the county's governing body adopt a resolution to appeal. MCL 141.1546(3). A county has various options to consider when faced with a determination that a financial emergency exists in the county, including, as relevant here, the option of entering into a "consent agreement." MCL 141.1547(1)(a). MCL 141.1548 provides details with respect to consent agreements, and Subsection (11), MCL 141.1548(11), states:

> Unless the state treasurer determines otherwise, beginning 30 days after the date a local government enters into a consent agreement under this act, that local government is not subject to section 15(1) of 1947 PA 336, MCL 423.215 [that is, mandatory collective bargaining], for the remaining term of the consent agreement.

A reciprocal provision in PERA is MCL 423.215(9), which provides that "[a] unit of local government that enters into a consent agreement under the local financial stability and choice act . . . is not subject to subsection (1) [mandatory collective bargaining] for the term of the consent agreement, as provided in the local financial stability and choice act . . . ."

III. CONSENT AGREEMENT

In light of severe financial distress, the County initiated and participated in proceedings under Act 436. And on August 21, 2015, upon the determination that a financial emergency existed in the County, the County entered into a consent agreement with the State Treasurer.[3] Paragraph 2 of the consent agreement provided, in pertinent part:

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[3] As reflected in the agreement, the legislative authority of the County is vested in a county commission, and the County's elected county executive (the County Executive) is the chief administrative officer of the County. See MCL 141.1542(b)(*iv*).

> (b) Consistent with [MCL 141.1548(11)] of Act 436, beginning 30 days after the effective date of this agreement the County is not subject to section 15(1) of [PERA], MCL 423.215, for the remaining term of this agreement.
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> (c) Beginning 30 days after the effective date of this agreement, if a collective bargaining agreement has expired, the County Executive may exercise the powers prescribed for emergency managers under [MCL 141.1552(1)(ee)] of Act 436 to impose by order matters relating to wages, hours, and other terms and conditions of employment, whether economic or noneconomic, for County employees previously covered by the expired collective bargaining agreement.

Taking into consideration the 30-day window in the consent agreement, the County's PERA obligation to engage in collective bargaining with the Union was suspended starting September 20, 2015. A collective-bargaining agreement that had existed between the parties expired in September 2014, and despite negotiations, a new collective-bargaining agreement could not be reached by September 20, 2015, although the County did enter into collective-bargaining agreements by that date with all other county-affiliated unions. The County Executive, exercising the powers of an emergency manager, proceeded to impose employment terms and conditions on Union members on September 21, 2015.

On October 18, 2016, the State Treasurer provided the County with written notification that the County had satisfied the terms of the consent agreement and that it was therefore released from the agreement. However, for purposes of clarification and by letter dated November 10, 2016, the State Treasurer informed the County that as required by the consent agreement, the County had to adopt a two-year budget beginning the first fiscal year after the release.

The State Treasurer recognized that the release on October 18, 2016, occurred 18 days after the start of the County's current fiscal year, but the State Treasurer indicated that the two-year budget contemplated by the Treasury Department at the time of the release was for fiscal years 2017 and 2018. As gleaned by reading Paragraphs 2(d), 10, and 11 of the consent agreement and § 21 of Act 436, MCL 141.1561, the protections of Act 436 remain in place for the two-year budgetary period, including suspension of the County's obligation to engage in collective bargaining under MCL 423.215(1). Thus—given the State Treasurer's notification of release, the State Treasurer's letter of clarification, provisions in the consent agreement, and Act 436—the County's duty to participate in collective bargaining will not be reinstated until October 1, 2018 (the beginning of fiscal year 2019). Accordingly, from September 20, 2015, until October 1, 2018, the County was and is not subject to MCL 423.215(1), i.e., PERA's mandatory collective-bargaining provision. We shall refer to this time frame as "the collective-bargaining suspension period."[4] As discussed later in this opinion, there was a dispute between the parties whether the collective-bargaining suspension period actually ended upon the release in mid-October 2016, as urged by the Union, or whether it ran until at least October 1, 2018, as urged by the County. The ALJ found in the Union's favor, but MERC agreed with the County, and MERC's ruling has not been challenged.

[4] For purposes of the remainder of this opinion, when we refer to "*a* collective-bargaining suspension period," we mean, generally speaking, a period in which a local government has no legal obligation to engage in collective bargaining because of a financial emergency under Act 436.

IV. LITIGATION BETWEEN THE PARTIES

The procedural history of MERC litigation between the parties is extensive and dizzying. For our purposes, we shall attempt to keep it simple, focusing only on the relevant procedural facets of the litigation. The County and the Union entered into a collective-bargaining agreement that was effective from October 1, 2011, through September 30, 2014. In July 2014, the Union filed a ULP charge with MERC against the County, alleging that in 2014 the County had engaged in bad-faith bargaining under PERA. The ULP charge covered negotiations and conduct by the County that occurred before the collective-bargaining suspension period. We shall refer to this ULP charge as ULP Charge 1. In May 2015, the Union sought to amend ULP Charge 1 to add new allegations of PERA violations relative to actions taken by the County in April 2015, which was also before the collective-bargaining suspension period. The ALJ allowed the Union to pursue the new ULP charge, but bifurcated it from ULP Charge 1, effectively creating ULP Charge 2 based on the County's conduct in April 2015.

As indicated earlier, on August 21, 2015, after a financial-emergency determination had been made, the County and the State Treasurer executed the consent agreement, which allowed for 30 more days of mandatory collective bargaining before the collective-bargaining suspension period commenced on September 20, 2015. In February 2016, the Union filed ULP Charge 3 with MERC against the County, alleging a failure to engage in good-faith bargaining in violation of PERA with respect to the County's negotiations and conduct from August 21, 2015, up to September 20, 2015 (the consent agreement's 30-day window).

Finally, in November 2016, the Union filed ULP Charge 4 with MERC against the County, alleging that despite the consent agreement expiring when the State Treasurer notified the County in October 2016 of a "release" from the agreement, the County nevertheless refused to engage in collective bargaining following the release. Other ULP accusations were also part of ULP Charge 4. As noted earlier, because a two-year budgetary period had to essentially be tacked on to the date of the release, the collective-bargaining suspension period did not terminate in October 2016 but will do so at the end of September 2018. Relevant here, in November 2016, aside from filing ULP Charge 4, the Union also filed a petition with MERC for mediation, as part of an effort to reopen collective-bargaining negotiations with the County and as a prerequisite to binding arbitration under 1969 PA 312, MCL 423.231 *et seq*., commonly referred to as "Act 312." See *Oakland Co v Oakland Co Deputy Sheriff's Ass'n*, 282 Mich App 266, 268; 765 NW2d 373 (2009), vacated in part on other grounds 483 Mich 1133 (2009). This mediation petition, like ULP Charge 4, was premised on the Union's faulty position that the freeze on collective bargaining ended when the State Treasurer notified the County in October 2016 that it was released from the consent agreement.

To recap, ULP Charges 1 through 3 concerned alleged PERA violations that took place before the collective-bargaining suspension period commenced, while ULP Charge 4 was in regard to conduct that occurred during the collective-bargaining suspension period, although the Union did not view it that way. The Union's mediation petition sought to force collective bargaining during the collective-bargaining suspension period. The dispute between the parties took two different tracks, one pertaining to all four ULP

charges filed by the Union and one concerning the Union's mediation petition.

With respect to the four ULP charges, the County filed a motion for summary disposition with the ALJ, arguing, in pertinent part, that the consent agreement and Act 436 deprived MERC of authority and jurisdiction to hear and resolve the ULP charges that were based on violations of PERA's mandatory, good-faith collective-bargaining provision, § 15(1), regardless of whether the alleged violations occurred before or during the collective-bargaining suspension period. The County's position was that MERC could not adjudicate § 15(1) ULP charges during the pendency of the collective-bargaining suspension period. The ALJ agreed with the Union that the consent agreement no longer protected the County following the release notification by the State Treasurer in mid-October 2016. Additionally, the ALJ concluded that MERC did not lose its jurisdiction to adjudicate ULP charges brought under § 15(1) of PERA when the conduct at issue occurred while the County was still subject to § 15(1). The ALJ recognized the County's burden of having to litigate § 15(1) ULP charges during the collective-bargaining suspension period, which is why the ALJ had held the proceedings in abeyance. The ALJ determined, however, that nothing in Act 436 could "be read to stand for the premise that past transgressions are immediately unassailable because of a consent agreement." Accordingly, the ALJ issued a recommended order denying the County's motion for summary disposition of the four ULP charges.

Within two months of the ALJ's decision, MERC, the full commission, issued a decision and order on a motion by the County to dismiss the Union's mediation petition. MERC dismissed the petition after finding

that the collective-bargaining suspension period indeed extended to October 1, 2018, precluding MERC from ordering the County to participate in mediation for purposes of forming a new collective-bargaining agreement. The Union has not challenged that decision. In its decision and order, MERC mentioned that the parties had referred to the earlier contrary determination by the ALJ that the consent agreement no longer permitted the County to avoid its obligation to engage in collective bargaining as of mid-October 2016. However, while recognizing that the ALJ had ruled differently, MERC observed that the ALJ's decision "did not dismiss or sustain either of the four unfair labor practice charges in their entirety," and therefore any review by MERC had to "await the filing of exceptions to the ALJ's decision and recommended order . . . ." Apparently, no exceptions to the ALJ's recommended order were ever filed.

Within two weeks of MERC's decision, the ALJ issued a decision and recommended order with respect to ULP Charge 1, which, as noted, pertained to negotiations and conduct by the County in 2014—that is, before the collective-bargaining suspension period. In the decision, the ALJ acknowledged MERC's ruling that the collective-bargaining suspension period was not scheduled to end until October 1, 2018, and stated that he intended to follow that decision. The ALJ concluded, however, that nothing in MERC's decision precluded the ALJ from exercising jurisdiction over ULP Charge 1, or any of the ULP charges, except for a portion of ULP Charge 4 that claimed a failure to engage in collective bargaining. The ALJ proceeded to substantively address ULP Charge 1, finding that the Union had failed to establish a PERA violation by the County. The ALJ entered a recommended order to dismiss ULP Charge 1.

Shortly before the ALJ issued its decision regarding ULP Charge 1 and its authority to exercise jurisdiction over the ULP charges, the County had filed a motion for reconsideration with respect to MERC's earlier ruling dismissing the Union's mediation petition. In a decision on the reconsideration motion, MERC stated that although the County had prevailed on the mediation issue, the County was asking MERC "to reconsider our decision and to instruct [the ALJ] to dismiss four unfair labor practice charge cases that were pending between the parties at that time." MERC acknowledged that the ALJ had, in the meantime, recommended dismissal of ULP Charge 1. MERC ruled:

> The County has based its motion for reconsideration on its assertion that the ALJ . . . has no jurisdiction over the unfair labor practice charges before him because the County is not currently subject to the duty to bargain. The County argues that Act 436, . . . PERA, and the Consent Agreement not only authorize the suspension of the County's duty to bargain, but also exempt it from responsibility for any alleged unfair labor practices that may have occurred prior to or during the term of the Consent Agreement.
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> For the reasons that follow, we find no basis to conclude that either Act 436, . . . PERA, or the Consent Agreement exempt the County from responsibility for unfair labor practices. Beside the references to § 15(1) of PERA in Act 436, there are no other references in Act 436 to any provision of PERA. With the exception of the references to Act 436 in § 15(7), (8), & (9) of PERA, there are no references in PERA to Act 436. Nothing in the language of Act 436 discusses unfair labor practices or the Commission's subject matter jurisdiction.
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> The suspension of a public employer's duty to bargain does not affect the Commission's jurisdiction over unfair labor practice charges against that public employer. As explained in further detail below, the effect of the suspension of a public employer's duty to bargain under Act 436

> is to limit the kinds of actions or inaction by that employer that could constitute an unfair labor practice. If a public employer whose duty to bargain has been suspended is charged with an unfair labor practice prior to or during the term of the suspension, the Commission is responsible for determining whether the alleged unfair labor practice has been committed.

MERC proceeded to rule that a ULP charge can be based on conduct other than a failure to bargain collectively or a failure to do so in good faith, citing MCL 423.210(1)(a) to (d). See note 1 of this opinion. Therefore, the suspension of the County's duty to bargain would have no bearing on such claims. MERC then observed "that the issue of whether an ALJ can adjudicate an unfair labor practice charge against the County is not determined by whether the County is subject to § 15(1) of PERA." MERC next stated that an ALJ has the authority to assess whether a ULP charge states a claim upon which relief can be granted under PERA and that, if not, the ALJ should recommend dismissal of the charge. But if a ULP charge does state a claim, the ALJ has the authority to determine whether material facts are in dispute and to hold an evidentiary hearing if there is a material factual dispute. MERC noted that if a ULP charge is brought alleging that a public employer refused to bargain during a period in which the duty to bargain was suspended, the charge would not state a claim upon which relief could be granted. This statement reflected that MERC would still have subject-matter jurisdiction over such a charge.

MERC found that the County's motion for reconsideration did not indicate that the Union's ULP charges were limited to claims that the County "breached its duty to bargain between September 20, 2015, and October 1, 2018." MERC then explained:

> If the charges before [the ALJ] allege that the County violated its duty to bargain before the County's duty to bargain was suspended, those matters would be within the subject matter jurisdiction of this Commission and would be properly before [the ALJ]. Moreover, if the charges before [the ALJ] allege that the County violated provisions of PERA other than § 10(1)(e) or § 15(1) [the collective-bargaining requirement], those matters would be within the subject matter jurisdiction of this Commission and would be properly before [the ALJ].

This passage seems to suggest a view that a ULP charge of a failure to engage in collective bargaining during a period of suspension is not within MERC's subject-matter jurisdiction; however, that construction would contradict MERC's earlier observation that such a charge would simply reflect a failure to state a claim upon which relief can be granted. And later in its ruling, MERC stated that "[i]f the County simply failed to bargain during the period in which the County has no duty to bargain, that failure to bargain is not an unfair labor practice. However, it currently remains within the jurisdiction of [the ALJ] to determine whether an alleged unfair labor practice has been committed by the County."

MERC next determined that the County's motion for reconsideration failed to identify the dates on which the County was alleged to have engaged in ULPs and that the County had "not asserted anything to indicate that any of the unfair labor practice charges fail[ed] to state a claim . . . ." But MERC then explained that even had the County asserted that the Union's ULP charges did not state a claim upon which relief could be granted, MERC "could not consider the matter unless and until exceptions were filed to [the] ALJ's decision and recommended order addressing the matter." MERC stated that "[e]ven if we thought it was appro-

priate under the circumstances of this case to review the ALJ's rulings, which we do not, we could not legally act in a manner contrary to the requirements of § 16 of PERA and Commission Rule 161(7)." Section 16(b) of PERA, MCL 423.216(b), provides, in relevant part:

> If the evidence is presented before a commissioner of the commission, or before examiners thereof, the commissioner, or examiners shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the commission, and if an exception is not filed within 20 days after service thereof upon the parties, or within such further period as the commission may authorize, the recommended order shall become the order of the commission and become effective as prescribed in the order.

And Mich Admin Code, R 423.161(7) provides:

> Rulings by an administrative law judge on any motion, except a motion resulting in a ruling dismissing or sustaining the unfair labor practice charge in its entirety, shall not be appealed directly to the commission, but shall be considered by the commission only if raised in exceptions or cross exceptions to the proposed decision and recommended order filed under R 423.176.

MERC concluded that the ULP charges were properly before the ALJ for determination of whether the charges stated a claim upon which relief could be granted and, if so, to decide whether the Union had established the charges at an evidentiary hearing.

The County filed a claim of appeal in this Court on August 1, 2017, and on November 17, 2017, the Union filed a motion to dismiss the appeal, arguing that this Court lacked jurisdiction to decide the appeal because it did not fall within the parameters of MCL 423.216(e).[5] The motion was denied by a panel of this

[5] MCL 423.216(e) provides, in part:

Court. *Wayne Co v AFSCME Local 3317*, unpublished order of the Court of Appeals, entered December 21, 2017 (Docket No. 339493).

V. ANALYSIS

A. STANDARDS OF REVIEW

In *AFSCME Council 25*, 494 Mich at 77, the Michigan Supreme Court recited the standards of review applicable to a decision by MERC, stating:

> In a case on appeal from the MERC, the MERC's factual findings are conclusive if supported by competent, material, and substantial evidence on the whole record. Legal questions, which include questions of statutory interpretation and questions of contract interpretation, are reviewed de novo. As a result, an administrative agency's legal rulings are set aside if they are in violation of the constitution or a statute, or affected by a substantial and material error of law. [Quotations marks and citations omitted.]

This Court reviews de novo issues concerning subject-matter jurisdiction. *Winkler v Marist Fathers of Detroit, Inc*, 500 Mich 327, 333; 901 NW2d 566 (2017).

B. PRINCIPLES OF STATUTORY CONSTRUCTION

The primary task in construing a statute is to discern and give effect to the Legislature's intent, and in doing so, we start with an examination of the

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Any party aggrieved by a final order of the commission granting or denying in whole or in part the relief sought may within 20 days of such order as a matter of right obtain a review of the order in the court of appeals by filing in the court a petition praying that the order of the commission be modified or set aside, with copy of the petition filed on the commission, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the commission.

language of the statute, which constitutes the most reliable evidence of legislative intent. *City of Coldwater v Consumers Energy Co*, 500 Mich 158, 167; 895 NW2d 154 (2017). When the language of a statutory provision is unambiguous, we must conclude that the Legislature intended the meaning that was clearly expressed, requiring enforcement of the statute as written, without any additional judicial construction. *Id*. Only when an ambiguity in a statute exists may a court go beyond the statute's words to ascertain legislative intent. *Id*. We must give effect to every word, phrase, and clause in a statute, avoiding a construction that would render any part of the statute nugatory or surplusage. *Id*. at 167-168.

An agency charged with executing a statute is entitled to respectful consideration of its construction of that statute and should not be overruled absent cogent reasons; however, an agency's interpretation cannot bind the courts or conflict with the Legislature's intent as expressed in the statutory language. *In re Rovas Complaint Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008).

