MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

# MICHIGAN

# COURT OF APPEALS

FROM

April 24, 2018 through June 21, 2018

KATHRYN L. LOOMIS
REPORTER OF DECISIONS

**VOLUME 324**
FIRST EDITION

THOMSON REUTERS®

2020

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# COURT OF APPEALS

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Chief Clerk: JEROME W. ZIMMER, Jr.

Research Director: JULIE ISOLA RUECKE

[1] To April 24, 2018.

[2] From April 25, 2018.

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Commissioners

DANIEL C. BRUBAKER, Chief Commissioner

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|---|---|
| TIMOTHY J. RAUBINGER | ANNE E. ALBERS |
| SHARI M. OBERG | AARON J. GAUTHIER |
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| ANNE-MARIE HYNOUS VOICE | MARK E. PLAZA |
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| SAMUEL R. SMITH | CHRISTOPHER M. THOMPSON |

CHRISTOPHER M. SMITH

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MILTON L. MACK, Jr.

Clerk: LARRY S. ROYSTER

Reporter of Decisions: KATHRYN L. LOOMIS

Crier: JEFFREY A. MILLS

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JUDGE

ANICA LETICA

Judge Anica Letica was appointed to the Michigan Court of Appeals in 2018.

She first joined the Court of Appeals as a prehearing attorney in 1985. Thereafter, she clerked for the Honorable John H. Gillis.

Judge Letica then worked in the Appellate Division of the Oakland County Prosecutor's Office, handling hundreds of appeals and supporting legislation benefitting crime victims, law enforcement, and the public.

In 2009, the Michigan Attorney General appointed Judge Letica to serve as an Assistant Attorney General in the Department's Criminal Appellate Division. There, she supervised criminal appeals for 56 county prosecutors along with in-state prisoner litigation. Judge Letica also coordinated the Department's Sexual Assault Kit Initiative projects to investigate and prosecute cases arising from the testing of previously untested sexual assault kits. In addition, Judge Letica assisted the Human Trafficking Commission and represented the Attorney General on the Michigan Commission on Law Enforcement Standards.

Judge Letica is a member of the State Bar's Criminal Law and Appellate Practice Sections, previously serving on the latter's Council. For a number of years, she also served on the Standard Criminal Jury Instructions Committee and was a member of the workgroup responsible for proposing revisions to the court rules governing circuit-court appellate practice.

Judge Letica has lectured for the Michigan Judicial Institute and the Prosecuting Attorneys Association of Michigan. She contributed to the postconviction and appellate chapters in *Michigan Criminal Procedure* for the Institute of Continuing Legal Educatio*n* and served on the editorial advisory committee for the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Volume 3*.

Judge Letica graduated from the University of Michigan with high distinction, receiving her Bachelor of Arts degree. She then graduated from the Wayne State University Law School, where she was elected to the Order of the Coif.

COURT OF APPEALS CASES

PEOPLE v KASBEN

Docket No. 337082. Submitted April 13, 2018, at Lansing. Decided April 24, 2018, at 9:00 a.m. Leave to appeal denied 503 Mich 954.

In 2015, William Kasben was charged with first-degree criminal sexual conduct (CSC-I), MCL 750.520b, for allegedly sexually penetrating his 13-year-old sister in 1983. Defendant left the state in 1989 or 1990, the victim turned 21 years old in August 1991, and defendant returned to Michigan in 2004. In 2015, defendant pleaded guilty to a reduced charge of second-degree criminal sexual conduct, MCL 750.520c, admitting that he had sexual intercourse with the victim in 1983 in exchange for the prosecution dismissing the CSC-I charge and not seeking a fourth-offense habitual offender sentence enhancement under MCL 769.12. Defendant moved multiple times to withdraw his guilty plea and later moved for relief from judgment, arguing that he had pleaded guilty without being informed that the CSC-I charge was barred by the statute of limitations. The Leelanau Circuit Court, Thomas G. Power, J., concluded that the statute-of-limitations defense was available to defendant at the time of his plea, reasoning that under *People v Budnick*, 197 Mich App 21 (1992), the years defendant lived outside of Michigan did not toll the six-year period of limitations because the MCL 767.24(1) tolling provision was inapplicable to the MCL 767.24(2) twenty-first-birthday period of limitations. However, the court denied defendant's motion, holding that defendant had waived the defense by pleading guilty. Defendant appealed by leave granted.

The Court of Appeals *held*:

Under MCL 767.24, as amended by 1954 PA 100, the statutory period of limitations for CSC offenses in 1983 was six years. The act was amended by 1987 PA 255, adding MCL 767.24(2), which provides that if an alleged victim was under the age of 18 at the time of the offense, an indictment for certain offenses, including those for CSC, must be filed within six years of the commission of the offense or by the alleged victim's twenty-first birthday, whichever is later; the new period of limitations related to a victim's age applied to all charges that were not time-barred by an existing period of limitations on the effective date of the act.

Under MCL 767.24(1) of that act, any period during which the party charged did not usually and publicly reside within Michigan was not to be considered part of the time within which the respective indictments had to be filed. The Subsection (1) tolling provision applied equally to the MCL 767.24(2) period of limitations related to victims under the age of 18. Accordingly, any period during which a defendant did not reside in Michigan could not be used when calculating the time within which charges had to be found and filed, including the MCL 767.24(2) limitations period based on the victim's twenty-first birthday. 2001 PA 6 amended MCL 767.24(1) to provide that an indictment for CSC-I could be filed at any time; that is, as of 2001, there was no period of limitations for CSC-I offenses. In this case, the 1987 amendment applied because the 1983 charge was not time-barred by the original six-year period of limitations when 1987 PA 255 was enacted, thereby extending the limitations period to the victim's twenty-first birthday in August 1991. As a result, the 1987 PA 255 period of limitations that was in effect when defendant left Michigan in 1990 was tolled because the victim had not yet turned 21 years old. To the extent the *Budnick* Court stated that the tolling provision in MCL 767.24(1) did not apply to the MCL 767.24(2) provision related to the alleged victim's twenty-first birthday, it constituted nonbinding dicta because it was not essential to resolving the appeal; the reasoning of the *Budnick* Court on the issue was also not persuasive. Because 2001 PA 6 was enacted before defendant returned to Michigan in 2004—and the period of limitations for the 1983 CSC offense was consequently still tolled when it was enacted—the 2001 amendment's period of limitations applied to the 1983 offense. As a result, there was no period of limitations for the CSC-I charge against defendant, and the charge was not time-barred when he pleaded guilty in exchange for a reduction in charges and sentencing. Accordingly, defendant did not have a statute-of-limitations defense to CSC-I when he pleaded guilty, and the trial court correctly denied defendant's motion for relief from judgment.

Affirmed.

LIMITATIONS OF ACTIONS — CRIMINAL SEXUAL CONDUCT — MINORS — TOLLING.

MCL 767.24(1), as amended by 1987 PA 255, provides, in part, that a period of limitations is tolled for any period during which the charged party did not usually and publicly reside within the state; MCL 767.24(2), as amended by 1987 PA 255, provides that when an alleged victim was under the age of 18 at the time of the offense, an indictment for certain offenses, including those of criminal sexual conduct, may be found and filed within six years

> after the commission of the offense or by the alleged victim's twenty-first birthday, whichever is later; the MCL 767.24(1) tolling provision applies to the MCL 767.24(2) period of limitations related to victims under the age of 18.

*Bill Schuette*, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Joseph T. Hubbell*, Prosecuting Attorney, and *Tristan Chamberlain*, Assistant Prosecuting Attorney, for the people.

*David B. Carter, Jr.*, for defendant.

Before: MURPHY, P.J., and JANSEN and SWARTZLE, JJ.

MURPHY, P.J. Defendant was charged with first-degree criminal sexual conduct (CSC-I), MCL 750.520b, arising out of an alleged act of sexual penetration in 1983, with the prosecution also giving notice that it would seek enhancement of any sentence on the basis of defendant's status as a fourth-offense habitual offender, MCL 769.12. Defendant was subsequently convicted by guilty plea of second-degree criminal sexual conduct (CSC-II), MCL 750.520c, and sentenced to 10 to 15 years' imprisonment. His efforts to withdraw his guilty plea and to otherwise obtain relief from or set aside the judgment were rejected. Relevant to this appeal, one of the grounds raised by defendant in his postsentence motions seeking to avoid the guilty plea was that the CSC-I charge was barred by the statute of limitations, which defense he was completely unaware of when pleading guilty, as neither his counsel nor the trial court informed him of the defense. Defendant appeals by leave granted the trial court's order denying his motion for relief from judgment. We hold that the CSC-I charge was not time-barred under MCL 767.24. Accordingly, we affirm.

As reflected in defendant's statements that formed the factual basis for his guilty plea, defendant admitted that he had sexual intercourse with his 13-year-old sister in 1983 when he was 17 years old. At the time of the crime, the period of limitations for all CSC offenses was six years, falling within the general catch-all provision. MCL 767.24, as amended by 1954 PA 100. With the enactment of 1987 PA 255, which was made effective March 30, 1988, MCL 767.24 was amended to provide that CSC offenses "may be found and filed within 6 years after the commission of the offense or by the alleged victim's twenty-first birthday, whichever is later." The victim turned 21 years old on August 13, 1991. According to information in defendant's presentence investigation report, defendant left Michigan sometime in 1989 or 1990—definitely before the victim turned 21 years of age—residing in several other states, including a lengthy prison stint in Montana, before returning to Michigan in approximately 2004.[1] And MCL 767.24(10) provides that "[a]ny period during which the party charged did not usually and publicly reside within this state is not part of the time within which the respective indictments may be found and filed."[2] During the period in which defendant did not reside in Michigan, our Legislature again amended MCL 767.24, effective May 2, 2001, providing that CSC-I "may be found and filed *at any time*." MCL 767.24(1), as amended by 2001 PA 6 (emphasis added).

On May 18, 2015, defendant was charged with CSC-I for the 1983 act of sexual intercourse with his sister.

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[1] Defendant disputes that he did not reside in Michigan in 1989 or early 1990, but he concedes that by May or June 1990, he had left the state.

[2] An out-of-state tolling provision has been part of MCL 767.24 for the entire time frame captured by this case. See 1954 PA 100 and all subsequently enacted amendments.

The prosecution also gave notice of seeking a sentence enhancement under MCL 769.12, asserting that defendant had three or more prior felony convictions. On August 4, 2015, defendant pleaded guilty to CSC-II in exchange for the prosecution dismissing the CSC-I charge and dropping the habitual notice. On September 9, 2015, defendant was sentenced to 10 to 15 years' imprisonment. After sentencing, there were multiple motions and applications for leave to appeal that were filed by two different attorneys representing defendant, wherein defendant unsuccessfully sought to withdraw or otherwise avoid his guilty plea. The subject of this appeal is defendant's last postsentence motion, which was a motion for relief from judgment brought pursuant to MCR 2.612. Defendant raised the argument concerning the statute of limitations, claiming that the charged offense of CSC-I was time-barred and that he was never informed of the defense before pleading guilty to CSC-II. We note that the issue was not raised in earlier appellate proceedings.

The trial court, although determining that a statute-of-limitations defense had been available to defendant on the CSC-I charge, denied the motion after concluding that defendant waived the defense, as well as any related ineffective-assistance claim, by pleading guilty, as opposed to pleading no contest. The trial court, relying on *People v Budnick*, 197 Mich App 21; 494 NW2d 778 (1992), determined that there could be no tolling despite defendant's time away from Michigan, because the tolling provision was inapplicable in connection with the twenty-first-birthday period of limitations. Further, on the basis that defendant pleaded guilty, reciting the factual basis for the crime, and not no contest, the trial court distinguished the instant case from the Michigan Supreme Court's order in *People v Cagle*, 472 Mich 884, 884-885 (2005), which stated:

In lieu of granting leave to appeal, the case is remanded to the Oakland Circuit Court for a hearing to determine whether defendant received ineffective assistance of counsel. Defendant was charged with and pleaded no contest in 1992 to six counts of first-degree criminal sexual conduct based on alleged acts committed between June 1979 and November 1981. At the time defendant entered his plea, the charges against him were barred by the six-year period of limitations of MCL 767.24 in effect at the time the crimes were allegedly committed. The circuit court shall determine whether defendant was informed by his counsel of the expiration of the period of limitations on the charges brought against him and whether defendant indicated that he wished to waive this defense. If the circuit court determines that defendant was not so informed and did not knowingly waive the defense, the court shall vacate defendant's convictions. [Citations omitted.]

Defendant filed an application for leave to appeal in this Court, and the panel's order provided as follows:

The Court orders that the application for leave to appeal is GRANTED. We note that at the time defendant filed his motions to set aside judgments, his only avenue for relief was pursuant to MCR Chapter 6.500. In addition to the issue raised in the application, we direct the parties to address whether defendant is entitled to relief from judgment pursuant to MCR 6.508(D).[3] MCR 7.205(E)(4).

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[3] MCR 6.508(D) provides, in part:

The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

(1) seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300;

(2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;

[*People v Kasben*, unpublished order of the Court of Appeals, entered August 10, 2017 (Docket No. 337082).]

On appeal, defendant argues that the trial court erred by ruling that defendant waived his statute-of-limitations defense to CSC-I when he pleaded guilty, given that, according to defendant, he had never been informed of the defense by anyone. Defendant contends, therefore, that he is entitled to relief from judgment pursuant to MCR 6.508(D).

Our holding is ultimately one that is based on the construction of MCL 767.24 and the application of its tolling provision and the various amendments to the statute over the years. We review de novo issues of statutory construction. *People v Hill*, 486 Mich 658, 665-666; 786 NW2d 601 (2010). With respect to MCR 6.508, "[w]e review a trial court's decision on a motion for relief from judgment for an abuse of discretion and its findings of facts supporting its decision for clear error." *People v Swain*, 288 Mich App 609, 628; 794 NW2d 92 (2010).

With respect to the principles governing statutory construction, our Supreme Court in *People v Morey*, 461 Mich 325, 329-330; 603 NW2d 250 (1999), observed:

> In [interpreting a statute], our purpose is to discern and give effect to the Legislature's intent. We begin by examining the plain language of the statute; where that lan-

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(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief.

> guage is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written. We must give the words of a statute their plain and ordinary meaning, and only where the statutory language is ambiguous may we look outside the statute to ascertain the Legislature's intent. [Citations omitted.]

The CSC offense was committed in 1983, and the statutory period of limitations at that time was six years, 1954 PA 100, which would have resulted in prosecution of the offense being time-barred at some point in 1989. However, *before that period of limitations expired*, the Legislature amended MCL 767.24, providing that CSC offenses "may be found and filed within 6 years after the commission of the offense or by the alleged victim's twenty-first birthday, whichever is later." MCL 767.24(2), as amended by 1987 PA 255. In *People v Russo*, 439 Mich 584, 588; 487 NW2d 698 (1992), the Supreme Court, examining MCL 767.24, as amended by 1987 PA 255, held:

> We find that the extended limitation period for criminal sexual conduct involving a minor was intended by the Legislature to apply to formal charges of offenses not time-barred on the effective date of the act filed after its effective date. This application is not a violation of the Ex Post Facto Clauses of the United States and Michigan Constitutions.

Accordingly, even though defendant's crime was committed in 1983 under a six-year period of limitations, the 1987 amendment of the statute became applicable, providing for an extension of the limitations period to the victim's twenty-first birthday in August 1991.

At the time of the victim's twenty-first birthday, defendant was not "usually and publicly" residing in Michigan, having left the state sometime in 1989 or

1990. We hold that defendant's absence from Michigan triggered the tolling provision in MCL 767.24(10).[4] In *People v Blackmer*, 309 Mich App 199, 200; 870 NW2d 579 (2015), the defendant sexually assaulted the adult victim in 1981, and the defendant later traveled to Indiana in 1982, where he committed another sexual assault, leading to his arrest, conviction, and incarceration for a prison term of 90 years. In 2013, the defendant was extradited to Michigan to stand trial for the 1981 sexual assault, and he argued that the applicable six-year period of limitations had expired in 1987, thereby barring the prosecution against him, and that the tolling provision did not apply because his intent had always been to return to Michigan. *Id*. at 200-201. The *Blackmer* panel held:

> The plain language of the former MCL 767.24 is clear and unambiguous. . . . In sum, the plain and unambiguous language of the nonresident tolling provision at issue provided that the limitations period was tolled for any period in which a defendant was not customarily and openly living in Michigan. Defendant's subjective intent is irrelevant to this definition. . . . The facts of this case patently show that defendant did not customarily and openly live in Michigan between 1982 and 2013; therefore, the trial court properly determined that the period of limitations was tolled from the time defendant left Michigan in 1982, and the court properly denied defendant's motion to dismiss. [*Id*. at 201-202 (citations omitted).]

Although we are addressing the period of limitations predicated on the victim's twenty-first birthday, the plain and unambiguous language of the tolling provision applies regardless whether the six-year period of limitations is at issue or whether the alternative period

[4] Under 1987 PA 255, the tolling provision, with nearly identical language to the current provision, was found in Subsection (1) of MCL 767.24.

of limitations based on a victim reaching the age of 21 is at issue. In 1989 or 1990, when defendant left Michigan before the victim's twenty-first birthday, the tolling provision stated, "[A]ny period during which the party charged did not usually and publicly reside within this state shall not be considered part of the time within which the respective indictments shall be found and filed." MCL 767.24(1), as amended by 1987 PA 255. The tolling provision contained no language that even remotely suggested that the Legislature did not intend for it to be applicable to all periods of limitation; there was no limiting or restrictive language. The tolling provision was all-encompassing, indicating that any period during which a defendant did not reside in Michigan could not be considered when calculating the time within which charges must be found and filed, i.e., the pertinent limitations period. A limitations period based on a victim's twenty-first birthday, while variable from one case to another, is nevertheless a limitations period. Before we address a contrary analysis on the matter in *Budnick*, 197 Mich App 21, we shall first proceed to the next and final step in the analysis.

The period of limitations, as set by employing the date of the victim's twenty-first birthday in August 1991, was tolled when defendant left Michigan in 1989 or 1990. Had there been no further amendment of MCL 767.24, the 2015 charge of CSC-I would have been time-barred, given that defendant returned to Michigan 11 years earlier in 2004. However, the Legislature amended MCL 767.24 in 2001, at which time the tolling of the period of limitations was ongoing, removing altogether any period of limitations for the offense of CSC-I. See 2001 PA 6.[5] Because the period of

[5] Defendant does not contend that the guilty plea needs to be vacated on the basis that the offense of CSC-II was time-barred.

limitations had not yet expired in light of the tolling, the 2001 amendment became applicable to the case, extending indefinitely the period of limitations on a charge of CSC-I. See *Russo*, 439 Mich at 588 (recognizing that charges not yet time-barred by an existing period of limitations are subject to a new period of limitations set forth in an amended statute).

Finally, we need to examine this Court's opinion in *Budnick*, 197 Mich App 21. There, the defendant was charged in 1990 with CSC-I, which offense had occurred back in 1975. The complainant was 10 years old at the time of the offense and had reached her twenty-first birthday on March 2, 1986. The defendant had lived continuously in the state of Wisconsin since 1978. *Id*. at 23. Pertinent to our discussion is the following passage from *Budnick*:

> The tolling provision of subsection 1 speaks of "any *period* during which the party charged did not usually and publicly reside within this state . . . ." Subsection 2 contains two distinct limitations. One is a six-year period from the time of the offense. The other is not a "period," but rather the date of an alleged victim's twenty-first birthday. The tolling provision of subsection 1, then, does not seem to apply to the second limitation concerning an alleged victim's twenty-first birthday. Subsection 2, however, provides that an indictment must be brought within six years from the time of the offense or by the alleged victim's twenty-first birthday, "whichever is later." In the present case, unless defendant took up residence again in Michigan after 1978, in which case the statute's six-year period would resume running, the six-year period remained tolled. Thus, the indictment brought against defendant, although untimely under the birthday limitation, was timely under the six-year limitation. [*Id*. at 26-27 (citations omitted).]

We question the logic of the analysis by this Court in *Budnick*, if not only for the reason that the reference to

"any period" in the tolling provision concerns the period of time during which a defendant does not reside in Michigan; it is not a direct reference to a *period* of limitations. Rather, the tolling provision indicates that the *period of absence* shall not be considered "part of the time" within which to bring charges, with the latter language pertaining to the applicable period of limitations. Thus, the time within which to bring charges, i.e., the period of limitations, shall not include a period of absence. Regardless, employing a victim's twenty-first birthday as a deadline to bring charges against a defendant does in fact create a "period" of limitations. If, under the former version of MCL 767.24, a child victim of CSC-I were five years old at the time of the offense, the period of limitations would be roughly 16 years when using the twenty-first-birthday provision as the measure.[6]

Of course, we are bound by any "rule of law established" in *Budnick*. MCR 7.215(J)(1). However, because the *Budnick* panel ultimately decided the case in favor of the prosecution on the basis of tolling the six-year period of limitations, we conclude that the Court's position on tolling with respect to a victim's twenty-first birthday was not necessarily involved in nor essential to resolving the appeal; it was dicta. See *Wold Architects & Engineers v Strat*, 474 Mich 223, 232 n 3; 713 NW2d 750 (2006) ("Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand, are, however illuminating, . . . *obiter dicta* and lack the force of an adjudication.") (quotation marks and citations omitted).

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[6] The exact time frame would depend on the specific date of the crime in relation to the victim's fifth year of life.

The Court in *Budnick* noted that the parties had not even addressed tolling in connection with a victim's twenty-first birthday. *Budnick*, 197 Mich App at 26. And the panel's own words indicated that it was treading in "dicta" territory when it stated that the tolling provision "does not *seem* to apply to the . . . limitation concerning an alleged victim's twenty-first birthday." *Id*. at 27 (emphasis added). This was not a definitive statement establishing a rule of law, and the Court itself appeared to recognize that it did not need to take a definitive stance. The panel immediately moved on to conclude that tolling did apply to the six-year statute of limitations, saving the prosecutor's case. *Id*. For all of the reasons expressed, we are not persuaded by and decline to follow the dicta in *Budnick* in regard to out-of-state tolling and the twenty-first-birthday period of limitations.

Because a statute-of-limitations defense to CSC-I was not available to defendant, he was not entitled to relief under MCR 6.508(D) for purposes of trying to escape his guilty plea, and we need not entertain any issues concerning waiver. Accordingly, we affirm the trial court's ultimate ruling, albeit for a reason different than the court's "waiver" analysis, upon which we take no position.

Affirmed.

JANSEN and SWARTZLE, JJ., concurred with MURPHY, P.J.

PEOPLE v MIKULEN

Docket No. 337003. Submitted April 12, 2018, at Lansing. Decided April 24, 2018, at 9:05 a.m. Leave to appeal denied 503 Mich 914.

Gregory S. Mikulen was convicted by a jury in the 12th District Court of operating a motor vehicle while visibly impaired (OWVI), MCL 257.625(3), but was acquitted of the greater charge of operating a motor vehicle while intoxicated (OWI), MCL 257.625(1). Defendant was pulled over while driving because his vehicle had a corroded, obscured license plate; he was not speeding or driving erratically when he was stopped. Defendant admitted that he had consumed two or three beers, and the arresting officer noted that defendant's eyes were glassy and bloodshot and that he smelled of intoxicants. The officer conducted three field-sobriety tests—the horizontal gaze nystagmus (HGN) test, the walk-and-turn test, and the one-legged-stand test, before concluding that defendant was intoxicated. The officer arrested defendant, and defendant's blood alcohol content was later determined through a blood draw to be 0.109 grams per 100 milliliters of blood. The police officer admitted at trial that he had made errors in conducting the HGN test and that he did not understand the clues of alcohol consumption relative to the other two tests. Defendant appealed his conviction in the Jackson Circuit Court. The circuit court, John G. McBain, J., vacated defendant's OWVI conviction, reasoning that there was insufficient evidence to support the conviction because the offense required testimony that defendant had been observed driving in an impaired manner, that the district court accordingly abused its discretion when it instructed the jury on that offense, and that the district court should not have admitted defendant's blood test because the phlebotomist who drew his blood did not testify, denying defendant his constitutional right of confrontation. The prosecution appealed by leave granted.

The Court of Appeals *held*:

1. The OWI statute provides, in part, that a person shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles within this state if the person is operating while intoxicated, including

when (1) the person is under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance (OUIL) or (2) the person has an alcohol content of 0.08 grams or more per 100 milliliters of blood. In contrast, the OWVI statute provides that a person shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles within the state when, due to the consumption of alcoholic liquor, a controlled substance, or other intoxicating substance, or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance, the person's ability to operate the vehicle is visibly impaired. To establish a violation of MCL 257.625(3), the prosecution must demonstrate beyond a reasonable doubt that consumption of alcohol weakened or reduced the defendant's ability to drive such that the defendant drove with less ability than would an ordinary, careful, and prudent driver. The defendant's impaired ability to drive must have been visible to an ordinary, observant person. The visible impairment may be established through evidence describing or depicting actions, conduct, characteristics, or movements of the person during the pertinent time frame. While the visibility or observation of erratic driving is relevant to demonstrating that a defendant's ability to drive was impaired, it is not a required element of the offense. The difference between OUIL and OWVI is the degree of intoxication that the prosecution must prove; that is, under an OUIL theory of OWI, the prosecution must establish that a defendant's ability to operate a vehicle was substantially lessened, while the prosecution must show that a defendant drove with less ability than an ordinary, careful, and prudent driver to establish an OWVI violation. Consistently with the OWVI statute, M Crim JI 15.4 provides that the prosecution must prove beyond a reasonable doubt that—due to the consumption of alcohol or an intoxicating substance—the defendant drove with less ability than would an ordinary careful driver and that the defendant's driving ability must have been lessened to the point that it would have been noticed by another person. Defendant admitted that he consumed alcohol before driving, his eyes were bloodshot, and he failed the videotaped sobriety tests, which the jurors viewed. On those facts, the district court correctly instructed the jury on OWVI. The arresting officer's misunderstanding and errors regarding the sobriety tests went to the weight of the evidence and the officer's credibility. And although there was no testimony that defendant drove erratically before being pulled over, the evidence was sufficient to demonstrate that defendant drove with less ability than an ordinary, careful, and

prudent driver. The circuit court erred by concluding that the OWVI charge should not have been submitted to the jury and that there was insufficient evidence to support the OWVI conviction.

2. Even if the district court erred by admitting the blood-test results, the error was harmless.

Reversed and remanded.

JANSEN, J., concurred only in the result reached by the majority.

AUTOMOBILES — INTOXICATING LIQUORS — DRIVING WHILE ABILITY VISIBLY IMPAIRED — EVIDENCE OF VISIBLE IMPAIRMENT.

MCL 257.625(3) provides that a person shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles within the state when, due to the consumption of alcoholic liquor, a controlled substance, or other intoxicating substance, or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance, the person's ability to operate the vehicle is visibly impaired; to establish a violation, the prosecution must demonstrate beyond a reasonable doubt that the consumption of alcohol weakened or reduced the defendant's ability to drive such that the defendant drove with less ability than would an ordinary, careful, and prudent driver; while the visibility or observation of erratic driving is relevant to demonstrating that a defendant's ability to drive was impaired, it is not a required element of the offense; the visible impairment may be established through evidence describing or depicting actions, conduct, characteristics, or movements of the person during the pertinent time frame.

*Bill Schuette*, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jerard M. Jarzynka*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

*Michael Skinner* and *Barone Defense Firm* (by *Mike Boyle*) for defendant.

Before: MURPHY, P.J., and JANSEN and SWARTZLE, JJ.

MURPHY, P.J. The prosecution appeals by leave granted the circuit court's order that vacated defendant's conviction in the district court of operating a

motor vehicle while visibly impaired (OWVI), MCL 257.625(3).[1] The district court jury acquitted defendant of the greater charge of operating a motor vehicle while intoxicated (OWI), MCL 257.625(1). The prosecution argues that the circuit court erred by ruling that there was insufficient evidence to convict defendant of OWVI. The circuit court concluded that it was necessary for the prosecution to present evidence showing that defendant was seen operating his vehicle in an impaired manner in order to obtain a conviction for OWVI. The circuit court found that no such evidence was submitted to the jury. Indeed, according to the circuit court, the only evidence regarding defendant's actual driving was the arresting officer's testimony that indicated that defendant was not driving in an erratic, improper, or impaired manner. The circuit court therefore determined that the district court erred by submitting the OWVI offense to the jury. We hold that the circuit court misconstrued MCL 257.625(3), given that the crime of OWVI does not require proof that a person was operating a motor vehicle in an impaired manner. The offense does require proof that a *person's ability* to operate a motor vehicle was visibly impaired, and we conclude that this evidentiary mandate compels the prosecution to proffer evidence of a visual or observational nature, i.e., evidence describing or depicting actions, conduct, characteristics, or movements of the person during the pertinent time period, revealing an impaired ability relevant to operating a vehicle. In the instant case, the prosecution presented, in part, evidence that defendant had glassy, bloodshot eyes and failed sobriety tests, and while there was evidence of errors by the arresting officer in conducting

[1] *People v Mikulen*, unpublished order of the Court of Appeals, entered June 27, 2017 (Docket No. 337003).

the tests, those errors went to the weight of the evidence. Moreover, the jury was permitted to assess whether defendant's ability to operate his vehicle was visibly impaired based on its viewing of the videotape of the stop and sobriety tests. We hold that there was sufficient evidence to support the conviction of OWVI and that there was no error in instructing the jury on OWVI. The circuit court also ruled that the district court erred by admitting blood-test evidence because of a foundational flaw, specifically that the prosecution failed to provide the testimony of the phlebotomist who drew defendant's blood and that the lapse was not overcome through the testimony of other witnesses. We conclude that, assuming error, it was harmless for purposes of OWVI, considering the OWI acquittal and that untainted evidence established that defendant had consumed alcohol before driving. In sum, we reverse the circuit court's decision and remand for reinstatement of defendant's OWVI conviction.

The arresting officer observed defendant driving satisfactorily; he was not swerving, speeding, or driving abnormally in any way. The officer initiated a traffic stop because defendant's vehicle had a corroded, obscured license plate. The officer spoke with defendant and saw that defendant had glassy, bloodshot eyes and smelled of intoxicants. Defendant admitted to the officer that he had consumed two or three beers. Consequently, the officer administered a few sobriety tests, the horizontal gaze nystagmus (HGN) test, the walk-and-turn test, and the one-legged-stand test, which indicated to the officer's satisfaction that defendant was intoxicated. On cross-examination, the officer acknowledged that he made errors in conducting the HGN test and that he did not fully understand the clues of alcohol consumption relative to the walk-and-turn and one-legged-stand tests. The officer arrested

defendant and, with defendant's consent, took him to a local hospital where a phlebotomist drew defendant's blood in the officer's presence. The officer sealed defendant's blood sample and mailed it to the Michigan State Police Crime Lab where a forensic scientist tested the sample and determined that defendant's blood alcohol content was 0.109 grams, exceeding the legal limit of 0.08 grams per 100 milliliters of blood, MCL 257.625(1)(b).

The prosecution charged defendant with OWI, and over defendant's objection, the district court also instructed the jury on the lesser charge of OWVI. Defendant was convicted of OWVI, and he appealed the conviction in the circuit court. The circuit court interpreted MCL 257.625(3)—the OWVI provision—to require testimony by a witness who actually observed defendant driving in an impaired manner. Stated otherwise, the circuit court construed the statutory provision to demand proof of bad or erratic driving, i.e., impaired driving. The circuit court found that no such evidence was submitted to the jury and that, to the contrary, the arresting officer testified that defendant was not driving in an impaired manner. Accordingly, the circuit court concluded that the district court should never have instructed the jury on OWVI. The circuit court also ruled that the district court erred by admitting the blood-test evidence on the ground that there was no testimony that properly established the method and procedure used in conducting the blood draw, given that the phlebotomist who drew defendant's blood did not testify. The circuit court concluded that the absence of the phlebotomist at trial deprived defendant of his constitutional right of confrontation. In light of its rulings, the circuit court vacated defendant's OWVI conviction.

We review de novo whether there was sufficient evidence to sustain a conviction. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In reviewing the sufficiency of the evidence, this Court must view the evidence—whether direct or circumstantial—in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012); *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). A jury, and not an appellate court, observes the witnesses and listens to their testimony; therefore, an appellate court must not interfere with the jury'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). Circumstantial evidence and the reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). The prosecution need not negate every reasonable theory of innocence; instead, it need only prove the elements of the crime in the face of whatever contradictory evidence is provided by the defendant. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). We resolve all conflicts in the evidence in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). We review de novo the proper interpretation of a statute. *People v Martin*, 271 Mich App 280, 286-287; 721 NW2d 815 (2006). The determination regarding whether a jury instruction is applicable to the facts of a case is reviewed for an abuse of discretion; however, questions of law relative to jury instructions are reviewed de novo. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

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

MCL 257.625 provides, in pertinent part, as follows:

> (1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. As used in this section, "operating while intoxicated" means any of the following:
>
> (a) The person is under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance [OUIL].
>
> (b) The person has an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine [UBAL] . . . .
>
> * * *
>
> (3) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state when, due to the consumption of alcoholic liquor, a controlled substance, or other intoxicating sub-

> stance, or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance, *the person's ability to operate the vehicle is visibly impaired*. If a person is charged with violating subsection (1), a finding of guilty under this subsection may be rendered. [Emphasis added.]

Subsection (1) of the statute concerns the offense of OWI, for which defendant was acquitted,[2] while Subsection (3) regards OWVI. To convict a defendant under MCL 257.625(3), the Michigan Supreme Court has held that the prosecution must present evidence to establish beyond a reasonable doubt that consumption of alcohol weakened or reduced the defendant's ability to drive such that the defendant drove with less ability than would an ordinary, careful, and prudent driver. *People v Lambert*, 395 Mich 296, 305; 235 NW2d 338 (1975). Further, the prosecution must establish that the defendant's impaired ability to drive was " 'visible to an ordinary, observant person.' " *Id*. Our Supreme Court explained the difference between a violation of MCL 257.625(1)(a) (OUIL) and a violation of MCL 257.625(3) as follows:

> "The distinction between the crime of driving under the influence of intoxicating liquor and the lesser included offense of driving while ability is visibly impaired is the degree of intoxication which the people must prove." [*Id*.][3]

We find it quite evident that the Legislature enacted MCL 257.625(3), creating the offense of OWVI, to address those situations in which a defendant's level of

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[2] With respect to OWI, the jury was instructed to consider both OUIL and UBAL as alternate theories of criminal liability, MCL 257.625(1)(a) and (b).

[3] The Supreme Court stated that the trial judge should instruct the jury using the quoted language, which it found to "express legislative intent[.]" *Id*. at 305.

intoxication and resulting impairment does not suffice to establish OWI, yet the defendant still presents a danger to the public because his or her "ability to operate the vehicle is visibly impaired."[4]

The plain language of MCL 257.625(3) does not require testimony regarding a person's impaired driving to satisfy the statutory burden necessitating proof that the *person's ability* to operate a vehicle was visibly impaired. In this case, the circuit court improperly read into the statute a requirement that the prosecution present evidence showing that defendant was operating his vehicle in an impaired manner. Courts, however, may not read into a statute that which 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). Further, Michigan caselaw has not interpreted MCL 257.625(3) as requiring testimony that a defendant's vehicle was being operated in a drunken or impaired manner. See *Lambert*, 395 Mich at 305 (couching its discussion in terms of a driver's ability). A close reading of the statutory language reflects that it is a "person's ability" to operate a vehicle that must be visibly impaired. MCL 257.625(3). In other words, the focus is on whether the person's capacity to drive was impaired as could be observed by another. Although proof that a vehicle was being operated in an impaired manner, e.g., weaving from side to side, would, of course, greatly strengthen the prosecution's case by

[4] As indicated, for purposes of OWVI, the prosecution must show that a defendant drove with less ability than an ordinary, careful, and prudent driver, while with respect to OWI, under an OUIL theory, the prosecution must show that a defendant's ability to operate a vehicle was "substantially" lessened. *Lambert*, 395 Mich at 305; *Oxendine v Secretary of State*, 237 Mich App 346, 354; 602 NW2d 847 (1999); M Crim JI 15.3(2).

indicating that a defendant's ability to drive was visibly impaired, the statute does not compel such proof to convict a defendant.

The offense of OWVI does require proof that a person's ability to operate a motor vehicle was visibly impaired, MCL 257.625(3), and we hold that this evidentiary mandate demands that a prosecutor present evidence describing or depicting actions, conduct, characteristics, or movements of the person during the pertinent time period, revealing an impaired ability to operate a vehicle. Such evidence would be visual or observational in nature, thereby giving meaning to the term "visibly" as used in MCL 257.625(3). And the visibility of an impairment, under the grammatical construct of MCL 257.625(3), goes to the visibility of a driver's ability to operate a vehicle, not to the visibility of the vehicle's movements or the driving itself.[5] If there is no evidence that a defendant was actually operating his or her vehicle in an impaired or erratic manner, a prosecutor can nevertheless seek to establish that the defendant's ability to operate the vehicle was visibly impaired by evidence of, for example, the defendant failing a sobriety test, the defendant stumbling out of a vehicle and being unable to walk without falling over, or the defendant speaking incoherently or in a confused manner.[6] Again, the best evidence showing that a defendant's ability to operate a motor vehicle

[5] To be clear, the visibility or observation of erratic driving would be very relevant to showing that a defendant's ability to drive was impaired, but it is not an evidentiary requirement. And the observation of erratic, impaired driving would constitute visual evidence of a defendant's conduct or actions.

[6] Of course, the diminished ability to drive must be "due to the consumption of alcoholic liquor, a controlled substance, or other intoxicating substance, or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance . . . ." MCL 257.625(3).

was visibly impaired would likely be testimony that the defendant's vehicle was observed swerving or moving in some improper fashion, but such evidence is not absolutely required to obtain a conviction for OWVI.

The relevant model jury instruction, M Crim JI 15.4, which was crafted from our Supreme Court's holding in *Lambert*, likewise does not contain the requirement invoked by the circuit court in this case.[7] The instruction provides that a prosecutor must prove beyond a reasonable doubt that, due to the consumption of alcohol or an intoxicating substance, "the defendant drove *with less ability* than would an ordinary careful driver." M Crim JI 15.4 (emphasis added). The instruction further provides that "[t]he defendant's driving *ability* must have been lessened to the point that it would have been noticed by another person." *Id*. (emphasis added). Defendant focuses on the preceding sentence, as found in M Crim JI 15.4, claiming that it stands for the proposition that there must be testimony showing that the vehicle was being operated in some type of erratic, impaired manner. However, under the instruction, and consistently with the statutory language and *Lambert*, it is a defendant's "driving ability" that must be lessened such that it would be noticed, not the actual act of driving itself—although,

[7] MCR 2.512(D)(2) provides:

> Pertinent portions of the instructions approved by the Committee on Model Civil Jury Instructions or the Committee on Model Criminal Jury Instructions or a predecessor committee must be given in each action in which jury instructions are given if
>
> (a) they are applicable,
>
> (b) they accurately state the applicable law, and
>
> (c) they are requested by a party.

as noted earlier, erratic driving would be evidence of a defendant's lessened ability to drive.

For purposes of OWVI and the instant case, there was evidence that defendant was operating a motor vehicle, that he had consumed alcohol just before driving, and that due to the consumption of alcohol, defendant had glassy, bloodshot eyes and had failed sobriety tests, as was visible to and observed by the arresting officer; the jurors also viewed a videotape of the stop and the sobriety tests. The charge of OWVI was therefore properly submitted to the jury, despite the fact that there was no evidence showing that defendant's vehicle was being driven in an impaired manner. We acknowledge that the arresting officer conceded to certain errors and misunderstandings regarding the sobriety tests. However, his testimony and the videotape concerning the sobriety tests still presented sufficient evidence to show that defendant was driving with less ability than an ordinary, careful, and prudent driver. *Lambert*, 395 Mich at 305; M Crim JI 15.4.[8] The problematic aspects of the arresting officer's testimony regarding the sobriety tests went to the weight of the evidence and the officer's credibility, which were matters for the jury to assess, not this panel. *Wolfe*, 440 Mich at 514-515. Similarly, the arresting officer's testimony that defendant was operating his vehicle in an appropriate manner did not establish that the evidence was insufficient to prove OWVI. It merely constituted evidence favorable to defendant upon which the jury could place as much or as little weight as it wished. In sum, the circuit court erred by vacating defendant's OWVI conviction on grounds of insufficiency of evidence and instructional error.

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[8] There was also the officer's testimony that defendant had glassy, bloodshot eyes, which would constitute evidence of a visible nature suggesting that defendant's ability to drive was impaired.

The prosecution also argues that the circuit court erred by vacating defendant's conviction on the ground that no evidence established the method and procedure used in conducting defendant's blood test because the phlebotomist who drew the blood did not testify. Assuming that the circuit court did not err and that the blood-test results should not have been admitted into evidence, defendant cannot establish the requisite prejudice, because any error was harmless. MCL 769.26; MCR 2.613(A); *People v Lukity*, 460 Mich 484, 493-494; 596 NW2d 607 (1999). Given the acquittal on the charge of OWI, which encompassed a UBAL theory, it is evident that the jury did not give any weight to the blood-test results, yet it still convicted defendant of OWVI. Although the prosecution had to establish that defendant had consumed alcohol for purposes of proving OWVI, no specific blood alcohol level had to be shown, see MCL 257.625(3), and the prosecution presented testimony by the arresting officer that defendant had glassy, bloodshot eyes and smelled of intoxicants and that defendant acknowledged consuming two or three beers. We therefore simply cannot conclude that defendant was harmed or prejudiced by the admission of the blood-test evidence, assuming error in its admission.

Reversed and remanded for reinstatement of defendant's conviction of OWVI. We do not retain jurisdiction.

SWARTZLE, J., concurred with MURPHY, P.J.

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

*In re* SMITH

Docket No. 339478. Submitted April 12, 2018, at Lansing. Decided April 24, 2018, at 9:10 a.m.

In October 2015, the Department of Health and Human Services (DHHS) petitioned the Livingston Circuit Court, Family Division, to take jurisdiction over respondent's minor son, RS, and remove him from respondent's home. RS had serious medical problems, including cerebral palsy and fetal-hydantoin syndrome, a rare disorder caused by exposure to drugs commonly used to treat epilepsy. The court authorized the petition, and respondent entered a plea of admission to most of the allegations. After RS was removed, petitioner put a parent-agency treatment plan in place, and review hearings were held regularly. CPS caseworkers reported at the review hearings that respondent was not complying with the treatment plan—for example, she had attended less than half of RS's doctors' appointments, she was not employed, and she had not secured appropriate housing. Petitioner filed a supplemental petition in November 2016 seeking termination of respondent's parental rights. The court, Miriam A. Cavanaugh, J., adopted the referee's findings of fact and recommendations and terminated respondent's parental rights under MCL 712A.19b(3)(c)(*i*), (g), and (j). Respondent appealed. RS died during the pendency of the appeal.

The Court of Appeals *held*:

1. Michigan courts may only exercise the authority granted to them by Article VI of the 1963 Constitution. An essential element of that authority is that courts will not reach moot issues; to warrant review, parties must present the court with a real case or controversy. Generally, a case is rendered moot when something occurs that makes it impossible for a reviewing court to grant relief. A moot case should ordinarily be dismissed without reaching its merits. However, the instant case was not rendered moot by RS's death even though reunification was not possible because the termination of respondent's parental rights could have collateral legal consequences: (1) under MCL 712A.19b(3)(i), termination of respondent's parental rights to RS may provide a statutory ground to terminate respondent's parental rights to another

child; (2) under MCL 712A.19a(2)(c), a prior termination of parental rights is relevant to a determination whether respondent is entitled to reunification services if another child is removed from her care; (3) the termination could affect respondent's ability to manage RS's property postmortem or to wrap up legal or medical affairs; and (4) the termination could affect respondent's ability to obtain future employment, especially in the medical or childcare sectors.

2. DHHS must make reasonable efforts to reunify a parent with a minor child who has been removed from that parent's care. In this case, respondent challenged whether petitioner's efforts regarding transportation, job services, housing, and ongoing medical training were adequate. The evidence established that petitioner met its obligation to provide reasonable reunification services to respondent but that respondent did not uphold her commensurate responsibility to engage in and benefit from those services. Respondent secured housing with rent assistance, but the housing did not have wheelchair access, which was necessary for RS. Respondent refused help to find suitable housing. Petitioner offered to help respondent find employment, but respondent did not fully avail herself of those services. The record showed that petitioner provided the transportation assistance that respondent requested. Respondent claimed that she did not receive the proper medical training to care for RS, specifically, that she did not receive instruction about any special cleaning or care needed in connection with RS's feeding tube. But respondent missed more than half of RS's medical appointments and frequently argued with care providers at the appointments she did attend. The record made clear that if respondent did not receive some training, her own conduct was the cause. Finally, respondent argued that petitioner had a duty to tailor its reunification assistance to RS's specific needs and, therefore, that petitioner had to provide RS with more intensive services. But respondent failed to support this argument, and a party may not leave it to the court to search for authority to sustain or reject the party's position.

3. To terminate parental rights, a trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met. In this case, the trial court concluded that clear and convincing evidence supported the termination of respondent's parental rights under MCL 712A.19b(3)(c)(*i*) (conditions leading to adjudication continue to exist); MCL 712A.19b(3)(g) (regardless of intent, parent failed to provide proper care or custody of the

child); and MCL 712A.19b(3)(j) (reasonable likelihood that child would be harmed if returned to parent's home). Respondent made minimal progress in meeting the requirements established to avoid termination under (3)(c)(*i*). In addition to refusing help to find employment and to secure accessible housing, respondent failed to make sufficient progress in addressing her own mental-health concerns. Respondent also failed to demonstrate her ability to manage RS's extensive medical needs. Respondent missed half of RS's medical appointments, was confrontational with medical personnel and their treatment recommendations, and claimed to have inadequate training regarding RS's feeding tube. Therefore, respondent was ill-equipped to address RS's medical needs, and her inability to participate in RS's care made it unlikely that she would improve her caregiving abilities in the future. Termination under MCL 712A.19b(3)(c)(*i*) was appropriate. Termination under MCL 712A.19b(3)(g) and (j) was also appropriate because respondent's failure to participate in and benefit from a service plan was evidence that she would not be able to provide RS with proper care and custody, MCL 712A.19b(3)(g). In addition, respondent's failure to comply with the terms and conditions of her service plan was evidence that RS would be harmed if returned to respondent's home, MCL 712A.19b(3)(j). Respondent's parental rights were properly terminated.

Affirmed.

COURTS — AUTHORITY — CASE REVIEW AND DISPOSITION — MOOTNESS — COLLATERAL LEGAL CONSEQUENCES.

An essential element of the authority given Michigan courts in Const 1963, art VI, is that courts will generally not reach moot issues; an issue is moot if an event has occurred that makes it impossible to grant relief; when the minor child who is the subject of a termination appeal dies before the appellate court has heard oral argument, reunification is not possible; even though reunification is impossible, the case is not necessarily moot when termination of a party's parental rights could result in collateral legal consequences for that party; that, under MCL 712A.19b(3)(i), termination of parental rights to one child may provide statutory grounds for terminating parental rights to another child is a collateral legal consequence that prevents a case from being moot and allows for judicial review of the lower court's decision.

*William J. Vailliencourt, Jr.*, Prosecuting Attorney, and *Kimberly W. Morrison*, Assistant Prosecuting Attorney, for petitioner.

Child Welfare Appellate Clinic (by *Vivek S. Sankaran* and Stephanie Benjamini (under MCR 8.120(D)(3))) for respondent.

Before: MURPHY, P.J., and JANSEN and SWARTZLE, JJ.

SWARTZLE, J. Respondent's minor son, RS, faced significant medical problems, including cerebral palsy and fetal-hydantoin syndrome. At the age of nine years old, RS weighed approximately 35 lbs. and could not talk other than to say "momma." After a seven-day hearing, the trial court terminated respondent's parental rights to RS and this appeal followed. Several weeks prior to oral argument, RS passed away. This Court cannot, therefore, reunite respondent and RS regardless of the merits of her appeal. Yet, concluding that the appeal is not moot because respondent faces collateral legal consequences as a result of the termination, we reach the merits and hold that the trial court did not err by terminating respondent's parental rights.

## I. BACKGROUND

Respondent had two biological children: an older daughter who was placed in a guardianship with respondent's mother in 2006, and a younger son who remained in respondent's care until petitioner intervened in 2015. The younger son, RS, was born in 2006 and was the only child subject to this appeal.[1]

[1] The parental rights of the child's father were also terminated. He is not a party to this appeal.

RS had extensive medical problems, which essentially formed the basis for both his initial placement in foster care and the decision to terminate respondent's parental rights. Respondent testified that RS suffered from cerebral palsy. RS started having myoclonic-epilepsy seizures when he was a year old; they occurred approximately every other month and were triggered when he was woken suddenly or heard loud noises. He also had asthma and was prone to severe vomiting, which required the use of various feeding tubes. RS weighed only 35 lbs. at nine years old.

RS also suffered from fetal-hydantoin syndrome, which caused muscle spasms, and he had a small cerebellum and cranium. RS was unable to walk or sit up on his own and could not talk other than to say "momma." He wore a vest for chest congestion and used a suction machine. RS required a specialized wheelchair for movement and a special feeding chair to be fed upright. Even with special foot braces and a stander, RS could only stand upright for a short period three times a day. When he was not at school, he spent the majority of his time in bed.

Respondent and RS had a lengthy history with Child Protective Services (CPS). In October 2015, petitioner moved the trial court to take jurisdiction over RS and remove him from respondent's home. The petition alleged that respondent was unable to provide adequate medical care for RS, that respondent and RS had missed 40 doctor appointments in the previous 10 months, and that respondent refused to allow service providers to come to her home. The petition also alleged that, during a home visit in October 2015, the caseworker saw RS's grandmother smoking in the home next to an oxygen breathing machine. Eleven

people were living in the three-bedroom home, and the caseworker did not observe any medical supplies or a medical bed for RS. The petition further alleged that respondent was suspected of having deliberately removed a tube from RS's stomach, allegedly to prevent RS's discharge from the hospital during one of his stays there. The petition also contained allegations about respondent's mental health, lack of employment, and inability to stop other family members from smoking in the home.

The trial court authorized the petition on October 21, 2015, at which time it made RS a ward of the court and placed him in petitioner's care. In December 2015, respondent entered a plea of admission to several allegations contained in the petition. She acknowledged most of the above allegations and admitted that RS did not have his own room, his medical bed and other equipment were stored in the garage, and others in the home smoked. She also admitted that she had anxiety, depression, and bipolar disorder. Respondent testified that she was married to and living with William Barnes despite his extensive criminal history, which included a conviction for domestic violence. She acknowledged that her history with CPS included numerous allegations of domestic violence involving herself and Barnes, and she admitted that petitioner had offered services to her and RS in the past.

A parent-agency treatment plan was put in place in January 2016. The treatment plan required respondent and Barnes to obtain psychological evaluations, continue mental-health counseling, obtain employment and housing, properly care for RS's medical needs, attend all of RS's medical appointments, follow the medical recommendations, participate in substance-abuse assessments and random drug screens, contact

the agency for transportation help if needed, and complete a domestic-violence assessment.

Review hearings were held regularly. At a review hearing in April 2016, respondent's caseworker, Ann Kotch, stated that respondent had reported that she had been fired from her part-time job and had been removed from the waiting list for subsidized housing. The trial court noted that it had reviewed reports submitted for respondent and Barnes and that respondent and Barnes had made inconsistent statements to various service providers. At a review hearing in July 2016, another caseworker, Jessica Girz, and the prosecutor reported that all of the barriers to reunification remained the same—Barnes had not been drug testing, respondent was unemployed, and respondent was harassing caseworkers and threatening to sue them. Respondent's counsel further acknowledged that respondent had not attended all of RS's medical appointments.

Finally, at a review hearing in October 2016, Kotch advised the trial court that respondent's therapist had reported that respondent refused to address her role in RS's removal. Respondent had attended six therapy sessions and had requested a new therapist, but she had not provided information about a replacement or releases for information. The guardian ad litem reported that respondent had only attended 17 of 54 doctor appointments. Accordingly, petitioner requested that the goal be changed to termination. The trial court authorized the petition due to respondent's noncompliance with her treatment plan.

Petitioner filed a supplemental petition in November 2016 requesting termination of respondent's parental rights under MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), and (j). Also around this time, respondent's parenting

time was suspended after she filed a baseless CPS complaint against RS's foster parents and was involved in an altercation with Kotch at one of RS's hospital appointments.

A seven-day termination hearing was held between February and May 2017. Regarding her relationship with Barnes, respondent testified that she was aware that Barnes had a criminal history, including a conviction for domestic violence, and that this history prevented Barnes from visiting RS. Still, respondent denied that Barnes was ever violent toward her. Respondent acknowledged Barnes's history of substance abuse and mental-health issues and stated that, although Barnes participated in random drug testing, he had not provided those records to petitioner.

With respect to respondent's own mental-health concerns, she testified that she had been attending therapy and that she no longer needed to take anxiety medication. One of the recommendations after her psychological evaluation was that she see a psychiatrist, but she had not seen one for more than two years. She was taking medications prescribed by her primary-care doctor and had not provided therapy records to her caseworker.

Respondent acknowledged having had a substance-abuse problem in the past, but testified that the problem was behind her. Respondent testified that she had not completed all of the required drug screens and had stopped testing after November 2016. According to respondent, she stopped testing because she was not provided with transportation assistance, though she acknowledged that she did not request this assistance. She later stated that transportation was not really a barrier for her to attend her services because a bus stop was only a quarter of a mile from her home.

Respondent acknowledged that her caseworker had arranged for a service to come to her home for testing, but stated that she did not allow them to come into her home because it was an invasion of her privacy.

Regarding RS's medical appointments, respondent claimed that she attended all of the appointments about which she had been informed. Still, respondent acknowledged that she missed some other appointments for various reasons, including transportation problems, her own conflicting appointments, and her belief that the appointments had been cancelled or that she was not allowed to attend. Later, however, respondent denied that she had missed any appointments due to transportation problems.

Respondent denied that she pulled out RS's stomach tube and claimed that she received information that a nurse had confessed to pulling out the tube, although no such information was offered for the record. Respondent testified at length about the mechanisms for feeding RS through his stomach tube, but she complained that no one had given her instructions for any special cleaning or care needed in connection with the use of the tube.

Respondent acknowledged that employment was an issue she needed to address and claimed that she was looking for work and trying to obtain her GED. Still, respondent admitted that she did not tell her caseworker about her job search. Respondent later testified that she had not looked for work, explaining that she had been busy with court. Respondent was not concerned about money because Barnes worked and she received public assistance.

With respect to her current housing, respondent testified that she obtained an apartment in Ypsilanti in September 2016 and had obtained rent assistance.

Respondent testified that her caseworker came to the apartment and determined that it was not suitable for RS because it did not have handicap-accessible ramps, but respondent later maintained that her caseworker never told her that the apartment was unsuitable. Respondent stated that Barnes's name was on the lease, but he was hardly there due to his work. Respondent admitted that both she and Barnes smoked, but she denied that they smoked in the home and said that she and Barnes washed their hands and changed their clothes after smoking.

RS's foster mother, Natalie Burge, testified at length about the amount of daily care and medical equipment RS required. Burge stated that RS's cognitive development was between a toddler and an adolescent. Doctors had told her that RS's cognition and other chronic medical conditions were not likely to improve. Burge explained that RS currently had two tubes for feeding and drainage and described the considerable daily tasks involved in taking care of the tubes. Burge discussed an esophageal-disconnect surgery that RS underwent in June 2016 to relieve his vomiting and its success, which led to a significant weight gain. According to Burge, respondent was informed earlier that the surgery would help RS, but respondent, although agreeing that the surgery would be helpful, told Burge that it "was going to be in the way future" and not to worry about it. Burge acknowledged that "a handful" of RS's doctor appointments were scheduled too quickly to provide much notice to respondent, but maintained that she provided notice to Kotch of all the scheduled appointments.

Kotch testified that respondent had missed 30 of RS's 62 scheduled doctor appointments, surgeries, or other procedures, despite being informed of them all.

Kotch maintained that, in the past, respondent would not agree with the doctors' recommendations, particularly with regard to discharging RS, and would become hostile to them.

As to the other aspects of the treatment plan, Kotch further testified that respondent had not addressed her need to provide housing for RS because respondent's current home did not have a wheelchair ramp and that respondent had told Kotch that she was not interested in becoming employed. Kotch further stated that respondent was not compliant with drug screening and that she had received a number of hostile or inappropriate text messages from respondent, which led Kotch to require that respondent communicate with her only by phone or in person. According to Kotch, respondent was inconsistent in her psychiatric treatment, refused to address the reasons RS was put in foster care, and refused to release therapy information to the caseworker.

With respect to respondent's relationship with Barnes, Kotch testified that it remained a barrier to reunification. Kotch testified that respondent had not dealt with the issues posed by Barnes's criminal history and that Barnes had stopped drug testing almost a year earlier. Kotch testified that Barnes participated in the psychological and substance-abuse assessments, but he did not follow the recommendations.

Regarding her efforts to help respondent with reunification, Kotch stated that respondent informed her that she had applied for housing from the Michigan State Housing Development Authority, and Kotch stated that respondent did not ask her for other assistance with housing. Kotch scheduled monthly meetings with respondent and consistently asked if respondent needed assistance with any of her services,

including obtaining housing. She provided respondent with bus tokens and gas cards, and she and others had personally transported respondent to services and parenting times. RS's insurance also covered transportation to medical appointments.

After the close of proofs, the trial court concluded that petitioner had established grounds for termination of respondent's parental rights under MCL 712A.19b(3)(c)(*i*), (g), and (j). Regarding MCL 712A.19b(3)(c)(*i*), the trial court concluded that respondent had failed to rectify the conditions that led to RS's removal. The trial court concluded that respondent had not made sufficient progress in addressing her own mental health to be able to take care of RS's extensive medical needs. The trial court noted that respondent had inconsistently attended therapy and that she refused to address her role in RS's removal. With respect to respondent's employment, the trial court concluded that respondent had no interest in working so that she would be able to meet RS's needs, meaning that her employment issues were not likely to be rectified in the near future. The trial court also concluded that respondent remained without adequate housing to address RS's needs because her current apartment did not have a handicap-accessible ramp and that respondent's own conduct prevented petitioner from assisting respondent in finding suitable housing. The trial court determined that one of the main issues that led to RS's removal was respondent's inability to care for him medically. The trial court concluded that respondent was in no better position to care for RS than at the time he was removed. The trial court noted that respondent failed to attend many of RS's appointments and was confrontational with his medical providers. With respect to respondent's claim that she was not provided with adequate instruction on

how to care for RS, the trial court determined that respondent's claim was not credible and further found that any instructional issue was due to respondent's combativeness or her inability to understand the instructions.

With regard to MCL 712A.19b(3)(g), the trial court concluded that respondent had failed to provide for the proper care and custody of RS and that there was no reasonable expectation that she would be able to do so within a reasonable time. The trial court found that respondent failed to provide proper care because she failed to comply with the treatment plan. Respondent's failure to comply with the treatment plan also served as the basis for the trial court's conclusion under MCL 712A.19b(3)(j) that RS was reasonably likely to be harmed if returned to respondent's home. The trial court found that respondent was in no better position to address RS's medical needs given her combativeness with medical personnel and her inconsistent attendance at RS's appointments and that respondent's current home was unsafe for RS. The trial court found that these issues were not likely to be rectified within a reasonable time considering RS's age.

The trial court found that petitioner had met its burden to provide reasonable efforts to reunify the family and rectify the identified problems, but that respondent had not availed herself of that assistance. Because of respondent's refusal to address the deficiencies outlined in her treatment plan and RS's vulnerable state, the trial court concluded that termination of respondent's parental rights was justified considering RS's best interests. MCL 712A.19b(5).

This appeal followed. During the pendency of this appeal, RS died of complications from his cerebral palsy.

## II. ANALYSIS

### A. MOOTNESS

As an initial matter, because the minor child has died, we must first determine whether the termination of respondent's parental rights presents a justiciable issue over which the parties may invoke this Court's jurisdiction.

The courts of this state may only exercise the authority granted to them by Article VI of the 1963 Constitution. An essential element of that authority is that courts will not reach moot issues. *In re Detmer*, 321 Mich App 49, 55; 910 NW2d 318 (2017). Therefore, to warrant our review, the parties must present this Court with a real controversy, rather than a hypothetical one. *Id*. at 55-56. This requirement, commonly known as the real-case-or-controversy requirement, prevents this Court from rendering advisory opinions "that have no practical legal effect in a case." *Id*. at 55 (quotation marks and citation omitted). "Thus, before we can reach the merits of this appeal, we must first consider whether it has become moot" by the child's death. *Id*. at 56.

"Generally speaking, a case becomes moot when an event occurs that makes it impossible for a reviewing court to grant relief," i.e., when the case presents only "abstract questions of law which do not rest upon existing facts or rights." *Id*. (quotation marks and citation omitted). A case is not moot, however, "[w]here a court's adverse judgment may have collateral legal consequences" for at least one of the parties. *Id*. (quotation marks and citation omitted). "When no such collateral legal consequences exist, and there is no possible relief that a court could provide, the case is moot and should ordinarily be dismissed without reaching the underlying merits." *Id*.

Both parties argue that the minor child's death does not render this case moot despite the inability of respondent to assume care of the child in the event that this Court reverses the trial court's termination. While we are not bound by the parties' agreement on this legal issue, see *In re Jarrell*, 172 Mich App 122, 123-124; 431 NW2d 426 (1988), we agree that this case is not moot because the trial court's termination of respondent's parental rights may have collateral legal consequences for respondent.

In the immediate context of termination proceedings, the trial court's termination of respondent's parental rights may provide a statutory ground to terminate respondent's parental rights to another child. MCL 712A.19b(3)(i).[2] Moreover, as respondent points out, a prior termination is a relevant matter for the trial court to consider when determining whether petitioner should be required to provide reunification services in the event that another child is removed from respondent's care. MCL 712A.19a(2)(c).[3] Additionally, the termination may affect respondent's abil-

[2] MCL 712A.19b(3)(i) has been amended, effective June 12, 2018. See 2018 PA 58. Under the current version of the statute, a prior termination involving serious neglect is a statutory ground to terminate rights to a sibling when "prior attempts to rehabilitate the parents have been unsuccessful." MCL 712A.19b(3)(i), as amended by 2012 PA 386. Under the version of the statute that will be effective June 12, 2018, a prior termination involving serious neglect is a statutory ground to terminate rights to a sibling only when "the parent has failed to rectify the conditions that led to the prior termination of parental rights." MCL 712A.19b(3)(i), as amended by 2018 PA 58.

[3] As currently codified, MCL 712A.19a(2)(c), as amended by 2012 PA 115, permits the trial court to order that reunification services not be made if the parent has had his or her rights to another child involuntarily terminated. As amended by 2018 PA 58, effective June 12, 2018, the trial court may only order that reunification services not be made under MCL 712A.19a(2)(c) if "the parent has failed to rectify the conditions that led to that termination of parental rights."

ity to direct the child's property postmortem or wrap up legal or medical affairs concerning the child. See *In Interest of ECG*, 345 NW2d 138, 142 (Iowa, 1984). Finally, given the facts of this case, the termination may affect respondent's ability to obtain future employment, especially in the medical or childcare sectors.

Therefore, we conclude that the case is not moot because collateral legal consequences still exist, even given the unfortunate passing of RS. See *In re Detmer*, 321 Mich App at 56; see also *In re Welfare of Child of JKT*, 814 NW2d 76, 85 (Minn App, 2012) (applying the collateral-legal-consequences rule when the minor child died during the pendency of the appeal); *In Interest of ECG*, 345 NW2d at 141 (resolving an appeal filed after the minor child's death).

### B. REASONABLE EFFORTS

Moving to the merits, respondent argues that the trial court erred by finding that petitioner made reasonable efforts to reunify her with the minor child. Absent exceptions not present here, petitioner is required to make reasonable efforts to reunify families and to rectify the conditions that led to the initial removal. See *In re Terry*, 240 Mich App 14, 25-26; 610 NW2d 563 (2000). We review the trial court's findings regarding reasonable efforts for clear error. *In re Fried*, 266 Mich App 535, 542-543; 702 NW2d 192 (2005). "A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made." *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011).

Respondent challenges the adequacy of petitioner's efforts with regard to transportation, job services, housing, and ongoing medical training. After reviewing

the record, we are satisfied that petitioner's reunification efforts were reasonable.

With respect to housing, respondent was able to obtain housing with rent assistance. Respondent acknowledged that the caseworker visited her apartment and determined that it was not suitable because it did not have handicap-accessible ramps. The caseworker offered to help respondent find suitable housing, but respondent refused. Similarly, the caseworker offered to help respondent obtain employment but respondent did not fully avail herself of those services. We agree with the trial court that respondent never intended to work. Respondent provided myriad reasons for why she did not seek employment, and stated that her husband could provide financially for her and the minor child.

Regarding transportation, respondent acknowledged that she was provided with assistance, including gas cards and rides. The caseworker also testified that respondent was provided with transportation assistance. Indeed, respondent acknowledged that she had not asked petitioner for further assistance with transportation, and that, in any event, she could use a bus stop near her home. Accordingly, the record makes clear that petitioner provided the necessary transportation assistance respondent requested.

Respondent claims that she did not receive the proper medical training to provide for RS. Although respondent claimed that no one explained any special cleaning or care needed in connection with the use of the child's stomach tube, she testified at length about the mechanisms for feeding the child through the tube. Moreover, respondent missed 30 of RS's 62 medical appointments despite being informed of them and, during the appointments she did attend, respondent

frequently argued with care providers. Accordingly, the record makes clear that, if respondent did not receive some training, her own conduct was the cause.

Respondent also asserts that petitioner's duty required it to tailor its reunification assistance to the child's specific needs, in particular his numerous severe medical conditions. Respondent argues that she was entitled to more intensive services and that petitioner's "cookie cutter" approach to the case was insufficient to satisfy its duty to provide reasonable reunification efforts. In support of this argument, respondent cites only caselaw establishing a duty by petitioner to tailor services to accommodate a disabled parent under the Americans with Disabilities Act, 42 USC 12101 *et seq*., rather than a disabled child. Respondent does not identify a disability of her own that required accommodation and "[a] party may not leave it to this Court to search for authority to sustain or reject its position." *People v Fowler*, 193 Mich App 358, 361; 483 NW2d 626 (1992).

In any event, a significant component of respondent's treatment plan required her to attend RS's medical appointments so that she could be aware of his needs and learn how to provide the specialized care he required. Respondent failed to attend approximately half of the child's appointments and frequently argued with care providers when she did attend appointments. Moreover, as discussed previously, respondent failed to avail herself of many of the services that were offered.

Therefore, the record makes clear that, although petitioner met its obligation to provide reasonable reunification services to respondent, respondent did not uphold her commensurate responsibility to engage in and benefit from those services. *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012). Accordingly,

respondent's claim that petitioner failed to provide reunification services is without merit.

C. STATUTORY GROUNDS

Respondent next argues that the trial court erred when it found that petitioner had established the statutory grounds for termination by clear and convincing evidence. "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 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 at 264.

The trial court found that grounds for terminating respondent's parental rights were established under MCL 712A.19b(3)(c)(*i*), (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.
>
> * * *
>
> (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.

1. MCL 712A.19b(3)(c)(*i*)

The trial court did not clearly err by finding that termination of respondent's parental rights was justified under MCL 712A.19b(3)(c)(*i*). The initial requirements were that respondent obtain a psychological evaluation and follow the recommendations, continue mental-health counseling, seek employment and housing, properly care for the child's medical needs, participate in a substance-abuse assessment and random drug screens, contact the agency for transportation help if needed, and complete a domestic-violence assessment and comply with the recommendations. The trial court found that respondent made minimal progress in meeting these requirements.

Regarding respondent's employment, we agree with the trial court that respondent did not intend to work. As noted previously, respondent provided a number of excuses as to why she could not work and did not provide petitioner with any documentation of her job search. Considering respondent's belief that she did not need to work, we agree that this issue was unlikely to be resolved within a reasonable time.

With respect to respondent's housing, although respondent had obtained an apartment during the time RS was placed with petitioner, the apartment did not

have a handicap-accessible ramp. Although petitioner offered to help respondent find suitable housing, respondent refused help. Accordingly, the record indicates that respondent did not meet her suitable-housing goals and was unlikely to do so within any reasonable time.

The trial court's finding that respondent had not made sufficient progress in addressing her mental-health concerns is also supported by the record. Respondent met with a number of therapists over the course of the case, but failed to provide the caseworker with a release for her most current mental-health provider so that petitioner could track her progress. More importantly, there is no indication that respondent benefited from any of these services. Respondent refused to address the issues that caused RS's removal, and she continued to act with hostility toward the child's medical providers and foster parents. Indeed, this hostility eventually resulted in an altercation at the hospital and the suspension of respondent's parenting time. Accordingly, respondent failed to address the main barriers that her mental health posed to the child's care. Given that respondent refused to address these issues throughout the case, as opposed to making a good-faith effort at improving, respondent was not likely to rectify her mental-health issues within any reasonable time frame.

Finally, with respect to the principal issue that led to the child's removal, clear and convincing evidence showed that respondent made no progress toward demonstrating her ability to care for the child's extensive medical needs. Respondent missed 30 of the child's 62 scheduled doctor appointments, surgeries, or other procedures and respondent continued to be confrontational with medical personnel and their treatment

recommendations. Moreover, respondent herself claimed to have inadequate training regarding the minor child's feeding tube. Accordingly, respondent was ill-equipped to address the child's medical needs and, given her inability to participate in the child's care, was unlikely to improve her care-taking abilities in the future.

Despite being provided ample services, respondent made minimal progress in rectifying the conditions that led to the adjudication. The trial court did not clearly err by finding that the evidence supported termination of her parental rights under § 19b(3)(c)(*i*).

2. MCL 712A.19b(3)(g) AND (j)

Finally, the record also supports the trial court's reliance on MCL 712A.19b(3)(g) and (j). "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 failed to comply with many of the terms of her treatment plan and made only minimal progress on the other terms. The testimony showed that the child had extensive medical needs and required constant care. Considering respondent's lack of participation in the child's medical care during the time he was in petitioner's care, and her minimal progress in addressing the other requirements of her treatment plan, there was no reasonable expectation that she would be able to care for him within a reasonable time. Given the child's fragile medical condition, there existed a reasonable likelihood that the

child would have suffered serious physical harm if returned to respondent's home.

### III. CONCLUSION

The trial court terminated respondent's parental rights to RS, and during the pendency of the appeal, RS tragically died. While reunification is no longer possible, we conclude that the matter is not moot because respondent faces collateral legal consequences as a result of the termination. Upon review of the merits, we conclude that the trial court did not err by holding that petitioner made reasonable efforts to reunify the family, nor did the trial court err by holding that statutory grounds existed for termination. Respondent does not challenge the trial court's best-interests determination. Accordingly, we affirm the termination of respondent's parental rights to RS.

MURPHY, P.J., and JANSEN, J., concurred with SWARTZLE, J.

PUETZ v SPECTRUM HEALTH HOSPITALS

Docket No. 335329. Submitted February 7, 2018, at Grand Rapids. Decided April 24, 2018, at 9:15 a.m. Leave to appeal denied 504 Mich 880.

Catherine Puetz, M.D., filed an action in the Kent Circuit Court against Spectrum Health Hospitals and its president, Kevin Splaine, alleging defamation, false-light invasion of privacy, intellectual-property (IP) ownership, and tortious interference with a business expectancy. Plaintiff, who specialized in emergency and observation medicine, worked for Emergency Care Specialists (ECS), a physicians' medical group that exclusively staffed its physicians at Spectrum-owned facilities. Spectrum appointed plaintiff to serve in various administrative roles, including as the associate medical director of observation medicine, the associate medical director of emergency and cardiovascular medicine, and the clinical advisor for pediatrics. In connection with these roles, plaintiff developed certain observation protocols for Spectrum's use that were then placed on Spectrum's intranet. In 2013, because the observation program at Spectrum was successful, ECS and plaintiff began preparing a pamphlet on observation medicine to consult on the subject. Spectrum instructed ECS that it had to work with Spectrum on any consulting or observation work, and at a meeting in July 2013, Spectrum claimed ownership of the observation materials. On August 5, 2013, a Spectrum nurse posted on a public Facebook page a photograph of the backside of a woman with the caption, "Don't judge me. I like what I like." Twelve Spectrum employees and 3 ECS employees commented on the Facebook post, including plaintiff, who stated: "OMG is that [patient's initials]? You are soo naughty." A Spectrum employee reported the Facebook comments to Spectrum, and Spectrum disciplined the multiple individuals who commented on the Facebook post. The severity of the discipline differed depending on whether the commenter was aware that the photograph was of a Spectrum patient. On August 19, 2013, Spectrum removed plaintiff from her administrative positions; three or four other commenters were either fired or banned from working in Spectrum hospitals. On August 21, 2013, Splaine spoke at an ECS meeting of approximately 50 partners, explaining Spectrum's decision. During that meeting, Splaine did

not refer to plaintiff by name but allegedly stated that plaintiff's comment violated the Health Insurance Portability and Accountability Act, 42 USC 1320d *et seq*. On August 22, 2013, Splaine sent ECS a letter demanding that plaintiff and another ECS employee not be scheduled at any hospital owned by Spectrum and referring to their conduct as reprehensible, unprofessional, and disturbing. On March 14, 2014, plaintiff filed a complaint in federal district court, alleging defamation, false-light invasion of privacy, breach of contract, IP ownership, and two counts of tortious interference with a business relationship. Plaintiff argued that the IP-ownership claim was a federal cause of action and asserted that the federal court had supplemental jurisdiction of her state-law claims—defamation, false-light invasion of privacy, and tortious interference with a business relationship—under 28 USC 1367(a). The federal court concluded that it lacked subject-matter jurisdiction over the IP-ownership claim and dismissed the entire complaint without prejudice. On July 21, 2015, plaintiff filed the state-court action within 30 days of the federal complaint being dismissed, and defendants moved for summary disposition. The circuit court, Christopher P. Yates, J., dismissed plaintiff's defamation claim under MCR 2.116(C)(7), reasoning that plaintiff had filed the claim after the MCL 600.5805(9) period of limitations had passed and that the claim had not been tolled under 28 USC 1367(d) by filing the federal action because the federal court lacked subject-matter jurisdiction under 28 USC 1367(a) over the IP-ownership claim and, in turn, never had supplemental jurisdiction over the defamation claim. The circuit court also dismissed plaintiff's remaining claims. Plaintiff appealed.