C. DISCUSSION AND RESOLUTION

We hold that MERC has subject-matter jurisdiction to adjudicate ULP charges and that nothing in the language of Act 436 alters that jurisdiction. The jurisdiction extends to ULP charges filed before, during, and after a collective-bargaining suspension period, regardless of whether the ULP charges concern conduct occurring within or outside a collective-bargaining suspension period. MERC retains subject-matter jurisdiction to adjudicate ULP charges during a collective-bargaining suspension period. The County's position to the contrary reflects a fundamental misun-

derstanding of subject-matter jurisdiction. As a starting point, an excellent discussion of subject-matter jurisdiction in general is found in *Altman v Nelson*, 197 Mich App 467, 472-473; 495 NW2d 826 (1992), wherein this Court explained:

> Jurisdiction of the subject matter is the right of the court to exercise judicial power over a class of cases, not the particular case before it; to exercise the abstract power to try a case of the kind or character of the one pending. The question of jurisdiction does not depend on the truth or falsity of the charge, but upon its nature: it is determinable on the commencement, not at the conclusion, of the inquiry. Jurisdiction always depends on the allegations and never upon the facts. When a party appears before a judicial tribunal and alleges that it has been denied a certain right, and the law has given the tribunal the power to enforce that right if the adversary has been notified, the tribunal must proceed to determine the truth or falsity of the allegations. The truth of the allegations does not constitute jurisdiction.
>
> There is a wide difference between a want of jurisdiction, in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction, in which case the action of the trial court is not void, although it may be subject to direct attack on appeal. . . . When there is a want of jurisdiction over the parties or the subject matter, no matter what formalities may have been taken by the trial court, the action is void because of its want of jurisdiction. . . .
>
> Where jurisdiction of the subject matter and the parties exist, errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, do not render the judgment void; until the judgment is set aside, it is valid and binding for all purposes and cannot be collaterally attacked. Once jurisdiction of the subject matter and the parties is established, any error in the determination of questions of law or fact upon which the court's jurisdiction in the particular case

> depends is error in the exercise of jurisdiction. Jurisdiction to make a determination is not dependent upon the correctness of the determination made. [Citations omitted.]

ULP cases or charges constitute the "class of cases" over which MERC has the authority to exercise powers of adjudication. MCL 423.210; MCL 423.216.

With respect to administrative agencies, subject-matter jurisdiction poses the question whether an agency has the authority to hear and resolve a particular cause or matter. *Detroit Pub Sch v Conn*, 308 Mich App 234, 242; 863 NW2d 373 (2014). Administrative agencies are creatures of the Legislature, and their authority is governed by statute; there are no common-law agency powers. *Id*. The Legislature may confer on an administrative agency the power to conduct hearings, find facts, and exercise discretion, but the power and authority conferred on the agency must be by clear and unmistakable language. *Id*. at 242-243. And as a general proposition, the divestiture of subject-matter jurisdiction must also be stated clearly and unambiguously. See *Campbell v St John Hosp*, 434 Mich 608, 614; 455 NW2d 695 (1990); *Leo v Atlas Indus, Inc*, 370 Mich 400, 402; 121 NW2d 926 (1963) ("The divestiture of jurisdiction . . . is a serious matter and cannot be done except under clear mandate of law."); *Crane v Reeder*, 28 Mich 527, 532-533 (1874) ("[I]t is very natural and reasonable to suppose that the Legislature, in so far as they should think it needful to authorize interruptions and the shiftings of jurisdiction, would express themselves with clearness and leave nothing for the play of doubt and uncertainty.").

The Legislature conferred on MERC the power and authority to adjudicate ULP charges, MCL 423.216, and it did not withdraw that power in Act 436 within

the setting of financial emergencies. Instead, under Act 436, the Legislature simply curtailed a union's ability to force collective bargaining during a collective-bargaining suspension period. Any effort by a union to seek redress in MERC because of a failure to bargain during that period will not be sustainable, but it is left to MERC, *in the exercise of its subject-matter jurisdiction*, to render that ruling. Under the plain and unambiguous language of Act 436, and specifically MCL 141.1548(11), which is mirrored in ¶ 2(b) of the consent agreement, the County is not subject to the requirement or mandate to engage and participate in collective bargaining during the collective-bargaining suspension period. But the Legislature did not express in Act 436 that local governments are not subject to ULP charges during a collective-bargaining suspension period or that MERC cannot exercise its subject-matter jurisdiction over ULP charges during that time frame. Had the Legislature intended to afford such greater protection to a financially distressed local government, it could easily have done so in plain, unambiguous, and understandable language.

Especially confounding is the County's position that MERC lacks subject-matter jurisdiction with respect to ULP charges that relate to conduct occurring before a county facing a financial emergency is even relieved of its duty to collectively bargain with a union and with respect to ULP charges that have nothing to do with the obligation to bargain, e.g., discriminating against an employee in regard to conditions of employment, MCL 423.210(1)(c). In either scenario, a duty or obligation would exist—i.e., to collectively bargain or to not discriminate, either of which would support a ULP charge upon a violation, MCL 423.210(1)(c) and (e)—yet under the County's stance, no adjudication could be

sought in MERC proceedings. There is simply no language in Act 436 or PERA that supports this view.

The County contends that the express language of Act 436 exempts the County from any ULP charge based on the duty to bargain for the entirety of the collective-bargaining suspension period. The County relies on the "not subject to" language in MCL 141.1548(11), arguing that the textual focus is on the "local government" and not on the date when a dispute may have arisen. This argument is unavailing. When MCL 141.1548(11) of Act 436 is examined in conjunction with MCL 423.215(1) of PERA, the meaning is clear: during the relevant period, a "local government is not subject to" the requirement to "bargain collectively with the representatives of its employees." The County effectively seeks an interpretation that during the relevant period a "local government is not subject to" *any MERC litigation regarding* the requirement to "bargain collectively with the representatives of its employees." The emphasized language in the preceding sentence, or even words to that effect, are not found in Act 436 or PERA. "[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).

The County favorably cites *Martin v Murray*, 309 Mich App 37, 49; 867 NW2d 444 (2015), in which this Court explained that Act 436 "exists to provide specific tools for resolving financial emergencies within local governments that are not available under more general legislation." Relying on *Martin*, the County argues that "[i]t is clear that [Act] 436 was intended to remove . . . bargaining obstacles and allow necessary and durable financial changes, not hold them in some

long term limbo." Act 436 did remove bargaining obstacles for the financially strapped County, allowing the County Executive to unilaterally impose employment terms and conditions in regard to Union employees for the duration of the collective-bargaining suspension period. Further, Act 436 and the consent agreement plainly drove other unions representing county employees hurriedly to the bargaining table after the consent agreement was inked in order to avoid the extreme power that the County Executive would be able to wield after the agreement's 30-day window expired. The fact that the Union complained to MERC about conduct that primarily took place before the collective-bargaining suspension period, while possibly giving rise to some uncertainty or a state of limbo, is ultimately irrelevant to whether Act 436 deprives MERC of subject-matter jurisdiction. Act 436 simply does not encompass collective bargaining that transpires before the commencement of a collective-bargaining suspension period, and it does not speak to the issue of subject-matter jurisdiction relative to any point in time, before, during, or after a collective-bargaining suspension period.

The County additionally maintains "that if there is no duty to bargain[,] there is and can no longer be a breach of a non-existent duty and therefore no ULP hearings would be authorized or necessary." The problem with the County's argument is that it does not translate to a lack of subject-matter jurisdiction. During a collective-bargaining suspension period, there clearly is no duty to bargain and, therefore, there can be no breach of the duty to engage in collective bargaining within that time span. But that does not mean that ULP hearings are not authorized or that MERC has no subject-matter jurisdiction and cannot adjudicate a ULP dispute during the collective-bargaining

suspension period. It is necessary for an arbiter to find that there was no duty, even if it is clear that no duty exists for purposes of a particular ULP charge, and that arbiter is MERC. MCL 423.216; *St Clair Intermediate*, 458 Mich at 550 (MERC has "exclusive jurisdiction over unfair labor practices"). As aptly recognized by MERC, if a ULP charge claims a failure to participate in good-faith collective bargaining during a collective-bargaining suspension period, the charge is subject to dismissal for failure to state a claim, not for lack of subject-matter jurisdiction. The County's argument is akin to a defendant property owner arguing that a circuit court lacks subject-matter jurisdiction in a premises-liability action seeking over $25,000 in damages because the suing plaintiff did not allege facts or submit evidence showing that a legal "duty" was owed by the property owner to the plaintiff. The absence of a duty would not deprive the circuit court of subject-matter jurisdiction; it would merely provide a basis for summary dismissal of the premises-liability action under MCR 2.116(C)(8) or (10).

To an extent, the County's argument entails an exercise in procedural gymnastics: should an ALJ recommend summary dismissal for failure to state a claim or summary dismissal for lack of subject-matter jurisdiction? However, there is, of course, an indisputable difference between MCR 2.116(C)(4) and (8). And while Act 436 can plainly serve as a basis under MCR 2.116(c)(8) to dismiss a ULP charge for failure to state a claim, Act 436 cannot serve as a basis under MCR 2.116(c)(4) to dismiss for lack of subject-matter jurisdiction because there is nothing in the plain language of Act 436 that lends itself to such a construction. Moreover, once again, there was a duty to engage in collective bargaining before the collective-bargaining

suspension period commenced. The County desires a period free of PERA litigation, but Act 436 does not provide that relief.

We next examine *Baumgartner v Perry Pub Sch*, 309 Mich App 507; 872 NW2d 837 (2015), upon which the County places great weight. The *Baumgartner* panel held that the State Tenure Commission (STC) did not have jurisdiction to hear the claims of the petitioners, who were teachers that had been laid off by the respondent school districts, and that therefore the STC lacked the authority to instruct ALJs to hear the petitioners' suits. As explained by the Court, before legislative amendments were passed in 2011, teacher layoffs were a mandatory subject of collective bargaining and almost all collective-bargaining agreements employed seniority as the method for determining the prioritization of layoffs. *Id*. at 511. The Court explained the effect of the amendments in 2011, stating:

> In 2011, this all changed when, for the first time in Michigan history, the Legislature exercised its constitutional role and decided that the Legislature and local school boards, not the unions or administrative agencies, would decide which teachers should be retained and which should be laid off in the event of a reduction in force. The key to this historic change was to remove the subject of teacher layoffs from the realm of collective bargaining. Doing so had the twofold effect of (1) removing the unions as decision-makers on layoff-related issues and (2) by definition, making it unnecessary for MERC to review layoff-related cases because they no longer implicated public-sector labor laws.
>
> To implement this dramatic shift in the law of teacher layoffs, the Legislature also mandated that Michigan's several hundred school boards make layoff decisions on the basis of merit, through the development of a mandated, comprehensive evaluation system for public school teachers. To make it perfectly clear that these decisions

> would be made by the local school boards, and not be sidetracked by administrative agencies, the Legislature took the additional and somewhat unusual precaution of explicitly saying how and by whom the layoff decisions could be reviewed.
>
> As stated, MERC obviously would no longer have any reason to address this subject, and thus assert jurisdiction. And because the [STC] had, before the 2011 Amendments, asserted jurisdiction over a few teacher-layoff suits—wrongfully, in our view, and on the basis of a now nonbinding 1975 decision of our Court—the Legislature again took the unusual, but prudent, precaution of amending the teacher tenure act (TTA) to remove the slim statutory basis that the STC claimed gave it jurisdiction over layoff-related actions. *Finally, to make it absolutely clear that no administrative agency may review a school board's layoff decisions, the Legislature provided that a teacher's "sole and exclusive remedy" is to appeal the decision to the courts*. [*Id*. at 512-513 (citations omitted; emphasis added).]

This Court observed that MCL 380.1248 explicitly identifies the sole remedy for laid-off teachers, providing that a " '*teacher's sole and exclusive remedy* shall be an order of reinstatement commencing 30 days after a decision *by a court of competent jurisdiction*.' " *Id*. at 532, quoting MCL 380.1248(3).

There is no language in Act 436 that even remotely approaches the plain and unambiguous language of MCL 380.1248(3) that divests MERC of jurisdiction with respect to adjudicating teacher layoffs. The County's assertion that *Baumgartner* supports the proposition that the elimination of the duty to bargain in financial emergencies in Act 436 equates with eliminating MERC's subject-matter jurisdiction is devoid of merit. And the County's claims that MERC eviscerated Act 436 in this case and that MERC's decision regarding subject-matter jurisdiction was "[a]bsolutely law-

less" do not stand scrutiny. Indeed, *Baumgartner* supports MERC's ruling in this case, considering that it reveals that the Legislature, if it intends to divest an adjudicative body or agency of its jurisdiction, even for a limited period, is more than familiar with the wording or language needed to accomplish that intended goal. And the Legislature did not employ such language in Act 436.

Finally, we conclude that any limitations that might be imposed by Act 436 on available remedies for ULP violations with respect to providing relief during a collective-bargaining suspension period have no relevancy to MERC's subject-matter jurisdiction to adjudicate ULP charges. MCL 423.216(b) provides, in pertinent part:

> If upon the preponderance of the testimony taken the commission is of the opinion that any person named in the complaint has engaged in or is engaging in the unfair labor practice, then it shall state its findings of fact and shall issue and cause to be served on the person an order requiring him to cease and desist from the unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this act.

If MERC finds that a ULP charge is true in regard to a claim that a public employer refused to engage in collective bargaining or failed to do so in good faith, MERC "has the discretionary power to issue an order to bargain in good faith . . . ." *Detroit Police Officers*, 391 Mich at 56-57. Act 436 would plainly prohibit MERC from ordering a local government to participate in collective bargaining during a collective-bargaining suspension period, which is why MERC dismissed the Union's mediation petition. Without commenting on the nature or propriety of possible available remedies for a ULP violation occurring before the commence-

ment of a collective-bargaining suspension period, we conclude that MERC has subject-matter jurisdiction to adjudicate ULP charges, even *assuming* no remedy existed. As indicated at the outset of our discussion, subject-matter jurisdiction concerns the authority of a court or adjudicative body to exercise power "over a class of cases" or "to exercise the abstract power to try a case of the kind or character of the one pending." *Altman*, 197 Mich App at 472. The Union presented four ULP charges, and MERC has the exclusive power, authority, and jurisdiction to adjudicate such charges, regardless of whether a particular remedy might not be available.

In sum, we hold that nothing in the language of Act 436, let alone clear and unambiguous language, reveals a legislative intent to divest MERC of its subject-matter jurisdiction to adjudicate ULP charges during a collective-bargaining suspension period.

Affirmed. Because the Union fully prevailed on appeal, we award taxable costs to it under MCR 7.219.

GLEICHER and LETICA, JJ., concurred with MURPHY, P.J.

PEOPLE v FAIREY

Docket No. 333805. Submitted May 9, 2018, at Detroit. Decided August 28, 2018, at 9:05 a.m.

Frank Shepard Fairey was charged in the 36th District Court with one count of malicious destruction of a building, $20,000 or more, MCL 750.380(2)(a), and two counts of malicious destruction of property, bridges/railroads/locks, MCL 750.379. Fairey, an internationally acclaimed artist best known for creating a poster of President Barack Obama entitled *Hope*, was hired to design and create three large murals on buildings in downtown Detroit. Local media covered the visit, and a Detroit police sergeant watched a television interview in which Fairey was asked whether he would be "leaving anything behind uncommissioned" when he left the city. Fairey responded, "[Y]ou'll just have to keep your eyes peeled." Additionally, a newspaper article quoted Fairey as saying: "I still do stuff on the street without permission. I'll be doing stuff on the street when I'm in Detroit." The police sergeant found a 2013 YouTube video in which Fairey admitted to putting up posters in illegal locations, an activity known as "tagging," although the video never mentioned Detroit. The sergeant then went on a hunt for illegal artwork in Detroit and found posters containing Fairey's signature icon, the "Obey Giant," or a related icon, "Misfit," in 14 places around Detroit, mostly on abandoned buildings or bridge and railroad abutments. The district court, Kenneth J. King, J., bound Fairey over to the Wayne Circuit Court for trial. The circuit court, Cynthia G. Hathaway, J., quashed the information and dismissed the charges, finding that the prosecution failed to present evidence establishing Fairey's identity as the person who installed the posters. The prosecution appealed.

The Court of Appeals *held*:

To warrant a bindover, the prosecution must produce evidence that a crime was committed and that probable cause exists to believe that the charged defendant committed it. Probable cause is established if the evidence would persuade a careful and reasonable person to believe in the defendant's guilt. Evidence supporting that the defendant perpetrated the crime may be

circumstantial but must nevertheless demonstrate reasonable grounds to suspect the defendant's personal guilt. In this case, the prosecution presented no facts establishing when the illegal posters were installed or the length of time they had been present before the sergeant spotted them. The sergeant conceded that the artwork could have been on the walls long before her hunt for evidence implicating Fairey revealed them. Additionally, no witnesses saw Fairey post any illegal art during his sojourn in Detroit, and the prosecution brought forward no evidence that Fairey had an opportunity or the means to travel around the city tagging buildings while also working on the commissioned murals. Although the illegal art bore Fairey's signature imagery, Fairey's art easily could be purchased on the Internet. None of the illegal art was painted by hand; all were removable posters. Finally, Fairey's statements in the media might have been enough to convince a person of ordinary prudence and caution that Fairey *wanted* to tag some buildings while he was in Detroit, but a person of ordinary prudence and caution could not infer that Fairey carried out his veiled threats to tag absent any actual evidence linking Fairey to the acts of tagging. Accordingly, the district court abused its discretion in binding Fairey over for trial by failing to distinguish between a suspicion of guilt and a reasonable belief that Fairey was the person who committed the crime.

Affirmed.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Melvin Butch Hollowell*, Corporation Counsel, and *Sheri L. Whyte*, Senior Assistant Corporation Counsel and Special Assistant Prosecuting Attorney, for the people.

Walter J. Piszczatowski, *Bradley J. Friedman*, and *Rosemary Gordon Pánuco* for Frank Shepard Fairey.

Before: CAMERON, P.J., and FORT HOOD and GLEICHER, JJ.

GLEICHER, J. Frank Shepard Fairey is an internationally acclaimed artist best known for creating a red,

white, and blue poster of then presidential candidate Barack Obama, entitled *Hope*. Fairey launched his career by designing stickers that adorned skateboards and t-shirts. Over the years, his artistic repertoire expanded to include posters, prints, and larger works, including murals. Fairey's work combines elements of graffiti and pop culture; his themes often thumb a nose at authority and champion dissent. Anyone can buy Fairey's portable artworks (including posters and stickers) from his website, www.obeygiant.com.[1]

Fairey's signature image is a cartooned face that he has dubbed "Obey Giant." Fairey has boasted of his exploits in applying posters and stickers sporting Obey Giant in public places without the permission of the owners. See Schjeldahl, *Hope and Glory: A Shepard Fairey Moment*, The New Yorker (February 23, 2009), pp 79-80, available at <https://www.newyorker.com/magazine/2009/02/23/hope-and-glory> (accessed August 20, 2018). This activity is known as "tagging."

In 2015, Bedrock Properties hired Fairey to design and create three large murals on its downtown Detroit buildings. Fairey arrived in Detroit sometime in May of that year; the exact dates of his stay are unknown. Local media commemorated his visit with interviews and articles about Fairey's life and works. Detroit Police Sergeant Rebecca McKay watched a television interview that month in which Fairey was asked whether he would be "leaving anything behind uncommissioned" when he left the city. Fairey responded, "[Y]ou'll just have to keep your eyes peeled." A newspaper article quoted Fairey as saying: " 'I still do stuff on the street without permission. I'll be doing stuff on the street when I'm in Detroit.' " Stryker, *Street Artist Shepard Fairey Ready to Tag Detroit*, Detroit Free Press (May 16,

[1] https://perma.cc/AZV5-VY83.

2015), p 7A, available at <https://www.freep.com/story/entertainment/arts/2015/05/16/shepherd-fairey-detroit-mural/27459223/> (accessed August 20, 2018).

McKay did some Internet research about Fairey. She came across a 2013 YouTube video in which Fairey admitted to putting up posters in illegal locations (he never mentioned Detroit). The video offers aspiring taggers a blueprint of the process. On May 22, 2015, McKay went on a hunt for illegal art containing the Obey Giant or other Shepard Fairey-esque images. She found posters harboring the icon (or a related one, called "Misfit") in 14 places around the city, mostly abandoned buildings or bridge and railroad abutments.

McKay decided that Fairey must have put up the illegal posters while he was in town. She had no evidence linking him to the posters and readily admitted that she had no idea when the illegal posters were installed. In McKay's estimation, the fact that the posters included the Obey Giant image and that Fairey had threatened to "do stuff on the street without permission" while in Detroit meant that he was responsible for the tagging. An examining magistrate agreed and bound Fairey over for trial on one count of malicious destruction of a building, $20,000 or more, MCL 750.380(2)(a), and two counts of malicious destruction of property, bridges/railroads/locks, MCL 750.379.

The circuit court quashed the information and dismissed the charges, finding (among other things) that the prosecution failed to present evidence establishing Fairey's identity as the tagger. We agree, and affirm.

I. GUIDING LEGAL PRINCIPLES

At a preliminary examination, the prosecution must present evidence establishing that the defendant committed the charged offense, and the district court must

find that probable cause exists to bind over a defendant for trial. *People v Shami*, 501 Mich 243, 250-251; 912 NW2d 526 (2018). To satisfy this burden, the prosecution must present evidence of each and every element of the charged offense, or enough evidence from which an element may be inferred. *People v Seewald*, 499 Mich 111, 116; 879 NW2d 237 (2016). Identity is an essential element of every crime. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Accordingly, to warrant a bindover, the prosecution must produce evidence that a crime was committed and that probable cause exists to believe that the charged defendant committed it.

Probable cause is established if the evidence would persuade a careful and reasonable person to believe in the defendant's guilt. *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003). Evidence supporting that the defendant perpetrated the crime may be circumstantial, but must nevertheless demonstrate reasonable grounds to suspect the defendant's personal guilt. *People v Tower*, 215 Mich App 318, 320; 544 NW2d 752 (1996). The evidence considered must be legally admissible. *People v Walker*, 385 Mich 565, 575-576; 189 NW2d 234 (1971), overruled on other grounds by *People v Hall*, 435 Mich 599 (1990).

We review a district court's bindover decision for an abuse of discretion. *Seewald*, 499 Mich at 116. An abuse of discretion occurs when the district court's decision " 'falls outside the range of principled outcomes.' " *Id*., quoting *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 528; 872 NW2d 412 (2015).

II. ANALYSIS

The prosecution failed to establish probable cause that Fairey tagged the 14 buildings bearing the Obey Giant or other signature images.

We must review the evidence in the light most favorable to the prosecution, and we will assume that all of the prosecution's evidence was legally admissible. Even with the benefit of these presumptions, the prosecution failed to paint a picture suggesting that Fairey committed the crimes.

Several holes in the prosecution's evidentiary canvas doom its case. The prosecution presented no facts establishing when the illegal posters were installed or the length of time they had been present before McKay spotted them. McKay conceded that the artwork could have been on the walls long before her hunt for evidence implicating Fairey revealed them. No witnesses saw Fairey post any illegal artwork during his sojourn in Detroit, and the prosecution brought forward no evidence that Fairey had an opportunity or the means to travel around the city tagging buildings while also working on the commissioned murals. Although the prosecution makes much of the fact that the illegal art bore Fairey's signature imagery, McKay testified that the tags were all removable posters; the damage occasioned by their removal underlies the prosecutor's malicious-destruction charges. Proving that a piece of art was created by a particular artist usually requires expert testimony. See *Greenberg Gallery, Inc v Bauman*, 817 F Supp 167, 170-174 (D DC, 1993). That is not a significant concern here, though, because none of the tags were painted by hand and, as we have mentioned, Fairey's posters and stickers are easy to purchase on the Internet.

The district court judge gave short shrift to these evidentiary deficiencies and instead focused on Fairey's statements to the press. The judge declared that the media comments "all amount[] to one big fat admission."

Precisely what Fairely "admitted" in these interviews is difficult to discern. Telling an audience that "you'll just have to keep your eyes peeled" for illegal art and that he anticipated "do[ing] stuff on the street without permission" sounds like an artist playing a street-smart scoundrel. These statements might convince a person of ordinary prudence and caution that Fairey *wanted* to tag some buildings while he was in Detroit. What is missing is evidence that Fairey *did* tag the buildings.

In one of his best-known opinions, Justice Robert Jackson elegantly explained that a crime consists of a "concurrence of an evil-meaning mind with an evil-doing hand . . . ." *Morissette v United States*, 342 US 246, 251; 72 S Ct 240; 96 L Ed 288 (1952). A wrongful act is an essential element of the malicious-destruction-of-property crimes with which Fairey stands charged. It is not a crime to fantasize (even publicly) about putting up posters on property that does not belong to you. Vincent van Gogh said, "I dream of painting and then I paint my dream."[2] Fairey dreamed aloud, but no evidence exists that Fairey's hands painted his dreams or even touched the 14 tagged buildings.

The district court abused its discretion in binding Fairey over for trial by failing to distinguish between a *suspicion* of guilt and a *reasonable belief* that Fairey was the person who committed the crime. True, a district court may also rely on inferences to establish probable cause for a bindover. But a person of ordinary prudence and caution could not infer that Fairey carried out his veiled threats to tag absent any actual evidence linking Fairey to the acts of tagging. Mere

[2] *Vincent van Gogh: Paintings, Drawings, Quotes, and Biography* <https://www.vincentvangogh.org/> [https://perma.cc/WXA9-GJ9H].

suspicion is not the same as probable cause, and the record gives us nothing more. *People v Nunez*, 242 Mich App 610, 624; 619 NW2d 550 (2000) (O'CONNELL, J., concurring).

We affirm.

CAMERON, P.J., and FORT HOOD, J., concurred with GLEICHER, J.

In re BEERS/LeBEAU-BEERS

Docket Nos. 341100 and 341101. Submitted August 8, 2018, at Lansing. Decided September 11, 2018, at 9:00 a.m.

Respondent-mother's and respondent-father's parental rights to two minor children, TB and OL, were terminated in the Eaton Circuit Court, Family Division, by Thomas K. Byerley, J., under MCL 712A.19b(3)(c)(*i*) (conditions of adjudication continue to exist) and (g) (failure to provide proper care or custody). The Department of Health and Human Services (DHHS), driven by respondents' severe addiction to opiates, petitioned for the termination of respondents' parental rights to TB and OL. Respondent-mother was a member of the Cheyenne River Sioux Tribe of South Dakota (the tribe); therefore, TB and OL were Indian children under the federal Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*., and MCR 3.977(G). Respondent-father was not of Indian descent. He had signed an affidavit of parentage for TB but did not execute one for OL. Therefore, DHHS proceeded against respondent-father as OL's putative father. The court applied the heightened standards under ICWA and MIFPA that were necessary to terminate respondent-mother's parental rights to the children, but the court failed to apply the same standards to the termination of respondent-father's parental rights, ostensibly because he was not of Indian descent. In Docket No. 341100, respondent-father appeals as of right the termination of his parental rights to TB, but he expressly declined to challenge the termination order involving OL. In Docket No. 341101, respondent-mother appeals as of right the orders terminating her parental rights to both children. The cases were consolidated.

The Court of Appeals *held*:

1. Congress enacted ICWA to establish minimum federal standards for the removal of Indian children from their families in order to promote the stability and security of Indian tribes and families. MIFPA represents Michigan's standards for child welfare and adoption proceedings involving Indian children. Under 25 USC 1912(d) and MCL 712B.15(3), an Indian child cannot rightfully be removed from his or her Indian family unless clear

and convincing evidence shows that active efforts have been made to provide the child's parents with services and programs aimed at preventing the breakup of the Indian family and that these efforts have been unsuccessful. In addition, under 25 USC 1912(f) and MCL 712B.15(4), the parental rights of an Indian child's parent must not be terminated unless evidence beyond a reasonable doubt, including the testimony of an expert witness, shows that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. To terminate a parent's parental rights to an Indian child, at least one state statutory ground for termination must be proved by clear and convincing evidence. In this case, the trial court determined that petitioner had established that termination was proper under MCL 712A.19b(3)(c)(*i*) and (g) and that termination was in the children's best interests. The trial court did not, however, as it did concerning the respondent-mother's parental rights, apply ICWA or MIFPA protections to the proceedings involving the respondent-father. The trial court did note that respondent-father's housing situation was "totally unknown," that he last visited with TB approximately 10 months before the hearing, that he had done nothing to address his emotional instability, that he would disappear for long periods, that he had not participated in the offered services, and that he had not progressed with regard to his substance-abuse issues. Notwithstanding respondent-father's failures, respondent-father's parental rights should not have been terminated absent compliance with ICWA, MIFPA, and MCR 3.977(G), even though respondent-father himself is not of Indian descent, because TB is an Indian child and respondent-father is TB's biological parent. That is, ICWA, MIFPA, and MCR 3.977(G) must be applied whenever the *child* involved is of Indian descent, regardless of the individual parent's heritage.

2. Termination of the parental rights of a parent of an Indian child requires a court to find that active efforts at reunification had been taken and, according to 25 USC 1912(d) and (f), MCL 712B.15(3) and (4), and MCR 3.977(G), that the "continued custody" of the child by that parent would likely result in serious emotional or physical damage to the child. Because no court proceedings regarding custody had been initiated between respondents following TB's birth and execution of the affidavit of parentage, respondent-mother was treated under MCL 722.1006 as having sole physical and legal custody of TB. Although respondent-father had no custodial rights, the heightened standards of ICWA, MIFPA, and MCR 3.977(G) applied to respondent-father because, when the petition was filed, he had been living

with TB and TB's mother as a family unit. The instant case was distinguishable from *Adoptive Couple v Baby Girl*, 570 US 637 (2013), in which the Court ruled that the evidentiary requirement in 25 USC 1912(f)—damage to children as a result of continued custody—did not apply to a parent who had never had legal or physical custody of the Indian child because there was no custody to continue. In *Adoptive Couple*, the father had never spent any time with, cared for, or resided with the child. In contrast, respondent-father in the instant case lived with and cared for TB for the approximately three months between TB's birth and his removal from respondents' home. *In re SD*, 236 Mich App 240 (1999), was also distinguishable. In that case, the petitioner sought to terminate the non-Indian father's parental rights. He and the Indian mother had broken up before the petition against the father was filed, and no DHHS petition was filed against the mother. The mother continued living with the children after the breakup. Further, the father was not involved in the children's lives, and the father had sexually abused one child. *In re SD* did not apply in this case because the family in *In re SD* had already broken up by the time the termination proceedings were initiated, whereas in this case, the petition was authorized and reunification efforts began while respondents and TB were living together as an Indian family, which ended only upon TB's removal from the home. Under the particular facts of the instant case, the heightened standards for termination that appear in ICWA, MIFPA, and MCR 3.977(G) applied to respondent-father because he had, in practice, established a custodial relationship with the Indian child.

3. Generally, unpreserved claims of error in termination proceedings are reviewed for plain error. To avoid forfeiture under the plain-error rule, a respondent must establish that a clear or obvious error occurred that affected substantial rights, that is, that the error affected the outcome of the proceedings. The parties agreed that the trial court erred by failing to apply MIFPA and ICWA standards when determining whether to terminate his parental rights to TB. Notwithstanding the error, petitioner argued that the plain-error standard of review applied to the father's rights because respondent-father did not raise this issue in the trial court. However, petitioner's forfeiture argument was fatally flawed because under MCR 2.517(A)(7) respondent-father was not required to object to or otherwise challenge the trial court's ruling from the bench in order to preserve this issue for appeal. Accordingly, the order was conditionally reversed and

remanded for the trial court to address and resolve the issues that arose under ICWA and MIFPA, 25 USC 1912(d) and (f), and MCL 712B.15(3) and (4), respectively.

4. Termination of parental rights to an Indian child requires, among other things, that the petitioner present clear and convincing evidence that active efforts were made to provide services designed to prevent the breakup of an Indian family. Respondent-mother claimed that petitioner failed to provide the specific active efforts set forth in MCL 712B.3(a)(*i*), (*iv*), (*vi*), and (*x*), all of which involve the participation of the Indian child's tribe. Under MCL 712B.3(a), "active efforts" are actions to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and to reunify the Indian child with the Indian family. Active efforts require more than the standard reasonable-efforts approach. In this case, evidence showed that petitioner properly mailed notices of all hearings to the tribe but that the tribe did not initially confirm or deny tribal membership. A caseworker testified that she made phone contact with tribal caseworkers but that they initially seemed uninterested. Evidence also showed that petitioner offered or provided respondent-mother with a plethora of services and programs, including assessments, treatment, counseling, drug screens, substance abuse services, psychological evaluations, parenting time, in-home services, and various family programs. The qualified tribal expert witness testified that she had received reports and updates from petitioner and that she had been included in treatment plans, had been able to provide input for services, and had participated in family team meetings. However, the record revealed that respondent-mother was resistant to petitioner's efforts and did not cooperate or benefit from the services provided to her. There was clear and convincing evidence that petitioner had made active efforts to prevent the breakup of the Indian family, that the efforts were unsuccessful, and that termination was proper.

5. In addition to establishing that active efforts were made at reunification, petitioner must also have established by proof beyond a reasonable doubt, including the testimony of an expert witness, that respondent-mother's continued custody of TB and OL would likely result in serious emotional or physical damage to TB or OL. Respondent-mother's counselor testified that respondent-mother had been actively engaged in therapy, that she had been working through her communication issues, and that she had not used heroin for about a year. The trial court noted, however, that although a few things had changed for the

better—employment and housing, for example—other things had not undergone any appreciable change, especially substance abuse and emotional stability. In deciding to terminate respondent-mother's parental rights, the trial court considered (1) her failure to cooperate with and benefit from substance-abuse services, (2) her failure to acknowledge that she had a substance-abuse problem, (3) her resistance to therapy and the need for another 18 to 24 months of intensive therapy, (4) her failure to take personal responsibility for the fact that her children were in care, and (5) her missed parenting times. Finally, the trial court considered the tribal expert's testimony that the tribe's board of directors believed that it was in the children's best interests to terminate respondent-mother's parental rights. The trial court did not clearly err by concluding that proof beyond a reasonable doubt supported its finding that the children would likely suffer serious emotional or physical damage if they remained in respondent-mother's custody.

Docket No. 341101 affirmed. Docket No. 341100 conditionally reversed and remanded.

PARENT AND CHILD — INDIAN CHILD — TERMINATION OF PARENTAL RIGHTS — APPLICATION OF INDIAN CHILD WELFARE ACT AND MICHIGAN INDIAN FAMILY PRESERVATION ACT TO NON-INDIAN PARENT.

The heightened requirements for termination of parental rights to an Indian child are found in the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*., and MCR 3.977(G); the heightened requirements apply whenever the *child* is of Indian descent, without regard to whether the parent whose parental rights are at issue is of Indian descent.

Douglas R. Lloyd, Prosecuting Attorney, and *Brent E. Morton*, Senior Assistant Prosecuting Attorney, for the Department of Health and Human Services.

Stull & Associates (by *Robert K. Ochodnicky*) for respondent-father.

Farhat & Story, PC (by *Linda L. Widener*) for respondent-mother.

Before: MURPHY, P.J., and GLEICHER and LETICA, JJ.

MURPHY, P.J. The trial court terminated the parental rights of respondent-mother and respondent-father to the two minor children, TB and OL, under MCL 712A.19b(3)(c)(*i*) (conditions of adjudication continue to exist) and (g) (failure to provide proper care or custody).[1] The proceedings were driven by respondents' severe drug addictions, primarily involving the abuse of opiates. In these consolidated appeals, respondent-father appeals as of right the termination of his parental rights to TB in Docket No. 341100; he expressly declines to challenge the termination order as it pertains to OL. And in Docket No. 341101, respondent-mother appeals as of right the termination of her parental rights to both minor children. Respondent-mother is a member of the Cheyenne River Sioux Tribe of South Dakota (the tribe), and there is no dispute that TB and OL are Indian children for purposes of the federal Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*., and MCR 3.977(G). ICWA and MIFPA, along with MCR 3.977(G), set forth various procedural and substantive protections, mostly duplicative of each other, which are triggered when an Indian child is the subject of a child protective proceeding. These protections go beyond the burdens generally applicable to child protective proceedings. The trial court applied the appropriate heightened standards or burdens when terminating respondent-mother's parental rights, but it failed to apply them when terminating the parental rights of respondent-father, ostensibly because the Indian heritage of the children is solely through their mother's bloodline.

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[1] Respondents were not married and, with respect to OL, respondent-father did not execute an affidavit of parentage, so the case proceeded against him as OL's putative father. Respondent-father did sign an affidavit of parentage with regard to TB.

Respondent-father argues that ICWA and MIFPA standards govern the termination of his parental rights, considering that TB is his biological child *and* an Indian child, regardless of respondent-father's personal heritage. We agree and conditionally reverse the termination of respondent-father's parental rights to TB and remand for proceedings consistent with ICWA and MIFPA, as well as MCR 3.977(G).

Respondent-mother contends that the trial court erred by terminating her parental rights because petitioner, the Department of Health and Human Services (DHHS), and the tribe failed to make the required "active efforts" at preventing the breakup of her family and because the evidence did not establish beyond a reasonable doubt that her continued custody of TB and OL was likely to result in serious emotional or physical damage to the children. We disagree and affirm the trial court's ruling terminating respondent-mother's parental rights to the children.