The Court of Appeals *held*:

1. 28 USC 1367(a) provides that before a federal district court may exercise supplemental jurisdiction over a state-law claim, there must be a civil action over which the federal district court has original jurisdiction and the state-law claim must be so related to the federal claim that it forms part of the same case or controversy under Article III of the United States Constitution. 28 USC 1367(d), in turn, provides that the period of limitations for *any* claim asserted under § 1367(a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under § 1367(a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless state law provides for a longer tolling period. Section 1367(d) was enacted to prevent the limitations period on dismissed claims from expiring while the plaintiff was fruitlessly

pursuing them in federal court. In light of the provision's plain language, the § 1367(d) tolling provision applies to *all* claims asserted under § 1367(a). In that regard, 28 USC 1367(d) tolls a state-law claim filed in federal court when the complaint is later dismissed by the federal court for lack of subject-matter jurisdiction. *Raygor v Regents of Univ of Minnesota*, 534 US 533 (2002), in which the United States Supreme Court held that the § 1367(d) tolling provision did not apply to claims against nonconsenting states that were dismissed on constitutional grounds—specifically, the Eleventh Amendment of the United States Constitution—did not control the outcome of this case because *Raygor*'s interpretation of § 1367(d) was driven by constitutional concerns, and the Supreme Court has declined to extend that holding absent Eleventh Amendment concerns. The Arizona Court of Appeals' extension of *Raygor* in *Morris v Giovan*, 225 Ariz 582 (Ariz App, 2010), to conclude that the § 1367(d) tolling provision did not toll the statutory limitations period for the plaintiff's supplemental state-law claims when the action was dismissed from the federal court for lack of subject-matter jurisdiction was not persuasive.

2. Statutes of limitations afford security against fraudulent or stale claims that become difficult to defend because of the loss of evidence, relieve courts from dealing with stale claims, and protect potential defendants from protracted fear of litigation. MCL 600.5805(9) provides that the period of limitations for defamation is one year; the claim accrues when the wrong on which the claim is based was done regardless of the time when damage results. In this case, the federal court dismissed plaintiff's claims for lack of subject-matter jurisdiction. Plaintiff filed her defamation claim in federal court within the one-year period of limitations, and that claim was tolled under 28 USC 1367(d) notwithstanding that her federal claim was dismissed for lack of subject-matter jurisdiction. Accordingly, because plaintiff timely filed her state defamation claim within 30 days of the federal action being dismissed, the action was not time-barred under MCL 600.5805(9), and the trial court erred by dismissing plaintiff's defamation claim under MCR 2.116(C)(7).

3. To maintain an action for false-light invasion of privacy, a plaintiff must show that the defendant broadcast to the public in general, or to a large number of people, information that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position. The plaintiff must receive publicity for the claim to be viable, and publicity occurs when the

defendant broadcast the challenged information to the public in general or to a large number or people. Summary disposition is not appropriate when the communication is only published to a small or specific group of individuals. In addition, the defendant must have known of, or acted in reckless disregard as to, the falsity of the publicized matter and the false light in which the plaintiff would be placed. With regard to the August 22, 2013 letter, plaintiff failed to demonstrate a sufficient level of publicity because the submitted evidence showed that Splaine distributed the letter to only five people, most of whom were involved in managing the incident. With regard to the August 21, 2013 meeting with ECS, the trial court erred by concluding that there was no genuine issue of material fact regarding the publicity element because a jury could reasonably infer that the group of 50 to 60 people at the meeting was sufficiently large to satisfy the publication requirement. However, regardless of whether the asserted comments at the meeting were false or placed plaintiff in a false light, plaintiff failed to establish that when Splaine made the comments, he knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed. Plaintiff also failed to present any evidence that Spectrum made any false statements to the media about plaintiff. Accordingly, the trial court did not err by granting summary disposition in favor of the defendants on the false-light claim, even though it did so for the wrong reason.

4. The trial court erred by concluding that plaintiff was bound by the IP provisions in the 2008, 2009, and 2012 agreements between Spectrum and ECS; plaintiff was not a party to those agreements. In addition, there were factual questions regarding whether some of the materials were developed before the IP policy was in place and before plaintiff signed any contracts potentially binding her to conform to the policy. Accordingly, the trial court erred by granting summary disposition under MCR 2.116(C)(10) in favor of defendants on plaintiff's IP claim.

5. To establish a claim of tortious interference with a business expectancy, a plaintiff must establish (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy on the part of the defendant, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the plaintiff; the plaintiff must demonstrate that the defendant did something illegal, unethical, or fraudulent. To show "intentional interference" the plaintiff must demonstrate that the defendant acted both intentionally and either improperly

or without justification. The act does not constitute improper motive or interference if the defendant's act was motivated by legitimate business reasons. While plaintiff established that Spectrum intentionally interfered with her relationship with ECS by instructing ECS not to schedule plaintiff at any Spectrum facility, she was unable to establish that Spectrum acted improperly or without justification given that it terminated or disciplined the other Facebook commenters. In addition, there was no evidence suggesting that Spectrum acted illegally, unethically, or fraudulently when it declared that plaintiff could not work at Spectrum facilities, particularly in light of the impropriety of plaintiff's comments. Therefore, the trial court correctly granted summary disposition in favor of Spectrum on plaintiff's tortious-interference-with-a-business-expectancy claim.

Affirmed in part and reversed in part.

LIMITATION OF ACTIONS — SUPPLEMENTAL JURISDICTION — STATE-LAW CLAIMS FILED IN FEDERAL COURT — STATUTORY PERIOD OF LIMITATIONS TOLLED.

28 USC 1367(a) provides that before a federal district court may exercise supplemental jurisdiction over a state-law claim, there must be a civil action over which the federal district court has original jurisdiction and the state-law claim must be so related to the federal claim that it forms part of the same case or controversy under Article III of the United States Constitution; 28 USC 1367(d), in turn, provides that the period of limitations for *any* claim asserted under § 1367(a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under § 1367(a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless state law provides for a longer tolling period; 28 USC 1367(d) tolls the statutory period of limitations for supplemental state-law claims when an action is dismissed from federal court for lack of subject-matter jurisdiction.

*Burgess Sharp & Golden, PLLC* (by *Heidi T. Sharp* and *Joseph A. Golden*) and *Heikens Law Firm* (by *Steven Heikens*) for plaintiff.

*Dykema Gossett, PLLC* (by *Steven S. Muhich* and *Mark J. Magyar*) for defendants.

Before: MARKEY, P.J., and M. J. KELLY and CAMERON, JJ.

M. J. KELLY, J. Plaintiff, Catherine Puetz, M.D., appeals by right the trial court order dismissing her complaint under MCR 2.116(C)(7) (statute of limitations) and MCR 2.116(C)(10) (no genuine issue of material fact). For the reasons stated in this opinion, we affirm in part and reverse in part.

## I. BASIC FACTS

In 1999, Puetz took a job with Emergency Care Specialists (ECS), a physicians' group representing about 150 physicians and about 70 physician's assistants. ECS exclusively staffs its physicians at hospitals run by defendant, Spectrum Health Hospitals (Spectrum). Through her relationship with ECS, Puetz had admission privileges in emergency services and observation medicine at Spectrum. In addition, Spectrum appointed Puetz to serve as the associate medical director of observation medicine, the associate medical director for emergency and cardiovascular medicine, and the clinical advisor for pediatrics. In connection with her role at Spectrum, Puetz developed certain observation protocols, which she admitted were created for Spectrum's use and placed on Spectrum's intranet.

Because the observation program at Spectrum was considered a success, individuals and organizations outside of Spectrum and ECS were interested in it. As a result, in the summer of 2013, ECS and Puetz decided to prepare a pamphlet on observation medicine in an effort to start consulting on the subject. When Spectrum learned about the pamphlet, it instructed ECS that it had to work with Spectrum on any consulting or observation work. Further, a meeting was held on the pamphlet/consulting work in July 2013. At the meeting, Spectrum claimed ownership of the obser-

vation materials. A follow-up meeting was scheduled, but the meeting did not occur before Puetz was, essentially, prohibited from working at Spectrum in any capacity because of her comments on a Facebook page.

The record reflects that on August 5, 2013, a Spectrum nurse posted on a public Facebook page a photograph of the backside of an overweight woman and the caption: "Don't judge me. I like what I like." In response to the post, 12 Spectrum employees and 3 ECS employees commented on the photograph on Facebook. Relevant to this appeal, Puetz was the sixth person to comment, and she stated, "OMG is that [patient's initials]? You are soo naughty."

A Spectrum staff member saw the post on Facebook, was uncomfortable with the dialogue, and reported it to Spectrum. Defendant Kevin Splaine, Spectrum's president, testified that the decision was made to discipline those involved. Initially, Spectrum decided to remove Puetz from her administrative roles at the hospital. However, Splaine testified that as the investigation into the incident continued, he decided that additional discipline was warranted. According to Splaine, "anyone with whom we could prove was part of this dialogue knew that this was a patient, if they were an employee of Spectrum Health, they would be terminated. If they were contracting with Spectrum Health, the contract would be terminated. And if they were privileged at Spectrum Health, we would not allow them to practice at Spectrum Health Hospitals." The other individuals involved received a written reprimand. By August 19, 2013, Puetz was informed that she was being removed from both her "administrative leadership position and clinical" because of the Facebook incident.

On August 21, 2013, after making that decision, Splaine spoke at an ECS meeting. Ostensibly, Splaine spoke at the meeting because there was "a lot of angst and concern" about the decision to remove Puetz, and ECS wanted to hear Spectrum's side of it. Splaine apparently did not refer to Puetz by name at the meeting; however, he allegedly told everyone at the meeting that Puetz's comments on Facebook violated HIPAA.[1] In addition, Splaine sent ECS a letter demanding that Puetz and another employee of ECS not be scheduled at any hospital owned by Spectrum. In the letter, Splaine referred to the conduct of Puetz and the other employee as reprehensible, unprofessional, and disturbing.

On March 14, 2014, Puetz filed a complaint in the United States District Court for the Western District of Michigan alleging defamation, false-light invasion of privacy, breach of contract, intellectual-property ownership, and two counts of tortious interference with a business expectancy. Only Count IV, the intellectual-property-ownership claim, arguably fell within the federal court's original jurisdiction. After discovery closed, the federal district court sua sponte issued a show-cause order regarding subject-matter jurisdiction. Thereafter, the court determined that it lacked subject-matter jurisdiction over the intellectual-property claim and dismissed the entire complaint without prejudice.

Within 30 days of her federal complaint being dismissed, Puetz filed a claim in the Kent County Circuit Court. In response, Spectrum moved for summary disposition under MCR 2.116(C)(7) with regard to the defamation claim and for summary disposition under

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[1] Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d *et seq*.

MCR 2.116(C)(10) for the remaining claims. Puetz also moved for partial summary disposition on the defamation claim, asserting that Splaine's comments were defamation per se, and she asked the court to rule as a matter of law that her comments on Facebook did not constitute a violation of HIPAA. After oral argument, the trial court entered a written opinion and order dismissing the defamation claim under MCR 2.116(C)(7) and dismissing the remaining claims under MCR 2.116(C)(10).

## II. DISMISSAL UNDER MCR 2.116(C)(7)

### A. STANDARD OF REVIEW

Puetz first argues that the trial court erred by dismissing her defamation claim under MCR 2.116(C)(7). Whether a trial court properly granted summary disposition on statute-of-limitations grounds is reviewed de novo. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). "Summary disposition under MCR 2.116(C)(7) is appropriate when the undisputed facts establish that the plaintiff's claim is barred under the applicable statute of limitations." *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013). In addition, issues regarding the proper interpretation and application of statutes are reviewed de novo. *Petersen v Magna Corp*, 484 Mich 300, 306; 773 NW2d 564 (2009) (opinion by KELLY, C.J.).

### B. ANALYSIS

In Michigan, the period of limitations for a defamation claim is one year. MCL 600.5805(9). "A defamation claim accrues when 'the wrong upon which the claim is based was done regardless of the time when damage

results.' " *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005), quoting MCL 600.5827. Here, the allegedly defamatory statements were made on August 21, 2013, and August 22, 2013. Puetz timely filed her complaint in federal court, but her federal complaint was dismissed for lack of subject-matter jurisdiction in June 2015. Puetz declined to appeal the dismissal from federal district court. Subsequently, on July 21, 2015, she filed suit in Michigan, again raising her defamation claim based on Splaine's August 21 and August 22, 2013 statements to ECS. Because her defamation claim was filed more than a year after her claim accrued, it is time-barred unless a tolling provision applies.[2] In order to bring a state-law claim in federal court, a plaintiff must assert his or her claim under the supplemental jurisdiction statute, 28 USC 1367. Section 1367(a) provides:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, *in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.* Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties. [Emphasis added.]

Therefore, before a federal court may exercise supplemental jurisdiction over a state-law claim, two require-

[2] The parties argue that unless the tolling provision in 28 USC 1367(d) applies to Puetz's defamation claim, that claim is time-barred by the one-year period of limitations in MCL 600.5805(9). However, our general tolling statute, MCL 600.5856(a), would also toll Puetz's claim. See *Badon v Gen Motors Corp*, 188 Mich App 430, 436; 470 NW2d 436 (1991) (holding that if the plaintiff timely files a complaint in federal court, then—under MCL 600.5856—"[t]he statutory period of limitation was then tolled until the federal action was no longer pending").

ments must be met. First, there must be a civil action over which the federal district court has original jurisdiction. Second, the state-law claim must be "so related" to the federal claim that it forms "part of the same case or controversy under Article III of the United States Constitution." *Id*. In this case, the federal district court concluded that Puetz's complaint failed to satisfy the first requirement, i.e., the federal district court lacked original jurisdiction over any of the claims raised in the complaint.[3] Accordingly, because there was no claim over which the federal court had original jurisdiction, the court had no authority under § 1367(a) to exercise supplemental jurisdiction over Puetz's state-law claims.

The supplemental-jurisdiction statute does not contain a provision expressly addressing what happens when a state-law claim is dismissed for lack of subject-matter jurisdiction under § 1367(a). Instead, "Subsection (b) places limits on supplemental jurisdiction when the district court's original jurisdiction is based only on diversity of citizenship jurisdiction . . . ." *Raygor v Regents of Univ of Minnesota*, 534 US 533, 540; 122 S Ct 999; 152 L Ed 2d 27 (2002). "Subsection (c) allows district courts to decline to exercise supplemental jurisdiction in certain situations" that are not applicable under the facts in this case. *Id*. In addition, Subsection (d) appears to toll the limitations period for *any* claim asserted under Subsection (a) regardless of

[3] Puetz contends that Count IV of her federal complaint was a claim over which the federal district court had original jurisdiction. And she argues that the trial court should have reviewed anew the issue of whether the federal court had original jurisdiction over her federal complaint despite the fact that she did not appeal the dismissal in federal court. Puetz, however, cites no authority in support of that novel proposition, so we conclude that this issue was abandoned on appeal. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

whether the plaintiff was successful in asserting that claim. See *Raygor*, 534 US at 542. Section 1367(d) provides:

> The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

It is an issue of first impression in Michigan whether 28 USC 1367(d) tolls a state-law claim filed in federal court that is later dismissed for lack of subject-matter jurisdiction. Further, the United States Supreme Court has not addressed this issue, and although there are a number of state courts and lower federal courts that have addressed the issue, those decisions are not binding on this Court.[4]

In the absence of binding authority interpreting 28 USC 1367(d), we first address the United States Supreme Court decision in *Raygor*. The *Raygor* Court addressed the narrow issue of whether it was constitutionally permissible to apply the tolling provision in § 1367(d) to state-law claims dismissed on Eleventh Amendment grounds. *Raygor*, 534 US at 539, 544. In answering this question, the *Raygor* Court acknowledged that § 1367(d) applied on its face to *any* claim asserted under Subsection (a). *Id*. at 542. However, the

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[4] See *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004) (stating that when construing federal statutes, state courts must follow the decisions of the United States Supreme Court, but the decisions of lower federal courts are merely persuasive), and *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 559 n 38; 705 NW2d 365 (2005) (stating that although not binding, the decisions of courts from other states may be considered as persuasive authority).

Court stated that "reading subsection (d) to apply when state law claims against nonconsenting States are dismissed on Eleventh Amendment grounds raises serious doubts about the constitutionality of the provision given principles of state sovereign immunity." *Id*. The Court considered it a *constitutional* question given that a limitations period may be a central condition of a state's decision to waive immunity and given that a state can "prescribe the terms and conditions on which it consents to be sued . . . ." *Id*. at 542-543 (quotation marks and citation omitted). As a result, the *Raygor* Court relied on the following principle of statutory construction: "When Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Id*. at 543 (quotation marks and citation omitted).

Turning to the statutory language, the *Raygor* Court noted that there was a lack of clarity on whether there was a clear intent to toll the limitations period for claims against nonconsenting state defendants that were dismissed on Eleventh Amendment grounds. *Id*. at 544. As a result, although the language "any claim asserted" was broad enough to cover the situation in *Raygor*, it was "not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment" because it did not reflect any "specific or unequivocal intent to toll the statute of limitations for claims asserted against nonconsenting States . . . ." *Id*. at 544-545. Moreover, although the statute could be read to authorize tolling of claims dismissed against nonconsenting State defendants on Eleventh Amendment grounds, in context, 28 USC 1367 only contemplates a few grounds for dismissal. *Id*. at 545. The Court stated:

> The requirements of § 1367(a) make clear that a claim will be subject to dismissal if it fails to "form part of the same case or controversy" as a claim within the district court's original jurisdiction. Likewise, § 1367(b) entails that certain claims will be subject to dismissal if exercising jurisdiction over them would be "inconsistent" with 28 U.S.C. § 1332 (1994 ed. and Supp. V). Finally, § 1367(c) (1994 ed.) lists four specific situations in which a district court may decline to exercise supplemental jurisdiction over a particular claim. Given that particular context, it is unclear if the tolling provision was meant to apply to dismissals for reasons unmentioned by the statute, such as dismissals on Eleventh Amendment grounds. In sum, although § 1367(d) may not clearly exclude tolling for claims against nonconsenting States dismissed on Eleventh Amendment grounds, we are looking for a clear statement of what the rule *includes*, not a clear statement of what it *excludes*. Section 1367(d) fails this test. As such, we will not read § 1367(d) to apply to dismissal of claims against nonconsenting States dismissed on Eleventh Amendment grounds. [*Id*. at 545-546 (citations omitted).]

Overall, *Raygor* contains language suggesting that § 1367(d) may apply only to dismissals contemplated by §§ 1367(a), (b), and (c), but it also contains language making clear that the interpretation of § 1367(d) was driven by constitutional concerns that are not relevant to the issue in the case sub judice.

Relying on the *Raygor* decision, the Arizona Court of Appeals held that if a federal court dismissed a state-law claim for lack of subject-matter jurisdiction premised on a lack of original jurisdiction, the tolling provision in § 1367(d) does not apply to a plaintiff's claims when they are refiled in state court. *Morris v Giovan*, 225 Ariz 582, 585; 242 P3d 181 (Ariz App, 2010). The *Morris* court concluded that there was no real distinction between a claim dismissed against nonconsenting defendants on Eleventh Amendment grounds and a claim dismissed for lack of subject-

matter jurisdiction. See *id*. at 584. Further, the court believed that holding otherwise would "affect the constitutional balance between the states and the federal government, and Congress has not expressed this intent in the language of the statute." *Id*. at 585, citing *Raygor*, 534 US at 543.

The trial court in this case found *Morris* persuasive and applied it to bar Puetz's defamation claim. We conclude, however, that the court's reliance on *Morris* was misplaced. The *Morris* court did not independently evaluate the statutory language. Instead, it relied on the *Raygor* Court's interpretation of § 1367(d), which was an interpretation of the statute *in light of the dismissal of a claim on Eleventh Amendment grounds*. *Morris*, 225 Ariz at 584; *Raygor*, 534 US at 542. Then, without citing legal authority, the *Morris* court presumed that the same constitutional concerns that existed in *Raygor* were present when a case is dismissed for want of subject-matter jurisdiction. See *Morris*, 225 Ariz at 585. Finally, the *Morris* court did not acknowledge that in *Jinks v Richland Co, South Carolina*, 538 US 456, 466; 123 S Ct 1667; 155 L Ed 2d 631 (2003), the United States Supreme Court declined to extend the holding in *Raygor* in the absence of Eleventh Amendment concerns. For these reasons, we do not find *Morris* persuasive.

Instead, we turn to the language used in 28 USC 1367(d) and the rules of interpretation espoused by our own Supreme Court in *Walters v Nadell*, 481 Mich 377; 751 NW2d 431 (2008). In that case, our Supreme Court explained that

> [w]hen interpreting a federal statute, our task is to give effect to the will of Congress. To do so, we start, of course, with the statutory text, and unless otherwise defined, statutory terms are generally interpreted in accordance

> with their ordinary meaning. When the words of a statute are unambiguous, judicial inquiry is complete. [*Id*. at 381-382 (quotation marks, brackets, ellipses, and citations omitted).]

28 USC 1367(d) provides that its tolling provision applies to "any claim asserted under subsection (a)." The term " '[a]ny' means 'every; all.' " *Nat'l Pride At Work, Inc v Governor*, 481 Mich 56, 77; 748 NW2d 524 (2008) (citation and brackets omitted). Therefore, applying the statute as written, because Puetz asserted a supplemental-jurisdiction claim under § 1367(a), her claim was tolled under § 1367(d).[5]

Applying the statute as written is also in line with Congress's intent when enacting the statute. As explained by the United States Supreme Court in *Jinks*, § 1367(d) was enacted "[t]o prevent the limitations period on [dismissed] claims from expiring while the plaintiff was fruitlessly pursuing them in federal court . . . ." *Jinks*, 538 US at 459. The *Jinks* Court further stated:

> Prior to enactment of § 1367(d), [plaintiffs] had the following unattractive options: (1) They could file a single federal-court action, which would run the risk that the federal court would dismiss the state-law claims after the limitations period had expired; (2) they could file a single state-law action, which would abandon their right to a

[5] Other courts have applied the plain language of the statute to conclude that a dismissal for lack of subject-matter jurisdiction does not bar application of the tolling provision in 28 USC 1367(d). See *Krause v Textron Fin Corp*, 59 So 3d 1085, 1090 (Fla, 2011) (holding that the mere fact that a dismissal in federal court was based on lack of subject-matter jurisdiction does not change the plain and unambiguous language of the tolling provision in 28 USC 1367(d)); *Stevens v Arco Mgt of Washington DC, Inc*, 751 A2d 995, 998 (DC, 2000) (holding that 28 USC 1367(d) does not limit its application to conditional dismissals under § 1367(c) and instead applies to *any claim asserted* under § 1367(a) regardless of whether that assertion was successful or unsuccessful).

> federal forum; (3) they could file separate, timely actions in federal and state court and ask that the state-court litigation be stayed pending resolution of the federal case, which would increase litigation costs with no guarantee that the state court would oblige. Section 1367(d) replaces this selection of inadequate choices with the assurance that state-law claims asserted under § 1367(a) will not become time barred while pending in federal court. [*Id*. at 463-464.]

Similarly, the United States Supreme Court recently explained that the supplemental jurisdiction statute was enacted because "Congress sought to clarify the scope of federal courts' authority to hear claims within their supplemental jurisdiction, appreciating that supplemental jurisdiction has enabled federal courts and litigants to . . . deal economically—in single rather than multiple litigation—with related matters." *Artis v Dist of Columbia*, 583 US ___, ___; 138 S Ct 594, 598; 199 L Ed 2d 473 (2018) (quotation marks, citation, and brackets omitted).

Moreover, three purposes of statutes of limitations are (1) to afford security against fraudulent or stale claims that become difficult to defend because of the loss of evidence, (2) to relieve the courts from dealing with stale claims, and (3) to protect potential defendants from protracted fear of litigation. *Moll v Abbott Laboratories*, 444 Mich 1, 14; 506 NW2d 816 (1993). Here, because the case was filed in federal district court, the purpose of the statute of limitations was, in effect, satisfied insofar as no evidence was lost and Spectrum had notice of the claim against it. Furthermore, although we recognize that exceptions to statutes of limitations are generally strictly construed, *Mair v Consumers Power Co*, 419 Mich 74, 80; 348 NW2d 256 (1984), that does not mean that they must be interpreted contrary to their plain meaning.

For the foregoing reasons, we hold that 28 USC 1367(d) tolled Puetz's defamation claim notwithstanding that her federal claim was dismissed for lack of subject-matter jurisdiction.[6]

### III. DISMISSAL UNDER MCR 2.116(C)(10)

#### A. STANDARD OF REVIEW

Puetz also argues that the trial court erred by dismissing her claims for false-light invasion of privacy, breach of contract, and tortious interference with a business expectancy. In reviewing a motion for summary disposition under MCR 2.116(C)(10), a court considers "the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Greene v A P Prod, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006) (quotation marks and citation omitted). The motion for summary disposition "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). A genuine issue of material fact exists if the record, viewed in a light most favorable to the nonmoving party, establishes a matter on which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). Further, the court may not make factual findings on disputed factual issues during a motion for summary disposition and may not make

[6] Spectrum argues that even if summary disposition was improper under MCR 2.116(C)(7), there was no genuine question of material fact on the merits of the claim, so summary disposition would have been proper under MCR 2.116(C)(10). However, because the trial court did not rule on that argument, we will not address it on appeal.

credibility determinations. *Burkhardt v Bailey*, 260 Mich App 636, 646-647; 680 NW2d 453 (2004).

### B. ANALYSIS

#### 1. FALSE-LIGHT INVASION OF PRIVACY

An invasion-of-privacy claim protects against four types of invasion of privacy: "(1) intrusion upon the plaintiff's seclusion or solitude or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity that places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness." *Doe v Mills*, 212 Mich App 73, 80; 536 NW2d 824 (1995). In this case, Puetz's claim is based on the third type: false light. "In order to maintain an action for false-light invasion of privacy, a plaintiff must show that the defendant broadcast to the public in general, or to a large number of people, information that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position." *Duran v Detroit News, Inc*, 200 Mich App 622, 631-632; 504 NW2d 715 (1993). Further, "the defendant must have known of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed." *Detroit Free Press, Inc, v Oakland Co Sheriff*, 164 Mich App 656, 666; 418 NW2d 124 (1987). See also *Early Detection Ctr, PC, v New York Life Ins Co*, 157 Mich App 618, 630; 403 NW2d 830 (1986).

Puetz's complaint does not clearly identify the statements that she contends placed her in a false light. Her complaint provides:

> 77. The statements of Spectrum placed [Puetz] in a false light to her peers within the hospital, outside hospital as well as with other staff within Spectrum.
>
> 78. Spectrum set in motion communications to the media that a physician was fired for a HIPAA violation and encouraged invasion of her privacy.
>
> 79. This cause of action protects [Puetz's] right to be left alone and not have private facts shared about her to third parties who have no duty to know.
>
> 80. Statements by Spectrum that placed [Puetz] in a false light would be highly offensive and objectionable to a reasonable person.
>
> 81. [Puetz] was injured and suffered shame, embarrassment and humiliation by the actions of Spectrum. Her injuries are ongoing because the websites for the media are disseminated continuously on the Internet.
>
> 82. As a direct and proximate result of Defendant Spectrum's conduct, [Puetz] has suffered loss of privacy, loss of reputation, emotional distress, embarrassment, ridicule and humiliation.

Wholly missing from Puetz's pleading is an identification of who disseminated information about her, when that information was given, and what was actually said about her that placed her in a false light. It is likely that a motion for summary disposition under MCR 2.116(C)(8) (failure to state a claim) would have been viable given the lack of detail in the complaint. However, the trial court reviewed this claim under MCR 2.116(C)(10) and permitted Puetz to clarify the factual basis for this claim at oral argument on the motion for summary disposition. We therefore address this claim in light of the clarification.

Puetz contends that her false-light claim is based on statements that Splaine made to ECS on August 21, 2013, and on August 22, 2013. The trial court concluded that these statements were not actionable as a

matter of law because any information Splaine provided at the meeting was not "publicized." A claim for false-light invasion of privacy requires that the plaintiff receive publicity. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 385; 689 NW2d 145 (2004). Publicity can be shown if the defendant "broadcast [the challenged information] to the public in general, or to a large number of people . . . ." *Duran*, 200 Mich App at 631-632. The term "broadcast" means "to make widely known." *Merriam-Webster's Collegiate Dictionary* (11th ed). Therefore, summary disposition is appropriate when the communication is only published to a small or specific group of individuals. See *Derderian*, 263 Mich App at 387 ("Even construing Dr. Rogers's list of medical personnel as the 'public' to whom the information was broadcast, plaintiffs have not demonstrated a sufficient level of publicity . . . ."); *Dzierwa v Mich Oil Co*, 152 Mich App 281, 288; 393 NW2d 610 (1986) (holding that the plaintiff's false-light claim failed because the communications "occurred only in the presence of other employees or, at most, a handful of office visitors"); *Hall v Pizza Hut of America, Inc*, 153 Mich App 609, 618; 396 NW2d 809 (1986) (stating that the plaintiff's false-light claim failed when the actionable communication consisted of one telephone call); *Sawabini v Desenberg*, 143 Mich App 373, 380-381; 372 NW2d 559 (1985) (holding that a letter from a physician to a lawyer was not disseminated to the public in general or to a large number of people).

With regard to the comments made by Splaine in the August 22, 2013 letter, Puetz has provided no evidence that the information in it was distributed to a large number of people or the public in general. The letter was addressed to ECS, "Attn: Kenneth S. Johnson, MD," and was copied to ECS's lawyer and three employees at Spectrum. Therefore, it appears that Spec-

trum "broadcast" the letter to only five people who were involved in the incident management.[7] Like the plaintiff in *Derderian*, 263 Mich App at 387, Puetz simply has failed to demonstrate a sufficient level of publicity with regard to the letter. Instead, she merely speculates that the letter could have been widely disseminated because it was not marked "confidential." Without proof that it was disseminated further, however, the trial court did not err by dismissing her false-light claims based on the letter.

The next component of the false-light claim is premised on Splaine's comments at the August 21, 2013 meeting. Puetz asserts that at the meeting, Splaine told ECS's members that she violated HIPAA and that Splaine called her conduct reprehensible, egregious, unprofessional, and lacking in integrity. Splaine allegedly disclosed false information about Puetz to a group of 50 to 60 people at the meeting. Despite the large size of the group, the trial court relied on *Derderian* for the proposition that disclosure to a "medical executive committee/team" does not satisfy the publicity element of a false-light claim. See *id*. at 388. In *Derderian*, however, unlike the present case, the plaintiffs failed to provide adequate factual support for their claim that any "publication was made to a sufficiently large group of people." *Id*. Here, given that there is factual support for Puetz's claim that the disclosure was made to 50 to

[7] An official letter explaining Spectrum's position was not unwarranted. It is also reasonable to conclude that as the president of ECS, Johnson needed to receive the letter and that it should have been copied to ECS's lawyer. Further, Kathy Van Rhee, one of the Spectrum employees who received the letter, was the head of nursing in the emergency room and worked with Puetz. She was one of the individuals involved. Thus, at best, the letter was copied to two individuals who had no apparent reason to be copied. Sending the letter to two people who (arguably) should not have received it does not establish a sufficient level of publicity.

60 people, and given that a jury could reasonably infer that to be a large group of people so as to satisfy the publication requirement, we conclude that the trial court erred by finding there was no genuine issue of material fact on the publicity element of Puetz's false-light claim with regard to the statements made at the August 21, 2013 meeting.

The second element of a false-light claim is that the comments must be "unreasonable and highly objectionable" because they attributed to the plaintiff "characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position." See *Duran*, 200 Mich App at 632. The trial court did not reach this element because it granted summary disposition based on a lack of publicity. Puetz contends there is a factual dispute on this point because Splaine stated at the ECS meeting that she had violated HIPAA. Spectrum argues, however, that Splaine never referred to Puetz by name at the meeting, so Puetz cannot prove that Splaine attributed a HIPAA violation to her at the meeting. We disagree. The record reflects that the attendees of the ECS meeting were aware of the Facebook incident, those involved, and the discipline imposed; it is reasonable to infer that they knew Splaine was referring to Puetz when he spoke at the meeting. Consequently, we conclude that there are fact questions about whether Splaine told ECS that Puetz violated HIPAA.

The next question is whether there is a fact question regarding whether the communication of that information, i.e., the attribution of a HIPAA violation to Puetz, was false and placed her in a false light. We note that whether Puetz's comments violated HIPAA could be determined as a matter of law. However, it is not necessary to take that step because in order to estab-

lish a false-light claim, a plaintiff must establish that when the defendant disseminated the information, it was done with actual knowledge or reckless disregard of the truth or falsity of the publicized matter. *Detroit Free Press, Inc*, 164 Mich App at 666. Here, the record reflects that before Splaine spoke at the ECS meeting, he had ongoing discussions with Spectrum's lawyers and others involved in the decision-making process about whether the Facebook incident was a violation of HIPAA. Further, he testified that based on his own compliance training, he was aware that identifying a patient by his or her initials is part of what constitutes a patient identifier for HIPAA purposes. In addition, several witnesses testified at length about the rationale behind the discipline imposed. Specifically, if the Facebook post demonstrated knowledge that the individual commenting knew the woman depicted was a patient, then the person making that comment was terminated or prohibited from practicing at Spectrum. Puetz has not directed this Court to any evidence showing that when Splaine made his comments, he either knew his comments were false or he recklessly disregarded the possibility that they were false. Stated differently, even if Puetz could establish that unreasonable and highly objectionable information was publicized to a large group of people, she cannot establish that when he spoke at the ECS meeting, Splaine "must have known of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed." *Id*. As a result, although the court's reasoning was flawed, the trial court did not err by dismissing Puetz's false-light claim to the extent that it was based on Splaine's comments at the August 21, 2013 meeting.

Finally, Puetz argues that her false-light claim should be allowed to proceed because Spectrum, ECS,

and "some doctors" knew who Puetz was and then, one day, she opened her door and a reporter was there asking if she was terminated for a Facebook comment. Puetz's lawyer represented to the trial court that this type of result did not come about "without that information being publicized," but when asked by the court to show "anything in the record that supports your supposition that anyone at Spectrum gave that information out," Puetz's lawyer candidly admitted that "we can't." In its opinion granting summary disposition on this claim, the trial court noted that "the record is bereft of evidence that Spectrum took any actions to notify the media of its disciplinary actions" and that the court could not "presume that Spectrum leaked any information to the press." In the absence of any evidence in support of this claim, we conclude that the trial court did not err by dismissing this aspect of the false-light claim.

In sum, Puetz's false-light claim was premised on three separate incidents: the letter to ECS, the statements made at the ECS meeting, and statements made to the media about Puetz. The letter, however, is not actionable because there is no genuine issue of material fact with regard to whether it was publicized. The statements to the media are not actionable because there is, in fact, no evidence that Spectrum made any false statement to the media about Puetz. Finally, although the trial court erred by finding no genuine issue of fact with regard to whether the statements at the ECS meeting were publicized, Puetz cannot establish that Splaine made the statements with actual knowledge or reckless disregard of the truth or falsity of the publicized matter. *Detroit Free Press, Inc*, 164 Mich App at 666. Therefore, despite there being a fact question on some of the elements of the false-light

claim, Puetz's failure to establish the final element is fatal to her claim, and the trial court did not err by dismissing it.

For the foregoing reasons, the trial court did not err by dismissing this claim under MCR 2.116(C)(10).

2. BREACH OF CONTRACT

The trial court also erred by dismissing Puetz's intellectual-property-ownership claim, which was based on a breach-of-contract theory. The trial court held that as a matter of law all the agreements Puetz signed bound her to follow Spectrum's policies and procedures, including Spectrum's intellectual-property policy. The court further found that under the broad language of the intellectual-property policy, Spectrum owned the disputed observation materials. On appeal, Puetz contends that the trial court erred by finding she was bound by the intellectual-property policy.

"In Michigan, the essential elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). Here, the trial court relied on three contracts: a 2008 clinical-services agreement, a 2009 medical-director-services agreement, and a 2012 pediatric-clinical-services agreement. However, the language of the contracts makes it apparent that Puetz was not a party to the contracts and her signature on the agreements did not represent her intent to be bound by the terms set forth in them. Instead, the parties were Spectrum and ECS, who were named parties, signed as parties, and referred to as parties throughout the contracts. Because Puetz was not a party to the contracts and because there is no evidence

before this Court that she separately agreed to be bound by the agreements, the trial court erred by concluding she was bound by the 2008, 2009, and 2012 provisions providing that she would conform with Spectrum's intellectual-property policy.

We note that there are also several problems with the dates of the agreements. The 2008, 2009, and 2012 agreements refer to "this agreement," indicating that they apply to services performed under each respective contract. Puetz testified that she started developing her observation materials in 2003, which is about five years before she signed the 2008 agreement, about six years before the 2009 agreement, and about nine years before she signed the 2012 agreement. Given that the contracts purportedly binding her to the intellectual-property policy were not in place when she started developing the content, not all of the observation materials could have been developed under the 2008, 2009, and 2012 agreements. Moreover, a copy of the intellectual-property policy in effect in 2003 is *not* included in the lower-court record. Instead, the record indicates that the intellectual-property policy was put into effect in June 2006. It was revised in June 2010 and again in October 2012. Section 2.3.3.3 of the 2012 version of the intellectual-property policy provided that "[a]ny Intellectual Property developed by an Associate prior to his or her relationship with Spectrum Health shall not be owned by Spectrum Health, except to the extent a Derivative Work of such Intellectual Property is developed during the Associate's relationship with Spectrum Health and otherwise meets the qualifications for ownership by Spectrum Health set forth in Section 2.3. above." The 2010 version of the policy had a similar limitation. Accordingly, at a minimum, viewing the evidence in the light most favorable to Puetz, it appears that there are factual questions

about whether some of the materials were developed before the intellectual-property policy was in place and before Puetz signed any contract potentially binding her to conform to the policy.[8]

For the foregoing reasons, the trial court erred by dismissing this claim under MCR 2.116(C)(10).

3. TORTIOUS INTERFERENCE WITH A BUSINESS EXPECTANCY

To succeed on a claim of tortious interference with a business expectancy, a plaintiff must establish "the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resulting damage to the plaintiff." *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 323; 788 NW2d 679 (2010) (quotation marks and citation omitted). Further, to satisfy the third element, the plaintiff must establish that the defendant "acted both intentionally and either improperly or without justification." *Id*. If the defendant's act was motivated by legitimate business reasons, then the act does not "constitute improper motive or interference." *Id*. at 324. Finally, the plaintiff must demonstrate that the defendant "did something illegal, unethical, or fraudulent." *Id*.

The record reflects that multiple individuals who commented on the Facebook post were disciplined. In addition, although not everyone who posted on the Facebook page was terminated or prohibited from work-

[8] According to Puetz's copyright-registration forms, she completed work on part of the materials in 2011 and on another part of the materials in 2012. Accordingly, when she completed the materials, the intellectual-property policy was clearly in place, as were at least some of the contracts Puetz signed.

ing at Spectrum, the record reflects that Puetz and three or four others were either terminated or prohibited from working at Spectrum Hospitals. Thus, although Puetz can establish that Spectrum intentionally interfered with her relationship with ECS by instructing ECS not to schedule her at any Spectrum facility, she cannot establish that Spectrum acted improperly or without justification, given that Spectrum also terminated or disciplined others involved in the Facebook incident. Further, given the impropriety of Puetz's comments on Facebook, there is nothing to suggest that Spectrum was acting illegally, unethically, or fraudulently when it sought to prevent her from being employed in its hospitals.

Moreover, although Puetz speculates that Spectrum had an improper motive when it interfered with her relationship with ECS, she cannot direct this Court to anything other than her own suspicions. Splaine testified that he did not know about Puetz's intellectual-property dispute before he reached the decision to prohibit her from working at Spectrum. Puetz offered no evidence to counter that testimony, other than speculation that his direct supervisor probably knew about the dispute and may have influenced him. Further, Puetz has offered no evidence to contradict Splaine's testimony that the rationale behind the discipline imposed was based on whether or not the individual who commented on the Facebook post was aware or unaware that the woman depicted was a patient. Consequently, Puetz has failed to support this claim, and the trial court did not err by dismissing it under MCR 2.116(C)(10).

## IV. CONCLUSION

In sum, we reverse the trial court's decision to dismiss Puetz's defamation claim because under the

language in 28 USC 1367(d) the limitations period was tolled. We also reverse the court's decision to dismiss Puetz's breach-of-contract claim because there is a genuine issue of material fact with regard to whether Puetz agreed to be bound by Spectrum's intellectual-property policy. However, we affirm the court's decision to dismiss Puetz's claim for false light and her claim for tortious interference with a business expectancy.

Affirmed in part and reversed in part. We do not retain jurisdiction. No taxable costs, neither party having prevailed in full. MCR 7.219(A).

MARKEY, P.J., and CAMERON, J., concurred with M. J. KELLY, J.

SUMMER v SOUTHFIELD BOARD OF EDUCATION

Docket No. 336665. Submitted April 10, 2018, at Detroit. Decided May 1, 2018, at 9:00 a.m. Leave to appeal denied 503 Mich 953.

Meredith Summer brought an action in the Oakland Circuit Court against the Southfield Board of Education and Southfield Public Schools, alleging that she was laid off in violation of the Revised School Code, MCL 380.1 *et seq*. Defendants moved for summary disposition, alleging that the court lacked subject-matter jurisdiction under MCR 2.116(C)(4) and that plaintiff failed to state a claim under MCR 2.116(C)(8). The court, Denise Langford Morris, J., granted the motion under both MCR 2.116(C)(4) and (8). Plaintiff appealed, and the Court of Appeals, WILDER, P.J., and OWENS and M. J. KELLY, JJ., determined that the trial court's explanation for its ruling really was only based on MCR 2.116(C)(4). *Summer v Southfield Bd of Ed*, 310 Mich App 660 (2015) (*Summer I*). The Court of Appeals reversed the grant of summary disposition under MCR 2.116(C)(4), holding that the circuit court had jurisdiction to hear plaintiff's claims and that while MCL 380.1249 of the Revised School Code did not provide a private right of action, MCL 380.1248 did. Therefore, the Court of Appeals held that a plaintiff may not raise a claim under § 1248 based on a violation of an evaluation system under § 1249 unless he or she is specifically alleging that a school district's failure to comply with § 1249 resulted in a performance evaluation that was not actually based on his or her effectiveness and, most importantly, that a personnel decision was made based on that noncompliant performance evaluation. However, the Court of Appeals did not reach a decision regarding whether plaintiff's complaint actually stated a claim; rather, the Court of Appeals explained that the trial court failed to specifically articulate whether plaintiff's complaint stated such a claim and remanded for consideration of that question. Subsequently, effective November 5, 2015, the Legislature enacted 2015 PA 173, which amended MCL 380.1249 to add a provision explaining that MCL 380.1249 "does not affect the operation or applicability of" MCL 380.1248. Plaintiff then filed an amended complaint on March 11, 2016. The amended complaint explained that plaintiff had a personal dispute with a colleague, Tina Lees, who was a friend of Paula

Lightsey, the principal of the school at which plaintiff was employed. Plaintiff alleged that she filed an internal complaint against Lees and later received a letter from the school's superintendent for human resources stating that the superintendent could "attest to the dereliction of duty and neglect of duty on the part of" the school's administrative team. Plaintiff's amended complaint further alleged that Lightsey observed plaintiff's classroom but did not share the result of this observation with plaintiff. Lightsey rated plaintiff in March 2012 as "minimally effective" but allegedly did not provide plaintiff with a plan of improvement or an opportunity to cure any purported shortcomings. Defendants again moved for summary disposition. The circuit court, Denise Langford Morris, J., granted the motion pursuant to MCR 2.116(C)(8) and (10), holding that by enacting 2015 PA 173, the Legislature had rejected the holding of *Summer I* and that plaintiff therefore no longer alleged a valid cause of action. Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court erred when it held that 2015 PA 173 rejected the holding in *Summer I* and rendered plaintiff's complaint inactionable. The trial court, relying on language added by 2015 PA 173 that stated that MCL 380.1249 "does not affect the operation or applicability of" MCL 380.1248, incorrectly held that MCL 380.1248 and MCL 380.1249 were distinct and unconnected. Rather, the amendatory language did not affect the holding of *Summer I* because that holding was based on the specific language of MCL 380.1248 and the Court's interpretation and application of the plain language of that statute.

2. MCL 380.1248(3) provides for a private cause of action when a plaintiff alleges that he or she was laid off because he or she was deemed ineffective but the school district measured his or her effectiveness using a performance evaluation system that did not comply with MCL 380.1249 (e.g., if a school district failed to use a rigorous, transparent, and fair performance evaluation system under MCL 380.1249(1)) or made a personnel decision that was not based on the factors delineated in MCL 380.1248(1)(b)(*i*) through (*iii*). In this case, plaintiff's amended complaint stated a claim under *Summer I*. Plaintiff alleged that she had been given a rating of "minimally effective" because Lightsey held a personal bias against her that was not based on the merits of her performance, i.e., not based on the factors delineated in MCL 380.1248(1)(b)(*i*) through (*iii*). Additionally, plaintiff alleged other specific violations of MCL 380.1249. Both currently and as enacted at the time plaintiff was discharged,

MCL 380.1249(1) requires defendants to adopt and implement a rigorous, transparent, and fair performance evaluation system. MCL 380.1249(1)(a) provides that defendants must evaluate teachers at least annually and provide timely and constructive feedback. Furthermore, MCL 380.1249(1)(d)(*i*) provides that defendants must ensure that teachers receive ample opportunities for improvement, and MCL 380.1249(1)(d)(*iv*) provides that defendants are required to use the evaluations of MCL 380.1249 to inform decisions regarding removing ineffective teachers after they have had ample opportunities to improve. Plaintiff alleged sufficient facts to show violations of these sections: she alleged that she was not given the results of her February 7, 2012 observation, was not provided with an improvement plan, and was not given an opportunity to improve. Accordingly, the trial court erred by holding that plaintiff failed to state a claim under *Summer I*.

3. Pursuant to MCL 380.1248(1)(b), all personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position must be based on the effectiveness of teachers, which is to be determined using the system delineated in MCL 380.1249. This language encompasses both "layoffs" and "removals" because both are the result of a staffing or program reduction. Accordingly, layoff decisions must comport with the requirements of MCL 380.1249.

4. While classroom observation requirements were not specifically in effect at the time of plaintiff's layoff, the Legislature nonetheless required that a district use a performance evaluation system that was "fair" and "transparent" under MCL 380.1249(1). Therefore, while defendants were not statutorily required to use classroom observations as an evaluation tool during the 2011–2012 school year, whatever tool defendants did use nonetheless was required to be fair and transparent. Having chosen to use classroom observations as a tool to evaluate teacher effectiveness, in order to have a fair and transparent evaluation system, defendants should have provided the results of the observations to the teachers. Further, MCL 380.1249(1)(a) required defendants to provide timely and constructive feedback, and MCL 380.1249(1)(d)(*i*) and (*iv*) required defendants to ensure that teachers receive ample opportunities for improvement. Plaintiff's claims that she was given no improvement plan and no opportunity to improve her performance alleged violations of these statutory provisions, which were applicable at the time plaintiff was laid off.

5. The trial court erred when it found that defendants had complied with the statutory requirements and granted summary disposition pursuant to MCR 2.116(C)(10). Nothing in the materials that defendants submitted to the trial court in support of their motion for summary disposition showed that Lightsey was not influenced by any personal bias. And while plaintiff did not provide any evidence that Lightsey acted impermissibly, discovery had not yet been completed and Lightsey had not been deposed. As a result, summary disposition should have been denied on this ground alone. Further, plaintiff presented evidence that under defendants' own policies regarding the evaluation of teacher performance, Lightsey should have known that her evaluation had the capability to potentially affect plaintiff's continued employment. Defendants' policy created a factual question regarding whether Lightsey was aware that the evaluation she prepared would lead to plaintiff's dismissal. To grant summary disposition on the basis of a single affidavit presented by defendants, and before plaintiff has deposed witnesses, including Lightsey, was premature. Moreover, whether plaintiff received timely feedback under MCL 380.1249(1)(a) when she received a formal evaluation form five weeks after her evaluation was a factual question that needed to be resolved by a fact-finder at trial. Finally, a letter sent to plaintiff from defendants dated September 15, 2011, explaining that a meeting would be held on September 19, 2011, to discuss three concerns with plaintiff's performance did not conclusively establish that plaintiff was aware of certain performance issues and had ample time to correct them; while this letter may have demonstrated some concerns defendants had, whether these concerns were substantiated or whether the concerns were resolved was unknown. Accordingly, summary disposition under MCR 2.116(C)(10) was inappropriate.

Reversed and remanded.

*White Schneider PC* (by *Jeffrey S. Donahue* and *Erin M. Hopper*) for plaintiff.

*The Allen Law Group, PC* (by *Kevin J. Campbell* and *George K. Pitchford*) for defendants.

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

TUKEL, J. In this suit involving an employment dispute under the Revised School Code, MCL 380.1 *et seq*., plaintiff, Meredith Summer, appeals as of right the trial court's January 9, 2017 opinion and order granting summary disposition in favor of defendants, the Southfield Board of Education and Southfield Public Schools, pursuant to MCR 2.116(C)(8) and (C)(10). We reverse and remand for further proceedings.

## I. BASIC FACTS

This matter returns to this Court after a prior panel affirmed in part, reversed in part, and vacated in part an earlier decision of the trial court, which had granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(4) and (C)(8). *Summer v Southfield Bd of Ed*, 310 Mich App 660; 874 NW2d 150 (2015) (*Summer I*). In that June 2, 2015 opinion, this Court explained the general factual background that gave rise to this litigation:

> This action arises out of a teacher layoff dispute. According to plaintiff's complaint, she began working as a teacher in the Southfield Public Schools in 1999. During the 2010-2011 school year, plaintiff was involved in an ongoing dispute with a colleague. The dispute ultimately led plaintiff to file an internal complaint in the spring of 2011, in which she claimed that the other employee had been harassing her. According to plaintiff, defendants failed to provide any information regarding the results of the investigation that followed plaintiff's complaint.
>
> At the beginning of the 2011-2012 school year, an administrator for defendants allegedly informed an employee that she "would not have to worry about [plaintiff]" after the 2011-2012 school year. According to plaintiff, defendants subsequently observed her performance in the classroom, but never shared with her the results of the observation. At the end of the school year, defendants concluded that plaintiff's teaching performance that year

was "minimally effective," but despite this evaluation rating, they did not provide a "plan of improvement" for plaintiff or otherwise give plaintiff an opportunity to improve the purported deficiencies in her performance. At the end of the 2011-2012 school year, plaintiff was laid off by defendants. According to plaintiff, she was the only teacher in the school to receive a "minimally effective" rating. Despite being laid off at the end of the 2011-2012 school year, plaintiff was subsequently hired to teach summer school during the summer of 2012.

On August 30, 2013, plaintiff filed a complaint alleging that she was laid off in violation of the Revised School Code, MCL 380.1 *et seq*. Plaintiff asserted that while defendants had purportedly "developed a system to effectuate standards for placements, layoffs, and recalls," which—under the requirements of MCL 380.1249—"was supposed to be based on teacher effectiveness and be rigorous, transparent and fair," nevertheless, defendants' actions in laying off plaintiff "were arbitrary, capricious, and in bad faith" in the following ways:

> A. Defendants . . . retaliated against [plaintiff] by failing or refusing to share the results of her retaliation complaint [against another employee who had harassed plaintiff] despite the fact that she was the Complainant;
>
> B. Defendants . . . prejudged her evaluation when it [sic] decided, and declared that at the end of the 2011-2012 school year, people "would not have to worry about [plaintiff];"
>
> C. Defendants . . . gave [plaintiff] a "Minimally Effective" evaluation based in part on Observations that were never even shared with [plaintiff] and for which no written feedback was given;
>
> D. Defendants . . . also harbored ill will towards [plaintiff] based on incidents when she served as the union building representative[.]

Plaintiff also alleged that defendants provided no plan of improvement and "no opportunity to cure any alleged performance shortcomings" after it rated plaintiff as mini-

> mally effective. Plaintiff's complaint requested a judgment (1) requiring defendants to recall her to her previous position, (2) requiring defendants to void and destroy her 2011-2012 school year evaluation, and (3) awarding money damages equaling her costs and attorney fees, and any other relief to which she was entitled. [*Id*. at 662-664 (alterations by the *Summer I* Court).]

Defendants moved for summary disposition pursuant to MCR 2.116(C)(4) (lack of subject-matter jurisdiction) and MCR 2.116(C)(8) (failure to state a claim). *Id*. at 664. The trial court granted the motion. *Id*. at 667. However, while the trial court stated that it was granting the motion under both MCR 2.116(C)(4) and MCR 2.116(C)(8), this Court determined that the trial court's explanation for its ruling really was only based on MCR 2.116(C)(4). *Id*. at 682.

Relevant to the present appeal, this Court examined § 1248 of the Revised School Code, MCL 380.1248, and explained:

> The purpose of MCL 380.1248 is, at least in part, to regulate the policies and criteria governing "personnel decisions . . . resulting in the elimination of a position . . . ." MCL 380.1248(1). In furtherance thereof, § 1248 requires the "school district [to] adopt[] . . . a policy that provides that all personnel decisions when conducting a staffing or program reduction . . . *are based on retaining effective teachers*." MCL 380.1248(1)(b) (emphasis added). The determination of whether a teacher is effective is to be made pursuant to the evaluation system delineated in § 1249 [of the Revised School Code, MCL 380.1249]. See MCL 380.1248(1)(b) ("Effectiveness shall be measured by the performance evaluation system under section 1249 . . . ."). And the individual performance of a teacher must be the majority factor in making personnel decisions, MCL 380.1248(1)(b)(*i*). Any violation of § 1248 provides a private cause of action for the aggrieved teacher. MCL 380.1248(3). [*Summer I*, 310 Mich App at 678-679 (citations omitted).]

This Court reversed the grant of summary disposition under MCR 2.116(C)(4) because, contrary to the trial court's ruling, the circuit court did have jurisdiction to hear plaintiff's claims. *Id*. at 673-674, citing *Baumgartner v Perry Pub Sch*, 309 Mich App 507, 531; 872 NW2d 837 (2015). Further, the *Summer I* Court held that while § 1249 of the Revised School Code did not provide a private right of action, § 1248 did. *Id*. at 676, 679. As a result, "the trial court properly determined that MCL 380.1249 does not establish a private cause of action under which plaintiff may bring the instant case." *Id*. at 676. The Court therefore determined that

> a private right of action under § 1248 is limited to claims that a personnel decision was made based on considerations that are not permitted under the statute, i.e., the teacher was laid off based on length of service or tenure status in violation of § 1248(1)(c), or was laid off using a procedure or based on factors *other than* those listed in § 1248(1)(b). Accordingly, a plaintiff may not raise a claim under § 1248 based on a violation of an evaluation system under § 1249 *unless* he or she is specifically alleging that a school district's failure to comply with § 1249 resulted in a performance evaluation that was *not* actually based on his or her effectiveness and, most importantly, *that a personnel decision was made based on that noncompliant performance evaluation*. [*Id*. at 680.]

"Therefore, to the extent that plaintiff's complaint alleged that she was laid off on the basis of considerations other than those permitted under MCL 380.1248, or was laid off following an evaluation that did not comply with MCL 380.1249, plaintiff *may* have stated a cause of action under MCL 380.1248 that was sufficient to survive summary disposition under MCR 2.116(C)(8)." *Id*. at 679-680 (emphasis added). Notably, the Court did not reach a decision regarding whether

plaintiff's complaint actually stated such a claim. *Id*. at 680 n 10. Rather, the Court explained that the trial court failed to specifically articulate whether plaintiff's complaint stated such a claim and remanded for consideration of this question. *Id*. at 682.

This Court's opinion in *Summer I* was handed down on June 2, 2015. And effective November 5, 2015, the Legislature enacted 2015 PA 173, which amended MCL 380.1249. 2015 PA 173, *inter alia*, added a provision that explained that § 1249 "does not affect the operation or applicability of section 1248." MCL 380.1249(7), as amended in 2015 PA 173.

Plaintiff filed an amended complaint on March 11, 2016. The amended complaint provided a little more detail regarding plaintiff's dispute with her coworker. Plaintiff explained that she had had a personal dispute with Tina Lees, a colleague. Lees was a personal friend of Paula Lightsey, the principal of Thompson K-8 Academy, the school where plaintiff taught. Plaintiff allegedly had sought Lightsey's assistance with regard to her conflict with Lees but "to no avail." Plaintiff also alleged that she had filed an internal complaint that was investigated in the "Spring of 2011." Plaintiff alleged that after having filed her internal complaint, she had contacted defendants' human resources department to inquire regarding the status of the investigation. She was eventually told that Lightsey had been reprimanded. Plaintiff requested a written report regarding the investigation, and she received a letter on October 3, 2011. This letter, which was authored by David Turner, defendants' Associate Superintendent for Human Resources and Labor Relations, explained that while Turner was unable to substantiate plaintiff's allegations of a hostile work environment, Turner could "attest to the dereliction and neglect of duty on the part of the Thompson K-8 administrative team."

Plaintiff's amended complaint also alleged that Lightsey observed plaintiff's classroom on February 7, 2012, but did not share the results of this observation with plaintiff or give any indication of any concerns she may have had about plaintiff's performance in the classroom. Lightsey, however, told another teacher, Lori List, that List would not have to worry about plaintiff after the 2011–2012 school year. In March 2012, Lightsey rated plaintiff as "minimally effective" but allegedly did not provide her with a plan of improvement or an opportunity to cure any purported shortcomings. Plaintiff was the only teacher rated minimally effective in her building. She was laid off effective June 30, 2012, but was hired by defendants to teach summer school in 2012.

The final two paragraphs of the amended complaint state:

> 28. Defendants' layoff of Plaintiff was in violation of Section 1248 and Section 1249 of the Revised School Code because they refused to provide Plaintiff with the February 7th observation results and failed to provide Plaintiff with a Plan of Improvement and an opportunity to improve. MCL 380.1248, 380.1249.
>
> 29. Defendants' evaluation system was not rigorous, transparent, and fair when used to evaluate Plaintiff.

On October 19, 2016, defendants again moved for summary disposition pursuant to MCR 2.116(C)(8). Defendants primarily argued that through the enactment of 2015 PA 173, and specifically the amended MCL 380.1249(7), our Legislature rejected the holding in *Summer I*, thereby rendering plaintiff's claims based on purported violations of MCL 380.1249 inactionable. Defendants also argued that if *Summer I* was still controlling notwithstanding the legislative amendment, plaintiff's amended complaint still failed

to state a claim under *Summer I* and that, in any event, the factual record proved that defendants had complied with the applicable statutory provisions by providing plaintiff with constructive feedback and opportunities to improve.

The trial court agreed that in enacting 2015 PA 173, our Legislature had rejected the holding of *Summer I*. The trial court concluded that as a result of the legislative amendment, plaintiff's complaint no longer alleged a valid cause of action. The trial court also agreed with defendants' alternative arguments, explaining in a written opinion:

> Assuming arguendo that the [*Summer I*] decision is still binding precedent, Plaintiff's Complaint fails to state a valid claim because she has not pled violations of [§] 1249(1)(a) through (d). In addition, Plaintiff's claim of bias would necessarily encompass subjective considerations regarding her evaluator's state of mind and would not be specifically based on violations of the particular statutory requirements. Under the statute, Plaintiff was not entitled to an IDP [Individualized Development Plan] in 2011-2012, or an opportunity to cure before a layoff. The Court finds that Defendants have complied with the requirements of [§] 1249 by properly evaluating and sharing the evaluation with timely and constructive feedback with Plaintiff. Therefore, summary disposition is appropriate under MCR 2.116(C)(8) and (10).

Plaintiff now appeals the trial court's ruling.

## II. DISCUSSION

### A. 2015 PA 173 AND *SUMMER I*

Plaintiff first argues that the trial court erred when it held that 2015 PA 173 rejected this Court's holding in *Summer I* and rendered her complaint inactionable. We agree.

The proper interpretation of a statute is a question of law that we review de novo on appeal. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 102; 754 NW2d 259 (2008).

> The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature, as inferred from the specific language of the statute. Statutory language should be construed reasonably, keeping in mind the purpose of the act. Once the intention of the Legislature is discovered, it must prevail regardless of any conflicting rule of statutory construction. This Court must consider the object of the statute and the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the statute's purpose. [*Summer I*, 310 Mich App at 677-678 (citations omitted).]

In this case, the trial court ruled that 2015 PA 173, through its amendment of MCL 380.1249, clarified that §§ 1248 and 1249 "are distinct and unconnected and not in pari materia," contrary to this Court's holding in *Summer I*. We hold that such an interpretation is not supported by the plain language of the statute.

The trial court, in making its ruling, relied on MCL 380.1249(7), which was amended by 2015 PA 173 and states, "This section does not affect the operation or applicability of section 1248." Defendants contend that the trial court correctly determined that the *Summer I* Court interpreted MCL 380.1248 and MCL 380.1249 *in pari materia*. As a result, defendants claim that through the revision to MCL 380.1249(7), our Legislature demanded that this Court interpret the two provisions separately. Thus, defendants argue (and the trial court agreed) that a teacher may no longer raise claims based on violations of MCL 380.1249 by way of a suit alleging violations of MCL 380.1248(3). Defendants and the trial court are incorrect on all fronts.

The *in pari materia* rule of statutory construction holds that statutes relating to the same subject or sharing a common purpose should be read together as one, even if the two statutes contain no reference to each other and were enacted at different times. *O'Connell v Dir of Elections*, 316 Mich App 91, 99; 891 NW2d 240 (2016). Notably absent from this Court's opinion in *Summer I* is any use of the phrase "*in pari materia*." Rather, this Court's holding was based on the fact that § 1248 "expressly incorporates the performance evaluation system delineated in § 1249." *Summer I*, 310 Mich App at 677; see also MCL 380.1248(1)(b) (stating that a teacher's "[e]ffectiveness shall be measured by the performance evaluation system under section 1249"). Accordingly, this Court's ultimate holding was "*based on the specific language of § 1248*," *Summer I*, 310 Mich App at 679 (emphasis added), and this Court was not reading the statutes *in pari materia*. Rather, this Court read the plain language of MCL 380.1248 and applied it as written. Given this conclusion, the *in pari materia* rule of statutory construction is not implicated. "If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). "Once the intention of the Legislature is discovered, this intent prevails regardless of any conflicting rule of statutory construction." *GMAC LLC v Dep't of Treasury*, 286 Mich App 365, 372; 781 NW2d 310 (2009).

Therefore, the amendatory language now found in MCL 380.1249(7) does not alter this Court's holding in *Summer I*. The provision relied on by the trial court and defendants states that MCL 380.1249 "does not

affect the operation or applicability of section 1248." MCL 380.1249(7), as amended by 2015 PA 173. This language simply means what it states, no more and no less—that MCL 380.1249 simply has no effect on the operation or applicability of MCL 380.1248. It does not purport to preclude a cause of action of the type found viable in *Summer I*. And as plaintiff notes, had the Legislature intended to reject *Summer I*, it much more likely would have indicated its intent by amending MCL 380.1248, the language of which formed the basis for this Court's ruling, rather than to enact a statute which by its terms did not affect the operative existing statutory language.[1]

B. SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8)

Plaintiff next challenges the trial court's conclusion that if *Summer I* still controls, plaintiff's amended complaint fails to state a claim upon which relief may be granted. We agree that plaintiff's complaint states a claim under *Summer I* and that the trial court erred by holding otherwise.

We review a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

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[1] Moreover, assuming that the trial court correctly ruled that the revision of MCL 380.1249(7) through 2015 PA 173 did act to overrule *Summer I* and ostensibly preclude plaintiff's suit, the legislation nevertheless could not be applied to negate plaintiff's claims here because such an application of the legislation would run afoul of the prohibition against retroactive legislation abolishing existing causes of action or vested rights. See *In re Certified Questions*, 416 Mich 558, 573-575; 331 NW2d 456 (1982); *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v Pontiac (On Remand)*, 317 Mich App 570, 585; 895 NW2d 206 (2016). Therefore, even if our interpretation of the effect of 2015 PA 173 is incorrect, plaintiff's claims, which accrued and became vested before the enactment of 2015 PA 173, remain viable, subject to our MCR 2.116(C)(8) analysis.

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." When deciding a motion brought under this section, a court considers only the pleadings. [*Id*. at 119-120 (citations omitted).]

As already discussed, this Court's holding in *Summer I* is still germane and controlling. The following statutory language, added by 2011 PA 102, was in effect during the period relevant to this case:

> Sec. 1248. (1) For teachers, as defined in section 1 of article I of 1937 (Ex Sess) PA 4, MCL 38.71, all of the following apply to policies regarding personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position, when conducting a recall from a staffing or program reduction or any other personnel determination resulting in the elimination of a position, or in hiring after a staffing or program reduction or any other personnel determination resulting in the elimination of a position by a school district or intermediate school district:
>
> (a) Subject to subdivision (c), the board of a school district or intermediate school district shall not adopt, implement, maintain, or comply with a policy that provides that length of service or tenure status is the primary or determining factor in personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position, when conducting a recall from a staffing or program reduction or any other personnel determination resulting in the elimination of a position, or in hiring after a staffing or program reduction or any other personnel determination resulting in the elimination of a position.

(b) Subject to subdivision (c), the board of a school district or intermediate school district shall ensure that the school district or intermediate school district adopts, implements, maintains, and complies with a policy that provides that all personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position, when conducting a recall from a staffing or program reduction or any other personnel determination resulting in the elimination of a position, or in hiring after a staffing or program reduction or any other personnel determination resulting in the elimination of a position, are based on retaining effective teachers. The policy shall ensure that a teacher who has been rated as ineffective under the performance evaluation system under section 1249 is not given any preference that would result in that teacher being retained over a teacher who is evaluated as minimally effective, effective, or highly effective under the performance evaluation system under section 1249. Effectiveness shall be measured by the performance evaluation system under section 1249, and the personnel decisions shall be made based on the following factors:

(*i*) Individual performance shall be the majority factor in making the decision, and shall consist of but is not limited to all of the following:

(A) Evidence of student growth, which shall be the predominant factor in assessing an employee's individual performance.

(B) The teacher's demonstrated pedagogical skills, including at least a special determination concerning the teacher's knowledge of his or her subject area and the ability to impart that knowledge through planning, delivering rigorous content, checking for and building higher-level understanding, differentiating, and managing a classroom; and consistent preparation to maximize instructional time.

(C) The teacher's management of the classroom, manner and efficacy of disciplining pupils, rapport with parents and other teachers, and ability to withstand the strain of teaching.

(D) The teacher's attendance and disciplinary record, if any.

(*ii*) Significant, relevant accomplishments and contributions. This factor shall be based on whether the individual contributes to the overall performance of the school by making clear, significant, relevant contributions above the normal expectations for an individual in his or her peer group and having demonstrated a record of exceptional performance.

(*iii*) Relevant special training. This factor shall be based on completion of relevant training other than the professional development or continuing education that is required by the employer or by state law, and integration of that training into instruction in a meaningful way.

(c) Except as otherwise provided in this subdivision, length of service or tenure status shall not be a factor in a personnel decision described in subdivision (a) or (b). However, if that personnel decision involves 2 or more employees and all other factors distinguishing those employees from each other are equal, then length of service or tenure status may be considered as a tiebreaker.

(2) If a collective bargaining agreement is in effect for employees of a school district or intermediate school district as of the effective date of this section and if that collective bargaining agreement prevents compliance with subsection (1), then subsection (1) does not apply to that school district or intermediate school district until after the expiration of that collective bargaining agreement.

(3) If a teacher brings an action against a school district or intermediate school district based on this section, the teacher's sole and exclusive remedy shall be an order of reinstatement commencing 30 days after a decision by a court of competent jurisdiction. The remedy in an action brought by a teacher based on this section shall not include lost wages, lost benefits, or any other economic damages.

Sec. 1249. (1) Not later than September 1, 2011, and subject to subsection (9), with the involvement of teachers and school administrators, the board of a school district or

intermediate school district or board of directors of a public school academy shall adopt and implement for all teachers and school administrators a rigorous, transparent, and fair performance evaluation system that does all of the following:

(a) Evaluates the teacher's or school administrator's job performance at least annually while providing timely and constructive feedback.

(b) Establishes clear approaches to measuring student growth and provides teachers and school administrators with relevant data on student growth.

(c) Evaluates a teacher's or school administrator's job performance, using multiple rating categories that take into account data on student growth as a significant factor. For these purposes, student growth shall be measured by national, state, or local assessments and other objective criteria. If the performance evaluation system implemented by a school district, intermediate school district, or public school academy under this section does not already include the rating of teachers as highly effective, effective, minimally effective, and ineffective, then the school district, intermediate school district, or public school academy shall revise the performance evaluation system within 60 days after the effective date of the amendatory act that added this sentence to ensure that it rates teachers as highly effective, effective, minimally effective, or ineffective.

(d) Uses the evaluations, at a minimum, to inform decisions regarding all of the following:

(*i*) The effectiveness of teachers and school administrators, ensuring that they are given ample opportunities for improvement.

(*ii*) Promotion, retention, and development of teachers and school administrators, including providing relevant coaching, instruction support, or professional development.

(*iii*) Whether to grant tenure or full certification, or both, to teachers and school administrators using rigorous standards and streamlined, transparent, and fair procedures.

> (*iv*) Removing ineffective tenured and untenured teachers and school administrators after they have had ample opportunities to improve, and ensuring that these decisions are made using rigorous standards and streamlined, transparent, and fair procedures.[2]

As this Court explained, only MCL 380.1248(3) provides for a private cause of action under this statutory scheme, and such a claim is successfully pleaded if a plaintiff alleges that she was laid off because she was "deemed ineffective, but the school district measured [her] effectiveness using a performance evaluation system that did not comply with § 1249 (e.g., if a school district failed to use a 'rigorous, transparent, and fair performance evaluation system,' MCL 380.1249(1)), or made a personnel decision that was not based on the factors delineated in MCL 380.1248(1)(b)(*i*) through (*iii*) . . . ." *Summer I*, 310 Mich App at 679. Such a claim is not identical to a "subterfuge claim"[3] but may be "analogous in that plaintiff may have a cause of action, even though the school evaluated plaintiff as minimally effective and laid her off due to her status as the lowest rated teacher, if her evaluation was based on an evaluation system other than that delineated in § 1249 or was based on an evaluation system that was not fair and transparent." *Id*.

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[2] These portions of MCL 380.1248 and MCL 380.1249, as enacted by 2011 PA 102, are substantially similar to the current versions of the statutes.

[3] A subterfuge claim is a judicially recognized claim that existed before our Legislature's amendment of the Revised School Code in 2011. See *Summer I*, 310 Mich App at 668-673, 676-677. Such a claim contends that what would have been a valid reason for a layoff was, in reality, a pretext to terminate the teacher in bad faith. *Id*. at 676-677. In *Summer I*, this Court stated that the continued viability of subterfuge claims is "dubious at best" in light of the 2011 amendment of the Revised School Code. *Id*. at 676-677, citing *Baumgartner*, 309 Mich App at 523.

Plaintiff's amended complaint clearly stated a claim under *Summer I*. Looking at the complaint broadly, plaintiff alleged that her layoff was the result of being given a rating of "minimally effective," which was the lowest rating any teacher received at her school. Viewing the amended complaint in a light most favorable to plaintiff, plaintiff alleged that she was given this rating because Lightsey held a personal bias or animus against her that was not based on the merits of her performance. Thus, plaintiff alleged that her poor effectiveness rating, which caused her to be laid off, "was not based on the factors delineated in MCL 380.1248(1)(b)(*i*) through (*iii*) . . . ." *Id*. Plaintiff's amended complaint therefore stated a claim upon which relief could be granted.

Defendants contend that plaintiff's references to Lightsey's personal bias cannot state a claim because the claim would necessarily encompass Lightsey's subjective opinions of plaintiff and would not be based on specific violations of MCL 380.1249. However, if plaintiff was laid off "based on considerations that are not permitted under the statute," such as being "laid off using a procedure or based on factors *other than* those listed in § 1248(1)(b)," then plaintiff has stated a valid claim. *Id*. at 680. Thus, although Lightsey's opinion of plaintiff certainly is subjective, if the opinion was based on an impermissible consideration, i.e., not a factor listed in § 1248(1)(b), then plaintiff can state a claim based on this failure of defendants to make a personnel decision based on permissible factors. Here, Lightsey having a bias against plaintiff because plaintiff filed a complaint against Lightsey's friend Lees for the way Lees harassed plaintiff at work qualifies as a "consideration[] . . . not permitted under the statute . . . ." *Id*. As the *Summer I* Court held, "the Legislature specifically intended to allow teachers to chal-

lenge layoff decisions that were based on performance evaluations *that did not comply with the requirements of § 1249*." *Id*. at 681 (emphasis added). In this case, plaintiff alleged that her performance evaluation did not comply with § 1249 because it was instead based on a personal bias, which was not related to any of the factors listed in § 1249.

Additionally, plaintiff alleged other specific violations of MCL 380.1249.[4] Plaintiff alleged that she was not given the results of her February 7, 2012 observation, was not provided with an improvement plan, and was not given an opportunity to improve. Both currently and as enacted at the time plaintiff was discharged, MCL 380.1249 requires defendants to "adopt and implement . . . a rigorous, transparent, and fair performance evaluation system . . . ." MCL 380.1249(1).[5] This evaluation system was to meet certain minimum requirements. Defendants must evaluate teachers "at least annually" and "provid[e] timely and constructive feedback." MCL 380.1249(1)(a). Further, in using the evaluations to determine a teacher's effectiveness, defendants must ensure that teachers receive "ample opportunities for improvement."