I. TERMINATION OF PARENTAL RIGHTS—MICHIGAN LAW

A. GENERAL PRINCIPLES

Under Michigan law, if a trial court finds that a single statutory ground for termination of parental rights has been established by clear and convincing evidence and that it has also been proved by a preponderance of the evidence that termination of parental rights is in the best interests of a child, the court is required to terminate a respondent's parental rights to that child. MCL 712A.19b(3) and (5); *In re Beck*, 488 Mich 6, 10-11; 793 NW2d 562 (2010); *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013); *In re Ellis*, 294 Mich App 30, 32-33; 817 NW2d 111 (2011). The two statutory grounds implicated in this

case are MCL 712A.19b(3)(c)(*i*) and (g), which provide for termination under the following circumstances:

> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:
>
> (*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
>
> * * *
>
> (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.[2]

B. MIFPA AND THE MICHIGAN COURT RULE

In 2012, the Legislature enacted MIFPA, which was made effective January 2, 2013. See 2012 PA 565. "[T]he Legislature adopted MIFPA to establish state law standards for child welfare and adoption proceedings involving Indian children." *In re Williams*, 501 Mich 289, 298; 915 NW2d 328 (2018). MIFPA was designed to protect the best interests of Indian children, to promote the security and stability of Indian tribes and families, and to ensure that the DHHS

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[2] Pursuant to 2018 PA 58, effective June 12, 2018, Subsection (3)(g) now provides as follows:

> The parent, although, in the court's discretion, financially able to do so, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

employs practices that are in accord with ICWA, MIFPA itself, and other applicable law, the goal of which is to prevent removal of Indian children or, if removal is necessary, to place an Indian child in an environment that reflects the unique values of the child's tribal culture. MCL 712B.5(a) and (b); *Williams*, 501 Mich at 298. In child custody proceedings, and in consultation with an Indian child's tribe, these policy directives or goals must be considered when determining the best interests of the Indian child. MCL 712B.5. As part of MIFPA, MCL 712B.15 provides, in pertinent part:

> (3) A party seeking a termination of *parental* rights to an Indian child under state law must demonstrate to the court's satisfaction that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that the active efforts were unsuccessful.
>
> (4) No termination of *parental* rights may be ordered in a proceeding described in this section without a determination, supported by evidence beyond a reasonable doubt, including testimony of at least 1 qualified expert witness as described in section 17, that the continued custody of the Indian child by the *parent* or Indian custodian is likely to result in serious emotional or physical damage to the Indian child.[3] [Emphasis added.]

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[3] In *Williams*, 501 Mich at 300-302, our Supreme Court, citing MCL 712B.15(1) to (4), provided a summary of the heightened evidentiary and procedural burdens required of the state under MIFPA, observing:

> For example: (1) the state must give notice of the pending proceeding to the Indian tribe; (2) before removal or to continue removal, the state must prove by clear and convincing evidence that active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, that the active efforts were unsuccessful, and that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical

Respondent-father is alleging a violation of MCL 712B.15(3) and (4).[4] And MIFPA defines "parent" as "*any biological parent . . . of an Indian child* or any person who has lawfully adopted an Indian child . . . ." MCL 712B.3(s) (emphasis added). But "parent" "does not include the putative father if paternity has not been acknowledged or established." *Id*. With respect to TB, an Indian child, there is no dispute that respondent-father is a biological parent—he signed the affidavit of parentage regarding TB. See MCL 722.1003(1) ("If a child is born out of wedlock, a man is considered to be the natural father of that child if the man joins with the mother of the child and acknowledges that child as his child by completing a form that is an acknowledgment of parentage."). As reflected in the definition of "parent," even adoptive parents of an Indian child, regardless of the parents' heritage, enjoy the benefits of the heightened burdens that seek to protect Indian children from family disruptions.

The fact that a parent, as defined in MCL 712B.3(s), is afforded protection under MIFPA is further spelled out in MCL 712B.39, which provides:

> Any Indian child who is the subject of an action for foster care placement or termination of parental rights

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damage to the child; (3) when seeking termination, the state must demonstrate that active efforts were made to prevent the breakup of the Indian family and that the efforts were unsuccessful; and (4) any termination of parental rights must be supported by evidence beyond a reasonable doubt and by the testimony of at least one qualified expert who knows about the child-rearing practices of the Indian child's tribe.

[4] "We review de novo issues involving the interpretation and application of MIFPA." *In re Detmer*, 321 Mich App 49, 59; 910 NW2d 318 (2017). When construing a statute, our goal is to discern the intent of the Legislature, looking first to the language of the statute, and if the statutory language is clear and unambiguous, we must enforce it as written. *Id*. at 59-60.

> under state law, *any parent* or Indian custodian from whose custody an Indian child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate the action upon a showing that the action violated any provision of sections 7, 9, 11, 13, 15, 21, 23, 25, 27, and 29 of this chapter. [Emphasis added.]

As indicated earlier, respondent-father is alleging a violation of Subsections (3) and (4) of § 15 of MIFPA.

In addition to MIFPA, MCR 3.977, which is the court rule addressing the termination of parental rights, provides in Subrule (G):

> In addition to the required findings in this rule, *the parental rights of a parent of an Indian child must not be terminated unless*:
>
> (1) the court is satisfied that active efforts as defined in MCR 3.002 have been made to provide remedial service and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful, and
>
> (2) the court finds evidence beyond a reasonable doubt, including testimony of at least one qualified expert witness as described in MCL 712B.17, that parental rights should be terminated because continued custody of the child by the parent or Indian custodian will likely result in serious emotional or physical damage to the child. [Emphasis added.]

MCR 3.002 includes, in part, the definitions taken from MCL 712B.3, thereby reiterating that a "parent" is "any biological parent . . . of an Indian child . . . ." MCR 3.002(20).

The "active efforts" referred to in MIFPA and MCR 3.977(G)(1) must be proved by clear and convincing evidence. *In re England*, 314 Mich App 245, 258-259; 887 NW2d 10 (2016). "Active efforts" are defined as "actions to provide remedial services and rehabilitative

programs designed to prevent the breakup of the Indian family and to reunify the Indian child with the Indian family." MCL 712B.3(a); see also MCR 3.002(1). MIFPA and the court rule provide an extensive list of actions and efforts that must be undertaken by the state in order to satisfy the "active efforts" requirement. MCL 712B.3(a)(*i*) to (*xii*); MCR 3.002(1)(a) to (*l*). We also note that MIFPA requirements are in addition to the mandate that petitioner prove a statutory ground for termination by clear and convincing evidence. *England*, 314 Mich App at 253; see also MCR 3.977(G) ("*In addition to* the required findings in this rule, the parental rights of a parent of an Indian child must not be terminated unless . . . .") (emphasis added).

II. TERMINATION OF PARENTAL RIGHTS—FEDERAL LAW—ICWA

"In 1978, Congress enacted ICWA in response to growing concerns over 'abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.' " *In re Morris*, 491 Mich 81, 97-98; 815 NW2d 62 (2012), quoting *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 32; 109 S Ct 1597; 104 L Ed 2d 29 (1989). The United States Congress, in 25 USC 1902, stated:

> The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

Section 1912(d) of ICWA provides that "[a]ny party seeking . . . termination of parental rights to an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 USC 1912(d) (comma omitted). As with "active efforts" under MIFPA, "active efforts" for purposes of ICWA must also be proved by clear and convincing evidence. *England*, 314 Mich App at 258-259. Next, 25 USC 1912(f) provides that "[n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." Comparable to the definition of "parent" found in MCR 3.002(20) and § 3(s) of MIFPA, 25 USC 1903(9) defines "parent" as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom."

ICWA also has a provision similar to § 39 of MIFPA in 25 USC 1914:

> Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, *any parent* or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title. [Emphasis added.]

Finally, "in addition to finding that at least one state statutory ground for termination was proven by clear

and convincing evidence, the trial court must also make findings in compliance with ICWA before terminating parental rights." *In re Payne/Pumphrey/Fortson*, 311 Mich App 49, 58; 874 NW2d 205 (2015).

III. TERMINATION OF RESPONDENT-FATHER'S PARENTAL RIGHTS

At the close of the termination hearing, which respondent-father did not attend,[5] the trial court began its ruling from the bench by indicating that because the children are Indian children, it was required to apply a beyond-a-reasonable-doubt standard "to terminate the parental rights as to the mother." The court then noted that respondent-father "does not have any Native American heritage[.]" The trial court found that respondent-father had done nothing to perfect paternity with regard to OL, but the court did recognize him as TB's "legal father." The trial court further found, as to respondent-father, that his housing situation was "totally unknown," that his last visitation with TB was approximately 10 months earlier, that he had done nothing to address his emotional instability, that he would disappear for long periods, that he had not participated in services, and that he had not progressed with regard to his substance-abuse issues. Accordingly, the trial court determined that petitioner had established MCL 712A.19b(3)(c)(*i*) and (g) by clear and convincing evidence. The trial court then reviewed various best-interest factors and concluded that termination of respondent-father's parental rights was in the chil-

[5] Respondent-father was, however, represented by counsel at the termination hearing and throughout the lower-court proceedings. Respondent-father's attorney informed the court at the termination hearing that he last had "face-to-face contact" with respondent-father approximately a year before the hearing.

dren's best interests. The court did not apply any of the protections, burdens, or standards set forth in ICWA, MIFPA, and MCR 3.977(G).

The trial court entered an order terminating the parental rights of both respondents to the two children. The order, on a standard court form, had boxes checked indicating that the children were Indian children, that there existed clear and convincing evidence of a statutory basis for termination, and that termination of parental rights was in the best interests of the children. Another checked box on the order provided:

> Active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. These efforts have proved unsuccessful and **there is** evidence beyond a reasonable doubt, including qualified expert witness testimony, that continued custody of the child(ren) by the parent(s) or Indian custodian will likely result in serious emotional or physical damage to the child(ren).

The trial court made no such ruling from the bench in relation to respondent-father, and it is clear that this provision in the order applied solely to respondent-mother, especially considering that the court had also checked the box regarding the generally applicable "reasonable efforts" language, presumably in reference to respondent-father.

On appeal, respondent-father argues that the trial court erred by failing to apply MIFPA and ICWA standards when assessing whether to terminate his parental rights to TB. More specifically, respondent-father claims a violation of the "active efforts" and "beyond a reasonable doubt" provisions of MIFPA, respectively MCL 712B.15(3) and (4), and those same provisions in ICWA, respectively 25 USC 1912(d) and

(f).[6] Petitioner concedes that the trial court was required to apply MIFPA and ICWA burdens and protections with respect to respondent-father and failed to do so. Petitioner, however, urges us to affirm the termination of respondent-father's parental rights under plain-error review. Petitioner contends that respondent-father's argument is "nothing more than an appellate after-thought" and "[a] means to raise a technical violation in an attempt to obtain a result that [respondent-father] has done nothing to earn." Petitioner further maintains that even if the trial court had considered respondent-father's efforts, which were essentially nonexistent, under the enhanced ICWA and MIFPA burdens, his "parental rights still would have been properly terminated." While we are somewhat sympathetic to petitioner's sentiments, considering the record of respondent-father's noninvolvement, we cannot oblige petitioner.

Because TB is an Indian child and respondent-father is TB's biological parent, we hold that respondent-father's parental rights should not have been terminated absent compliance with MIFPA, ICWA, and MCR 3.977(G), even though respondent-father himself is not of Indian descent. 25 USC 1903(9); 25 USC 1912(d) and (f); MCL 712B.3(s); MCL 712B.15(3) and (4); MCR 3.002(20); MCR 3.977(G).[7]

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[6] Respondent-father does not argue that the trial court erred by finding that clear and convincing evidence established the statutory grounds for termination under MCL 712A.19b(3)(c)(*i*) and (g). We also note that respondent-father does not raise an issue concerning the adjudicative phase of the proceedings, when in December 2015 he entered a plea of admission to the allegations in the DHHS's petition.

[7] We are not aware of any published opinion that has expressly held that the demands of ICWA, MIFPA, and MCR 3.977(G) govern termination of the parental rights of a non-Indian, biological parent of an Indian child. However, the principle can be implied from the existing caselaw. See, e.g., *In re Jones*, 316 Mich App 110; 894 NW2d 54 (2016)

Accordingly, the trial court erred by terminating respondent-father's parental rights to TB. However, before addressing petitioner's plain-error argument and the proper remedy for the error, it is incumbent on us to address an issue not raised by the parties.

When respondents signed the affidavit of parentage, respondent-mother, by operation of MCL 722.1006, received legal and physical custody of TB. *Sims v Verbrugge*, 322 Mich App 205, 214; 911 NW2d 233 (2017). MCL 722.1006 provides:

> After a mother and father sign an acknowledgment of parentage, the mother has initial custody of the minor child, without prejudice to the determination of either parent's custodial rights, until otherwise determined by the court or otherwise agreed upon by the parties in writing and acknowledged by the court. This grant of initial custody to the mother shall not, by itself, affect the rights of either parent in a proceeding to seek a court order for custody or parenting time.

TB was born on August 14, 2015, and respondents executed the affidavit of parentage on August 15th. TB remained in the hospital until August 24th, the day on which the DHHS filed its petition requesting that the court take jurisdiction of TB, although it was "recommended that the child remain in the home with [his] parents" and the court followed the recommendation. With petitioner providing a variety of services, respondent-mother, respondent-father, and TB lived together as a family unit. The trial court authorized TB's removal from the home on November 13, 2015. Subsequent hearings in November and December 2015, as well as in January 2016, revealed that respon-

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(conditionally reversing termination as to the mother because of the failure to notify the tribe to which the child might belong, even though the possible Indian heritage was through the father alone).

dents still resided together and were a couple. Because no court proceedings regarding custody had been initiated between respondent-father and respondent-mother, following TB's birth and the execution of the affidavit of parentage, respondent-mother was treated under the law as having sole physical and legal custody of TB. Respondent-father had no custodial rights, despite physically residing with the child for approximately three months.

As indicated earlier, 25 USC 1912(f) provides that

> [n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the *continued custody* of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. [Emphasis added.]

MIFPA, specifically MCL 712B.15(4), and MCR 3.977(G)(2) have the same "continued custody" language. The question that we raise sua sponte is whether the heightened standards of ICWA, MIFPA, and MCR 3.977(G) should apply to the termination of respondent-father's parental rights when he never had legal or physical custody rights with regard to TB.

In *Adoptive Couple v Baby Girl*, 570 US 637; 133 S Ct 2552; 186 L Ed 2d 729 (2013), the United States Supreme Court addressed a situation in which a child was conceived by an unwed couple, and the father was of Indian heritage. The couple separated before the child's birth, and the mother decided before the birth to place the child up for adoption. *Id*. at 643. A prospective adoptive couple emotionally and financially supported the mother during her pregnancy, and the father did not provide any support. *Id*. at 644. Four months after the child's birth, the prospective adoptive couple

served the father with notice of the pending adoption, and the father executed papers indicating that he would not contest the adoption, although he later claimed that he believed that he was relinquishing his rights in favor of the mother, not the prospective adoptive couple. *Id*. at 644-645. During the adoption proceedings, the father, whose paternity had been confirmed by biological testing, challenged the adoption and sought custody of the child. *Id*. at 645. The family court in South Carolina determined that the prospective adoptive couple did not satisfy the heightened burden under 25 USC 1912(f) of establishing beyond a reasonable doubt that the child would suffer serious emotional or physical damage if the father were given custody. *Id*. The adoption petition was denied, the father was awarded custody and, at the age of 27 months, the child was handed over to the father, whom the child had never met. *Id*. The case made its way to the United States Supreme Court, which held that neither 25 USC 1912(f) nor 25 USC 1912(d) (active efforts) barred termination of the father's parental rights. *Id*. at 656.

The Court ruled that the phrase "continued custody" necessarily envisions a situation in which a parent, who is a party to child protective proceedings, has custody of an Indian child or had custody of an Indian child at some point before the proceedings were initiated. *Id*. at 648. According to the Court, § 1912(f) is not applicable when a parent never had custody of an Indian child because there is no custody to continue. *Id*. The Court held that "when, as here, the adoption of an Indian child is voluntarily and lawfully initiated by a non-Indian parent *with sole custodial rights*, the ICWA's primary goal of preventing the unwarranted removal of Indian children and the dissolution of

Indian families is not implicated." *Id*. at 649 (emphasis added). Moving on to the "active efforts" provision, § 1912(d), the Court held:

> Consistent with the statutory text, we hold that § 1912(d) applies only in cases where an Indian family's "breakup" would be precipitated by the termination of the parent's rights. The term "breakup" refers in this context to the discontinuance of a relationship . . . or an ending as an effective entity . . . . But when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody, there is no "relationship" that would be discontinued—and no effective entity that would be ended—by the termination of the Indian parent's rights. In such a situation, the "breakup of the Indian family" has long since occurred, and § 1912(d) is inapplicable. [*Adoptive Couple*, 570 US at 651-652 (some quotation marks, citations, and brackets omitted).]

The Court observed that the various provisions in § 1912 "strongly suggest[] that the phrase 'breakup of the Indian family' should be read in harmony with the 'continued custody' requirement." *Id*. at 652.

Justice Alito wrote the majority opinion, and he was joined by two justices who wrote separate concurrences and two justices who did not write separately; there were four dissenting justices. Justice Thomas concurred in "the Court's opinion in full but wr[o]te separately to explain why constitutional avoidance compels [the] outcome." *Id*. at 656 (Thomas, J., concurring). He opined that "the Constitution does not grant Congress power to override state law whenever that law happens to be applied to Indians"; therefore, "application of the ICWA to these child custody proceedings would be unconstitutional." *Id*. at 666. But Justice Thomas concurred with the outcome "[b]ecause the Court's plausible interpretation of the relevant sec-

tions of the ICWA avoids these constitutional problems." The other concurrence, by Justice Breyer, provided, in full, as follows:

> I join the Court's opinion with three observations. First, the statute does not directly explain how to treat an absentee Indian father who had next-to-no involvement with his child in the first few months of her life. That category of fathers may include some who would prove highly unsuitable parents, some who would be suitable, and a range of others in between. Most of those who fall within that category seem to fall outside the scope of the language of 25 U.S.C. §§ 1912(d) and (f). Thus, while I agree that the better reading of the statute is, as the majority concludes, to exclude most of those fathers, I also understand the risk that, from a policy perspective, the Court's interpretation could prove to exclude too many.
>
> Second, we should decide here no more than is necessary. Thus, this case does not involve a father with visitation rights or a father who has paid all of his child support obligations. Neither does it involve special circumstances such as a father who was deceived about the existence of the child or a father who was prevented from supporting his child. The Court need not, and in my view does not, now decide whether or how §§ 1912(d) and (f) apply where those circumstances are present.
>
> Third, other statutory provisions not now before us may nonetheless prove relevant in cases of this kind. Section 1915(a) grants an adoptive "preference" to "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families . . . in the absence of good cause to the contrary." Further, § 1915(c) allows the "Indian child's tribe" to "establish a different order of preference by resolution." Could these provisions allow an absentee father to reenter the special statutory order of preference with support from the tribe, and subject to a court's consideration of "good cause"? I raise, but do not here try to answer, the question. [*Adoptive Couple*, 570 US at 666-667 (Breyer, J., concurring) (some quotation marks omitted; citations omitted).]

This concurrence essentially indicates that, for purposes of the case then before the Court, the "continuing custody" analysis by Justice Alito was fine, but there may be other cases in which it would not be.

Given the equivocal nature of Justice Breyer's concurrence, it cannot truly be said that a majority of the United States Supreme Court created an inflexible rule for purposes of the "continuing custody" analysis under § 1912(f), as well as the analysis under § 1912(d). And even assuming the contrary, it certainly is not clear whether the Supreme Court would impose the rule based solely on whether a parent had physical custody, in the strictest sense of the term under the law, where a custodial-like environment existed on a practical level absent any technical custodial rights.[8] The father in *Adoptive Couple* did not have legal or physical custody of the child; the mother had sole legal and physical custody, *and* the father had never spent any time with, cared for, or resided with the child. The Court found that the father "never had *physical* custody of" the child. *Adoptive Couple*, 570 US at 650. Nor did the father have "*legal* custody," given that South Carolina law provided, " 'Unless the court orders otherwise, the custody of an illegitimate child is solely in the natural mother . . . .' " *Id*., quoting S.C. Code Ann § 63-17-20(B) (2010). The Court's reference to "physical" custody did not suggest that the Court equated physical custody only to custody that arises by operation of law or court order, as opposed to a scenario

[8] For example, if the father and mother of an Indian child were unwed but lived together for years as a family despite the mother having sole legal and physical custody of the child by operation of law or court order, we cannot imagine the Supreme Court holding that the father, especially if he had Indian heritage, could have his parental rights terminated without application of heightened burdens merely because he did not have legal or physical custody rights under the law.

in which a parent simply provides a custodial environment for a child.

We hold that under the particular facts of the instant case—which are entirely dissimilar to those in *Adoptive Couple*, in which the father effectively abandoned the child from birth and even in utero—the beyond-a-reasonable-doubt standard applied to the termination of respondent-father's parental rights, although he never had legal or physical custody rights as those terms are legally employed. When DHHS's petition was filed in August 2015 and for a period thereafter, respondent-father, respondent-mother, and TB lived together as a family unit and respondent-father provided some care for and shared custody of TB. And petitioner was providing reunification services. The family unit dissolved only when TB was removed by court order, although respondents remained together. The removal of TB discontinued the custodial arrangement that had existed with respect to both respondents and TB—if not in law, in practice.

We also note that, as alluded to earlier, MCL 722.1006 provides that "[a]fter a mother and father sign an acknowledgment of parentage, the mother has initial custody of the minor child, *without prejudice to the determination of either parent's custodial rights* . . . ." (Emphasis added.) Allowing the operation of MCL 722.1006 to negate the protections of ICWA, MIFPA, and MCR 3.977(G) in cases in which the father of an Indian child is providing or has provided care and custody for the Indian child, absent legally recognized custodial rights, could certainly be viewed as being prejudicial to the father's custodial rights.

In assessing the impact of *Adoptive Couple*, our reasoning in rejecting application of the Supreme Court's "continuing custody" analysis to the particular

facts of this case applies equally to the state and federal "active efforts" provisions. There was an existing intact Indian family and an existing relationship between respondent-father and TB when petitioner intervened for the protection of TB, began providing services, and then removed TB by court order. The breakup of the Indian family had not yet occurred when the petition was filed and TB was removed. But we must go one step further and examine this Court's opinion in *In re SD*, 236 Mich App 240; 599 NW2d 772 (1999). There, this Court addressed a situation in which the non-Indian father and the Indian mother of the Indian children had separated, the children were residing with their mother, the father was not involved in the children's lives, and he had sexually abused one child. The mother was not the subject of any DHHS petition. This Court accepted that the state had to prove beyond a reasonable doubt that custody of the children by the father would likely result in damage to the children, and it also determined that active efforts to provide services to the father to prevent the breakup of the Indian family under ICWA were unnecessary. *Id*. at 244-246.

The panel reasoned that "the family had already broken up by the time the termination proceedings were initiated" and that an "Indian family" was not being broken up because the children's mother was the parent with the Indian heritage, and she remained with the children. *Id*. at 244-245. As with *Adoptive Couple*, we conclude that *In re SD* is factually distinguishable from the instant case. Here, a petition for jurisdiction had been authorized, and the DHHS commenced providing reunification services while respondents and TB were living together as an Indian family, which ended only when TB was removed from the home at petitioner's behest. Both respondents were subject to parallel protective proceedings, their paren-

tal rights were terminated at the same time, and respondent-mother did not remain with TB as an intact Indian family. Thus, *In re SD* is inapplicable.

We now address petitioner's plain-error argument and the issue of the proper remedy. Generally speaking, in termination proceedings, we review unpreserved claims under the plain-error rule. *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011); *In re Utrera*, 281 Mich App 1, 8-9; 761 NW2d 253 (2008). To avoid forfeiture under the plain-error rule, the proponent must establish that a clear or obvious error occurred and that the error affected substantial rights. *VanDalen*, 293 Mich App at 135. "[A]n error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *Utrera*, 281 Mich App at 9. The fatal flaw in petitioner's plain-error argument is that respondent-father was not required to object to or otherwise challenge the trial court's ruling from the bench in order to preserve the issues for appeal. See MCR 2.517(A)(7) (addressing findings in a bench trial and stating that "[n]o exception need be taken to a finding or decision"). Moreover, were we to apply a plain-error analysis, we would effectively have to conclude that active efforts at reunification were demonstrated relative to respondent-father and that there was evidence beyond a reasonable doubt that respondent-father's custody of TB would likely result in serious emotional or physical damage to TB. 25 USC 1912(d) and (f); MCL 712B.15(3) and (4); MCR 3.977(G). These criteria were not examined and the standards were not employed by the trial court, and we would be in danger of engaging in improper appellate fact-finding if we attempted to decide the matters on the basis of the existing record. See *People v Thompson*, 314 Mich App 703, 712 n 5; 887 NW2d 650 (2016).

Respondent-father seeks reversal of the trial court's termination order and remand of the case for entry of an order releasing TB to respondent-father, or at least awarding respondent-father parenting time and additional services. We hold that the proper remedy in this case is to conditionally reverse the order terminating respondent-father's parental rights to TB and remand the case for the trial court to address and resolve the issues regarding active efforts and the potential of serious emotional or physical damage to TB if custody continued with respondent-father, as analyzed under the beyond-a-reasonable-doubt standard. See *In re McCarrick/Lamoreaux*, 307 Mich App 436, 469; 861 NW2d 303 (2014) ("We conditionally reverse and remand for the trial court to determine whether McCarrick's continued custody would result in serious emotional or physical damage to the children."). Stated otherwise, we reverse and remand to the trial court for compliance with 25 USC 1912(d) and (f), MCL 712B.15(3) and (4), and MCR 3.977(G). Given the record regarding respondent-father, there clearly could be a risk of harm or danger to TB were we to order the trial court to release TB to respondent-father. See *McCarrick/Lamoreaux*, 307 Mich App at 469 ("[W]e decline to automatically reverse the trial court's order in this case because doing so could place the child in danger . . . ."). The trial court is of course free to enter any interim orders pending the trial court's compliance with this opinion.

IV. TERMINATION OF RESPONDENT-MOTHER'S PARENTAL RIGHTS

Respondent-mother argues that petitioner failed to present clear and convincing evidence that active efforts were made to provide services designed to prevent the breakup of her Indian family. She contends that peti-

tioner did not utilize resources available through the tribe or otherwise engage the tribe in the case until 15 months after the original petition was filed. Respondent-mother complains that the tribe took a passive role in the proceedings. She further maintains that petitioner failed to provide "active efforts" under the definitional requirements set forth in MCL 712B.3(a)(*i*), (*iv*), (*vi*), and (*ix*).[9] Respondent-mother argues that there was no evidence that petitioner did anything more than make "reasonable efforts" at reunification, thereby failing to satisfy the heightened "active efforts" burden.

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[9] Under MCL 712B.3(a), "active efforts" include the following:

> (*i*) Engaging the Indian child, child's parents, tribe, extended family members, and individual Indian caregivers through the utilization of culturally appropriate services and in collaboration with the parent or child's Indian tribes and Indian social services agencies.
>
> * * *
>
> (*iv*) Requesting representatives designated by the Indian child's tribe with substantial knowledge of the prevailing social and cultural standards and child rearing practice within the tribal community to evaluate the circumstances of the Indian child's family and to assist in developing a case plan that uses the resources of the Indian tribe and Indian community, including traditional and customary support, actions, and services, to address those circumstances.
>
> * * *
>
> (*vi*) Identifying, notifying, and inviting representatives of the Indian child's tribe to participate in all aspects of the Indian child custody proceeding at the earliest possible point in the proceeding and actively soliciting the tribe's advice throughout the proceeding.
>
> * * *
>
> (*ix*) Offering and employing all available family preservation strategies and requesting the involvement of the Indian child's tribe to identify those strategies and to ensure that those strategies are culturally appropriate to the Indian child's tribe.

For purposes of ICWA and MIFPA, active efforts must be proved by clear and convincing evidence. *England*, 314 Mich App at 258-259. The factual findings by the trial court are reviewed for clear error, and any issue regarding the interpretation and application of the relevant federal and state statutory provisions is reviewed de novo. *In re Johnson*, 305 Mich App 328, 331; 852 NW2d 224 (2014). As observed earlier, "active efforts" are defined as "actions to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and to reunify the Indian child with the Indian family." MCL 712B.3(a); see also MCR 3.002(1). "Active efforts" require affirmative, as opposed to passive, efforts, and "active efforts" require more than the standard "reasonable efforts" approach. *In re JL*, 483 Mich 300, 321; 770 NW2d 853 (2009). "Active efforts require more than a referral to a service without actively engaging the Indian child and family." MCL 712B.3(a); MCR 3.002(1). "Active efforts" involve a caseworker who takes a client through the steps of a treatment plan rather than requiring the client to perform the plan on his or her own. *In re JL*, 483 Mich at 321.

Respondent-mother acknowledges that petitioner mailed notices of all hearings to the tribe, but she argues that there is no evidence that petitioner made meaningful efforts to involve the tribe. There is no dispute that petitioner provided proper notice to the tribe and that the tribe did not initially confirm or deny tribal membership. Nonetheless, notices of every hearing and copies of the petitions and reports were provided to the tribe. A Michigan caseworker assigned to respondent-mother's case testified that she made phone contact with tribal caseworkers, but they initially seemed uninterested. However, once the tribe expressed its intent to intervene, petitioner withdrew

the termination petition, and the tribe participated in all subsequent hearings by telephone.

Evidence was presented that petitioner offered or provided respondent-mother with assessments, treatment, counseling, drug screens, and services related to her substance abuse issues.[10] Psychological evaluations, therapy, parenting time, in-home services, and various family programs were also offered or provided. Family team meetings were held to address respondent-mother's barriers to reunification and to assist her in complying with court orders. The qualified expert witness from the tribe who was assigned to the case testified that she had received reports and updates from petitioner, that she had been included in treatment plans, that she had been able to provide input for services, and that she had participated in family team meetings. The tribal expert additionally testified that while the tribe itself did not have many services available, those services appropriate to the situation were offered to respondent-mother, but she failed to contact the tribe to take advantage of the services. The record reveals that respondent-mother was resistant to petitioner's efforts and did not cooperate or benefit from the services that were provided to her. She refused to acknowledge that she had a drug problem. The tribal expert testified that she could not think of any relevant service that had not been offered to respondent-mother and, in the expert's opinion, "active efforts" had been made to reunite respondent-mother with her children.

In light of this evidence, respondent-mother's argument that petitioner failed to make the requisite active efforts is unavailing. The trial court did not clearly err

[10] TB had tested positive for various opiates and benzodiazepines at birth.

by finding that there was clear and convincing evidence that active efforts were made to prevent the breakup of the Indian family and that the efforts were unsuccessful.

Respondent-mother next argues that the trial court erred by terminating her parental rights when the evidence did not support a finding beyond a reasonable doubt that her custody of the children would likely result in serious emotional or physical damage to them. On the basis of her previous argument that petitioner failed to make "active efforts" to prevent the breakup of the family, respondent-mother contends that the evidence presented by petitioner did not amount to proof beyond a reasonable doubt. Her appellate brief again discusses the purported lack of services provided to her. As already held, the "active efforts" argument lacks merit. Respondent-mother further maintains that the evidence was insufficient to meet the high evidentiary burden because her current counselor testified at the termination hearing that respondent-mother was actively engaged in therapy and was working through her communication issues[11] and because respondent-mother had been off of heroin for about a year.

The trial court concluded that the evidence, which included the testimony of the tribal expert, established beyond a reasonable doubt that continued custody of the children with respondent-mother would likely result in serious emotional or physical damage to the children. The trial court explained:

> [F]rom the things that I've summarized in this case, based on emotional stability and substance abuse factors, that the efforts that have been provided and offered have not made any appreciable change other than some

[11] The counselor had met with respondent-mother for seven sessions.

> changes regarding employment, which has been great, and housing, which has been great, but as far [as] underlying issues, which are substance abuse and emotional stability, those just have not changed to any great degree.

The factors considered by the trial court included (1) respondent-mother's failure to cooperate with and benefit from services designed to address her substance abuse, (2) her failure to acknowledge that she had a substance-abuse problem, (3) her resistance to therapy and the need for another 18 to 24 months of intensive therapy to address her emotional instability, (4) her failure to take personal responsibility for her children being in care, and (5) her missed parenting times. The trial court also considered the tribal expert's testimony that the tribe's board of directors believed that it was in the best interests of the children to terminate respondent-mother's parental rights. In light of the tribal expert's testimony and the other evidence presented at the hearing, we cannot conclude that the trial court clearly erred by finding beyond a reasonable doubt that custody of the children by respondent-mother would likely result in serious emotional or physical damage to them. 25 USC 1912(f); MCL 712B.15(4); MCR 3.977(G)(2).

V. CONCLUSION

In summary, in Docket No. 341100, respondent-father argues that ICWA and MIFPA standards govern the termination of his parental rights considering that TB is his biological child and is an Indian child, regardless of respondent-father's personal heritage. We agree. Therefore, we conditionally reverse the termination of respondent-father's parental rights to TB and remand for proceedings consistent with ICWA and MIFPA, as well as MCR 3.977(G). In Docket No.

341101, respondent-mother contends that the trial court erred by terminating her parental rights because petitioner and the tribe failed to make the required active efforts at preventing the breakup of her family. Respondent-mother also asserts that the evidence did not establish beyond a reasonable doubt that her continued custody of TB and OL was likely to result in serious emotional or physical damage to the children. We disagree. Therefore, we affirm the trial court's ruling terminating respondent-mother's parental rights to the children.

Docket No. 341101 affirmed, and Docket No. 341100 conditionally reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

GLEICHER and LETICA, JJ., concurred with MURPHY, P.J.

MAURER v FREMONT INSURANCE COMPANY

Docket No. 336514. Submitted February 9, 2018, at Detroit. Decided September 18, 2018, at 9:00 a.m.

Dale Maurer, as conservator for his wife, Rachel A. Maurer, brought this action in the Tuscola Circuit Court against defendant, Fremont Insurance Company, for payment of personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*., after Rachel was catastrophically injured in a motor vehicle accident in 2012 while using her vehicle to deliver mail as a part-time relief driver for the United States Postal Service. According to Dale, when he initially purchased the insurance policy for Rachel's vehicle from an agent in 2006, he noted that the agent had incorrectly indicated on the application that the vehicle was not used for business, including mail delivery, but when he told the agent that Rachel did occasionally use the vehicle in this manner, the agent responded that it was unnecessary to change the application. Dale accepted automatic renewal of this policy by continuing to pay the premiums when he received renewal notices. Dale testified that in early 2012, when he informed the insurance agent that Rachel had purchased a different vehicle, he again told the agent that this vehicle would occasionally be used to deliver mail. In 2014, nearly two years after the accident, Fremont advised Dale that it was rescinding the policy retroactively to 2006 because of this misrepresentation in the application and that it therefore had no obligation to pay for any of Rachel's medical treatment, replacement services, or wage loss related to the accident. Dale sought a declaratory judgment stating that Rachel was entitled to PIP benefits from Fremont, and Fremont filed a counterclaim for rescission. The parties filed competing motions for summary disposition, and the trial court, Amy Gierhart, J., ruled in Dale's favor, having determined that Fremont's rescission claim was not filed within the statutory period of limitations indicated in MCL 600.5813 and that the innocent-third-party doctrine prevented Fremont from withdrawing insurance coverage from Rachel because she had not participated in the fraud. However, the innocent-third-party doctrine had been abrogated in *Bazzi v Sentinel Ins Co*, 315 Mich App 763, 781 (2016) (*Bazzi I*), rev'd in part by *Bazzi v Sentinel Ins*

Co, 502 Mich 390 (2018) (*Bazzi II*). In light of *Bazzi I*'s holding, the trial court allowed Fremont to file a delayed motion for reconsideration. At the same time, Fremont also filed an untimely motion to amend its affirmative defenses to add a claim alleging that plaintiff was not entitled to coverage under MCL 500.3113(b) because Dale purchased the policy and Rachel was the vehicle's titleholder and registrant. The parties again filed competing motions for summary disposition, and the trial court again granted summary disposition to plaintiff. The trial court denied for lack of merit Fremont's motion to amend its affirmative defenses. Fremont appealed.