[4] We reiterate that, as the *Summer I* Court held, a direct private cause of action does not exist for violations of § 1249, but a cause of action does exist through MCL 380.1248(3), which can be predicated on a violation of § 1249 under the limited circumstances recognized in *Summer I*. *Summer I*, 310 Mich App at 679; see also MCL 380.1248(1)(b) (incorporating the requirements of § 1249); MCL 380.1248(3) (allowing for a cause of action "based on this section"). We recognize that some might state that our interpretation has little practical difference to a finding that a direct private right of action exists under § 1249. Whether or not that is true, our interpretation is based on fidelity to the language used by the Legislature.

[5] The statute has since been amended on several occasions to provide more specific requirements for teacher evaluations. See 2014 PA 257; 2015 PA 173; 2016 PA 170.

MCL 380.1249(1)(d)(*i*). And pursuant to MCL 380.1249(1)(d)(*iv*), defendants were required to use the evaluations required by MCL 380.1249 to "inform decisions regarding . . . [r]emoving ineffective . . . teachers . . . *after they have had ample opportunities to improve* . . . ." (Emphasis added.)

Construing the allegations of the complaint in a light most favorable to plaintiff, plaintiff alleged sufficient facts to show violations of these provisions. That plaintiff was evaluated through a classroom observation, but allegedly was not permitted to know the results of that observation, cannot be viewed as a transparent or fair evaluation system, much less one that provided plaintiff with "timely and constructive feedback." MCL 380.1249(1)(a). Plaintiff's allegations that she was never given prior warning of her purported shortcomings or an opportunity to cure those shortcomings, if true, would clearly seem to violate the requirement that defendants "ensur[e] that [teachers] are given ample opportunities for improvement." MCL 380.1249(1)(d)(*i*). Further, that plaintiff was removed without being given any opportunity to improve clearly violates MCL 380.1249(1)(d)(*iv*).

Defendants argue that there is no requirement that ineffective teachers receive an opportunity to improve before being laid off. We disagree. Again, MCL 380.1249(1)(d)(*i*) states that in rating the effectiveness of teachers, defendants must "ensur[e] that [teachers and school administrators] are given ample opportunities for improvement." In other words, giving teachers an opportunity to improve is, by statutory command, part and parcel of the evaluation of a teacher's effectiveness. Further, MCL 380.1249(1)(d)(*iv*) speaks of making the decision to remove a teacher after he or she has had "ample opportunities to improve." To hold that

a school district need not provide a teacher with an opportunity to improve after giving a poor performance review would be to simply ignore these statutory provisions.

Defendants make the bald assertion that layoffs are not akin to "removing" a teacher. Thus, according to defendants, because MCL 380.1249(1)(d)(*iv*) speaks of "removing" a teacher, the statute has no relevance to this matter. In *Summer I*, this Court drew no distinction between layoffs and "removals"; rather, this Court plainly held that layoff decisions must comport with the requirements of MCL 380.1249. *Summer I*, 310 Mich App at 679 (explaining "the requirement that the school district must use a performance evaluation system in compliance with § 1249 as it evaluates teachers and makes *layoff decisions*") (emphasis added). Indeed, pursuant to MCL 380.1248(1)(b), "*all* personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position" must be based on the effectiveness of teachers, which is to be determined using the system delineated in MCL 380.1249. (Emphasis added.) This language clearly encompasses "layoffs" because layoffs are the result of a "staffing or program reduction." *Baumgartner*, 309 Mich App at 527.

Defendants argue that MCL 380.1249 did not require the use of classroom observations until the 2013–2014 school year and did not require feedback to be provided within 30 days until the 2016–2017 school year. Thus, according to defendants, it is not relevant that they failed to provide any feedback from the classroom evaluation to plaintiff because the statute did not require it. Defendants are correct in stating that classroom observations were not required until

the 2013–2014 school year. See MCL 380.1249(2)(c), as amended by 2011 PA 102. And it was not until more recently that our Legislature required feedback from classroom observations to be provided to teachers within 30 days after an observation. See MCL 380.1249(2)(e)(*v*), as amended by 2015 PA 173.

However, defendants' argument still misses the mark. While the classroom observation requirements were not specifically in effect at the time of plaintiff's layoff, our Legislature nonetheless required that a district use a performance evaluation system that was "fair" and "transparent." MCL 380.1249(1). Thus, while defendants were not statutorily required to use classroom observations as an evaluation tool during the 2011–2012 school year, whatever tool defendants did use nonetheless was required to be fair and transparent. Having chosen to use these observations as a tool to evaluate teacher effectiveness, it goes without saying that in order to have a fair and transparent evaluation system, defendants should have provided the results of the observations to the teachers. Further, while there was no specific time frame for providing teachers with feedback from classroom observations, the statute required defendants to provide "*timely* and constructive feedback." MCL 380.1249(1)(a) (emphasis added). And as previously explained, defendants indeed were required to give teachers opportunities for improvement. A system that observes teachers but gives no feedback and no opportunity to cure any deficiencies clearly fails to abide by these statutory requirements.

Defendants also contend that the version of MCL 380.1249 in effect at the relevant time did not require them to provide teachers with an individualized development plan (IDP). Defendants are correct in noting

that the use of IDPs was not specifically mandated until the 2013–2014 school year. See MCL 380.1249(2)(a)(*iii*), as enacted by 2011 PA 102. But plaintiff did not allege that she was not provided an IDP in violation of the statute. Rather, she alleged that she was not given a "Plan of Improvement and an opportunity to improve." Again, defendants were required to give plaintiff timely and constructive feedback, MCL 380.1249(1)(a), and "ample opportunities for improvement," MCL 380.1249(1)(d)(*i*) and (*iv*). Plaintiff's claims that she was given no improvement plan and no opportunity to improve her performance allege violations of these statutory provisions, which were applicable at the time plaintiff was laid off.[6]

Defendants also argue that plaintiff's claim that her evaluation was not rigorous, transparent, and fair fails to state a claim because the statute at issue, MCL 380.1249(1), speaks in terms of an overall evaluation *system*, not an individual teacher's evaluation. By attributing the adjectives "rigorous, transparent, and fair" only to the "performance evaluation system," defendants ignore the other mandates of the statute requiring that "timely and constructive feedback" be given to the evaluated teacher, MCL 380.1249(1)(a), and providing that teachers get "ample opportunities for improvement," MCL 380.1249(1)(d)(*i*) and (*iv*). As was explained earlier, plaintiff's complaint alleges deficiencies in her evaluation that correspond, at a minimum, to the require-

[6] To the extent plaintiff now argues that defendants' own policies required that she be given such a plan, we agree that the issue is not relevant to the question of whether summary disposition was appropriately granted under MCR 2.116(C)(8). Such a motion is limited to the allegations of the pleadings, *Maiden*, 461 Mich at 119-120, and plaintiff did not plead any facts regarding defendants' policies in her amended complaint.

ments of MCL 380.1249(1)(a), (1)(d)(*i*), and (1)(d)(*iv*). Further, plaintiff's arguments related to Lightsey's bias allege a cognizable claim under MCL 380.1248(1)(b). Because plaintiff's amended complaint states viable claims for relief under *Summer I*, the trial court erred when it granted summary disposition pursuant to MCR 2.116(C)(8).

C. SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

Finally, plaintiffs argue that the trial court erred when it found that defendants had, in fact, complied with the statutory requirements and granted summary disposition pursuant to MCR 2.116(C)(10). Again, we agree.

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden*, 461 Mich at 120.]

As they did in the trial court, defendants argue that even if the allegations stated in plaintiff's complaint are actionable, the evidentiary record shows that defendants did not violate MCL 380.1248 or MCL 380.1249, and thus, summary disposition is appropriate pursuant to MCR 2.116(C)(10). The trial court seemingly agreed, explaining, "The Court finds that Defendants complied with the requirements of [MCL 380.]1249 by properly evaluating and sharing the evaluation with timely and constructive feedback with Plaintiff."

We begin with the general import of the complaint, which is that plaintiff was given a poor evaluation by Lightsey because Lightsey has a personal bias against plaintiff. Notably, nothing in the materials that defendants submitted to the trial court in support of their motion for summary disposition shows that Lightsey was not influenced by any personal bias. And while plaintiff did not provide any evidence that Lightsey acted impermissibly, it is important to note that discovery had not yet been completed and Lightsey had not been deposed. As a result, summary disposition should have been denied on this ground alone.

Moreover, we reject defendants' argument that Lightsey "had no objective basis to believe that the evaluation would have any adverse effect on Plaintiff." Defendants rely on the fact that the ultimate decision to lay plaintiff off rested with defendants' human resources department. But defendants ignore the fact that Lightsey had to have known, under the statutory scheme introduced in 2011, that a poor evaluation could lead to plaintiff's termination or layoff. The statutory scheme makes it quite clear that those teachers with higher effectiveness ratings are to be given priority when it comes to personnel decisions. MCL 380.1248(1).

Further, in addition to the Legislature's directive, plaintiff presented evidence that under defendants' own policies regarding the evaluation of teacher performance, Lightsey should have known that her evaluation had the capability to potentially affect plaintiff's continued employment. Under defendants' own policies:

> e. As soon as possible and not later than March 15th, the principal and/or director will meet with each teacher to complete an initial evaluation of teaching performance.

> The teacher is to see the principal's evaluation form, discuss it, sign it and receive a copy.
>
> f. Not later than March 22nd, the principal will meet with the Associate Superintendent for Curriculum and Instruction and/or the Associate Superintendent for Human Resources & Labor Relations and a cooperative decision will be reached concerning the future status of each teacher.
>
> g. If dismissal is to be recommended, a report must be submitted to the Board of Education prior to March 30th. The Board of Education shall meet to consider the recommendation and take appropriate action no later than June 1st.

Thus, under defendants' policies, it is clear that a poor evaluation is the first step toward dismissing a teacher from employment. The policies also require the principal to discuss the future status of each teacher no later than March 22 of each year. This policy creates a factual question regarding whether Lightsey was aware that the evaluation she prepared would lead to plaintiff's dismissal.

In any event, "[s]ummary disposition is generally premature if discovery is not complete." *Caron v Cranbrook Ed Community*, 298 Mich App 629, 645; 828 NW2d 99 (2012). It is true that summary disposition may nonetheless be appropriate when further discovery does not stand a fair chance of uncovering factual support for a party's claims. *Id*. But here, plaintiff's complaint contains detailed allegations regarding her dispute with Lees. Plaintiff attached to her complaint a letter confirming that plaintiff reported Lees's conduct to the administration on several occasions and that while an investigation could not substantiate these particular allegations, the investigation did find "dereliction and neglect of duty on the part of the Thompson K-8 administrative team," which necessarily in-

cluded Lightsey. And as explained earlier, there is evidence tending to show that Lightsey had reason to know that a poor evaluation of plaintiff would lead to her layoff. We cannot say that further discovery bears no possibility of providing further support to plaintiff's claims. To grant summary disposition on the basis of a single affidavit presented by defendants and before plaintiff has deposed witnesses, including Lightsey, is premature.

Turning to plaintiff's allegations regarding the failure to provide her with feedback or opportunities to cure any deficiencies, defendants argue that the factual record so far developed undermines any such claims. Defendants submitted a document that shows that after the February 7, 2012 observation of plaintiff's classroom, plaintiff was given a formal evaluation form, which plaintiff signed/acknowledged on March 14, 2012. However, we cannot conclude as a matter of law that plaintiff's receipt of this feedback five weeks after her evaluation was "timely" under MCL 380.1249(1)(a). Accordingly, on the record before us, this factual question is to be resolved by a fact-finder at trial, and summary disposition is not appropriate. See *White v Taylor Distrib Co, Inc*, 275 Mich App 615, 625; 739 NW2d 132 (2007), aff'd 482 Mich 136 (2008); *Lewis v LeGrow*, 258 Mich App 175, 195-196; 670 NW2d 675 (2003).

In a similar vein, defendants argue that plaintiff was aware of her performance problems at least as early as September 15, 2011, and that she thus had ample time to cure her deficiencies. Defendants rely on a letter dated September 15, 2011, which explained that a meeting would be held on September 19, 2011, to discuss three concerns: reporting time, attendance-taking procedures, and classroom management. The

letter stated that the meeting could result in discipline and that plaintiff was entitled to have a union representative at the meeting. There is no evidence in the record demonstrating what occurred after this meeting or whether the meeting even took place. While perhaps this letter demonstrates some concerns defendants had, what is unknown is if these concerns were substantiated or whether the concerns were resolved at that point. This letter does not conclusively establish that plaintiff was aware of certain performance issues and had ample time to correct them. Further, the evidentiary record could be reasonably construed as showing that although plaintiff was aware that she had some problems in the area of classroom management, she did not know that her overall performance was anything less than effective until she received the evaluation that caused her to be laid off. Under the circumstances, and particularly in light of the fact that discovery had not been completed, the trial court prematurely granted summary disposition pursuant to MCR 2.116(C)(10).[7]

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

BORRELLO, P.J., and SHAPIRO, J., concurred with TUKEL, J.

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[7] Defendants also rely on performance evaluations performed in 2000, 2002, and 2003, each of which noted several concerns regarding plaintiff's teaching. Defendants contend that these evaluations further show that plaintiff should have been aware of her performance issues and had time to correct them. What is entirely missing from the record is any evidence of what occurred between 2003 and 2011. One could easily assume that, given the fact that plaintiff remained employed during these years, she made substantial improvements in these intervening years. Again, with discovery remaining incomplete, it is inappropriate to make any assumptions.

MARGARIS v GENESEE COUNTY

Docket No. 337771. Submitted April 4, 2018, at Detroit. Decided May 3, 2018, at 9:00 a.m. Leave to appeal denied 503 Mich 1018.

Apostolos Margaris brought an action in the Genesee Circuit Court against Genesee County, Undersheriff Christopher Swanson, Sheriff Robert Pickell, and others, alleging fraud, intentional infliction of emotional distress, conversion, discrimination, harassment, and civil conspiracy in connection with a sting operation that Pickell conducted after receiving a tip that plaintiff, a restaurant owner, had been purchasing meat that was stolen from defendant Starlite Diner, Inc., which was owned by defendant Kosta Popoff. Plaintiff was arrested after purchasing three boxes of meat for $75, and Swanson facilitated an agreement under which the case would not be prosecuted if plaintiff paid $1,800 in restitution. Plaintiff claimed that the sting operation and the restitution agreement constituted fraud and extortion. Defendants moved for summary disposition. After the parties stipulated to dismiss plaintiff's claims against Starlite and Popoff, the court, Archie L. Hayman, J., granted summary disposition in favor of the remaining defendants—Genesee County, Pickell, and Swanson—pursuant to MCR 2.116(C)(7) (claim barred by immunity), MCR 2.116(C)(8) (failure to state a claim), and MCR 2.116(C)(10) (no genuine issue of material fact), ruling that governmental immunity applied because Pickell was acting in his capacity as the sheriff at all times and Swanson was acting within the bounds of his authority. Plaintiff appealed.

The Court of Appeals *held*:

1. The court did not err by granting summary disposition in favor of Pickell. When a defendant invokes individual governmental immunity, the court must first determine whether the individual is entitled to absolute immunity as a high-level executive official under MCL 691.1407(5). To benefit from the immunity granted to highly ranked officials, an individual must be a judge, a legislator, or the highest executive official in the level of government in which he or she is employed. Pickell was the sheriff of Genesee County, and a county sheriff is entitled to high-level governmental immunity as the highest elected official and executive officer of the county's law enforcement. Because the allega-

tions against Pickell involved his acting in his capacity as sheriff, he was entitled to absolute immunity if he was acting within the scope of his executive authority. Whether the highest executive official of local government was acting within his or her authority depends on a number of factors, including the nature of the specific acts, the position held by the official, the local law defining the official's authority, and the structure and allocation of powers in the particular level of government. MCL 51.76(2)(b) provides that the sheriff is responsible for enforcing the criminal laws of this state, violations of which are observed by or brought to the attention of the sheriff's department while providing the patrolling and monitoring required by MCL 51.76(2). Pickell's activities of receiving information about a theft crime, conducting an investigation, suggesting restitution rather than prosecution, and authorizing Swanson to speak with plaintiff about restitution were in the framework of investigating crimes and enforcing the law in Genesee County, all of which were Pickell's responsibilities as sheriff. Because Pickell was acting in the scope of his executive authority as sheriff, he was entitled to immunity. Plaintiff argued that the sheriff's department was not accepting a restitution payment but rather collecting a debt from plaintiff, which was not within Pickell's executive authority, because Pickell and Swanson knew that plaintiff was not going to be prosecuted before plaintiff agreed to pay the money. However, the evidence, considered in a light most favorable to plaintiff, indicated that plaintiff's prosecution was deferred in an attempt to resolve the situation through restitution, and there was no evidence that prosecution had been dismissed as a possibility before the situation was resolved through the settlement. Further, despite plaintiff's argument that he could not have been guilty of a crime because he did not know the meat was stolen, the evidence, considered in a light that favored plaintiff, indicated that it would have been possible for a jury to determine that plaintiff had committed a crime had plaintiff chosen to decline restitution. The fact that the black-market value of the meat purchased in the sting operation was only $75 did not render plaintiff's payment of $1,800 too high to be considered restitution, given that the meat had a much higher market value and that there had been additional purchases of stolen meat with varying values.

2. The court did not err by ruling that Swanson was entitled to individual governmental immunity. With respect to an intentional tort, lower-level governmental employees can demonstrate entitlement to individual governmental immunity by showing that the acts at issue were undertaken during the course of employment and the employee was acting, or reasonably believed that he or she was acting, within the scope of his or her authority;

the acts were undertaken in good faith, or were not undertaken with malice; and the acts were discretionary, as opposed to ministerial. Investigating the criminal activity of purchasing stolen meat and resolving the investigation with the payment of restitution was within Swanson's authority, and the evidence did not support plaintiff's allegation that Swanson was not acting in good faith when speaking with plaintiff about restitution.

3. The court did not err by ruling that Genesee County was entitled to governmental immunity. The governmental tort liability act, MCL 691.1401 *et seq.*, grants immunity from tort liability to the state, as well its agencies, when they are engaged in the exercise of a governmental function, except where the Legislature has expressly granted an exception. To determine whether a governmental agency was engaged in a governmental function, the focus must be on the general activity, not the specific conduct involved at the time of the tort. In this case, Genesee County was engaged in the governmental function of law enforcement, which includes investigating suspected crimes and resolving those investigations. Additionally, governmental entities are immune from liability for the torts of their employees when the employees are engaged in the exercise of a governmental function, except where the Legislature has expressly granted an exception to immunity. There is no exception in the governmental immunity statute for intentional torts, and Genesee County was engaged in a governmental function at the time of the alleged intentional torts of its employees. Therefore, Genesee County was immune from liability because there was no applicable statutory exception and plaintiff did not plead facts in avoidance of immunity.

Affirmed.

O'CONNELL, J., concurring, wrote separately to clarify the scope of governmental immunity, explaining that governmental immunity is not a defense to a cause of action but rather a characteristic of government, and a plaintiff cannot sue the government unless it has waived its immunity and granted permission to be sued. He noted that the Court of Appeals had nevertheless held in an earlier case, without analysis or authority, that governmental immunity is not a defense to a claim brought under the Civil Rights Act, MCL 37.2101 *et seq*., which set a dangerous precedent by imposing a prohibitive cost on public servants and disturbing the balance between civil rights and governmental rights. He urged the Supreme Court to reexamine the scope of governmental immunity in order to make clear that governmental immunity is a characteristic of government, not a defense, and that, in order to institute a cause of action against the state, a plaintiff must plead in avoidance of governmental immunity.

GOVERNMENTAL IMMUNITY — GOVERNMENTAL EMPLOYEES — HIGH-LEVEL EXECUTIVE OFFICIALS — SHERIFFS.

A county sheriff is entitled to absolute immunity as a high-level executive official under MCL 691.1407(5) if he or she was acting within the scope of his or her executive authority; actions such as receiving information about a theft crime, conducting an investigation of that crime, and suggesting restitution rather than prosecution are within the scope of a sheriff's executive authority for purposes of this provision.

*Tom R. Pabst* for plaintiff.

*Plunkett Cooney* (by *Mary Massaron* and *Josephine A. DeLorenzo*) for defendants.

Before: SERVITTO, P.J., and MARKEY and O'CONNELL, JJ.

PER CURIAM. Plaintiff, Apostolos Margaris, appeals by right the trial court's grant of summary disposition in favor of defendants, Genesee County, Sheriff Robert Pickell, and Undersheriff Christopher Swanson, pursuant to MCR 2.116(C)(7) (claim barred by immunity), MCR 2.116(C)(8) (failure to state a claim), and MCR 2.116(C)(10) (no genuine issue of material fact). The trial court ruled that governmental immunity applied because at the relevant times, Pickell was acting in his capacity as the sheriff and Swanson was acting within the bounds of his authority. The trial court further concluded that defendant Kosta Popoff, owner of the Starlite Diner, Inc., was a victim under the circumstances and acted with good character in trying to resolve a conflict.[1] We affirm.

[1] Although the trial court granted summary disposition to defendants Starlite and Popoff pursuant to MCR 2.116(C)(8) (failure to state a claim) and MCR 2.116(C)(10) (no genuine issue of material fact), the parties had stipulated to dismiss the claims against Popoff and Starlite after the motion hearing and before the trial court's opinion and order was entered.

Plaintiff was the owner of another restaurant. An employee at Starlite informed Popoff that one of plaintiff's intermittent employees, Mike Jacques, who used to work for Starlite, was stealing meat from Starlite and selling it to plaintiff. Popoff informed Pickell. Pickell's department investigated and performed a sting operation in which plaintiff purchased three boxes of meat that were supplied to Jacques by Popoff. After plaintiff's arrest, Swanson facilitated an agreement for plaintiff to pay $1,800 in restitution, and in exchange the case would not be prosecuted. Plaintiff filed claims alleging that defendants committed fraud by misrepresenting facts in order to extort money from plaintiff and for intentional infliction of emotional distress, conversion, discrimination, harassment, and civil conspiracy.

Plaintiff argues on appeal that the trial court erred by granting summary disposition pursuant to MCR 2.116(C)(7) because Pickell's actions were not within the scope of his executive authority and Swanson acted in bad faith. We disagree.

This Court reviews de novo the applicability of governmental immunity as a question of law. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). In reviewing a motion for summary disposition based on immunity, MCR 2.116(C)(7), this Court considers the affidavits, depositions, admissions, and other documentary evidence to determine whether the movant is entitled to immunity as a matter of law. *Tarlea v Crabtree*, 263 Mich App 80, 87; 687 NW2d 333 (2004). The evidence is viewed in a "light most favorable to the nonmoving party," and "all legitimate inferences in favor of the nonmoving party" are drawn. *Jackson v Saginaw Co*, 458 Mich 141, 142; 580 NW2d 870 (1998).

Governmental immunity from tort liability is governed by the operation of § 7 of the governmental tort liability act (GTLA), MCL 691.1407. Under § 7, immunity is broadly interpreted, and exceptions to it are narrowly construed. *Frohriep v Flanagan*, 275 Mich App 456, 468; 739 NW2d 645 (2007), rev'd in part on other grounds 480 Mich 962 (2007). Governmental immunity is a characteristic of government, and plaintiffs bringing suit against the government must plead to avoid the government's immunity. *Odom v Wayne Co*, 482 Mich 459, 478-479; 760 NW2d 217 (2008).

I. SHERIFF PICKELL

When a defendant invokes individual governmental immunity, the court must first determine whether the individual is entitled to absolute immunity as a high-level executive official under MCL 691.1407(5). High-level executive officials "may qualify for absolute immunity because they have broad-based jurisdiction or extensive authority similar to that of a judge or legislator." *Harrison v Dir of Dep't of Corrections*, 194 Mich App 446, 451; 487 NW2d 799 (1992). To benefit from the immunity granted to highly ranked officials, an individual must be a judge, a legislator, or the highest executive official in the level of government in which he or she is employed. See *Eichhorn v Lamphere Sch Dist*, 166 Mich App 527, 538; 421 NW2d 230 (1988). In this case, Pickell was the sheriff of Genesee County. A county sheriff is entitled to high-level governmental immunity. See *Bennett v Detroit Police Chief*, 274 Mich App 307, 313-315; 732 NW2d 164 (2007) (concluding that the chief of police was entitled to governmental immunity). The sheriff is the highest elected official and executive officer of the county's law enforcement. See Const 1963, art 7, § 4. Because the allegations

against Pickell involved his acting in his capacity as sheriff, he is entitled to absolute immunity if he was acting within the scope of his executive authority.

Whether the highest executive official of local government was acting within his or her authority depends on a number of factors, including the "nature of the specific acts," the "position held by the official," the "local law defining the official's authority," and the "structure and allocation of powers in the particular level of government." *Bennett*, 274 Mich App at 312 (quotation marks and citation omitted). Here, plaintiff argues that Pickell was not acting within his authority because he was acting as a debt collector for a private citizen and his political supporter, Popoff, rather than serving a law-enforcement function. But there was no evidence of an intentional transaction between Popoff and plaintiff for which plaintiff incurred a debt to be collected.

MCL 51.76(2)(b) provides that the sheriff is responsible in part for "[e]nforcing the criminal laws of this state, violations of which are observed by or brought to the attention of the sheriff's department while providing the patrolling and monitoring required by this subsection." Here, Pickell was dining at the restaurant belonging to his friend and political supporter, Popoff, when Popoff informed him that he learned that an ex-employee had been selling plaintiff meat stolen from his restaurant. Pickell directed Swanson to investigate. He did so by interviewing those involved and by the sheriff's department initiating an undercover operation in which Jacques sold meat from Popoff to plaintiff.[2] Plaintiff was arrested after buying the meat from Jacques. The investigating officer, William

[2] According to Swanson, Jacques admitted he stole steaks from Starlite and sold 10 boxes of them to plaintiff more than four times.

Lanning, spoke to the assistant prosecutor, Timothy Bograkos, to request an arrest warrant, and Bograkos spoke to the county prosecutor, David Leyton. Pickell and Swanson met with Leyton to request resolution of the case through restitution instead of prosecution, as Popoff favored restitution. Swanson met with plaintiff, and they reached an agreement in which plaintiff paid $1,800 to Popoff, and Popoff would not seek prosecution.

Thus, Pickell's activities of receiving information about a theft crime, conducting an investigation, suggesting restitution rather than prosecution, and authorizing Swanson to speak with plaintiff about restitution were in the framework of investigating crimes and enforcing the law in Genesee County, all of which were his responsibilities as sheriff. Because Pickell was acting in the scope of his executive authority as sheriff, he was entitled to immunity.

Plaintiff argues that the sheriff's department was collecting a debt from plaintiff, and debt collection was not within the executive authority of Pickell. Pickell characterized the resolution of the matter as plaintiff's paying restitution for a wrongdoing, not satisfying a debt for money owed. The sheriff's department had experience at resolving complaints through restitution whether through its consumer protection bureau for consumer issues or after investigating criminal matters. Pickell believed that it was the right of the sheriff to attempt to settle a dispute and perhaps avoid prosecution. Leyton believed that it was proper for the victim of a crime to settle the case through restitution and that Swanson had assisted with resolving other cases similarly. Bograkos said it was common to resolve a case such as this with restitution. Popoff said that after the sheriff's department asked him about

resolving the situation, his attorney told him that the police frequently used a civil remedy to work out a complaint. Popoff recalled that the local police previously worked out restitution, rather than prosecution, for a person who vandalized his restaurant. Popoff said that he did not wish to harm plaintiff or his business but that he did wish to receive restitution for the meat that was stolen.

Plaintiff argues that the money he paid could not have been restitution because Pickell and Swanson knew that plaintiff was not going to be prosecuted before plaintiff agreed to pay the money. Plaintiff states that Pickell and Swanson knew that plaintiff was not going to be prosecuted because former County Commissioner Jamie Curtis stated that she heard Leyton report that he told Pickell and Swanson that he would not prosecute plaintiff because the case involved the theft of only $75 worth of meat, a misdemeanor.

Other facts of record, however, provide more insight into the comments Curtis heard. Leyton did not recall a conversation about the value of the meat or whether the crime was a misdemeanor, and he did not recall discussing the case with Curtis. The Curtis affidavit also states that she heard Leyton say that he did not know about prosecuting plaintiff because he knew both plaintiff and Popoff. Leyton said that Bograkos informed him that a warrant was requested stemming from plaintiff's buying stolen meat, and Leyton said that the case would have to be transferred to another agency if it were prosecuted because he knew plaintiff and Popoff. Similarly, Bograkos said Lanning presented the case to him for warrant review, and he spoke to Leyton, who requested a dollar amount of the meat involved so that he could determine which agency to refer the case to because he was going to have to

recuse his office. Bograkos believed that there was probable cause to authorize a warrant before the case was resolved.

Pickell reported that Popoff told him that he had common friends with plaintiff because he was Greek and did not wish to see plaintiff's business harmed by a prosecution. Consequently, Pickell thought it was appropriate to treat the situation like a consumer protection matter so Popoff could get his money back. Pickell and Swanson reported that they met with Leyton, who approved the reimbursement remedy rather than prosecution. Leyton said that he met with Pickell and Swanson, who wished to refer the case to the consumer protection division, which Leyton approved. Thus, the evidence, considered in a light most favorable to plaintiff, indicated that plaintiff's prosecution was deferred in an attempt to resolve the situation through restitution.

The Sheriff's Department report stated that plaintiff had been arrested for larceny and receiving and concealing stolen property but that plaintiff and Popoff agreed to a $1,800 settlement and a promise not to pursue criminal or civil action. After the agreement was reached, Bograkos denied the warrant because the case had been resolved. The warrant request stated that a warrant was denied by the prosecutor because the "parties have resolved their differences and reached a restitution agreement." There was no evidence that prosecution had been dismissed as a possibility before the situation was resolved through the settlement.

Plaintiff also argues that he could not have been guilty of a crime because he did not know the meat was stolen. Plaintiff reported that Jacques told him on a previous occasion that the meat was from his friend at

Sysco Foods. He further stated that he did not know where the meat was from that he purchased the day he was arrested because he did not look at the boxes, which had Starlite mailing labels on them, before he put them in the freezer. The trial court acknowledged that it was possible that plaintiff did not know the meat was stolen. However, plaintiff reported that he and his wife discussed that Jacques used to work at Starlite and that he agreed with his wife that the meat could have been taken from Starlite. Plaintiff explained that his wife attempted to call Starlite to discuss the matter, but she was unable to speak with Popoff. Plaintiff testified that he apologized to Lanning for having purchased stolen meat and that he made a big mistake. Swanson reported that Jacques said "enjoy the Starlite special" after selling the stolen meat to plaintiff. Notably, rather than undergo prosecution and allow a jury to determine whether plaintiff knew he was buying stolen meat, plaintiff agreed to pay an amount of restitution. Considering the evidence in a light that favors plaintiff, we agree that, had plaintiff chosen to decline restitution, it would have been possible for a jury to determine that plaintiff had committed a crime.

Plaintiff argues that the value of the meat was only $75, so plaintiff's payment of $1,800 was too excessive to be considered restitution for an amount that would have been a misdemeanor. But the actual value of the meat that had been stolen from Popoff and that plaintiff purchased was not definitively established. Plaintiff reported that on the day of his arrest he bought two boxes of steaks and one of turkey, for a total of $75. Popoff said the total value of the three boxes of meat he provided for the undercover operation was $350. Additionally, Jacques stated that he had sold three boxes of meat stolen from Popoff to plaintiff earlier for $275. Plaintiff told Lanning that approximately a month

before his arrest he purchased four or five boxes of steak for $40 a box. When he was arrested, plaintiff provided Lanning with four cases of meat from his freezer that he had purchased from Jacques.

According to Popoff, his informant thought that plaintiff purchased the stolen meat on four or five occasions. Popoff estimated from information from his manager and prep cook that the stolen food was worth between $500 and $1,000 for each instance, or a total of $4,000 to $10,000. Swanson thought that the value of the meat, according to Popoff's report, was "into the thousands," as high as $10,000, but that amount could not be demonstrated. Pickell stated that he was not involved in determining the amount of restitution. Bograkos said that he never learned of a specific dollar amount. Thus, the $75 figure was the black-market value of the meat stolen during the sting operation; it had a much higher market value. Additionally, there were additional purchases of stolen meat with varying black-market and retail values. But, in sum, it is disingenuous to suggest that plaintiff paid $1,800 for $75 worth of meat or that the case would not have been prosecuted because of the amount plaintiff paid for his most recent purchase.

## II. UNDERSHERIFF SWANSON

Plaintiff next argues that the trial court erred by ruling that Swanson was entitled to individual governmental immunity. With respect to an intentional tort, lower-level governmental employees can demonstrate entitlement to individual governmental immunity by showing the following:

> (a) The acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority,

(b) the acts were undertaken in good faith, or were not undertaken with malice, and

(c) the acts were discretionary, as opposed to ministerial. [*Odom*, 482 Mich at 480.]

The commission of an intentional tort is not the exercise or discharge of a governmental function. *Moore v Detroit*, 128 Mich App 491, 497; 340 NW2d 640 (1983).

As discussed above, investigating the criminal activity of purchasing stolen meat from Starlite and Popoff and resolving the investigation with the payment of restitution was within Swanson's authority. Plaintiff does not argue that resolving the case with restitution was a ministerial task. Plaintiff argues that Swanson did not act in good faith when speaking with plaintiff about restitution. Plaintiff recalled that he invited Swanson to speak with him at his restaurant, and Swanson told him that Starlite could not wait for him to not agree to pay a settlement. According to plaintiff, Swanson said that Starlite wanted to "bury" him, so that he "will never see the daylight," and that he was facing prison time and "he" knows the judges, the sheriff, and the prosecutor. Plaintiff said that Swanson asked him to pay $5,000 to make the incident go away, but plaintiff refused. Plaintiff reported that Swanson then called Popoff and lowered the requested amount to $3,000, after which plaintiff offered, or agreed to, the $1,800 that was accepted. Plaintiff said that after he paid the money, Swanson told him that the owner of Starlite did not want to hurt him. Plaintiff recalled that he signed a receipt that Popoff also signed documenting the transaction.

By contrast, Swanson denied that he threatened plaintiff with prison during their conversation, which he characterized as cordial and factual. He said he informed plaintiff that Popoff did not wish to prosecute

but wanted to resolve the case with restitution. Swanson said that he did not recall what amounts were discussed, other than plaintiff's offering $1,500, but he knew that the lowest amount that Popoff would accept was $1,800. Popoff stated that $1,800 was his settlement amount because plaintiff had $600 worth of Popoff's steaks in his freezer, and his attorney told him that he could seek treble damages. Popoff recalled Swanson's informing him of plaintiff's $1,500 offer, which he declined. Swanson reported that plaintiff provided cash that he documented and gave to Popoff. Popoff reported that he collected the $1,800 from the Sheriff's Department.

Plaintiff argues that Swanson was not acting in good faith to demand $5,000 for $75 of meat and while threatening jail time when he knew that the case would not be prosecuted. But as discussed earlier, the decision to decline an arrest warrant was made after the restitution payment because the parties had agreed on restitution. Until the case was resolved with restitution, the status of plaintiff's prosecution was not determined, and Swanson could fairly inform plaintiff that prosecution was a possibility. Further, as discussed, no value of the meat stolen was definitively determined. Thus, the potential amount of restitution varied during negotiations, but Popoff ultimately determined a dollar figure to which plaintiff agreed. The evidence indicated that Popoff and his attorney together determined the restitution amount. Plaintiff then agreed to that amount; it was not based on Swanson's actions.

### III. GENESEE COUNTY

Plaintiff also argues that the trial court erred by ruling that Genesee County was entitled to govern-

mental immunity. The GTLA grants immunity from tort liability to the state, as well its agencies, when they are engaged in the exercise of a governmental function, except where the Legislature has expressly granted an exception. MCL 691.1407(1).[3] In this case, Genesee County was not engaged in any of the functions that are exempted from immunity. Therefore, Genesee County was immune from liability because there is no statutory exception applicable to the instant facts, and plaintiff did not plead facts in avoidance of immunity. *Odom*, 482 Mich at 478-480.

Plaintiff argues that Genesee County was not engaged in a governmental function when it was collecting a debt for Popoff from plaintiff. "In determining whether a particular activity constitutes a governmental function, the focus is on the precise activity giving rise to plaintiff's claim rather than on the entity's overall or principal operation." *Everett v Saginaw Co*, 123 Mich App 411, 414; 333 NW2d 301 (1983). Nonetheless, "to use anything other than the general activity standard would all but subvert the broad governmental immunity intended by the Legislature" because it "would be difficult to characterize any tortious act that is a governmental function." *Payton v Detroit*, 211 Mich App 375, 392; 536 NW2d 233 (1995) (quotation marks and citation omitted). Governmental immunity is differentiated from the immunity given to individuals in that the immunity granted by the GTLA to a governmental entity "is based upon the general nature

[3] "The statutory exceptions to the governmental immunity provided to the state and its agencies are the highway exception, MCL 691.1402; the motor-vehicle exception, MCL 691.1405; the public-building exception, MCL 691.1406; the proprietary-function exception, MCL 691.1413; the governmental-hospital exception, MCL 691.1407(4); and the sewage-disposal-system-event exception, MCL 691.1417(2) and (3)." *Odom*, 482 Mich at 478 n 62.

of the activity of its employees, rather than the specific conduct of its employees." *Id*. Thus, "[t]o determine whether a governmental agency is engaged in a governmental function, the focus must be on the general activity, not the specific conduct involved at the time of the tort." *Pardon v Finkel*, 213 Mich App 643, 649; 540 NW2d 774 (1995). In this case, Genesee County was engaged in the governmental function of law enforcement, and, as discussed, the activity of law enforcement includes investigating suspected crimes and resolving those investigations. Additionally, governmental entities are immune from liability for the torts of their employees when the employees are engaged in the exercise of a governmental function, except where the Legislature has expressly granted an exception to immunity. Although "there is no exception in the governmental immunity statute for intentional torts," *Payton*, 211 Mich App at 392, as discussed earlier, Genesee County was engaged in a governmental function at the time of the alleged intentional torts of its employees, see *id*. at 393 (concluding that a governmental unit was entitled to immunity "because it cannot be held liable for the intentional torts of its employees").

## IV. CONCLUSION

We conclude that the trial court did not err by granting summary disposition to Pickell, Swanson, and Genesee County pursuant to MCR 2.116(C)(7) because they were entitled to governmental immunity. Therefore, we do not reach the issue whether the trial court also properly granted summary disposition pursuant to MCR 2.116(C)(8).

We affirm.

SERVITTO, P.J., and MARKEY, J., concurred.

O'CONNELL, J. (*concurring*). I concur with the majority's resolution of this case and its reasons for doing so, but I write separately to clarify the scope of governmental immunity.

The law of governmental immunity has gone through a whirlwind and now requires clarification. Governmental immunity is a characteristic of government that protects the government from liability and the expense of litigation. *Odom v Wayne Co*, 482 Mich 459, 478; 760 NW2d 217 (2008). A plaintiff must plead in avoidance of governmental immunity, specifically stating the statutory language by which the government has waived its sovereign immunity. *Id*. at 478-479. This has been the law dating back to our English heritage. It must be emphasized that the concept of governmental immunity, under current law, is not recognized as a defense, nor is it a defense to a cause of action. Rather, governmental immunity is a characteristic of government, and a plaintiff cannot sue the government unless it has waived its immunity and granted permission to be sued.

Nonetheless, the characterization of governmental immunity as an affirmative defense is a common refrain for those who seek to bypass governmental immunity. For example, a panel of this Court held that "[g]overnmental immunity is not a defense to a claim brought under the Civil Rights Act."[1] *Manning v Hazel Park*, 202 Mich App 685, 699; 509 NW2d 874 (1993). Although unsupported by any meaningful analysis,[2] this conclusory statement has become a generally

[1] MCL 37.2101 *et seq*.

[2] This statement in *Manning* is like a quip made at a cocktail party, with no analysis or citation of any authority, and it has been repeated in numerous other cases, including *Does 11-18 v Dep't of Corrections*, 323 Mich App 479, 490; 917 NW2d 730 (2018).

accepted legal principle, cited most recently in *Does 11-18 v Dep't of Corrections*, 323 Mich App 479, 485, 490; 917 NW2d 730 (2018) (holding that governmental immunity does not bar a claim of discrimination in the provision of a "public service"), citing *In re Bradley Estate*, 494 Mich 367, 393 n 60; 835 NW2d 545 (2013); *Mack v Detroit*, 467 Mich 186, 195; 649 NW2d 47 (2002); *Diamond v Witherspoon*, 265 Mich App 673, 691; 696 NW2d 770 (2005); and *Manning*, 202 Mich App 685.

Cases such as *Manning* and *Does* set a dangerous precedent. The cost to all public-service providers, both in their official capacity and in their individual capacity, will be prohibitive. Who among us would serve as public servants knowing that we could be frivolously sued for all of our day-to-day decisions? The aforementioned cases have disturbed the balance between civil rights and governmental rights. Our Supreme Court needs to reexamine the scope of governmental immunity in light of *Does* and the litany of cases calling governmental immunity an affirmative defense. More importantly, the Supreme Court, or a conflict panel of this Court, needs to reexamine the ipse dixit statement made in *Manning*, 202 Mich App at 699, that "[g]overnmental immunity is not a defense to a claim brought under the Civil Rights Act." See *Mack*, 467 Mich at 197-203 (holding that governmental immunity is not an affirmative defense).

While the bold and unhinged statement that "[g]overnmental immunity is not a defense to a claim brought under the Civil Rights Act" makes a great sound bite and may be well-intentioned, it is contrary to established caselaw, statutory law, and, for that matter, the common law. I ask that the Supreme Court grant leave and remind this Court that governmental

immunity is a characteristic of government and not a defense. In order to institute a cause of action against the state, a plaintiff must plead in avoidance of governmental immunity.

I concur in the majority's well-reasoned decision.

PEOPLE v WILEY

PEOPLE v RUCKER

Docket Nos. 336898 and 338870. Submitted April 10, 2018, at Detroit. Decided May 4, 2018, at 9:00 a.m. Leave to appeal denied 503 Mich 929.

In 1994, when Christopher Wiley was 16 years and 9 months old, he shot and killed Jamal Cargill. Following a jury trial in the Wayne Circuit Court, Wiley was convicted of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. In 1995, Warfield Moore, Jr., J., sentenced Wiley to consecutive sentences of 2 years' imprisonment for the felony-firearm conviction and life imprisonment without the possibility of parole for the murder conviction, as then mandated by state law. In 2012, the United States Supreme Court decided *Miller v Alabama*, 567 US 460 (2012), which held that sentencing a juvenile offender to a mandatory term of life in prison without the possibility of parole violated the Eighth Amendment of the United States Constitution. The Michigan Legislature subsequently set forth the procedure for resentencing defendants fitting *Miller*'s criteria by enacting MCL 769.25 (applicable to cases not yet final when *Miller* was decided) and MCL 769.25a (to be applicable to cases that were final when *Miller* was decided if the Michigan Supreme Court or the United States Supreme Court were to later declare that *Miller* applied retroactively). In 2016, the United States Supreme Court decided *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718 (2016), holding that *Miller* applied retroactively. In accordance with MCL 769.25a, the prosecution sought to have Wiley resentenced to a term of 35 to 60 years' imprisonment for the murder conviction. The court, Richard M. Skutt, J., resentenced Wiley to 25 to 60 years' imprisonment for the murder conviction with credit for 7,411 days served on that conviction. Wiley appealed, challenging the constitutionality of MCL 769.25a(6), which states that a defendant resentenced under MCL 769.25a(4) shall receive credit for time served but shall not receive any good-time credits, special good-time credits, disciplinary credits, or any other credits that reduce a defendant's minimum or maximum sentence.

In 1992, when William L. Rucker was 17 years and 3 months old, he shot and killed Earl Cole. Following a jury trial in the Wayne Circuit Court, Rucker was convicted of first-degree murder, MCL 750.316, and felony-firearm, MCL 750.227b. In 1993, Gershwin A. Drain, J., sentenced Rucker to consecutive sentences of 2 years' imprisonment for the felony-firearm conviction and life imprisonment without the possibility of parole for the murder conviction, as then mandated by state law. Following the decision in *Montgomery*, the prosecution sought to have Rucker resentenced in accordance with MCL 769.25a to a term of 32 to 60 years' imprisonment for the murder conviction. The court, James R. Chylinski, J., resentenced Rucker to 30 to 60 years' imprisonment for the murder conviction with credit for 8,132 days served on that conviction. Rucker appealed, challenging the constitutionality of MCL 769.25a(6) and asserting that his minimum sentence was imposed in violation of *Alleyne v United States*, 570 US 99 (2013), because it was based on judge-found facts.

The Court of Appeals consolidated Wiley's and Rucker's appeals.

The Court of Appeals *held*:

1. The exercise of subject-matter jurisdiction over Wiley's and Rucker's appeals was proper. The prosecution correctly noted that MCL 791.204 grants the Michigan Department of Corrections (MDOC) sole jurisdiction over questions of parole, but the prosecution incorrectly characterized the instant cases as challenging the Parole Board's decision to grant or deny parole or to award disciplinary credits. The issue on appeal in these cases was whether MCL 769.25a is constitutional. That is, the question to be decided was whether it is constitutional when resentencing a defendant who was sentenced to a mandatory term of life without parole for a murder committed when the defendant was a juvenile to deny the award of any credits, other than those for time served, that could reduce the defendant's minimum or maximum sentence. To review the constitutionality of MCL 769.25a does not usurp or trespass on the Parole Board's exclusive authority to grant or deny parole, and resolution of the issue would directly affect Wiley and Rucker. Appellate jurisdiction over a final order or judgment in a criminal case is authorized by MCR 7.203(A)(1), and according to MCR 7.202(6)(b)(iii), a final judgment includes a sentence imposed following the grant of a motion for resentencing. Therefore, the Court of Appeals could properly exercise subject-matter jurisdiction in the instant cases.

2. MCL 769.25a(6) is a retroactive provision that violates the Ex Post Facto Clauses of the United States and Michigan Con-

stitutions because it attaches legal consequences to acts that occurred before the statute's effective date and works to the disadvantage of the defendant. The analysis and conclusions of Judge Mark A. Goldsmith in *Hill v Snyder*, 308 F Supp 3d 893 (ED Mich, 2018), were persuasive. Michigan's statutory scheme regarding good-time and disciplinary credits has changed over the years, but the broad language used in both the good-time and the disciplinary-credit statutes does not draw any distinction based on whether the prisoner is serving a life sentence. Michigan law therefore provides good-time and disciplinary credits to prisoners serving a term of life imprisonment. The elimination of those credits by MCL 769.25a(6) thus violates the Ex Post Facto Clauses. That is, when Wiley and Rucker committed their crimes and were sentenced to life in prison without the possibility of parole, they were permitted to earn disciplinary credits. To later prevent those credits from being applied to reduce Wiley's and Rucker's minimum or maximum sentences increased the punishment for their offenses in violation of the Ex Post Facto Clauses.

3. Under MCL 769.25a(4)(c), if the prosecution opts not to seek resentencing to life in prison without the possibility of parole, the court shall sentence the defendant to a term of imprisonment for which the maximum term shall be 60 years and the minimum term shall be not less than 25 years or more than 40 years. Rucker contended that the trial court's imposition of a 30-year minimum sentence, instead of a 25-year minimum sentence, was improper under *Alleyne* because the 30-year sentence was based on facts not admitted by him or found by a jury. Contrary to Rucker's argument, the trial court's imposition of a 30-year minimum sentence did not constitute a Sixth Amendment violation proscribed by *Alleyne*. A judge acting within the range of punishment authorized by statute may exercise his or her discretion—and find facts and consider factors relating to the offense and the offender—without violating the Sixth Amendment. The trial court was afforded discretion in determining and imposing a minimum sentence that comported with the required statutory range. Therefore, Rucker's sentence did not violate the Sixth Amendment.

Wiley's and Rucker's sentences affirmed, but MCL 769.25a(6) declared unconstitutional.

BOONSTRA, J., concurring in part and dissenting in part, would not have reached the constitutional ex post facto issue presented by Wiley and Rucker but agreed with the majority that the Court of Appeals had subject-matter jurisdiction over the appeals gen-

erally, that Rucker's sentence did not violate the Sixth Amendment, and that Wiley's and Rucker's sentences should be affirmed. The question whether application of MCL 769.25a(6) violates the prohibition against ex post facto laws was not properly raised in the context of the appeals, as essentially conceded by Rucker and Wiley when their position shifted during the course of this appeal with developments in the *Hill* case. Notably, aside from Rucker's *Alleyne* challenge, Wiley and Rucker did not even challenge the sentences imposed when they were resentenced. Rather, Wiley and Rucker essentially sought a declaratory ruling that MCL 769.25a(6) was unconstitutional and that its application could affect their future parole eligibility. Wiley's and Rucker's claims regarding MCL 769.25a(6) were not ripe; neither Wiley nor Rucker had suffered a concrete and particularized injury arising from either the actions of the trial court or an appellate court judgment. Wiley and Rucker were not aggrieved parties whose claims merited review. The instant cases involved criminal prosecutions, not actions for declaratory relief, and the Court of Appeals does not have original jurisdiction over actions for declaratory relief. Importantly, the Court of Appeals is an error-correcting court, and none of the parties identified any errors committed by the trial court. Even if declaratory relief were possible in this context, the ripeness doctrine precludes the adjudication of claims that are contingent on future events, which may not occur as anticipated or may not occur at all. Wiley and Rucker had suffered no injury to their parole eligibility at the time they were resentenced. Assuming that Wiley and Rucker accrued disciplinary credits during their terms of imprisonment before resentencing, MCL 800.33(3) provides that those credits are to be deducted from a prisoner's minimum and maximum sentences in order to determine the prisoner's parole eligibility dates and discharge date. Prison wardens and the Parole Board are empowered by MCL 800.33(8), (10), and (13) to both reduce and restore such credits on the basis of prisoner conduct. MCL 800.33 pointedly does not indicate that a trial court may consider a defendant's disciplinary credits when resentencing the defendant because the amount of credits earned is not then known or even a sum certain—a defendant may gain or lose credits on the basis of his or her conduct in prison. The credits are to be considered by the Parole Board or the MDOC to determine parole eligibility at the appropriate time in the future. Wiley's and Rucker's sentences should be affirmed, but MCL 769.25a should not be declared unconstitutional.

CRIMINAL LAW — RESENTENCING UNDER MCL 769.25a — JUVENILE OFFENDERS SENTENCED TO LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE — DENIAL OF CREDITS THAT WOULD REDUCE THE DEFENDANT'S MINIMUM OR MAXIMUM SENTENCE — CONSTITUTIONAL LAW — EX POST FACTO LAWS.

MCL 769.25a(6), which states that a defendant resentenced under MCL 769.25a(4) shall receive credit for time served but shall not receive any good-time credits, special good-time credits, disciplinary credits, or any other credits that reduce a defendant's minimum or maximum sentence, is unconstitutional because it violates the prohibitions in the United States and Michigan Constitutions against ex post facto laws (US Const, art I, § 10; Const 1963, art 1, § 10).

*Bill Schuette*, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Jon P. Wojtala*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Peter Jon Van Hoek*) and *Deborah LaBelle* for Christopher Wiley.

*Robert Tomak* and *Deborah LaBelle* for William L. Rucker.

Amicus Curiae:

*Bill Schuette*, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *B. Eric Restuccia*, Deputy Solicitor General, for the Attorney General.

Before: BOONSTRA, P.J., and BECKERING and RONAYNE KRAUSE, JJ.

BECKERING, J. These appeals arise in the aftermath of the United States Supreme Court's proclamation that mandatory life-without-parole sentencing schemes are unconstitutional with respect to juvenile offenders and the Michigan Legislature's enactment of

MCL 769.25a in an attempt to retroactively rectify the problem. In Docket No. 336898, defendant Christopher Wiley appeals by right the trial court's order resentencing him under MCL 769.25a to 25 to 60 years' imprisonment for his 1995 conviction of first-degree murder, MCL 750.316. In Docket No. 338870, defendant William Lawrence Rucker appeals by right the trial court's order resentencing him under MCL 769.25a to 30 to 60 years' imprisonment for his 1993 conviction of first-degree murder, MCL 750.316.[1] Both defendants allege on appeal that MCL 769.25a(6) unconstitutionally deprives them of having earned disciplinary credits applied to their term-of-years sentences. These appeals were consolidated by order of this Court.[2]

We affirm the sentences defendants received at the time of their resentencings, but we agree with their contention that MCL 769.25a(6) is unconstitutional. Put simply, we agree with the analysis of our federal colleague Judge Mark A. Goldsmith in *Hill v Snyder*, 308 F Supp 3d 893 (ED Mich, 2018), in which he concluded that MCL 769.25a(6) runs afoul of the Ex Post Facto Clauses of the United States and Michigan Constitutions.

## I. RELEVANT LEGAL HISTORY

As alluded to above, these appeals arise following the United States Supreme Court's decisions in *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d

[1] Both Wiley and Rucker were also convicted of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Their sentences for those convictions were not altered on resentencing, have been served, and are not relevant to the issues presented in these appeals.

[2] See *People v Wiley*, unpublished order of the Court of Appeals, entered January 17, 2018 (Docket Nos. 336898 and 338870).

407 (2012), and *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016), and our Legislature's concomitant enactment of MCL 769.25a.

The *Miller* Court held, in relevant part:

> [A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory-sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment. [*Miller*, 567 US at 489.]

Subsequently, the Supreme Court recognized that the ruling in *Miller* had resulted in some confusion and disagreement among various state courts about whether *Miller* applied retroactively. *Montgomery*, 577 US at ___; 136 S Ct at 725. In determining that *Miller* was to be afforded retroactive application, the Court subsequently explained:

> *Miller*'s conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution.
>
> Giving *Miller* retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.

> Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions. Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change. [*Id*. at ___; 136 S Ct at 736 (citations omitted).]

After *Miller* but before *Montgomery*, our Legislature enacted MCL 769.25, which set forth the procedure for resentencing criminal defendants who fit *Miller*'s criteria, provided either that their case was still pending in the trial court or that the applicable time periods for appellate review had not elapsed. In other words, MCL 769.25 applied only to cases that were not yet final; MCL 769.25 did not retroactively apply *Miller* to cases that were final. See 2014 PA 22, effective March 4, 2014.

However, in anticipation of the possibility that *Miller* might be determined to apply retroactively, our Legislature simultaneously enacted MCL 769.25a, which set forth the procedure for resentencing defendants who fit *Miller*'s criteria even if their cases were final. See 2014 PA 22, effective March 4, 2014. In other words, if *Miller* were determined to apply retroactively, MCL 769.25a would apply it retroactively to cases that were final. MCL 769.25a states:

> (1) Except as otherwise provided in subsections (2) and (3), the procedures set forth in section 25 of this chapter do not apply to any case that is final for purposes of appeal on or before June 24, 2012.[3] A case is final for purposes of appeal under this section if any of the following apply:

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[3] *Miller* was decided on June 25, 2012.

(a) The time for filing an appeal in the state court of appeals has expired.

(b) The application for leave to appeal is filed in the state supreme court and is denied or a timely filed motion for rehearing is denied.

(c) If the state supreme court has granted leave to appeal, after the court renders its decision or after a timely filed motion for rehearing is denied.

(2) If the state supreme court or the United States supreme court finds that the decision of the United States supreme court in Miller *v* Alabama, 576 [sic] US ___; 183 L Ed 2d 407; 132 S Ct 2455 (2012), applies retroactively to all defendants who were under the age of 18 at the time of their crimes, and that decision is final for appellate purposes, the determination of whether a sentence of imprisonment for a violation set forth in section 25(2) of this chapter shall be imprisonment for life without parole eligibility or a term of years as set forth in section 25(9) of this chapter shall be made by the sentencing judge or his or her successor as provided in this section. For purposes of this subsection, a decision of the state supreme court is final when either the United States supreme court denies a petition for certiorari challenging the decision or the time for filing that petition passes without a petition being filed.

(3) If the state supreme court or the United States supreme court finds that the decision of the United States supreme court in Miller *v* Alabama, 576 [sic] US ___; 183 L Ed 2d 407; 132 S Ct 2455 (2012), applies retroactively to all defendants who were convicted of felony murder under section 316(1)(b) of the Michigan penal code, 1931 PA 328, MCL 750.316, and who were under the age of 18 at the time of their crimes, and that the decision is final for appellate purposes, the determination of whether a sentence of imprisonment shall be imprisonment for life without parole eligibility or a term of years as set forth in section 25(9) of this chapter shall be made by the sentencing judge or his or her successor as provided in this section. For purposes of this subsection, a decision of the

state supreme court is final when either the United States supreme court denies a petition for certiorari challenging the decision with regard to the retroactive application of Miller *v* Alabama, 576 [sic] US ___; 183 L Ed 2d 407; 132 S Ct 2455 (2012), to defendants who committed felony murder and who were under the age of 18 at the time of their crimes, or when the time for filing that petition passes without a petition being filed.

(4) The following procedures apply to cases described in subsections (2) and (3):

(a) Within 30 days after the date the supreme court's decision becomes final, the prosecuting attorney shall provide a list of names to the chief circuit judge of that county of all defendants who are subject to the jurisdiction of that court and who must be resentenced under that decision.

(b) Within 180 days after the date the supreme court's decision becomes final, the prosecuting attorney shall file motions for resentencing in all cases in which the prosecuting attorney will be requesting the court to impose a sentence of imprisonment for life without the possibility of parole. A hearing on the motion shall be conducted as provided in section 25 of this chapter.

(c) If the prosecuting attorney does not file a motion under subdivision (b), the court shall sentence the individual to a term of imprisonment for which the maximum term shall be 60 years and the minimum term shall be not less than 25 years or more than 40 years. Each victim shall be afforded the right under section 15 of the William Van Regenmorter crime victim's rights act, 1985 PA 87, MCL 780.765, to appear before the court and make an oral impact statement at any resentencing of the defendant under this subdivision.

(5) Resentencing hearings under subsection (4) shall be held in the following order of priority:

(a) Cases involving defendants who have served 20 or more years of imprisonment shall be held first.

(b) Cases in which the prosecuting attorney has filed a motion requesting a sentence of imprisonment for life without the possibility of parole shall be held after cases described in subdivision (a) are held.

(c) Cases other than those described in subdivisions (a) and (b) shall be held after the cases described in subdivisions (a) and (b) are held.

(6) A defendant who is resentenced under subsection (4) shall be given credit for time already served, but shall not receive any good time credits, special good time credits, disciplinary credits, or any other credits that reduce the defendant's minimum or maximum sentence.

The instant appeals challenge the proscription in MCL 769.25a(6) against applying good-time and disciplinary credits when resentencing juvenile offenders to sentences during which they will become eligible for parole, in addition to raising other constitutional challenges.

## II. FACTUAL AND PROCEDURAL HISTORIES

### A. DOCKET NO. 336898—DEFENDANT WILEY

The events leading to Wiley's conviction of first-degree murder involved the death of Jamal Cargill on June 22, 1994, and were described by this Court as follows:

Defendant entered the backyard of a home where several people, including the victim, were playing basketball. Defendant, who had a gun concealed on his person, asked who had been messing with his car. No one threatened defendant or tried to hurt him. Defendant twice asked the victim why he was smiling, and placed his hand on the gun. The victim told defendant that he was not scared, but did not rush defendant and made no motions toward him. Defendant pulled out the gun, cocked it, and pointed at the victim's chest area. Defendant then fired seven to eight shots at the victim. After the victim fell, defendant ran

> away but then came back when the victim began to get up. Defendant then fired two more shots at the victim. [*People v Wiley*, unpublished per curiam opinion of the Court of Appeals, issued November 21, 1997 (Docket No. 193252).]

At the time this crime was committed, Wiley was 16 years and 9 months old. Wiley was convicted on August 30, 1995, after a jury trial, of first-degree murder, MCL 750.316, and felony-firearm, MCL 750.227b, and he was originally sentenced on December 19, 1995, to life in prison without parole for his first-degree murder conviction and two years' imprisonment for his felony-firearm conviction.

After the issuance of *Miller* and *Montgomery*, and the enactment of MCL 769.25a, the Wayne County Prosecutor's Office prepared a sentencing memorandum indicating that it would not seek to resentence Wiley to life in prison without parole but would instead seek to have Wiley resentenced on his first-degree murder conviction "to a term of imprisonment for which the maximum term shall be 60 years and the minimum term shall be not less than 25 years or more than 40 years" as set forth in MCL 769.25a(4)(c). While numerous prison misconducts were documented for Wiley from 1996 until 2008, the prosecutor's office noted that, while in prison, Wiley had completed his general equivalency diploma (GED), had enrolled in several community college courses, and had maintained employment in the prison in various capacities since 1999. The prosecution specifically requested that the trial court resentence Wiley to a term of 35 to 60 years' imprisonment for his first-degree murder conviction.

Wiley's resentencing hearing was held on December 21, 2016. After a statement from the victim's family and Wiley's allocution, the trial court reviewed the

history of the case and sentencing, as well as Wiley's record while in prison and his achievements. The trial court then stated as follows:

> I think it was a horrific crime, and I certainly hope that you don't ever forget about what you've done, and before there's any confrontational situation again, you think about what happened the last time you didn't think, 'cuz I think you really went looking for trouble.
>
> But I am going to, I think there is sufficient time for completion of programming within the 25 years and a review at that point by the Parole Board for determining whether or not he has met the standards that they feel are adequate for parole, and they've got the ability to keep him up to 60 years, so the sentence will be 25 to 60 years on the first[-]degree murder with credit for 7,441 days served, consecutive to the felony firearm which he will get credit for 700, the 2 years on the felony firearm, and be given credit for the 730 days served.
>
> I know that that may not be satisfactory to the Cargill family, but there is nothing that this court can do to restore the life of your brother, son, or friend, and I'm, I think we're looking at a situation in all of these cases where it's not just one family but multiple families and multiple people whose lives are destroyed by the senselessness of these actions.
>
> I only hope that with the sentence that you will continue to grow and that you will, if paroled, become a productive member of society.

A judgment of resentencing was entered on December 21, 2016. Wiley appealed, contending that MCL 769.25a(6), which deprives him of sentencing credits on his term-of-years sentence, violates the Ex Post Facto Clause of both the Michigan and United States Constitutions, US Const, art I, § 10, and Const 1963, art 1, § 10. He also contends that the statute violates Const 1963, art 2, § 9, because it repealed "Proposal B"

concerning parole eligibility, and Const 1963, art 4, § 24, because it violates the Title-Object Clause.

B. DOCKET NO. 338870—DEFENDANT RUCKER

The events leading to Rucker's conviction of first-degree murder involved the death of Earl Cole on November 27, 1992, and were described by this Court as follows:

> There was evidence of animosity between defendant and the decedent because of defendant's replacement by the decedent as the drug seller at the Tireman address. Further, defendant brought a shotgun to the Tireman address and talked the decedent into leaving the home with him. Later, a neighbor heard someone say, "Please don't shoot me," just prior to shots being fired. The decedent was found dead from five gunshot wounds, which were inflicted from a gun that had to be reloaded each time it was fired. Finally, defendant told various stories to different people regarding what had happened. [*People v Rucker*, unpublished memorandum opinion of the Court of Appeals, issued December 29, 1994 (Docket No. 167012).]

At the time this crime was committed, Rucker was 17 years and 3 months old. Rucker was convicted on May 20, 1993, after a jury trial, of first-degree murder, MCL 750.316, and felony-firearm, MCL 750.227b. Rucker was originally sentenced on June 8, 1993, to life in prison without parole for his first-degree murder conviction and to two years' imprisonment for his felony-firearm conviction.

After *Miller* and *Montgomery* were issued and MCL 769.25a was enacted, the Wayne County Prosecutor's Office prepared a sentencing memorandum indicating that it would not seek to resentence Rucker to life in prison without parole, but would instead seek to have Rucker resentenced on his first-degree murder convic-

tion "to a term of imprisonment for which the maximum term shall be 60 years and the minimum term shall be not less than 25 years or more than 40 years," as set forth in MCL 769.25a(4)(c). The prosecution detailed Rucker's juvenile record. While numerous misconducts were documented for Rucker from 1993 until 2016, the prosecutor's office noted that, while incarcerated, Rucker completed his GED and participated in numerous training and employment opportunities or classes. The prosecution requested that the trial court resentence Rucker to a term of 32 to 60 years' imprisonment for his first-degree murder conviction.

Rucker's resentencing hearing was held on February 28, 2017. After a statement from the victim's mother and Rucker's allocution, the trial court resentenced Rucker to 30 to 60 years in prison for the first-degree murder conviction, with credit for 8,132 days on the first-degree murder conviction and 730 days credit on the felony-firearm conviction. At the conclusion of the resentencing hearing, Rucker's counsel, for purposes of record preservation, stated the following:

> Any challenges to mandatory sentencing range of twenty-five to forty on the minimum, and sixty on the maximum per [*Alleyne v United States*, 570 US 99; 133 S Ct 2151; 186 L Ed 2d 314 (2013)]. I'm just placing them on the record, and to preserve any ex-post facto challenges to the denial of disciplinary credits, per M.C.L. 769.25a(6).

A judgment of resentencing was entered on February 28, 2017. Rucker appealed, contending that MCL 769.25a(6) unconstitutionally deprives him of disciplinary credits in violation of the Ex Post Facto Clause of the United States Constitution, US Const, art I,

§ 10, and that his minimum sentence was imposed in contravention of *Alleyne* because it was based on judge-found facts.

## III. SUBJECT-MATTER JURISDICTION

Before addressing the substantive issues on appeal, it is necessary to address the prosecution's initial contention that this Court lacks subject-matter jurisdiction to review defendants' claims. Specifically, the prosecution asserted in both appeals:

> Since defendant's constitutional claim has no effect on the validity of his sentence, but only to how the Department of Corrections is calculating parole eligibility, it seems that defendant's challenge would be better directed in a suit against the Department of Corrections and not in an appeal of his validly imposed sentence.

The prosecution in Wiley's case further expanded on this argument in its brief as follows:

> Judicial review of a Parole Board decision is governed by MCL 791.234(11). While the statute provides an avenue for the prosecution to appeal the granting of a prisoner's release on parole, it does not extend the same for a defendant seeking to challenge the Board's parole decisions, including the awarding or denial of disciplinary credits. . . . Importantly, this Court has no subject-matter jurisdiction to consider defendant's challenge to the Parole Board's decisions in determining a prisoner's eligibility for parole or to deny him parole.

The prosecution therefore contended that the "current appeal[s are] not the correct vehicle for such review" and suggested that these defendants can only seek redress "by filing a complaint for habeas corpus challenging the legality of [their] detention or an action for mandamus to compel the Board to comply with its statutory duties." We disagree.

First, the prosecution is mistaken regarding the gist of these appeals. It is well recognized and undisputed that the Department of Corrections "possesses sole jurisdiction over questions of parole." *Hopkins v Parole Bd*, 237 Mich App 629, 637; 604 NW2d 686 (1999), citing MCL 791.204. However, defendants are not challenging a decision of the Parole Board. Rather, defendants are challenging the constitutionality of the statutory provision, MCL 769.25a(6), that allows "credit for time already served" but that precludes the receipt of "any good time credits, special good time credits, disciplinary credits, or any other credits that reduce the defendant's minimum or maximum sentence." This Court is neither usurping nor trespassing on the Parole Board's authority and "exclusive discretion to grant or deny parole." *Hopkins*, 237 Mich App at 637. Under MCR 7.203(A)(1), this Court has jurisdiction over "[a] final judgment or final order of the circuit court . . . ." In a criminal case, a final order or judgment encompasses "a sentence imposed following the granting of a motion for resentencing[.]" MCR 7.202(6)(b)(*iii*). We therefore reject the prosecution's initial challenge to this Court's subject-matter jurisdiction over these appeals.

Second, the prosecution's desire to prevent this Court from weighing in on a constitutional question of law that directly affects defendants' sentences of incarceration and their eligibility for parole—unless they file a habeas corpus complaint or a mandamus action, for which appointment of counsel for the indigent is discretionary, not mandatory—smacks of gamesmanship. Regardless, our appellate courts have, in fact, weighed in on similar issues before without requiring civil actions to do so. See *People v Tyrpin*, 268 Mich App 368; 710 NW2d 260 (2005) (determining whether a defendant was entitled to good-time credits at resen-

tencing when credits were earned "in conjunction with an illegal sentence"), and *People v Cannon*, 206 Mich App 653; 522 NW2d 716 (1994) (holding that according to MCL 51.282, a prisoner may not be deprived of good-time credits by setting a specific release date and preventing the prisoner from earning the credits). Moreover, the relevant entities that would be involved in a habeas corpus complaint or mandamus action are actively involved in this case. The Michigan Attorney General, who acts as the chief law-enforcement officer for the State[4] and has the authority to intervene in any matter "when in his own judgment the interests of the state require it,"[5] filed amicus briefs in both appeals,[6] and his Deputy Solicitor General actively participated in oral argument.[7] The Attorney General also took over briefing for the prosecution. Thus, the executive branch, which speaks for the Michigan Department of Corrections (MDOC) and the Parole Board, has stated its position. In any event, we are not reviewing a challenge to the conduct of either the MDOC or the Parole Board. We are simply analyzing the constitutionality of a law passed by the third branch of government, our Legislature, and our decision will directly impact Wiley and Rucker because MCL 769.25a(6) affects both their minimum and maximum sentences. Because everyone agrees that time is of the essence with respect to this constitutional issue, we deem it

[4] *Fieger v Cox*, 274 Mich App 449, 465; 734 NW2d 602 (2007).

[5] MCL 14.28.

[6] See *People v Wiley*, unpublished order of the Court of Appeals, entered November 1, 2017 (Docket No. 336898), and *People v Rucker*, unpublished order of the Court of Appeals, entered November 1, 2017 (Docket No. 338870).

[7] See *People v Wiley*, unpublished order of the Court of Appeals, entered March 23, 2018 (Docket Nos. 336898 and 338870).

appropriate to address the question of law that was raised on appeal by Wiley and Rucker.

And finally, it is worth noting that the tables have turned on the parties' opposing positions with respect to whether we should address the constitutionality of MCL 769.25a(6). Shortly after the prosecution filed its briefs challenging subject-matter jurisdiction as to the constitutional questions presented, it changed its stance when the United States Court of Appeals for the Sixth Circuit issued an opinion in *Hill v Snyder*, 878 F3d 193, 213 (CA 6, 2017), remanding a federal civil rights act case to the federal district court for a substantive analysis of what it deemed to be a "plausible" allegation that MCL 769.25a(6) violates the Ex Post Facto Clause.[8] Following the Sixth Circuit's remand, the prosecution filed motions to expedite the appeals before us "on the merits," conceding that determining the matter immediately in these cases was appropriate because each

> [d]efendant asserts that he is being denied good time and disciplinary credits that would permit early parole consideration by the Michigan Department of Corrections or a reduction of the maximum sentence. Those claimed credits will continue to accrue during the pendency of this appeal and cannot possibly be applied, if defendant's claim is successful, until the appeal reaches finality.

This Court granted the prosecution's motions to expedite these appeals.[9] And it was after the Sixth Circuit tipped a hopeful hand to defendants when remanding *Hill* that they each filed motions seeking to voluntarily withdraw their appeals from this Court. The prosecu-

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[8] Judge Goldsmith's April 9, 2018 opinion, which will be discussed further, was the outcome of that remand.

[9] *People v Wiley*, unpublished order of the Court of Appeals, entered January 17, 2018 (Docket Nos. 336898 and 338870).

tion objected to defendants' motions, asking in its briefs that we either "deny the motion[s], or, alternatively, grant the motion[s] and dismiss the appeal[s] with prejudice, ruling that [defendants Wiley and Rucker have] waived any claim that [they are] entitled to disciplinary credits under the Ex Post Facto Clause." The prosecution accused defendants of forum-shopping while claiming that it was not seeking to do the same thing itself, explaining:

> The State is not looking to obtain a tactical advantage, but rather seeks resolution of the underlying question of state law in the appropriate forum. The State courts are that proper forum and are best suited to interpret state law on how Michigan's credit system operates. . . . The proper resolution of [Wiley's and Rucker's motions to dismiss] is to deny the motion[s] and leave [Wiley and Rucker] to [their] arguments on appeal.

In his reply brief, Wiley accused the prosecution of forum-shopping because it objected to his motion to withdraw, but he also requested that if we denied his motion, we hold his appeal in abeyance pending a decision in *Hill*. This panel denied defendants' motions to withdraw their appeals,[10] and the matter proceeded to oral arguments, where all interested parties had their say.

## IV. MCL 769.25a(6) AND THE EX POST FACTO CLAUSE

Defendants contend that MCL 769.25a(6) violates the Ex Post Facto Clauses of the United States and Michigan Constitutions, US Const, art I, § 10, and Const 1963, art 1, § 10, because it precludes them from

[10] *People v Rucker*, unpublished order of the Court of Appeals, entered February 16, 2018 (Docket No. 338870); *People v Wiley*, unpublished order of the Court of Appeals, entered March 5, 2018 (Docket No. 336898).

having disciplinary credits applied to their term-of-years sentences, and thus, MCL 769.25a(6) is a retroactive provision that increases their potential sentences or punishments. We agree.

To be preserved for appellate review, an issue must be raised before and addressed by the trial court. *People v Giovannini*, 271 Mich App 409, 414; 722 NW2d 237 (2006). Wiley did not raise concerns regarding the Ex Post Facto Clause or any other constitutional claim at his resentencing. Consequently, this issue is not preserved with regard to Wiley. Nonetheless, we conclude that appellate review of his constitutional challenge is appropriate. See *People v Wilson*, 230 Mich App 590, 593; 585 NW2d 24 (1998) ("Although [a] defendant should have challenged the constitutionality of the statute in the trial court to preserve the issue for appellate review, we may still consider this constitutional question absent a challenge below."); *People v Blunt*, 189 Mich App 643, 646; 473 NW2d 792 (1991) ("[W]here a significant constitutional question is presented, as in this case, appellate review is appropriate."). Although Rucker did not ask the trial court to decide either of his challenges—his ex post facto challenge or his challenge under *Alleyne v United States*, 570 US 99; 133 S Ct 2151; 186 L Ed 2d 314 (2013), to the minimum sentence imposed—he did place his objections on the record, so they could arguably be considered preserved.