The Court of Appeals *held*:

1. The trial court did not err by granting Dale's motion for summary disposition. Claims of fraud are governed by the six-year limitations period in MCL 600.5813. According to MCL 600.5827, a claim generally accrues at the time the wrong on which the claim is based was done without regard to the time damage results. Dale argued that Fremont's counterclaim for rescission was barred by the statute of limitations because the claim arose in 2006 when he first completed the application for insurance. In its response to Dale's motion for summary disposition, Fremont argued, contrary to its letter of rescission, that rescission was based on Dale's failure to advise Fremont of the business use of Rachel's vehicle when the policy renewed in 2012. However, the declaration sheet accompanying the 2012 policy renewal unambiguously directed the policyholder to provide notice to the insured's *agent*, not to Fremont, of any error or change concerning coverage. Therefore, Dale fulfilled his contractual obligation when he again advised the agent in 2012 that Rachel used the vehicle to deliver mail, and Fremont did not contest Dale's testimony that he had advised his agent of the car's use. Accordingly, because the wrong on which Fremont's claim rested was Dale's submission of the initial application that contained a misrepresentation, Fremont's claim accrued in 2006, and its counterclaim for rescission was untimely.

2. MCL 500.3101(1) states that the owner or the registrant of a motor vehicle required to be registered in Michigan shall maintain security for payment of no-fault insurance benefits on the vehicle. MCL 500.3113(b) states that a person is not entitled to be paid PIP benefits for accidental bodily injury if at the time of the accident the person was the owner or the registrant of a motor vehicle involved in the accident and the vehicle was without the security required by MCL 500.3101(1). Fremont filed an untimely motion to amend its affirmative defenses to include

the argument that Rachel was not entitled to coverage under MCL 500.3113(b) because she was the owner and registrant of the vehicle but Dale was the policyholder. However, in *Iqbal v Bristol West Ins Group*, 278 Mich App 31 (2008), the Court applied the last-antecedent rule to the plain language of MCL 500.3113(b) and held that, for purposes of determining whether the security required by MCL 500.3101 was in effect, the critical question was whether the *vehicle* was insured, not whether the owner or registrant of the vehicle had purchased the insurance policy. Therefore, the trial court properly denied Fremont's motion to amend its affirmative defenses in this respect.

Affirmed.

JANSEN, J., dissenting, would have reversed the trial court's ruling denying Fremont's motion for summary disposition and its motion to amend its affirmative defenses and would also have reversed the trial court's grant of Dale's motion for summary disposition. When Dale renewed his no-fault policy with Fremont in September 2012, he effectively entered into a new, separate, and distinct contract. Because Dale's assertions in the renewal contract materially misrepresented the use and driver of the vehicle at issue, Fremont was entitled to rescind the policy, and Fremont had six years from September 2012 in which to do so. Therefore, Fremont's counterclaim for rescission was timely filed on January 5, 2015, and the trial court erred by ruling otherwise. Judge JANSEN would also have held that the trial court abused its discretion when it denied Fremont's motion to amend its affirmative defenses to include a defense that Dale's claim was barred by MCL 500.3113(b). An individual is excluded from receiving PIP benefits if at the time of the accident that person was the owner or registrant of an involved motor vehicle for which the security required was not in effect. Dale obtained no-fault insurance for the car, but he was not the owner or registrant of the vehicle. The sole titleholder and registrant was Rachel. Therefore, the vehicle driven by Rachel was not covered by the required security because Rachel did not obtain the insurance as MCL 500.3101(1) prescribes. As a result, Rachel was barred from recovering PIP benefits from Fremont. Finally, the three equitable defenses raised by Dale—laches, the innocent-third-party doctrine, and the availability of an adequate remedy at law—were not persuasive.

1. STATUTE OF LIMITATIONS — CONTRACTS INVOLVING FRAUD — WHEN A CLAIM ARISES — RENEWAL CONTRACTS.

A motion to rescind a contract on the basis of fraud must be brought within the six-year period of limitations prescribed by

MCL 600.5813; under MCL 600.5827, a claim generally accrues at the time the wrong on which the claim is based was done without regard to the time damage results; when there is an initial contract and a renewal contract and rescission of the contract is sought because of a wrong committed at the time the initial contract was executed, the claim accrued at the time of the initial execution—and the statutory period of limitations began to run at that time—even if the wrong continued at the time the contract was renewed.

2. INSURANCE — NO-FAULT AUTOMOBILE INSURANCE — REQUIRED SECURITY FOR A VEHICLE — WHO MUST PURCHASE THE POLICY.

Whether a vehicle is insured pursuant to MCL 500.3101(1) is the critical question when determining whether an individual injured in an accident involving that vehicle may receive personal protection insurance (PIP) benefits; a vehicle is insured, and the vehicle's titleholder or registrant is entitled to PIP benefits, whenever the vehicle is covered by a valid no-fault insurance policy, regardless of who purchased the policy; that is, the titleholder or the registrant may receive PIP benefits when injured in an accident involving the insured vehicle, even when the titleholder or the registrant is not the named policyholder.

Law Offices of Robert June, PC (by *Robert B. June*) for plaintiff.

Sullivan, Ward, Asher & Patton (by *David L. Delie, Jr.*) and *James G. Gross, PLC* (by *James G. Gross*) for defendant.

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

SHAPIRO, J. In December 2012, plaintiff Rachel Amy Maurer[1] was catastrophically injured in an automobile accident. Her car, along with all the family cars, had been insured with defendant Fremont Insurance Company since 2006. In October 2014, almost two years after the accident, Fremont advised plaintiff's hus-

[1] Dale Maurer is Rachel's conservator, and he filed this case on her behalf. He did not bring any claim in his own right. "Plaintiff" as used in this opinion refers to Rachel.

band, Dale Maurer, who was the policyholder, that the policy was being rescinded by the company retroactive to 2006 and that it therefore had no obligation to pay for any of plaintiff's medical treatment, replacement services, or wage loss related to the 2012 accident.

Plaintiff sought a declaratory judgment stating that she was entitled to personal protection insurance (PIP) benefits from Fremont under the no-fault act, MCL 500.3101 *et seq*. Fremont filed a counterclaim for rescission. The parties filed competing motions for summary disposition. The trial court ruled in plaintiff's favor, determining that Fremont's rescission claim was not filed within the statutory period of limitations. Fremont appealed, and for the reasons set forth below, we affirm.

I. FACTS

A. PREACCIDENT EVENTS

In 2006, Mr. Maurer contacted an insurance agent to purchase no-fault insurance for the three family vehicles. Shortly after, Mr. Maurer received a copy of the Fremont application that had been prepared by the agent, and the agent told him to sign and send it to Fremont. The vehicle in question was a 1992 Buick Regal that was used primarily by plaintiff. She was employed part-time by the United States Postal Service (USPS) as a clerk and delivered mail for half a day on some Saturdays as a relief driver when other drivers took time off. The application listed several questions about the use of the vehicles. One of these questions asked: "Any vehicles used in any business? This includes but is not limited to snowplowing, sales, artisan use, delivery of newspapers, food, mail or any other items." Next to that question, the agent had

entered "No." Mr. Maurer testified that he noticed this answer and advised the agent that plaintiff sometimes used the car for mail deliveries on Saturdays. The agent told him not to worry about it and that it was not necessary to change the answer. The agent was independent but had authority from Fremont to bind it to policies.

No evidence was presented that plaintiff participated in completing the application or was aware of what answers were provided to the questions on the application.

Throughout the next several years, Mr. Maurer accepted automatic renewal of the policy by continuing to pay the premiums for all the vehicles when renewal notices were sent to him. In early 2012, Mr. Maurer contacted the insurance agent to advise him that the 1992 Buick Regal was being replaced with a 2004 Buick Century. Mr. Maurer provided uncontradicted testimony that when he did so, he again informed the agent that the vehicle used primarily by his wife, now the Buick Century, was being used, in part, to deliver mail.

B. POSTACCIDENT EVENTS

The auto accident in which plaintiff was injured[2] occurred on December 3, 2012. Fremont promptly

[2] According to her physician's report, plaintiff suffered a traumatic brain injury, respiratory failure, multiple internal injuries, and multiple orthopedic injuries. In March 2016, her physician reported that she continues to suffer from

> severe neurologic deficits that impair her both physically and mentally. At this time, she is not able to make informed decisions. Her comprehension and cognition [are] severely limited. She has very little insight and is unable to communicate consistently.

learned of the accident, including the fact that plaintiff had been delivering mail at the time. On December 14, 2012, an application for no-fault benefits was submitted to Fremont. The application indicated that plaintiff was employed with the USPS as a mail carrier and that the accident occurred when she was working. The police report also indicated that plaintiff was delivering mail when the accident happened.

A suit was filed on plaintiff's behalf against the at-fault driver in 2013. Fremont was informed of this third-party tort case and monitored its progress. Because plaintiff was delivering mail when she was injured, her medical expenses were paid pursuant to the Federal Employees' Compensation Act, 5 USC 8101 *et seq*. However, under 5 USC 8132, USPS was entitled to reimbursement from any judgment obtained in plaintiff's third-party action, and USPS asserted a lien in anticipation of that event. After the third-party action was resolved, USPS's lien was satisfied from the tort recovery, and Fremont, as plaintiff's no-fault carrier, became liable to reimburse her for that amount. See *Sibley v Detroit Auto Inter-Ins Exch*, 431 Mich 164, 170-171; 427 NW2d 528 (1988). Fremont did not agree to reimburse plaintiff the sum she paid to the federal government to reimburse it for the cost of her medical care. In January 2014, plaintiff filed suit seeking a judgment declaring that Fremont had to do so.

Although the accident occurred on December 3, 2012, Fremont did not seek to rescind the no-fault policy until after the tort suit concluded, nearly two

> . . . She has right sided weakness involving both the arm and the leg . . . . She has severe spasticity and tone in the right arm and leg. She is totally dependent on others for all aspects of her care throughout the day. She will likely require assistance for the rest of her life.

years later. On October 27, 2014, Fremont sent a letter captioned as "Rescission of Policy" to Mr. Maurer. It stated that Fremont was rescinding the policy on the ground that in the 2006 application Mr. Maurer inaccurately answered the question regarding the business use of the vehicle. Fremont's letter described this as "material misrepresentations regarding driver information, usage of an insured vehicle and miles driven . . . ." According to the letter, "[u]pon rescission, the policy is void as of inception such that there is no coverage applicable for the claim filed by you . . . ." Consistent with Fremont's assertion of rescission, the letter included a check to Mr. Maurer for a refund of all premiums paid since 2006. Mr. Maurer returned the check to Fremont. In January 2015, Fremont filed a counterclaim for rescission in which it asked the trial court to declare that the policy issued to the Maurers was rescinded and void *ab initio* and to award "other equitable relief as is proper under the facts and circumstances . . . ."

The rescission letter did not assert that Fremont would have declined to insure the vehicle had it known that it was being used for occasional mail delivery. The letter stated that the policy was being rescinded because "[h]ad we been informed of the [business] use of the vehicles on the policy we would have adjusted the rate accordingly resulting in an increase of premium, and issued a different insurance contract to you with applicable endorsements under the circumstances."[3]

[3] The parties dispute the amount of the premium increase that would have been applied. Plaintiff, based on documents produced by Fremont in discovery, claims that the difference would have been $4 per policy term. Fremont relies on other documents showing that if the car had been listed as primarily used for business the premium would have been approximately $170 higher. Fremont would also have issued a policy

And, although Fremont repeatedly refers to a contractual right to rescind in the case of fraud, the policy contained no rescission provision. The policy did, however, contain two relevant provisions.

First, the policy provided how the insurer could address errors or misrepresentations in the application for insurance coverage. It provided that Fremont could adjust its premiums retroactively if it discovered that the use category of the car was in error or had been changed. It stated that the change in premium would be made "at the time of such changes or when we become aware of the changes, if later." There is nothing in the record, however, to indicate that during the 22 months between the accident and the rescission letter Fremont sought any backpayment or increased its premiums.

Second, the contract contained a provision that specifically addressed intentional misrepresentation, i.e., fraud. That provision narrowly referred to an exclusion to be applied only to the person who committed the fraud. It read: "We will not cover any person seeking coverage under this policy who has intentionally concealed or misrepresented any material fact, made fraudulent statements, or engaged in fraudulent conduct with respect to the procurement of this policy . . . ."[4]

The parties filed cross-motions for summary disposition, and the trial court ruled that Fremont's rescission claim was barred by both the statute of limitations

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endorsement entitled "Federal Employees Using Autos in Government Business," which would have limited Fremont's liability exposure in the event plaintiff *caused* an accident while delivering mail. That circumstance is not present here because although the accident occurred when plaintiff was delivering mail, she was not at fault in the accident.

[4] The application also contained an "anti-fraud" warning that anyone making false statements in the application with intent to defraud was "guilty of insurance fraud." It did not, however, contain any language regarding rights or remedies.

and the innocent-third-party doctrine. The innocent-third-party doctrine provided a bright-line rule that if the policyholder fraudulently provided false information on the application, any rescission based on that fraud would not apply to other persons covered by the policy who did not participate in the fraud. After the trial court's ruling, this Court held that the innocent-third-party doctrine had been abrogated. *Bazzi v Sentinel Ins Co*, 315 Mich App 763, 781; 891 NW2d 13 (2016) (*Bazzi I*), rev'd in part by *Bazzi v Sentinel Ins Co*, 502 Mich 390; 919 NW2d 20 (2018) (*Bazzi II*).[5] In light of that decision, the trial court allowed Fremont to file a delayed motion for reconsideration. With that motion, Fremont also filed an untimely motion to amend its affirmative defenses to add a claim alleging that plaintiff was not entitled to coverage under MCL 500.3113(b) because Mr. Maurer purchased the policy and plaintiff was the titleholder to and registrant of the vehicle. The parties again filed competing motions for summary disposition, and the trial court again granted summary disposition to plaintiff based on the statute of limitations. Fremont's motion to amend affirmative defenses was denied for lack of merit.

II. ANALYSIS

Fremont raises two issues on appeal: (1) whether the trial court erred by concluding that its rescission claim was untimely, and (2) whether MCL 500.3113(b) pre-

[5] We held this appeal in abeyance pending the Supreme Court's resolution of *Bazzi*. *Maurer v Fremont Ins Co*, unpublished order of the Court of Appeals, entered May 31, 2018 (Docket No. 336514). Recently, the Supreme Court affirmed this Court's ruling that the innocent-third-party doctrine had been abrogated but reversed this Court's conclusion that the insurer was automatically entitled to rescission. *Bazzi II*, 502 Mich at 407. The Court explained that rescission is an equitable remedy to be awarded in the trial court's discretion. *Id*. at 409-410.

cluded plaintiff from recovering no-fault benefits. We review de novo a trial court's grant or denial of summary disposition. *Batts v Titan Ins Co*, 322 Mich App 278, 284; 911 NW2d 486 (2017).

III. STATUTE OF LIMITATIONS

Actionable fraud, also known as fraudulent misrepresentation, *Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012), requires that

> (1) the [party] made a material representation; (2) the representation was false; (3) when the [party] made the representation, the [party] knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the [party] made the representation with the intention that the [opposing party] would act upon it; (5) the [opposing party] acted in reliance upon it; and (6) the [opposing party] suffered damage. [*M&D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998) (quotation marks and citation omitted).]

Silent fraud, also known as fraudulent concealment, acknowledges that "suppression of a material fact, which a party in good faith is duty-bound to disclose, is equivalent to a false representation and will support an action in fraud." *Id*. at 28-29 (quotation marks and citations omitted). But in order for silent fraud to be actionable, the party having a legal or equitable duty to disclose must have concealed the material fact with an intent to defraud. *Id*.; *Titan*, 491 Mich at 557.

Fremont's counterclaim asserted that the Maurers engaged in a material and fraudulent misrepresentation. Before the trial court, the parties agreed that claims of fraud are governed by the six-year limitations period in MCL 600.5813. *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 709-710; 742 NW2d 399 (2007). They disagreed, however, about whether the

claim accrued in 2006 when the initial application was inaccurately completed or in 2012 when the policy was last renewed before the accident.

Generally, "[a] claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. Plaintiff argues that Fremont's counterclaim for rescission was filed after the expiration of the six-year limitations period because the claim for rescission accrued in 2006 when the alleged intentional misrepresentation was made. Plaintiff points out that Fremont's letter rescinding the insurance policy explicitly stated that the reason for the rescission was Mr. Maurer's failure to disclose the business use of the vehicle in the 2006 application for insurance. Further, Fremont sought to return all premiums paid since the policy was first issued in 2006, demonstrating its belief that the fraud occurred at the initial application. Accordingly, plaintiff argues, the wrongful act underlying the fraudulent misrepresentation claim occurred in 2006.

In its response to plaintiff's motion for summary disposition, Fremont developed a new position, arguing, contrary to its letter of rescission, that the rescission was not based on the 2006 application but rather on the failure of Mr. Maurer to advise Fremont of the business use of the vehicle when the policy renewed in 2012.[6] Fremont argued that at that time, Mr. Maurer violated his duty to disclose that the vehicle was being used for business purposes. However, any such duty to disclose was defined, or at least modified, by Fremont's statement on the 2012 declaration sheet that unambiguously directed the policyholder to provide notice of any

[6] A renewal policy is considered to be a new contract. See *Russell v State Farm Mut Auto Ins Co*, 47 Mich App 677, 680; 209 NW2d 815 (1973).

error or change concerning coverage to the insured's agent, not to Fremont. The precise wording was, "If the covered autos are not used as indicated above, *contact your agent*." (Emphasis added; capitalization omitted.) Thus, as to the 2012 renewal, Mr. Maurer fulfilled his contractual responsibility when he again advised the agent of the car's use for mail delivery.[7]

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[7] Fremont does not concede that Mr. Maurer informed the agent of the vehicle's use, but it does not offer any evidence to contradict Mr. Maurer's testimony. Nor has Fremont produced any proof of fraudulent intent. An insurance policy can be rescinded for fraud, but there must be an intentional misrepresentation of a material fact. *Bazzi II*, 502 Mich at 408. As noted, in order for fraudulent concealment to be actionable, the party having a legal or equitable duty to disclose must have concealed the material fact with an intent to defraud. *Titan Ins Co*, 491 Mich at 557. However, Fremont offers no proof of intentional misrepresentation and no proof that either plaintiff or Mr. Maurer acted with fraudulent intent. Indeed, the evidence is unrebutted that Mr. Maurer twice advised his agent—once in 2006 and again in 2012—that the vehicle was used to deliver mail. These actions are inconsistent with the actions of a person engaging in fraud or intentional misrepresentation. The application was submitted after the agent told Mr. Maurer that the answer to the question did not matter and to not worry about it.