This Court reviews de novo constitutional issues and questions of statutory interpretation. *People v Harris*, 499 Mich 332, 342; 885 NW2d 832 (2016). However, we review unpreserved constitutional issues for plain error affecting the defendant's substantial rights. *People v Bowling*, 299 Mich App 552, 557; 830 NW2d 800 (2013). Under the plain-error rule, a "defendant bears

the burden of establishing that: (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights." *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). "To establish that a plain error affected substantial rights, there must be a showing of prejudice, i.e., that the error affected the outcome of the lower-court proceedings." *Id*. at 356. "[R]eversal is only warranted if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

As a starting point, we recognize that any challenge to the constitutionality of a statute is governed by certain precepts. Specifically:

> Statutes are presumed to be constitutional unless their unconstitutionality is clearly apparent. Statutes must be construed as proper under the constitution if possible. The party opposing the statute bears the burden of overcoming the presumption and proving the statute unconstitutional. [*People v MacLeod*, 254 Mich App 222, 226; 656 NW2d 844 (2002) (citations omitted).]

The particular statutory provision being challenged as unconstitutional and violative of the Ex Post Facto Clause is MCL 769.25a(6), which states as follows:

> A defendant who is resentenced under subsection (4) shall be given credit for time already served, but shall not receive any good time credits, special good time credits, disciplinary credits, or any other credits that reduce the defendant's minimum or maximum sentence.

MCL 769.25a(4) refers to the procedure for resentencing juvenile offenders convicted of first-degree murder both when the prosecution seeks to continue a life-in-prison-without-parole sentence (regardless of the sentence ultimately imposed), MCL 769.25a(4)(b), and when the

prosecution does not seek to continue a life-in-prison-without-parole sentence, MCL 769.25a(4)(c). The latter subdivision, which applies to defendants in the instant cases, directs that a trial court at resentencing "shall sentence the individual to a term of imprisonment for which the maximum term shall be 60 years and the minimum term shall be not less than 25 years or more than 40 years." *Id*.

As discussed by this Court in *People v Tucker*, 312 Mich App 645, 651; 879 NW2d 906 (2015):

> The United States and Michigan Constitutions prohibit ex post facto laws. *People v Callon*, 256 Mich App 312, 316-317; 662 NW2d 501 (2003), citing US Const, art I, § 10; Const 1963, art 1, § 10. This Court has declined to interpret the Ex Post Facto Clause of the Michigan Constitution as affording broader protection than its federal counterpart. *Callon*, 256 Mich App at 317. All laws that violate ex post facto protections exhibit the same two elements: "(1) they attach legal consequences to acts before their effective date, and (2) they work to the disadvantage of the defendant." *Id*. at 318. "The critical question [for an *ex post facto* violation] is whether the law changes the legal consequences of acts completed before its effective date." *Id*. (quotation marks and citations omitted; alteration in original). This Court has identified four circumstances that implicate the Ex Post Facto Clauses:
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> > A statute that affects the prosecution or disposition of criminal cases involving crimes committed before the effective date of the statute violates the Ex Post Facto Clauses if it (1) makes punishable that which was not, (2) makes an act a more serious criminal offense, (3) increases the punishment, or (4) allows the prosecution to convict on less evidence. [*Riley v Parole Bd*, 216 Mich App 242, 244; 548 NW2d 686 (1996).]

The purpose underlying ex post facto prohibitions is "to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed" and to "restrict[] governmental power by restraining arbitrary and potentially vindictive legislation." *Weaver v Graham*, 450 US 24, 28-29; 101 S Ct 960; 67 L Ed 2d 17 (1981), overruled in part on other grounds by *California Dep't of Corrections v Morales*, 514 US 499, 506 n 3; 115 S Ct 1597; 131 L Ed 2d 588 (1995). As stated and explained by the United States Supreme Court in *Weaver*:

> [T]wo critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. . . . [A] law need not impair a "vested right" to violate the *ex post facto* prohibition. Evaluating whether a right has vested is important for claims under the Contracts or Due Process Clauses, which solely protect pre-existing entitlements. The presence or absence of an affirmative, enforceable right is not relevant, however, to the *ex post facto* prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense. [*Weaver*, 450 US at 29-31 (citations omitted).]

Therefore, "[t]he critical question is whether the law changes the legal consequences of acts completed before its effective date." *Id*. at 31 (holding that as applied to a prisoner whose crime was committed

before a statute's effective date, the statute reducing the amount of good-time credit violated the Ex Post Facto Clause). "The imposition of a punishment more severe than that assigned by law when the criminal act occurred is a violation of the Constitution's *ex post facto* prohibition." *Hallmark v Johnson*, 118 F3d 1073, 1077 (CA 5, 1997), citing *Weaver*, 450 US at 30.

It is undisputed that MCL 769.25a *alters* the punishment for both convicted and future juvenile offenders who committed or who will commit first-degree murder. Our inquiry therefore focuses on "[w]hether a retrospective state criminal statute ameliorates or worsens conditions imposed by its predecessor . . . ." *Weaver*, 450 US at 33. In other words, for purposes of these appeals, does the challenged statutory provision serve to increase the punishment for a prisoner by imposing "new restrictions on eligibility for release" and therefore "make[] more onerous the punishment for crimes committed before its enactment"? *Id*. at 34, 36. We conclude that it does.

As noted at the outset of this opinion, we are not the first court faced with assessing the constitutionality of MCL 769.25a(6). Just a few weeks ago, Judge Goldsmith issued his opinion analyzing this very issue in *Hill*, 308 F Supp 3d 893. In that case, brought by individuals similarly situated to Wiley and Rucker, Judge Goldsmith determined that MCL 769.25a(6) violates the United States Constitution's ban on ex post facto laws, and in fact, he certified a class of plaintiffs that includes Wiley and Rucker.[11] *Hill*, 308 F Supp 3d at 911, 915. Although this Court is not bound by the decisions of lower federal courts, we may find

[11] Wiley's appellate counsel in this Court, who represented other parties in the class action, was appointed to serve as class counsel. *Hill*, 308 F Supp 3d at 915.

their "analyses and conclusions persuasive." *Abela v General Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004). After a careful review of Judge Goldsmith's opinion and the applicable law, we find his analysis and conclusions to be, in the words of the Sixth Circuit, "thoughtful and well-reasoned."[12]

The salient portion of Judge Goldsmith's analysis, *Hill*, 308 F Supp 3d at 900-911, which we find persuasive and respectfully adopt as our own,[13] states as follows:

> The crux of Plaintiffs' claim . . . hinges on an interpretation of the good time and disciplinary credit statutes, and whether these statutes previously afforded credit to individuals who were sentenced to life without parole.
>
> * * *
>
> . . . [T]he Court concludes that state law regarding good time and disciplinary credits is unmistakably clear and solidly supports [the incarcerated] Plaintiffs' position. Before modification by the Michigan legislature in 2014, Michigan law regarding good time and disciplinary credits made no distinction based on whether the prisoner was serving a life sentence and allowed such a prisoner to earn credit if otherwise eligible.
>
> * * *

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[12] *Hill v Snyder*, unpublished order of the United States Court of Appeals for the Sixth Circuit, entered April 18, 2018 (Case No. 18-1418). The Sixth Circuit offered this sentiment when denying the state parties' recent motion for a 14-day stay so that they could appeal Judge Goldsmith's permanent injunction, which included enjoining the state parties from enforcing or applying MCL 769.25a(6) and ordering them to calculate the good-time credits and disciplinary credits for each member of the class who has been resentenced.

[13] The party designations would be switched, however, because the plaintiffs in *Hill* are similarly situated to defendants in the instant case.

Good time and disciplinary credits are applied to a prisoner's minimum and/or maximum sentence in order to determine his or her parole eligibility dates.[7] Thus, if Michigan's statutory scheme permitted any Plaintiff to earn good time or disciplinary credits at the time the Plaintiff's crime was committed, the removal of such credits increases the Plaintiff's punishment and violates the Ex Post Facto Clause.

* * *

**i. Statutory Interpretation**

Michigan's statutory scheme regarding good time and disciplinary credits has changed over the years. Prior to 1978, prisoners could apply good time credits to both their minimum and maximum terms; the law was amended in 1978 to provide that prisoners convicted for certain crimes, including first and second-degree murder, could only apply good time credits to their maximum terms. See Wayne Cty. Prosecuting Atty. v. Mich. Dep't of Corrections, No. 186106, 1997 WL 33345050, at *2 (Mich. Ct. App. June 17, 1997). In 1987, good time credits were eliminated altogether for offenses committed on or after April 1, 1987. Id.

Disciplinary credits were created in 1982, and were deducted from both the minimum and maximum sentences of prisoners convicted of certain crimes, including first and second-degree murder. See Mich. Comp. Laws § 800.33(5). Disciplinary credits were less favorable to prisoners than good time credits, as the amount of good time credits available to a prisoner increased with each year of imprisonment, while disciplinary credits remained constant over the entirety of the term to which they applied. See Lowe v. Dep't of Corrections, 206 Mich. App. 128, 521 N.W.2d 336, 338 (1994). The law changed again in 1998 to provide that prisoners who committed certain crimes, including first and second-degree murder, on or after December 15, 1998, or any other crime on or after

December 15, 2000, are unable to earn disciplinary credits. See Mich. Comp. Laws §§ 800.33(14) and 800.34(5) . . . .[14]

The broad language used in both the good time and the disciplinary credit statutes does not draw any distinction based on whether the prisoner is serving a life sentence.[15] The good time credit statute provides as follows:

> (2) Except as otherwise provided in this section, a prisoner who is serving a sentence for a crime committed before April 1, 1987, and who has not been found guilty of a major misconduct or had a violation of the laws of this state recorded against him or her shall receive a reduction from his or her sentence as follows:
>
> (a) During the first and second years of his or her sentence, 5 days for each month.
>
> (b) During the third and fourth years, 6 days for each month.
>
> [ . . . ]
>
> (g) From and including the twentieth year, up to and including the period fixed for the expiration of the sentence, 15 days for each month.

Mich. Comp. Laws § 800.33(2). The statute providing for disciplinary credit provides,

> (3) . . . [A]ll prisoners serving a sentence for a crime that was committed on or after April 1, 1987 are eligible to earn disciplinary and special disciplinary credits as provided in subsection (5). Disciplinary credits shall be earned, forfeited, and restored as provided in this section. Accumulated disciplinary

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[14] MCL 769.25a(6) only affects individuals who (1) were convicted of first-degree murder for offenses committed before December 15, 1998, when the individuals were under the age of 18, and (2) receive a post-*Miller* sentence and will be eligible for parole.

[15] Although neither Wiley nor Rucker is entitled to good-time credits based on the dates they committed their offenses, the statutory language used in both the good-time and the disciplinary-credit statutes is relevant to the constitutional question before this Court.

> credits shall be deducted from a prisoner's minimum and maximum sentence in order to determine his or her parole eligibility date and discharge date.
>
> [ . . . ]
>
> (5) . . . [A]ll prisoners serving a sentence on December 30, 1982, or incarcerated after December 30, 1982, for the conviction of a crime enumerated in section 33b(a) to (cc) of 1953 PA 232, MCL 791.233b, are eligible to earn a disciplinary credit of 5 days per month for each month served after December 30, 1982. Accumulated disciplinary credits shall be deducted from a prisoner's minimum and maximum sentence in order to determine his or her parole eligibility dates.

Mich. Comp. Laws § 800.33(3), (5).

Nothing in the text of the good time credit or disciplinary credit statutes excludes their application to prisoners serving life sentences. In fact, both statutes use language that is all encompassing. See Mich. Comp. Laws § 800.33(2) ("[A] prisoner who is serving a sentence for a crime . . ."); Mich. Comp. Laws § 800.33(5) ("[A]ll prisoners serving a sentence . . ."). [16] Further, the disciplinary credit statute states explicitly that first-degree murderers earn disciplinary credit; it provides that disciplinary credits are earned by those convicted of a crime enumerated in Mich. Comp. Laws § 791.233b—which includes first-degree murder. See § 791.233b(n) (listing Section 316 of the Michigan penal code as one of the enumerated crimes); § 750.316 (first degree murder).[8]

Despite this unambiguous language, Defendants argue there is some shade of gray. They point out that the good time statute indicates that a prisoner "shall receive a reduction" from his or her sentence, up to and including the "period fixed for the expiration of the sentence." Mich. Comp. Laws § 800.33(2). They argue that prisoners serving a life sentence cannot have that sentence "reduced," and that there is no time "fixed" for the "expiration" of

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[16] See also MCL 800.33(3) ("[A]ll prisoners serving a sentence . . . .").

such sentence; therefore, they say, this statute cannot be applied to prisoners serving a life term. . . .

This argument is unconvincing. The language may mean that the good time credits are not actually applied to a life sentence so long as it remains a life sentence. But there is no reason to think that a prisoner serving a life sentence could not, nonetheless, earn good time credits. They would be applied if and when the sentence was converted, for some reason, to a fixed sentence. Once changed to a term of years, there is an "expiration" that is "fixed," and the sentence can then be "reduced." In fact, this view of the statutory language is precisely the view of the MDOC, whose practice has routinely been to calculate credits when a prisoner previously serving a life sentence is subsequently resentenced to a term of years. . . .

As for the disciplinary credit statute, Defendants have no explanation for the explicit inclusion of first-degree murder as one of the crimes for which credits could be earned. They maintain that the language in other parts of the statute, which references deductions from a minimum and maximum sentence, means that the statute cannot apply to those serving a life sentence, as such prisoners have no minimum or maximum term. . . . But again, a plausible interpretation of the statute—and one that renders the statute as a whole internally consistent—is that the disciplinary credits are not applied to a life sentence, although prisoners serving such term still earn them. To agree with Defendants would be to ignore a portion of the statute, and courts have a "duty to give effect, if possible, to every clause and word of a statute." Duncan v. Walker, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) (internal quotations omitted); see also Williams v. Taylor, 529 U.S. 362, 404, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (describing this rule as "a cardinal principle of statutory construction").

The lack of any ambiguity in the statutory language is, perhaps, best evidenced by the action of the Michigan legislature itself, in adopting Mich. Comp. Laws § 769.25a(6). If the legislature had believed that Michigan law did not provide credits to those convicted of first-

degree murder, there would have been no purpose for a provision that expressly stripped them of those credits. The inference is ineluctable that the legislature understood that these individuals would invoke these credits unless the legislature affirmatively repealed them. In doing so, the legislature eloquently testified to the state of Michigan law prior to the adoption of Section 769.25a(6).

**ii. Michigan Case Law**

The Michigan Supreme Court is in accord with the view that good time credit is earned even by individuals serving life sentences. In Moore v. Buchko, 379 Mich. 624, 154 N.W.2d 437 (1967), the Michigan Supreme Court considered whether a prisoner who had been unconstitutionally sentenced to life imprisonment in 1938 for first-degree murder should receive credit, including good time credit, when he was resentenced following vacation of his conviction, retrial, and conviction for second-degree murder in 1958. Although no opinion received a majority of votes, all the Justices agreed that the prisoner was entitled to good time credit for the time he had served. Justice Souris's opinion, which was joined by Chief Justice Dethmers, concluded that the prisoner was "entitled by statute to the credit he seeks," which was "the nearly 20 calendar years he served under his invalidated conviction . . . and the regular and special good time credit he earned during that time." Id. at 438, 441 (Souris, J.). Justice Adams, writing for three other justices, wrote that a sentencing judge "shall give credit for time served under an illegal sentence," and that "[i]t follows, A [sic] fortiori, that such credit includes recognition of regular or special good time earned during an illegal incarceration." Id. at 445 n.3 (Adams, J.).

Justice Brennan addressed the issue of whether the prisoner had earned good time credits in much greater detail, ultimately concluding that "the good time statute purports to give good time credits to every convict who behaves himself in prison." Id. at 447 (Brennan, J.). He

described the rationale behind allowing all prisoners, even those serving a life term, to earn credits:

> Clearly, the purpose of this enactment is to encourage good behavior by prisoners and thus generally to improve conditions in the prisons and reduce custodial costs to the taxpayers.
>
> Presumably, the statute makes no distinction between lifers and other convicts by reason of the fact that the legislature wanted to encourage good behavior by lifers as well as by all other prisoners.
>
> Admittedly, the good time credit incentive is rather nebulous in the case of a convict imprisoned for life. But since hope and post conviction pleas spring eternal within the incarcerated human breast, it cannot be said the good time credit law is not at least some encouragement to them. At least, it appears that the legislature thought it would be so, and its policy determination is binding on this Court.

Id. Thus, seven of the eight justices joined an opinion that held that the prisoner was entitled to good time credit.[9]

Defendants attempt to distinguish Moore by arguing that Moore was resentenced to a term of years under law that existed at the time of his crime in 1938. . . . Plaintiffs' new sentencing options, they contend, did not exist until 2014. . . . However, Defendants have not explained why this should make a difference. Nothing in Moore suggests that the availability of a term-of-years sentence while Moore served his first-imposed sentence had some bearing on the question of his entitlement to credit. Additionally, Defendants' position that Plaintiffs should not receive credit because Michigan law did not provide a constitutional sentence for them until 2014 would punish Plaintiffs for the shortcomings of Michigan's unconstitutional sentencing of youth offenders.

Defendants argue that the Michigan Supreme Court recognized that the good time statute does not apply to someone serving a life sentence in Meyers v. Jackson, 245

Mich. 692, 224 N.W. 356 (1929).[17] In Meyers, the petitioner was convicted of murder and sentenced to life in prison; the governor later commuted his sentence "so that the same will expire 15 years from the date of sentence." Id. at 356. The court denied the petitioner's request for good time credit, stating that "if he accepts the benefit of the commutation granted[, he] must accept it in accordance with the terms imposed by the executive authority granting it." Id. at 356–357. The court also noted that "the question of good time applies only to those where the date of expiration of sentence is fixed. Petitioner was sentenced to imprisonment for life. The period of his imprisonment was not fixed." Id. at 356.

This last statement is dictum, as it was not necessary to the Meyers court's holding that a prisoner who accepts a commutation must accept it according to its terms. See Moore, 154 N.W.2d at 447 (Brennan, J.) ("[T]he language in the Meyers Case to the effect that good time allowances do not apply to life sentences was not essential to the decision there."); see also Petition of Cammarata, 341 Mich. 528, 67 N.W.2d 677, 682 (Mich. 1954) ("In Meyers . . . we held that a prisoner who accepts the benefit of a commutation must accept it in accordance with the terms imposed by the executive authority granting it.").

Thus, the only decision by the Michigan Supreme Court containing a holding applicable to our case accords with the view that credits are earned by those convicted of first-degree murder and applied to their sentences once those sentences become term-of-years sentences. . . .[10]

* * *

For all of the above reasons, this Court interprets Mich. Comp. Laws § 800.33 to provide good time and disciplinary credits to prisoners who were serving a term of life imprisonment. The elimination of those credits by Mich. Comp. Laws § 769.25a(6), therefore, violates the Ex Post

[17] The Michigan Attorney General cited *Meyers* and made the same argument in the amicus brief he filed in the present case.

Facto Clause of the Constitution . . . Defendants must apply good time and disciplinary credits in calculating parole eligibility dates for prisoners resentenced under Mich. Comp. Laws § 769.25a.

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[7] As the Sixth Circuit noted . . . "[C]redits deducted from a term-of-years sentence do not automatically result in earlier release; they merely hasten the date on which prisoners fall within the jurisdiction of the Michigan Parole Board. Even after an inmate falls within its jurisdiction, the Board retains discretion to grant or deny parole." [Citation omitted.]

[8] Whatever exceptions to credit that exist in the statutes have nothing to do with whether the defendant committed first-degree murder. For example, the good time credit statute excepts those who have committed later crimes or were guilty of prison misconduct. See Mich. Comp. Laws § 800.33(2).

[9] Justice Black concurred only in the result and did not join any opinion.

[10] Defendants cite People v. Tyrpin, 268 Mich. App. 368, 710 N.W.2d 260 (2005), for support, but that case is distinguishable.[18] There, the defendant was originally given a determinate one-year jail sentence. After serving some time, the sentence was reversed, based on the prosecutor's appeal that an indeterminate sentence was required. Defendant argued on resentencing that he should receive disciplinary credit that he earned on the initial improper sentence. The court of appeals affirmed the trial court's refusal to award any disciplinary credit, reasoning that if the defendant had been properly sentenced to an indeterminate sentence originally, he would not have been entitled to such credit based on an express exclusion in the statutory language. (This was because, as discussed supra, individuals sentenced for assaultive crimes committed on or after December 15, 1998 were not

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[18] The Michigan Attorney General cited *Tyrpin* and made the same argument in the amicus brief he filed in the present case.

> eligible for disciplinary credits.) Our case is entirely different. Tyrpin sought credit that he would not have received had he been sentenced properly initially. Here, Plaintiffs do not seek any credit they would not have received had they been sentenced properly initially. Tyrpin thus is no help to Defendants.[19]

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In light of our determination that MCL 769.25a(6) violates the Ex Post Facto Clause, we need not address Wiley's other constitutional arguments claiming that the statute repeals an initiative adopted by the voters as "Proposal B" concerning parole eligibility or his claim that the statute violates the Title-Object Clause of the Michigan Constitution, Const 1963, art 4, § 24.

## V. USE OF JUDICIAL FACT-FINDING

Finally, Rucker contends that his resentencing under MCL 769.25a(4)(c) violated the Sixth Amendment because the trial court used judicially found facts in imposing a minimum sentence of 30 years' imprisonment (rather than 25 years' imprisonment). Citing *Alleyne*, 570 US 99, and *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), Rucker argues that the only sentence that could be imposed was 25 to 60 years' imprisonment. According to *Rucker*, the increase in the minimum sentence from 25 to 30 years was improper because such an increase required the use of facts found either by a jury or to which he admitted. We disagree.

"This Court reviews de novo the proper interpretation of statutes." *People v Allen*, 295 Mich App 277, 281; 813 NW2d 806 (2012). Constitutional issues are also reviewed de novo. *People v Pennington*, 240 Mich App

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[19] Some alterations in *Hill*.

188, 191; 610 NW2d 608 (2000). A trial court's factual findings are reviewed for clear error. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). Any questions of law are to be reviewed de novo, and the trial court's decision about the sentence imposed is reviewed for an abuse of discretion. *People v Malinowski*, 301 Mich App 182, 185; 835 NW2d 468 (2013). "An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes. A trial court necessarily abuses its discretion when it makes an error of law." *People v Franklin*, 500 Mich 92, 100; 894 NW2d 561 (2017) (quotation marks and citations omitted). "A trial court's factual finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *Id*. (quotation marks and citation omitted).

In accordance with MCL 769.25a(4)(c), if the prosecution opts not to seek resentencing to life in prison without parole,

> the court shall sentence the individual to a term of imprisonment for which the maximum term shall be 60 years and the minimum term shall be not less than 25 years or more than 40 years. Each victim shall be afforded the right under section 15 of the William Van Regenmorter crime victim's rights act, 1985 PA 87, MCL 780.765, to appear before the court and make an oral impact statement at any resentencing of the defendant under this subdivision.

At Rucker's resentencing, the victim's mother, Cynthia Cole, addressed the court and opposed Rucker's receipt of less than a life sentence. The trial court also had available for its review sentencing memoranda prepared by the prosecution and defense counsel detailing the original offense, Rucker's prior juvenile criminal history, and his misconduct while in prison, in addition to any accomplishments attained, such as the procure-

ment of his GED. The prosecution requested that Rucker be resentenced to a term of 32 to 60 years' imprisonment. The trial court elected to impose a sentence of 30 to 60 years for the first-degree murder conviction, seeking to balance the punishment for the crime with the severity of the crime, while respecting the concerns expressed by the victim's family.

Contrary to Rucker's argument, the trial court's imposition of a 30-year minimum sentence did not constitute a Sixth Amendment violation proscribed by *Alleyne*. This Court squarely addressed this issue in this very context in *People v Hyatt*, 316 Mich App 368, 394-395; 891 NW2d 549 (2016),* stating:

> For all that was said in *Apprendi* [*v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000)] and its progeny, we note that the Supreme Court's holding in those cases must not be read as a prohibition against all judicial fact-finding at sentencing. Indeed, the rules from *Apprendi* and its progeny do not stand for the proposition that a sentencing scheme in which judges are permitted "genuinely to exercise broad discretion . . . *within a statutory range*" is unconstitutional; rather, as articulated in *Cunningham*, "everyone agrees" that such a scheme "encounters no Sixth Amendment shoal." *Cunningham* [*v California*], 549 US [270,] 294[; 127 S Ct 856; 166 L Ed 2d 856 (2007)] (citation and quotation marks omitted; alteration in original; emphasis added). See also *Alleyne*, 570 US at [116]; 133 S Ct at 2163 ("Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment."). Therefore, a judge acting within the range of punishment authorized by statute may exercise his or her discretion—and find

* Reporter's Note: The Court of Appeals' decision in *Hyatt* was reversed in part on other grounds after the release of the opinion in this case. *People v Hyatt*, 502 Mich 89 (2018).

> facts and consider factors relating to the offense and the offender—without violating the Sixth Amendment. *Id*. at [116], 136 S Ct at 2163, citing *Apprendi*, 530 US at 481. As explained in *Alleyne*, 570 US at [117]; 133 S Ct at 2163:
>
> > [W]ithin the limits of any discretion as to the punishment which the law may have allowed, the judge, when he pronounces sentence, may suffer his discretion to be influenced by matter shown in aggravation or mitigation, not covered by the allegations of the indictment. [1 J. Bishop, Criminal Procedure 50 (2d ed, 1872), § 85, at 54.]
> >
> > [E]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things. *Apprendi*, [530 US] at 519; 120 S Ct 2348 (Thomas, J., concurring).

Rucker's reliance on *Lockridge* is similarly unavailing. In *Lockridge*, 498 Mich at 364, our Supreme Court was clear that the use of judge-found facts *in conjunction* with mandatory sentencing guidelines was the source of the constitutional infirmity. Following the release of *Lockridge*, this Court in *People v Biddles*, 316 Mich App 148, 158; 896 NW2d 461 (2016), further explained:

> The constitutional evil addressed by the *Lockridge* Court was not judicial fact-finding in and of itself; it was judicial fact-finding in conjunction with *required* application of those found facts for purposes of increasing a *mandatory* minimum sentence range. *Lockridge* remedied this constitutional violation by making the guidelines *advisory*, not by eliminating judicial fact-finding.

Rucker was resentenced within the minimum range statutorily mandated by MCL 769.25a(4)(c). The trial court was afforded discretion in determining and imposing a minimum sentence for Rucker that comported with the required statutory range. There is no Sixth

Amendment violation as contemplated by *Alleyne*, *Lockridge*, or their progeny.

VI. CONCLUSION

This Court has subject-matter jurisdiction of defendants' appeals. MCL 769.25a(6) unconstitutionally deprives defendants of having earned disciplinary credits applied to their term-of-years sentences in violation of the Ex Post Facto Clause of the United States and Michigan Constitutions, US Const, art I, § 10; Const 1963, art 1, § 10. MCL 769.25a(6) may not be used to prevent Wiley or Rucker from receiving disciplinary credits on their minimum and maximum sentences. We need not address Wiley's other challenges to the constitutionality of the statute. And Rucker's argument regarding the use of judicial fact-finding when imposing a minimum sentence of 30 years' imprisonment lacks merit.

We affirm defendants' sentences, but we declare MCL 769.25a(6) to be unconstitutional.

RONAYNE KRAUSE, J., concurred with BECKERING, J.

BOONSTRA, P.J. (*concurring in part and dissenting in part*). I agree with the parties (both plaintiff and defendants at various times) that the constitutional ex post facto issue is not properly before us. Further, I discern—from the issues and arguments raised on appeal—no challenge to any aspect of the sentences imposed by the trial court (apart from an *Alleyne*[1] challenge); rather, the sole issue raised is whether a nonparty (the Parole Board or the Michigan Department of Corrections (MDOC)) may—in the future—

[1] *Alleyne v United States*, 570 US 99; 133 S Ct 2151; 186 L Ed 2d 314 (2013).

constitutionally apply MCL 769.25a(6) to the unchallenged sentences imposed by the trial court. I dissent from the majority's determination to decide the ex post facto issue in the current context. I concur with the majority's disposition of the *Alleyne* challenge. Accordingly, I would affirm.

## I. THE ISSUES ON APPEAL

In Docket No. 336898, defendant Christopher Wiley ostensibly appeals by right the trial court's order resentencing him under MCL 769.25a to 25 to 60 years' imprisonment for his 1995 conviction of first-degree murder, MCL 750.316. Wiley's brief on appeal contains neither the required "statement of the basis of jurisdiction," MCR 7.212(C)(4), nor the required "statement of questions involved," MCR 7.212(C)(5). Wiley's arguments on appeal are limited to raising constitutional challenges to MCL 769.25a.[2] Wiley did not raise any constitutional claims at his resentencing. To be preserved for appellate review, an issue must be raised before and addressed by the trial court. Consequently, the constitutional issues are not preserved with regard to Wiley. *People v Giovannini*, 271 Mich App 409, 414; 722 NW2d 237 (2006). We review unpreserved constitutional issues for "plain error affecting defendant's substantial rights." *People v Bowling*, 299 Mich App 552, 557; 830 NW2d 800 (2013). Under the plain-error rule,

[2] The constitutional issues raised by Wiley on appeal include (1) whether MCL 769.25a(6) violates the Ex Post Facto Clause of United States and Michigan Constitutions, US Const, art I, § 10; Const 1963, art 1, § 10; (2) whether MCL 769.25a(6) improperly repeals an initiative adopted by voters as "Proposal B," in violation of Const 1963, art 2, § 9; and (3) whether MCL 769.25a(6) violates the Title-Object Clause of the Michigan Constitution, Const 1963, art 4, § 24. In light of its disposition of the first of these issues, the majority does not reach the remaining two issues. I would not reach any of them in the context of these appeals.

"the defendant bears the burden of establishing that: (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights." *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). "To establish that a plain error affected substantial rights, there must be a showing of prejudice, i.e., that the error affected the outcome of the lower-court proceedings." *Id*. at 356. "[R]eversal is only warranted if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). Wiley concedes that the proper analysis is that of plain error, but does not articulate what errors the trial court purportedly made.

In Docket No. 338870, defendant William Lawrence Rucker ostensibly appeals by right the trial court's order resentencing him to 30 to 60 years' imprisonment under MCL 769.25a for his 1993 conviction of first-degree murder, MCL 750.316. Rucker's brief on appeal asserts that this Court "has jurisdiction of this appeal under MCR 7.203(A)(1) and MCR 7.202(6)(b)(iii)."[3] Rucker raises two issues on appeal: (1) an *Alleyne* challenge and (2) a constitutional ex post facto challenge. Rucker arguably preserved those issues in the trial court. With regard to the constitutional challenge, however, Rucker—like Wiley—does not articulate on appeal any errors that the trial court purportedly made.

## II. THE PARTIES' MORPHING LEGAL POSITIONS

In responding to Wiley's appeal, plaintiff argued, in part, as follows:

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[3] MCR 7.203(A)(1) provides for an appeal of right of a "final judgment or final order of the circuit court . . . as defined in MCR 7.202(6) . . . ." MCR 7.202(6)(b)(iii) defines a "final judgment or final order" in a criminal case to include "a sentence imposed following the granting of a motion for resentencing."

The People first note that this Court has no subject-matter jurisdiction to consider defendant's claim. Defendant's challenge has no relevancy to the validity of his sentence. Defendant was sentenced to a term of years within the range of sentences proscribed [sic] by statute. Defendant's challenge is not that the courts or the prosecution are denying him constitutional rights that would affect the validity of his sentence. The sentencing court does not have authority to award disciplinary or special disciplinary credits. Defendant's challenge is to the legislative branch's denial of credit reductions and the executive branch's execution of that legislative directive in determining when defendant is eligible for parole. Once a defendant is committed to the custody of the Michigan Department of Corrections, authority over a defendant passes out of the hands of the judicial branch. The Michigan Department of Corrections, an administrative agency within the executive branch of government, possesses *exclusive* jurisdiction over questions of parole. Parole can be granted *solely* by the Michigan Parole Board, a division of the MDOC. Once a defendant has been lawfully committed to the custody of the MDOC, the Michigan Legislature has determined that the only body that can release defendant from prison is the Parole Board, not the sentencing court or any subsequent reviewing courts. Whether or when a defendant should be released on parole is devoted exclusively to the discretion of the Parole Board. Because parole is a discretionary function, no due process right is implicated. "That the state holds out the possibility of parole provides no more than a mere hope that the benefit will be obtained . . .[ ]a hope which is not protected by due process."

> The Michigan parole statute . . . does not create a right to be paroled. Because the Michigan Parole Board has the discretion whether to grant parole, a defendant does not have a protected liberty interest in being paroled prior to the expiration of his or her sentence. The Sixth Circuit has held that Michigan Complied [sic] Laws § 791.233 does not create a protected liberty interest in parole, because the

> statute does not place any substantive limitations on the discretion of the parole board through the use of particularized standards that mandate a particular result.

Since defendant's constitutional claim has no effect on the validity of his sentence, but only to how the Department of Corrections is calculating parole eligibility, it seems that defendant's challenge would be better directed in a suit against the Department of Corrections and not in an appeal of his validly imposed sentence. Judicial review of a Parole Board decision is governed by MCL 791.234(11). While the statute provides an avenue for the prosecution to appeal the granting of a prisoner's release on parole, it does not extend the same for a defendant seeking to challenge the Board's parole decisions, including the awarding or denial of disciplinary credits. Prisoners "have no legal right to seek judicial review of the denial of parole by the Parole Board." Importantly, this Court has no subject-matter jurisdiction to consider defendant's challenge to the Parole Board's decisions in determining a prisoner's eligibility for parole or to deny him parole.

The judiciary has limited review of the Parole Board's process in determining parole. But, defendant's current appeal is not the correct vehicle for such review. Challenges to the procedures used by the Parole Board in determining whether to grant parole, how the Board exercised those procedures, or the decisions reached by the Board based on those procedures are properly subject to a totally different appellate procedure.

The Parole Board is an administrative body. By statute, the Parole Board has been entrusted to develop its own guidelines for exercising its discretion in considering prisoners for parole and deciding whether to grant parole. In *Hopkins v. Parole Board*, this Court determined that there were three avenues for a prisoner to challenge the Parole Board's decisions: (1) review pursuant to a procedure specified in a statute applicable to the particular agency, here the applicable statute being MCL 791.234; (2) the method of review for contested cases under the Adminis-

> trative Procedures Act (APA), MCL 24.201 [*et seq*.;] or (3) an appeal pursuant to the Revised Judicature Act (RJA), MCL 600.631. The Court then determined that review under either the APA and RJA was unavailable to prisoners because parole hearings are not contested cases and because the prisoner has no private right to parole. The final avenue for review, MCL 791.234, as previously mention[ed], also does not provide for review. Although none of the avenues for review listed in *Hopkins* are available, the legality of a prisoner's detention "is not insulated from judicial oversight." The prisoner is still able to challenge the Parole Board's action by filing a complaint for habeas corpus challenging the legality of his detention or an action for mandamus to compel the Board to comply with its statutory duties. It is only by these avenues, and not by an appeal of the underlying sentences, that defendant may challenge the guidelines or decisions of the Parole Board concerning parole. This Court has no subject-matter jurisdiction to review the guidelines of the Parole Board, the process the Parole Board conducted in determining defendant's eligibility for parole, or the Board's final decision regarding parole. [Citations omitted.]

Plaintiff argued similarly—and to a large extent verbatim—in response to Rucker's appeal. The Attorney General subsequently filed amicus curiae briefs in support of plaintiff in both appeals, addressing only the constitutional ex post facto issue.

After the filing of plaintiff's briefs on appeal, both defendants moved to voluntarily dismiss their appeals under MCR 7.218. Plaintiff, then represented principally by the Attorney General, opposed the motions, arguing that the ex post facto issue presented questions of state law that should be decided by a state court. Plaintiff claimed that defendants had moved to dismiss their appeals because of the related putative class action challenge pending in the United States District Court captioned *Hill v Snyder*, Case

No. 10-cv-14568. This Court denied defendants' motions to dismiss in separate orders.[4]

At oral argument, counsel for defendants agreed with the position stated in plaintiff's briefs—that the proper parties were not before the Court, that the matter was not ripe, and that the sentencing judge had no authority to compute good-time or disciplinary credits or to order the Parole Board or the MDOC to do so.[5]

### III. SUBJECT-MATTER JURISDICTION

Because Rucker raises an arguably preserved *Alleyne* challenge, and because these appeals were consolidated by order of this Court,[6] I conclude that this Court has subject-matter jurisdiction over these appeals generally. I therefore disagree with plaintiff's initial characterization that this Court lacks subject-matter jurisdiction. However, for the reasons that follow, I also conclude—as plaintiff initially asserted and as defendants now assert—that these appeals of

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[4] See *People v Rucker*, unpublished order of the Michigan Court of Appeals, entered February 16, 2018 (Docket No. 338870); *People v Wiley*, unpublished order of the Michigan Court of Appeals, entered March 5, 2018 (Docket No. 336898).

[5] As noted, the parties' positions in this case have morphed and shifted with the developments in *Hill*. For example, plaintiff's briefs on appeal (in part challenging this Court's subject-matter jurisdiction) were filed before the December 20, 2017 decision of the United States Court of Appeals for the Sixth Circuit, see *Hill v Snyder*, 878 F3d 193 (CA 6, 2017), that reversed the district court's earlier dismissal of the ex post facto challenge in that case, see *Hill v Snyder*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued February 7, 2017 (Case No. 10-14568). And defendants filed their motions to dismiss their appeals—and plaintiff opposed those motions—after the December 2017 decision of the Sixth Circuit.

[6] See *People v Wiley*, unpublished order of the Michigan Court of Appeals, entered January 17, 2018 (Docket Nos. 336898 and 338870).

defendants' sentences are not the proper vehicle by which to decide the constitutional challenge asserted. Rather, because the constitutional issues are not properly before us, I conclude that we should address only Rucker's *Alleyne* challenge.

## IV. RIPENESS: AGGRIEVED PARTY

Irrespective of whether, as plaintiff now argues, the ex post facto issue presents questions of state law, such that a state court should weigh in on those questions apart from the federal court's April 9, 2018 decision in *Hill*,[7] the question remains whether *this* Court, in *these* cases, is the proper forum in which to decide the issue. I conclude that it is not.

In appealing their sentences, defendants did not challenge the sentences themselves, but essentially sought from this Court a declaration that MCL 769.25a(6) is unconstitutional and that it must not be applied so as to affect their future parole eligibility.[8] Plaintiff argued that the request was improper in this context. Now, in an unusual swapping of legal positions, defendants essentially concede that their request was improper, and plaintiff now advocates that we issue the diametrically opposed declaration.

I conclude that the claims presented (if indeed they can be described as claims in this criminal-sentencing context) are not ripe, that defendants are not aggrieved by any decision of the trial court (and therefore are not "aggrieved parties"), and that the constitutional issues presented are otherwise not appropriately decided by this Court in this context, for several reasons.

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[7] *Hill v Snyder*, 308 F Supp 3d 893 (ED Mich, 2018).

[8] It is unknown whether Wiley or Rucker will ever become eligible for parole, when either of them might become eligible, or whether MCL 769.25a(6) will continue to exist in its current form at any such time.

First, it bears repeating that defendants did not seek, by their constitutional challenges, any relief from their convictions or from their sentences as imposed by the trial court. Yet the rules of this Court limit its jurisdiction over appeals by right to those filed by an "aggrieved party" from an order of the trial court. See MCR 7.203(A). To be aggrieved, a party "must have suffered a concrete and particularized injury." *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291; 715 NW2d 846 (2006). Further, "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 292 (emphasis added). None of the parties has identified any injury arising from any action of the trial court. I therefore conclude that, apart from Rucker's *Alleyne* challenge, defendants are not "aggrieved parties" for the purpose of challenging MCL 769.25a(6) in this context.

Moreover, and regardless of whether defendants presented their constitutional challenges in the trial court, it is far from clear to me that the trial court would have possessed the authority, in the context of the criminal proceedings then before it, to essentially enter a declaratory judgment that would have bound the Parole Board or the MDOC; our Supreme Court has stated that, depending on the type of underlying claim, a *complaint* for declaratory relief against a state agency must be filed in either the Court of Claims or the circuit court. See *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 773-774; 664 NW2d 185 (2003). These cases are criminal prosecutions, however, not actions for declaratory relief. No such complaint was filed, nor could one realistically have been filed, in the course of these criminal proceedings. Yet defendants essentially sought (and

plaintiff now seeks) to transform these appeals into declaratory judgment proceedings originating in this Court. We lack original jurisdiction over such actions. *Id*. Further, we are an error-correcting court. See *W A Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159, 181; 909 NW2d 38 (2017). But the parties have not identified any errors by the trial court that they seek to have us correct, and the declaratory relief that defendants essentially sought (and that plaintiff now seeks) was never even considered by a court with original jurisdiction over such matters.

In any event, even if we possessed the ability to order declaratory relief in this context, our ripeness doctrine precludes "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." ' " See *Mich Chiropractic Council v Comm'r of OFIS*, 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; 792 NW2d 686 (2010), quoting *Thomas v Union Carbide Agricultural Prod Co*, 473 US 568, 580-581; 105 S Ct 3325; 87 L Ed 2d 409 (1985) (citation omitted); see also *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 554; 904 NW2d 192 (2017). In this case, even assuming that defendants accrued disciplinary credits during their terms of imprisonment before resentencing, MCL 800.33(3) provides that such credits "shall be deducted from a prisoner's minimum and maximum sentence in order to determine his or her parole eligibility date and discharge date." See also MCL 800.33(5). MCL 800.33 also empowers the warden of a prison, as well as the Parole Board in the case of parole violations, to both reduce and restore such

credits on the basis of prisoner conduct.[9] See MCL 800.33(8), (10), and (13). In other words, the language of MCL 800.33 pointedly does not indicate that a trial court, when resentencing a defendant, may consider the disciplinary credits then earned by the defendant because the amount of credits earned is not then known or even a sum certain—a defendant may gain and lose credits on the basis of his or her conduct in prison. Rather, these credits are to be considered by the Parole Board or the MDOC to determine parole eligibility at the appropriate future time.

Although defendants appeal from their resentencings, they had suffered no injury to their parole eligibility at the time of the resentencings. Rather, their claims appear to rest on a contingent future event, i.e., a denial of disciplinary credits, assuming they were earned and have not been forfeited by misconduct, at the time that their parole eligibility is determined (again, assuming that MCL 769.25a(6) exists in its current form at that time). Such a claim is not ripe. See *Mich Chiropractic*, 475 Mich at 371 n 14; see also *In re Parole of Johnson*, 235 Mich App 21, 25; 596 NW2d 202 (1999) ("[A] prisoner is not truly 'eligible' for parole until each and every one of the statutory 'conditions' [for granting parole] has been met[.]").

My conclusion is strengthened by the fact that a prisoner may not take an appeal, either by claim of right or by leave granted, from the denial of his or her parole. See MCL 791.234(11); *Morales v Parole Bd*, 260 Mich App 29, 42; 676 NW2d 221 (2003). A prisoner has no constitutional right to parole. *Morales*, 260 Mich App at 39. A prisoner may, however, use the "legal tools

[9] A circuit court may order the reduction or forfeiture of credits only in limited circumstances related to a prisoner's malicious or vexatious court filings. See MCL 800.33(15) and MCL 600.5513.

of habeas corpus and mandamus" actions in order to "have the judiciary review the legality of an inmate's imprisonment[.]" *Id*. at 42. I see no reason why this same standard should not apply to a prisoner aggrieved by a potential *future* denial of parole, should he or she overcome the ripeness problem. I note that cases relied on by the federal court in *Hill v Snyder*, 308 F Supp 3d at 908-909, for the proposition that "good time credit is earned even by individuals serving life sentences" arose in such contexts. See *Moore v Parole Bd*, 379 Mich 624; 154 NW2d 437 (1967) (mandamus); *Meyers v Jackson*, 245 Mich 692; 224 NW 356 (1929) (habeas corpus); *In re Cammarata*, 341 Mich 528; 67 NW2d 677 (1954) (habeas corpus).[10]

The Attorney General, as amicus curiae, nonetheless contended at oral argument in this case that we should decide the ex post facto issue in the context of these criminal sentencing appeals because this Court and our Supreme Court have previously considered issues involving good-time credits or disciplinary credits on direct review. The majority agrees. But I find these cases distinguishable. For example, in *People v Tyrpin*, 268 Mich App 368; 710 NW2d 260 (2005), the defendant had originally been sentenced to a jail term and was later resentenced, after the prosecution appealed, to a prison term. *Id*. at 370. The defendant argued that the jail good-time credit that he had earned under MCL 51.282 should have been applied on resentencing by increasing the number of days for which he would have received credit for time served. *Id*. at 371. The defendant made no argument concerning parole eligibility, but was aggrieved by what he believed to be the trial court's failure to add 61 days to his sentencing credit as reflected in the judgment of

[10] *Hill* itself arose in the context of a claim under 42 USC 1983.

sentence. *Id*. The injury alleged by the defendant (although his claim was ultimately unsuccessful) was neither contingent nor hypothetical; the defendant alleged that the trial court had erred by calculating his credit for time served. *Id*. Our analysis of good-time and disciplinary-time statutes was conducted in that context. By contrast, there are no alleged errors by the trial court in the instant appeals.

In *People v Cannon*, 206 Mich App 653; 522 NW2d 716 (1994), the defendant argued that the imposition of a fixed jail sentence with a specified release date violated his right to receive good-time jail credits under MCL 51.282. *Id*. at 654. Again, the defendant was aggrieved by the trial court's sentencing order, which had already injured him by fixing his release date to a specific date regardless of sentencing credits. *Id*. at 656-657 (holding that "a court may not deprive a prisoner of good-time credit to which the prisoner may be entitled under statute before that prisoner has even begun serving the term of imprisonment").

And in *People v Johnson*, 421 Mich 494; 364 NW2d 654 (1984), our Supreme Court considered the effects of Proposal B on life sentences. *Id*. at 497-498. Although the Court did declare Proposal B to be binding on the Parole Board with regard to indeterminate sentences, the context of the defendant's appeal was that the trial court had not correctly informed him of the consequences of his guilty plea. *Id*. at 496. Once again, the defendant was aggrieved by an action of the trial court.[11]

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[11] I note also that our Supreme Court is much freer than we, as an intermediate appellate court, to consider issues beyond the claimed errors of the lower courts and to opine on broader issues of Michigan law. See *People v Woolfolk*, 304 Mich App 450, 475-476; 848 NW2d 169 (2014).

V. CONCLUSION

For all of these reasons, I would not reach the constitutional issues presented.[12] They are not properly raised in the context of these appeals, inasmuch as they do not present any claim of error by the trial court in its resentencing decisions. Plaintiff is already litigating the ex post facto issue with a class of plaintiffs (which includes Wiley and Rucker) in federal court, and plaintiff or defendants remain free to additionally raise the issue in a proper state court proceeding in which the proper parties are present. By contrast, Wiley and Rucker are the only persons who will be directly affected by this Court's disposition of the issue in the context of these criminal sentencing appeals; in essence, we would be declaring the rights of two individuals with regard to this statute, while in the meantime a class action (of which Rucker and Wiley are also a part) is already proceeding and has already resulted in declaratory relief.

Because I would not reach the constitutional issues and because I agree with the majority's treatment of the *Alleyne* issue, I would affirm, but, unlike the majority, I would not issue a declaration of unconstitutionality.

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[12] Although I do not express any opinion on the constitutional issues, I note that the parties have not briefed (nor does it appear to me that either the federal court in *Hill* or the majority in the instant appeals has addressed) whether a finding of unconstitutionality would relate solely to MCL 769.25a(6), or whether, alternatively, and given that the Legislature's enactment of that statutory provision was made in the context of the sentencing scheme set forth in MCL 769.25a(4), the entire sentencing scheme would be rendered unconstitutional. This gives me additional pause about deciding the constitutional issues in the current context.

JAWAD A SHAH, MD, PC v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Docket No. 340370. Submitted April 11, 2018, at Detroit. Decided May 8, 2018, at 9:00 a.m. Leave to appeal denied 504 Mich 987.

Jawad A. Shah, M.D., PC; Integrated Hospital Specialists, PC; Insight Anesthesia, PLLC; and Sterling Anesthesia, PLLC, brought an action in the Genesee Circuit Court against State Farm Mutual Automobile Insurance Company, seeking to recover payment under the no-fault act, MCL 500.3101 *et seq*., for the healthcare services each plaintiff provided to George Hensley. On November 30, 2014, Hensley was injured in a motor vehicle accident and at the time was insured by defendant. Plaintiffs submitted claims to defendant for the services they had provided to Hensley, but defendant denied those claims. After plaintiffs filed their complaint against defendant on February 24, 2017, the Supreme Court issued its opinion in *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191 (2017), holding that healthcare providers do not possess a statutory cause of action to recover personal protection insurance benefits under the no-fault act, reversing prior decisions of the Court of Appeals that had concluded to the contrary. The *Covenant* Court clarified that the decision did not alter an insured's ability to assign his or her right to past or presently due benefits to a healthcare provider. On July 11, 2017, Hensley assigned to plaintiffs his right to pursue no-fault benefits from defendant. On July 20, 2017, defendant moved for summary disposition, arguing that plaintiffs' no-fault claim failed in light of *Covenant*. Plaintiffs moved for leave to amend their complaint to include recovery under an assignment-of-rights theory, arguing that the amendment was necessary given that *Covenant* had extinguished their ability to pursue an independent action against defendant. The court, Judith A. Fullerton, J., granted defendant's motion for summary disposition and denied plaintiffs' motion to amend, reasoning that Hensley's assignments to plaintiffs were void because defendant did not consent to the assignments as required by Hensley's insurance policy. The court further reasoned that even if the assignments were valid, plaintiffs' motion was actually a request for a supplemental pleading under MCR 2.118(E)—not a request

for an amendment under MCR 2.118(D)—and that because the supplemental pleading did not relate back to the date the original complaint was filed, plaintiffs' claims would be barred under the MCL 500.3145(1) statute of limitations. Defendant appealed.

The Court of Appeals *held*:

1. Plaintiffs waived review of their argument that *Covenant* was inapplicable to the case and that it should apply prospectively only; manifest injustice would not result from not reviewing the issue. Regardless, plaintiffs' argument was without merit because the Court was bound by earlier decisions that concluded *Covenant* applied retroactively.

2. Agreements must be enforced as written absent some highly unusual circumstance, such as when the contract violates the law or is against public policy. Courts may not refuse to enforce contractual provisions because the provisions are judicially assessed as unreasonable. Under general contract law, rights may be assigned unless the assignment is clearly restricted. In that regard, a clear and unambiguous antiassignment clause is enforceable unless it violates the law or public policy. In *Roger Williams Ins Co v Carrington*, 43 Mich 252 (1880), the Supreme Court held that an antiassignment clause is not enforceable with regard to an accrued cause of action; public policy dictates that the clause cannot be enforced when the loss occurs before the assignment. In this case, Hensley's policy with defendant unambiguously provided that any assignment of benefits or other transfer of rights by Hensley was not binding on defendant. However, Hensley's claim for payment of healthcare services that had already been provided accrued before Hensley executed the assignments. Therefore, the antiassignment clause in the insurance policy was unenforceable as against public policy—not because of a judicial assessment of unreasonableness—and the clause did not prohibit the assignment.

3. MCL 500.3145(1), the so-called one-year-back rule, provides that a claimant may not recover no-fault benefits for any portion of a loss incurred more than one year before the date on which the action was commenced; the provision is designed to limit the amount of benefits recoverable under the no-fault act to those losses occurring no more than one year before the action is brought. MCR 2.118(D) provides that an amendment that adds a claim or defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading. In contrast, a supplemental pleading under MCR 2.118(E)—that is, a pleading that states

transactions or events that have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief or a defense—does not relate back to the date the original pleading was filed. Because, as assignees, plaintiffs did not obtain any greater rights from Hensley, the assignor, than Hensley had when he assigned his right to payments on July 11, 2017, under MCL 500.3145(1), plaintiffs did not obtain any right to recover benefits for losses that were incurred more than one year before the July 11, 2017 assignment date. Notwithstanding the label used by plaintiffs, their motion for leave to amend was, in fact, a motion for leave to file a supplemental pleading because the assignments occurred after the filing of the original complaint and provided the only means by which plaintiffs could have standing to maintain a direct action against defendants to recover no-fault benefits. For that reason, plaintiffs were unable to pursue no-fault benefits for any portion of the loss incurred more than one year before July 11, 2017.

4. If a trial court grants summary disposition pursuant to MCR 2.116(C)(8), (9), or (10), the court must give the parties an opportunity to amend their pleadings under MCR 2.118 unless the amendment would be futile. In this case, the antiassignment clause was unenforceable with regard to Hensley's assignments, and plaintiffs' healthcare-services claims were barred under MCL 500.3145(1) only with regard to those services that were provided more than one year before the date of the assignments. Accordingly, the trial court necessarily abused its discretion by denying plaintiffs' supplemental pleading because it misapplied the law. The trial court, in turn, erred by granting defendant's motion for summary disposition without properly applying the law when determining whether an amendment to the pleadings would be futile.

Reversed and remanded.

SHAPIRO, J., concurring in part and dissenting in part, agreed with the majority's conclusion that the antiassignment clause in the insurance policy was unenforceable in this case because the loss—Hensley's payment of insurance premiums—had already occurred. Plaintiffs' public-policy argument that the claims process would be significantly more complicated, including an increase in administrative costs, if an insured's rights could be assigned after the loss occurred was factually and legally flawed. Defendant's assertion was contrary to the purpose of the no-fault act, which was designed to provide assured, adequate, and prompt reparation for certain economic loss. The no-fault act does

not contain language indicating that the Legislature intended to allow insurers to unilaterally add limitations on benefits. And by statutorily prohibiting under MCL 500.3143 the assignment of rights to benefits payable in the future, the Legislature made clear its intent to adhere to the fundamental principle that assignments of past-due benefits were allowed under the no-fault act. Judge SHAPIRO disagreed with the majority's conclusion that the one-year-back date should be measured from when Hensley assigned his rights and not from when plaintiffs filed their complaint. The majority's conclusion was supported by little authority. MCL 500.3145(1) provides that benefits may not be recovered for any portion of a loss incurred more than one year before the date on which the action was commenced. Contrary to the majority's focus on plaintiffs only possessing those rights that Hensley had on the date of assignments, the triggering of the one-year-back statute does not depend on whether there was a right to file suit; rather, it triggers on the date suit was filed. Plaintiffs' request to add an allegation to establish standing—that is, to add the assignment-of-rights theory of recovery—did not commence a new action for purposes of MCL 500.3145(1); plaintiff still sought payment of past-due benefits. *W A Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159 (2017), which concluded that *Covenant* applies retroactively, was wrongly decided. Instead, *Covenant* should be applied prospectively only because healthcare providers relied on earlier caselaw to the contrary, and retroactive application allows an insurance company to avoid the payment of no-fault benefits for services provided under pre-*Covenant* law. Courts should apply the common-sense principles articulated in *Tebo v Havlik*, 418 Mich 350 (1984), when deciding whether a court's decision overruling prior settled law should be applied retroactively or prospectively; when the earlier caselaw was clear, it is unjust when a decision overruling that prior law is applied retroactively to persons other than those before the court in that case.

CONTRACTS — ANTIASSIGNMENT CLAUSES — CLAUSES NOT ENFORCEABLE WITH REGARD TO ACCRUED CAUSES OF ACTION.

An antiassignment clause is not enforceable with regard to an accrued cause of action because public policy dictates that the clause cannot be enforced when the loss occurs before the assignment.

*Green & Green, PLLC* (by *Jonathan A. Green*) for plaintiff.

*Miller, Canfield, Paddock & Stone, PLC* (by *Paul D. Hudson* and *Samantha S. Galecki*) and *Hackney Grover PLC* (by *Ross Lawrence Janecyk*) for defendant.

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

BORRELLO, P.J. In this suit seeking recovery of medical expenses under the no-fault act, MCL 500.3101 *et seq*., plaintiffs, Jawad A. Shah, M.D., PC, Integrated Hospital Specialists, PC, Insight Anesthesia, PLLC, and Sterling Anesthesia, PLLC, appeal as of right the trial court's order granting summary disposition in favor of defendant, State Farm Mutual Automobile Insurance Company, and denying as futile plaintiffs' motion for leave to amend their complaint. For the reasons set forth in this opinion, we reverse the trial court's order and remand this matter for further proceedings consistent with this opinion.

## I. BACKGROUND

This case involves various healthcare providers attempting to recover from a no-fault insurer for services rendered to the insured, George Hensley. According to plaintiffs' initial complaint filed on February 24, 2017, Hensley was injured on November 30, 2014, in a motor vehicle accident and was insured by defendant. Plaintiffs submitted claims for services rendered to Hensley, but defendant refused to pay these claims. In their complaint, plaintiffs sought a judgment of approximately $82,000, plus interest and reasonable attorney fees. Defendant answered the complaint and filed its affirmative defenses on April 21, 2017, denying liability.

On May 25, 2017, our Supreme Court issued its opinion in *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017). In

*Covenant*, our Supreme Court held "that healthcare providers do not possess a statutory cause of action against no-fault insurers for recovery of personal protection insurance benefits under the no-fault act," expressly overruling a body of caselaw from this Court that had concluded to the contrary. *Id*. at 196. In explaining its holding, the *Covenant* Court rejected the notion that a medical provider had independent standing to bring a claim against an insurer to recover no-fault benefits. *Id*. at 195. However, the Court clarified that its decision was "not intended to alter an insured's ability to assign his or her right to past or presently due benefits to a healthcare provider." *Id*. at 217 n 40.

On July 20, 2017, defendant moved for summary disposition pursuant to MCR 2.116(C)(8). Defendant argued that dismissal was required for failure to state a claim because plaintiffs' no-fault claim was "in direct contravention of the Michigan Supreme Court's decision in *Covenant*."

Apparently anticipating defendant's motion, plaintiffs had obtained an assignment of rights from Hensley on July 11, 2017,[1] to pursue payment of no-fault

[1] We note that there are four assignments attached to plaintiffs' brief in opposition to defendant's motion for summary disposition and that two of those assignments explicitly designate plaintiffs Jawad A. Shah, M.D., PC, and Integrated Hospital Specialists, PC, as assignees. However, the names of the designated assignees in the other two assignments do not match the names of the remaining two plaintiffs. Nonetheless, in the trial court, defendant conceded in its reply brief in support of its summary-disposition motion that Hensley had executed an assignment to each plaintiff. Thus, as will be further explained later in this opinion, it appears that the parties assumed that all plaintiffs received assignments of rights from Hensley and that the parties essentially disputed only (1) whether these assignments were valid in light of the antiassignment clause in Hensley's insurance policy and (2) whether an amended complaint based on that assignment would relate

benefits for healthcare services "already provided" by plaintiffs.[2] Plaintiffs relied on this assignment to then file a response to the summary-disposition motion and a motion for leave to amend the complaint to reflect that the suit was being pursued through the assignment of rights obtained from Hensley. Plaintiffs argued that it was necessary to amend the complaint to allow the action to proceed pursuant to their respective assignments because the *Covenant* decision had extinguished their ability to pursue an independent, direct action against defendant under these circumstances. Again showing foresight in anticipating defendant's next tactical decision, plaintiffs also preemptively argued that if the trial court were to determine that a contractual provision within defendant's policy prevented assignments, then such a provision should not be enforced for one of two reasons. First, plaintiffs

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back to the date of the original complaint. For purposes of this opinion, we assume, without deciding, that the assignments effectively assigned the stated rights to plaintiffs in this case as long as such assignments were not barred by the antiassignment clause. The only issue with respect to the validity of the assignments that was actually raised and decided in the trial court was the effect of the antiassignment clause. Therefore, we limit our review to this issue. See *Allen v Keating*, 205 Mich App 560, 564-565; 517 NW2d 830 (1994).

[2] The assignment-of-rights forms provided, in pertinent part, that Hensley was assigning

> all rights, privileges and remedies to payment for health care services, products or accommodations ("Services") provided by Assignee to Assignor to which Assignor is or may be entitled under MCL 500.3101, *et seq*., the No Fault Act. This Assignment is for the right to payment of Assignee's charges, only, and not for the right to payment of any other No Fault insurance benefits.
>
> The Assignment as set forth above is for all services already provided to Assignor by Assignee prior to or at the time of Assignor's execution of this agreement. Specifically, this Assignment **does not** include an Assignment of any future No Fault benefits.

argued that defendant would have to show that Hensley was a named insured under the policy (rather than, for example, a passenger entitled to benefits under someone else's policy) for the antiassignment clause to be enforced against him. Second, plaintiffs argued that the antiassignment clause was voidable as against public policy because the assignment was obtained after the loss occurred. Furthermore, in an effort to avoid problems with the one-year-back rule of MCL 500.3145(1), plaintiffs also argued that the amended complaint should relate back to the date of the original complaint because the amendment to accommodate the assignments was intended to support the previously filed no-fault claim that arose from the same transaction or occurrence, namely Hensley's injuries sustained in the November 30, 2014 accident. Plaintiffs did not contend that *Covenant* was inapplicable to their suit.

On September 7, 2017, defendant filed a reply in support of its summary-disposition motion. As plaintiffs anticipated, defendant argued that an antiassignment clause in the policy rendered any assignment of rights from Hensley void. Accordingly, defendant argued that plaintiffs' claims should be dismissed because the antiassignment clause had to be enforced as written and was not against public policy. Defendant also argued that the one-year-back rule of MCL 500.3145(1) would bar the assigned claims, or a portion of the assigned claims, even if the assignments were considered valid. Defendant explained that plaintiffs could not obtain any greater rights than those held by Hensley at the time of the assignments. Had Hensley brought suit on the date of the assignments, he could not have obtained damages for any expenses incurred more than a year before that date. Defendant argued that plaintiffs stood in the shoes of Hensley after the

assignments and could not obtain any greater rights than this. Defendant also asserted that Hensley had his own lawsuit that had already been resolved and was no longer pending. Defendant further argued that the relation-back doctrine would not apply because the assignment did not exist on the date plaintiffs originally filed their complaint. Defendant contended that plaintiffs were not really seeking an amendment that could relate back to the original complaint pursuant to MCR 2.118(D) but were actually attempting to supplement their complaint pursuant to MCR 2.118(E) in order to allege a subsequently acquired assignment. Defendant explained that supplemental pleadings never relate back to the date of the original pleading. Finally, defendant explained that Hensley was indeed a named insured, and it provided a copy of the declarations page as support.

On the same day, defendant also filed a response to plaintiffs' motion for leave to amend their complaint. Defendant raised the same arguments made in its reply brief and argued that for these reasons, any amendment was futile because the cause of action that plaintiff was attempting to add was legally insufficient on its face.

A hearing on the motions was held on September 11, 2017. The parties' oral arguments reiterated the arguments made in their written submissions. The trial court ruled as follows:

> All right, the Court read both of the motions and the briefs, as well as the second motion, which is the motion for leave to file an amended complaint. As I said they interrelate and the circumstances are that Shah was a provider or plaintiffs were health providers—health services care providers for the insured George Hensley. And apparently only after the covenant [sic: *Covenant* decision] did an assignment take place and the policy language of

> the State Farm policy, which Mr. Hensley purchased precludes the assignment without approval of State Farm, which did not occur. So actually (inaudible) did not acquire any rights by virtue of the assignment.
>
> And in addition, as pointed out by defense counsel, if it had been granted it would have been a supplemental pleading and the date would be barred under the statute of limitations. You may submit an order if you don't have one here today.

The trial court clarified that it was granting defendant's motion for summary disposition, denying leave to file an amended complaint as futile, and dismissing the case with prejudice. The trial court entered an order[3] granting summary disposition pursuant to MCR 2.116(C)(8) and dismissing the case with prejudice "for the reasons stated on the record."

This appeal followed.

## II. ANALYSIS

### A. RETROACTIVITY OF THE *COVENANT* DECISION

Plaintiffs first argue that our Supreme Court's decision in *Covenant* should not apply retroactively but should instead be given prospective effect only.

Whether a judicial decision applies retroactively is a question that this Court reviews de novo. *W A Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159, 168; 909 NW2d 38 (2017). However, plaintiffs never challenged the retroactive application of *Covenant* or the applicability of *Covenant* to this case in the trial court. In fact, plaintiffs appeared to concede in the trial court that *Covenant* was retroactively appli-

[3] This order appears to be missing from the lower-court file; however, a true copy of this order was provided to this Court on appeal.

cable and was consequently controlling in this case. Therefore, we must first address whether plaintiffs preserved their argument that *Covenant* should apply prospectively only and not retroactively to the instant case.

"Michigan generally follows the 'raise or waive' rule of appellate review." *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) (citation omitted). Accordingly, "[f]or an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *Mouzon v Achievable Visions*, 308 Mich App 415, 419; 864 NW2d 606 (2014) (quotation marks and citation omitted). The failure to timely raise an issue typically waives appellate review of that issue. *Walters*, 481 Mich at 387. Our Supreme Court has explained the rationale for the preservation requirements as follows:

> The principal rationale for the rule is based in the nature of the adversarial process and judicial efficiency. By limiting appellate review to those issues raised and argued in the trial court, and holding all other issues waived, appellate courts require litigants to raise and frame their arguments at a time when their opponents may respond to them factually. This practice also avoids the untenable result of permitting an unsuccessful litigant to prevail by avoiding its tactical decisions that proved unsuccessful. Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention. Trial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute. [*Walters*, 481 Mich at 388 (citations omitted).]

"Although this Court need not review issues raised for the first time on appeal, this Court may overlook preservation requirements if the failure to consider the

issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006) (citations omitted). However, while an appellate court has the inherent power to review an unpreserved claim of error, our Supreme Court has emphasized the fundamental principles that "such power of review is to be exercised quite sparingly" and that the inherent power to review unpreserved issues "is to be exercised only under what appear to be compelling circumstances to avoid a miscarriage of justice or to accord a [criminal] defendant a fair trial." *Napier v Jacobs*, 429 Mich 222, 233; 414 NW2d 862 (1987) (quotation marks and citation omitted; alteration in original).

In this case, plaintiffs assert that this issue is preserved for appellate review without identifying a single place in the lower-court record where they argued that *Covenant* should not apply retroactively to the instant case. As previously noted, plaintiffs actually treated the *Covenant* decision as the controlling law at all times following the issuance of that decision, arguing that it was necessary to amend the original complaint because the *Covenant* decision had extinguished plaintiffs' independent cause of action against defendant that was not premised on an assignment of rights from Hensley. On appeal, plaintiffs essentially argue that although they never contested the application of *Covenant* in the trial court, their appellate challenge to the propriety of that retroactive application is somehow automatically preserved because the *Covenant* decision was actually applied retroactively in the trial court and because defendant responded to plaintiffs' arguments on ap-

peal.[4] This argument ignores the fundamentals of appellate-preservation law, which require parties to first raise issues in the lower court to be addressed in that forum. *Walters*, 481 Mich at 387; *Mouzon*, 308 Mich App at 419. Therefore, plaintiffs have waived appellate review of this issue. *Walters*, 481 Mich at 387. Plaintiffs may not remain silent in the trial court and then hope to obtain appellate relief on an issue that they did not call to the trial court's attention. *Id.* at 388; see also *Hoffenblum v Hoffenblum*, 308 Mich App 102, 117; 863 NW2d 352 (2014) ("A party may not claim as error on appeal an issue that the party deemed proper in the trial court because doing so would permit the party to harbor error as an appellate parachute.") (quotation marks and citation omitted).

We further conclude that there is no apparent reason for us to exercise our discretion to review this issue. It does not present a question that must be addressed in order to properly resolve this case, and no manifest injustice will result if we decline to review it; as explained in this opinion, plaintiffs' legal argument is unavailing because *Covenant* has already been determined to be retroactive in published decisions of this Court. Moreover, a litigant in a civil case must demonstrate more than a potential monetary loss to show a miscarriage of justice or manifest injustice. See *Napier*, 429 Mich at 234. Accordingly, we decline to review plaintiffs' various arguments that *Covenant* is inapplicable to the instant case and that it should be given prospective application only.[5]

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[4] We note that the primary thrust of defendant's appellate argument in response to plaintiffs' retroactivity argument is that plaintiffs failed to preserve this issue for appeal.

[5] We acknowledge that decisions of our Supreme Court and this Court have applied the plain-error standard of review to certain unpreserved issues in the civil context. See, e.g., *Wischmeyer v Schanz*, 449 Mich 469,

Furthermore, as we alluded to, plaintiffs' argument is without merit even if they had not waived this issue for appellate review. This Court has already held in two recent published decisions that *Covenant* applies retroactively. See *W A Foote*, 321 Mich App at 196; *VHS Huron Valley-Sinai Hosp v Sentinel Ins Co (On Remand)*, 322 Mich App 707, 713-714; 916 NW2d 218 (2018).[6] We are bound by the holdings in *W A Foote* and

483 & n 26; 536 NW2d 760 (1995); *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). However, we do not decide today under what circumstances the plain-error standard of review should be applied in the civil context. In this case, we simply conclude that there is no need to review plaintiffs' unpreserved issue *at all* because it was waived and no compelling circumstances exist to justify appellate review.

We also recognize the general distinction between forfeiture and waiver, but, as our Supreme Court has explained, the term "waiver" in the civil-procedure context "is typically used in the colloquial sense, encompassing inaction that would technically constitute forfeiture." *Walters*, 481 Mich at 384 n 14. That is exactly what happened in this case: plaintiffs failed to raise any argument in the trial court challenging the applicability of the *Covenant* decision to this case, thereby waiving appellate review of that issue, and none of the reasons that would justify exercising our discretion to disregard the preservation requirement exists.

[6] We note that this Court declined in both *W A Foote* and *VHS Huron Valley* to decide whether *Covenant* was to be given limited or full retroactive effect because that question was not necessary to the resolution in either of those cases. See *W A Foote*, 321 Mich App at 174 n 9; *VHS Huron Valley*, 322 Mich App at 714. However, plaintiffs have not provided any discussion or legal analysis addressing whether *Covenant* should receive limited or full retroactive effect in the instant case. Therefore, any such argument is abandoned. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) ("It is not sufficient for a party simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.") (quotation marks and citation omitted); *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003) ("An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue.").

*VHS Huron Valley*. See MCR 7.215(C)(2) ("A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis."). And furthermore, whether an application for leave to appeal in our Supreme Court has been filed in a case[7] is irrelevant: "The filing of an application for leave to appeal to the Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals." MCR 7.215(C)(2).

Therefore, even if this issue had not been waived for our review, *Covenant* is applicable to the instant case, *W A Foote*, 321 Mich App at 196; *VHS Huron Valley*, 322 Mich App at 713-714; MCR 7.215(C)(2), and plaintiffs "do not possess a statutory cause of action" against defendant as a no-fault insurer to recover personal protection insurance benefits under the no-fault act, *Covenant*, 500 Mich at 196.

### B. ENFORCEABILITY OF THE CONTRACT PROVISION PROHIBITING ASSIGNMENT

Next, plaintiffs argue that the antiassignment clause in the insurance policy is unenforceable and that it therefore cannot prevent the assignment that occurred in this case.

Insurance policies are contracts and are thus "subject to the same contract construction principles that apply to any other species of contract." *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). "[Q]uestions involving the proper interpretation of a contract or the legal effect of a contractual clause are . . . reviewed de novo." *Id*. at 464. "In ascertaining the meaning of a contract, we give the words used in

[7] We note that an application for leave to appeal to our Supreme Court has been filed in both *W A Foote* and *VHS Huron Valley*.

the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Id*. "[U]nambiguous contracts are not open to judicial construction and must be enforced as written." *Id*. at 468 (emphasis omitted). "[T]he judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties . . . ." *Id*. at 461.

However, our Supreme Court has also recognized that "courts are to enforce the agreement as written *absent some highly unusual circumstance such as a contract in violation of law or public policy*." *Id*. at 469 (quotation marks and citation omitted; emphasis added). "A mere judicial assessment of 'reasonableness' is an invalid basis upon which to refuse to enforce contractual provisions," and "[o]nly recognized traditional contract defenses may be used to avoid the enforcement of the contract provision." *Id*. at 470. With respect to determining whether a contractual provision violates public policy, our Supreme Court explained in *Rory* that "the determination of Michigan's public policy is not merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law." *Id*. at 470-471 (quotation marks and citation omitted). "In ascertaining the parameters of our public policy, we must look to policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law." *Id*. at 471 (quotation marks and citation omitted).

"Under general contract law, rights can be assigned unless the assignment is clearly restricted." *Burkhardt v Bailey*, 260 Mich App 636, 652; 680 NW2d 453 (2004). Defendant argues in this case that the

present matter is one in which Hensley's ability to assign his rights is prohibited by a specific contractual provision. The insurance policy states, "No assignment of benefits or other transfer of rights is binding upon *us* [i.e., defendant] unless approved by *us*." Despite plaintiffs' newly raised arguments to the contrary, the language of this provision is perfectly clear.[8] In order for any benefits or rights to be assigned to anyone other than the insured, defendant must consent to the assignment. In contravention of this provision, the assignments at issue attempt to assign the right to claim benefits held by Hensley to plaintiffs, and it is undisputed that defendant did not consent to these assignments. The appellate courts of Michigan have previously recognized the enforceability of antiassignment clauses that are clear and unambiguous. See *Detroit Greyhound Employees Fed Credit Union v Aetna Life Ins Co*, 381 Mich 683, 689-690; 167 NW2d 274 (1969); *Employers Mut Liability Ins Co of Wisconsin v Mich Mut Auto Ins Co*, 101 Mich App 697, 702; 300 NW2d 682 (1980). Therefore, because the antiassignment clause is unambiguous, it must be enforced unless it violates the law or public policy. *Rory*, 473 Mich at 468-469.

Resolution of this issue turns on the application of our Supreme Court's decision in *Roger Williams Ins Co v Carrington*, 43 Mich 252; 5 NW 303 (1880). In *Roger Williams*, an insurance policy was issued covering livery stable property; the property was later destroyed in a fire. *Id*. at 253. After the fire, the insured assigned the policy to secure a debt. *Id*. at

[8] Plaintiffs did not argue in the trial court that the antiassignment clause was ambiguous, and this argument is therefore waived for appellate review. *Walters*, 481 Mich at 387.

253-254. Our Supreme Court refused to enforce an antiassignment clause in that matter, explaining:

> The assignment having been made after the loss, did not require consent of the company. The provision of the policy forfeiting it for an assignment without the company's consent is invalid, so far as it applies to the transfer of an accrued cause of action. It is the absolute right of every person—secured in this State by statute—to assign such claims, and such a right cannot be thus prevented. It cannot concern the debtor, and it is against public policy. [*Id*. at 254.]

In this case, the parties provide no authority, and we have found none, explicitly rejecting this analysis in *Roger Williams*. Moreover, it has been deemed controlling on this point of law in at least two relatively recent[9] opinions of the United States District Court for the Western District of Michigan,[10] *Century Indemnity Co v Aero-Motive Co*, 318 F Supp 2d 530, 539 (WD Mich, 2003) (relying on *Roger Williams* while explaining that under Michigan law, "an anti-assignment clause will not be enforced where a loss occurs before the assignment, because in that situation the assignment of the claim under the policy is viewed no differently than any other assignment of an accrued cause of action."); *Action Auto Stores, Inc v United Capitol Ins Co*, 845 F Supp 417, 422-423 (WD Mich, 1993) (citing *Roger Williams* in support of the proposition that a provision prohibiting assignment without consent of the insurer was invalid with respect to a post-loss assignment).

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[9] While we recognize that cases from 1993 and 2003 are not exactly recent in the ordinary sense, they certainly are recent when compared to a case from 1880.

[10] We recognize that lower federal court decisions are not binding on state courts, but they may be considered persuasive. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

Our Supreme Court in *Roger Williams* essentially held that an accrued cause of action may be freely assigned after the loss and that an antiassignment clause is not enforceable to restrict such an assignment because such a clause violates public policy in that situation. *Roger Williams*, 43 Mich at 254. In this case, Hensley had an accrued claim against his insurer for payment of healthcare services that had already been provided by plaintiffs before Hensley executed the assignment. Under *Roger Williams*, the contractual prohibition against Hensley assigning that claim to plaintiffs was unenforceable because it was against public policy. *Id*.

Therefore, we conclude that the antiassignment clause in the instant case is unenforceable to prohibit the assignment that occurred here—an assignment after the loss occurred of an accrued claim to payment—because such a prohibition of assignment violates Michigan public policy that is part of our common law as set forth by our Supreme Court. *Roger Williams*, 43 Mich at 254; *Rory*, 473 Mich at 469-471.

We note that contrary to the arguments advanced by defendant, our conclusion that a contractual provision is unenforceable because it violates public policy is not equivalent to a judicial assessment of unreasonableness, nor is it in conflict with the principle that unambiguous contracts must be enforced as written. Our Supreme Court has made clear that judicial notions of reasonableness are not proper grounds on which to hold contractual provisions unenforceable. *Rory*, 473 Mich at 470. Our Supreme Court has also made clear that unambiguous contractual provisions are "to be enforced as written *unless the provision would violate law or public policy*." *Id*. (emphasis added). Defendant's arguments appear to

incorrectly conflate the concept of "reasonableness" with "public policy." Our decision is not based on a determination that the antiassignment clause is somehow "unreasonable." Rather, we have simply concluded that enforcing the antiassignment clause in this circumstance to prohibit the assignment of an accrued claim after the loss occurred is against Michigan public policy as stated by our Supreme Court 138 years ago in *Roger Williams*. Finally, defendant takes issue with the continued validity of our Supreme Court's holding in *Roger Williams* and its application in the instant case. However, as our Supreme Court has instructed, we are bound to follow its decisions "except where those decisions have *clearly* been overruled or superseded." *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 191; 880 NW2d 765 (2016). There is no indication that *Roger Williams* or its holding relating to antiassignment clauses has been clearly overruled or superseded. Therefore, if the continued validity of *Roger Williams* is to be called into question, it will have to be by our Supreme Court.

Plaintiffs also raise several additional grounds for arguing that the antiassignment clause is unenforceable to prevent the assignment at issue in this case. However, plaintiffs did not raise these additional arguments in the trial court, and they are thus waived for appellate review. *Walters*, 481 Mich at 387. Nonetheless, given our conclusion that the antiassignment clause did not prohibit the assignments at issue in this case, there is no further relief on this issue that we could grant to plaintiffs, and these additional arguments are therefore moot. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). We decline to address these arguments because we generally do not decide moot issues. *Id*.

C. EFFECT OF THE ASSIGNMENTS WITH RESPECT TO THE ONE-YEAR-BACK RULE

Next, plaintiffs argue that the trial court should have granted their motion for leave to amend the complaint to account for the assignments and that such an amendment should have related back to the date of the original complaint. In light of our conclusion that the assignments were not prohibited by the antiassignment clause, the issue to be addressed on appeal becomes determining the effect of the assignments at issue with respect to the one-year-back rule in MCL 500.3145(1). Clearly, we must address this question first before we can address the final, and interrelated, questions of whether the trial court erred by granting defendant's summary-disposition motion and denying plaintiffs' motion for leave to amend the complaint.

MCL 500.3145(1) provides, in pertinent part, that "the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced." The one-year-back rule in MCL 500.3145(1) "is designed to limit the amount of benefits recoverable under the no-fault act to those losses occurring no more than one year before an action is brought." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 203; 815 NW2d 412 (2012).

The instant case presents an unusual situation with respect to the one-year-back rule because plaintiffs began this case on February 24, 2017, as a direct lawsuit filed against defendant under pre-*Covenant* caselaw and then sought to amend the complaint to bring the action based on an assignment theory after the *Covenant* decision was issued. Plaintiffs obtained the assignments from Hensley on July 11, 2017. Plaintiffs argue that they may amend their complaint to

account for the assignment-of-rights theory and that such an assignment should relate back to the date of the original complaint, which would allow them to pursue benefits incurred during the year preceding the date of February 24, 2017. Defendant, on the other hand, argues that the date of the assignments—July 11, 2017—provides the pertinent reference date for purposes of the one-year-back rule because plaintiffs' motion actually sought leave to file a supplemental pleading rather than an amended pleading.

The rule regarding the relation back of amended pleadings is contained in MCR 2.118(D), which provides, in pertinent part, that an "amendment that adds a claim or defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading." However, while an amended pleading may relate back to the date of the original pleading, "there is no provision for relating back as to supplemental pleadings . . . ." *Grist v Upjohn Co*, 1 Mich App 72, 84; 134 NW2d 358 (1965).[11] Supplemental pleadings are governed by MCR 2.118(E), which provides, in pertinent part, as follows:

> On motion of a party the court may, on reasonable notice and on just terms, permit the party to serve a supplemental pleading to state transactions or events that have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief or a defense.

Further, the "relation-back doctrine does not apply to the addition of new parties." *Miller v Chapman*

[11] Although the *Grist* Court was discussing GCR 1963, 118.5, this former court rule was substantively the same as the current court rule addressing supplemental pleadings, which is MCR 2.118(E).

*Contracting*, 477 Mich 102, 106; 730 NW2d 462 (2007) (quotation marks and citation omitted).

In this case, after the *Covenant* decision was issued, plaintiffs sought to amend their complaint to account for the assignments obtained from Hensley to allow plaintiffs to pursue an action against defendant-insurer. "An assignee stands in the position of the assignor, possessing the same rights and being subject to the same defenses." *Burkhardt*, 260 Mich App at 652-653. For that reason, plaintiffs could not obtain any greater rights from Hensley on the date of the assignments—July 11, 2017—than Hensley himself possessed on that date. Had Hensley filed an action directly against defendant on July 11, 2017, he would not have been permitted to recover benefits for any portion of the loss incurred one year before that date. MCL 500.3145(1). Accordingly, plaintiffs also could not obtain any right to recover benefits for losses incurred more than one year before July 11, 2017, through an assignment of rights from Hensley. *Burkhardt*, 260 Mich App at 652-653. Furthermore, the procurement of the assignments was an event that occurred after the filing of the original complaint and provided the only means by which plaintiffs could have standing to maintain a direct action against defendant-insurer for recovery of no-fault benefits in this case. *Covenant*, 500 Mich at 195-196, 217 n 40. Therefore, plaintiffs' motion for leave to amend actually sought leave to file a supplemental pleading. MCR 2.118(E). Courts "are not bound by a party's choice of labels because this would effectively elevate form over substance." *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 715; 742 NW2d 399 (2007).

Because plaintiffs actually sought to file a supplemental pleading, it could not relate back to the date of

the original pleading. MCR 2.118(D) and (E); *Grist*, 1 Mich App at 84. Through the assignment, plaintiffs only obtained the rights Hensley actually held at the time of the execution of the assignment, *Burkhardt*, 260 Mich App at 652-653, and plaintiffs cannot rely on the relation-back doctrine to essentially gain the potential for a greater right to recovery than they actually received. As our Supreme Court explained in *Jones v Chambers*, 353 Mich 674, 681-682; 91 NW2d 889 (1958):[12]

> The assignment created nothing. It simply passed to plaintiffs' insurer rights already in existence, if any. If plaintiffs' insured had no rights, then plaintiffs' insurer acquired none by virtue of the assignment. To rule otherwise would be to give such an assignment some strange alchemistic power to transform a dross and worthless cause of action into the pure gold from which a judgment might be wrought. [Quotation marks omitted.]

Therefore, through the assignments in this case, plaintiffs did not obtain the right to pursue no-fault benefits for any portion of the loss incurred more than one year before July 11, 2017, because that is the pertinent point of reference for purposes of the one-year-back rule. A supplemental pleading predicated on the July 11, 2017 assignments could not relate back to the date of the original pleading.

### D. APPLICATION

We now turn to the trial court's final ruling granting summary disposition in favor of defendant and denying plaintiffs' motion for leave to amend.

"This Court reviews de novo the trial court's decision

[12] Although the language from *Jones* that we have quoted was a quotation attributed to the circuit court judge in that case, our Supreme Court explicitly adopted this reasoning. *Id*. at 682.

to grant or deny summary disposition." *Rory*, 473 Mich at 464. The trial court granted summary disposition pursuant to MCR 2.116(C)(8).

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." When deciding a motion brought under this section, a court considers only the pleadings. [*Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999) (citations omitted).]

However, we note that the trial court clearly considered material outside the pleadings, contrary to the proper procedure for considering a motion under MCR 2.116(C)(8). The insurance policy that contained the antiassignment clause was crucial to the trial court's decision that plaintiffs could not maintain any claim against defendant predicated on assignments from Hensley; this insurance policy was attached to defendant's reply brief in support of its motion for summary disposition and defendant's response to plaintiffs' motion for leave to amend the complaint. Furthermore, the assignments on which plaintiffs relied were attached to plaintiffs' brief in opposition to the motion for summary disposition, as well as plaintiffs' brief in support of their motion for leave to amend the complaint. While a written instrument that forms the basis for a claim or defense and that is attached to or referred to in a pleading may be treated as "part of the pleading for all purposes," MCR 2.112(F), neither the assignments nor the insurance policy were attached to or referred to in a *pleading*, MCR 2.110(A) (defining the term "pleading" to include only a complaint, cross-

claim, counterclaim, third-party complaint, an answer to any of the aforementioned pleadings, or a reply to an answer).

Therefore, we treat the motion as having been brought and decided under MCR 2.116(C)(10) because it necessarily involved considering material outside the pleadings.[13] Cf. *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007) ("[W]here, as here, the trial court considered material outside the pleadings, this Court will construe the motion as having been granted pursuant to MCR 2.116(C)(10).").

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden*, 461 Mich at 120 (citations omitted).]

"The grant or denial of leave to amend pleadings is within the trial court's discretion." *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*, 270 Mich App 110, 142; 715 NW2d 398 (2006). A trial court's decision on whether to permit a party to serve a supplemental pleading is also discretionary. See MCR 2.118(E) (providing in pertinent part that the court "may, on reasonable notice and on just terms, permit the party to serve a supplemental pleading"); *In re Weber Estate*,

[13] Moreover, neither party has argued in the trial court or on appeal that the trial court erroneously considered material outside the pleadings in treating the summary disposition as a motion under MCR 2.116(C)(8). Therefore, any potential appellate challenge on this ground is abandoned. *Houghton*, 256 Mich App at 339-340.

257 Mich App 558, 562; 669 NW2d 288 (2003) ("[T]he term 'may' presupposes discretion and does not mandate an action."). "[A] motion to amend should ordinarily be denied only for particularized reasons, including undue delay, bad faith or a dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility." *PT Today, Inc*, 270 Mich App at 143. "The trial court must specify its reasons for denying leave to amend, and the failure to do so requires reversal unless the amendment would be futile." *Id*. "[A]mendment is generally a matter of right rather than grace." *Id*.

"This Court will not reverse a trial court's decision regarding leave to amend unless it constituted an abuse of that discretion that resulted in injustice." *Id*. at 142. "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *In re Kostin Estate*, 278 Mich App 47, 51; 748 NW2d 583 (2008). "A trial 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); see also *Kidder v Ptacin*, 284 Mich App 166, 170; 771 NW2d 806 (2009) ("A court by definition abuses its discretion when it makes an error of law.") (quotation marks and citation omitted).

In this case, the trial court granted defendant's motion for summary disposition and denied plaintiffs' motion for leave to amend their complaint because the trial court concluded that the antiassignment clause prohibited any assignment from Hensley and that any claims based on such an assignment would be time-barred nonetheless.

"If a trial court grants summary disposition pursuant to MCR 2.116(C)(8), (C)(9), or (C)(10), the court must give the parties an opportunity to amend their pleadings pursuant to MCR 2.118, unless the amendment would be futile." *Yudashkin v Holden*, 247 Mich App 642, 651; 637 NW2d 257 (2001) (quotation marks and citation omitted); see also MCR 2.116(I)(5) ("If the grounds asserted are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified."). "An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim." *Yudashkin*, 247 Mich App at 651 (quotation marks and citation omitted). Under MCR 2.118(A)(2), a party may amend a pleading by leave of the court, and such "[l]eave shall be freely given when justice so requires."

As previously discussed, the antiassignment clause was unenforceable to the extent that it prohibited the particular assignments at issue, and the one-year-back rule did not bar *all* of plaintiffs' claims but rather those that were based on services provided more than one year before the date of the assignments. Accordingly, the trial court's decision was based on a misapplication of the law, and the trial court necessarily abused its discretion by denying plaintiffs the opportunity to serve their supplemental pleading. *Ronnisch*, 499 Mich at 552. Similarly, because the antiassignment clause was not enforceable and the one-year-back rule did not bar all of plaintiffs' claims, the trial court erred by granting defendant's motion for summary disposition without properly applying the law in determining whether an amendment of the pleadings would be futile. *Rory*, 473 Mich at 464; *Yudashkin*, 247 Mich App at 651.

Defendant's remaining argument related to the jurisdictional minimum for the amount in controversy constitutes an argument that an alternate ground for affirming the trial court's ruling exists. This argument was not presented to the trial court. As an error-correcting court, *W A Foote*, 321 Mich App at 181, this Court's review is generally limited to matters actually decided by the lower court, *Allen*, 205 Mich App at 564-565. We acknowledge that this Court may affirm the grant of summary disposition on an alternate ground that was not decided by the trial court when the issue was presented to the trial court. *Adell Broadcasting Corp v Apex Media Sales, Inc*, 269 Mich App 6, 12; 708 NW2d 778 (2005). However, it is apparent that the trial court's ruling in the instant case was based on an erroneous application of the pertinent legal principles because the trial court determined (1) that the antiassignment clause was enforceable in this case, contrary to Michigan public policy, and (2) that the one-year-back rule would bar *all* of plaintiffs' claims even if the assignments had been treated as valid. Accordingly, we conclude that it would be better for any additional matters relating to plaintiffs' proposed supplemental complaint to be addressed in the first instance by the trial court under the proper legal framework.

We reverse the order of the trial court and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. We decline to award taxable costs under MCR 7.219(A).

TUKEL, J., concurred with BORRELLO, P.J.

SHAPIRO, J. (*concurring in part and dissenting in part*). I concur with the majority's conclusion that the antiassignment clause in defendant State Farm

Mutual Automobile Insurance Company's policy is unenforceable because it conflicts with longstanding principles of contract law and the Michigan no-fault act, MCL 500.3101 *et seq*. I dissent from the majority's conclusion that the one-year-back provision runs from the date of the assignment rather than from the date set forth in the no-fault act, i.e., the date "the action was commenced." Lastly, I conclude that *W A Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159; 909 NW2d 38 (2017), was wrongly decided and that *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017), should be given only prospective application.

## I. ANTIASSIGNMENT CLAUSE

For over 100 years, Michigan law has provided that all contracts, other than those that involve personal performance, are assignable. In *Northwestern Cooperage & Lumber Co v Byers*, 133 Mich 534, 538; 95 NW 529 (1903), the Michigan Supreme Court held that

> where an executory contract is not necessarily personal in its character, and can, consistent with the rights and interests of the adverse party, be fairly and sufficiently executed as well by an assignee as by the original contractor, and when the latter has not disqualified himself from a performance of the contract, it is assignable.

Accord *Voigt v Murphy Heating Co*, 164 Mich 539; 129 NW 701 (1911); *Detroit, T & I R Co v Western Union Tel Co*, 200 Mich 2, 5; 166 NW 494 (1918).

This basic principle of contract law has never changed. It was recently articulated in *In re Jackson*, 311 BR 195, 200-201 (Bankr WD Mich, 2004), when, applying Michigan law, the court stated:

> As a general rule, contract rights and duties are assignable.
>
> Notwithstanding this general rule, Michigan law recognizes certain classes of contracts as inherently nonassignable in their character, such as promises to marry, or engagements for personal services, requiring skill, science, or peculiar qualifications. [Citations omitted.]

In this case, it is undisputed that the contract in question is not one for personal services, and it therefore falls within the general rule that contract rights may be assigned.

Defendant argues that despite this general rule, the insured may not assign his right to overdue benefits because its insurance policy contains an antiassignment clause. The majority properly relies on *Roger Williams Ins Co v Carrington*, 43 Mich 252; 5 NW 303 (1880), for the principle that once the assigning party has performed, its right to assign past benefits cannot be contractually limited. Significantly, *Roger Williams* does not stand alone, and multiple legal authorities support its analysis.

The case of *In re Jackson*, cited earlier, is directly on point. The contract in that case was a settlement agreement that provided for Jackson to receive annuity payments. *In re Jackson*, 311 BR at 197. The settlement contract contained an antiassignment clause, and the question before the court was whether the annuity payments could nevertheless be assigned. The court answered affirmatively, noting that while a party may not assign benefits while its own performance is incomplete, it cannot be barred from assigning its rights as to the other party's performance once it has itself performed:

> An executory contract is "a contract that remains wholly unperformed *or for which there remains something*

> *still to be done on both sides*." With respect to [Jackson's] contractual obligations, the Settlement Agreement is not executory. Immediately upon executing the Settlement Agreement, [Jackson] released her claims against the state court defendants and dismissed her lawsuit with prejudice. As of the date of [Jackson's] agreement with Settlement Capital, Jackson had fully performed the duties required of her.
>
> Therefore, [Jackson], *having held up her end of the bargain with Transamerica Insurance, had every right to partially assign her interest in the annuity to Settlement Capital, irrespective of the anti-assignment clause*. The modern trend with respect to contractual prohibitions on assignments is to interpret them narrowly, as barring only the delegation of duties, and not necessarily as precluding the assignment of rights from assignor to assignee. Unless the circumstances indicate the contrary, a contract term prohibiting assignment of 'the contract' bars only the delegation to an assignee of the performance by the assignor of a duty or condition. [*Id*. at 201 (quotation marks and citations omitted; emphasis added).]

The *In re Jackson* court further explained:

> [It is argued] that the anti-assignment clause in the Settlement Agreement renders inapplicable the general rule that contract rights and duties are assignable. We find however, that Michigan law mandates application of the general rule. This finding is based on the theory that *once a party to a contract performs its obligations to the point that the contract is no longer executory, its right to enforce the other party's liability under the contract may be assigned without the other party's consent, even if the contract contains a non-assignment clause*. [*Id*. (quotation marks and citations omitted; emphasis added).]

This principle is broadly recognized. As described in Couch on Insurance:

> [T]he great majority of courts adhere to the rule that general stipulations in policies prohibiting assignments of

> the policy, except with the consent of the insurer, apply only to assignments before loss, and do not prevent an assignment after loss, for the obvious reason that the clause by its own terms ordinarily prohibits merely the assignment of the policy, as distinguished from a claim arising under the policy, and the assignment before loss involves a transfer of a contractual relationship while the assignment after loss is the transfer of a right to a money claim. *The purpose of a no assignment clause is to protect the insurer from increased liability, and after events giving rise to the insurer's liability have occurred, the insurer's risk cannot be increased by a change in the insured's identity*. [3 Couch, Insurance, 3d, § 35:8, pp 35-15 through 35-18 (emphasis added).]

Another learned treatise states:

> Antiassignment clauses in insurance policies are strictly enforced against attempted transfers of the policy itself before a loss has occurred, because this type of assignment involves a transfer of the contractual relationship and, in most cases, would materially increase the risk to the insurer. Policy provisions that require the company's consent for an assignment of rights are generally enforceable only before a loss occurs, however. As a general principle, *a clause restricting assignment does not in any way limit the policyholder's power to make an assignment of the rights under the policy—consisting of the right to receive the proceeds of the policy—after a loss has occurred*. The reasoning here is that once a loss occurs, an assignment of the policyholder's rights regarding that loss in no way materially increases the risk to the insurer. After a loss occurs, the indemnity policy is no longer an executory contract of insurance. It is now a vested claim against the insurer and can be freely assigned or sold like any other chose in action or piece of property. [17 Williston, Contracts (4th ed), § 49:126, pp 130-132 (emphasis added).]

The Restatement of Contracts, 2d, § 322(1), pp 31-32, articulates the same rule, stating, "Unless the circum-

stances indicate the contrary, a contract term prohibiting assignment of 'the contract' bars only the delegation to an assignee of the performance by the assignor of a duty or condition." This principle is more clearly expressed in the Restatement of Contracts, 2d, § 322(2), p 32, which provides that "[a] contract term prohibiting assignment of rights under the contract . . . does not forbid assignment of a right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation[.]"

Defendant State Farm makes a public-policy argument, asserting that permitting the assignment of rights after the loss has occurred will significantly complicate the claims process. This argument is both factually and legally flawed. It is *factually* flawed for two reasons. First, defendant already has a claims process that has been operational for decades that allows for assignments and payments to providers. Second, defendant's claim of increased administrative costs is not supported by any *evidence.* It should come as no surprise that a court may not base its decision on factual assertions unsupported by any evidence; such factual assertions amount to nothing more than speculation until such evidence is proffered. Defendant's public-policy argument is *legally* flawed for two reasons. First, it is inconsistent with over 100 years of law. Second, defendant's position is intrinsically contrary to the purpose of the no-fault system, which is designed to provide "*assured*, adequate, and prompt reparation for certain economic losses." *Shavers v Attorney General*, 402 Mich 554, 579; 267 NW2d 72 (1978) (emphasis added). Defendant takes the position that it has an unrestricted right to employ mechanisms to decrease its *administrative costs* even when those administrative mechanisms will result in a denial of benefits to

injured persons who have paid their premiums and obtained reasonable and necessary medical treatment following a covered accident.

This view is contrary to Michigan law generally and to the no-fault act in particular. As the court explained in *Wonsey v Life Ins Co of North America*, 32 F Supp 2d 939, 943 (ED Mich, 1998):

> [D]efendants strenuously argue that when a beneficiary of a structured settlement agreement decides to sell all or a number of his future payments, "it requires a complicated review process" and that "defendants [would be required] to review substantial paper work, and [to] determine if the assignment appears to be legal . . . and/or whether any guarantees or releases provided by the assignor . . . are satisfactory to fully and completely protect [defendants] . . . ." The Court is not persuaded. *The reasons asserted by defendants in objecting to the proposed assignment do not appear to amount to substantial harm or actual prejudice to defendants' interests, but merely center upon the necessary administrative tasks associated with the assignment's implementation.* As such, defendants have not submitted sufficient reasons to . . . [enforce] contractual anti-assignment clauses. [Second and third alterations in original; emphasis added.]

The no-fault act itself speaks to the issue of assignment. It provides, "An agreement for assignment of a right to benefits *payable in the future* is void." MCL 500.3143 (emphasis added). Notably, the Legislature elected not to void assignment of past-due benefits. By not including past-due benefits in this statutory prohibition, the Legislature, under the doctrine of *expressio unius est exclusio alterius*, made clear its intent to adhere to the fundamental principle that assignments of past-due benefits are effective and proper.

Defendant argues that its "right of contract" must supersede these longstanding principles. However, it

cites nothing in the no-fault act providing that insurers may add *policy language*, ostensibly to limit administrative costs, that has the effect of denying benefits to individuals who are entitled to them under the *statutory language*. Defendant cites *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005), for the principle that an insurance contract may include provisions to which the no-fault act does not speak. However, defendant reads *Rory* too generously. *Rory* involved uninsured motorist coverage, an insurance product whose mechanism is not governed by the no-fault act.[1]

Defendant's theory seems to be that it may include any provision in its policies so long as the provision is not explicitly barred in the no-fault act. It contends, therefore, that it has the right to add policy provisions not provided for in the act whose result, if not purpose,

[1] I respectfully suggest that the Michigan Supreme Court should revisit *Rory*'s conclusion that there is no such thing as a "contract of adhesion." Anyone (except perhaps some lawyers and judges) who has ever purchased an automobile insurance policy—which under state law all car owners must do—knows exactly what a contract of adhesion is. One party, typically an individual, is presented with a preprinted policy and told to "take it or leave it." On the other side is typically an insurance entity with billions of dollars in assets and multiple employees dedicated to drafting contract language that will favor the entity in every way possible under the law or in what the entity hopes it can reshape the law to be. If the individual, assuming he or she is able to understand the policy language, declines to accept every word as written, they will not be permitted to purchase a policy. No revisions are even entertained. Moreover, if this individual then seeks coverage from a competitor insurer, they are all but certain to face the same or similar situation. In sum, the only "freedom of contract" that an individual purchaser has is to buy or not to buy a policy. And that freedom is illusory because by law every vehicle owner must obtain insurance. Accordingly, I respectfully suggest that the "freedom of contract" discussed in *Rory* is less a reality in this context than it is a phrase used to permit the judicial branch to ignore the words and the will of the Legislature as defined in the no-fault act.

is to deny benefits to people who qualify under the statute. This position cannot be squared with the fundamental goal of the no-fault act to provide "*assured*, adequate, and prompt reparation for certain economic losses." *Kelley*, 402 Mich at 579 (emphasis added).

Defendant's conceptual error lies in its view that the no-fault act is defined by what *it does not say*, i.e., because the act does not explicitly prohibit an antiassignment provision, an insurer is free to insert such a provision into the policy regardless of its effect on the functioning of the no-fault system and an insured's ability to obtain covered medical treatment. However, the no-fault act must be defined by what it *does say*. It defines a comprehensive statewide *system* designed to provide "assured, prompt and adequate" coverage for medical services following an auto accident. *Id*. The fact that the act does not contain an omnibus list of actions inconsistent with that comprehensive system does not mean that it intended that such actions be permitted. There is nothing in the act that indicates that the Legislature intended to allow insurers to unilaterally add limitations on benefits. Ultimately, if insurers are free to add whatever administrative conditions or hurdles their policy drafters can define, then the Legislature's comprehensive system will be sliced and diced by artfully drafted policy provisions, depriving insureds the benefits they paid for and that the no-fault act mandates. Defendant's position is a slippery slope by which the no-fault system dies the death of a thousand cuts.

## II. ONE-YEAR-BACK RULE

I dissent from the majority's conclusion that the one-year-back date should be measured from the date

of the assignment and not from the date that suit was filed. The statute provides that benefits may not be recovered "for any portion of the loss incurred more than 1 year before *the date on which the action was commenced*." MCL 500.3145(1) (emphasis added). In this case, the action was commenced on February 24, 2017, by these plaintiffs—Jawada Shah, M.D., PC; Integrated Hospital Specialists, PC; Insight Anesthesia, PLLC; and Sterling Anesthesia, PLLC—against this defendant. Nothing has changed in the nature of the action. I respectfully suggest that the majority is mistaken in its view that the addition of an allegation to establish standing when the issue is raised "commences" a new "action."

The majority cites scant authority for this position. It cites *Burkhardt v Bailey*, 260 Mich App 636, 653; 680 NW2d 453 (2004), for the general principle that an "assignee stands in the position of the assignor, possessing the same rights and being subject to the same defenses."[2] From this, the majority concludes that

[2] *Burkhardt* was not a no-fault case, and the question was whether a party could assign rights it did not possess at the time of the assignment. In the instant case, by contrast, there is no dispute about the insured's possession of the right to benefits when he assigned them to the plaintiff healthcare providers. Specifically, *Burkhardt* concerned multiple parties involved in a tax foreclosure and subsequent assignments. The party foreclosed upon, Michael Bailey, did not redeem, and the plaintiff purchased the property at tax auction. *Id*. at 639-640. The plaintiff, however, failed to give notice to the mortgagor, Bond Corporation. *Id*. at 640. The case came before this Court twice. In its first decision, the Court refused to quiet title and held that Bailey had lost all rights of redemption but that the plaintiff still had time to provide notice to the mortgagee who could, thereupon, object and assert its rights, which Bond later did. *Id*. at 641. While the case was pending on appeal, the intervening defendants, Ralph and Lona Hamilton, provided funds to Bailey to pay off his mortgage and Bond recorded a discharge of the mortgage. *Id*. at 641-642. After the discharge of the mortgage, Bond assigned any rights of redemption it had to the Hamiltons, who sought

"plaintiffs could not obtain any greater rights from Hensley on the date of the assignments—July 11, 2017—than Hensley himself possessed on that date." However, the triggering of the one-year-back statute does not depend on whether there was a "right" to file suit; it triggers on the date suit was filed. Of course, if a party lacks the "right" to sue, then the court in which the suit was filed will dismiss it, and in those cases, the application of the one-year-back rule will not be at issue. However, here, plaintiffs sought to amend their complaint to cure the standing problem *before* the court ordered that it be dismissed, and as already noted, neither the parties nor the cause of action changed in any way.

The majority also relies on *Grist v Upjohn Co*, 1 Mich App 72; 134 NW2d 358 (1965), to support its conclusion, but the question in that case was fundamentally different than the one before us today. In *Grist*, the plaintiff sued for defamation. *Id*. at 75. Later, she sought to add an additional count of defamation related to other acts that had occurred since the filing of her complaint. *Id*. at 76-77, 85. However, because the statute of limitations had run as to these new claims, she asserted that she could add them to her original complaint by the doctrine of relation back. *Grist*, 1 Mich at 83-84. The Court rejected the argument, stating that the plaintiff could not add new *claims* as to which the statute had run by adding them to a previously filed action. *Id*. at 84-85. In the instant case, plaintiffs do not seek to add any claim and

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to redeem. The Court determined that once the mortgage was discharged, Bond's rights as mortgagor were extinguished and that Bond accordingly had no right of redemption to assign to the Hamiltons. *Id*. at 645-646. Accordingly, the Court concluded that Bond's assignment to the Hamiltons was void and granted the plaintiff a quiet-title judgment. *Id*. at 660-661.

certainly do not seek to add a claim as to which the statute of limitations has run. Indeed, every claim at issue in this case was defined and set forth in the initial complaint. Plaintiffs seek exactly what they sought at the outset of the case, payment of past-due benefits.

Accordingly, I would hold that the one-year-back period runs from the date the suit was filed.

### III. RETROACTIVITY OF *COVENANT*

In *Covenant*, 500 Mich at 195-196, the Michigan Supreme Court held that healthcare providers do not have an independent cause of action against a no-fault carrier for failure to pay benefits. In *W A Foote Mem Hosp*, 321 Mich App at 196, this Court concluded that the rule articulated in *Covenant* should be applied retroactively. I agree with much of the Court's analysis in that case. The opinion accurately reviews the United States Supreme Court's decision in *Harper v Virginia Dep't of Taxation*, 509 US 86, 97, 100; 113 S Ct 2510; 125 L Ed 2d 74 (1993), which held that retroactive application must be given to federal decisions involving federal law but that the individual states are not bound to follow that rule when interpreting state law. I am less convinced by the *W A Foote Mem Hosp* Court's reliance on *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 536; 821 NW2d 117 (2012), to support its conclusion that *Covenant* should be applied retroactively. The *Spectrum Health Hosps* Court continued to recognize an exception to the principle of retroactivity, stating:

> When a statute law has received a given construction by the courts of last resort and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated, nor

> vested rights acquired under them impaired, by a change of construction made by a subsequent decision. [*Id*. (quotation marks and citation omitted).]

The Court went on to note that in the case before it, the "decision today does not at all affect the parties' contractual rights" and should be retrospectively applied. *Id*. at 536-537.

There is no question that plaintiffs: (1) properly and reasonably relied on what appeared to be settled law when they filed suit, (2) provided services to defendant's insured based upon that law, and (3) have not been paid. A prospective application would merely allow healthcare providers who provided services based on the law as it was universally understood to be paid for those already-provided services. A retroactive application, by contrast, creates a distorted result inconsistent with the no-fault act. The hospital, which provided a valuable service, will remain unpaid, while the insurer, which has already been paid through the insured's premiums, will not have to provide the service it was paid to perform.

With these concerns in mind, I respectfully suggest that the better course would be to follow the commonsense principles described in *Tebo v Havlik*, 418 Mich 350; 343 NW2d 181 (1984), which involved complaints that were filed before the Supreme Court's decision in *Putney v Haskins*, 414 Mich 181; 324 NW2d 729 (1982). In *Putney*, the Supreme Court concluded that MCL 436.22(5)[3] required dramshop plaintiffs "to name and retain" the intoxicated driver as a defendant until the litigation was concluded when also suing the bar or retail liquor licensee that served the

[3] MCL 436.22, as amended by 1980 PA 351, was in effect when *Putney* was decided. That statute was repealed by 1998 PA 58 and replaced by MCL 436.1801, as enacted by 1998 PA 58.

intoxicated driver. The question in *Tebo*, therefore, was whether the Court's interpretation of the "name and retain" requirement—which implicitly overruled earlier Court of Appeals decisions—should be applied retroactively, which would result in the dismissal of many dramshop cases filed before that case. The *Tebo* Court stated:

> It is evident that there is no single rule of thumb which can be used to accomplish the maximum of justice in each varying set of circumstances. The involvement of vested property rights, the magnitude of the impact of decision on public bodies taken without warning or a showing of substantial reliance on the old rule may influence the result.
>
> The benefit of flexibility in opinion application is evident. If a court were absolutely bound by the traditional rule of retroactive application, it would be severely hampered in its ability to make needed changes in the law because of the chaos that could result in regard to prior enforcement under that law. *Placek v City of Sterling Heights*, 405 Mich 638, 665; 275 NW2d 511 (1979).
>
> Appreciation of the effect a change in settled law can have has led this Court to favor only limited retroactivity when overruling prior law. Thus, when the doctrine of imputed negligence was overruled in *Bricker v Green*, 313 Mich 218; 21 NW2d 105 (1946), the decision was applied only to the case before the Court and to pending and future cases. When the doctrine of charitable immunity was overruled in *Parker v Port Huron Hospital*, 361 Mich 1; 105 NW2d 1 (1960), the retroactive effect of the decision was limited to the parties before the Court. Even where statutory construction has been involved, this Court has limited the retroactivity of a decision when justice so required.
>
> The question before us is whether our interpretation of a statute should be applied retroactively to the statute's effective date. In *Putney*, we found the clear import

> of the statute to be to require the plaintiff to name and retain the allegedly intoxicated person at risk. Were *Putney* a case of first impression in the Michigan courts, we would hold that the statutory language gave plaintiffs no reason to believe that the settlements entered into would comply with the "retain" portion of the statute. *Putney*, however, was not a case of first impression in the Michigan courts. [*Tebo*, 418 Mich at 360-361 (opinion by BRICKLEY, J.) (quotation marks and some citations omitted).][4]

The *Tebo* Court further stated:

> In light of the unquestioned status of [*Buxton v Alexander*, 69 Mich App 507; 245 NW2d 111 (1976),] at the time *Putney* was decided by this Court, it would be unjust to apply *Putney* retroactively to persons other than those before the Court in that case.
>
> In contrast to the harsh effect which the full retroactivity of *Putney* would have on injured plaintiffs, prospective application will have little effect on dramshop defendants in those pending cases where settlement agreements have been made, even though the defense of *Putney* will be unavailable. For them, the law will simply remain as it was from 1976 to 1982. We hold that *Putney v Haskins* is applicable to all cases where settlement agreements are entered into with the allegedly intoxicated person after the date of decision in *Putney*. [*Tebo*, 418 Mich at 363-364.]

For these reasons, I conclude that *W A Foote Mem Hosp* was wrongly decided and that *Covenant* should only be applied prospectively.

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[4] Justice BOYLE concurred with Justice BRICKLEY's opinion in full. *Tebo*, 418 Mich at 368. Justice CAVANAGH participated only in the Court's consideration of the companion case of *Burns v Carver*, but otherwise concurred with Justice BRICKLEY. *Id*. In separate concurrences, Chief Justice WILLIAMS and Justice RYAN agreed with the retroactivity decision. *Id*. at 368-369 (WILLIAMS, C.J., concurring); *id*. at 373 (RYAN, J., concurring).

## IV. CONCLUSION

I join the majority in holding that the antiassignment clause in the policy is unenforceable. I dissent from the majority's conclusion as to the one-year-back rule, which I conclude should be calculated from the date plaintiffs filed suit.

DOE v DEPARTMENT OF TRANSPORTATION

Docket No. 338999. Submitted May 2, 2018, at Lansing. Decided May 8, 2018, at 9:05 a.m. Leave to appeal denied 503 Mich 876.

Jane Doe brought an action against the Department of Transportation in the Ingham Circuit Court, alleging that while employed by defendant, she was sexually harassed by her manager in violation of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*. Plaintiff demanded a jury trial. Defendant moved to transfer the action to the Court of Claims and moved for summary disposition, arguing that plaintiff failed to comply with the requirements for filing in the Court of Claims. Plaintiff moved to transfer the case back to the circuit court, arguing that the jury-trial exception in MCL 600.6421(1) to the exclusive jurisdiction of the Court of Claims applied. In response to plaintiff's motion, defendant argued that the jury-trial exception did not apply because plaintiff was not entitled to a jury trial in an action under the ELCRA against a state defendant. The Court of Claims, STEPHEN L. BORRELLO, J., held that plaintiff had the right to a jury trial in an action under the ELCRA and that Michigan's appellate courts had extended this right to claims against the state or state agencies. The Court of Claims concluded that because a jury-trial right existed in this case, the circuit court and the Court of Claims had concurrent jurisdiction. Accordingly, the Court of Claims granted plaintiff's motion for transfer to the circuit court, denied as moot defendant's motion for summary disposition, and denied plaintiff's motion for sanctions. Defendant appealed with respect to the court's granting plaintiff's motion to transfer and denying defendant's motion for summary disposition.

The Court of Appeals *held*:

MCL 600.6419(1) states, in pertinent part, that except as provided in MCL 600.6421 and MCL 600.6440, the jurisdiction of the Court of Claims, as conferred upon it under the Court of Claims Act, is exclusive. MCL 600.6421(1) provides that nothing in the Court of Claims Act eliminates or creates any right a party may have to a trial by jury, including any right that existed before November 12, 2013; that nothing in the act deprives the circuit, district, or probate court of jurisdiction to hear and determine a

claim for which there is a right to a trial by jury as otherwise provided by law, including a claim against an individual employee of this state for which there is a right to a trial by jury as otherwise provided by law; and that except as otherwise provided in MCL 600.6421, if a party has the right to a trial by jury and asserts that right as required by law, the claim may be heard and determined by a circuit, district, or probate court in the appropriate venue. In this case, defendant argued that the right to a jury trial under the ELCRA does not extend to state defendants and therefore that the Court of Claims had exclusive jurisdiction. The Supreme Court's reasoning in *Anzaldua v Band*, 457 Mich 530 (1998), in which the Court held that the state may be tried by a jury in lawsuits brought under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., was instructive in interpreting the ELCRA. MCL 37.2202(1) of the ELCRA prohibits discrimination by an "employer"; MCL 37.2201(a) defines an "employer" as "a person"; and MCL 37.2103(g) specifically includes the state and its political subdivisions in the definition of a "person." Therefore, the Legislature intended for the state and its political subdivisions to be regulated by and subject to the ELCRA. MCL 37.2801(2) allows suit under the ELCRA to be brought in circuit court. Nothing in the ELCRA indicates that the state is to be treated differently from any other employer, indicating that the Legislature chose to subject the state to suit in the circuit court rather than in the Court of Claims. Thus, the Legislature indicated its intent to submit the state to the jurisdiction of the circuit court. And the court rules governing civil actions in circuit court allow a party seeking money damages to be tried by a jury upon request. Hence, the Legislature consented that the state may be tried by a jury in ELCRA cases; in other words, the Legislature waived the state's immunity from jury trial in actions brought under the ELCRA. Because plaintiff was entitled to a jury trial against defendant in her action under the ELCRA, the Court of Claims had concurrent jurisdiction with the circuit court by virtue of MCL 600.6421(1). Therefore, the Court of Claims did not err by transferring the case back to the circuit court.

Affirmed.

ACTIONS — CIVIL RIGHTS — ELLIOTT-LARSEN CIVIL RIGHTS ACT — RIGHT TO JURY TRIAL — STATE DEFENDANTS.

A plaintiff who alleges a violation of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*., has the right to a jury trial; the state and its political subdivisions may be tried by a jury in lawsuits brought under the ELCRA.

*Bill Schuette*, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *Michael J. Dittenber*, Assistant Attorney General, for the Department of Transportation.

*Ringsmuth Wuori PLLC* (by *Blake K. Ringsmuth* and *Thomas J. Wuori*) for Jane Doe.

Before: SHAPIRO, P.J., and M. J. KELLY and O'BRIEN, JJ.

PER CURIAM. Defendant appeals as of right the opinion and order of the Court of Claims granting plaintiff's motion to transfer the case back to the circuit court, denying as moot defendant's motion for summary disposition, and denying plaintiff's motion for sanctions. Defendant only appeals the order with respect to its granting plaintiff's motion to transfer and denying defendant's motion for summary disposition. We affirm.

Plaintiff filed her original complaint in the Ingham Circuit Court on August 31, 2015, alleging that while employed by defendant, she was sexually harassed by her manager in violation of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*. On April 1, 2016, plaintiff filed a first amended complaint alleging sexual harassment and illegal retaliation by defendant in violation of the ELCRA. Both complaints included a jury demand. On May 25, 2017, defendant filed a notice of transfer to the Court of Claims, "effective immediately," pursuant to MCL 600.6404(3). On the same day, defendant moved for summary disposition under MCR 2.116(C)(7), arguing that it was entitled to summary disposition because plaintiff failed to comply with the requirements for filing in the Court of Claims.

On June 5, 2017, plaintiff filed an emergency motion to transfer the case back to the circuit court, arguing that the jury-trial exception in MCL 600.6421(1) to the exclusive jurisdiction of the Court of Claims applied. In response to plaintiff's motion, defendant argued that the jury-trial exception did not apply because plaintiff was not entitled to a jury trial in an action under the ELCRA against a state defendant.

On June 20, 2017, the Court of Claims issued its opinion. The court found that it was "well established in this state's jurisprudence that [plaintiff] enjoys" the right to a jury trial in an action under the ELCRA and that Michigan's appellate courts had extended this right "to claims against the state or state agencies." The Court of Claims concluded that because a jury-trial right existed in this case, the circuit court and the Court of Claims had concurrent jurisdiction. Accordingly, the court granted plaintiff's motion for transfer to the circuit court and denied as moot defendant's motion for summary disposition.

This appeal followed.

Defendant argues that the Court of Claims erred by transferring the case back to the circuit court because the Court of Claims had exclusive jurisdiction. MCL 600.6419(1) states, in pertinent part, "Except as provided in sections 6421 and 6440, the jurisdiction of the court of claims, as conferred upon it by this chapter, is exclusive." If an exception does not apply, then the Court of Claims has exclusive jurisdiction over this action pursuant to MCL 600.6419(1)(a).[1] The only

[1] MCL 600.6419(1)(a) states that the Court of Claims has jurisdiction

> [t]o hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory

exception that may apply to the Court of Claims' exclusive jurisdiction is MCL 600.6421(1), which provides as follows:

> Nothing in this chapter eliminates or creates any right a party may have to a trial by jury, including any right that existed before November 12, 2013. Nothing in this chapter deprives the circuit, district, or probate court of jurisdiction to hear and determine a claim for which there is a right to a trial by jury as otherwise provided by law, including a claim against an individual employee of this state for which there is a right to a trial by jury as otherwise provided by law. Except as otherwise provided in this section, if a party has the right to a trial by jury and asserts that right as required by law, the claim may be heard and determined by a circuit, district, or probate court in the appropriate venue.

If plaintiff had the right to a jury trial in her case against defendant, defendant does not contest that transfer back to the circuit court was otherwise proper.

On appeal, defendant concedes that a right to a jury trial exists under the ELCRA but argues that this right does not extend to *state* defendants. Defendant contends that because a plaintiff does not have an established right to a jury trial in an action under the ELCRA when the state is the defendant, the Court of Claims had exclusive jurisdiction. This argument fails because the question is not whether a plaintiff enjoys the right to a jury trial against a state defendant in an action under the ELCRA; plaintiffs already enjoy the right to a jury trial under the ELCRA. The proper inquiry is whether the Legislature waived the state's immunity from jury trial in the ELCRA.

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relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court.

A challenge to the jurisdiction of the Court of Claims requires interpretation of the Court of Claims Act, MCL 600.6401 *et seq*., which presents a statutory question that is reviewed de novo. *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 767; 664 NW2d 185 (2003). The availability of governmental immunity presents a question of law that is reviewed de novo. *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 578; 808 NW2d 578 (2011). "Issues of statutory interpretation are questions of law that are reviewed de novo." *Klooster v City of Charlevoix*, 488 Mich 289, 295; 795 NW2d 578 (2011).

" 'The State, as sovereign, is immune from suit save as it consents to be sued, and any relinquishment of sovereign immunity must be strictly interpreted.' " *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 601; 363 NW2d 641 (1984), quoting *Manion v State Hwy Comm'r*, 303 Mich 1, 19; 5 NW2d 527 (1942).

In addressing the issue before us, we find instructive our Supreme Court's reasoning in *Anzaldua v Band*, 457 Mich 530; 578 NW2d 306 (1998).[2] *Anzaldua* involved the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. After finding that a plaintiff had a

[2] This Court has twice held that a plaintiff has the right to a jury trial when proceeding against a state defendant under the ELCRA. See *Barbour v Dep't of Social Servs*, 172 Mich App 275, 279-281; 431 NW2d 482 (1988); *Marsh v Dep't of Civil Serv*, 142 Mich App 557, 569-570; 370 NW2d 613 (1985). As published decisions of the Court of Appeals, the Court of Claims was required to follow these cases. See MCR 7.215(C)(2); *People v Mitchell*, 428 Mich 364, 369-370; 408 NW2d 798 (1987) (explaining vertical stare decisis). However, both cases were decided before our Supreme Court's decision in *Anzaldua*, and neither case expressly addressed whether the Legislature waived the state's immunity from jury trial. Although these cases are not binding on this Court because they were published before November 1, 1990, MCR 7.215(J)(1), they may be persuasive, *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2013).

statutory right to a jury trial in an action under the WPA, the Michigan Supreme Court addressed the argument of the defendant Michigan State University (MSU) that "even if a jury right exists generally under the act, MSU is immune from suit before a jury because it is an arm of the state." *Anzaldua*, 457 Mich at 550. Our Supreme Court rejected this argument, reasoning as follows:

> Defendant has confused the test we use to determine whether the state is immune from *liability* with the test used for determining whether the state is immune from *suit*. As the Court noted in *Ross v Consumers Power Co (On Rehearing)*, the state's sovereign immunity from liability and its immunity from suit are not the same.
>
> Defendant MSU and amici curiae argue that the state's sovereign immunity from a trial by jury can be waived only by "express statutory enactment or by necessary inference from a statute." They are incorrect. The quoted language comes from this Court's opinion in *Mead v Public Service Comm*, 303 Mich 168, 173; 5 NW2d 740 (1942). In *Mead*, we examined portions of the motor vehicle law, 1929 CL 4724. In ruling on *Mead*, we overturned one of our own prior decisions, *Miller v Manistee Co Bd of Rd Comm'rs*, 297 Mich 487; 298 NW 105 (1941). We held that *Miller* had given the language of the motor vehicle law too broad a construction when it extended liability to the state. *Mead*, *supra* at 172-173.
>
> In *Miller*, the Court had construed the motor vehicle law to waive the state's immunity from liability as the owner of a vehicle. *Id*. at 490. However, the motor vehicle law made only the *driver* of a vehicle liable. The act provided:
>
> > "The provisions of this act applicable to the drivers of vehicles upon the highways, shall apply to the *drivers* of all vehicles owned or operated by this State or any county, city, town, district or any other political subdivision of the State subject to such

> specific exceptions as are set forth in this act." [*Mead*, *supra* at 172-173, quoting 1929 CL 4724.]

In overruling *Miller*, the Court in *Mead* explained:

> It is sufficient to note that the above-quoted portion of the statute by its express terms affects only the duties and liabilities of *drivers*. It does not enlarge or modify the duties or liabilities of the State as *owner* of a motor vehicle. [*Id*. at 173.]

The motor vehicle law did not, by its express terms or by necessary implication, provide liability for the state as an owner. Therefore, we held that the state had not waived its immunity to liability. *Id*. at 173-174.

The Whistleblowers' Protection Act satisfies the *Mead* test for waiver of immunity from liability. The Legislature expressly applied the act to the state by including the state and its political subdivisions in the definition of "employer." See MCL 15.361(b); MSA 17.428(1)(b). Because the state is expressly named in the act, it is within the act's coverage.

However, *Mead* does not provide a test for determining whether a jury right exists against the state. The Court of Appeals dissent cited *Mead* for the proposition that the state's immunity from suit before a jury could be waived only by express statutory enactment or by necessary inference. [*Anzaldua v Band*, 216 Mich App 561, 590; 550 NW2d 544 (1996)] (O'CONNELL, J., dissenting). However, *Mead* does not concern the state's immunity from suit. Rather, the state was subject to suit in the Court of Claims, and we held merely that it was immune from liability under the act involved in that case. As we noted above, immunity from suit and immunity from liability are distinct matters. See *Ross*, *supra* at 601.

Thus, the language from *Mead* to the effect that the state waives immunity only by express statutory enactment or by necessary inference applies only to the state's immunity from liability. It has no application to the state's immunity from suit, or to immunity from trial before a jury, which is at issue here.

The rule for immunity from suit was recognized by this Court in *Ross*: " 'The State, as sovereign, is immune from suit save as it consents to be sued, and any relinquishment of sovereign immunity [from suit] must be strictly interpreted . . . .' " *Id*. at 601, quoting *Manion v State Hwy Comm'r*, 303 Mich 1, 19-21; 5 NW2d 527 (1942).

The Legislature created the Court of Claims in 1939, permitting the state to be sued before a judge. *Ross*, *supra* at 600. The broad language of the act creating the Court of Claims mandates that suits against the state for money damages are typically brought in that forum. *Id*. See MCL 600.6419; MSA 27A.6419.

As *Ross* makes clear, the Legislature was free when enacting the Whistleblowers' Protection Act to waive the state's immunity from suit. *Ross*, *supra* at 601. Section 3 of the act allows suit to be brought in the circuit courts. The statute specifically includes the state among the bodies to be regulated by defining "employers" subject to the act to include the state and its political subdivisions. Nothing in the act suggests that the state is not to be treated the same as a business for purposes of the act's protection of noncivil service employees like the plaintiff. We find it significant that the Legislature chose to subject the state to suit in the circuit court rather than in the Court of Claims.

The express language of the act indicates that the Legislature intended to submit the state to the jurisdiction of the circuit court. As indicated above, the court rules govern in civil actions in circuit court. They provide that legal actions for money damages are to be tried by a jury upon request. Hence, it necessarily follows, the Legislature consented that the state may be tried by a jury in Whistleblowers' Protection Act cases.

We uphold the result reached by the Court of Appeals on the question whether the case against MSU may be tried by a jury. We find that MSU is subject to a trial by jury under the Whistleblowers' Protection Act as provided by the court rules, generally. Plaintiff is entitled to a jury

> in her suit against both defendants. [*Anzaldua*, 457 Mich at 550-554 (citation omitted; some alterations in original).]

The WPA is constructed similarly to the ELCRA, see *id*. at 545-548, and, therefore, we find our Supreme Court's interpretation of the WPA to be instructive for how the ELCRA should be interpreted. To reiterate, defendant concedes on appeal that a jury-trial right generally exists under the ELCRA. But like MSU in *Anzaldua*, defendant in this case argues that it is not subject to jury trial because it is an arm of the state. And like MSU's argument in *Anzaldua*, defendant's argument fails.

Pursuant to MCL 37.2202:

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.[3]

Pursuant to MCL 37.2201(a), " 'Employer' means a person who has 1 or more employees, and includes an agent of that person." MCL 37.2103 provides:

> As used in this act:
>
> * * *
>
> (g) "Person" means an individual, agent, association, corporation, joint apprenticeship committee, joint stock company, labor organization, legal representative, mutual company, partnership, receiver, trust, trustee in bankruptcy, unincorporated organization, *the state or a politi-*

[3] Pursuant to MCL 37.2103(i), "Discrimination because of sex includes sexual harassment."

> *cal subdivision of the state or an agency of the state*, or any other legal or commercial entity.
>
> (h) "Political subdivision" means a county, city, village, township, school district, or special district or authority of the state. [Emphasis added.]

Based on the foregoing, "[t]he Legislature expressly applied the act to the state by including the state and its political subdivisions in the definition" of "person." *Anzaldua*, 457 Mich at 551. Relevant to the case before us, the Legislature defined "employer" as "a person" with one or more employees. MCL 37.2201(a). Therefore, like the WPA, the ELCRA satisfies "the *Mead* test for waiver of immunity from liability." *Anzaldua*, 457 Mich at 551. This conclusion is well grounded in our caselaw. See *Manning v City of Hazel Park*, 202 Mich App 685, 699; 509 NW2d 874 (1993) ("Concerning the sex and age discrimination claims, defendants do not have a governmental immunity defense because the Civil Rights Act specifically includes state and political subdivisions and their agents as employers covered by the act."); *Does 11-18 v Dep't of Corrections*, 323 Mich App 479, 490; 917 NW2d 730 (2018) ("Contrary to defendants' assertions, the law is clear that governmental immunity does not apply to ELCRA claims."); *In re Bradley Estate*, 494 Mich 367, 393 n 60; 835 NW2d 545 (2013).

However, this does not resolve whether the Legislature in the ELCRA waived the state's "immunity from suit, or to immunity from trial before a jury, which is at issue here." *Anzaldua*, 457 Mich at 552. A cause of action under the ELCRA is provided in MCL 37.2801, which states as follows:

> (1) A person alleging a violation of this act *may bring a civil action for* appropriate injunctive relief or *damages*, or both.

> (2) *An action commenced pursuant to subsection (1) may be brought in the circuit court* for the county where the alleged violation occurred, or for the county where the person against whom the civil complaint is filed resides or has his principal place of business.
>
> (3) As used in subsection (1), "damages" means damages for injury or loss caused by each violation of this act, including reasonable attorney's fees. [Emphasis added.]

When enacting the ELCRA, the Legislature was free to waive the state's immunity from suit. See *Anzaldua*, 457 Mich at 553. MCL 37.2202(1) prohibits discrimination by an "employer"; MCL 37.2201(a) defines an "employer" as "a person"; and MCL 37.2103(g) specifically includes the state and its political subdivisions in the definition of a "person." It is therefore clear that the Legislature intended for the state and its political subdivisions to be regulated by and subject to the ELCRA. See *Anzaldua*, 457 Mich at 553. MCL 37.2801(2) allows suit under the ELCRA to be brought in circuit court. Nothing in the ELCRA indicates that the state is to be treated differently from any other employer, indicating that "the Legislature chose to subject the state to suit in the circuit court rather than in the Court of Claims." *Anzaldua*, 457 Mich at 553. Therefore, based on "[t]he express language of the act . . . [,] the Legislature intended to submit the state to the jurisdiction of the circuit court." *Id*. And the court rules governing civil actions in circuit court allow a party seeking money damages "to be tried by a jury upon request." *Id*. "Hence, it necessarily follows, the Legislature consented that the state may be tried by a jury in" ELCRA cases. *Id*. at 553-554. In other words, the Legislature waived the state's immunity from jury trial in actions brought under the ELCRA.

Defendant argues that *Anzaldua* employed improper reasoning and was ultimately wrongly decided.

Whatever issues defendant may take with *Anzaldua*, "it is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until [that] Court takes such action, the Court of Appeals and all lower courts are bound by that authority." *State Treasurer v Sprague*, 284 Mich App 235, 242; 772 NW2d 452 (2009) (quotation marks and citation omitted; alteration in original); see also *People v Mitchell*, 428 Mich 364, 369-370; 408 NW2d 798 (1987).

Defendant also contends on appeal that *Anzaldua*'s "persuasive value" was "undercut" by the enactment of 2013 PA 164 because that act "abrogated the primary rationale for affording plaintiffs a right to [a] jury—the ELCRA's grant of jurisdiction to the circuit courts." This is apparently a reference to MCL 600.6419, which defendant argues "[b]y its plain terms . . . superseded MCL 37.2801(2), which granted circuit courts jurisdiction over ELCRA claims."

Defendant's argument fatally ignores MCL 600.6421(1). By its plain language, MCL 600.6419 is expressly subject to MCL 600.6421. See MCL 600.6419(1) ("Except as provided in sections 6421 and 6440, the jurisdiction of the court of claims, as conferred upon it by this chapter, is exclusive."). MCL 600.6421(1) states that "[n]othing in this chapter eliminates . . . any right a party may have to a trial by jury . . . ." Therefore, pursuant to MCL 600.6421(1), the Court of Claims' expanded jurisdiction in MCL 600.6419 cannot be construed to deprive a party of an existing right to a jury trial.

Accordingly, because plaintiff was entitled to a jury trial against defendant in her action under the ELCRA, the Court of Claims had concurrent jurisdiction with the circuit court by virtue of MCL 600.6421(1).

Therefore, the Court of Claims did not err by transferring the case back to the circuit court.[4]

Affirmed.

SHAPIRO, P.J., and M. J. KELLY and O'BRIEN, JJ., concurred.

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[4] Because the Court of Claims properly transferred the case back to the circuit court, defendant's argument that plaintiff did not follow the procedures necessary to proceed in the Court of Claims is moot and this Court need not address it. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

PROTECTING MICHIGAN TAXPAYERS v BOARD OF STATE CANVASSERS

Docket No. 343566. Submitted May 8, 2018, at Lansing. Decided May 11, 2018, at 9:00 a.m. Leave to appeal denied 501 Mich 1087.

Protecting Michigan Taxpayers (PMT) and others brought an action for mandamus, alleging that the Board of State Canvassers had a clear legal duty to certify PMT's initiative petition, which sought to repeal Michigan's prevailing wage act, MCL 408.551 *et seq*. The Bureau of Elections examined the petition sheets and projected that PMT had gathered 268,403 valid signatures, more than enough to qualify its initiative for the ballot. Protect Michigan Jobs—a ballot-question committee formed to oppose the efforts of PMT—challenged the petitions on several grounds, including that 18 petition circulators certified that they resided at addresses that appeared to be fraudulent. PMT responded that MCL 168.544c, the statute governing petitions and circulators, does not require a circulator to provide any residential address at all. In response to a request from the senate majority leader, the chief legal counsel for the Department of the Attorney General opined that while circulators must provide their residential addresses on the petition forms, the penalty for failing to do so (or for providing fraudulent information) does not include nullifying elector signatures. After considering this opinion and the arguments of the parties, the Bureau of Elections recommended that the Board of State Canvassers reject the address-related challenges. However, the Board of State Canvassers deadlocked on whether to certify the petition, which precluded certification of the petition. This mandamus action followed, and Protect Michigan Jobs intervened.

The Court of Appeals *held*:

The Board of State Canvassers had a clear legal duty to certify the petition. Under MCL 168.544c(1), petition circulators must certify that they are at least 18 years of age and United States citizens, that the signatures they gathered were made in their presence, that the circulator has neither caused nor permitted a person to sign the petition more than once and has no knowledge of a person signing the petition more than once, and that the signatures are genuinely those of registered

electors. MCL 168.544c(1) also sets forth the form for a petition, which includes a space for a "complete residence address" and a warning that a circulator who knowingly makes a false statement on that form is guilty of a misdemeanor. Accordingly, regardless of whether an address is statutorily required under MCL 168.544c(1), the penalties for failing to include an address, or for inserting a fraudulent residence location, do not include striking otherwise valid elector signatures. MCL 168.544c provides for the penalty of striking valid signatures only in two distinct circumstances: (1) when a circulator collects signatures after signing and dating a petition and (2) when a circulator fails to sign the sheet entirely. In sum, Michigan's election laws make no allowance for striking elector signatures in the event that a circulator records an incorrect address, and nothing in the relevant statutes conveys any intent to disenfranchise electors who were unaware of a circulator's error or infraction.

Complaint for mandamus granted; Board of State Canvassers directed to certify petition; judgment given immediate effect.

ELECTIONS — INITIATIVE PETITIONS — SIGNATORIES — COMPLETE RESIDENCE ADDRESS.

An otherwise valid elector signature on an initiative petition may not be struck on the ground that the circulator failed to provide a complete residence address or provided an address that was fraudulent (MCL 168.544c).

*Dykema Gossett, PLLC* (by *Gary P. Gordon* and *Jason T. Hanselman*) and *Doster Law Offices, PLLC* (by *Eric E. Doster*) for plaintiffs.

*Denise C. Barton*, Assistant Attorney General, for defendants.

*Honigman Miller Schwartz and Cohn LLP* (by *John D. Pirich* and *Andrea L. Hansen*) for intervening defendant.

Before: GLEICHER, P.J., and O'CONNELL and TUKEL, JJ.

GLEICHER, P.J. The issue presented is whether the Board of State Canvassers has a clear legal duty to

certify an initiative petition despite that some of the petition circulators may have claimed fraudulent residential addresses. The statutory sanctions for any such irregularities do not include disqualifying elector signatures. We grant the plaintiffs' complaint for mandamus and direct the Board of State Canvassers to certify the petition.

I

Plaintiff Protecting Michigan Taxpayers is an organized ballot-question committee that seeks to repeal Michigan's prevailing wage act, MCL 408.551 *et seq*. The act regulates the terms and conditions of employment for workers employed on state construction projects. The intervenor, Protect Michigan Jobs, is a ballot-question committee formed to oppose the efforts of Protecting Michigan Taxpayers. Because the names and initials of these parties are similar, we refer to plaintiffs (including the three named individuals) as "Taxpayers" and the intervenors as "Jobs."

Michigan's Constitution grants our citizens the right to enact or repeal laws through a ballot-initiative process. Const 1963, art 2, § 9. Proponents of a voter initiative must submit petitions bearing the signatures of a certain number of registered voters to the Bureau of Elections within a time frame set by the Legislature. To qualify for the November 2018 ballot, the magic number of signatures required is 252,523. In November 2017, Taxpayers timely submitted 50,483 petition sheets containing 382,700 elector signatures.

The Bureau of Elections examined the petition sheets and discarded those that were torn, mutilated, or otherwise obviously ineligible for signature counting. Bureau staff twice randomly sampled the re-

maining signatures to verify their validity. The Bureau projected that Taxpayers had gathered 268,403 valid signatures, more than enough to qualify their initiative for the ballot.

Jobs challenged the petitions on several grounds, including that 18 petition circulators certified that they resided at addresses Jobs believed were likely fraudulent. According to Jobs, these circulators wrote down residence locations including a UPS Store, a motel, an auto repair shop, and a vacant, uninhabited piece of land. If valid, Jobs's challenge to the circulators would disqualify 295 petition sheets.[1]

Taxpayers responded that MCL 168.544c, the statute governing petitions and circulators, does not require a circulator to provide *any* residential address. The Senate Majority Leader requested an Attorney General opinion on this question. Eric Restuccia, the chief legal counsel for the Department of the Attorney General, opined that while circulators must provide their residential addresses on the petition forms, the penalty for failing to do so (or for providing fraudulent information) does not include nullifying elector signatures. After considering the arguments of the parties and Restuccia's opinion, the Bureau of Elections recommended that the Board of State Canvassers reject the address-related challenges.

The Board of State Canvassers met on April 26, 2018, and voted on whether to certify the petition. Two members voted in favor, and two were opposed. The

[1] We take no position on whether the challenged addresses were truly fraudulent. While it is reasonable to conclude that a circulator did not actually reside on a piece of vacant land, a hotel address does not strike us as necessarily deceptive or dishonest. We need not further consider this aspect of Jobs's arguments as the validity of the addresses does not factor into our analysis.

deadlock precludes certification of the petition for the ballot. This mandamus action followed.

II

Our task is to decide whether the Board of State Canvassers has a clear legal duty to certify the petition and submit it to the Legislature for consideration. See Const 1963, art 2, § 9. We review this question de novo, meaning that we consider it independently of the decisions reached by the Bureau of Elections or the Board of State Canvassers. *Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 491-492; 688 NW2d 538 (2004). Mandamus is the proper remedy for a party aggrieved by an election official's inaction. *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 283; 761 NW2d 210 (2008). Our analysis requires us to interpret MCL 168.544c, which we also perform de novo. *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 598; 822 NW2d 159 (2012).

III

Petition circulators must certify that they are at least 18 years of age and United States citizens. They must further attest that the signatures they gathered were made in their presence, that the circulator "has neither caused nor permitted a person to sign the petition more than once and has no knowledge of a person signing the petition more than once," and that the signatures are genuinely those of registered electors. MCL 168.544c(1). This statute sets forth the "form" for a petition. The form includes the following signature block and "warning" applicable to circulators:

(Printed Name and Signature of Circulator) (Date)

(Complete Residence Address (Street and Number or Rural Route))
Do not enter a post office box

(City or Township, State, Zip Code)

(County of Registration, if Registered to Vote, of a Circulator who is not a Resident of Michigan)

Warning-A circulator knowingly making a false statement in the above certificate, a person not a circulator who signs as a circulator, or a person who signs a name other than his or her own as circulator is guilty of a misdemeanor. [*Id*.]

The parties' disagreement begins with the significance of the space designated for the circulator's "complete residence address." MCL 168.11, a statute contained within Michigan's Election Law,[2] defines "residence" as "that place at which a person habitually sleeps, keeps his or her personal effects, and has a regular place of lodging." According to Jobs, a number of the circulators listed obviously phony addresses. Jobs tested this hypothesis by sending certified letters to circulators it believed had inaccurately certified their residence locations. A substantial number were returned as undeliverable. Absent a genuine address, Jobs urges, the Board has no ability to contact a circulator regarding any irregularities found on the petition sheet. Taxpayers replies that although the form provides space for a circulator's address, the balance of the statute does not mandate that a circulator include any address information at all.

[2] MCL 168.1 *et seq*.

We need not resolve this dispute. Regardless of whether an address is statutorily required, the penalties for failing to include one (or for inserting a fraudulent residence location) do not include striking otherwise valid elector signatures.

We draw our conclusion from other subsections of MCL 168.544c; this statute generally "details the requirements for a valid nominating petition . . . ." *People v Hall*, 499 Mich 446, 452; 884 NW2d 561 (2016). This statute also covers the form of initiative petitions, describes circulation requirements, and establishes punishments for those who break the rules. Several subsections specifically address the obligations of circulators and the penalties for circulators' infractions; those are the subsections that guide us.

Circulators need not be residents of Michigan, but they must agree to accept the jurisdiction of this state for the purposes of any legal proceedings concerning the petition sheets they certify. MCL 168.544c(3). Every petition must be signed and dated by the circulator before being filed, and a circulator may not obtain signatures on a petition after signing and dating it. MCL 168.544c(5). "A filing official shall not count electors' signatures that were obtained after the date the circulator signed the certificate or that are contained in a petition that the circulator did not sign and date." *Id*.

MCL 168.544c(8) identifies four prohibitions applicable to "individual[s]." Although the term is not defined in the election laws, its context demonstrates that it refers to those who sign petitions and, in some circumstances, circulators:

> An individual shall not do any of the following:
>
> (a) Sign a petition with a name other than his or her own.

> (b) Make a false statement in a certificate on a petition.
>
> (c) If not a circulator, sign a petition as a circulator.
>
> (d) Sign a name as circulator other than his or her own. [*Id*.]

Subsection (8) prohibits a circulator from making a false statement in a certificate or on a petition and from using someone else's name when signing a petition as a circulator. Assuming for the sake of argument that a circulator is legally required to enter his or her address on a certificate, it makes sense that recording a fake address would qualify as a "false statement" under Subsection (8)(b). But these suppositions do not take us where Jobs would like us to go.

In MCL 168.544c(9) through (12), the Legislature codified the punishments for those who disobey the rules governing the signing and circulation of petitions. Subsection (9) establishes a penalty for simple violations of Subsection (8): "An individual who violates subsection (8) is guilty of a misdemeanor punishable by a fine of not more than $500.00 or imprisonment for not more than 93 days, or both." MCL 168.544c(9). Notably absent from this subsection is any mention of striking signatures or petition sheets.

A second penalty provision is triggered by more serious violations of Subsection (8). Those who commit knowing and intentional violations of its commandments are subject to having their gathered signatures or their candidacy disqualified:

> If after a canvass and a hearing on a petition under [MCL 168.476 or MCL 168.552] the board of state canvassers determines that an individual has knowingly and intentionally failed to comply with subsection (8), the board of state canvassers may impose 1 or more of the following sanctions:

> (a) Disqualify obviously fraudulent signatures on a petition form on which the violation of subsection (8) occurred, without checking the signatures against local registration records.
>
> (b) Disqualify from the ballot a candidate who committed, aided or abetted, or knowingly allowed the violation of subsection (8) on a petition to nominate that candidate.[3] [MCL 168.544c(10).]

These penalty provisions are narrowly drawn. Even in the event of knowing and intentional violations of the law, the Legislature omitted from the list of punishments an automatic disqualification of signatures. Instead, only "obviously fraudulent signatures" may be struck. And Jobs does not contend that the petitions contain any "obviously fraudulent signatures" missed through the Board's routine canvass processes.

Subsection (11) creates a penalty that comes into play when an organization or person supporting the petition drive knew of a violation of Subsection (8) before the petition was filed, but failed to report it to the Secretary of State or another official named in the section. In that circumstance, the Legislature opened the door to a misdemeanor conviction. MCL 168.544c(11). And the Legislature granted the Board of State Canvassers the ability to add additional punishment for knowing and intentional lawbreakers, including a fine, a charge for the cost of canvassing the petition form on which the violation occurred, and disqualification from collecting signatures for four years. MCL 168.544c(12)(a) through (c). As in Subsection (10), "obviously fraudulent signatures" may be disqualified. MCL 168.544c(12)(d). But again, these

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[3] MCL 168.476 requires the Board of State Canvassers to "canvass the petitions to ascertain if the petitions have been signed by the requisite number of qualified and registered electors." MCL 168.476(1). MCL 168.552 does not apply to statewide elections.

sanctions do not encompass eliminating valid signatures on a petition circulated by someone who has violated the law.

The Legislature decreed that certain other election-law violations *do* result in the elimination of valid signatures. This penalty is mandatory when a circulator fails to sign and date a petition sheet and the signatures were obtained "after the date the circulator signed the certificate or that are contained in a petition that the circulator did not sign and date." MCL 168.544c(5). And if an elector (signer) of a petition fails to include his or her signature, street address, or the date of signing, the signature "is invalid and shall not be counted by a filing official." MCL 168.544c(2).

The presence of these penalties aids our resolution of this case. A rule often applied by judges evaluating the meaning of statutory text provides that if the Legislature omitted something from a statute, it intended to do so.[4] In applying that rule, we focus on whether it is sensible to infer that the Legislature left out a sanction in one section of the law because it meant to.

The statute governing the rules that circulators must follow creates specific penalties for negligent and intentional malfeasance. Those penalties do not encompass the negation of elector signatures except in two distinct circumstances: when a circulator collects signatures after signing and dating a petition, and when a circulator fails to sign the sheet entirely. An elector who omits critical information will also forfeit his or her right to petition. The presence of these

[4] This rule, or canon, is referred to in our caselaw by its Latin name, *expressio unius est exclusio alterius*, "the expression of one thing suggests the exclusion of all others." *People v Wilson*, 500 Mich 521, 526; 902 NW2d 378 (2017) (quotation marks and citation omitted).

weighty punishments in one subsection and their absence in others strongly suggests a deliberate legislative choice. This Court has summarized that when the Legislature omits a particular penalty provision in one part of a statute but includes it in another, we should presume that decision to have been purposeful. *People v Barrera*, 278 Mich App 730, 741-742; 752 NW2d 485 (2008).

Jobs asks us to find a penalty where none exists. "[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), superseded in part on other grounds as noted in *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009). Michigan's election laws make no allowance for striking elector signatures in the event that a circulator records an incorrect address, and nothing in the relevant statutes conveys any intent to disenfranchise electors who were unaware of a circulator's error or infraction.

Because the Board of State Canvassers had a clear legal duty to certify Taxpayers' petition, we grant relief on the complaint for mandamus, and we give this judgment immediate effect. MCR 7.215(F)(2).

O'CONNELL and TUKEL, JJ., concurred with GLEICHER, P.J.