The dissent reads the declaration sheets, specifically the sheet pertaining to the September 2012 renewal, as though Mr. Maurer was making representations regarding the use of the vehicles. However, this argument misunderstands the insurance renewal process. Deposition testimony from one of Fremont's claims managers established that Fremont prepared the declaration sheets and sent them to Mr. Maurer for review. Mr. Maurer was obligated to contact his insurance agent, not Fremont, to correct errors regarding the use of the vehicles. Again, there is no evidence contradicting Mr. Maurer's testimony that he informed his agent that plaintiff used the vehicle to deliver mail. If the agent failed to contact Fremont in turn, that does not support a fraud claim against the Maurers. Further, the dissent's focus on the declaration sheet identifying the Maurers' daughter as the driver of the vehicle is misplaced because it is undisputed that this mistake was attributable to Fremont.

In sum, Fremont has not proffered any evidence that Mr. Maurer set out to induce Fremont to sell him a policy with a lower premium or that he knew that the answer to the question at issue would result in a lower

We conclude that Fremont's claim for rescission accrued in 2006 when Mr. Maurer submitted the application containing the misrepresentation. That was the wrong on which Fremont's claim rests. The allegation that Mr. Maurer failed to disclose the vehicle's use in 2012 fails, at least for purposes of summary disposition, because the evidence is uncontested that he complied with the directive on the declaration sheet to "contact your agent" in the event of any changes to or inaccuracies in the description of the vehicle's use. Thus, we affirm the trial court's conclusion that Fremont's counterclaim for rescission was untimely and that plaintiff was entitled to summary disposition.[8]

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premium. It is well settled that fraud "is not to be lightly presumed, but must be clearly proved by clear, satisfactory and convincing evidence" and that "trial courts should ensure that these standards are clearly satisfied with regard to all of the elements of a fraud claim." *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414; 751 NW2d 443 (2008) (quotation marks and citations omitted). For those reasons, Fremont failed to establish a question of fact as to fraudulent intent.

[8] Given our ruling, we need not address the parties' equitable arguments regarding rescission in this case. We note, however, that Fremont argues in its reply brief that it is seeking a legal, not an equitable, rescission. But Fremont does not argue that a different limitations period applies to legal rescissions. Further, we note that there is no rescission clause in the policy. We also question whether the distinction drawn by Fremont is still meaningful after the merger of law and equity. According to one respected treatise:

> In considering the availability and scope of judicial rescission, it is necessary to bear in mind that the great bulk of cases have been decided under the dual-court system of separate courts of law and of equity, with judicial rescission being historically an equitable remedy. This means that currently, in view of the widespread fusion of law and equity, many of the decided cases have no current value except to point to the existence of certain "equitable" principles which would still be followed by a court in determining whether rescission should be granted, although it was not a court of "equity." [2 Couch, Insurance, 3d, § 31:65, p 31-117.]

III. MCL 500.3113

Fremont filed an untimely motion to amend its affirmative defenses to add a defense based on MCL 500.3113(b). On appeal, Fremont pursues this defense but its statement of questions presented does not assert that the trial court erred by denying the motion to amend. "Independent issues not raised in the statement of questions presented are not properly presented for appellate review." *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 404; 628 NW2d 86 (2001). Accordingly, whether the trial court so erred is not properly before us, and because the affirmative defense was never filed, Fremont may not seek to assert it on appeal. Nonetheless, we choose to address this unpreserved issue because it involves a question of law and the relevant facts are undisputed. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006).

Fremont's new argument is that plaintiff is not entitled to coverage under MCL 500.3113(b) because plaintiff was the titleholder and registrant of the vehicle but her husband was the policyholder. MCL 500.3113 provides, in part, that

> [a] person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> * * *
>
> (b) The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by [MCL 500.3101] . . . was not in effect.

MCL 500.3101(1) provides that "[t]he owner or registrant of a motor vehicle required to be registered in

this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance."

The seminal case interpreting MCL 500.3113(b) is *Iqbal v Bristol West Ins Group*, 278 Mich App 31; 748 NW2d 574 (2008). In that case, we considered the plain text of MCL 500.3113(b) and concluded that the critical question was whether the *vehicle* was insured, not whether the owner or registrant had been the purchaser of the policy.

> [T]he phrase "with respect to which the security required by section 3101 . . . was not in effect," § 3113(b), when read in proper grammatical context, defines or modifies the preceding reference to the *motor vehicle involved in the accident*, here the BMW, and not the person standing in the shoes of an owner or registrant. The statutory language links the required security or insurance solely to the vehicle. Thus, the question becomes whether the BMW, and not plaintiff, had the coverage or security required by MCL 500.3101. As indicated above, the coverage mandated by MCL 500.3101(1) consists of "personal protection insurance, property protection insurance, and residual liability insurance." While plaintiff did not obtain this coverage, there is no dispute that the BMW had the coverage, and that is the only requirement under MCL 500.3113(b), making it irrelevant whether it was plaintiff's brother who procured the vehicle's coverage or plaintiff. Stated differently, the security required by MCL 500.3101(1) was in effect for purposes of MCL 500.3113(b) as it related to the BMW. [*Id*. at 39-40.]

In sum, *Iqbal* followed the last-antecedent rule based on the plain language of the statute. "The 'last antecedent' rule of statutory construction provides that a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent, unless something in the statute requires a different interpretation."

Stanton v Battle Creek, 466 Mich 611, 616; 647 NW2d 508 (2002). Thus, the phrase "with respect to which the security required by [MCL 500.3101] . . . was not in effect" modifies only the last antecedent or clause, which is "motor vehicle or motorcycle involved in the accident." See MCL 500.3113(b). The words "owner or registrant" are not part of the last antecedent.

Six years after *Iqbal* was decided, a panel of this Court read that decision as holding that at least one of the vehicle's owners had to obtain the policy in order "to avoid the consequences" of MCL 500.3113(b). *Barnes v Farmers Ins Exch*, 308 Mich App 1, 8-9; 862 NW2d 681 (2014).[9] We do not read *Iqbal* so narrowly and note that *Barnes* never addressed the plain text of the statute, which by the rules of grammar and the canons of legal interpretation[10] attaches the need for a policy to the vehicle and not the owner. Were the ruling in *Barnes* controlling under the facts of this case, we would declare a conflict with it. However, that is not necessary here because *Barnes* is plainly distinguishable. In that case, the purchaser of the insurance was neither a relative nor a resident of the same household as the plaintiff. In this case, the policy was purchased by plaintiff's husband, a wholly different situation.[11] It would be very difficult to articulate any reason why the

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[9] The Supreme Court has granted leave to appeal in a separate case to determine whether *Barnes* was rightly decided. See *Dye v Esurance Prop & Cas Ins Co*, 501 Mich 944 (2017).

[10] See Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 152 ("When the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent.") (formatting altered).

[11] Moreover, the relevant exclusion in the insurance policy itself is consistent with *Iqbal* and inconsistent with *Barnes* because it turned on whether the vehicle was insured and not who procured it. That provision provided that Fremont would not pay PIP benefits for bodily injury

Legislature, by adopting MCL 500.3113, would have intended to prevent a spouse from procuring insurance on a family car when the vehicle was registered to the other spouse, or to completely deprive the spouse owning the car from no-fault benefits simply because the car owner let his or her spouse procure the policy.[12] Certainly Fremont has not articulated a basis to find such intent. In the absence of a compelling reason to do so, we will not interpret MCL 500.3113(b) in a way that would undermine both the purpose of the no-fault act[13] and the institution of marriage.[14]

"[s]ustained to the owner or registrant of an **auto** or **motorcycle** involved in the accident and for which the security required under Michigan no-fault is not in effect."

[12] When interpreting statutes, our goal is to discern the Legislature's intent. *Batts*, 322 Mich App at 284. "[S]tatutes should be construed so as to prevent absurd results, injustice, or prejudice to the interests of the public." *Liberty Mut Ins Co v Mich Catastrophic Claims Ass'n*, 248 Mich App 35, 45; 638 NW2d 155 (2001).

[13] "The purpose of the Michigan no-fault act is to broadly provide coverage for those injured in motor vehicle accidents without regard to fault." *Iqbal*, 278 Mich App at 37 (quotation marks and citation omitted).

[14] Our dissenting colleague essentially concludes that if anyone other than an *owner* of a vehicle procures the policy, the owner(s) may not recover no-fault benefits under MCL 500.3113(b). Our colleague cites no authority for this position. The dissent does not address the holding of *Iqbal*, which rejects that view. We presume that our colleague is relying on *Barnes*, which we have distinguished because this case involves spouses.

We also question the dissent's conclusion that Mr. Maurer does not qualify as an owner of the vehicle. The no-fault act defines owner, in part, as "[a] person renting a motor vehicle or having the use of a motor vehicle, under a lease or otherwise, for a period that is greater than 30 days." MCL 500.3101(*l*)(*i*). Mr. Maurer testified that he did not drive plaintiff's vehicle, but there was no testimony or other evidence suggesting that Mr. Maurer did not have the *right* to use the vehicle. And to determine if he is an owner of the vehicle for purposes of the no-fault act, the focus is on the nature of his right to use the vehicle. *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 530; 676 NW2d 616 (2004). However, given our disposition of the matter, we need not resolve whether Mr. Maurer is an owner of the vehicle.

Affirmed. As the prevailing party, plaintiff may tax costs. MCR 7.219(A).

SERVITTO, J., concurred with SHAPIRO, J.

JANSEN, P.J. (*dissenting*). Defendant appeals as of right the trial court's amended final order closing the case in this first-party no-fault action. However, the crux of defendant's appeal is actually a challenge to the trial court's order granting summary disposition in favor of plaintiff, denying defendant's motion to amend its affirmative defenses, and denying defendant's motion for summary disposition. Because I would reverse, I respectfully dissent.

I. RELEVANT FACTS AND PROCEDURAL HISTORY

On December 3, 2012, plaintiff, Rachel Amy Maurer, was catastrophically injured in a motor vehicle accident. At the time of the collision, plaintiff was driving her personal vehicle, a Buick Century, within the course and scope of her employment with the United States Postal Service (USPS). Accordingly, plaintiff's medical expenses were paid pursuant to the Federal Employees' Compensation Act (FECA), 5 USC 8101 *et seq*. Plaintiff also successfully pursued a tort action, which sought third-party no-fault benefits pursuant to MCL 500.3135, against the driver who caused the collision, as well as the driver's employer.

At the time of the accident, plaintiff's car was insured by a no-fault insurance policy that plaintiff's husband, Dale Maurer, had obtained through defendant. On January 3, 2014, plaintiff filed a complaint for declaratory relief against defendant after the USPS had "asserted a lien claiming a right of reimbursement for expenses paid under FECA[.]" Plaintiff asked the

trial court to enter a declaratory judgment ordering defendant to reimburse the USPS in the event that she obtained a tort recovery.

On December 5, 2014, after plaintiff succeeded in obtaining a tort recovery, she filed an amended complaint in which she claimed that the USPS had, in fact, asserted a lien for reimbursement of expenses paid under FECA, and she asked the trial court to enter a declaratory judgment against defendant for personal protection insurance (PIP) benefits, together with costs, interest, and attorney fees. Plaintiff also added a second breach-of-contract claim, alleging that despite having reasonable proof of her loss, defendant unreasonably refused to pay PIP benefits to her.

On January 5, 2015, defendant filed a counterclaim for rescission of the no-fault insurance policy issued to Mr. Maurer on the basis that Mr. Maurer had made material misrepresentations in his application for no-fault insurance on September 6, 2006, regarding the use of the Buick Century. Defendant claimed that Mr. Maurer's material misrepresentations increased its risk of loss by "impairing its ability to make a reasoned and informed underwriting decision relative to the policy that was issued." Accordingly, defendant claimed it was entitled to rescind *ab initio* the no-fault policy issued to Mr. Maurer.

On July 20, 2015, plaintiff moved for summary disposition of defendant's counterclaim for rescission, arguing that the innocent-third-party doctrine protected plaintiff's right of recovery, that defendant's rescission claim was time-barred by the six-year statute of limitations, or that alternatively, the doctrine of laches precluded defendant's claim. In an opinion and order dated September 29, 2015, the trial court granted plaintiff's motion for summary disposition,

concluding that because Mr. Maurer was the one to file the application for insurance, plaintiff was protected by the innocent-third-party rule. Additionally, the trial court determined that the six-year statute of limitations in MCL 600.5813 barred defendant's rescission claim because the alleged misrepresentation occurred on September 6, 2006, which meant that defendant should have filed its claim before September 6, 2012.

Following this Court's decision in *Bazzi v Sentinel Ins Co*, 315 Mich App 763; 891 NW2d 13 (2016) (*Bazzi I*), rev'd in part by *Bazzi v Sentinel Ins* Co, 502 Mich 390; 919 NW2d 20 (2018) (*Bazzi II*), defendant was permitted to file a motion for summary disposition on its rescission claim. Defendant argued that rescission was appropriate because Mr. Maurer had made material misrepresentations regarding the use of the Buick Century, namely that he failed to indicate that the vehicle was, in fact, being used for business purposes. Additionally, defendant argued that because plaintiff was injured "in a motor vehicle accident involving a vehicle which she owned, but for which she did not purchase the required no-fault insurance," coverage was precluded under MCL 500.3113(b). Defendant also argued that the statute of limitations, the doctrine of laches, and the innocent-third-party rule did not bar its claim for rescission. Finally, defendant filed a motion to amend its affirmative defenses to include plaintiff's failure to comply with MCL 500.3113(b).

Plaintiff filed her own motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff argued that defendant's "only justification for refusing [to pay PIP benefits to plaintiff] [was] a legal theory that [had] already been rejected" by the trial court, i.e., rescission. Accordingly, plaintiff further argued that there was no justifiable reason for defendant to refuse to pay

plaintiff PIP benefits, and summary disposition in favor of plaintiff should have been granted with respect to plaintiff's claims for work-loss benefits and the itemized allowable expenses claimed.

In a written opinion and order entered on October 12, 2016, the trial court granted plaintiff's motion for summary disposition, denied defendant's motion to amend its affirmative defenses, and denied defendant's motion for summary disposition. The trial court found that the six-year statute of limitations in MCL 600.5813 barred defendant's rescission claim. Accordingly, the court did not find it necessary to address defendant's arguments regarding the doctrine of laches or the innocent-third-party rule. Likewise, the court denied defendant's motion to amend its affirmative defenses, stating that the court had "reviewed the argument, and . . . it [was] without merit . . . ."

Conversely, plaintiff's motion for summary disposition was granted. The trial court noted that plaintiff had requested entry of a judgment in the amount of $1,434,628.54 and that because defendant did not dispute the amount of damages, a judgment in that amount would be entered. This appeal followed.

II. STATUTE OF LIMITATIONS

Defendant first argues that the trial court erroneously denied its motion for summary disposition on the basis that its claim for rescission was brought after the six-year period of limitations found in MCL 600.5813 had expired. More specifically, defendant argues that because each renewal of Mr. Maurer's insurance policy formed a new contract, defendant's rescission claim accrued on September 6, 2012, the effective date of the policy in effect at the time of the underlying accident, and therefore, its rescission claim was timely. I agree.

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5-6; 890 NW2d 344 (2016). A motion for summary disposition brought under MCR 2.116(C)(10) "tests the factual sufficiency of the complaint," *Shinn v Mich Assigned Claims Facility*, 314 Mich App 765, 768; 887 NW2d 635 (2016), and should be granted when "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law," *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

"The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence." *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). The court must consider all the admissible evidence in the light most favorable to the nonmoving party. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). However, the party opposing summary disposition under MCR 2.116(C)(10) "may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Oliver v Smith*, 269 Mich App 560, 564; 715 NW2d 314 (2006) (quotation marks and citation omitted). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 423; 864 NW2d 609 (2014) (quotation marks and citation omitted).

It is well settled that a no-fault insurer is entitled to rescind *ab initio* an insurance policy on the basis that

the insured made a material misrepresentation in his or her application for no-fault insurance. *21st Century Premier Ins Co v Zufelt*, 315 Mich App 437, 446; 889 NW2d 759 (2016). " 'Rescission is justified without regard to the intentional nature of the misrepresentation, as long as it is relied upon by the insurer. Reliance may exist when the misrepresentation relates to the insurer's guidelines for determining eligibility for coverage.' " *Id.*, quoting *Lake States Ins Co v Wilson*, 231 Mich App 327, 331; 586 NW2d 113 (1998). However, an insurer must assert any claim for rescission within six years after the claim accrues. MCL 600.5813. A claim for rescission accrues when the wrong, in this case fraud or misrepresentation, is done, regardless of when the damage results. MCL 600.5827.

The issue here boils down to when defendant's rescission claim accrued. Plaintiff argues that the claim accrued on September 6, 2006, when Mr. Maurer first submitted an application for no-fault insurance, and therefore, defendant's counterclaim for rescission was untimely, as it was filed after September 6, 2012. Conversely, defendant argues that its rescission claim arose on September 6, 2012, when Mr. Maurer renewed the insurance policy, and therefore could be brought any time before September 6, 2018.

This Court has previously determined that a renewal contract is "a new or separate contract." *21st Century*, 315 Mich App at 443-444 (quotation marks and citation omitted). Accordingly, when Mr. Maurer renewed his no-fault policy with defendant on September 6, 2012, he effectively entered into a new, separate, and distinct contract. In obtaining that contract, Mr. Maurer made the following representations regarding the use of vehicles covered under the policy:

> 1 PRIVATE PASSENGER PICKUP DRIVEN TO WORK OR SCHOOL 5 DAYS PER WEEK A DISTANCE [OF] OVER 3 MILES BUT LESS THAN 15 MILES ONE WAY BY A 54 YEAR OLD MALE
>
> 2 PRIVATE PASSENGER CAR DRIVEN TO WORK OR SCHOOL 5 DAYS PER WEEK A DISTANCE [OF] 3 MILES OR LESS ONE WAY BY A 52 YEAR OLD FEMALE
>
> 3 PRIVATE PASSENGER CAR USED FOR PLEASURE DRIVEN BY A 54 YEAR OLD MALE
>
> 4 PRIVATE PASSENGER CAR DRIVEN TO WORK OR SCHOOL 5 DAYS PER WEEK A DISTANCE [OF] 3 MILES OR LESS ONE WAY BY A 17 YEAR OLD FEMALE

The policy identified Mr. Maurer's and plaintiff's daughter as the principal or occasional driver of the Buick Century. Clearly, however, the Buick Century was driven by plaintiff, not her daughter, and was not simply a "private passenger car." Indeed, it is undisputed that at the time of the accident, plaintiff drove the Buick Century for business purposes.

Further, Mr. Maurer agreed to contact his agent "if the covered autos [were] not used as indicated above[.]" The policy contained an antifraud provision, providing that defendant would not

> cover any person seeking coverage under this policy who has intentionally concealed or misrepresented any material fact, made fraudulent statements, or engaged in fraudulent conduct with respect to the procurement of this policy or to any accident or loss for which coverage is sought.