SHEARDOWN v GUASTELLA

Docket No. 338089. Submitted November 7, 2017, at Detroit. Decided May 15, 2018, at 9:00 a.m.

Anita L. Sheardown brought an action in the Oakland Circuit Court, Family Division, seeking custody of and parenting time with MEG, a child who had been conceived with the aid of a sperm donor by plaintiff's former domestic partner, defendant Janine Guastella, during the parties' relationship. The parties and the sperm donor had signed an agreement in which the parties stated their intent to be the legal parents of any child born as a result of the inseminations and to file a petition for plaintiff to adopt the child as soon as possible after its birth. The parties' relationship continued for some time after MEG's birth, but it had ended by February 2014. Defendant moved for summary disposition. The court, Lisa Langton, J., granted defendant's motion pursuant to MCR 2.116(C)(4), (5), and (8), ruling that plaintiff lacked standing to pursue the action under the Child Custody Act (CCA), MCL 722.21 *et seq*., because she was not a "parent" for purposes of the CCA as that term is defined in MCL 722.22(i). Plaintiff appealed as of right. After hearing oral argument, a majority of the Court of Appeals panel, on its own motion, entered an order remanding the case for consideration of whether MCL 722.22(i) was constitutional as applied to the facts of this case in light of *Obergefell v Hodges*, 576 US 644; 135 S Ct 2584; 192 L Ed 2d 609 (2015), which recognized the fundamental right of same-sex couples to marry, and *Pavan v Smith*, 582 US ___; 137 S Ct 2075; 198 L Ed 2d 636 (2017), which required states to afford the same marriage-related benefits to same-sex married couples that they afford to heterosexual married couples. On remand, the court ruled that MCL 722.22(i) was unconstitutional as applied to the facts of this case in light of *Obergefell* and *Pavan* but declined to apply that ruling retroactively.

The Court of Appeals *held*:

MCL 722.22(i) was not unconstitutional as applied to plaintiff. *Obergefell* and its progeny did not affect plaintiff because she was never married and was not asking the courts to create a marriage post hoc. Further, under an equal-protection analysis, plaintiff

was not subject to dissimilar treatment under MCL 722.22(i) compared to a heterosexual unmarried individual. The Equal Protection Clause generally prohibits the government from treating similarly situated persons differently without a valid reason to do so. MCL 722.22(i) applies equally to same-sex and heterosexual married couples, but the parties were never married, nor did plaintiff ever seek to adopt MEG, even though that legal right existed after *Obergefell* was decided. Consequently, plaintiff was not in a position to argue that she was denied a benefit granted to a heterosexual married person. Because MCL 722.22(i) can apply equally to same-sex and opposite-sex unmarried couples, there was no equal-protection violation. Even if dissimilar treatment did occur, it was not unconstitutional treatment under either the Equal Protection Clause or the Due Process Clause. Nothing within MCL 722.22(i) distinguishes between same-sex and opposite-sex married couples; rather, it distinguishes only between those who have a biological or legal link to the child and those who do not. Such a distinction, particularly when applied to plaintiff, an unmarried person, did not run afoul of the constitutional principles declared in *Obergefell*, nor did it suggest unlawful unequal treatment. Accordingly, the trial court properly granted defendant summary disposition.

Order determining that MCL 722.22(i) was unconstitutional as applied to plaintiff reversed; order dismissing plaintiff's complaint affirmed.

Judge FORT HOOD, dissenting, would have held that under the circumstances of this case, the definition of "parent" in MCL 722.22(i) violated plaintiff's equal-protection and substantive-due-process rights because it excluded plaintiff, who was legally prohibited from marrying her same-sex partner and adopting MEG before the decision in *Obergefell*. She noted that a male in an opposite-sex relationship was not similarly situated to plaintiff for purposes of an equal-protection analysis because plaintiff had been legally precluded from marrying her partner and adopting the child whereas the male could have done so. She stated that excluding some individuals from the definition of "parent" in MCL 722.22(i) on the basis of their sexual orientation was not rationally related to the state's interest in ensuring that those who seek to adjudicate matters of child custody and parenting time have a legal, valid, and continuing relationship with the minor child at issue. She further concluded that, under *Obergefell* and *Pavan*, plaintiff had a fundamental liberty interest in parenting MEG and that the limited definition of "parent" in MCL 722.22(i) amounted to an arbitrary exercise of govern-

mental power infringing that right, thereby violating plaintiff's right to substantive due process. She would have reversed the trial court's order granting summary disposition in favor of defendant and remanded for further proceedings to allow plaintiff to commence adoption proceedings and to allow the trial court to determine matters related to custody and parenting time as set forth in MCL 722.23, MCL 722.25, MCL 722.27, and MCL 722.27b.

*John R. Foley, PC* (by *Patrick A. Foley*) for plaintiff.

*Judith A. Curtis* for defendant.

Before: MURRAY, C.J., and FORT HOOD and GLEICHER, JJ.

MURRAY, C.J. In this child custody action brought pursuant to the Child Custody Act, MCL 722.21 *et seq*., plaintiff appeals as of right from an order granting summary disposition in favor of defendant. The trial court dismissed plaintiff's case on the basis that she lacked standing to seek custody. But, after a remand from this Court, the trial court held that the definition of "parent" contained within MCL 722.22(i) was unconstitutional as applied to plaintiff. Nonetheless, the court concluded that its ruling would not be applied retroactively, so the court maintained its ruling that plaintiff could not pursue this custody action. We hold that MCL 722.22(i) is not unconstitutional as applied to plaintiff, and we affirm the trial court's dismissal of her complaint.

## I. MATERIAL FACTS AND PROCEEDINGS

This case arises from plaintiff and defendant's former romantic relationship. During their relationship, defendant entered into a contract (the agreement) with plaintiff and a sperm donor, who agreed to assist defendant with becoming pregnant. In the agreement,

the donor promised that he would not "try to become a legal parent of any child born from [the] inseminations, or ask for custody or visitation rights at any time." The agreement also contained a statement that plaintiff and defendant "intend[ed] to be legal parents of any child born as a result of [the] inseminations" and that "they will file a petition for [plaintiff] to adopt the child as soon as possible after its birth." Ultimately, defendant's child, MEG, was born as a result of this agreement.

Plaintiff and defendant's romantic relationship continued for some time after MEG's birth. However, plaintiff and defendant never married, nor did plaintiff seek to adopt MEG. Ultimately, plaintiff and defendant's relationship ended no later than February 2014.[1] In 2016 plaintiff filed a complaint in the trial court to initiate a child custody dispute concerning MEG, wherein plaintiff requested custody of, and parenting time with, MEG on the grounds that it was in MEG's best interests as she had acted as his parent for a number of years. Defendant filed an answer to plaintiff's complaint and subsequently moved for summary disposition. The trial court ultimately granted defendant's motion on the basis, as noted earlier, that plaintiff lacked standing to pursue the action.

On appeal, plaintiff argued that she should be considered a parent under the agreement and, therefore, had standing to maintain the custody action. In that regard, she argued that the fundamental right to parent recognized in *Troxel v Granville*, 530 US 57; 120 S Ct 2054; 147 L Ed 2d 49 (2000), was violated by the court's refusal to allow her to seek custody of MEG.

[1] Plaintiff and defendant, who were a same-sex couple, ended their relationship more than a year prior to the United States Supreme Court's decision in *Obergefell v Hodges*, 576 US 644; 135 S Ct 2584; 192 L Ed 2d 609 (2015).

After oral argument before this Court, a majority entered an order remanding this case "for consideration of whether MCL 722.22(i) is constitutional as applied to the facts of this case, in light of *Obergefell v Hodges*, [576] US [644]; 135 S Ct 2584; 192 L Ed 2d 609 (2015), and *Pavan v Smith*, [582] US ___; 137 S Ct 2075; 198 L Ed 2d 636 (2017)." *Sheardown v Guastella*, unpublished order of the Court of Appeals, entered November 14, 2017 (Docket No. 338089).[2]

As it was required to do, on remand, the trial court issued an opinion and order addressing what the majority asked of it, whether MCL 722.22(i) is constitutional as applied to the facts of this case, in light of *Obergefell* and *Pavan*. The trial court held that it was unconstitutional, but that this determination did not affect the ultimate disposition because the court could not go back in time and determine whether the parties would have married had it not been for the state law precluding them from doing so.[3]

## II. THE CONSTITUTIONALITY OF MCL 722.22(i) AS APPLIED TO PLAINTIFF

Generally, this Court reviews de novo questions of constitutional law. *Detroit Mayor v Arms Technology, Inc*, 258 Mich App 48, 57; 669 NW2d 845 (2003), citing *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246

[2] Presiding Judge MURRAY dissented from the sua sponte remand, arguing that the constitutional issue ordered to be addressed by the trial court was injected into the case by the Court, not the parties. See *Sheardown v Guastella*, unpublished order of the Court of Appeals, entered November 14, 2017 (Docket No. 338089) (MURRAY, P.J., dissenting).

[3] At oral argument before this Court, plaintiff's counsel conceded that the courts should not attempt to reconstruct whether the parties would have married prior to their breakup in 2012 had they had the right to do so.

(2002). We embrace the presumption that statutes are constitutional, and the party challenging the constitutional validity of a statute bears a heavy burden. *Phillips v Mirac, Inc*, 470 Mich 415, 422-423; 685 NW2d 174 (2004).

This as-applied challenge to the constitutional validity of MCL 722.22(i) must be considered in light of the facts and circumstances existing at the time of the complaint's filing.[4] See generally *Miller v Allstate Ins Co*, 481 Mich 601, 606; 751 NW2d 463 (2008), and *Friends of the Earth, Inc v Laidlaw Environmental Servs (TOC), Inc*, 528 US 167, 189; 120 S Ct 693; 145 L Ed 2d 610 (2000). Plaintiff's complaint was filed on October 7, 2016, more than a year after the *Obergefell* Court struck down Michigan's constitutional and statutory prohibitions on same-sex marriage. Thus, when considering the constitutionality of MCL 722.22(i) as applied to these parties, it must be recognized that at the time the case was filed, (1) Michigan was required to recognize same-sex marriages, (2) our Court had already held that the definition of "parent" under MCL 722.22(i) did not run afoul of *Obergefell* because "that definition applies equally to same-sex and opposite-sex married couples,"[5] (3) the parties

[4] The trial court erred when it concluded that it lacked subject-matter jurisdiction because "the Child Custody Act does not afford Plaintiff substantive rights to Defendant's child or Defendant substantive rights to Plaintiff's child." The trial court's analysis, while germane to considering whether plaintiff had standing to initiate a child custody dispute under the Child Custody Act, did not address whether the trial court itself lacked the right to exercise jurisdiction over child custody disputes. There is no dispute that a circuit court has the right to exercise jurisdiction over child custody, as the Child Custody Act expressly contemplates that "a child custody dispute" may be "submitted to the circuit court as an original action under this act . . . ." MCL 722.27(1).

[5] *Stankevich v Milliron (On Remand)*, 313 Mich App 233, 238 n 2; 882 NW2d 194 (2015).

never availed themselves of the marriage laws of other states that recognized same-sex marriages, and (4) the parties' relationship had, at a minimum, ended some two-and-a-half years before, and approximately a year and a half prior to the issuance of *Obergefell*.

In light of these undisputed factual and legal propositions, and when applying the governing law under the Equal Protection and Due Process Clauses of the federal Constitution,[6] it is apparent that there is no constitutional infirmity to MCL 722.22(i). In *Barrow v Detroit Election Comm*, 301 Mich App 404, 419-420; 836 NW2d 498 (2013), our Court set forth the standards governing the equal-protection inquiry:

> In undertaking constitutional analysis, we are mindful—as was the circuit court—that legislation challenged on equal protection grounds is presumed constitutional and the challenger has the burden to rebut that presumption. *Boulton v Fenton Twp*, 272 Mich App 456, 467; 726 NW2d 733 (2006). Courts examine three factors when determining whether a law violates the Equal Protection Clause: "the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." *Dunn v Blumstein*, 405 US 330, 335; 92 S Ct 995; 31 L Ed 2d 274 (1972).
>
> When evaluating an equal protection challenge to a provision, courts apply one of three traditional levels of review. *Heidelberg Bldg, LLC v Dep't of Treasury*, 270 Mich App 12, 18; 714 NW2d 664 (2006). Traditionally, the rational basis test applies where no suspect factors are present or where no fundamental right is implicated. *Kyser v Kasson Twp*, 486 Mich 514, 522 n 2; 786 NW2d 543 (2010). Under this test, a statute is constitutional if it furthers a legitimate governmental interest and if the challenged statute is rationally related to achieving that interest. *Boulton*, 272 Mich App at 467. Thus, restrictions

[6] See US Const, Am XIV.

> are set aside only if they are based on reasons unrelated to the state's goals and no grounds can be conceived to justify them.
>
> The most heightened review, strict scrutiny, applies when the provision interferes with a fundamental right or classifies based on factors that are suspect, such as race, national origin, or ethnicity. *Rose v Stokely*, 258 Mich App 283, 300; 673 NW2d 413 (2003). Under a strict scrutiny analysis, the government may not infringe upon a fundamental liberty interest unless the infringement is narrowly tailored to serve a compelling state interest. *In re B & J*, 279 Mich App 12, 22; 756 NW2d 234 (2008).

There are two reasons why plaintiff cannot establish a violation of the Equal Protection and Due Process Clauses of the federal Constitution. First, *Obergefell* and its limited progeny do not have any impact on plaintiff as she was never married, and she is not asking the courts to create a marriage post hoc. Second, under an equal-protection analysis, plaintiff is simply not subject to dissimilar treatment under the statute compared to a heterosexual unmarried individual.

### A. *OBERGEFELL*'S PRINCIPLES DO NOT APPLY

As noted above, the parties were never married and the plaintiff has disavowed any interest (as has the dissent) in going back in time in an attempt to determine whether the parties would have been married had they had the legal option to do so prior to *Obergefell*. This is important because *Obergefell* addressed only the fundamental right to marry protected by the liberty interest of the Due Process Clause and the many state laws that did not recognize that right relative to same-sex couples. And, as *Pavan*, 582 US at ___; 137 S Ct at 2078, recognized, the overarching principle from *Obergefell* requires states to afford the

same *marriage-related* benefits to same-sex married couples that are afforded to heterosexual married couples. See also *McLaughlin v Jones*, 243 Ariz 29, 34; 401 P3d 492 (2017) (reasoning that "the benefits *attendant to marriage* were expressly part of the [*Obergefell*] Court's rationale for concluding that the Constitution does not permit states to bar same-sex couples from marriage 'on the same terms' "), quoting *Obergefell*, 576 US at ___; 135 S Ct at 2607 (emphasis added); *In re Carter Estate*, 159 A3d 970, 977; 2017 PA Super 104 (2017) (holding that *Obergefell* was limited to recognizing the constitutional right of same-sex couples to marry under state law and not to be subsequently denied the same state-law privileges afforded opposite-sex married couples). In other words, *Obergefell* requires states to recognize a legal marriage between individuals of the same sex and, as *Pavan* held, once the state recognizes these marriages it cannot deny government benefits that are offered to heterosexual married couples. And that is why our Court, with respect to this very statute, concluded that MCL 722.22(i) applies equally to same-sex and heterosexual *married* couples. *Stankevich v Milliron (On Remand)*, 313 Mich App 233, 238 n 2; 882 NW2d 194 (2015).

But the parties were never married. They had the option to marry in several different states while they were in a relationship, but for whatever reason (and they offer conflicting ones), they did not. Nor did plaintiff ever seek to adopt MEG, even though that legal right existed after *Obergefell* was decided, see *Mabry v Mabry*, 499 Mich 997, 998-999 (2016) (MCCORMACK, J., dissenting), most likely because the parties' relationship had ended years earlier. Consequently, plaintiff is not in a position to argue that she was denied a benefit granted to a heterosexual *married* person, because she was never married to defendant.

As a result, the liberty interest in the right to marry that was extended to same-sex couples in *Obergefell* simply does not come into play.

### B. WITHOUT DISSIMILAR TREATMENT, NO EQUAL-PROTECTION VIOLATION EXISTS

As noted, the Equal Protection Clause generally prohibits the government from treating similarly situated persons differently without a valid reason to do so. See *In re Parole of Hill*, 298 Mich App 404, 420-422; 827 NW2d 407 (2012) (recognizing the compelling-state-interest and rational-basis tests). If possible, we must construe a statute in a constitutional manner. See *In re Rood*, 483 Mich 73, 121; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.); *People v Wilson*, 230 Mich App 590, 593-594; 585 NW2d 24 (1998). What is dispositive of this constitutional argument is that a male in an opposite-sex relationship could also meet the same fate as plaintiff, and thus receive the same treatment as plaintiff under the statute. For example, suppose the female in an opposite-sex relationship becomes pregnant with a third party's child, but once born, the male in the relationship treats the child as his own. Once the relationship ends, the male would be in the same position as plaintiff relative to the statutory definition of "parent," i.e., he would have no biological or legal link to the child born during the relationship. Because the foregoing shows that the statute can be applied equally to someone in plaintiff's position, but not in a same-sex relationship, MCL 722.22(i) is constitutional.[7]

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[7] With respect to the dissent's conclusion that unlawful dissimilar treatment exists under the statute, the dissent bases its conclusion on the rationale that plaintiff could not be a "parent" because she has no biological link to the child born to defendant and could not adopt the

The Virginia Court of Appeals came to the same conclusion regarding its common-law definition of "parentage," which is the same as our statutory definition of "parent." In *Hawkins v Grese*, 68 Va App 462, 475; 809 SE2d 441 (2018), the court held that there was no dissimilar treatment under that state's biological/legal definition of "parentage," since it applied equally to all:

> Further, this definition of parentage does not discriminate between same-sex and opposite-sex couples. If the couple is not married, the non-biological/non-adoptive partner is not a parent irrespective of gender or sexual orientation. It is true that when Hawkins and Grese began their relationship, the law of the Commonwealth barred Hawkins and Grese from marrying, but the record does not indicate this was the sole reason they remained unmarried. While those laws previously banning same-sex *marriage* were discriminatory, the Commonwealth's definition of parent is not as it applies equally regardless of an unmarried couple's gender or sexual orientation.

Because MCL 722.22(i) can apply equally to same-sex and opposite-sex unmarried couples, there is no equal-protection violation.

We also conclude that even if dissimilar treatment did occur to plaintiff, it was not unconstitutional treatment under either the Equal Protection Clause or the Due Process Clause.[8] Nothing within MCL 722.22(i) distinguishes between same-sex and opposite-sex married couples, a proposition we recognized in *Stankevich*,

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child when he was born, while a heterosexual individual who *has* a biological link to the child would be a "parent" under MCL 722.22(i). A true statement, but, as we noted above, that is not the end of the inquiry, as the proper question is whether the statute can be applied constitutionally, and it can.

[8] The rational-basis test is applied to an equal-protection challenge based on alleged dissimilar treatment between heterosexual and homosexual persons. See *Bostic v Schaefer*, 760 F3d 352, 397 (CA 4, 2014)

313 Mich App at 238 n 2. Instead, MCL 722.22(i) distinguishes only between those who have a biological or legal link to the child and those who do not. Such a distinction, particularly when applied to plaintiff, an unmarried person, does not run afoul of the constitutional principles declared in *Obergefell*. Nor does it suggest unlawful unequal treatment. Again, the *Hawkins* court used the same rationale in upholding Virginia's definition of parentage:

> In sum, the entire basis of the holding of *Obergefell* is the significance and importance of *marriage* as an institution that should not be withheld from same-sex couples. Barring procreation or adoption, pre-*Obergefell*, different-sex marriages did not automatically result in the spouses becoming legal parents of each other's children and the analysis of the *Obergefell* majority opinion does not compel a different conclusion with respect to same-sex marriages, far less unmarried couples of any sexual orientation. [*Hawkins*, 68 Va App at 476-477.]

We agree with this proposition, which satisfies the deferential rational-basis review applicable to this challenge. *Lake v Putnam*, 316 Mich App 247, 254-256; 894 NW2d 62 (2016).

There are several significant differences between our opinion and that of the dissent. First off, the dissent fails to recognize that *Obergefell* did not grant same-sex couples anything more than the right to have states recognize their marriage (not an insignificant right, no doubt) and to treat *those marriages* the same as ones between heterosexuals. As we have explained, *Pavan* made this point clear when it held that the Arkansas Supreme Court's decision "denied married same-sex couples access to the 'constellation of benefits

(Niemeyer, J., dissenting), and cases cited therein. The *Obergefell* Court did not specify what standard of review it was using for equal-protection purposes.

that the Stat[e] ha[s] linked to marriage.' " *Pavan*, 582 US at ___; 137 S Ct at 2078, quoting *Obergefell*, 576 US at ___; 135 S Ct at 2601 (alterations in original). Plaintiff can simply reap no benefit from either *Obergefell* or *Pavan* because she was never married, nor was she ever engaged to be married.

And that brings us to our second point. Our reference to plaintiff's not having married—either before or after *Obergefell*—was not to "fault" her, or to raise any socioeconomic issues. Indeed, we know nothing of the parties' economic situations. Rather, our point was that in each case decided post-*Obergefell*, including *Pavan*, *Stankevich*, *McLaughlin*, and *In re Carter Estate*, the parties had been married (either in their state or another) and were seeking to obtain a benefit of marriage that was granted to heterosexual married couples. But when a party who comes before the court is not a part of a marital relationship, as in this case and *Hawkins*, he or she is not entitled to the "constellation of benefits" referred to in *Obergefell*. Thus, plaintiff's marital status is highly relevant to the *legal* issues presented, and not to any other social or economic matter.

Additionally, we are unclear how MCL 722.22(i) makes a classification based on sexual orientation. Nothing in the words of the statute does, and our Court has already stated that this statute applies equally to same-sex and opposite-sex marriages. *Stankevich*, 313 Mich App at 238 n 2. Nor can we allow any perceived inequities for a particular party to control our duty to objectively apply the law. *Progressive Mich Ins Co v Smith*, 490 Mich 977, 978-979 (YOUNG, C.J., concurring).

For these reasons, we reverse the trial court's holding that MCL 722.22(i) is unconstitutional as applied

to plaintiff,[9] but affirm the trial court's ultimate order dismissing plaintiff's complaint for custody.

Affirmed. No costs, a question of public importance being involved. MCR 7.219(A).

GLEICHER, J., concurred with MURRAY, C.J.

FORT HOOD, J. (*dissenting*). I respectfully dissent. At the heart of this case lies the well-being of a minor child who, without reason or justification aside from the fact that his parents were in a same-sex relationship and were not legally permitted to marry, has been denied the opportunity to continue a relationship with one of his parents, as well as his biological sibling. The foundation of the majority's conclusion permitting this action, that MCL 722.22(i) is constitutional on equal-protection and due-process grounds as applied to plaintiff, is grounded in its correct recognition that plaintiff and defendant were not legally married. However, the pivotal and very unfortunate fact not in dispute in this case is that plaintiff and defendant were legally forbidden by the state of Michigan from entering into a legally recognized marriage (1) before MEG was born, (2) on the date of his birth, July 26, 2011, and (3) in the time thereafter, before the breakdown of their romantic relationship. It was not until June 26, 2015, when the United States Supreme Court recognized that no person should be denied the fundamental right to marry, that members of same-sex relationships were afforded the basic human right to join in marriage, and

[9] As explained by this Court in *Lake*, 316 Mich App at 256, the equitable-parent doctrine is inapplicable to all unmarried couples, and thus the doctrine does not run afoul of either the Equal Protection or Due Process Clause. *Lake* is binding on this Court, MCR 7.215(J)(1), and the Supreme Court has declined to address the issue any further, see *Mabry*, 499 Mich 997 (2016) (MCCORMACK, J., dissenting).

all its attendant benefits, rights that all other Americans enjoyed before this date. As a result of the injustice that existed before *Obergefell v Hodges*, 576 US ___; 135 S Ct 2584; 192 L Ed 2d 609 (2015), and which the *Obergefell* Court sought to remedy, plaintiff was legally foreclosed from taking the necessary steps to protect her relationship with MEG. The one who bears the bitter consequence of his parents' legal inability to marry is young MEG, and the end result of this case in this Court is that plaintiff will play no part in MEG's life and MEG will have no further relationship with his biological sibling. I cannot countenance such a result, particularly in light of the controlling United States Supreme Court precedent recognizing the right of same-sex couples to marry and to avail themselves of the concomitant benefits, and for the reasons set forth below, I would reverse and remand for further proceedings.[1]

## I. MCL 722.22(i)

The Child Custody Act (CCA), MCL 722.21 *et seq*., governs custody, parenting time, and child support issues for minor children in Michigan. MCL 722.24(1). As this Court has observed, the CCA "is the exclusive means of pursuing child custody rights . . . ." *Aichele v Hodge*, 259 Mich App 146, 153; 673 NW2d 452 (2003) (quotation marks and citation omitted). The Legisla-

[1] During their romantic relationship, defendant entered into a November 13, 2010 agreement (the donor agreement) with plaintiff and a sperm donor (the donor) who agreed to assist defendant with becoming pregnant. The donor agreement contained a statement that plaintiff and defendant "intend[ed] to be legal parents of any child born as a result of [the] inseminations" and that "they will file a petition for [plaintiff] to adopt the child as soon as possible after its birth." During their romantic relationship plaintiff gave birth to MEG's half-sister, also conceived through artificial insemination, who is biologically related to MEG.

ture has also directed that the CCA, legislation that is "equitable in nature," should be "liberally construed . . . ." MCL 722.26(1). MCL 722.22(i) defines "parent" in the following terms:

> "Parent" means the natural or adoptive parent of a child.

If plaintiff is not a biological parent or a legal parent, she is considered a third person under the CCA. *Van v Zahorik*, 460 Mich 320, 328; 597 NW2d 15 (1999). The parties do not dispute that plaintiff does not meet the definition of a third person as contemplated by MCL 722.26c. Plaintiff also does not have standing under the CCA as a guardian or limited guardian. See MCL 722.26b. Therefore, this Court must decide whether, under the circumstances of this case, the definition of "parent" in MCL 722.22(i) violates plaintiff's equal-protection and substantive-due-process rights because it excludes from its ambit plaintiff, a member of a same-sex partnership that bore a child, who was legally prohibited from marrying her same-sex partner and adopting MEG before the United States Supreme Court's landmark decision in *Obergefell*. I answer this question in the affirmative and would hold that MCL 722.22(i) is unconstitutional as applied to plaintiff.

## II. UNITED STATES SUPREME COURT PRECEDENT

In *Obergefell*, the petitioners argued that the respondent state officials violated the Fourteenth Amendment by enforcing laws denying them the right to marry in their home state, or to have marriages validly performed in another state recognized in their home state. *Obergefell*, 576 US at ___; 135 S Ct at 2593. The *Obergefell* Court ultimately held, in pertinent part, as follows:

> [T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker v Nelson* [409 US 810; 93 S Ct 37, 34 L Ed 2d 65 (1972)] must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. [*Obergefell*, 576 US at ___; 135 S Ct at 2604-2605.]

Importantly, and as relevant to this case, in *Obergefell* the Court recognized a "constellation of benefits . . . linked to marriage" that same-sex couples were historically and unconstitutionally deprived of as a result of being denied the right to marry. *Id*. at ___; 135 S Ct at 2601. These included, according to the *Obergefell* Court, the following:

> taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; *adoption rights*; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; *and child custody, support, and visitation rules*. [*Id*. at ___; 135 S Ct at 2601 (emphasis added).][2]

Following *Obergefell*, the United States Supreme Court decided *Pavan v Smith*, 582 US ___; 137 S Ct

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[2] This Court is bound to follow *Obergefell*, and as the majority points out, Michigan now recognizes the validity of same-sex marriage. *Stankevich v Milliron (On Remand)*, 313 Mich App 233, 237, 240; 882 NW2d 194 (2015). However, in *Stankevich*, this Court was not presented with the issue that we are in this case, that being whether a provision of the CCA is unconstitutional as applied to plaintiff on due-process and equal-protection grounds in light of the fact that plaintiff was not able to enter into a legal same-sex marriage before *Obergefell*.

2075; 198 L Ed 2d 636 (2017), in which two married same-sex couples in Arkansas, having conceived their children through anonymous sperm donation, challenged an Arkansas state statute setting forth who could appear as parents on a child's state-issued birth certificate. The state law "generally require[d] the name of the mother's male spouse to appear on the child's birth certificate—regardless of his biological relationship to the child," and the Arkansas Supreme Court concluded that this rule would not extend to same-sex couples. *Id*. at ___; 137 S Ct at 2077. The United States Supreme Court held that such "differential treatment infringes *Obergefell*'s commitment to provide same-sex couples 'the constellation of benefits that the States have linked to marriage' " and reversed the judgment of the Arkansas Supreme Court. *Id*. at ___; 137 S Ct at 2077, quoting *Obergefell*, 576 US at ___; 135 S Ct at 2601.

> The Arkansas Supreme Court's decision, we conclude, denied married same-sex couples access to the "constellation of benefits that the Stat[e] ha[s] linked to marriage." *Obergefell*, [576 US at ___; 135 S Ct at 2601]. As already explained, when a married woman in Arkansas conceives a child by means of artificial insemination, the State will—indeed, *must*—list the name of her male spouse on the child's birth certificate. See [Ark Code Ann] § 20–18–401(f)(1); see also § 9–10–201; *supra*, at 2077. And yet state law, as interpreted by the court below, allows Arkansas officials in those very same circumstances to omit a married woman's female spouse from her child's birth certificate. See [*Smith v Pavan*, 2016 Ark 437, 11-12; 505 SW3d 169 (2016)]. *As a result, same-sex parents in Arkansas lack the same right as opposite-sex parents to be listed on a child's birth certificate, a document often used for important transactions like making medical decisions for a child or enrolling a child in school. See* [*Petition for Certiorari, pp*] *5–7 (listing situations in which a parent might be required to present a child's birth certificate)*.

> Obergefell *proscribes such disparate treatment*. *As we explained there, a State may not "exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples*." [*Obergefell*, 576 US at ___, 135 S Ct at 2605]. Indeed, in listing those terms and conditions—the "rights, benefits, and responsibilities" to which same-sex couples, no less than opposite-sex couples, must have access—we expressly identified "birth and death certificates." [*Id*. at ___; 135 S Ct at 2601]. That was no accident: Several of the plaintiffs in *Obergefell* challenged a State's refusal to recognize their same-sex spouses on their children's birth certificates. See *DeBoer v*. *Snyder*, 772 F.3d 388, 398–399 (C.A.6 2014). In considering those challenges, we held the relevant state laws unconstitutional to the extent they treated same-sex couples differently from opposite-sex couples. See [*Obergefell*, 576 US at ___; 135 S Ct at 2605]. That holding applies with equal force to [Ark Code Ann] § 20–18–401. [*Pavan*, 582 US at ___; 137 S Ct at 2078 (emphasis added).]

### III. EQUAL PROTECTION

In determining whether MCL 722.22(i) is unconstitutional as applied to plaintiff on equal-protection and due-process grounds, I start with the foundational principle that a statute will be presumed to be constitutional "unless the unconstitutionality is clearly apparent." *DeRose v DeRose*, 469 Mich 320, 326; 666 NW2d 636 (2003).

In *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318-319; 783 NW2d 695 (2010), the Michigan Supreme Court enunciated the applicable legal principles governing an equal-protection challenge:

> The equal protection clauses of the Michigan and United States constitutions provide that no person shall be denied the equal protection of the law. This Court has held that Michigan's equal protection provision is coexten-

> sive with the Equal Protection Clause of the United States Constitution. *The Equal Protection Clause requires that all persons similarly situated be treated alike under the law. When reviewing the validity of state legislation or other official action that is challenged as denying equal protection, the threshold inquiry is whether plaintiff was treated differently from a similarly situated entity. The general rule is that legislation that treats similarly situated groups disparately is presumed valid and will be sustained if it passes the rational basis standard of review: that is, the classification drawn by the legislation is rationally related to a legitimate state interest. Under this deferential standard, the burden of showing a statute to be unconstitutional is on the challenging party, not on the party defending the statute*[.] [Quotation marks and citations omitted; emphasis added.]

As a preliminary matter, plaintiff, on the basis of her sexual orientation, and as a former member of a same-sex partnership who was not permitted to marry her same-sex partner or adopt MEG following his birth, is receiving disparate treatment from that of an individual who does not share her sexual orientation, because under the CCA she cannot seek custody of and parenting time with MEG. Conversely, a former member of an opposite-sex relationship that produced a child, even after the relationship ended, would be able to proceed under the CCA to seek custody of and parenting time with the child at issue if that individual had a biological link to the child. The majority asserts that plaintiff has not suffered a violation of her right to equal protection under MCL 722.22(i), claiming that a male in an opposite-sex relationship who does not have a biological link with a child his female partner carried "could also meet the same fate as plaintiff[.]" " 'To be considered similarly situated [for purposes of an equal-protection analysis], the challenger and his comparators must be *prima facie* identical in all relevant

respects or directly comparable . . . in all material respects.' " *Demski v Petlick*, 309 Mich App 404, 464; 873 NW2d 596 (2015), quoting *Lima Twp v Bateson*, 302 Mich App 483, 503; 838 NW2d 898 (2013). In my view, the majority's conclusion that the male in an opposite-sex relationship is similarly situated to plaintiff overlooks the key fact that, unlike the heterosexual male whom the majority compares plaintiff to, plaintiff was in fact legally precluded from marrying her partner. Conversely, the heterosexual male subject of the majority's comparison, if he and his female partner deemed it appropriate, could not only have legally married, but the male individual could have in turn adopted the child. Plaintiff, before *Obergefell*, enjoyed no such privileges, and therefore the majority's claim that she and the male in an opposite-sex relationship such as given in the majority's example are similarly situated is, in my view, not an appropriate analogy.

Further, even employing the most deferential of standards,[3] the rational-basis standard of review, the classification that MCL 722.22(i) makes on the basis of sexual orientation must be "rationally related to a legitimate state interest." *Shepherd Montessori Ctr Milan*, 486 Mich at 318-319. In general, the CCA serves an important purpose for our state, in that it "standardiz[es] the criteria for resolving child custody disputes by requiring the circuit court to evaluate [several] factors in making its determination of the best interests of a child." *Bowie v Arder*, 441 Mich 23, 52; 490 NW2d 568 (1992). Put another way, "[i]t is clear

[3] In *Romer v Evans*, 517 US 620, 631-632, 635; 116 S Ct 1620; 134 L Ed 2d 855 (1996), the United States Supreme Court employed the rational-basis standard of review when considering an equal-protection challenge to an amendment to Colorado's state constitution that "prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect" gays and lesbians, *id*. at 624.

that the act was intended to provide a framework for the resolution of disputes with regard to the custody of a child." *Id*. (emphasis omitted). Specifically turning to MCL 722.22(i), by limiting the definition of "parent," Subdivision (i) presumably intends to ensure that those who seek to adjudicate matters of child custody and parenting time have a legal, valid, and continuing relationship with the minor child at issue. However, I cannot conclude that the means employed, which involve specifically and unjustifiably excluding some individuals from the definition of "parent" on the basis of their sexual orientation, is rationally related to the state's interest, particularly in light of *Obergefell* and *Pavan*, in which the United States Supreme Court has directed that benefits traditionally associated with marriage, such as child custody, parenting time, and adoption, should no longer be unconstitutionally withheld from married same-sex couples. *Obergefell*, 576 US at ___; 135 S Ct at 2604-2605; *Pavan*, 582 US at ___; 137 S Ct at 2076-2077. Accordingly, I agree with plaintiff that by limiting the definition of "parent" in MCL 722.22(i) to a natural or adoptive parent, the legislation at issue violates plaintiff's right to equal protection under the law given that she was legally prohibited from marrying her same-sex partner.

## IV. SUBSTANTIVE DUE PROCESS

In *AFT Mich v Michigan*, 497 Mich 197, 244; 866 NW2d 782 (2015), the Michigan Supreme Court recognized that "[t]he Michigan and United States Constitutions forbid the state from depriving any person of life, liberty, or property without due process of law."

Due process not only provides an individual with procedural protections, but also includes a "substantive" element by which an individual will be protected

against "the arbitrary exercise of governmental power." *Id*. at 245 (quotation marks and citation omitted). When a challenged law does not violate a "fundamental right[]," to succeed on a substantive-due-process claim, the plaintiff must establish that the law at issue is "not reasonably related to a legitimate governmental interest." *Id*. (quotation marks and citation omitted). As the Michigan Supreme Court has cautioned, the initial inquiry in determining whether legislation violates an individual's substantive-due-process rights is "whether the interest allegedly infringed by the challenged government action . . . comes within the definition of 'life, liberty or property.' " *Bonner v Brighton*, 495 Mich 209, 225; 848 NW2d 380 (2014) (citation omitted).

In *Washington v Glucksberg*, 521 US 702, 720; 117 S Ct 2258; 138 L Ed 2d 772 (1997), the United States Supreme Court highlighted some of the individual rights encompassed by the " 'liberty' specially protected by the Due Process Clause . . . ." According to the *Glucksberg* Court, these rights include the right to marry, to have children, and "to direct the education and upbringing of one's children . . . ." *Id*. (citations omitted). Later, in *Troxel v Granville*, 530 US 57, 65-66; 120 S Ct 2054; 147 L Ed 2d 49 (2000), the United States Supreme Court canvassed the history of what it characterized as one of "the oldest . . . fundamental liberty interests recognized by [the United States Supreme Court]," the right of parents to the care, custody, and control of their child:

> The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer* [*v Nebraska*, 262 US 390, 399, 401; 43 S Ct 625; 67 L Ed 1042 (1923)], we held that the "liberty" protected by the Due Process Clause includes the right of

> parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce* [*v Society of Sisters*, 268 US 510, 534-535; 45 S Ct 571, 69 L Ed 1070 (1925)], we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id*., at 535. We returned to the subject in *Prince* [*v Massachusetts*, 321 US 158; 64 S Ct 438; 88 L Ed 645 (1944)], and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id*., at 166.

While the cases protecting parents' fundamental liberty interests in the care and management of their own children have traditionally done so when the rights of natural parents are at issue, in *Obergefell* and *Pavan*, the United States Supreme Court expressly held that same-sex married couples should not be denied, either on equal-protection or due-process grounds, the right to marry, as well as concomitant benefits, including adoption, custody, and parenting time. *Obergefell*, 576 US at ___; 135 S Ct at 2604-2605; *Pavan*, 582 US at ___; 137 S Ct at 2076-2077. While the Michigan Supreme Court has observed that "there has 'always been reluctan[ce] to expand the concept of substantive due process' " and that " 'judicial self-restraint must be undertaken when the parties ask that new ground be broken in this field,' " *Bonner*, 495 Mich at 227 (citation omitted; alteration in original), the ground has already been broken wide open by the United States Supreme

Court. Specifically, in *Obergefell*, the United States Supreme Court discussed "four principles and traditions . . . [that] demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples." *Obergefell*, 576 US at ___; 135 S Ct at 2599. One such basis, the Court opined, "for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education." *Id*. at ___; 135 S Ct at 2600.

The majority opinion makes much of the fact that plaintiff did not legally marry defendant. This is correct, and therefore, to her detriment, and in a particularly cruel evolution of our nation's law, according to the majority, the protections afforded by *Obergefell* simply pass plaintiff by. As noted earlier, plaintiff did not legally marry defendant because she was not permitted to do so before *Obergefell* was decided on June 26, 2015, although the parties agreed in a written contract that plaintiff would seek adoption of MEG, which was also unlawful for plaintiff pre-*Obergefell*. The majority essentially faults plaintiff for the failure to marry defendant, impliedly questioning why she did not travel to another state to legally marry defendant. I am aware that not all Americans are of financial means, and traveling to another state, while juggling the demands of parenthood and working outside the home, might not have been possible. Additionally, what motivation did plaintiff and defendant have to make such an out-of-state excursion to legally marry in a state that recognized same-sex marriage before *Obergefell*, when Michigan would have refused to recognize the union? Under these circumstances, consistent with *Obergefell* and *Pavan*, I conclude that plaintiff has a fundamental liberty interest in parenting

MEG[4] and that the limitation of the definition of "parent" in MCL 722.22(i) to a natural or adoptive parent post-*Obergefell* amounts to an arbitrary exercise of governmental power infringing that right. *AFT Mich*, 497 Mich at 245. Accordingly, I agree with plaintiff that MCL 722.22(i) also violates her right to substantive due process.

## V. CONCLUSION

In my opinion, MCL 722.22(i) is unconstitutional in light of the United States Supreme Court's decisions in *Obergefell* and *Pavan* because it violates plaintiff's rights to equal protection under the law and substantive due process. I would reverse the trial court's order granting summary disposition in favor of defendant and remand for further proceedings to allow (1) plaintiff to commence adoption proceedings and (2) the trial court to determine matters related to custody and parenting time as set forth in MCL 722.23, MCL 722.25, MCL 722.27, and MCL 722.27b.

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[4] As the United States Supreme Court stated in *Obergefell*, the right to " 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." *Obergefell*, 576 US at ___; 135 S Ct at 2600, quoting *Zablocki v Redhail*, 434 US 374, 384; 98 S Ct 673; 54 L Ed 2d 618 (1978).

BROWN v RUDY

Docket No. 335923. Submitted February 14, 2018, at Lansing. Decided March 27, 2018. Approved for publication May 15, 2018, at 9:05 a.m.

Petitioner, Kay Windram Brown, acting through her conservator and limited guardian, Joelle Gurnoe, filed a petition for an ex parte domestic relationship personal protection order (PPO) in the Washtenaw Circuit Court against respondent, Michael Rudy. Gurnoe asserted that petitioner, a wealthy widow, needed a PPO because she was a vulnerable adult with Alzheimer's disease whom respondent had exerted control over and exploited. Gurnoe alleged that respondent had been asked to cease contact with her, and that he did for a while, but then he reinserted himself into petitioner's daily life and changed the passwords on petitioner's online accounts. The petition was supported by an affidavit of Gurnoe and an affidavit of petitioner's son, Soren Windram. Gurnoe averred that respondent had a history of predatory behavior in his relationship with petitioner, and Soren averred that petitioner admitted to him that she had a sexual relationship with respondent and that "she felt disgusted and embarrassed." The court, Julia B. Owdziej, J., issued the ex parte domestic relationship PPO, which prohibited respondent from entering onto petitioner's property, stalking petitioner, and accessing petitioner's online accounts. Respondent moved to terminate the PPO, arguing that the statements against him were false and that the petition falsely presumed that petitioner was so vulnerable as to not have the ability to exercise responsible agency and free will. The court conducted an evidentiary hearing. Gurnoe and Soren testified that there was a concerted effort to alienate petitioner from them and that petitioner had stated multiple times that if respondent was removed from her life, she would kill herself. Respondent testified that he never manipulated petitioner, that he never changed the passwords on her accounts, and that he was in a consensual relationship, including a sexual relationship, with petitioner. Kathleen Baxter, who had been petitioner's friend for over 40 years, testified that respondent was an honorable man and that petitioner wanted respondent in her life. Petitioner testified that she never asked for the

PPO to be taken out against respondent, that respondent never caused her to feel frightened, intimidated, threatened, or in emotional distress, and that Soren's statements about her telling Soren that she was emotionally distraught must have been fabricated by Soren. Following this testimony, respondent moved for a directed verdict, which the court denied. The court then issued an order denying the motion to terminate the PPO. Respondent moved for reconsideration, which the court denied. Respondent appealed.

The Court of Appeals *held*:

1. Respondent's argument that Gurnoe exceeded her authority as petitioner's limited guardian by filing a PPO was without merit. It was undisputed that Gurnoe was appointed as petitioner's conservator and limited guardian, and the order appointing Gurnoe provided for powers that included protecting petitioner from the exploitation and manipulation of others, including respondent. Furthermore, to the extent that respondent challenged whether Gurnoe was properly performing or was breaching her duties as petitioner's limited guardian by seeking a PPO against him, respondent failed to set forth any legal authority establishing his right to raise that challenge in this action.

2. MCL 600.2950(1) provides, in pertinent part, that an individual may petition the family division of the circuit court to enter a PPO to restrain or enjoin an individual with whom he or she has or has had a dating relationship from engaging in certain acts. Pertinent to this case, the prohibited acts included entering onto premises, engaging in stalking as prohibited under MCL 750.411h, and any other specific act or conduct that imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence. Under MCL 600.2950(4), a PPO must be issued if the court determines that there is reasonable cause to believe that the individual to be restrained or enjoined may commit one or more of the acts listed in MCL 600.2950(1). The burden of establishing reasonable cause to issue a PPO is on the petitioner, who also bears the burden of justifying its continuance at a hearing on a motion to terminate the PPO. In this case, it was unclear what specific violent, threatening, or harassing prohibited act identified in MCL 600.2950(1) Gurnoe claimed respondent committed or may commit against petitioner warranted the issuance of a PPO. It was also unclear what imminent danger warranted the issuance of an ex parte PPO under MCL 600.2950(12). Gurnoe and Soren alleged that respondent exerted control over petitioner, exploited and manipulated her, and had a sexual relationship with her, but not one of those acts is listed in

MCL 600.2950(1). Additionally, the evidence presented at the evidentiary hearing did not give rise to reasonable cause to continue the PPO against respondent: petitioner was adjudicated to have some capacity to take care of herself, and she chose not to move her home to North Carolina, which was where Soren lived; no evidence was presented that petitioner's intimate relations with respondent were not consensual; and the only purported "threats" included attempts to alienate petitioner from her family, disparaging remarks respondent made about Gurnoe, and that the passwords on petitioner's online accounts were changed—even though Gurnoe admitted that she had no idea who actually changed the passwords. Gurnoe's testimony did not support her claims that respondent exerted control over petitioner, exploited her, or manipulated her. And there was no predatory behavior; both petitioner and respondent made telephone calls to each other and mutually sought each other's friendship. Accordingly, Gurnoe's testimony did not give rise to reasonable cause to believe that respondent committed or would commit any of the violent, threatening, or harassing prohibited acts listed in MCL 600.2950(1). Petitioner, acting through her limited guardian and conservator, Gurnoe, bore the burden of demonstrating that respondent committed or would commit one or more of the violent, threatening, or harassing prohibited acts listed in MCL 600.2950(1) and wholly failed in that effort. Therefore, the circuit court erred by denying respondent's motion for a directed verdict.

Reversed and remanded for entry of an order granting respondent's motion to terminate the PPO and for further proceedings.

BECKERING, J., concurring in part and dissenting in part, agreed that Gurnoe had the requisite legal authority to petition for a PPO on behalf of petitioner and that the trial court erred by issuing its order denying the motion to terminate the PPO, but she would have held that the trial court erred by issuing the order because it failed to make the findings of fact necessary to determine whether Gurnoe, on behalf of petitioner, had met her burden of proof in establishing a right to continue the PPO pursuant to MCL 600.2950. The trial court appeared to rely only on MCL 600.2950(1)(i), which prohibits stalking under MCL 750.411h. MCL 750.411h(4) provides that evidence that the defendant continued to engage in a course of conduct involving repeated unconsented contact with the victim after having been requested by the victim to discontinue the same or a different form of unconsented contact, and to refrain from any further unconsented contact with the victim, gives rise to a rebuttable

presumption that the continuation of the course of conduct caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested. In this case, it was undisputed that respondent engaged in multiple acts of continuing contact with Brown after receiving Gurnoe's letter requesting that he cease all contact; therefore, respondent's repeated interactions with petitioner legally amounted to unconsented contacts. However, the trial court made no findings of fact as to whether respondent's unconsented contact caused petitioner to suffer emotional distress and would cause a reasonable person to suffer emotional distress. Because of petitioner's Alzheimer's disease, the operative factual question was likely whether respondent's conduct in maintaining a dating relationship with petitioner amounted to molestation in light of her capacity to consent. Accordingly, Judge BECKERING would have vacated the trial court's order and remanded for further proceedings to enable the trial court to make findings of fact and to determine whether the facts support petitioner's entitlement to continuation of the PPO.

*Chalgian & Tripp Law Offices, PLLC* (by *Douglas G. Chalgian* and *R. Drummond Black*) for Kay Windram Brown.

*Collis & Griffor, PC* (by *Stuart M. Collis*) for Michael Rudy.

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

CAVANAGH, P.J. Respondent appeals as of right an order denying his motion to terminate the personal protection order (PPO) that was obtained ex parte against him by petitioner, acting through her conservator and limited guardian, Joelle Gurnoe. We reverse and remand for entry of an order granting the motion and for further proceedings consistent with this opinion.

On July 13, 2016, Gurnoe filed a petition for an ex parte domestic relationship PPO on behalf of petitioner

as her limited guardian[1] and conservator. Gurnoe asserted that petitioner needed a PPO because she was a vulnerable adult with Alzheimer's and respondent had "exerted control over her and exploited her." Gurnoe alleged that respondent had been asked to stop, and he did for a while, but then he reinserted himself into petitioner's daily life and had changed passwords on petitioner's online accounts. Gurnoe requested that the PPO prohibit respondent from entering onto petitioner's property, stalking petitioner, and accessing petitioner's online accounts.

The petition for a PPO was supported by Gurnoe's affidavit, which stated, in part, that the order appointing her as petitioner's limited guardian provided for powers that included protecting petitioner "from exploitation and manipulation from others," including Kathleen Baxter and respondent. Further, Gurnoe averred, respondent "has a history of predatory behavior in his relationship with" petitioner. And respondent was not complying with the directive to cease all contact with petitioner, as evidenced by telephone records and notes found in petitioner's home that petitioner had written referring to respondent. Gurnoe again alleged that respondent had accessed petitioner's online accounts and changed passwords.

The petition for a PPO was also supported by the affidavit of petitioner's son, Soren Windram. His affidavit stated that he was able to monitor petitioner's physical location through an app on her cell phone; the app indicated that she spent on average one to two nights a week at respondent's home. Soren also averred that he had a video chat with petitioner on one

[1] The order appointing a guardian dated December 4, 2015, provided that petitioner was only partially without the capacity to care for herself; therefore, only a limited guardianship was ordered.

occasion in March 2015 while she was at respondent's home and petitioner was drinking a glass of wine and appeared intoxicated although she was an infrequent drinker. The next morning, Soren averred, petitioner broke into tears and said she thought she had sex with respondent and "she felt disgusted and embarrassed." Soren further stated that respondent had exploited petitioner's disease to alienate her from her family and, specifically, him by telling petitioner that Soren is not a good son, that he does not listen to her, and that he is trying to control her. Accordingly, Soren was in favor of the petition for a PPO against respondent.

On July 14, 2016, the ex parte domestic relationship PPO was issued and remained in effect until July 14, 2021.

On July 25, 2016, respondent filed a motion to terminate the PPO on the ground that false, erroneous, and distorted statements had been made against him, including that he is a predator and that he accessed petitioner's online accounts and changed passwords. Respondent alleged that the petition falsely presumed that petitioner was "so vulnerable as to not have the ability to exercise responsible agency and free will." And respondent referred to threats made against him by Soren and Gurnoe. Thereafter, the court conducted an evidentiary hearing on respondent's motion to terminate the PPO.

According to the testimony from a three-day evidentiary hearing, respondent and petitioner had met in the 1980s and then were reintroduced to each other by a mutual friend, Kathleen Baxter, in late 2014. At that time, petitioner was planning on going to North Carolina to visit her son, Soren, and respondent also was planning a trip to North Carolina, so they decided to travel there together. A friendship developed, which

eventually became a romantic and sexual relationship. Petitioner had significant issues with her short-term memory but was functioning well enough to drive a vehicle and live alone. Respondent is a licensed certified social worker, certified financial planner, and a registered investment advisor. At some point, respondent had become aware that petitioner had substantial assets in a trust and offered his professional financial services, but the offer was rejected by Soren. Respondent never brought the matter up again and had nothing to do with petitioner's finances. There was no evidence that respondent ever received any substantial amount of money or significant gifts from petitioner. During the course of their relationship they spoke on the telephone, took dance lessons, went out to dinner, and took petitioner's dog for walks around the lake. Respondent also introduced petitioner to yoga—and they took classes together—as well as massage therapy; these services were offered by two people whom respondent had known for years.

At some point, Soren became concerned about his mother. Petitioner did not come to North Carolina to visit him and his family, and he believed it was because of the company that his mother was keeping. In other words, respondent as well as Baxter and others in petitioner's life were alienating her from him and his family. Soren testified that respondent made disparaging comments about him to petitioner and that those comments were destructive to Soren's relationship with petitioner. He also claimed that pictures he brought to petitioner's house would disappear. Soren testified that petitioner never told him that she felt intimidated, threatened, or terrorized by respondent, but Soren felt that her relationship with respondent was emotionally damaging to petitioner.

Soren also testified that petitioner began making suicidal statements related to these proceedings against respondent.

Gurnoe also testified that she heard petitioner say multiple times that if respondent were removed from her life, she would have nothing to live for and would kill herself. Gurnoe believed there was a concerted effort to alienate petitioner from Soren and his family who live in North Carolina. In fact, when Soren is discussed by petitioner and her friends, it is all about what Soren is doing behind petitioner's back and petitioner becomes very upset and angry. They have also made disparaging remarks about Gurnoe. And Gurnoe noticed that the passwords on petitioner's Verizon and Comcast accounts were changed, but Gurnoe admitted that she had no evidence that respondent was the person responsible.[2]

Gurnoe further testified that she had sent respondent a letter in January 2016, about six weeks after she became petitioner's limited guardian, and told him not to have any further contact with petitioner. Respondent did appear to abide by her request, including that no telephone calls were made for a period of time. However, eventually respondent resumed contact with petitioner, so the PPO was obtained. Gurnoe admitted that petitioner "gets violently angry when you talk about [the fact that] he's not allowed to have contact." However, Gurnoe testified, petitioner "doesn't have the option of choosing to be around people that manipulate her. That right has been taken away from her."

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[2] In fact, petitioner's massage therapist testified that she was there when petitioner was assisted by Verizon in changing her account password. Further, a person who was paid to help petitioner with daily financial matters testified that she had changed the Comcast account password.

Respondent testified that he has never manipulated petitioner, that he never changed the passwords on any of petitioner's accounts, and that he never directed anyone to change her passwords. Respondent testified that he was in a consensual relationship, including a sexual relationship, with petitioner because she is "beautiful," "wonderful," and "a really, really fine companion." There was no question that petitioner needed support to function in life. Respondent did not believe that he was stalking petitioner. In fact, telephone records showed that petitioner called him too. He did not harass, threaten, or intimidate petitioner, nor was he benefiting in any way financially from their relationship. In fact, he would be willing to sign a document relinquishing any right to any property or finances of petitioner. He had not influenced her in any negative way and never prevented her from going to North Carolina or from having a good relationship with her family. He simply wanted to be a part of petitioner's life and felt that he could be very helpful to her life and well-being.

Kathleen Baxter testified that respondent was indeed an important part of petitioner's life and that he was an honorable, not a manipulative, man. Baxter had known petitioner for over 40 years, and they called each other "sisters." Petitioner confided in Baxter that respondent is kind to her, gives her good information, and never tells her what to do. Petitioner wanted respondent in her life, and when she learned about the PPO, petitioner was very irate and tore it up when she saw it. Respondent simply wanted petitioner to have a voice, to be heard, and to be part of the decisions that keep her safe and happy. Despite her short-term memory issues, petitioner had never forgotten about respondent during these proceedings and still talked about him daily.

Petitioner testified that she never asked for a PPO to be taken out against respondent. "He's a wonderful human being, and I like to be able to talk with him, see him." She said she has fun with him. She characterized him as an "A plus" person. He had never caused her to feel frightened, intimidated, threatened, or in emotional distress. In fact, when she is with him she feels "happy, really happy. And enjoying whatever we're doing." When petitioner was asked if she told Gurnoe to keep him away, petitioner testified, "Absolutely I didn't—wouldn't want that to occur." If Gurnoe did that "I'd kick her out of the house and not ever use her as a person at all for—that would be terrible." Petitioner testified that she would be furious. Later, at the resumed evidentiary hearing, petitioner was again asked if she wanted a PPO against respondent, and she replied: "Heck no. Because he is not—he is not at all mean; he is quite wonderful. It would do me a lot of good to have him more hours doing things with me. He's a gentleman. He's a kind heart. . . . [H]e's an A plus . . . . He's great. Best man I've ever met." As for Soren's claim that she was emotionally distraught after contact with respondent, petitioner testified that she thinks Soren made that up. She did not know why he would, but she would not put it past him.

After the testimony of Soren, Gurnoe, and respondent was received at the evidentiary hearing, respondent moved for a directed verdict, arguing that the statutory grounds required to issue a PPO were not proved by the evidence. Without providing any reasoning at all, the court denied the motion. Following all the testimony, the court held that a guardian was in place to protect petitioner and that the PPO would not be terminated. The basis for the court's ruling was that respondent continued to have contact with petitioner after he had been instructed by Gurnoe not to have

contact. Therefore, on October 14, 2016, an order denying the motion to terminate the PPO was entered. Respondent moved for reconsideration, which was denied. This appeal followed.

Respondent first argues that Gurnoe exceeded the scope of her authority as petitioner's limited guardian by seeking a PPO against respondent, who was petitioner's boyfriend, when there was no evidence of manipulation or exploitation.

Issues involving the interpretation of statutes and court rules are reviewed de novo. *Hill v L F Transp, Inc*, 277 Mich App 500, 507; 746 NW2d 118 (2008).

It is undisputed that Gurnoe was appointed petitioner's conservator and limited guardian. The order appointing Gurnoe as petitioner's limited guardian provided for powers that included protecting petitioner from the exploitation and manipulation of others, including respondent. Respondent argues that Gurnoe exceeded her authority as limited guardian because she was appointed under MCL 700.5306 "as a means of providing continuing care and supervision . . . ." And, respondent argues, filing for a PPO against petitioner's boyfriend does not comport with those limited duties.

To the extent that respondent is challenging whether Gurnoe was properly performing or was breaching her duties as petitioner's limited guardian by seeking a PPO against respondent, respondent has failed to set forth any legal authority establishing his right to raise that challenge in this PPO action. And we could find no such authority. While respondent may challenge whether in fact the PPO should have been issued against him on the ground that the requirements for issuance under MCL 600.2950 were not established, a claim that Gurnoe breached her duties

as petitioner's limited guardian by doing so may not be raised by him in this PPO action.

Further, to the extent that respondent is arguing that a personal protection action may not be filed on behalf of an incapacitated person, we reject that claim. MCR 3.703 provides the rules for commencing a personal protection action, and MCR 3.703(F)(1) states, "If the petitioner is a minor or a legally incapacitated individual, the petitioner shall proceed through a next friend." A "next friend" represents a petitioner under supervision of the trial court; however, when a conservator has already been appointed by the probate court, the conservator may bring such an action on behalf of the incapacitated person. MCL 2.201(E)(1)(a) and (b); see also *In re Powell Estate*, 160 Mich App 704, 713; 408 NW2d 525 (1987). Accordingly, Gurnoe was permitted to commence a personal protection action on behalf of petitioner as her conservator.

Next, respondent argues that the circuit court erred when it denied his motion for a directed verdict at the close of petitioner's proofs at the evidentiary hearing or, in the alternative, when it denied his motion to terminate the PPO. We agree.

A PPO constitutes injunctive relief. MCL 600.2950(31)(d). We review decisions to grant or deny injunctive relief, including the decision to deny a respondent's motion to terminate a PPO, for an abuse of discretion. *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). An abuse of discretion occurs when the court's decision falls outside the range of principled outcomes. *Id*. The circuit court's factual findings underlying its decision are reviewed for clear error, and issues of statutory interpretation are reviewed de novo. *Id*. A circuit court's decision to deny a motion for a directed verdict is reviewed de novo to

determine whether, after the close of the petitioner's proofs, the petitioner had shown a right to relief. *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995).

A domestic relationship PPO is issued under MCL 600.2950(1), which provides, in pertinent part:

> Except as provided in [MCL 600.2950(27) and (28)], by commencing an independent action to obtain relief under this section . . . an individual may petition the family division of circuit court to enter a personal protection order to restrain or enjoin . . . an individual with whom he or she has or has had a dating relationship . . . from doing 1 or more of the following:
>
> (a) Entering onto premises.
>
> (b) Assaulting, attacking, beating, molesting, or wounding a named individual.
>
> (c) Threatening to kill or physically injure a named individual.
>
> (d) Removing minor children . . . .
>
> (e) Purchasing or possessing a firearm.
>
> (f) Interfering with petitioner's efforts to remove petitioner's children or personal property from premises . . . .
>
> (g) Interfering with petitioner at petitioner's place of employment . . . .
>
> (h) Having access to information in records concerning a minor child . . . .
>
> (i) Engaging in conduct that is prohibited under section 411h or 411i of the Michigan penal code, 1931 PA 328, MCL 750.411h [stalking] and 750.411i [aggravated stalking].
>
> (j) Any of the following . . . with respect to an animal in which petitioner has an ownership interest . . . .
>
> (k) Any other specific act or conduct that imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence.

Under MCL 600.2950(4), a PPO must be issued "if the court determines that there is reasonable cause to believe that the individual to be restrained or enjoined may commit 1 or more of the acts listed in subsection (1)." The burden of establishing reasonable cause to issue a PPO is on the petitioner, who also bears the burden of justifying its continuance at a hearing on a motion to terminate the PPO. *Hayford*, 279 Mich App at 326.

In this case, Gurnoe's petition for an ex parte PPO filed on behalf of petitioner and against respondent stated that a PPO was needed because:

> Ms. Windram Brown is a vulnerable adult with Alzheimer's. Mr. Rudy has exerted control over her and exploited her. He has been asked to stop, and did for a while. Now he has changed the passwords on her accounts and has reinserted himself into her daily life. Petitioner is both Co-Guardian and Conservator for Ms. Windram Brown.

As permitted under MCL 600.2950(4)(a), the petition was also supported by the affidavits of Gurnoe and Soren, which were discussed earlier. However, it is unclear what specific violent, threatening, or harassing prohibited act identified in MCL 600.2950(1) Gurnoe claimed respondent committed or may commit against petitioner warranted the issuance of a PPO. See, e.g., *Kampf v Kampf*, 237 Mich App 377, 385; 603 NW2d 295 (1999). Likewise, it is not clear what *imminent* danger warranted the issuance of an ex parte PPO. See MCL 600.2950(12).

According to Gurnoe and Soren, respondent "exerted control over" petitioner, exploited and manipulated her, had a sexual relationship with her, and had "a history of predatory behavior in his relationship" with her. But not one of these acts is listed in Subsection (1).

See MCL 600.2950(4). To the extent that the purported "predatory behavior" can be construed to mean the prohibited conduct of "stalking," i.e., "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested," MCL 750.411h(1)(d), no such harassment was identified in either the petition or supporting documents seeking the PPO. Furthermore, Gurnoe was only appointed as petitioner's "limited guardian," which means that petitioner was found to have some capacity to take care of herself. See MCL 700.5306(3). And Gurnoe was appointed as petitioner's conservator to protect petitioner's finances. MCL 700.5319(1). Nevertheless, the circuit court concluded that there was reasonable cause to believe that respondent committed or would commit one of the violent, threatening, or harassing prohibited acts listed in Subsection (1) and issued the ex parte PPO. See MCL 600.2950(4) and (12); *Kampf*, 237 Mich App at 385.

After respondent moved to terminate the PPO, a three-day evidentiary hearing was conducted. During the course of that hearing, the evidence clearly demonstrated that petitioner's son Soren attributed petitioner's failure to visit or move to North Carolina to the influence, i.e., "manipulation," of her "circle of friends," which included petitioner's best friend of over 40 years, Baxter, as well as petitioner's boyfriend, respondent. That petitioner had her own life and her own friends that she enjoyed in Michigan apparently could not have been a reason petitioner chose not to move from her home to North Carolina. Despite the fact that petitioner threatened suicide if she could not continue

in her relationship with respondent, Soren was not persuaded; apparently, he believed petitioner's feelings were the product of some "undue influence" by respondent. It was also clear from Soren's testimony that the sexual relationship petitioner had with respondent was repulsive to him and, he testified, to petitioner. After Soren's testimony, however, petitioner accused Soren of lying in an outburst in the courtroom. And when petitioner testified, she was not queried about her sexual relationship with respondent. But when asked if she was emotionally distraught after having had contact with respondent, petitioner testified that Soren made that up and that she would not put it past him to do so. Further, no evidence was presented that petitioner's intimate relations were not consensual. In any case, Soren's testimony did not give rise to reasonable cause to continue the PPO against respondent.

The testimony offered by Gurnoe also did not give rise to reasonable cause to continue the PPO against respondent. Again, petitioner was adjudicated to have some capacity to take care of herself, so Gurnoe was appointed only as a limited guardian. Pursuant to MCL 700.5314, as petitioner's guardian, Gurnoe had the duty to consult with petitioner before making a major decision affecting petitioner. It would seem that seeking a PPO against petitioner's boyfriend—whom petitioner clearly and adamantly cared about—would be such a "major decision." That is, Gurnoe admitted that petitioner threatened multiple times to kill herself if respondent was removed from her life. And Gurnoe testified that petitioner "gets violently angry when you talk about [the fact that] he's not allowed to have contact." Apparently, as with Soren, Gurnoe ignored petitioner's sentiments and attributed them to some "undue influence" by respondent rather than petitioner's true feelings for him.

Likewise, Gurnoe considered all of petitioner's "circle of friends" to be threats to petitioner's well-being, including Baxter—who was like a sister to petitioner and had been for over 40 years—petitioner's yoga instructor, petitioner's massage therapist, and respondent. The apparent "threats" to which Gurnoe refers include attempts to alienate petitioner from Soren and his family, the fact that disparaging remarks were made about Gurnoe and were overheard by Gurnoe, and that the passwords on two of petitioner's online accounts were changed—although Gurnoe admitted that she had no idea who changed the passwords despite accusing respondent of doing so in the petition for the PPO. With regard to respondent specifically, Gurnoe's concern was that "he does not recognize [petitioner's] limitations or have a realistic view of what her future will be or what her future costs of care will be." According to Gurnoe, petitioner has a home in North Carolina, her burial plot is there, and her family is there; therefore, that is where petitioner belongs. The fact that petitioner's "circle of friends" do not promote that objective is apparently considered threatening, manipulative, or exploitive to Gurnoe. In her attempt to achieve the objective of petitioner moving to North Carolina where she "should be," Gurnoe has taken concerted—and legal—actions to remove all of petitioner's friends and support system from petitioner's life, in effect isolating her, so that petitioner would have no reason not to move to North Carolina.

In any case, Gurnoe's testimony did not support her claims that respondent "exerted control over" petitioner, exploited her, or manipulated her. And there was no "predatory behavior." While Gurnoe testified about telephone calls respondent made to petitioner, there were also numerous telephone calls petitioner made to respondent. In other words, they mutually

sought to speak to each other on the telephone, as friends generally do. Gurnoe's testimony certainly did not give rise to reasonable cause to believe that respondent committed or would commit any of the violent, threatening, or harassing prohibited acts listed in MCL 600.2950(1).

Respondent testified after Gurnoe and then moved for a directed verdict. The circuit court denied the motion without explanation. We conclude that the decision to deny respondent's motion for a directed verdict was erroneous. Petitioner, acting through her limited guardian and conservator, Gurnoe, bore the burden of demonstrating that respondent committed or would commit one or more of the violent, threatening, or harassing prohibited acts listed in MCL 600.2950(1) and wholly failed in that effort. Even if exerting control over, exploiting, and manipulating were considered prohibited acts under Subsection (1), which they are not, the evidence did not establish that respondent engaged in these behaviors. Accordingly, for all the reasons discussed in this opinion, the circuit court erred by denying respondent's motion for a directed verdict because not one of the statutory grounds required to issue a PPO was proved by petitioner's evidence.

Further, the testimony received by the circuit court after it denied respondent's motion for a directed verdict should have given the court even more reason to terminate the PPO. Petitioner's friend of 40 years, Baxter, whom petitioner considered a sister, testified that petitioner had told her repeatedly that respondent is important to her and that she wanted him in her life. Baxter further testified that despite petitioner's short-term memory issues, she has never forgotten about respondent even though they had not been allowed to

see each other since the PPO was issued. In fact, petitioner still talked about respondent on a daily basis. The testimony from petitioner herself confirmed that she remembered respondent, sincerely cared about respondent, and held him in the highest regard. Petitioner clearly testified that she wanted to be able to see respondent, talk to respondent, and spend time with respondent. She expressed absolutely no fear or apprehension of any kind with regard to respondent and, in fact, characterized him in the most glowing of terms.

Nevertheless, the circuit court denied respondent's motion to terminate the PPO, holding that the PPO was warranted because respondent defied Gurnoe's instruction not to have contact with petitioner. The circuit court's decision constituted an abuse of discretion. See *Hayford*, 279 Mich at 325. MCL 600.2950(1) sets forth very specific violent, threatening, and harassing behaviors that warrant the issuance of a PPO. A PPO is not to be sought or issued on a whim or because someone simply does not like someone else and makes reckless statements to support a fiction. And in this case, it was clear that the PPO was sought as a means to control petitioner moreso than to control respondent. In any case, defiance of the instruction of a limited guardian is not a statutory ground to issue a PPO under MCL 600.2950(1). And the evidence wholly failed to establish reasonable cause to believe that respondent committed or would commit any conduct prohibited under MCL 600.2950(1) that would warrant the issuance of a PPO. See MCL 600.2950(4). In light of our resolution of this matter, we need not consider respondent's other argument on appeal. Furthermore, because of the manner in which Gurnoe handled this matter, as well as the antagonistic relationship between Gurnoe and petitioner, we direct the circuit

court to consider the removal of Gurnoe as petitioner's guardian. See MCR 7.216(A)(7).

Reversed and remanded for entry of an order granting respondent's motion to terminate the PPO and for further proceedings consistent with this opinion. We do not retain jurisdiction. Respondent is entitled to tax costs as the prevailing party. See MCR 7.219(A).

HOEKSTRA, J., concurred with CAVANAGH, P.J.

BECKERING, J. (*concurring in part and dissenting in part*). One of our most treasured rights as adults is the freedom of association: the ability to spend time with whatever group or person we desire. But what happens when we are no longer cognitively able to discern for ourselves who is a friend and who is a foe, even though both may be sweet and endearing? This case is about the propriety of a personal protection order (PPO) issued against respondent, Michael Rudy, to protect petitioner, Kay Windram Brown, from her own vulnerability to manipulation and exploitation due to Alzheimer's disease. At issue is whether the trial court erred by continuing the PPO after hearing three days of testimony from a host of witnesses, including Brown, Rudy, and Brown's coguardian and conservator, Joelle Gurnoe.

In response to the issues Rudy has raised on appeal, the majority concludes that the trial court correctly held that Gurnoe had the requisite legal authority to petition for a PPO on behalf of Brown. On that point I agree. But the majority sides with Rudy on his argument that the trial court should have granted his motion to discontinue the PPO. While I agree that the trial court erred by issuing its October 14, 2016 order, I do so only because the trial court failed to make

findings of fact necessary to determine whether Gurnoe, on behalf of Brown, had met her burden of proof in establishing a right to continue the PPO pursuant to MCL 600.2950. A remand is necessary for the trial court to make those factual findings. For this Court to rule in favor of either party on the ultimate question of whether the trial court should have continued the PPO would require wading into witness credibility and fact-finding, neither of which is the proper function of this Court. I dissent from the majority opinion because I would vacate the trial court's order and remand for further proceedings.

## I. BASIC FACTS AND PROCEDURAL HISTORY

Kay Brown was 75 years old at the time of the PPO evidentiary hearing. She is a wealthy widow who, while bright and vivacious throughout her lifetime, is suffering from the progressive effects of Alzheimer's disease and has been exploited in the past by others. Michael Rudy was 71 years old at the time of the PPO evidentiary hearing. He holds himself out to be a financial planner, psychotherapist, and psychoanalyst. Rudy and Brown met at some point in the 1980s, but they did not have any significant contact or relationship until they became reacquainted in the fall of 2014 through a woman named Kathleen Baxter. When Rudy gave Brown a ride to North Carolina so that he could attend a conference and she could visit her grandchildren, Rudy discovered documents Brown had brought with her revealing her financial worth. After making several unsuccessful attempts to become her financial advisor, Rudy engaged in a dating relationship with Brown.

Before the instant proceedings commenced, Brown had been made a ward, subject to a limited guardianship, as the result of a December 4, 2015 order in which

the trial court found that she was an incapacitated individual. The trial court appointed "Christopher D. Brown and/or Joelle Gurnoe" as limited coguardians for Brown.[1] The order provided that the coguardians would only have the following powers: "[l]iving environment," "medical care," and to protect Brown "from exploitation and manipulation from others, which includes access of Kathleen Baxter or Michael Rudy" to Brown. On February 1, 2016, the trial court also appointed Gurnoe as Brown's conservator.

Aware that Rudy was spending time with Brown and that he had made several attempts to insinuate himself into her financial affairs—pitching his consulting services to Brown's son, Brown's lawyer, and then to Brown herself when the others had rebuffed his offers to work on Brown's estate monies—Gurnoe arranged a meeting with Rudy in order to assess the situation.[2] Following that meeting, Gurnoe sent a letter to Rudy on January 21, 2016. She informed him that she and Christopher had worked closely together to gain a deeper understanding of Brown's "needs and supports, and to make decisions with her safety being a top priority." Gurnoe continued, **"At this time, we respectfully request that you cease all contact with Kay . . . ."** The letter further stated: "We are hopeful that you will respect our wishes as Kay's

[1] According to testimony in the record, Christopher is Brown's stepson. Gurnoe is an attorney with professional experience as a guardian and who previously worked as a social worker for senior citizens. She has a law degree from Wayne State University and a bachelor's degree in psychology and sociology from the University of Michigan.

[2] At the PPO continuation evidentiary hearing, Gurnoe testified that Rudy showed up at the meeting in a three-piece suit and an "Abe Lincoln" top hat. He brought a stack of materials that he wanted to share with Gurnoe on how she could better understand the dementia process for Brown and how she could learn to work better with her. He also provided Gurnoe with a CD lecture regarding "existential existence."