Put simply, the new contract entered into by Mr. Maurer on September 6, 2012, provided that defendant would be entitled to rescind Mr. Maurer's no-fault policy if he had made any material misrepresentations in order to procure no-fault coverage. Accordingly, the

misrepresentation with respect to the contract in effect at the time plaintiff was injured occurred on September 6, 2012, when the renewal contract was entered into and took effect. Subject to any equitable defenses, defendant had until September 6, 2018, to bring a claim for rescission. MCL 600.5813. Therefore, I would conclude that defendant's counterclaim for rescission was timely filed on January 5, 2015, and that the trial court committed error requiring reversal by finding otherwise.

Further, I note that in my view, the majority's conclusion that defendant's rescission claim accrued in 2006 and is therefore now time-barred not only ignores the precedent previously set by this Court—that a renewal contract is "a new or separate contract," *21st Century*, 315 Mich App at 444—but it sets a terrible new precedent. In effect, the majority has given carte blanche to plaintiff, Mr. Maurer, or anyone else who makes material misrepresentations in an application for no-fault insurance. Moving forward, the majority has made it so that as long as an individual can avoid an accident for six years, they may make whatever fraudulent claims they please in order to obtain insurance, and still receive PIP benefits if an accident subsequently occurs. I cannot support such a conclusion.

III. MCL 500.3113(b)

Second, defendant argues that the trial court abused its discretion by denying its motion to amend its affirmative defenses to include that plaintiff's claim was barred by MCL 500.3113(b), and likewise, that the trial court erroneously denied defendant's motion for summary disposition. The basis of defendant's argument is that although plaintiff was the titleholder of the Buick Century, she was not the named insured on

the no-fault policy: Mr. Maurer was, and Mr. Maurer does not qualify as an owner for purposes of the no-fault act. Accordingly, plaintiff is not entitled to recover from defendant because plaintiff was driving an uninsured motor vehicle at the time of the accident. Again, I agree.

This Court reviews for an abuse of discretion a trial court's decision to grant or deny a motion to amend affirmative defenses. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Leave to amend "shall be freely given when justice so requires." MCR 2.118(A)(2). Amendment is generally a matter of right. *In re Kostin Estate*, 278 Mich App 47, 52; 748 NW2d 583 (2008). "Leave to amend should ordinarily be denied only for particularized reasons such as undue delay, bad faith or dilatory motive, repeated failures to cure by amendments previously allowed, or futility." *Id.*; *Ostroth v Warren Regency, GP, LLC*, 263 Mich App 1, 5; 687 NW2d 309 (2004) (holding that leave to amend should not be granted when amendment would cause opposing party undue prejudice). As noted, this Court reviews de novo a trial court's determination on a motion for summary disposition. *Lowrey*, 500 Mich at 5-6.

No-fault insurers are required to pay PIP benefits for accidental bodily injuries to the named insured, the named insured's spouse, and "a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident." MCL 500.3114(1). Defendant, through the deposition testimony of Pete Buhl, admitted as much when he testified that as Mr. Maurer's spouse, plaintiff was "pulled in . . . essentially [as] a named insured." Accordingly, if plaintiff had been driving a vehicle owned or titled to Mr. Maurer at the time of the accident, she would have been covered by the policy.

However, an individual is excluded from receiving PIP benefits if, at the time of the accident, that person "was the owner or registrant of a motor vehicle . . . involved in the accident with respect to which the security required by [MCL 500.3101] was not in effect." MCL 500.3113(b). Although Mr. Maurer obtained no-fault insurance for the Buick Century, the vehicle involved in the accident, he testified in his deposition that he was not the registrant; plaintiff was. The sole titleholder of the Buick Century was plaintiff. In fact, the policy states, in no uncertain terms, "IF THE COVERED AUTOS ARE NOT TITLED TO THE NAMED INSURED IDENTIFIED ABOVE, CONTACT YOUR AGENT." Accordingly, the relevant inquiry becomes whether Mr. Maurer was an owner for purposes of the no-fault act.

MCL 500.3101(2)(k)(*i*) defines an "owner" as "[a] person renting a motor vehicle or having the use of a motor vehicle, under a lease or otherwise, for a period that is greater than 30 days."[1] There may be multiple owners of a motor vehicle, *Ardt v Titan Ins Co*, 233 Mich App 685, 691; 593 NW2d 215 (1999), and "it is not necessary that a person *actually* have used the vehicle for a thirty-day period before a finding may be made that the person is the owner. Rather, the focus must be on the nature of the person's right to use the vehicle." *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 530; 676 NW2d 616 (2004).

In my view, the record is clear that Mr. Maurer does not qualify as an owner for purposes of the no-fault act. During his deposition, Mr. Maurer testified that plaintiff was the only titled owner of the Buick Century and that the only person to ever drive the Buick Century

[1] Effective October 30, 2017, the definition of "owner" appears in MCL 500.3101(2)(*l*)(*i*). See 2017 PA 140.

besides plaintiff was the Maurers' daughter, whose usage was characterized as occasional. Accordingly, I would conclude that plaintiff is barred from recovering PIP benefits from defendant because the Buick Century lacked the necessary security. MCL 500.3113(b).

Based on the foregoing, I would conclude that the trial court abused its discretion by refusing to allow defendant to amend its affirmative defenses to include MCL 500.3113(b). Additionally, the foregoing analysis makes it clear that plaintiff's recovery is barred regardless of the outcome of defendant's counterclaim for rescission, and summary disposition in favor of defendant is appropriate.

IV. ALTERNATIVE GROUNDS FOR AFFIRMANCE

Finally, plaintiff argues as alternative grounds for affirmance that even if the statute of limitations did not bar defendant's counterclaim for rescission, several other equitable defenses do. Specifically, plaintiff cites the doctrine of laches, the innocent-third-party doctrine, and the fact that when an insurance contract contains a remedy provision, rescission is unavailable in light of an adequate remedy at law.

The three issues raised by plaintiff as alternative grounds for affirmance were either not raised in the trial court or were purposely not addressed by the trial court. Accordingly, these issues are unpreserved. *Mouzon v Achievable Visions*, 308 Mich App 415, 419; 864 NW2d 606 (2014). However, because "the issue[s] . . . concern[] a legal question and all of the facts necessary for [their] resolution are present," *Dell v Citizens Ins Co of America*, 312 Mich App 734, 751 n 40; 880 NW2d 280 (2015), this Court has the authority to address the issues. Although "[a]n appellee may argue alternative grounds for affirmance without filing

a cross-appeal if the appellee does not seek a more favorable decision," *Hanton v Hantz Fin Servs, Inc*, 306 Mich App 654, 669; 858 NW2d 481 (2014), I would conclude that none of plaintiff's alternative grounds for affirmance is persuasive.

First, plaintiff's laches argument fails. A party seeking an equitable remedy must first offer to do equity, and because laches is an equitable doctrine, a party with unclean hands may not assert the defense. *Attorney General v PowerPick Player's Club of Mich, LLC*, 287 Mich App 13, 52; 783 NW2d 515 (2010). When determining whether a party entered equity with unclean hands, the relevant inquiry is whether the party seeking the remedy sought to mislead the other. *Isbell v Brighton Area Sch*, 199 Mich App 188, 190; 500 NW2d 748 (1993).

Even if MCL 500.3113(b) did not bar plaintiff's claim, based on the evidence placed before the trial court by both parties, reasonable minds could not differ on the fact that plaintiff cannot establish clean hands because of the material misrepresentations made by Mr. Maurer to obtain the insurance policy. Therefore, laches is unavailable as a defense to defendant's rescission claim. At his deposition, Mr. Maurer testified that he was aware that the insurance policy did not accurately reflect plaintiff's use of the Buick Century; however, on the advice of his insurance agent, Mr. Maurer did not correct the misrepresentation. Rather, Mr. Maurer testified that he relied on his agent's suggestion, "when we cross that bridge, we'll worry about it then." Further, the policy itself states that Mr. Maurer and plaintiff's daughter were the only drivers of the Buick Century, when in fact Mr. Maurer clearly testified that the Buick Century was titled to plaintiff and was only used by plaintiff as her "mail car."

Additionally, even if plaintiff came to equity with clean hands, defendant pleaded rescission as an affirmative defense on February 21, 2014, in response to plaintiff's original complaint. At this point plaintiff had not yet prevailed in her tort action, and therefore any recovery was speculative at best. Although defendant did not file its counterclaim for rescission until 2015, it put plaintiff on notice of its intent to rescind the contract through its affirmative defenses, and by returning to Mr. Maurer via check the insurance premiums he had paid. Plaintiff is therefore unable to establish any unreasonable delay on behalf of defendant. See *Yankee Springs Twp v Fox*, 264 Mich App 604, 611; 692 NW2d 728 (2004) (in which this Court previously determined that for the doctrine of laches to apply, there must be an "unreasonable delay that results in 'circumstances that would render inequitable any grant of relief to the dilatory plaintiff' ") (citation omitted).

Second, plaintiff argued that this Court incorrectly decided *Bazzi I* and that plaintiff is entitled to the protection of the innocent-third-party doctrine. Since this case was argued, our Supreme Court decided *Bazzi* and held that its decision in *Titan Insurance Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012), "abrogated the innocent-third-party rule . . . ." *Bazzi II*, 502 Mich at 396. Our Supreme Court went on to conclude that although an insurer is entitled to seek rescission of an insurance contract based on a policyholder's fraud in the application for insurance, the insurer is not automatically entitled to rescission by operation of law. *Bazzi II*, 502 Mich at 408-412. Rather, when a third party is involved, the trial court must balance the equities to determine whether the third party is "entitled to the relief he or she seeks." *Id*. at 410 (quotation marks and citation omitted). However, in this

case, plaintiff does not qualify as a third party, and therefore *Bazzi II* is inapplicable. As discussed, plaintiff was the owner of the Buick Century, MCL 500.3101(2)(k)(*i*),[2] but failed to obtain the necessary security required by the no-fault statute. Accordingly, plaintiff is barred from recovering PIP benefits, MCL 500.3113(b), and remand under *Bazzi II* is not required.

Finally, plaintiff argues that the insurance contract at issue contains a remedy provision, and equitable rescission is unavailable in light of an adequate remedy at law. However, in light of the fact that MCL 500.3113(b) bars plaintiff's recovery, the insurance contract at issue is inapplicable to plaintiff, and this argument is without merit.

I would reverse and remand for the trial court to vacate its October 12, 2016 order and grant summary disposition in favor of defendant.

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[2] Now MCL 500.3101(2)(*l*)(*i*).

PARKS v NIEMIEC

Docket No. 337823. Submitted September 12, 2018, at Detroit. Decided September 18, 2018, at 9:05 a.m. Leave to appeal denied 503 Mich 1019 (2019).

In 1992, the Department of Social Services brought an action on behalf of Bonnie M. Parks in the Macomb Circuit Court, Family Division, against John D. Niemiec over the paternity of his oldest child. Defendant acknowledged paternity, and the trial court entered an order of filiation. The trial court also ordered defendant to pay child support for that child, who was born in 1987, and for his second child, who was born in 1989. Over the next 12 years, Parks sought to enforce the support order. In June 2007, the trial court temporarily suspended defendant's support obligation because of his incarceration. Defendant was released from prison in December 2016, and in February 2017, defendant asked the trial court to discharge the unpaid support, arguing that the statute of limitations barred enforcement. The court, Rachel Rancilio, J., denied his motion to cancel the unpaid support, holding that no statute of limitations barred recovery of unpaid child support in a civil case. Defendant appealed.

The Court of Appeals *held*:

MCL 600.5809(4) provides, in relevant part, that a civil action to enforce a child support order is subject to a 10-year statutory limitations period that runs from the date that the last support payment is due under the support order regardless of whether the last payment is made. Generally, the date that the last support payment is due is the child's 18th birthday. Under MCL 600.5856(a) and (b), a statute of limitations is tolled when a complaint is properly filed or at the time jurisdiction over the defendant is otherwise acquired. Under MCL 722.720(a) and (b), a trial court has continuing jurisdiction over proceedings brought under the Paternity Act, MCL 722.711 *et seq*., to change the amount of child support or to enforce a support order. In this case, it was undisputed that defendant's oldest child turned 18 on December 25, 2005, and that his younger child turned 18 on May 21, 2007. The statutory limitations periods for recovery of unpaid support in a civil case for each child would have expired on December 25, 2015, and May 21, 2017, respectively. However,

the statutory limitations periods were tolled by the trial court's continuing jurisdiction. The trial court began exercising jurisdiction in 1992 when it entered a judgment of filiation and a support order, and the court continued to exercise jurisdiction by entering orders for defendant to show cause for failure to pay support, issuing multiple bench warrants and enforcement orders, and temporarily suspending defendant's support obligation beginning in June 2007 while he was in prison. The suspension of defendant's support obligation for the nearly 10 years of his incarceration did not affect the tolling of the limitations periods because Parks had already sought to recover unpaid support numerous times long before either child turned 18. Therefore, although the trial court erred when it held that no statute of limitations barred recovery of unpaid support in a civil case, the court nevertheless reached the correct result because the court's continuing jurisdiction in this proceeding tolled the limitations periods.

Affirmed.

PARENT AND CHILD — LIMITATION OF ACTIONS — CIVIL ACTIONS TO ENFORCE A CHILD SUPPORT ORDER.

MCL 600.5809(4) provides, in relevant part, that a civil action to enforce a child support order is subject to a 10-year statutory limitations period that runs from the date that the last support payment is due under the support order regardless of whether the last payment is made; under MCL 600.5856(a) and (b), a statute of limitations is tolled when a complaint is properly filed or at the time jurisdiction over the defendant is otherwise acquired; under MCL 722.720(a) and (b), a trial court has continuing jurisdiction over proceedings brought under the Paternity Act, MCL 722.711 *et seq*., to change the amount of child support or to enforce a support order; a trial court's continuing jurisdiction tolls the statutory limitations period for civil actions to enforce a child support order.

John D. Niemiec *in propria persona*.

Before: O'CONNELL, P.J., and CAVANAGH and SERVITTO, JJ.

PER CURIAM. In this domestic-relations action, defendant, John D. Niemiec, appeals by delayed leave

granted[1] the trial court's order denying his motion to discharge unpaid child support owed for his two children. In 1992, the Department of Social Services brought a paternity action against Niemiec over the paternity of his oldest child. Niemiec acknowledged paternity, and the trial court entered an order of filiation. The trial court also ordered Niemiec to pay child support for his two children, who were born in 1987 and 1989. Over the next 12 years, plaintiff, Bonnie M. Parks, sought to enforce the support order. By 2004, Niemiec owed around $40,000 in unpaid support. In June 2007, the trial court temporarily suspended Niemiec's support obligation because of his incarceration. Niemiec was released from prison in December 2016. In February 2017, Niemiec asked the trial court to discharge the unpaid support, arguing that the statute of limitations barred enforcement. The trial court rejected Niemiec's argument and denied his motion to cancel the unpaid support. We affirm.

On appeal, Niemiec contends that the statutory limitations period for enforcement of the support order has run. We disagree. We review de novo the legal questions of statutory interpretation and the application of a statute of limitations to undisputed facts. *O'Leary v O'Leary*, 321 Mich App 647, 651-652; 909 NW2d 518 (2017). "The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature." *Cox v Hartman*, 322 Mich App 292, 298; 911 NW2d 219 (2017) (quotation marks and citation omitted). "We read the statutory language in context and as a whole, considering the plain and ordinary meaning of every word." *O'Leary*, 321 Mich App at 652 (quotation marks and citation

[1] *Parks v Niemiec*, unpublished order of the Court of Appeals, entered August 23, 2017 (Docket No. 337823).

omitted). "If the statute's language is unambiguous, judicial construction is not permitted." *Sims v Verbrugge*, 322 Mich App 205, 210; 911 NW2d 233 (2017).

A civil action to enforce a child support order is subject to a 10-year statutory limitations period. MCL 600.5809(4); *People v Monaco*, 474 Mich 48, 54-55; 710 NW2d 46 (2006). For this reason, the trial court's reasoning that no statute of limitations barred recovery of unpaid support in a civil case was erroneous. Nonetheless, we affirm the trial court's order because the statutory limitations periods were tolled by the trial court's continuing jurisdiction.

The 10-year statutory period of limitations to enforce a support order in a civil proceeding runs "from the date that the last support payment is due under the support order regardless of whether or not the last payment is made." MCL 600.5809(4). Generally, the "date that the last support payment is due" is the child's 18th birthday. *Rzadkowolski v Pefley*, 237 Mich App 405, 411; 603 NW2d 646 (1999). A statute of limitations is tolled when a complaint is properly filed or "[a]t the time jurisdiction over the defendant is otherwise acquired." MCL 600.5856(a) and (b). Pertinent to this case, a trial court "has continuing jurisdiction over proceedings brought under" the Paternity Act, MCL 722.711 *et seq*., to change the amount of child support or to enforce a support order. MCL 722.720(a) and (b).

In this case, it is undisputed that Niemiec's oldest child turned 18 on December 25, 2005, and that his younger child turned 18 on May 21, 2007. The statutory limitations periods for recovery of unpaid support in a civil case for each child would have expired on December 25, 2015, and May 21, 2017, respectively. The statutory limitations periods were tolled, however,

by the trial court's continuing jurisdiction. The trial court began exercising jurisdiction in 1992 when it entered a judgment of filiation and a support order. The trial court continued to exercise jurisdiction by entering orders for Niemiec to show cause for failure to pay support, issuing multiple bench warrants and enforcement orders, and temporarily suspending Niemiec's support obligation beginning in June 2007 while he was in prison. Further, the suspension of Niemiec's support obligation for the nearly 10 years of his incarceration did not affect the tolling of the limitations periods because Parks had already sought to recover unpaid support numerous times long before either child turned 18. That temporary suspension merely reflected the trial court's continuing jurisdiction. Therefore, even after the statutory limitations periods began to run in December 2005 and May 2007, respectively, they were tolled by the trial court's continuing jurisdiction. In sum, although the trial court erred when it determined that no statute of limitations applied to civil proceedings to enforce a child support order, it nevertheless reached the correct result because the trial court's continuing jurisdiction in this proceeding tolled the limitations periods. See *Mich Ed Employees Mut Ins Co v Karr*, 228 Mich App 111, 115 n 1; 576 NW2d 728 (1998) (declining to "reverse when the trial court reaches the correct result regardless of the reasoning employed"). Therefore, Niemiec remains liable for unpaid child support in this civil proceeding.

We affirm.

O'CONNELL, P.J., and CAVANAGH and SERVITTO, JJ., concurred.