Guardians. However, if you are unable to seamlessly remove yourself from Kay's life, we will avail ourselves of all legal remedies, including pursuit of a personal protection order or restraining order." Rudy responded with a letter of his own on February 2, 2016, in which he indicated that "[a]s an act of civil disobedience—I may choose to not comply with your edict and have my case finally heard before a real judge."

On July 13, 2016, Gurnoe, acting as Brown's next friend, filed a petition for a PPO. The petition contended that Rudy and Brown "have or had a dating relationship" and that a PPO was needed because "Ms. Windram Brown is a vulnerable adult with Alzheimer's. Mr. Rudy has exerted control over her and exploited her. He has been asked to stop, and did for a while. Now he has changed the passwords on her accounts and has reinserted himself into her daily life." Gurnoe asked the court for a PPO prohibiting Rudy from entering onto the property where Brown lives, stalking her as defined under MCL 750.411h and MCL 750.411i, and accessing Brown's personal accounts online. She requested an ex parte order and accompanied her petition with two affidavits in support, her own and one written by Brown's son Soren Windram. The trial court issued an ex parte PPO on July 14, 2016. On July 25, 2016, Rudy moved to terminate the PPO. He contended that the allegations made against him were "[f]alse, erroneous and distorted."

At an evidentiary hearing that spanned three days, the trial court took testimony from Gurnoe, Windram, Rudy, Baxter, Brown, Milagros Paredes (telephonically), Fiona Gray (telephonically), and Michele Pingel.[3] At the conclusion of the evidentiary hearing, the

[3] The trial court heard testimony indicating that either Baxter or Rudy arranged for Gray to provide Brown with personal financial

trial court noted that it had put a professional guardianship in place to protect Brown because she "could not be kept safe by any other options." The court noted that it was a highly contentious guardianship and that Gurnoe "has not [sic] dog in this fight when she comes in, and she has a background in social work as well." The trial court noted, and it was undisputed, that Rudy continued to have contact with Brown despite Gurnoe's instructions in January 2016 to stop doing so. The court acknowledged Brown's testimony that she wanted to have contact with Rudy, but the court also noted that Gurnoe had been appointed to protect Brown. Without making any findings of fact on the record, the trial court concluded: "I am not going to terminate the personal protection order. The personal protection order is going to remain in place."

## II. ANALYSIS

At the heart of this case is whether the trial court erred by continuing the PPO, which was entered pursuant to MCL 600.2950. MCL 600.2950(1) provides, in pertinent part:

> Except as provided in [MCL 600.2950(27) and (28)],[4] by commencing an independent action to obtain relief under this section, by joining a claim to an action, or by filing a motion in an action in which the petitioner and the individual to be restrained or enjoined are parties, an individual may petition the family division of circuit court to enter a personal protection order to restrain or enjoin a spouse, a former spouse, an individual with whom he or she has had a child in common, an individual with whom he or she has or has had a dating relationship, or an

assistance and that Paredes and Pingel—Rudy's massage therapist and yoga instructor, respectively—also provide services to Brown.

[4] Subsections (27) and (28) are inapplicable to the circumstances in this case.

individual residing or having resided in the same household as the petitioner from doing 1 or more of the following:

(a) Entering onto premises.

* * *

(i) Engaging in conduct that is prohibited under section 411h or 411i of the Michigan penal code, 1931 PA 328, MCL 750.411h and 750.411i.

* * *

(k) Any other specific act or conduct that imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence.

Pursuant to MCL 600.2950(4), the trial court must issue a PPO "if the court determines that there is reasonable cause to believe that the individual to be restrained or enjoined may commit 1 or more of the acts listed in subsection (1)." "The petitioner bears the burden of establishing reasonable cause for issuance of a PPO and of establishing a justification for the continuance of a PPO at a hearing on the respondent's motion to terminate the PPO." *Hayford v Hayford*, 279 Mich App 324, 326; 760 NW2d 503 (2008) (citations omitted). "In determining whether good cause exists, the trial court is required to consider '[t]estimony, documents, or other evidence' and '[w]hether the individual to be restrained . . . has previously committed or threatened to commit 1 or more of the acts listed in subsection (1).' " *Pickering v Pickering*, 253 Mich App 694, 701; 659 NW2d 649 (2002) (alterations in original), quoting MCL 600.2950(4)(a) and (b).

Although the PPO petition sought to enjoin conduct falling under Subdivisions (a), (i), and (k) of MCL 600.2950(1), it appears that the trial court only relied

on Subdivision (i) in continuing the PPO following the evidentiary hearing. Furthermore, the parties' arguments on appeal are only directed at this subdivision. MCL 750.411h(2)[5] makes it a crime to engage in "stalking." MCL 750.411h(1) provides the following pertinent definitions:

> (a) "Course of conduct" means a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose.
>
> (b) "Emotional distress" means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.
>
> (c) "Harassment" means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.
>
> (d) "Stalking" means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.
>
> (e) "Unconsented contact" means any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following:

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[5] MCL 750.411i, which defines the crime of aggravated stalking, is not implicated in this case because there is no evidence or argument advanced that there exists any of the additional circumstances listed in MCL 750.411i(2) that are necessary for stalking conduct to constitute aggravated stalking.

(*i*) Following or appearing within the sight of that individual.

(*ii*) Approaching or confronting that individual in a public place or on private property.

(*iii*) Appearing at that individual's workplace or residence.

(*iv*) Entering onto or remaining on property owned, leased, or occupied by that individual.

(*v*) Contacting that individual by telephone.

(*vi*) Sending mail or electronic communications to that individual.

(*vii*) Placing an object on, or delivering an object to, property owned, leased, or occupied by that individual.

(f) "Victim" means an individual who is the target of a willful course of conduct involving repeated or continuing harassment.

Additionally, MCL 750.411h(4) provides:

> In a prosecution for a violation of this section, evidence that the defendant continued to engage in a course of conduct involving repeated unconsented contact with the victim after having been requested by the victim to discontinue the same or a different form of unconsented contact, and to refrain from any further unconsented contact with the victim, gives rise to a rebuttable presumption that the continuation of the course of conduct caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

This Court has stated in the context of supporting a PPO based on harassment or stalking that "[t]here must be evidence of two or more acts of unconsented contact that caused the victim to suffer emotional distress and that would cause a reasonable person to suffer emotional distress." *Hayford*, 279 Mich App at 330.

In this case, as Brown's limited guardian, Gurnoe had express legal authority to control Rudy's access to Brown for the purpose of protecting Brown.[6] It is undisputed that Gurnoe met with Rudy to evaluate his intentions and then instructed him by letter of January 21, 2016, to "cease all contact" with Brown; Gurnoe warned him that failure to comply with her instructions would result in the pursuit of a PPO. It is also undisputed that Rudy engaged in multiple acts of continuing contact with Brown after receiving Gurnoe's letter, and thus, Rudy's repeated interactions with Brown legally amounted to unconsented contacts. However, the trial court made no findings of fact as to whether Rudy's unconsented contact caused Brown to suffer emotional distress and would cause a reasonable person to suffer emotional distress. See *id*. Those findings would lead to a rebuttable presumption that the continuation of Rudy's course of conduct caused Brown to feel terrorized, frightened, intimidated, threatened, harassed, or molested. MCL 750.411h(4).

As an alternative approach, the trial court could have but did not address whether Rudy's unconsented conduct made Brown "feel terrorized, frightened, intimidated, threatened, harassed, or molested." See MCL 750.411h(1)(d). Because of Brown's Alzheimer's disease, the operative factual question here is likely whether Rudy's conduct in maintaining a dating relationship with Brown amounted to molestation in light of her capacity to consent. Rudy testified that he engaged in sexual relations with Brown, and the ma-

[6] Because Gurnoe had been granted these powers as limited guardian, Gurnoe was "responsible for the ward's care, custody, *and control*" with respect to Brown's access to Rudy. MCL 700.5314 (emphasis added). Gurnoe had a duty to act in Brown's best interests to prevent her from being exploited or manipulated. See *In re Redd Guardianship*, 321 Mich App 398, 406-407; 909 NW2d 289 (2017); MCL 330.1602(1).

jority appears to accept without question Rudy's self-characterization as Brown's "boyfriend." However, Gurnoe testified that Brown was "[a]bsolutely not" capable of consenting to sexual intercourse because of the advanced stage of her Alzheimer's disease. Windram testified that Brown told him she felt disgusted after spending the night at Rudy's house and that she began making suicidal comments after Rudy began having sex with her. Gurnoe and Windram testified regarding Brown's emotional outbursts and anxiety associated with Rudy and the actions designed to protect her from him. However, the trial court made no factual findings regarding Brown's capacity to consent to sexual relations and whether Rudy's contacts caused her to feel molested or harassed, or whether she felt harassed by her coguardians' efforts to protect her—efforts that she perceived as stymieing her personal desires. I appreciate the majority's observation that Gurnoe's appointment as a limited guardian implied that Brown retained some capacity to take care of herself, and I support the notion that Brown and other similarly situated adults should be able to exercise their freedom of association to the extent of their capacities. However, whether Brown has the capacity to consent to the type of relationship Rudy claims they share—and all that this type of relationship implies for the safety and security of a vulnerable adult—involves credibility determinations that the trial court skirted, but did not make, and that this Court should not make. The credibility of the witnesses and the reliability of their testimony are crucial in this case. We are not a fact-finding court, see *Bloomfield Twp v Kane*, 302 Mich App 170, 185 n 10; 839 NW2d 505 (2013), and it is not our place to step into the shoes of the trial court on that front. I would vacate the trial court's order and remand for further proceedings to enable the trial

court to make findings of fact on the basis of the testimony presented at the evidentiary hearing and to determine whether the facts support petitioner's entitlement to continuation of the PPO.

BRUGGER v MIDLAND COUNTY BOARD OF ROAD COMMISSIONERS

Docket No. 337394. Submitted May 1, 2018, at Lansing. Decided May 15, 2018, at 9:10 a.m. Reconsideration denied at 324 Mich App 801. Leave to appeal sought.

Tim E. Brugger II filed a negligence action in the Midland Circuit Court against the Midland County Board of Road Commissioners, alleging that he was injured in a motorcycle accident that was caused by a defect in a highway under the jurisdiction of defendant and that defendant was liable under the highway exception, MCL 691.1402, to the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. Plaintiff notified defendant of his injuries and the alleged highway defect 110 days after the crash in accordance with MCL 691.1404, which requires presuit notice to a governmental agency within 120 days after the injury occurs. After plaintiff filed his complaint, the Court of Appeals issued *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449 (2016), holding that MCL 224.21(3)—a provision of the county road act, MCL 224.1 *et seq*., that requires notice to the board of county road commissioners within 60 days after an injury occurs—not MCL 691.1404 of the GTLA, controlled the timing and content of presuit notice to a road commission for injuries caused by an alleged highway defect. Defendant moved for summary disposition, arguing that under *Streng*, plaintiff's notice was ineffective in that he failed to file it within the 60-day time limit required by MCL 224.21(3). The court, Michael J. Beale, J., denied defendant's motion, concluding that plaintiff had correctly filed his notice within 120 days in accordance with MCL 691.1404. The court rejected defendant's argument that plaintiff was required to notify defendant within the 60-day period set forth in MCL 224.21(3), reasoning that the Court of Appeals' decision in *Streng* applied prospectively only because injured plaintiffs had relied for multiple decades on courts applying the 120-day notice provision of the GTLA to highway-defect cases involving county road commissions. Defendant appealed.

The Court of Appeals *held*:

1. The timing requirement for notifying a governmental agency of a negligence cause of action is different under the GTLA

and the county road act. Specifically, MCL 691.1404(1) of the GTLA requires an injured plaintiff to notify the governmental agency of his or her injury and the alleged defect within 120 days after the injury occurs, while MCL 224.21(3) of the county road act requires an injured plaintiff to notify the board of county road commissioners of his or her injury and the alleged defect within 60 days after the injury occurred. The Court in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007), upheld as constitutional the 120-day notice provision in the GTLA, stating that a governmental agency need not show prejudice when a claimant failed to satisfy the notice provision, overruling contrary decisions regarding that GTLA notice provision in *Hobbs v Dep't of State Hwys*, 398 Mich 90 (1976), and *Brown v Manistee Co Rd Comm*, 452 Mich 354 (1996), and abrogating *Reich v State Hwy Dep't*, 386 Mich 617 (1972). However, the *Rowland* Court did not mention MCL 224.21(3) or explicitly overrule *Crook v Patterson*, 42 Mich App 241 (1972), which had relied on *Reich* to similarly strike down as unconstitutional the 60-day notice provision in MCL 224.21(3).

2. Judicial decisions are generally given full retroactive effect. When injustice might result from full retroactivity—for example, when a holding overrules settled precedent—a more flexible approach is warranted. To determine whether a judicial decision should be given retroactive effect, a court must consider (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. And as indicated by the Court in *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411 (2004), the role of the government in creating understandable confusion concerning a legal standard weighs strongly against sanctioning a party for acting in good faith on the basis of the apparent law. In this case, each factor favored prospective application of the *Streng* decision. First, the purpose of *Streng* was to correct an apparent error in interpreting a provision of the GTLA. Second, there was heavy reliance on applying the GTLA provision because, as recognized by the panel in *Streng*, for more than four decades, Michigan courts had routinely applied the 120-day GTLA notice provision to negligence actions against a county road commission without any discussion of the different notice and substantive requirements in MCL 224.21(3). Moreover, confusion over which notice provision to apply was created by the Legislature and the Judiciary, not by plaintiff, who filed his notice more than two and a half years before the *Streng* decision. Accordingly, because *Streng* applied prospectively only, MCL 691.1404(1) applied to plaintiff's action, and plaintiff correctly notified defendant of his

injuries and the alleged highway defect within that 120-day period in accordance with the GTLA provision. Therefore, the trial court correctly denied defendant's motion for summary disposition.

Affirmed.

SHAPIRO, P.J., concurring, agreed with the majority opinion that *Streng* applied prospectively only but wrote separately to state his view that *Streng* was wrongly decided. The *Streng* Court should have followed the result reached in *Apsey v Mem Hosp*, 477 Mich 120 (2007), which held that the Legislature provided alternative methods regarding out-of-state notary requirements when it enacted two statutes with differing requirements and that parties could comply with either statute's procedural requirements. Accordingly, the *Streng* Court should have concluded that a plaintiff bringing a negligence action against a county road commission could comply with the presuit notice requirements in *either* MCL 224.21(3) *or* MCL 691.1404(1).

O'BRIEN, J., dissenting, disagreed with the majority's conclusion that *Streng* should be applied prospectively only. In general, judicial decisions are given retroactive effect, and prospective-only application is generally limited to decisions that overrule clear and uncontradicted caselaw. In *Rowland*, the Supreme Court corrected a long line of cases that had engrafted an actual-prejudice requirement into statutory notice requirements to avoid governmental immunity, rejecting the idea that the sole purpose of a notice statute was to prevent prejudice and rejecting the conclusion in *Brown* that MCL 224.21 was unconstitutional. In that regard, *Streng* did not establish new law because it did not overrule caselaw or introduce a novel interpretation of a statute; instead, it resolved a dispute between the presuit notice requirements in MCL 224.21(3) and MCL 691.1404(1) after *Rowland* established new principles of law in 2007. When analyzing whether the *Streng* decision should be applied prospectively only, the majority erred by focusing on the extent of legal reliance throughout the entire history of the GTLA. Instead, the proper inquiry should have been on the extent of reliance on the GTLA notice provision after *Rowland* was decided; and in that time frame, there was not extensive reliance on the 120-day GTLA provision as evidenced by the absence of published decisions applying *Rowland* to cases filed after 60 days but before 120 days of when the injury occurred. While plaintiff complied with what he believed was the correct notice statute—which favored prospective application of *Streng*—he was injured six years after *Rowland* was released. And because MCL 224.21(3) was consti-

tutional post-*Rowland*, there was, at a minimum, a question regarding which notice provision applied to plaintiff's action against defendant, negating prospective-only application. Accordingly, under these circumstances, Judge O'BRIEN would have applied *Streng* retroactively. The majority's reliance on *Bryant* to support its invalid assertion that the role of government in creating confusion concerning a legal standard weighed in favor of prospective-only application was misplaced because that opinion did not address whether a case should be applied retroactively and did not support or contradict the majority's argument. Judge O'BRIEN disagreed with the concurrence that *Streng* rested exclusively on the principle of statutory interpretation that between a general and a specific statute the more specific statute, MCL 224.21(3), controlled; instead, the *Streng* Court interpreted the two notice provisions *in pari materia* to conclude that MCL 224.21 controlled the procedural and remedial provisions for county road commissions. The concurrence misapplied the holding in *Apsey* because neither MCL 224.21(3) nor MCL 691.1404(1) stated that it provided an additional method for giving notice. Absent such language, *Apsey* had no bearing on whether *Streng* was wrongly decided.

GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — COUNTY ROADS UNDER JURISDICTION OF COUNTY ROAD COMMISSIONS — NOTICE REQUIREMENTS — *STRENG* DECISION — PROSPECTIVE APPLICATION ONLY.

The Court's decision in *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449 (2016)—which holds that the presuit notice provisions of MCL 224.21(3) and not those of MCL 691.1404(1) control in negligence actions against boards of county road commissioners—applies prospectively only.

*Gray, Sowle & Iacco, PC* (by *Donald N. Sowle* and *Patrick A. Richards*) for plaintiff.

*Smith Haughey Rice & Roegge* (by *Jon D. Vander Ploeg* and *D. Adam Tountas*) for defendant.

Before: SHAPIRO, P.J., and M. J. KELLY and O'BRIEN, JJ.

SHAPIRO, P.J. Defendant, the Midland County Board of Road Commissioners, appeals the trial court's denial

of its motion for summary disposition. Because plaintiff's presuit notice complied with the applicable statute, we affirm.

## I. FACTS

Plaintiff, Tim E. Brugger II, was injured on April 27, 2013, when he lost control of his motorcycle and crashed. He filed suit against defendant, asserting that the crash was the result of large potholes and uneven pavement on a road maintained by the Midland County Road Commission. Governmental immunity does not shield a road commission from liability when it fails to maintain the road in a condition "reasonably safe and convenient for public travel." MCL 691.1402(1).

On August 15, 2013, 110 days after the crash, plaintiff served defendant with presuit notice in accordance with MCL 691.1404 of the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. After suit was filed, the case progressed in typical fashion until this Court issued the decision in *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449; 890 NW2d 680 (2016). In *Streng*, *id*. at 462-463, the Court concluded that MCL 224.21(3) (a provision of the county road act), rather than MCL 691.1404, controlled the timing and content of a presuit notice directed to a road commission. Following that decision, defendant, relying on *Streng*, moved for summary disposition, arguing that plaintiff's presuit notice—filed within the 120 days as set forth in the GTLA—was ineffective because it was not filed within the 60-day limit set forth in the county road act.

The trial court denied the motion, concluding that *Streng* should be given prospective application because, for decades, parties and the courts had under-

stood that the GTLA notice provision controlled. The trial court set forth its opinion from the bench, stating:

> From the Court's perspective, I find that the Supreme Court in Rowland[1] specifically indicated that the GTLA is the notice provision for which road commission cases are subject to being followed and it had done that consistent with a fairly significant long line of cases, two of which they overruled.
>
> However, it was consistent as to what was the proper statutory provision in the Court's perspective is that it was the application of that provision that was found to be inapplicable and, therefore, stricken by the Supreme Court in Rowland.
>
> So, therefore, the Court finds that the circumstances in this case are in compliance with the requirements of the GTLA. And, therefore, that it is—summary disposition on that basis is denied.
>
> However, I will also indicate if the analysis is, in fact, inaccurate and Streng was correctly decided, . . . I will find that based upon the criteria that [were] announced in Bahutski[2] [sic] as well as the other case that was cited in Rowland that it is, in fact, to be applied prospectively, because there had been no indication that the differentiation was appropriate to provide notice to claimants that were coming forward.
>
> And that it would—it would, in fact, result in manifest injustice to deny claims that had been in compliance with the agreed—with what had been agreed upon as the proper notice provision, but there was a change, from the Court's perspective, a change in the application of that interpretation by the Court of Appeals decision and that occurred after the notice had already been provided in this case.

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[1] *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007).

[2] Apparently, the trial court was referring to *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002).

> And, therefore, the Court's . . . opinion [is that] it does not prevent the application of the GTLA provision of 691.1404.

Defendant appeals the trial court's ruling, arguing that plaintiff's failure to file a notice consistent with the requirements of the county road act mandates dismissal.

The question before us, therefore, is whether the decision in *Streng* should apply to all pending cases or only to those cases that arose after it was issued.

## II. ANALYSIS

This case presents a highly unusual circumstance. The Legislature has enacted two inconsistent statutes governing presuit notice to road commissions. The GTLA requires that notice be provided within 120 days of the injury. MCL 691.1404(1). In contrast, the county road act allows for a 60-day period. MCL 224.21(3). The statutes also vary somewhat regarding the required content of the notice.

In 1970, the Michigan Supreme Court held that the 60-day notice provision in MCL 224.21(3) violated due process as applied to an incapacitated individual. *Grubaugh v City of St. Johns*, 384 Mich 165, 176; 180 NW2d 778 (1970), abrogated by *Rowland v Washtenaw Co Rd Comm*, 477 Mich 222; 731 NW2d 41 (2007). *Grubaugh* did not extend its conclusion to all claimants, however, noting that was a question for another day. *Id.* at 176-177. In 1972, in *Reich v State Hwy Dep't*, 386 Mich 617, 623-624; 194 NW2d 700 (1972), abrogated by *Rowland*, 477 Mich 222, the Supreme Court held that the then-extant 60-day notice provision in MCL 691.1404 was unconstitutional on its face because it violated the Equal Protection Clause by requiring governmental tortfeasors to be given notice when none was

required for private tortfeasors.[3] *Reich* did not address MCL 224.21, but shortly after it was decided, we concluded in *Crook v Patterson*, 42 Mich App 241, 242; 201 NW2d 676 (1972), that the rationale in *Reich* applied to that statute as well, and this Court struck down the MCL 222.421(3) notice requirement as unconstitutional. *Crook* was not appealed, and we can find no reported case thereafter in which a court evaluated a claimant's notice of claim under MCL 224.21(3) until the decision in *Streng*.[4]

Thus, *Crook—decided 46 years ago*—was the last time that the viability of the presuit notice provision in

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[3] The constitutionality of the GTLA notice provision was again addressed in *Hobbs v Dep't of State Hwys*, 398 Mich 90; 247 NW2d 754 (1976). By the time that case was heard, the Legislature had amended MCL 691.1404 to provide for a 120-day notice period, see MCL 691.1404(1), as amended by 1970 PA 155, and the Supreme Court in *Carver v McKernan*, 390 Mich 96, 100; 211 NW2d 24 (1973), had upheld a 120-day notice provision in a different statute. In *Hobbs*, 398 Mich at 96, the Supreme Court overruled *Reich*'s absolute bar on notice provisions and held that the 120-day notice provision in MCL 691.1404(1) was constitutional when the government could show prejudice. In 1996, the Supreme Court decided *Brown v Manistee Co Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996), reiterating that the 120-day notice provision in the GTLA was constitutional if prejudice could be shown but that the 60-day notice provision in MCL 224.21 was unconstitutional. *Id*. at 363-364. Finally, in *Rowland*, 477 Mich at 200-201, the Supreme Court overruled *Hobbs* and *Brown* and held that the 120-day notice provision in the GTLA was constitutional and that no prejudice need be shown by the government when a claimant failed to satisfy that provision.

[4] *Rowland*, while overruling *Brown* and abrogating *Reich*, addressed only the GTLA notice-provision holding and made no mention of MCL 224.21(3) or *Crook*. It considered only whether the plaintiff had complied with the 120-day notice provision of the GTLA. With *Reich* abrogated, the *Crook* holding striking down MCL 224.21(3) was without support and was implicitly overruled. However, it was not explicitly overruled, which may explain why until *Streng*, the notice requirement in MCL 224.21(3) remained dormant, if not dead, in the eyes of bench and bar.

MCL 224.21(3) was directly addressed. And since the *Crook* decision, our courts have routinely applied the 120-day notice requirement of the GTLA when a defendant is a county road commission without any discussion of MCL 224.21(3). See *Streng*, 315 Mich App at 460 n 4 (listing published and unpublished cases applying the GTLA notice provision in actions against county road commissions). As was stated in *Streng*, 315 Mich App at 463, "appellate courts appear to have overlooked the time limit, substantive requirements, and service procedures required by MCL 224.21(3) when the responsible body is a county road commission."

Plaintiff asks that we reject *Streng* and request a conflict panel under MCR 7.215(J)(2) and (3). We need not do so however because we can decide this case on other grounds. We conclude that *Streng* should be applied prospectively as it is at variance from what was understood to be the law for at least 40 years, and plaintiff's failure to comply with MCL 224.21(3) was the result of "the preexisting jumble of convoluted case law through which the plaintiff was forced to navigate." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 590 n 65; 702 NW2d 539 (2005).

The rules governing retroactivity are found in *Pohutski v City of Allen Park*, 465 Mich 675, 695-696; 641 NW2d 219 (2002). In *Pohutski*, the Michigan Supreme Court acknowledged the general rule that judicial decisions are given full retroactive effect. *Id*. at 695. However, "a more flexible approach is warranted when injustice might result from full retroactivity." *Id*. at 696. Such injustice may result where a holding overrules settled precedent. *Id*. There are three factors to be weighed in determining whether retroactive application is appropriate:

> (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. In the civil context, . . . this Court . . . recognized an additional threshold question whether the decision clearly established a new principle of law. [*Pohutski*, 465 Mich at 696 (citation omitted).]

We conclude that *Streng* should be given prospective-only application and that therefore the 120-day notice provision of MCL 691.1404(1) is applicable to this case. Because our Supreme Court in *Rowland* did not explicitly overrule binding precedent that established the 120-day notice requirement of the GTLA as the governing provision in actions against county road commission defendants, and no case has been decided on the basis of MCL 224.21(3) for at least 46 years, we conclude that *Streng* effectively established a new rule of law departing from the longstanding application of MCL 691.1404(1) by Michigan courts. See *Streng*, 315 Mich App at 463; *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455, 463; 795 NW2d 797 (2010) (opinion by WEAVER, J.).

Turning to the three-part test, we first consider the purpose of the *Streng* holding, which was to correct an apparent error in interpreting a provision of the GTLA. As noted in *Pohutski*, 465 Mich at 697, this purpose is served by prospective application. Second, as previously discussed, there has been an extensive history of reliance on the 120-day GTLA notice provision, rather than MCL 224.21(3), in cases concerning county road commission defendants. The universal reliance on this decades-long history also weighs in favor of prospective application. Moreover, prospective application would minimize the effect of this sudden departure from established precedent on the administration of justice.

Also relevant is the fact that the confusion concerning the law was not created by plaintiff but, rather, by

the Legislature and the Judiciary. The Legislature adopted two conflicting sets of requirements regarding the timing and content of the presuit notice. And for decades, the Judiciary has decided many presuit notice cases based on the requirements of the GTLA, with no reference to MCL 224.21(3). The role of the government in creating confusion concerning a legal standard weighs strongly against sanctioning a party for acting in good faith on the basis of the apparent law. For instance, in *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 417; 684 NW2d 864 (2004), the plaintiff filed an action against the defendant healthcare provider sounding in ordinary negligence. The defendant argued that two of the plaintiff's claims sounded in medical malpractice and that those claims should therefore be dismissed because, although the action had been filed during the three-year limitations period for negligence cases, it had not been filed within the two-year limitations period for medical malpractice. *Id*. at 418. The Supreme Court concluded that the two counts in question sounded in medical malpractice and that "under ordinary circumstances [those counts] would be time-barred." *Id*. at 432. Nevertheless, it did not dismiss them because "[t]he equities of [the] case . . . compel a different result." *Id*. The Court went on to state:

> The distinction between actions sounding in medical malpractice and those sounding in ordinary negligence is one that has troubled the bench and bar in Michigan, even in the wake of our opinion in *Dorris*.[5] Plaintiff's failure to comply with the applicable statute of limitations is the product of an understandable confusion about the legal nature of her claim, rather than a negligent failure to preserve her rights. Accordingly, for this case and others

[5] *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26; 594 NW2d 455 (1999).

> now pending that involve similar procedural circumstances, we conclude that plaintiff's medical malpractice claims may proceed to trial along with plaintiff's ordinary negligence claim. MCR 7.316(A)(7). [*Bryant*, 471 Mich at 432.]

There can be no doubt that the "procedural circumstances" in the instant case are, as they were in *Bryant*, the result of "understandable confusion" resulting from conflicting actions by the Legislature and the Judiciary. Accordingly, like the Supreme Court in *Bryant*, we conclude that "plaintiff's . . . claims may proceed to trial . . . . " *Id*. As discussed, for decades the Judiciary applied the 120-day notice provision of MCL 691.1404(1) in actions against county road commission defendants. See *Streng*, 315 Mich App at 460 n 4. Plaintiff filed his presuit notice on August 15, 2013, more than two years and nine months before *Streng* was decided.

Because we conclude that *Streng* applies only to actions arising on or after May 2, 2016, we affirm the trial court's denial of defendant's motion for summary disposition. As the prevailing party, plaintiff may tax costs under MCR 7.219.

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

SHAPIRO, P.J. (*concurring*). As I stated in the majority opinion, *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449; 890 NW2d 680 (2016), should not be applied retroactively. I write separately to set forth my view that *Streng* was wrongly decided and that compliance with either of the two notice-of-claim statutes suffices to preserve the claim.

*Streng* presented a highly unusual circumstance in that there were two statutes that set forth *inconsistent* requirements for a notice of claim against a county

road commission. The Court in *Streng* concluded that it had to choose one statute over the other, and it elevated MCL 224.21(3), the provision within the county road act, MCL 224.1 *et seq*., over MCL 600.1404, the provision within the governmental tort liability act, MCL 691.1401 *et seq*. *Streng*, 315 Mich App at 362-363. The Court's conclusion rested upon the principle of statutory interpretation that between a general and specific statute the more specific statute controls. It could, of course, have reached the opposite conclusion by following the interpretive principle that a later-adopted statute controls over an earlier-adopted conflicting statute.[1] Choosing between the statutes is therefore a somewhat arbitrary process.[2]

*Streng*, however, did not consider *Apsey v Mem Hosp*, 477 Mich 120, 123; 730 NW2d 695 (2007), which held that such a choice need not be made.[3] *Apsey* was the last time Michigan was faced with the issue of two conflicting statutes governing the same procedural requirements. The unfortunate history of that case and the Supreme Court's ultimate resolution of it provide much guidance. *Apsey* involved a medical malpractice

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[1] "Statutes enacted by the Legislature on a later date take precedence over those enacted on an earlier date." *Baumgartner v Perry Pub Sch*, 309 Mich App 507, 521; 872 NW2d 837 (2015).

[2] The dissent does not dispute that MCL 691.1404 was adopted after MCL 224.21. Nevertheless, the dissent argues that because MCL 691.1402 was amended in 2012, see 2012 PA 50, it should be considered the later-adopted provision. However, the 2012 amendment of MCL 691.1401 addressed matters wholly unrelated to notice to road commissions. The relevant provision in MCL 691.1402(1), i.e., the sentence referring to MCL 224.21, was part of the *original* version of the GTLA enacted in 1964, see 1964 PA 170, and has never been amended. The relevant provision reads exactly as it did when *Crook* was decided in 1972. The 2012 amendments of MCL 691.1402 are not relevant to the relationship of MCL 691.1404 and MCL 224.21.

[3] The *Streng* Court should not be faulted for not noting the significance of *Apsey* because neither party cited it in their briefs.

case brought in 2001. The plaintiff filed an affidavit of merit, as required by MCL 600.2912d(1), signed by a qualified out-of-state physician. *Id*. at 124. It was undisputed that the document was properly notarized and effective in Michigan under the relevant provision —MCL 565.262—of the Uniform Recognition of Acknowledgments Act, MCL 565.261 *et seq*. However, the defendant argued that the affidavit was not effective in Michigan because it did not satisfy MCL 600.2102(4). *Id*. at 125. That statute required that for an out-of-state affidavit to be effective in Michigan, it must be accompanied by a certification carrying the seal of the county clerk where the document was signed, confirming that the signing notary was in fact a notary.

Until *Apsey* was decided in 2007, courts had not relied on or even cited MCL 600.2102(4) during the 23 years that the courts had been reviewing the adequacy of notices of claim.[4] Instead, the bench and bar had, since the adoption of the affidavit-of-merit requirement, consistently relied on and enforced the MCL 565.262 notary requirements. Following the *Apsey* decision, medical malpractice defendants all over the state moved to dismiss pending cases because the affidavit of merit lacked certification of the notary's qualifications from the local court. Many of these cases were subject to dismissal with prejudice because the period of limitations had run, and in *Scarsella v Pollak*, 461 Mich 547, 549-550; 607 NW2d 711 (2000), the Supreme Court had previously held that when an

[4] It appears that the last time any version of MCL 600.2102(4) had been relied on to dismiss a case—see 1915 CL 12502—was in *In re Alston's Estate*, 229 Mich 478; 201 NW 460 (1924). In *Wallace v Wallace*, 23 Mich App 741, 747; 179 NW2d 699 (1970), the Court agreed that the relevant affidavit did not satisfy MCL 600.2102 but concluded that such an error could be corrected *nunc pro tunc* and was not dispositive of the case.

affidavit of merit was shown to be defective, the filing of the complaint did not toll the statutory limitations period.

Ultimately, however, the Supreme Court in *Apsey* rejected the idea that one of the two conflicting statutes had to prevail over the other. Instead, it concluded that in passing two statutes designating proper procedure, the Legislature had provided "alternative method[s]" to accomplish the task. *Apsey*, 477 Mich at 134. In other words, rather than viewing the two statutes as "conflicting" with one being "right" and the other being "wrong," the Court concluded that compliance with *either* of the statutes was sufficient. *Id*. at 124.

As Justice YOUNG stated in his concurrence:

> This is a case in which the majority and the dissent offer two compelling but competing constructions of [two statutes], and, in my view, neither construction is unprincipled. Both sides invoke legitimate, well-established canons of statutory construction to justify their respective positions. In short, this is a rare instance where our conventional rules of statutory interpretation do not yield an unequivocal answer regarding how to reconcile the provisions of the two statutes that appear to conflict. [*Id*. at 138-139 (YOUNG, J., concurring).]

After inviting the Legislature to "dispel much of the confusion generated" by the two statutes, Justice YOUNG concluded that "until that time, I favor a resolution that is least unsettling and disruptive to the rule of law in Michigan"; for that reason, he concurred in the reversal of the Court of Appeals. *Id*. at 141.

*Apsey* unmistakably leads to the conclusion that compliance with the presuit notice requirements of *either* MCL 691.1404(1) *or* MCL 224.21(3) is sufficient to proceed to suit. I believe that *Streng* was wrongly decided and should have adopted that view.

O'BRIEN, J. (*dissenting*). "[T]he general rule is that judicial decisions are to be given complete retroactive effect." *Hyde v Univ of Mich Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986). Because I believe that *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449, 463; 890 NW2d 680 (2016), does not warrant divergence from this general rule, I respectfully dissent.

In addressing this issue, it is necessary to understand the events that led up to the *Streng* decision. The following summary, although lengthy, is crucial for understanding the effects of *Streng* on our jurisprudence and the reasons why it should be given retrospective application.

Our Supreme Court in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 206-209; 731 NW2d 41 (2007)—the case that, as will be explained, created the issue that *Streng* resolved—summarized this history as follows:

> As of 1969 . . . the enforceability of notice requirements and the particular notice requirements in governmental immunity cases was well settled and had been enforced for almost a century. In 1970, however, there was an abrupt departure from these holdings in the Court's decision in *Grubaugh v City of St Johns*, 384 Mich 165; 180 NW2d 778 (1970).[1] In *Grubaugh* the Court discerned an unconstitutional due process deprivation if plaintiffs suing governmental defendants had different rules than plaintiffs suing private litigants. . . .
>
> Two years later, in *Reich v State Hwy Dep't*, 386 Mich 617; 194 NW2d 700 (1972),[2] the Court took *Grubaugh* one step further and held that an earlier version of MCL 691.1404, which included a 60-day notice provision, was unconstitutional, but this time because it violated equal

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[1] Abrogated by *Rowland*, 477 Mich 197.

[2] Abrogated by *Rowland*, 477 Mich 197.

protection guarantees. The analysis again was that the constitution forbids treating those injured by governmental negligence differently from those injured by a private party's negligence. Leaving aside the unusual switch from one section of the constitution to another to justify an adjudication of unconstitutionality, this claim is simply incorrect. Private and public tortfeasors can be treated differently in the fashion they have been treated here by the Legislature. It does not offend the constitution to do so because with economic or social regulation legislation, such as this statute, there can be distinctions made between classes of persons if there is a rational basis to do so. As we explained in *Phillips v Mirac, Inc*, 470 Mich 415, 431-433; 685 NW2d 174 (2004), legislation invariably involves line drawing and social legislation involving line drawing does not violate equal protection guarantees when it has a "rational basis," i.e., as long as it is rationally related to a legitimate governmental purpose. The existence of a rational basis here is clear, as we will discuss more fully, but even the already cited justification, that the road be repaired promptly to prevent further injury, will suffice.

Considering the same point, Justice BRENNAN in his dissent in *Reich* pithily pointed out the problems with the majority's analysis:

> The legislature has declared governmental immunity from tort liability. The legislature has provided specific exceptions to that standard. The legislature has imposed specific conditions upon the exceptional instances of governmental liability. The legislature has the power to make these laws. This Court far exceeds its proper function when it declares this enactment unfair and unenforceable. [*Reich*, 386 Mich at 626 (BRENNAN, J., dissenting).]

The next year, in *Carver v McKernan*, 390 Mich 96; 211 NW2d 24 (1973),[3] the Court retreated from *Grubaugh* and *Reich* and, in a novel ruling, held that application of

[3] Abrogated by *Rowland*, 477 Mich 197.

the six-month notice provision in the Motor Vehicle Accident Claims Act (MVACA), MCL 257.1118, was constitutional, and that the provision was thus enforceable, only where the failure to give notice resulted in prejudice to the party receiving the notice, in that case the Motor Vehicle Accident Claims Fund (MVACF). The reasoning was that while some notice provisions may be constitutionally permitted some may not be, depending on the purpose the notice serves. Thus, if notice served a permissible purpose, such as to prevent prejudice, it passed constitutional muster. But, if it served some other purpose (the Court could not even imagine any other) then the notice required by the statute became an unconstitutional legislative requirement. Thus, the Court concluded that in order to save the statute from being held unconstitutional, it had to allow notice to be given after six months and still be effective unless the governmental agency, there the MVACF, could show prejudice. Whatever a court may do to save a statute from being held to be unconstitutional, it surely cannot engraft an amendment to the statute, as was done in *Carver*. See, e.g., *North Ottawa Community Hosp v Kieft*, 457 Mich 394, 408 n 14; 578 NW2d 267 (1998). Notwithstanding these problems, they went unnoticed and the rule now was "only upon a showing of prejudice by failure to give such notice, may the claim against the fund be dismissed." *Carver*, 390 Mich at 100.

Returning to the *Carver* approach in 1976, this Court in [*Hobbs v Dep't of State Hwys*, 398 Mich 90, 96; 247 NW2d 754 (1976)][4] held regarding the notice requirement in the defective highway exception to governmental immunity:

> The rationale of *Carver* is equally applicable to cases brought under the governmental liability act. Because actual prejudice to the state due to lack of notice within 120 days is the only legitimate purpose we can posit for this notice provision, absent a showing of such prejudice the notice provision contained in [MCL 691.1404] is not a bar to claims filed pursuant to [MCL 691.1402].

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[4] Overruled by *Rowland*, 477 Mich 197.

> Finally, in 1996, in [*Brown v Manistee Co Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996)],[5] this Court reassessed the propriety of the *Hobbs* decision and declined to overrule it on the basis of stare decisis and legislative acquiescence. [Some alterations in original.]

Relevant to the current appeal, this Court in *Crook v Patterson*, 42 Mich App 241, 242; 201 NW2d 676 (1972), held—in a half-page decision that relied exclusively on *Reich*—that MCL 224.21 violated the Equal Protection Clause and was, therefore, unconstitutional and void. In 1996, the Michigan Supreme Court in *Brown* also held that MCL 224.21 was unconstitutional on equal-protection grounds, but the Court noted that the issue was "not the same equal protection issue raised in *Reich*," *Brown*, 452 Mich at 363-364, and that "[t]his Court is no longer persuaded that notice requirements are unconstitutional per se," *id*. at 361 n 12. Instead, the *Brown* Court held that MCL 224.21 violated the Equal Protection Clause because the 60-day notice provision had no rational relationship to "[t]he only purpose . . . for a notice requirement," which was "to prevent prejudice to the government . . . ." *Id*. at 362-364.

In 2007, the Michigan Supreme Court in *Rowland* corrected this long line of cases that impermissibly engrafted an "actual prejudice" requirement into statutory notice requirements to avoid governmental immunity. In our Supreme Court's words:

> The simple fact is that *Hobbs* and *Brown* were wrong because they were built on an argument that governmental immunity notice statutes are unconstitutional or at least sometimes unconstitutional if the government was not prejudiced. This reasoning has no claim to being defensible constitutional theory and is not rescued by

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[5] Overruled by *Rowland*, 477 Mich 197.

> musings to the effect that the justices " 'look askance' " at devices such as notice requirements, *Hobbs*, 398 Mich at 96, quoting *Carver*, 390 Mich at 99, or the pronouncement that other reasons that could supply a rational basis were not to be considered because in the Court's eyes the "only legitimate purpose" of the notice provisions was to protect from "actual prejudice." *Hobbs*, 398 Mich at 96. [*Rowland*, 477 Mich at 210.]

The *Rowland* Court went on to cite a number of purposes for notice provisions, thereby rejecting the long-held notion that the only purpose of a notice requirement in governmental immunity cases was to prevent prejudice. The *Rowland* Court concluded that "[t]he notice provision passes constitutional muster" and rejected "the hybrid constitutionality of the sort *Carver*, *Hobbs*, and *Brown* engrafted onto our law." *Id*. at 213.

After *Rowland* abrogated *Reich*, *Crook*'s holding that MCL 224.21 violated equal protection was no longer good law. But even before *Rowland*, it is debatable whether *Crook* was good law; *Brown* decided that MCL 224.21 was unconstitutional but expressly rejected reliance on *Reich*—upon which *Crook* was exclusively decided—because our Supreme Court was "no longer persuaded" by those reasons. *Brown*, 452 Mich at 361 n 12. In contrast to *Crook*, *Brown* held that MCL 224.21 violated equal protection because it was not rationally related to "[t]he only purpose" of a notice statute: "to prevent prejudice to the governmental agency." *Id*. at 362. *Rowland* expressly overruled *Brown* and its "reading an 'actual prejudice' requirement into" notice statutes. *Rowland*, 477 Mich at 213. *Rowland* also rejected the idea that the sole purpose of a notice statute was to prevent prejudice. See *id*. at 211-213. In so doing, it rejected the reasoning in *Brown* that MCL 224.21 was unconstitutional. See *Brown*, 452 Mich at 362.

It was in this context that this Court, in 2016, addressed *Streng*. As explained, after *Rowland* was decided, the notice requirements in MCL 224.21 were no longer unconstitutional. This created the question of whether the notice requirements in either MCL 224.21(3) or the GTLA applied to injuries caused by a highway defect on county roads. No published opinion addressed this issue until *Streng*, which held that the notice requirements in MCL 224.21(3) controlled. *Streng*, 315 Mich App at 463.

The question now before us is whether *Streng* should be given retroactive effect. The Michigan Supreme Court in *Pohutski v City of Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002), provided guidance for a court faced with a decision of this type:

> This Court adopted from *Linkletter v Walker*, 381 US 618; 85 S Ct 1731[;] 14 L Ed 2d 601 (1965), three factors to be weighed in determining when a decision should not have retroactive application. Those factors are: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. *People v Hampton*, 384 Mich 669, 674; 187 NW2d 404 (1971). In the civil context, a plurality of this Court noted that *Chevron Oil v Huson*, 404 US 97, 106-107; 92 S Ct 349; 30 L Ed 2d 296 (1971), recognized an additional threshold question whether the decision clearly established a new principle of law. *Riley v Northland Geriatric Center (After Remand)*, 431 Mich 632, 645-646, 433 NW2d 787 (1988) (GRIFFIN, J.).

Guiding this analysis are the principles that prospective-only application is an "extreme measure," *Wayne Co v Hathcock*, 471 Mich 445, 484 n 98; 684 NW2d 765 (2004), and that decisions are generally given retrospective application, *Hyde*, 426 Mich at 240.

Initially, I question the majority's conclusion that *Streng* established new law. *Streng* did not overrule any caselaw, nor did it introduce a novel interpretation of a statute. Instead, it resolved a dispute between two conflicting statutes. The majority is correct that this dispute had lain dormant since this Court's decision in *Crook* in 1972. However, as stated, *Brown*, in 1996, rejected the basis for the *Crook* decision. More pointedly, *Rowland*, in 2007, overruled *Brown* and abrogated *Reich*—on which *Crook* exclusively relied—making the holdings of both *Crook* and *Brown* no longer binding on the interpretation of MCL 224.21.[6] Accordingly, *Streng* did not clearly establish a new principle of law in 2016; the only new principles of law were established by *Rowland* in 2007, and *Streng* simply resolved the ensuing conflict between two statutes—MCL 224.21 and the GTLA notice provision—in the post-*Rowland* legal landscape.

Further, as observed in *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 587; 702 NW2d 539 (2005), "prospective-only application of our decisions is generally limited to decisions which overrule *clear and uncontradicted* case law." (Quotation marks and citation omitted.) As explained, *Rowland*—not *Streng*—upended over 30 years of caselaw governing notice requirements. *Streng* merely interpreted the pertinent statutes post-*Rowland* and did not, itself, "overrule" any caselaw. Moreover, as a result of *Rowland*, the caselaw governing the applicable notice requirements at the time that *Streng* was decided was not "clear and uncontradicted"; by abrogating the reasoning em-

[6] To the extent that *Rowland* did not explicitly overrule *Brown*'s holding that MCL 224.21 was unconstitutional, *Rowland* clearly rejected *Brown*'s reasoning with regard to that issue by explaining that there were numerous reasons, besides preventing prejudice, to find a rational basis for a notice requirement.

ployed by the relevant cases, *Rowland*, at the very least, "contradicted" the applicable caselaw.[7]

Even assuming that this Court's resolution of the highly unusual situation faced in *Streng* created new law, I believe that the next two factors weigh in favor of retroactivity. The purpose of the *Streng* holding was to resolve a conflict between two statutes. The *Streng* Court decided that of those two statutes, the Legislature intended for the 60-day notice requirement in MCL 224.21 to control. This purpose is not served by applying the notice requirements of the GTLA—the statute that the *Streng* Court held that the Legislature did not intend to apply—to control.[8]

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[7] Plaintiff's strongest argument that *Streng* created new law is that the *Rowland* Court applied the 120-day notice provision from the GTLA rather than the 60-day notice provision from MCL 224.21. See *Rowland*, 477 Mich at 219. Perhaps this was because, under either standard, the plaintiff's claim in *Rowland* was barred because she had served notice 140 days after her injury. *Id*. at 201. But regardless of the Supreme Court's reasoning, as recognized in *Streng*,

> [t]he *Rowland* Court made no mention of MCL 224.21, nor did it discuss the reasoning in *Brown* . . . regarding the notice period. . . . *Rowland* expressed neither approval nor disapproval regarding that choice but simply focused on the lack of statutory language in MCL 691.1404 allowing exceptions to the time limit. [*Streng*, 315 Mich App at 459-460.]

Therefore, the *Rowland* decision provides no help to plaintiff because MCL 224.21 "was not discussed by the Supreme Court and implicit conclusions are not binding precedent." *Galea v FCA US LLC*, 323 Mich App 360, 375; 917 NW2d 694 (2018); see also *People v Heflin*, 434 Mich 482, 499 n 13; 456 NW2d 10 (1990) ("[J]ust as obiter dictum does not constitute binding precedent, we reject the dissent's contention that 'implicit conclusions' do so.").

[8] The majority states that the purpose of *Streng* "was to correct an apparent error in interpreting a provision of the GTLA." I do not believe that *Streng* resolved any error in the interpretation of the GTLA because, both before and after *Streng*, the notice provision of the GTLA has been interpreted to be a 120-day notice requirement.

With respect to the next factor, I do not believe that it is proper to look back at the entire history of reliance on the GTLA notice provision as the majority does. As discussed, *Rowland* abrogated precedent establishing that MCL 224.21 was unconstitutional, which in turn created the question of whether the notice provisions of MCL 224.21 or the GTLA applied in cases such as the one before us. *Rowland* was decided in 2007, and I believe that the proper inquiry is the extent of reliance on the GTLA notice provision following *Rowland*. Orders by the Supreme Court following *Rowland* did not apply MCL 224.21, see *Mauer v Topping*, 480 Mich 912 (2007); *Ells v Eaton Co Rd Comm*, 480 Mich 902, 903 (2007); *Leech v Kramer*, 479 Mich 858 (2007), but none of those orders addressed whether MCL 224.21 was applicable. Instead, each case dismissed the respective plaintiff's claim for failure to file notice within the 120-day notice period required by the GTLA. Therefore, none of these cases established that a case filed after 60 days but before 120 days of the injury satisfied the applicable notice requirement; the claims would have failed under either the GTLA or MCL 224.21. The majority has not cited a single binding case decided after *Rowland* that allowed a claim noticed after 60 days of the injury but before 120 days to proceed. Therefore, in the relevant post-*Rowland* time frame, there does not appear to be extensive reliance on the 120-day GTLA notice provision.

The last factor, however, weighs in favor of plaintiff. Plaintiff attempted to comply with what he believed was the proper statute and filed notice within 120 days of his injury. However, plaintiff was injured six years after *Rowland* was released. At that time, MCL 224.21 was again constitutional and, as later decided by *Streng*, applied to claims such as plaintiff's. At the very least, when plaintiff was injured, there was a question

whether the notice requirements in MCL 224.21 or the GTLA applied to his claims. Ultimately, in light of the other factors—and guided by the principles that retrospective application is the general rule and prospective-only application is an extreme measure—I would hold that retrospective application is appropriate in this case.

Lastly, the majority contends that "[t]he role of the government in creating confusion concerning a legal standard weighs strongly against sanctioning a party for acting in good faith on the basis of the apparent law." In support of this assertion, the majority cites *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411; 684 NW2d 864 (2004). Put simply, *Bryant* is inapplicable to this case; it does not address whether a case should apply retroactively, and as will be explained, *Bryant* neither supports nor contradicts the majority's argument.

At issue in *Bryant* was whether the plaintiff's claims sounded in medical malpractice or ordinary negligence. *Id*. at 414. That determination was significant because if the plaintiff's claims sounded in medical malpractice, then the claims were filed after the period of limitations had run. *Id*. at 418-419. Our Supreme Court, after significant analysis, concluded that two of the plaintiff's four claims sounded in medical malpractice, and then it addressed "whether [the] plaintiff's medical malpractice claims [were] time-barred." *Id*. at 432. Our Supreme Court stated that normally the plaintiff's medical malpractice claims would be time-barred, but the "equities" in the case compelled "a different result." *Id*. The *Bryant* Court explained as follows:

> The distinction between actions sounding in medical malpractice and those sounding in ordinary negligence is

> one that has troubled the bench and bar in Michigan . . . . Plaintiff's failure to comply with the applicable statute of limitations is the product of an understandable confusion about the legal nature of her claim, rather than a negligent failure to preserve her rights. [*Id.*]

Had the plaintiff proceeded under the correct understanding of her legal claims, her first complaint would have been filed within the medical-malpractice statutory period of limitations, see *id.* at 418-419, and the Supreme Court ultimately allowed her claims to go forward, *id.* at 432.

Contrary to the majority's reading of *Bryant*, the "understandable confusion" identified in that case had nothing to do with the Legislature or the Judiciary. Rather, *Bryant* simply recognized that it is difficult to distinguish a medical malpractice claim from an ordinary negligence claim and, therefore, that the plaintiff's confusion with classifying her claims was understandable. Indeed, the general difficultly of determining whether a claim sounds in medical malpractice or ordinary negligence was on full display in *Bryant*: the first judge at trial decided that the plaintiff's claims sounded in ordinary negligence; after the first judge recused herself, the second judge decided that the plaintiff's claims sounded in medical malpractice; on appeal, two judges on a panel of this Court held that the plaintiff's claims sounded in ordinary negligence, while a dissenting judge believed that the plaintiff's claims sounded in medical malpractice; then, at our Supreme Court, five justices held that two of the plaintiff's four claims sounded in medical malpractice, while two justices dissented and would have held that all of the plaintiff's claims sounded in ordinary negligence. *Bryant* did not ascribe this difficulty—and the resulting "understandable confusion"—to either the courts or the Legislature. Therefore, *Bryant*'s holding

simply does not support the majority's contention that the role of the government in creating confusion weighs in favor of prospective-only application.

Because *Bryant* does not support the majority's contention that "the role of the government in creating confusion" supports prospective application, and because the majority does not otherwise support this assertion, I question whether the "role of the government in creating confusion" is a valid consideration for prospective-only application. If it were, it would "strongly" weigh in favor of prospectively applying virtually all cases that deal with the interpretation of an ambiguous statute. When the Legislature enacts an ambiguous statute, it creates confusion in the statute's interpretation, which is ultimately resolved by the courts. Under the majority's reasoning, if a party attempted to comply with an ambiguous statute in good faith but ultimately failed to do so, the well-intentioned plaintiff's actions would "strongly" weigh in favor of prospective application of the court's interpretation of the ambiguous statute. Therefore, I do not believe that "[t]he role of government in creating confusion concerning a legal standard" has any application to whether a decision should apply retrospectively.

Turning to the concurring opinion, I disagree that *Streng* rested exclusively "upon the principle of statutory interpretation that between a general and specific statute the more specific statute controls." Rather, *Streng* also interpreted MCL 224.21 and the GTLA *in pari materia*. Specifically, *Streng* cited language from MCL 224.21(2) that provides that liability is governed by the GTLA and language from the GTLA that provides that the " 'liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in . . . MCL 224.21.' "

*Streng*, 315 Mich App at 463, quoting MCL 691.1402(1). *Streng* concluded that "[a] close reading of the language of MCL 224.21(2) dictates that only those GTLA provisions of law that deal with 'liability' apply to counties, while under MCL 691.1402(1), procedural and remedial provisions for counties should be those of MCL 224.21." *Id*. at 462-463. Accordingly, *Streng* concluded that the procedural notice requirements in MCL 224.21 controlled.

I also disagree with the concurring opinion's conclusion that *Streng* "could, of course, have reached the opposite conclusion by following the interpretive principle that a later-adopted statute controls over an earlier-adopted conflicting statute." The current version of MCL 691.1402 became effective March 13, 2012, see 2012 PA 50, which is after MCL 691.1404 became effective. MCL 691.1402(1) contains the language on which *Streng* relied to conclude that the "procedural and remedial provisions for counties should be those of MCL 224.21" rather than those of the GTLA. *Streng*, 315 Mich App at 463. Therefore, if the later-adopted statute controlled, the GTLA's notice requirements were subject to MCL 224.21 for "county roads under the jurisdiction of a county road commission . . . ." MCL 691.1402(1).

Further, the concurring opinion misapplies the holding of *Apsey v Mem Hosp*, 477 Mich 120; 730 NW2d 695 (2007). At issue in *Apsey* were two statutes that provided conflicting requirements for notarizing an affidavit of merit in medical malpractice cases. However, one of the statutes at issue provided that it was "an additional method of proving notarial acts." MCL 565.268. The Supreme Court explained that this

> sentence of MCL 565.268 indicates that the [Uniform Recognition of Acknowledgments Act (URAA),

> MCL 565.261 *et seq*.] is an additional or alternative method of proving notarial acts. As an "additional" method, the URAA does not replace the prior method. Instead, it is intended to stand as a coequal with it. Because the two methods are alternative and coequal, the URAA does not diminish or invalidate "the recognition accorded to notarial acts by other laws of this state." MCL 565.268. Simply, MCL 600.2102(4) is not invalidated by the URAA. It remains an additional method of attestation of out-of-state affidavits. Because the two methods exist as alternatives, a party may use either to validate an affidavit. [*Apsey*, 477 Mich at 130.]

Clearly, the *Apsey* Court did not conclude "that in passing two statutes designating proper procedure, the Legislature had provided 'alternative method[s]' to accomplish the task," as the concurring opinion in this case asserts. (Alteration in original.) Rather, the *Apsey* Court relied on language from MCL 565.268, which explicitly stated that it was "an alternative method," to conclude that the Legislature intended to provide an alternative method.

In contrast to *Apsey*, there is no language in either MCL 224.21 or the GTLA providing that the statute is "an additional method" of providing notice for purposes of governmental immunity. Without some indication that the Legislature intended for these statutes to be alternative methods for providing notice, *Apsey* simply has no bearing on whether *Streng* was wrongly decided. See *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 218; 801 NW2d 35 (2011) ("[N]othing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself.") (quotation marks and citation omitted).[9]

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[9] Also notable, the concurring opinion of Justice YOUNG in *Apsey*, which the concurring opinion in this case cites, was a concurrence in

Ultimately, however, any disagreement I have with the concurring opinion will be resolved another day. With regard to the issue before us, because I would apply *Streng* retrospectively, I respectfully dissent from the majority opinion.

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result only. Five justices agreed with the majority, and one wrote a dissenting opinion. It is unclear why the concurring opinion in this case takes the position that the reasoning of one justice, which was not adopted by a single other justice, "unmistakably leads to" any conclusion grounded in the jurisprudence of this state.

*In re* PILAND

Docket No. 340754. Submitted May 2, 2018, at Lansing. Decided May 15, 2018, at 9:15 a.m. Affirmed in part and vacated in part 503 Mich 1032.

Petitioner, the Department of Health and Human Services, petitioned the Ingham Circuit Court, Family Division, to terminate respondents' parental rights to two children, MP and JP, following the death of the couple's third child, AP. Respondent-mother gave birth to AP at home with the assistance of a midwife. The midwife visited respondents' home the day after AP was born and expressed concern to respondent-mother that AP was suffering from jaundice, a condition common to newborns that, while potentially life-threatening, readily responds to treatment. The midwife suggested that respondents take AP to the doctor, but they did not do so, and when the midwife contacted a doctor regarding AP's condition, respondents did not reply when the doctor's office attempted to contact them. Respondents claimed to be members of a Christian sect that believes that no medical treatment may be administered other than first aid. Three days after AP's birth, respondents found her in an unresponsive state. Respondents did not contact emergency medical services but instead prayed for the child's resurrection. The police were notified about AP's death eight hours later, and the doctor who performed the autopsy explained that AP likely would have survived had respondents sought medical attention for AP's jaundice. Following AP's death, respondents stated that despite AP's symptoms, they chose to "believe in the word of God over the symptoms" and believed that any medical condition that could not be controlled with basic first aid should be left in the hands of God. Concerned that respondents would decline to seek medical treatment for their remaining two children, petitioner filed the termination petition, which the court, Laura L. Baird, J., authorized. Approximately two months later, the court issued an ex parte order returning the children to respondents provided that respondents comply with a safety plan and refrain from using physical discipline. Respondents requested that the order be amended to allow use of physical discipline as permitted under Michigan law. The children were again removed from respondents' custody for failure to comply with the court order. The

matter was scheduled for an adjudication trial before a jury. Before trial, respondents requested a jury instruction based on MCL 722.634, which the court denied, reasoning that use of the term "negligent" in MCL 722.634 is a tort concept and, therefore, MCL 722.634 does not apply in the context of child neglect cases. Respondents sought interlocutory leave to appeal, which the Court of Appeals granted.

The Court of Appeals *held*:

1. MCL 722.634, a provision of the Child Protection Law, MCL 722.621 *et seq*., provides that a parent or guardian legitimately practicing his or her religious beliefs who thereby does not provide specified medical treatment for a child shall not be considered a negligent parent or guardian for that reason alone; MCL 722.634 also provides that this statute shall not preclude a court from ordering the provision of medical services or nonmedical remedial services recognized by state law to a child when the child's health requires it, nor does it abrogate the responsibility of a person required to report child abuse or neglect. Child protection proceedings often involve allegations that the parent is negligent in caring for a child, and MCL 722.622(k)(*i*) defines "child neglect" to include "negligent treatment, including the failure to provide adequate . . . medical care." Accordingly, the mandate of MCL 722.634 applies in child protection proceedings, and the trial court must instruct the jury that a parent or guardian legitimately practicing his or her religious beliefs who thereby does not provide specified medical treatment for a child for that reason alone shall not be considered a negligent parent or guardian.

2. The United States Supreme Court has held that the right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. Accordingly, respondents' argument that they would be entitled to an instruction even in the absence of MCL 722.634 because the First Amendment guarantees their right to freedom of religion had no merit.

Reversed and remanded.

O'BRIEN, J., concurring in part and dissenting in part, agreed with the majority's conclusion that MCL 722.634 applies in child protection proceedings but disagreed that this conclusion entitled respondents to a jury instruction on MCL 722.634. Judge O'BRIEN would have held that because MCL 712A.2(b)(1), the statute that is used to determine whether jurisdiction is proper, differentiates between acts of "neglect" and acts of refusal, MCL 722.634 only applies when there is a question of neglect. MCL 712A.2(b)(1)

states that a court may take jurisdiction if a parent "neglects or refuses" to provide proper or necessary medical care. Therefore, the use of the phrase "negligent parent" in MCL 722.634 showed that the Legislature only intended to provide a defense for acts of neglect. Accordingly, Judge O'BRIEN disagreed with the majority's conclusion that the trial court must instruct the jury on MCL 722.634 and would have directed the trial court on remand to decide the applicability of MCL 722.634 to this case on the basis of the evidence presented at trial.

INFANTS — CHILD PROTECTION PROCEEDINGS — JURY INSTRUCTIONS — PROVIDING MEDICAL TREATMENT — RELIGIOUS BELIEFS.

MCL 722.634, a provision of the Child Protection Law, MCL 722.621 *et seq*., provides that a parent or guardian legitimately practicing his or her religious beliefs who thereby does not provide specified medical treatment for a child for that reason alone shall not be considered a negligent parent or guardian; MCL 722.634 also provides that this statute shall not preclude a court from ordering the provision of medical services or nonmedical remedial services recognized by state law to a child when the child's health requires it, nor does it abrogate the responsibility of a person required to report child abuse or neglect; the mandate of MCL 722.634 applies in child protection proceedings, and the trial court must instruct the jury that a parent or guardian legitimately practicing his or her religious beliefs who thereby does not provide specified medical treatment for a child for that reason alone shall not be considered a negligent parent or guardian.

*Carol A. Siemon*, Prosecuting Attorney, and *Joseph B. Finnerty*, Appellate Division Chief, for the Department of Health and Human Services.

*David L. Zoglio* for respondents.

Before: SHAPIRO, P.J., and M. J. KELLY and O'BRIEN, JJ.

SHAPIRO, P.J. In this interlocutory appeal,[1] respondents assert that the trial court erred by denying their

[1] *In re Piland Minors*, unpublished order of the Court of Appeals, entered December 20, 2017 (Docket No. 340754).

motion for a proposed jury instruction based on MCL 722.634 in the adjudicative phase of a child protection proceeding. For the reasons set forth in this opinion, we reverse the trial court's decision not to give the jury instruction and remand for proceedings consistent with this opinion.

## I. FACTS

On February 6, 2017, respondent-mother gave birth to the couple's third child, AP. AP was born at home with the assistance of a midwife, Sandra McCurdy. The day after AP's birth, McCurdy visited respondents' home and expressed concern to respondent-mother that AP was suffering from jaundice, a condition common to newborns that, while potentially life-threatening, readily responds to treatment. McCurdy suggested that respondents take AP to the doctor, but they did not do so. With respondents' permission, McCurdy contacted a doctor regarding AP's jaundice, but respondents did not reply when the doctor's office tried to reach them. Respondents claim to be members of a Christian sect that believes that no medical treatment may be administered other than first aid. According to the petition, AP's health continued to degenerate, and she died on February 9, 2017.

On that morning, respondents found AP in an unresponsive state. They did not contact emergency medical services but instead prayed for the child's resurrection. Respondent-father later reported that he attempted a "rescue breath" on AP but did not know how to perform CPR on a baby; he stated that the only thing he knew to do was to "pray and ask for help from God." Respondents also called members of their church, who came to the home and prayed with them. The police were notified about AP's death eight hours

later. An autopsy revealed that AP's cause of death was "unconjugated hyperbilirubinemia with kernicterus."[2] The doctor who performed the autopsy explained that "[j]aundice is a very treatable condition" and that AP likely would have survived if respondents had sought medical attention.

Following AP's death, a Family Team Meeting[3] was held on March 7, 2017. According to petitioner, at that meeting, respondents stated that despite AP's symptoms, they chose to "believe in the word of God over the symptoms" and believed that any medical condition that could not be controlled with basic first aid should be left in the hands of God. Concerned that respondents would decline to seek medical treatment for their remaining two children, MP and JP, petitioner filed a termination petition,[4] which was authorized by the court. MP and JP were then removed from respondents' custody and placed with their maternal grandparents.

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[2] Hyperbilirubinemia is "[a]n abnormally high level of bilirubin in the circulating blood, resulting in clinically apparent icterus or jaundice when the concentration is sufficient." *Stedman's Medical Dictionary* (28th ed), p 918. Kernicterus is "[j]aundice associated with high levels of unconjugated bilirubin, or in small premature infants with more modest degrees of bilirubinemia; . . . characterized early clinically by . . . high-pitched cry, lethargy, and poor sucking . . . ." *Id.* at 1027.

[3] "A Family Team Meeting is an opportunity for parents, extended family members, children (if age appropriate), caregivers and child welfare staff to meet and share ideas that will assist the family in creating and reviewing a plan related to the child(ren)'s safety, stability, well-being and permanence." Michigan Department of Health and Human Services, *Family Team Meeting Informational Sheet*, DHS-1104, available at <https://www.michigan.gov/documents/dhs/DHS-1104_364119_7.dot> (accessed April 26, 2018) [https://perma.cc/R4EN-P4LN].

[4] The subject petition was filed on March 31, 2017. Petitioner had attempted to file a petition on March 8, 2017, but it was not authorized because more information was needed regarding the autopsy.

Approximately two months later, the trial court issued an ex parte order returning the children to respondents on condition that they comply with a safety plan and refrain from using physical discipline. Six days later, respondents requested that the trial court amend the ex parte order to provide that respondents "may only use physical discipline of any kind upon the children as permitted under Michigan law" on the basis that they sincerely held a religious belief that physical discipline should be used. The children were again removed from respondents' custody for failure to comply with the court's order after it was alleged that respondents said that they would not obey the court order and that respondent-father said that "the children are being trained with physical discipline in obeying my words."

The matter was then scheduled for an adjudication trial before a jury. Prior to trial, respondents requested a jury instruction based on MCL 722.634, which provides:

> A parent or guardian legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child, for that reason alone shall not be considered a negligent parent or guardian. This section shall not preclude a court from ordering the provision of medical services or nonmedical remedial services recognized by state law to a child where the child's health requires it nor does it abrogate the responsibility of a person required to report child abuse or neglect.

Respondents argued that because their defense was based on this statute, the court should provide an instruction reflecting its content. Respondents also argued that their rights under the First Amendment mandated an instruction based on religious liberty. In response, petitioner argued that the instruction should not be given because the use of the term "negligent" in

the statute is a tort concept, and so MCL 722.634 does not apply in the context of child neglect cases. The trial court agreed with petitioner, stating:

> The statute in question is [MCL] 722.634. It says a parent or guardian legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child, for that reason alone shall not be considered a negligent parent or guardian.
>
> . . . [N]egligence law has nothing to do with the law in child protection matters. Therefore, that portion of the statute is not relevant to these proceedings.
>
> The section goes on to say, the section shall not preclude a court from ordering the provision of medical services or non-medical remedial services recognized by state law to a child where the child's health requires it, nor does it abrogate the responsibility of a person required to report child abuse or neglect. So the second part of that paragraph confirms that negligence and neglect are two different bodies of law.

This interlocutory appeal followed.

## II. ANALYSIS

On appeal, respondents argue that the trial court erred by holding that the statute does not apply to child protection proceedings. We agree.[5]

MCL 722.634 is a provision of the Child Protection Law (CPL), MCL 722.621 *et seq*., the purpose of which "is to protect abused and neglected children."[6]

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[5] This Court reviews de novo questions of statutory interpretation and constitutional law. *In re Deng*, 314 Mich App 615, 621; 887 NW2d 445 (2016).

[6] The title of the CPL describes the CPL as follows:

> An act to require the reporting of child abuse and neglect by certain persons; to permit the reporting of child abuse and neglect by all persons; *to provide for the protection of children who are*

*Becker-Witt v Bd of Examiners of Social Workers*, 256 Mich App 359, 364; 663 NW2d 514 (2003). Analysis of the Legislature's intent with respect to MCL 722.634 requires statutory interpretation. "The goal of statutory interpretation is to give effect to the Legislature's intent as determined from the language of the statute." *Bukowski v Detroit*, 478 Mich 268, 273; 732 NW2d 75 (2007). The words in the statute are interpreted in "light of their ordinary meaning and their context within the statute and read . . . harmoniously to give effect to the statute as a whole." *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012) (quotation marks and citation omitted). In addition to a phrase's plain meaning, courts must consider "its placement and purpose in the statutory scheme." *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009) (quotation marks and citation omitted).

The trial court's view that this statute does not apply in child protective proceedings is erroneous because that view is inconsistent with the statutory language. Child protection proceedings often involve allegations that the parent is negligent in caring for a child. The CPL defines "child neglect" as

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*abused or neglected*; to authorize limited detainment in protective custody; to authorize medical examinations; to prescribe the powers and duties of the state department of social services to prevent child abuse and neglect; to prescribe certain powers and duties of local law enforcement agencies; to safeguard and enhance the welfare of children and preserve family life; to provide for the appointment of legal counsel; to provide for the abrogation of privileged communications; to provide civil and criminal immunity for certain persons; to provide rules of evidence in certain cases; to provide for confidentiality of records; to provide for the expungement of certain records; to prescribe penalties; and to repeal certain acts and parts of acts. [1975 PA 238, title, as amended by 1988 PA 372, effective March 30, 1989 (emphasis added).]

> harm or threatened harm to a child's health or welfare by a parent, legal guardian, or any other person responsible for the child's health or welfare that occurs through either of the following:
>
> (*i*) Negligent treatment, including the failure to provide adequate food, clothing, shelter, or medical care.
>
> (*ii*) Placing a child at an unreasonable risk to the child's health or welfare by failure of the parent, legal guardian, or other person responsible for the child's health or welfare to intervene to eliminate that risk when that person is able to do so and has, or should have, knowledge of the risk. [MCL 722.622(k)(*i*) and (*ii*).]

As was stated in *Mich Ass'n of Intermediate Special Ed Administrators v Dep't of Social Servs*, 207 Mich App 491, 497; 526 NW2d 36 (1994), "[c]hild neglect is harm to a child's welfare that occurs through negligent treatment or failure to eliminate an unreasonable risk to the child's welfare." We conclude that the mandate of MCL 722.634 applies in child protection proceedings.

There is no standard instruction reflecting the content of MCL 722.634. Therefore, the sought instruction is "necessary to state the applicable law accurately" and "the matter is not adequately covered by other pertinent model civil jury instructions." MCR 2.512(D)(3)(a) and (b). Consistently with MCL 722.634, the trial court must instruct the jury that "[a] parent or guardian legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child, for that reason alone shall not be considered a negligent parent or guardian."[7]

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[7] Respondents also argue that they would be entitled to an instruction of this sort even in the absence of MCL 722.634 because the First Amendment guarantees their right to freedom of religion. We disagree. As held by the United States Supreme Court, "[T]he family itself is not beyond regulation in the public interest, as against a claim of religious

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

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

O'BRIEN, J. (*concurring in part and dissenting in part*). I agree with the majority's conclusion that MCL 722.634 of the Child Protection Law (CPL), MCL 722.621 *et seq*., applies in child protective proceedings. I write separately because I disagree that this entitles respondents to a jury instruction on MCL 722.634. I believe that the applicability of that instruction to this case remains in the trial court's discretion. See *Hill v Hoig*, 258 Mich App 538, 540; 672 NW2d 531 (2003).

The parties are contesting whether MCL 722.634 is applicable to their upcoming adjudication trial. Whether jurisdiction is proper will be determined by MCL 712A.2(b), which provides, in pertinent part, as follows:

> Jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county:
>
> (1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship. . . .
>
> * * *

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liberty." *Prince v Massachusetts*, 321 US 158, 166; 64 S Ct 438; 88 L Ed 645 (1944). "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Id*. at 166-167.

> (2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in.[1]

MCL 722.634 provides as follows:

> A parent or guardian legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child, for that reason alone shall not be considered a negligent parent or guardian. This section shall not preclude a court from ordering the provision of medical services or nonmedical remedial services recognized by state law to a child where the child's health requires it nor does it abrogate the responsibility of a person required to report child abuse or neglect.

The majority correctly concludes that MCL 722.634 provides a defense in child protective proceedings given its use of the term "negligent parent." I would clarify, however, that MCL 722.634 only applies when there is a question of "neglect." Although the CPL does not expressly define "negligent," MCL 722.622 does define "child neglect" to include "[n]egligent treatment, including the failure to provide adequate . . . medical care." MCL 722.622(k)(*i*).[2] Further, the dictionary de-

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[1] MCL 712A.2(b)(1) will be amended, and effective June 12, 2018, " '[n]eglect' means that term as defined in section 2 of the child abuse and neglect prevention act, 1982 PA 250, MCL 722.602." 2018 PA 58. MCL 722.602(d) defines "neglect" as "harm to a child's health or welfare by a person responsible for the child's health or welfare which occurs through negligent treatment, including the failure to provide adequate food, clothing, shelter, or medical care." MCL 722.602 will also be amended, effective June 12, 2018, but the change in its meaning is not significant to this case. See 2018 PA 60 (among other things, adding "though financially able to do so, or the failure to seek financial or other reasonable means to provide adequate food, clothing, shelter, or medical care" to the definition of "neglect").

[2] Notably, this mirrors the definition of "neglect" that appears by reference in MCL 712A.2(b)(1)(B), effective June 12, 2018.

fines "negligent" as "marked by or given to neglect," and the first synonym listed is "neglectful." *Merriam-Webster's Collegiate Dictionary* (11th ed). Therefore, the phrase "a negligent parent" in MCL 722.634 refers to a parent's act—or acts—of "neglect," which is often at issue in child protective proceedings. Accordingly, I agree with the majority that MCL 722.634 applies to child protective proceedings and, as relevant here, provides a defense to MCL 712A.2(b).

However, this does not necessarily entitle respondents to an instruction on MCL 722.634 in this case. MCL 712A.2(b)(1) differentiates between acts of "neglect" and acts of refusal. Specifically, MCL 712A.2(b)(1) states that a court may take jurisdiction if a parent "neglects *or refuses* to provide proper or necessary . . . medical . . . care . . . ." (Emphasis added.) As stated, the use of the phrase "negligent parent" in MCL 722.634 shows that the Legislature only intended to provide a defense for acts of neglect. Therefore, it is significant that the Legislature differentiates "neglects" and "refuses"; a parent who "neglects" to provide medical care to his or her child is entitled to a defense under MCL 722.634, whereas a parent who "refuses" to provide medical care is not.

Accordingly, I agree with the majority's conclusion that MCL 722.634 applies in child protective proceedings. However, I would respectfully disagree that "the trial court must instruct the jury" on MCL 722.634. Rather, on remand, I would direct the trial court to decide the applicability of MCL 722.634 to this case on the basis of the evidence presented at trial.

FARRIS v McKAIG

Docket No. 337366. Submitted May 2, 2018, at Lansing. Decided May 17, 2018, at 9:00 a.m. Leave to appeal denied 504 Mich 888.

Plaintiff, Keagan Farris, through his father, James Farris, brought an action in the Antrim Circuit Court against John H. McKaig, II, alleging legal malpractice stemming from defendant's role as plaintiff's lawyer-guardian ad litem (LGAL). James, as plaintiff's next friend, alleged that defendant had failed to adequately advocate for plaintiff during child protective proceedings involving plaintiff's parents. Defendant moved for summary disposition, arguing that he was entitled to governmental immunity under MCL 691.1407(6), which grants a guardian ad litem (GAL) immunity from civil liability when acting within the scope of the GAL's authority. In response, James argued that MCL 691.1407(6) was only applicable to GALs, not LGALs. Following a hearing, the court, Thomas G. Power, J., held that LGALs are a "subset" of GALs and therefore entitled to governmental immunity under MCL 691.1407(6). The court granted summary disposition in favor of defendant because the allegations in the complaint were solely related to actions undertaken by defendant in his role as plaintiff's LGAL. James, as plaintiff's next friend, appealed.

The Court of Appeals *held*:

MCL 691.1407(6) of the governmental tort liability act, MCL 691.1401 *et seq*., provides that a GAL is immune from civil liability for an injury to a person or damage to property if he or she is acting within the scope of his or her authority as GAL. In this case, the issue was whether "guardian ad litem" as used in MCL 691.1407(6) applies to LGALs. A GAL is defined as someone appointed by the court to appear in a lawsuit on behalf of a minor and has the legal authority and duty to care for the minor's person or property. MCL 712A.17c(7) provides the duties of an LGAL: after an LGAL is appointed in child protective proceedings, he or she has the statutory authority and duty to care for the child by advocating for the child's best interests. And because an LGAL is a guardian appointed by the court to appear in child protective proceedings on the minor child's behalf, an LGAL

satisfies the dictionary definition of "guardian ad litem." Despite the fact that MCL 712A.13a, a provision of the Probate Code, differentiates between a GAL and an LGAL, MCL 712A.13a(1) does not state that its definitions are applicable to MCL 691.1407. Accordingly, the fact that a GAL is defined separately from an LGAL in MCL 712A.13a(1) did not affect what the Legislature intended by using the term "guardian ad litem" in MCL 691.1407(6). Additionally, although there are numerous differences between a GAL and an LGAL, the Legislature did not intend for an LGAL to be considered distinct from a GAL for purposes of MCL 691.1407(6). Although an LGAL functions like an attorney and has duties that go beyond those of a GAL, an LGAL's duties ultimately conform to those of a GAL: investigating and independently determining the child's best interests and then serving those interests. Finally, when the Legislature enacted 1998 PA 480 to amend MCL 691.1407 to include governmental immunity for GALs, the Legislature was aware that the governmental immunity granted to GALs in MCL 691.1407(6) was to be broadly interpreted and exceptions narrowly construed; therefore, after enacting 1998 PA 480, there was no need for the Legislature to amend MCL 691.1407(6) to include LGALs because, by crafting an LGAL's purpose to reflect that of a GAL, the Legislature intended for an LGAL to be considered a "guardian ad litem" when that term is broadly interpreted for purposes of governmental immunity. Accordingly, the Legislature intended for LGALs to be immune from civil liability under MCL 691.1407(6) when acting in their role as an LGAL. Because the allegations in this case all related to defendant's actions while acting in his role as an LGAL, the trial court properly granted summary disposition to defendant.

Affirmed.

SHAPIRO, P.J., dissenting, would have held that whether or not immunity applies to an LGAL turns on whether the action or omission complained of was one that fell within the more limited duties of a GAL or only within the broader statutory duties of an LGAL. Accordingly, Judge SHAPIRO would have held that when an LGAL is sued for a violation of a duty, the court must determine whether that duty is one also performed by a GAL. If it is, the Legislature intended to protect the party performing that duty regardless of whether the party is called a GAL or an LGAL; if it is not, then the Legislature did not intend to immunize the LGAL. Because a fuller understanding of plaintiff's claims would be necessary to resolve this case, Judge SHAPIRO would have reversed the grant of summary disposition and remanded the case to the

trial court to allow it, after permitting what it finds to be necessary discovery, to determine which if any of plaintiff's claims were directed to duties and authority not possessed by a GAL but possessed by an LGAL.

GUARDIAN AND WARD — GOVERNMENTAL IMMUNITY — LAWYER-GUARDIAN AD LITEM.

MCL 691.1407(6) of the governmental tort liability act, MCL 691.1401 *et seq*., provides that a guardian ad litem is immune from civil liability for an injury to a person or damage to property if he or she is acting within the scope of his or her authority as guardian ad litem; a lawyer-guardian ad litem is immune from civil liability under MCL 691.1407(6) when acting in his or her role as a lawyer-guardian ad litem.

*Blaske & Blaske, PLC* (by *Thomas H. Blaske* and *John F. Turck IV*) for plaintiff.

*Collins Einhorn Farrell, PC* (by *Michael J. Cook* and *Jonathan B. Koch*) for defendant.

Before: SHAPIRO, P.J., and M. J. KELLY and O'BRIEN, JJ.

O'BRIEN, J. James Farris, plaintiff's father and acting as plaintiff's next friend, appeals as of right the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(7). We affirm.

In 2010, defendant was appointed as plaintiff's lawyer-guardian ad litem (LGAL) in child protective proceedings involving plaintiff's parents. As a result of those proceedings, both of plaintiff's parents' parental rights were terminated. James appealed the termination, and our Supreme Court eventually remanded the case to the trial court "for reconsideration in light of *In re Sanders*, 495 Mich 394[; 852 NW2d 524] (2014)," which had abolished the one-parent doctrine. *In re*

*Farris*, 497 Mich 959, 959 (2015). James's parental rights were subsequently reinstated, and plaintiff now resides with his father.

After the reinstatement of James's parental rights, plaintiff, through next friend James, filed this suit against defendant for legal malpractice stemming from defendant's role as plaintiff's LGAL. The complaint alleged that defendant had breached his duty as LGAL to plaintiff by failing to "inform[] himself of the true facts" of the child protective proceedings and failing to adequately advocate for plaintiff.

Defendant moved for summary disposition under MCR 2.116(C)(7), arguing that he was entitled to governmental immunity under MCL 691.1407(6), which grants a guardian ad litem (GAL) immunity from civil liability when acting within the scope of the GAL's authority. In response, James argued that MCL 691.1407(6) was only applicable to GALs, not LGALs. Following a hearing, the trial court held that LGALs are a "subset" of GALs and, therefore, are entitled to governmental immunity under MCL 691.1407(6). The trial court granted summary disposition to defendant because the allegations in the complaint were solely related to actions undertaken by defendant in his role as LGAL.

On appeal, James, as plaintiff's next friend, argues that the trial court erred by concluding that LGALs are entitled to immunity under MCL 691.1407(6). We disagree.

"We review de novo a trial court's grant of summary disposition." *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 506; 885 NW2d 861 (2016). We also review de novo the availability of governmental immunity, *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 578; 808 NW2d 578 (2011), and issues of statutory

interpretation, *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). With regard to a motion for summary disposition pursuant to MCR 2.116(C)(7), we review the affidavits, pleadings, and other documentary evidence presented by the parties, and we accept as true the plaintiff's well-pleaded allegations that are not contradicted by documentary evidence. *Oliver v Smith*, 290 Mich App 678, 683; 810 NW2d 57 (2010).

At issue in this case is a provision of the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. The purpose of the GTLA is to limit governmental tort liability. *Genesee Co Drain Comm'r v Genesee Co*, 309 Mich App 317, 321; 869 NW2d 635 (2015). Thus, the GTLA's grant of immunity is broad, and exceptions are narrowly construed. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000). Under the GTLA, "[a] guardian ad litem is immune from civil liability for an injury to a person or damage to property if he or she is acting within the scope of his or her authority as guardian ad litem." MCL 691.1407(6). However, the GTLA does not define "guardian ad litem." Therefore, it is necessary for us to interpret the statute and determine whether "guardian ad litem" as used in MCL 691.1407(6) applies to LGALs.

In reviewing questions of statutory interpretation, we must discern and give effect to the Legislature's intent. *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 631; 563 NW2d 683 (1997). "To do so, we begin by examining the most reliable evidence of that intent, the language of the statute itself." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). "If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Id*.

When interpreting an undefined statutory term, the term "must be accorded its plain and ordinary meaning." *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008). Consulting a lay dictionary is proper when defining common words or phrases that lack a unique legal meaning, but when the statutory term is a legal term of art, the term "must be construed in accordance with its peculiar and appropriate legal meaning." *Id*. "Guardian ad litem" is a legal term of art, see *King v Emmons*, 283 Mich 116, 124-125; 277 NW 851 (1938), and, therefore, resort to a legal dictionary to determine its meaning is appropriate, see *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 440; 716 NW2d 247 (2006).

"Guardian ad litem" is defined in *Black's Law Dictionary* (10th ed) as "[a] guardian, usu. a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party." *Black's Law Dictionary* (10th ed) defines "guardian" as "[s]omeone who has the legal authority and duty to care for another's person or property, esp. because of the other's infancy, incapacity, or disability." Thus, we must decide whether an LGAL is someone appointed by the court to appear in a lawsuit on behalf of a minor and has the legal authority and duty to care for the minor's person or property. We conclude that an LGAL is.

MCL 712A.17c(7) provides that "[i]n a proceeding under section 2(b) or (c) of this chapter, the court shall appoint a lawyer-guardian ad litem to represent the child." The LGAL's duties are laid out in MCL 712A.17d(1), which provides, in pertinent part, as follows:

> A lawyer-guardian ad litem's duty is to the child, and not the court. The lawyer-guardian ad litem's powers and duties include at least all of the following:

(a) The obligations of the attorney-client privilege.

(b) To serve as the independent representative for the child's best interests, and be entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child.

(c) To determine the facts of the case by conducting an independent investigation including, but not limited to, interviewing the child, social workers, family members, and others as necessary, and reviewing relevant reports and other information. The agency case file shall be reviewed before disposition and before the hearing for termination of parental rights. Updated materials shall be reviewed as provided to the court and parties. . . .

(d) To meet with or observe the child and assess the child's needs and wishes with regard to the representation and the issues in the case . . . .

* * *

(f) To explain to the child, taking into account the child's ability to understand the proceedings, the lawyer-guardian ad litem's role.

(g) To file all necessary pleadings and papers and independently call witnesses on the child's behalf.

* * *

(i) To make a determination regarding the child's best interests and advocate for those best interests according to the lawyer-guardian ad litem's understanding of those best interests, regardless of whether the lawyer-guardian ad litem's determination reflects the child's wishes. The child's wishes are relevant to the lawyer-guardian ad litem's determination of the child's best interests, and the lawyer-guardian ad litem shall weigh the child's wishes according to the child's competence and maturity. Consistent with the law governing attorney-client privilege, the lawyer-guardian ad litem shall inform the court as to the child's wishes and preferences.

(j) To monitor the implementation of case plans and court orders, and determine whether services the court ordered for the child or the child's family are being provided in a timely manner and are accomplishing their purpose. The lawyer-guardian ad litem shall inform the court if the services are not being provided in a timely manner, if the family fails to take advantage of the services, or if the services are not accomplishing their intended purpose.

(k) Consistent with the rules of professional responsibility, to identify common interests among the parties and, to the extent possible, promote a cooperative resolution of the matter through consultation with the child's parent, foster care provider, guardian, and caseworker.

(*l*) To request authorization by the court to pursue issues on the child's behalf that do not arise specifically from the court appointment.

(m) To participate in training in early childhood, child, and adolescent development.

Based on the duties of an LGAL, an LGAL is clearly a guardian; after an LGAL is appointed in child protective proceedings, he or she has the statutory authority and duty to care for the child by advocating for the child's best interests. And because an LGAL is a guardian appointed by the court to appear in child protective proceedings on the minor child's behalf, an LGAL satisfies the dictionary definition of "guardian ad litem."

However, this does not end our discussion. MCL 712A.13a indicates that, in child protective proceedings, a GAL is distinct from an LGAL. MCL 712A.13a states, in pertinent part, as follows:

(1) As used in this section and sections 2, 6b, 13b, 17c, 17d, 18f, 19, 19a, 19b, and 19c of this chapter:

* * *

> (f) "Guardian ad litem" means an individual whom the court appoints to assist the court in determining the child's best interests. A guardian ad litem does not need to be an attorney.
>
> (g) "Lawyer-guardian ad litem" means an attorney appointed under section 17c of this chapter. A lawyer-guardian ad litem represents the child, and has the powers and duties, as set forth in section 17d of this chapter.

Despite the fact that MCL 712A.13a differentiates between a GAL and an LGAL, MCL 712A.13a(1) begins with the qualifier, "As used in this section and sections 2, 6b, 13b, 17c, 17d, 18f, 19, 19a, 19b, and 19c of this chapter . . . ." MCL 712A.13a(1) does not state that its definitions are applicable to MCL 691.1407. "By specifically limiting the applicability of [these definitions] to certain statutory provisions, the Legislature expressed a clear intent that the definition[s] should not be applied elsewhere." *People v Mazur*, 497 Mich 302, 314; 872 NW2d 201 (2015). Moreover, MCL 712A.13a is not part of the GTLA; rather, it is part of the Probate Code, and "the paramount purpose of the juvenile section of the Probate Code is to provide for the well-being of children." *In re Macomber*, 436 Mich 386, 390; 461 NW2d 671 (1990). Though this purpose does not conflict with the GTLA's purpose of limiting governmental tort liability, *Genesee Co Drain Comm'r*, 309 Mich App at 321, we need not read these statutes in harmony—or *in pari materia*—because their scopes and aims "are distinct and unconnected," *Mazur*, 497 Mich at 313. Accordingly, the fact that a GAL is defined separately from an LGAL in MCL 712A.13a(1) does not affect our interpretation of what the Legislature intended by using "guardian ad litem" in MCL 691.1407(6).

Nonetheless, the distinction is significant to the extent that it indicates that there are differences between a GAL and an LGAL. For instance, a GAL need not be an attorney, while an LGAL must be an attorney. MCL 712A.13a(1)(f) and (g). A GAL, after conducting an independent investigation, "shall make a report in open court or file a written report of the investigation and recommendations." MCR 5.121(C). The GAL's report and any subsequent reports "may be received by the court and may be relied on to the extent of their probative value . . . ." MCR 5.121(D)(1). And interested parties have a right to "examine and controvert reports received into evidence" and can cross-examine the GAL who made the report. MCR 5.121(D)(2)(a) through (c). An LGAL, like a GAL, must conduct an independent investigation, MCL 712A.17d(1)(b), but, unlike a GAL, "[t]he court or another party to the case shall not call [an LGAL] as a witness to testify regarding matters related to the case," and an LGAL's "file of the case is not discoverable," MCL 712A.17d(3). And while the court must appoint an LGAL in a child protective proceeding, MCL 712A.17c(7), a court is not required to appoint a GAL in such proceedings; MCL 712A.17c(10) provides, "To assist the court in determining a child's best interests, the court *may* appoint a guardian ad litem for a child involved in a proceeding under this chapter." (Emphasis added.) Perhaps the starkest difference between the two is that, unlike an LGAL, appointment of a GAL "does not create an attorney-client relationship," and "[c]ommunications between that person and the guardian ad litem are not subject to the attorney-client privilege." MCR 5.121(E)(1). In addition to these differences, an LGAL has the statutory duties outlined earlier, which do not apply to a GAL.

Though these differences are numerous, we are not convinced that the Legislature intended for an LGAL to be considered distinct from a GAL for purposes of MCL 691.1407(6). The LGAL is a unique entity in Michigan. An LGAL's duty in a child protective proceeding is to the child, MCL 712A.17d(1), but the LGAL is "[t]o serve as *the independent* representative for the child's *best interests*," MCL 712A.17d(1)(b) (emphasis added), as determined by "*the lawyer-guardian ad litem's understanding* of those interests, *regardless* of whether the lawyer-guardian ad litem's determination reflects the child's wishes," MCL 712A.17d(1)(i) (emphasis added). Thus, an LGAL serves the same basic function as a GAL: independently investigating, determining, and representing the child's best interests.

But, as indicated, an LGAL must serve this purpose differently; an LGAL is not tasked with simply assisting the court in determining the child's best interests but rather is an active participant in the proceedings. Like a party's attorney, an LGAL may advocate for a position, MCL 712A.17d(1)(i), may call witnesses, MCL 712A.17d(1)(g), and is "entitled to full and active participation in all aspects of the litigation," MCL 712A.17d(1)(b). However, an LGAL is not a party's attorney; an LGAL is an independent representative of *the child's best interests*.

Indeed, MCL 712A.13a(1)(c) separately defines "attorney" for purposes of child protective proceedings, stating that, as used in this section:

> "Attorney" means, if appointed to represent a child in a proceeding under section 2(b) or (c) of this chapter, an attorney serving as the child's legal advocate in a traditional attorney-client relationship with the child, as governed by the Michigan rules of professional conduct. An attorney defined under this subdivision owes the same

> duties of undivided loyalty, confidentiality, and zealous representation of the child's expressed wishes as the attorney would to an adult client. For the purpose of a notice required under these sections, attorney includes a child's lawyer-guardian ad litem.

And MCL 712A.17d(2) provides that, when a child's interests differ from the LGAL's determination of the child's best interests, the court has discretion to appoint an attorney for the child. In pertinent part, that section provides:

> If, after discussion between the child and his or her lawyer-guardian ad litem, the lawyer-guardian ad litem determines that the child's interests as identified by the child are inconsistent with the lawyer-guardian ad litem's determination of the child's best interests, the lawyer-guardian ad litem shall communicate the child's position to the court. If the court considers the appointment appropriate considering the child's age and maturity and the nature of the inconsistency between the child's and the lawyer-guardian ad litem's identification of the child's interests, the court may appoint an attorney for the child. An attorney appointed under this subsection serves in addition to the child's lawyer-guardian ad litem. [MCL 712A.17d(2).]

Thus, an attorney for the child is distinct from an LGAL; an LGAL is an advocate for the child's best interests as determined by the LGAL, MCL 712A.17d(1)(b) and (i), whereas an attorney for the child serves in the traditional sense of an attorney: an advocate for the child's interests as determined by the child, MCL 712A.13a(1)(c); MCL 712A.17d(2). While there will often not be a need for this distinction, we find it significant because it emphasizes that an LGAL is unique; an LGAL is an advocate in the proceedings—like an attorney—but not necessarily an advocate for a party. Rather, an LGAL is an advocate for the child's best interests.

In this role, an LGAL, although distinct from a GAL, serves the same purpose as a GAL: representing the child's best interests. MCL 712A.17c(10); MCL 712A.17d(1)(b). What constitutes the child's best interests is ultimately a professional judgment call made by the LGAL or GAL, independent of the child's wishes, although those wishes are considered as part of the GAL or LGAL's determination. In contrast, an attorney for the child, if appointed, advocates for the child's interests, regardless of what those interests are. Thus, although an LGAL functions like an attorney and has duties that go beyond those of a GAL, an LGAL's duties ultimately conform to those of a GAL: investigating and independently determining the child's best interests and then serving those interests. Accordingly, because an LGAL fits into the dictionary definition of "guardian ad litem" and serves the same purpose as a GAL in child protective proceedings, we broadly interpret "guardian ad litem" as used in the GTLA, *Nawrocki*, 463 Mich at 158, and conclude that the Legislature intended for LGALs to be immune "from civil liability for an injury to a person or damage to property if he or she is acting within the scope of his or her authority as" an LGAL, MCL 691.1407(6).

We find further support for this conclusion given the context in which the Legislature enacted MCL 691.1407(6) and its subsequent creation of LGALs. In *Bullock v Huster*, 209 Mich App 551, 553; 532 NW2d 202 (1995) (*Bullock I*), vacated and remanded 451 Mich 884 (1996), a GAL was sued for negligence stemming from her role in a custody dispute. The GAL argued that she was entitled to immunity under MCL 691.1407, which, at that time, did not include the provision extending immunity to GALs. *Bullock I*, 209 Mich App at 554-555. This Court disagreed, concluding that the statute was a "comprehensive review of governmental immunity" that

explicitly "failed to include [GALs] within the class of persons entitled to immunity." *Id*. at 555. The Court explained that "[w]here the Legislature undertakes such broad reform, the expression of one thing in the resulting statute may be deemed the exclusion of another." *Id*. Shortly after the release of *Bullock I*, the Legislature amended MCL 691.1407 to include the current subsection expressly granting GALs immunity from civil liability. *Bullock v Huster (On Remand)*, 218 Mich App 400, 403-404; 554 NW2d 47 (1996) (*Bullock II*). Our Supreme Court subsequently vacated *Bullock I* and remanded it to this Court, *id*. at 402, and this Court held on remand that the GAL was "immune from liability for any injuries to [the] plaintiff caused when [the] defendant was acting within the scope of her authority as a guardian ad litem for [the] plaintiff in the underlying child custody suit," *id*. at 404.

However, when the Legislature amended MCL 691.1407 following *Bullock I*, LGALs did not exist; LGALs were not codified until 1998. See 1998 PA 480. Before that time, courts were required to appoint an attorney to represent the child in child protective proceedings. See, e.g., 1998 PA 474. The role and responsibilities of that attorney were left largely undefined by statute and instead were informed by the obligations that an attorney owed a client generally. See *In re AMB*, 248 Mich App 144, 224; 640 NW2d 262 (2001) ("In both the Child Protection Law and the Juvenile Code, the Legislature made clear that a child's attorney has the same duties that any other client's attorney would fulfill when necessary.").[1] This

[1] Although *In re AMB* was decided after the creation of LGALs, the issue in the case did not relate to an LGAL but to an attorney for the child appointed under the earlier version of MCL 712A.17c. See *In re AMB*, 248 Mich App at 222; see also *id*. at 224 n 188 (acknowledging that 1998 PA 480 "changed the relationship between a child and the child's lawyer").

changed with the passage of 1998 PA 480 and its creation of LGALs and all of their statutory duties. MCL 712A.17d(1); see also *In re AMB*, 248 Mich App at 224 n 188. As explained, an LGAL is tasked with the statutory responsibility of representing the child's *best* interests—like a GAL—and not fulfilling the role of a traditional attorney in the attorney-client relationship.

James urges us to invoke the maxim of *expressio unius est exclusio alterius*—that the express mention of one thing is to the exclusion of all others—to conclude that the Legislature's failure to amend MCL 691.1407(6) to explicitly include LGALs after the enactment of 1998 PA 480 indicates that the Legislature intended to exclude LGALs from the grant of immunity in MCL 691.1407(6). However, that is true only if the Legislature recognized LGALs as being distinct from GALs. If, on the other hand, the Legislature recognized LGALs as type of GAL, there would be no need to mention LGALs in MCL 691.1407(6) because they were already included in the statute's reference to GALs. See *Kater v Brausen*, 241 Mich App 606, 609-610; 617 NW2d 40 (2000) (explaining that the Legislature did not intend to exclude "temporary guardians" from application of MCL 722.26b(1) by failing to expressly list them in that section because "the Legislature recognized temporary guardians as a subgroup of ordinary guardians" and, therefore, there was "no need to mention them").

The Legislature is presumed to be familiar with the rules of statutory construction, *Alma Piston Co v Dep't of Treasury*, 236 Mich App 365, 370; 600 NW2d 144 (1999), and "to be aware of the existence of the law in effect at the time of its enactments," *Malcolm v City of East Detroit*, 437 Mich 132, 139; 468 NW2d 479 (1991). Thus, when the Legislature enacted 1998 PA 480, it

was aware that the governmental immunity granted to GALs in MCL 691.1407(6) was to be broadly interpreted and exceptions narrowly construed. See *Nawrocki*, 463 Mich at 158. Therefore, after enacting 1998 PA 480, there was no need for the Legislature to amend MCL 691.1407(6) to include LGALs because, by crafting an LGAL's purpose to reflect that of a GAL, the Legislature intended for an LGAL to be considered a "guardian ad litem" when that term is broadly interpreted for purposes of governmental immunity.[2]

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[2] We also note that, given the importance of an LGAL's ability to make independent decisions regarding the child's best interests, we have no doubt that the Legislature intended to include LGALs in the class of GALs afforded immunity under MCL 691.1407(6). When this Court issued its opinion in *Bullock I*, Judge FITZGERALD, in a concurring opinion, wrote:

> I write separately . . . to express my concern that disgruntled parents who are dissatisfied with a custody decision may retaliate by suing the guardian ad litem, ostensibly on behalf of the child. I am concerned that guardians ad litem, whose services are consistently used in cases involving the termination of parental rights and child neglect and used with increasing frequency in custody cases to protect the interests of children, may be reluctant to serve as guardians ad litem if they are forced to defend their actions . . . . [*Bullock I*, 209 Mich App at 557 (FITZGERALD, P.J., concurring).]

A trial court is required to appoint an LGAL in a child protective proceeding, and the touchstone of an LGAL's role is its statutory responsibility to protect the best interests of the child. The Legislature enabled LGALs to accomplish this by granting them statutory independence and autonomy; an LGAL is required to conduct an independent investigation and determine—free from outside influence—the child's best interests. This independence and autonomy is essential to accomplishing the LGAL's task; yet it would be inherently compromised in the absence of immunity. See *Short v Short*, 730 F Supp 1037, 1039 (D Colo, 1990) ("Fear of liability to one of the parents can warp judgment that is crucial to vigilant loyalty for what is best for the child; the guardian's focus must not be diverted to appeasement of antagonistic parents."). In tasking LGALs with the independence to determine the child's best interests and advocate on behalf of those interests, we believe that the

The dissent provides a unique resolution to the problem before us, but its conclusion does not appear grounded in the principles of statutory interpretation. At issue before us is whether the Legislature intended to include LGALs in its use of "guardian ad litem" in MCL 691.1407(6). The dissent believes that "guardian ad litem" as used in the GTLA should be defined by the duties of a GAL set forth in MCR 5.121(C). The dissent would hold that, if the duty for which the LGAL is sued "is one also performed by a GAL" as defined in MCR 5.121(C), then "the Legislature intended to protect the party performing that duty regardless of whether the party is called a GAL or an LGAL." However, the dissent provides no support for its conclusion that the Legislature intended to define this statutory term by reference to a court rule. As stated, the Legislature is presumed to be familiar with the rules of statutory interpretation, and had it intended for us to interpret MCL 691.1407(6) through reference to a court rule, it certainly could have used language to reflect that intent. See *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 506; 475 NW2d 704 (1991) ("[W]e believe that if the Legislature had intended such an interpretation . . . , it would adopt explicit language clarifying that intent."). Thus, we disagree with the dissent's conclusion that this statutory term used by the Legislature should be interpreted through a court rule promulgated by the judiciary and instead adhere to the basic principles of statutory interpretation that we have explained throughout this opinion.[3]

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Legislature intended for LGALs to be immune so as to allow them to accomplish this goal free from considerations unrelated to the child's best interests.

[3] Further, interpreting a legislative term through reference to a court rule, without any indication that this is the Legislature's intent, potentially violates the separation-of-powers doctrine. Court rules were

For these reasons, we conclude that the Legislature intended for LGALs to be immune from civil liability under MCL 691.1407(6) when acting in their role as an LGAL. Because the allegations in this case all relate to defendant's actions while acting in his role as an LGAL, the trial court properly granted summary disposition to defendant.[4]

Affirmed.

M. J. KELLY, J., concurred with O'BRIEN, J.

SHAPIRO, P.J. (*dissenting*). I respectfully dissent.

Each side has presented a reasonable construction of the two statutes. Appellee points to the protections given to guardians ad litem (GALs) at the time the lawyer-guardian ad litem (LGAL) statute was passed and argues that in adopting the latter, the Legislature already knew that the governmental tort liability act

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created by our Supreme Court, and that Court has the power to amend those rules. See MCR 1.201. If we were to interpret "guardian ad litem" as used in MCL 691.1407(6) by reference to MCR 5.121(C), our Supreme Court would have effectively defined, and at any point could redefine, that term. Obviously, this is not the judiciary's role. See *Wilson v Arnold*, 5 Mich 98, 104 (1858) ("It is for the court to declare what the law is—not to make it."); see also *Mich Residential Care Ass'n v Dep't of Social Servs*, 207 Mich App 373, 377; 526 NW2d 9 (1994) ("The constitutional duty of courts is to interpret and apply the law, not to enact laws.").

[4] We note that judicial mechanisms remain in place to prevent abuse, misconduct, and irresponsibility of LGALs. First, an LGAL's immunity only attaches to conduct within the scope of the LGAL's duties. MCL 691.1407(6). Second, the court monitors the LGAL's performance, see, e.g., MCR 3.915(B)(2), and can remove the LGAL if necessary, MCL 712A.17c(9). Third, an LGAL is simply another advocate in our adversarial system; whatever position an LGAL takes during a proceeding can be addressed and rebutted by the other parties, thereby ensuring that the trial court will be apprised of the facts and can issue an informed decision. Finally, an LGAL may be subject to punishment by the Attorney Grievance Commission if his or her conduct fails to meet the standards set forth in the Michigan Rules of Professional Conduct.

(GTLA), MCL 691.1401 *et seq*., provided immunity and so there was no need to explicitly provide for immunity within the LGAL statute itself. Appellant points to the same statutory history but argues that if the Legislature wanted LGALs to have immunity, then the Legislature would have explicitly provided for that immunity in the LGAL statute or at least made reference therein to the immunity provided in the GTLA.[1] Each side has set forth a principled way to determine the statutory construction, and each side has relied on proper principles of statutory construction. Accordingly, it should be our task, if possible, to resolve the question in a manner that is consistent with both constructions.

The duties of an LGAL are far broader and more extensive than those of a GAL. The duties of a GAL are set forth in MCR 5.121(C), which provides, in relevant part, that "[b]efore the date set for hearing, the guardian ad litem . . . shall conduct an investigation and shall make a report in open court or file a written report of the investigation and recommendations." MCR 5.121(E)(1) goes on to state that if the person appointed as the GAL is an attorney, "that appointment does not create an attorney-client relationship" and the GAL's communications with the child "are not subject to the attorney-client privilege."

The duties of an LGAL are set forth in MCL 712A.17d:

> (1) A lawyer-guardian ad litem's duty is to the child, and not the court. The lawyer-guardian ad litem's powers and duties include at least all of the following:
>
> (a) The obligations of the attorney-client privilege.

[1] Each also presents credible arguments about the significance of the fact that when the GTLA was adopted, there was no such thing as an LGAL.

(b) To serve as the independent representative for the child's best interests, and be entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child.

(c) To determine the facts of the case by conducting an independent investigation including, but not limited to, interviewing the child, social workers, family members, and others as necessary, and reviewing relevant reports and other information. The agency case file shall be reviewed before disposition and before the hearing for termination of parental rights. Updated materials shall be reviewed as provided to the court and parties. The supervising agency shall provide documentation of progress relating to all aspects of the last court ordered treatment plan, including copies of evaluations and therapy reports and verification of parenting time not later than 5 business days before the scheduled hearing.

(d) To meet with or observe the child and assess the child's needs and wishes with regard to the representation and the issues in the case in the following instances:

(*i*) Before the pretrial hearing.

(*ii*) Before the initial disposition, if held more than 91 days after the petition has been authorized.

(*iii*) Before a dispositional review hearing.

(*iv*) Before a permanency planning hearing.

(*v*) Before a post-termination review hearing.

(*vi*) At least once during the pendency of a supplemental petition.

(*vii*) At other times as ordered by the court. Adjourned or continued hearings do not require additional visits unless directed by the court.

(e) The court may allow alternative means of contact with the child if good cause is shown on the record.

(f) To explain to the child, taking into account the child's ability to understand the proceedings, the lawyer-guardian ad litem's role.

(g) To file all necessary pleadings and papers and independently call witnesses on the child's behalf.

(h) To attend all hearings and substitute representation for the child only with court approval.

(i) To make a determination regarding the child's best interests and advocate for those best interests according to the lawyer-guardian ad litem's understanding of those best interests, regardless of whether the lawyer-guardian ad litem's determination reflects the child's wishes. The child's wishes are relevant to the lawyer-guardian ad litem's determination of the child's best interests, and the lawyer-guardian ad litem shall weigh the child's wishes according to the child's competence and maturity. Consistent with the law governing attorney-client privilege, the lawyer-guardian ad litem shall inform the court as to the child's wishes and preferences.

(j) To monitor the implementation of case plans and court orders, and determine whether services the court ordered for the child or the child's family are being provided in a timely manner and are accomplishing their purpose. The lawyer-guardian ad litem shall inform the court if the services are not being provided in a timely manner, if the family fails to take advantage of the services, or if the services are not accomplishing their intended purpose.

A review of the court rule and the statute demonstrates that an LGAL has many duties that a GAL does not have, some of which flow from the attorney-client relationship and some from the more specific requirements in MCL 712A.17d that are not within the scope of MCR 5.121. I would therefore conclude that whether or not immunity applies to an LGAL turns on whether the action or omission complained of was one that fell within the more limited duties of a GAL or only within the broader statutory duties of an LGAL. While the question of immunity is confusing when focusing only on the actor's *title*, i.e., GAL or LGAL, the question is

not confusing when viewed through the lens of the scope of action authorized to—and required of—each.

Accordingly, I would hold that when an LGAL is sued for a violation of a duty, the court must determine whether that duty is one also performed by a GAL. If it is, the Legislature intended to protect the party performing that duty regardless of whether the party is called a GAL or an LGAL. If it is not, then the Legislature did not intend to immunize the LGAL.

Determination of whether immunity applies in this case, and if so to what extent, involves a fuller understanding of plaintiff's claims than we can discern simply from reading the complaint. I would therefore reverse the grant of summary disposition and remand the case to the trial court to allow it, after permitting what it finds to be necessary discovery, to determine which, if any, of plaintiff's claims are directed to duties and authority not possessed by a GAL but possessed by an LGAL. Actions or omissions complained of that arise out of the duties and authority of a GAL should be dismissed on the grounds of immunity. Actions or omissions that flow solely from the duties and authority of an LGAL are not subject to immunity and therefore should not be dismissed on that ground.

*In re* VANSACH ESTATE

*In re* BOCKES ESTATE

Docket Nos. 334732 and 336267. Submitted May 8, 2018, at Detroit. Decided May 22, 2018, at 9:00 a.m.

In Docket No. 334732, Ramona Fenner-Vansach petitioned the St. Clair County Probate Court for entry of a protective order under the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., claiming that she was entitled to financial support from her husband, Joseph Vansach, Jr., because she lacked sufficient income to meet her needs. Ramona lived at home and was a "community spouse" under 42 USC 1396r–5(h)(2), while Joseph lived in an institution and was an "institutionalized spouse" under 42 USC 1396r–5(h)(1). The Department of Health and Human Services (DHHS) opposed the petition, asserting that Ramona actually sought a judicial determination that she was entitled to a larger community spouse monthly income allowance (CSMIA) under Medicaid, which would have had the effect of decreasing the Medicaid patient-pay amount that Joseph contributed toward his care. According to the DHHS, the probate court lacked the authority to make Medicaid determinations and to enter orders modifying the CSMIA. The court, John D. Tomlinson, J., granted Ramona's petition and entered a support order directing that 100% of Joseph's monthly income be paid to Ramona. The DHHS appealed as of right.

In Docket No. 336267, Beverly F. Bockes petitioned the Eaton County Probate Court for entry of a protective order under EPIC. As a community spouse, she claimed that she was entitled to financial support from her institutionalized husband, Jerome R. Bockes, because she lacked sufficient income to meet her needs. The DHHS opposed Beverly's petition for the same reasons as it opposed Ramona's petition. The court, Thomas K. Byerley, J., granted Beverly's petition and ordered that 100% of Jerome's monthly income be paid to Beverly. The DHHS appealed as of right. The Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. A probate court has subject-matter jurisdiction to enter a protective order directing the distribution of a protected individu-

al's income to, or for the use of, any of the protected individual's dependents or other claimants. In MCL 700.5402(a) and (b), EPIC provides probate courts with jurisdiction to enter protective orders in cases involving a community spouse's efforts to obtain additional income from an institutionalized spouse even when entry of such an order would effectively result in a redetermination of the CSMIA. The DHHS argued that a community spouse's request for additional income was in actuality a challenge to that spouse's existing CSMIA and that because the DHHS had exclusive jurisdiction over challenges to a CSMIA, those issues were subject to administrative proceedings under 42 USC 1396r–5(e)(2)(A) and (B). Under 42 USC 1396r–5(e)(2)(B), a spouse who is dissatisfied with his or her CSMIA amount may obtain an administrative hearing to establish that the amount of the spouse's CSMIA should be increased as a result of exceptional circumstances resulting in significant financial duress. If the DHHS denies the spouse's request for additional income, MCL 400.37 and MCL 24.303 permit an individual who is dissatisfied with the results of the administrative proceedings and who has otherwise exhausted the available administrative remedies to seek judicial review in circuit court. However, contrary to the DHHS's argument, the Medicaid provisions do not confer exclusive jurisdiction on the DHHS with regard to income allocation between spouses. Instead, one federal Medicaid provision, 42 USC 1396r–5(d)(5), plainly acknowledges that courts may have jurisdiction to enter a support order and that the CSMIA must not be less than the amount ordered by the court; that is, an adjustment might be necessary if the existing CSMIA fell below the amount ordered by the court. Consequently, the federal Medicaid provision acknowledging that a court might enter a protective order directing an institutional spouse to provide more financial support to his or her community spouse makes plain that administrative remedies under Medicaid are not the sole means of relief and that a court retains jurisdiction to enter a support order in such cases.

2. The Supremacy Clause of the United States Constitution, US Const, art VI, cl 2, gives Congress the authority to preempt state laws. The DHHS claimed that EPIC was preempted by obstacle-conflict preemption. Specifically, the DHHS asserted that EPIC was an obstacle to the execution of Congress's objectives. The spousal-impoverishment provisions of the Medicare Catastrophic Coverage Act, 42 USC 1396r–5, were enacted to ensure that a community spouse whose husband or wife was institutionalized and received Medicaid benefits had a sufficient, but not excessive, amount of income and resources available. Under § 1396r–5(d)(3), a minimum monthly maintenance needs

allowance (MMMNA) establishes the amount of income to which a community spouse is entitled when his or her spouse is institutionalized. When a community spouse's actual income does not rise to the level of the MMMNA amount, the community spouse is entitled to a CSMIA under § 1396r–5(d)(2) to make up the difference between the community spouse's actual income and the MMMNA. The CSMIA cannot be less than the amount ordered by the court. Therefore, by enacting § 1396r–5(d)(5), Congress specifically provided that a state court's order can affect the amount of an individual's CSMIA. EPIC's grant of authority to the probate courts to enter support orders is not preempted by Medicaid and its spousal-impoverishment provisions. Rather, EPIC's provisions allowing a probate court to enter support orders are consistent with Congress's objectives and purposes in enacting Medicaid and the spousal-impoverishment provisions.

3. Under MCL 700.5401(3), a community spouse seeking a protective order under EPIC must satisfy two prerequisites: the community spouse must show by clear and convincing evidence that (1) his or her spouse is unable to manage his or her affairs effectively because of mental or physical illness, chronic alcohol or drug use, or confinement, among other conditions, and (2) the community spouse needs money and is entitled to the institutionalized spouse's support and a protective order is necessary to obtain or provide money. In evaluating the second prerequisite, the court must consider the requesting spouse's needs as well as those of the protected individual. Relevant factors include the CSMIA provided under Medicaid and the institutionalized individual's patient-pay amount under Medicaid. The first prerequisite was satisfied in these cases because Joseph and Jerome (the institutionalized individuals) both suffered from dementia and, as a result, were unable to manage their own affairs. The probate courts failed to properly analyze the second prerequisite. MCL 750.161(1) states that a spouse's obligation to support his or her spouse is contingent on the assumption that the spouse providing the support has sufficient financial ability to provide the assistance. In these cases, the probate courts abused their discretion by ordering that Joseph and Jerome, the institutionalized spouses, pay 100% of their incomes each month to their respective community spouses, Ramona and Beverly, without regard to Joseph's and Jerome's needs and circumstances and without consideration of their status as Medicaid recipients and their existing patient-pay obligations under Medicaid. The level of support required is generally recognized as being that which is reasonably consistent with the supporting spouse's own means and station. The correct legal framework under which to evaluate

whether a spouse is entitled to a support order is to determine by clear and convincing evidence that the spouse *needs* the money, not that he or she simply *wants* the money, and that the spouse is entitled to support despite the CSMIA and despite the patient-pay amount under Medicaid. A community spouse cannot make a showing of "need" and is not entitled to the institutionalized spouse's support merely to maintain the community spouse's lifestyle when providing money to the community spouse will leave the institutionalized spouse entirely destitute and unable to meet his or her own needs. In Ramona's case, the probate court erred by applying a standard of reasonableness to her situation, determining that Ramona demonstrated a need for support because none of her budget requests was unreasonable. But the court considered only Ramona's requests and failed to weigh Joseph's needs and his existing patient-pay obligations. In Beverly's case, the probate court also erred by failing to operate under the correct legal framework; the probate court failed to appropriately consider Jerome's needs as well as Beverly's and so abused its discretion when it entered an order that rendered Jerome destitute in order to maintain Beverly's standard of living.

Protective orders vacated and cases remanded.

1. PROBATE COURT — ESTATES AND PROTECTED INDIVIDUALS CODE — SUBJECT-MATTER JURISDICTION — ALLOCATION OF INSTITUTIONALIZED SPOUSE'S INCOME.

Under MCL 700.5402(b), a probate court has subject-matter jurisdiction to enter a protective order directing the distribution of a protected individual's income to, or for the use of, any of the protected individual's dependents or other claimants; the probate court's jurisdiction extends to entering protective orders in cases involving a community spouse's efforts to obtain additional income from an institutionalized spouse even when entry of such an order would effectively result in a redetermination of the community spouse monthly income allowance under Medicaid; 42 USC 1396r–5 expressly acknowledges that a state court may enter an order allocating an institutionalized spouse's income to his or her community spouse, and therefore, a probate court has the subject-matter jurisdiction necessary to enter an order that may affect federal Medicaid matters.

2. PROBATE COURT — ESTATES AND PROTECTED INDIVIDUALS CODE — SPOUSAL-IMPOVERISHMENT PROVISIONS.

The laws in the federal Medicaid program governing spousal impoverishment do not preempt Michigan's Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., or the

authority EPIC provides to probate courts under MCL 700.5401(3)(b) to enter protective orders directing an institutionalized spouse receiving Medicaid benefits to increase the amount of financial support he or she gives to his or her community spouse (42 USC 1396r–5).

3. PROBATE COURT — ESTATES AND PROTECTED INDIVIDUALS CODE — INSTITUTIONALIZED AND COMMUNITY SPOUSES — FINANCIAL SUPPORT.

A probate court must not enter a protective order increasing the amount of money an institutionalized spouse pays to his or her community spouse for support without taking into account the needs and circumstances of the institutionalized spouse and his or her patient-pay amount under Medicaid; a community spouse is not entitled to his or her institutionalized spouse's support merely to maintain the community spouse's current lifestyle when providing money to the community spouse will leave the institutionalized spouse entirely destitute (42 USC 1396r–5; MCL 700.5401).

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*Barron, Rosenberg, Mayoras & Mayoras, PC* (by *Don L. Rosenberg*, *Kimberly C. Browning*, and *Scott M. Robbins*) for Ramona Fenner-Vansach.

*Chalgian & Tripp Law Offices PLLC* (by *David L. Shaltz*) and *Grua, Tupper & Young PLC* (by *Carrie S. Ihrig Freeman*) for Jerome R. Bockes.

Amici Curiae:

*James Schuster* for the Elder Law and Disability Rights Section of the State Bar of Michigan.

*Fraser Trebilcock Davis & Dunlap, PC* (by *Marlaine C. Teahan*) for the Probate and Estate Planning Section of the State Bar of Michigan.

Before: O'CONNELL, P.J., and HOEKSTRA and K. F. KELLY, JJ.

PER CURIAM. In Docket No. 334732, respondent, the Department of Health and Human Services (DHHS), appeals as of right a protective order entered by the St. Clair County Probate Court, which ordered that all of Joseph Vansach, Jr.'s income be paid to his wife, Ramona Fenner-Vansach, for the rest of Joseph's life. In Docket No. 336267, the DHHS appeals a similar protective order, entered by the Eaton County Probate Court, directing that all income of Jerome R. Bockes be paid to his wife, Beverly Fay Bockes.[1] For the reasons explained in this opinion, we conclude that a probate court has the authority to enter a protective order providing support for a community spouse whose institutionalized spouse is receiving Medicaid benefits.[2] However, we also conclude that a probate court's authority to enter such support orders under the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., does not include the power to enter an order preserving the community spouse's standard of living without consideration of the institutionalized spouse's needs and his or her patient-pay obligations under

[1] The appeals have been consolidated "to advance the efficient administration of the appellate process." *In re Joseph Vansach Jr*, unpublished order of the Court of Appeals, entered July 12, 2017 (Docket Nos. 334732 and 336267).

[2] Title XIX of the Social Security Act, 42 USC 1396 *et seq*., is commonly referred to as the Medicaid act. *Mackey v Dep't of Human Servs*, 289 Mich App 688, 693; 808 NW2d 484 (2010). In the Medicaid context, and as used in this opinion, the term "community spouse" refers to a spouse living at home, while the term "institutionalized spouse" refers to a spouse who has been institutionalized, usually in a nursing home. *Wisconsin Dep't of Health & Family Servs v Blumer*, 534 US 473, 478; 122 S Ct 962; 151 L Ed 2d 935 (2002); see also 42 USC 1396r–5(h)(1) and (2).

Medicaid. Given that the orders in these cases were entered without considering Joseph's and Jerome's needs and their patient-pay obligations under Medicaid, we conclude that the probate courts abused their discretion by entering the orders at issue. We therefore vacate both support orders and remand for reconsideration of Beverly's and Ramona's need for support under the proper framework.

Both Joseph and Jerome are institutionalized individuals who receive Medicaid benefits to cover part of the costs of their healthcare. Their respective spouses—Ramona and Beverly—sought protective support orders under EPIC, claiming that they lacked sufficient income to meet their needs and that they were entitled to financial support from Joseph and Jerome. The DHHS opposed the petitions, asserting that Ramona and Beverly actually sought a judicial determination that they were each entitled to a larger community-spouse monthly income allowance (CSMIA) under Medicaid,[3] which would have the effect of decreasing the patient-pay amount that Joseph and Jerome contribute toward their care. According to the DHHS, the probate courts lacked the authority to make Medicaid determinations and to enter orders modifying the CSMIAs. Nevertheless, in each case, the probate court granted the petition and entered a support order requiring that 100% of the institutionalized spouse's monthly income be paid to the community spouse. The DHHS now appeals as of right in each case.

Generally speaking, these consolidated appeals ask us to consider whether, and under what circumstances, a community spouse whose institutionalized spouse is receiving Medicaid benefits may obtain a support order under EPIC in light of the federal Medicaid statutes

[3] 42 USC 1396r–5(d)(2).

establishing CSMIAs. As a practical matter, a support order under EPIC may later be used to obtain an increase in a community spouse's CSMIA and a corresponding decrease in the institutionalized spouse's patient-pay amount under Medicaid. Under Medicaid, there exists an administrative remedy for challenging the CSMIA, and the DHHS's basic position on appeal is that this administrative process is the sole avenue by which a community spouse may seek a modification of the CSMIA. Alternatively, assuming that the probate court has the authority to enter support orders with potential Medicaid implications, the DHHS argues that Ramona and Beverly failed to establish the necessary prerequisites for a support order under EPIC and that the probate courts abused their discretion by stripping Joseph and Jerome of *all* income so that Ramona and Beverly could maintain their current lifestyles. To provide context for our analysis of these issues, we begin with a brief overview of Medicaid's spousal-impoverishment provisions and the availability of a support order under EPIC.

## I. MEDICAID'S SPOUSAL-IMPOVERISHMENT PROVISIONS

"The Medicaid program, 42 USC 1396 *et seq*., was established by Congress in 1965 as a cooperative federal-state program in which the federal government reimburses the state for a portion of the costs of medical care for needy individuals." *Cook v Dep't of Social Servs*, 225 Mich App 318, 320; 570 NW2d 684 (1997). "Participation in Medicaid is essentially need-based, with states setting specific eligibility requirements in compliance with broad mandates imposed by federal statutes and regulations."[4] *Mackey v Dep't of*

[4] In Michigan, Medicaid is administered by the DHHS. See MCL 400.105; MCL 400.227.

*Human Servs*, 289 Mich App 688, 693; 808 NW2d 484 (2010). "To be eligible for Medicaid long-term-care benefits in Michigan, an individual must meet a number of criteria, including having $2,000 or less in countable assets." *Hegadorn v Dep't of Human Servs Dir*, 320 Mich App 549, 552-553; 904 NW2d 904 (2017) (quotation marks and citation omitted), lv gtd 501 Mich 984 (2018). Even if eligible for benefits, Medicaid recipients have an obligation to contribute to the cost of their care to the extent that they are financially able as determined on the basis of posteligibility calculations of income. See 42 USC 1396a(a)(17); 42 USC 1396r–5(d)(1); 42 CFR 435.725; *Kent Co v Dep't of Social Servs*, 149 Mich App 749, 751-752; 386 NW2d 663 (1986). However, Medicaid, "with all of its complicated rules and regulations, has also become a legal quagmire that has resulted in the use of several 'loopholes' taken advantage of by wealthier individuals to obtain government-paid long-term care they otherwise could afford." *Mackey*, 289 Mich App at 693-694.

The rules governing Medicaid are particularly complicated in cases involving married couples, who "typically possess assets and income jointly and bear financial responsibility for each other . . . ." *Wisconsin Dep't of Health & Family Servs v Blumer*, 534 US 473, 479; 122 S Ct 962; 151 L Ed 2d 935 (2002). Historically, because the income of both spouses and any jointly held assets were considered available to the institutionalized spouse for Medicaid purposes, "[m]any community spouses were left destitute by the drain on the couple's assets necessary to qualify the institutionalized spouse for Medicaid and by the diminution of the couple's income posteligibility to reduce the amount payable by Medicaid for institutional care." *Id*. at 480. However, in some cases, by titling assets solely in a community spouse's name, "couples with ample means

could qualify for assistance when their assets were held solely in the community spouse's name." *Id*.

Congress sought to address these problems with the enactment of the "spousal impoverishment" provisions of the Medicare Catastrophic Coverage Act of 1988 (MCCA), 42 USC 1396r–5. *Blumer*, 534 US at 477, 480. Specifically, "Congress sought to protect community spouses from 'pauperization' while preventing financially secure couples from obtaining Medicaid assistance." *Id*. at 480. In other words, the basic goal of these spousal-impoverishment provisions was to assure that "the community spouse has a sufficient—but not excessive—amount of income and resources available." *Id*. (quotation marks and citation omitted). "To achieve this aim, Congress installed a set of intricate and interlocking requirements with which States must comply in allocating a couple's income and resources." *Id*.

Relevant to the present case, in addition to other rules regarding the allocation of resources, Medicaid provides various rules for the allocation of income between spouses for purposes of determining Medicaid eligibility as well as the posteligibility income calculations that apply after an institutionalized spouse is "determined or redetermined" to be eligible for medical assistance. See § 1396r–5(b) and (d).

> Income allocation is governed by [42 USC] 1396r–5(b) and (d). Covering any month in which "an institutionalized spouse is in the institution," § 1396r–5(b)(1) provides that "no income of the community spouse shall be deemed available to the institutionalized spouse." The community spouse's income is thus preserved for that spouse and does not affect the determination whether the institutionalized spouse qualifies for Medicaid. In general, such income is also disregarded in calculating the amount Medicaid will pay for the institutionalized spouse's care after eligibility is established.

> Other provisions specifically address income allocation in the period after the institutionalized spouse becomes Medicaid eligible. Section 1396r–5(b)(2)(A) prescribes, as a main rule, that if payment of income is made solely in the name of one spouse, that income is treated as available only to the named spouse (the "name-on-the-check" rule). Section 1396r–5(d) provides a number of exceptions to that main rule designed to ensure that the community spouse and other dependents have income sufficient to meet basic needs. Among the exceptions, § 1396r–5(d)(3) establishes for the community spouse a "minimum monthly maintenance needs allowance," or MMMNA. The MMMNA is calculated by multiplying the federal poverty level for a couple by a percentage set by the State. Since 1992, that percentage must be at least 150%, . . . but the resulting MMMNA may not exceed $1,500 per month in 1988 dollars . . . . [*Blumer*, 534 US at 480-481.]

In an effort to ensure that a community spouse has income that meets the MMMNA, Medicaid allows a community spouse to receive a CSMIA. *Id*. at 481-482. Ordinarily, the CSMIA is calculated as set forth in § 1396r–5(d)(2), which states:

> In this section (except as provided in paragraph (5)), the "community spouse monthly income allowance" for a community spouse is an amount by which—
>
> (A) except as provided in subsection (e) of this section, the minimum monthly maintenance needs allowance (established under and in accordance with paragraph (3)) for the spouse, exceeds
>
> (B) the amount of monthly income otherwise available to the community spouse (determined without regard to such an allowance).

Essentially, under § 1396r–5(d)(2), if the community spouse's income is less than the amount of the MMMNA, the CSMIA equals the amount of the shortfall. If either spouse is dissatisfied with this calculation of the CSMIA, they may obtain an administrative

hearing, § 1396r–5(e)(2)(A), and attempt to establish that the community spouse needs income above the MMMNA due to "exceptional circumstances resulting in significant financial duress," § 1396r–5(e)(2)(B). Central to the present case, aside from the calculation of the CSMIA under § 1396r–5(d)(2), an alternative method for determining the CSMIA is provided in § 1396r–5(d)(5), which states: "If a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the [CSMIA] for the spouse shall be not less than the amount of the monthly income so ordered."

Ultimately, once the CSMIA has been determined, this amount is deducted from the institutionalized spouse's income and reallocated to the community spouse. *Blumer*, 534 US at 481-482. See also § 1396r–5(d)(1)(B). "The provision for this allowance ensures that income transferred from the institutionalized spouse to the community spouse to meet the latter's basic needs is not also considered available for the former's care. As a result, Medicaid will pay a greater portion of the institutionalized spouse's medical expenses than it would absent the CSMIA provision." *Blumer*, 534 US at 482.

## II. SUPPORT ORDERS UNDER EPIC

In Michigan, laws concerning the affairs of protected individuals and legally incapacitated individuals are set forth in EPIC.[5] See MCL 700.1201(a). In particular,

[5] A "protected individual" is "a minor or other individual for whom a conservator has been appointed or other protective order has been made . . . ." MCL 700.1106(w). " '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 700.1105(a).

Article V of EPIC, MCL 700.5101 *et seq*., contains statutes governing the protection of individuals under a disability.[6] *In re Brody Conservatorship*, 321 Mich App 332, 336; 909 NW2d 849 (2017). Under EPIC, probate courts clearly have the authority to enter protective orders, including the authority to enter orders providing money for "those entitled" to support from the incapacitated individual. MCL 700.5401(3)(b). See also MCL 700.5402(a) and (b). As a prerequisite to appointing a conservator or entering other protective orders, the probate court must make a finding of "cause" as provided in MCL 700.5401. In relevant part, this provision states:

> (1) Upon petition and after notice and hearing in accordance with this part, the court may appoint a conservator or make another protective order for cause as provided in this section.
>
> * * *
>
> (3) The court may appoint a conservator or make another protective order in relation to an individual's estate and affairs if the court determines both of the following:
>
> (a) The individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.
>
> (b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money. [MCL 700.5401.]

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[6] In this context, the term " '[d]isability' means cause for a protective order as described in [MCL 700.5401]." MCL 700.1103(n).

The prerequisites under this section must be established by clear and convincing evidence. MCL 700.5406(7); *In re Bittner Conservatorship*, 312 Mich App 227, 237; 879 NW2d 269 (2015). If the prerequisites for a protective order are established by clear and convincing evidence, the standards applicable to the trial court in fashioning an order and exercising authority over the individual's property are set forth in MCL 700.5407 and MCL 700.5408. See *Bittner*, 312 Mich App at 237, 241-242.

## III. ANALYSIS

With this basic understanding of Medicaid and EPIC in mind, we turn to the issues in the present cases—namely, whether a community spouse may seek a support order under EPIC to obtain income from an institutionalized spouse who is receiving Medicaid benefits and, if so, what prerequisite determinations must be made under EPIC to merit such an order. The DHHS challenges the propriety of such orders on a number of grounds, asserting (1) that the probate courts lack jurisdiction to enter support orders that will effectively result in a redetermination of the CSMIA, (2) that the probate courts' authority to enter support orders is preempted by federal law in cases involving an institutionalized spouse receiving Medicaid benefits, and (3) that the orders in these cases were entered without a proper showing of the prerequisites in MCL 700.5401(3)(b) for such orders. We address each of these arguments in turn.

### A. STANDARDS OF REVIEW

Whether a court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal. *Usitalo v Landon*, 299 Mich App 222, 228; 829 NW2d 359 (2013).

Likewise, "[w]hether a federal statute preempts state law is a question of law that we review de novo." *Ter Beek v City of Wyoming*, 297 Mich App 446, 457; 823 NW2d 864 (2012), aff'd 495 Mich 1 (2014). Questions of statutory interpretation are also reviewed de novo. *Salem Springs, LLC v Salem Twp*, 312 Mich App 210, 216; 880 NW2d 793 (2015).

In comparison, "appeals from a probate court decision are on the record, not de novo." *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). We review a trial court's factual findings for clear error, *In re Townsend Conservatorship*, 293 Mich App 182, 186; 809 NW2d 424 (2011), while its dispositional rulings, including a decision to enter a protective order, are reviewed for an abuse of discretion, see *Bittner*, 312 Mich App at 235-236. "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 236 (quotation marks and citation omitted). "An abuse of discretion occurs when the court's decision falls outside the range of reasonable and principled outcomes." *Id*. at 235. A trial court may also abuse its discretion by failing to operate within the correct legal framework. See *People v Kelly*, 317 Mich App 637, 643; 895 NW2d 230 (2016).

### B. JURISDICTION

On appeal, the DHHS first argues that the probate courts lack jurisdiction to enter protective orders in cases involving a community spouse's efforts to obtain additional income from an institutionalized spouse. The DHHS contends that such requests are in actuality a challenge to the CSMIA, and the DHHS asserts that the probate courts lack authority to make

Medicaid determinations or to alter a community spouse's CSMIA. According to the DHHS, as the agency charged with administering Medicaid in Michigan, it has exclusive jurisdiction over challenges to CSMIAs because those issues are subject to administrative proceedings under § 1396r–5(e)(2)(B).

"Subject-matter jurisdiction concerns a court's abstract power to try a case of the kind or character of the one pending and is not dependent on the particular facts of a case." *Harris v Vernier*, 242 Mich App 306, 319; 617 NW2d 764 (2000). When a state agency is "endowed with exclusive jurisdiction" over a matter, courts cannot exercise jurisdiction over those same areas. *In re Harper*, 302 Mich App 349, 353; 839 NW2d 44 (2013). Rather, an individual must exhaust any available administrative remedies before a court may exercise jurisdiction over the matter. *Id*. at 353, 356.

As noted, when a community spouse is dissatisfied with the amount of the CSMIA, he or she may obtain an administrative hearing, § 1396r–5(e)(2)(A)(*i*), and attempt to establish that he or she needs additional income "due to exceptional circumstances resulting in significant financial duress," § 1396r–5(e)(2)(B). As the agency charged with administering Medicaid in Michigan, the DHHS has the power "to hold and decide hearings." MCL 400.9. And an individual dissatisfied with the administrative results may seek judicial review in circuit court. MCL 400.37; MCL 24.303. Certainly, there are administrative remedies available under Medicaid to a community spouse who wishes to obtain additional income from an institutionalized spouse.

However, contrary to the DHHS's arguments, the Medicaid provisions providing for administrative pro-

ceedings do not confer *exclusive* jurisdiction on the DHHS with regard to income allocation between spouses. Instead, the federal Medicaid statutes plainly acknowledge that courts may have jurisdiction to enter a support order and that this support order will affect the calculation of the CSMIA. In particular, the possibility of courts having jurisdiction is recognized in § 1396r–5(d)(5), which states that "[i]f a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the [CSMIA] for the spouse shall be not less than the amount of the monthly income so ordered." Like several of our sister states to have considered the meaning of § 1396r–5, we do not read this statute as *conferring* jurisdiction on any particular court or as requiring states to establish a judicial process for obtaining support orders as an alternative to the mandated administrative remedies. See *Alford v Mississippi Div of Medicaid*, 30 So 3d 1212, 1221 (Miss, 2010) (reiterating the doctrines of primary jurisdiction and exhaustion of administrative remedies and holding that the language of law does not confer parallel jurisdiction on state courts); *Amos v Estate of Amos*, 267 SW3d 761, 764 (Mo App, 2008) (concluding that the state agency has primary jurisdiction over initial eligibility determinations and that a plaintiff must exhaust administrative remedies before a court has jurisdiction); *Arkansas Dep't of Health & Human Servs v Smith*, 370 Ark 490, 499; 262 SW3d 167 (2007) (holding that a state agency has sole authority over determining Medicaid eligibility and that courts may exercise jurisdiction after exhaustion of administrative remedies).[7] However, by recognizing the possibility that a court may have entered an

[7] Although not binding on this Court, caselaw from sister states may be considered as persuasive authority. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221 n 6; 761 NW2d 293 (2008).

order of support, § 1396r–5(d)(5) acknowledges that there can be courts with jurisdiction to enter support orders; and by requiring the CSMIA to be calculated based on these court support orders, § 1396r–5(d)(5) makes plain that Medicaid did not establish administrative remedies as the sole means of relief or abolish any court's jurisdiction to enter a support order. See *MEF v ABF*, 393 NJ Super 543, 555-556; 925 A2d 12 (App Div, 2007); *In re Tyler Estate*, unpublished order of the Superior Court of the District of Columbia, entered May 30, 2002 (Docket No. 246-00), pp 2-3, 6; *Gomprecht v Gomprecht*, 86 NY2d 47, 52; 652 NE2d 936 (1995). The relief available in the judicial forum "is uniquely dependent on the state laws that intersect with the federal Medicaid statute." *Valliere v Comm'r of Social Servs*, 328 Conn 294, 320; 178 A3d 346 (2018).[8] In short, the statutory language governing Medicaid does not create an exclusive administrative remedy; rather, it acknowledges the possibility of judicial spousal-support orders, and the question whether a court has jurisdiction turns on the court's authority to enter support orders under state law.

In this case, the basic question thus becomes whether probate courts in Michigan have jurisdiction to enter an order of support requiring payment of one spouse's income to another. "Probate courts are courts of limited jurisdiction," and their jurisdiction is defined "entirely by statute." *In re Geror*, 286 Mich App 132, 133; 779 NW2d 316 (2009) (quotation marks and citations omitted). See also Const 1963, art 6, § 15. The

[8] See also *Tyler*, unpub order at 9; *Jenkins v Fields*, unpublished opinion of the United States District Court for the Southern District of New York, issued May 1, 1996 (Docket No. 95 CIV 9603), p 6. Although *Jenkins* is a lower federal court decision, such decisions may be persuasive even though they are not binding on state courts. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

probate court's jurisdiction to enter an order of support in a case involving a protected individual is established by EPIC. Pursuant to MCL 700.5402:

> After the service of notice in a proceeding seeking a conservator's appointment or other protective order and until the proceeding's termination, the court in which the petition is filed has the following jurisdiction:
>
> (a) Exclusive jurisdiction to determine the need for a conservator or other protective order until the proceeding is terminated.
>
> (b) Exclusive jurisdiction to determine how the protected individual's estate that is subject to the laws of this state is managed, expended, or distributed to or for the use of the protected individual or any of the protected individual's dependents or other claimants.

Under these provisions, the probate courts clearly have subject-matter jurisdiction to enter a protective order directing the distribution of a protected individual's income "to or for the use of . . . any of the protected individual's dependents or other claimants."[9] MCL 700.5402(b). Accordingly, the DHHS's jurisdictional arguments are without merit.

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[9] To be clear, the probate court's authority in this context extends to entering support orders under EPIC; the probate court cannot actually alter a CSMIA or modify Medicaid patient-pay amounts. Admittedly, it may often be true that a community spouse seeking a support order to obtain income from an institutionalized spouse might well intend to use the probate court's support order to obtain a redetermination of the CSMIA under § 1396r–5(d)(5). See Schaltz & Mall, *Probate Court Orders and Medicaid Community Spouse Allowances: The Elder Law Practitioner's Perspective* (Annual Michigan Judicial Conference, October 2015). However, the practical Medicaid implications of entering a support order under EPIC in favor of a community spouse do not divest a probate court of jurisdiction to consider a request for a protective support order under MCL 700.5402. Indeed, as discussed, § 1396r–5(d)(5) contemplates the use of court support orders for calculation of the CSMIA.

C. PREEMPTION

Next, contrary to the DHHS's arguments, Medicaid and the spousal-impoverishment provisions do not preempt EPIC's provisions allowing probate courts to enter support orders. "The Supremacy Clause of the United States Constitution gives Congress the authority to preempt state laws." *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132, 139; 796 NW2d 94 (2010). "There are three types of federal preemption: express preemption, conflict preemption, and field preemption." *Id*. at 140. In this case, the DHHS claims that there exists conflict preemption, specifically "obstacle conflict preemption," which occurs "when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ter Beek*, 297 Mich App at 458 (quotation marks and citation omitted). According to the DHHS, the probate court's authority under EPIC to enter support orders for a community spouse eviscerates the intent of the spousal-impoverishment provisions of § 1396r–5.

To determine whether EPIC stands as an obstacle to the full accomplishment of the spousal-impoverishment provisions, we begin by considering Congress's purposes and objectives. *Ter Beek*, 297 Mich App at 460. As noted, by enacting the spousal-impoverishment provisions, Congress sought to ensure that community spouses had sufficient, but not excessive, income and resources; that is, Congress sought to prevent community spouses from being pauperized while also preventing financially secure couples from obtaining Medicaid assistance. *Blumer*, 534 US at 480. These purposes are accomplished through the spousal-impoverishment statutes that provide "intricate and interlocking requirements" for allocating a couple's income and resources. *Id*.

Notably, as discussed, one of the statutes enacted by Congress was § 1396r–5(d)(5), which expressly recognizes that "[i]f a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the [CSMIA] for the spouse shall be not less than the amount of the monthly income so ordered." By enacting this provision, Congress specifically provided that a state court's order can affect the amount of an individual's CSMIA, and thus we can only conclude that EPIC's provisions allowing the probate court to enter support orders are consistent with Congress's objectives and purposes in enacting Medicaid and the spousal-impoverishment provisions.[10] Accordingly, EPIC does not constitute an obstacle to the full accomplishment of Medicaid and the spousal-impoverishment provisions. The DHHS's obstacle-conflict-preemption arguments are without merit.

### D. STANDARDS FOR SUPPORT ORDERS UNDER EPIC

Finally, having determined that probate courts generally have authority under EPIC to enter orders to provide support for community spouses, we turn to the DHHS's argument that the orders in these cases were improperly entered because Ramona and Beverly failed to establish the prerequisites under MCL 700.5401(3)(b) by clear and convincing evidence.[11] In

[10] Indeed, if the use of state-court support orders for the calculation of CSMIAs is inconsistent with the overarching goals of Medicaid and the spousal-impoverishment provisions, Congress created the inconsistency, and it is certainly not our role to ignore the text of the Medicaid statutes or to "create rules based on our own sense of the ultimate purpose of the law being interpreted . . . ." *James v Richman*, 547 F3d 214, 219 (CA 3, 2008).

[11] On appeal, Ramona and Beverly argue that the DHHS waived the ability to challenge the evidence supporting their requests for additional

particular, the DHHS argues that Ramona and Beverly failed to show that they need money for their support, and the DHHS asserts that they cannot show a need for money given that the CSMIA is designed to ensure that they have sufficient income. According to the DHHS, the probate courts abused their discretion by using support orders to bypass Medicaid's requirements and by failing to acknowledge that Joseph and Jerome need their incomes to meet their existing patient-pay obligations under Medicaid.

Although we have determined that the probate courts have the authority under EPIC to enter orders to provide support for community spouses whose spouses are institutionalized and receiving Medicaid benefits, that authority is constrained by the standards in EPIC. Thus, to determine the probate court's authority we begin with EPIC's statutory language. As noted, a probate court may enter a protective order if the court determines that both of the following have been shown by clear and convincing evidence:

> (a) The individual is unable to manage property and business affairs effectively for reasons such as mental

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income because the DHHS did not seek to present evidence in the probate courts. Such an argument improperly attempts to shift the burden of proof to the DHHS and incorrectly assumes that the DHHS had some obligation to present evidence. In actuality, Ramona and Beverly bore the burden of presenting clear and convincing evidence to warrant the issuance of a protective order. See MCL 700.5406(7). Moreover, while the DHHS did not challenge the accuracy of Ramona's and Beverly's budgets, the DHHS plainly challenged whether they had shown that support orders should be entered, emphasizing, for example, that what Ramona might "like" to have is not necessarily the same as what she needed. More generally, in both cases, the DHHS contested the propriety of entering support orders so that Ramona and Beverly could maintain their lifestyles at taxpayer expense while Jerome and Joseph received Medicaid benefits. The DHHS has by no means waived its ability to contest whether support orders were merited under EPIC based on the evidence presented by Ramona and Beverly.

> illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.
>
> (b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money. [MCL 700.5401(3). See also *Bittner*, 312 Mich App at 237.]

There can be no legitimate dispute that Subdivision (a) has been shown with respect to Joseph and Jerome. Both men are institutionalized individuals suffering from dementia, and they are unable to manage their own affairs.[12] The real issue in this case relates to Subdivision (b).

The relevant language of MCL 700.5401(3)(b) makes clear that a protective order can be entered when money is "needed" for someone "entitled to the individual's support," provided that the entry of a protec-

[12] Joseph has a conservator, and Beverly manages Jerome's affairs under a power of attorney. Based on the conservatorship and the power of attorney, the DHHS argues that, under *Bittner*, 312 Mich App at 243, the requirements in MCL 700.5401(3)(a) have not been shown because Joseph and Jerome are essentially managing their financial affairs through others. This argument is without merit. In *Bittner*, the protected individual suffered from "irksome attendants to the aging process," such as difficulties with math and memory, and she compensated for these shortcomings by granting her daughter a durable power of attorney so that her daughter could assist her in managing her financial affairs. *Id*. at 239, 243. On these facts, this Court reversed the appointment of a full conservatorship and held that someone capable of managing his or her affairs with assistance did not necessarily need a full conservatorship; rather, the court should have considered whether arrangements less intrusive than a full conservatorship would have sufficed to protect the individual's property. *Id*. at 242-243. In contrast to *Bittner*, Joseph and Jerome are not managing their affairs with assistance; instead, someone else is managing their affairs because they are unable to do so.

tive order is "necessary to obtain or provide money."[13] Plainly, to warrant a protective order under this provision, there must be a showing of need. That is, there must be a showing that money is necessary or required. See *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "need"). Further, the person claiming a need must be someone "entitled to the [incapacitated] individual's support." In general, married persons are entitled to support from their spouses. See MCL 750.161. Consequently, on a proper showing, a probate court may authorize funds for the support of a protected individual's spouse.[14] See *In re Buckley's Estate*, 330 Mich 102, 108; 47 NW2d 33 (1951).

In considering whether money is "needed" for the "support" to which a spouse is "entitled," we acknowl-

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[13] On appeal, the DHHS asserts that a court order is not "necessary to obtain or provide money" if there is a conservator or someone with a power of attorney who could authorize transfers of money to a spouse. Such an argument ignores the practical reality that such transfers cannot or will not be made when the institutionalized spouse's income is needed to meet his patient-pay amount. Unlike a conservator or someone with a power of attorney, as we have discussed, the probate court may enter an order of support despite the existing Medicaid calculations. In this regard, a probate court protective order can be "necessary to obtain or provide money."

[14] We emphasize that the petitions in this case were made after the initial Medicaid determinations had been made and the petitions were premised on the assertion that additional income was needed to "support" Beverly and Ramona, presumably because § 1396r–5(d)(5) recognizes court orders "for the support of the community spouse." Thus, our analysis is focused on the issuance of orders for support under EPIC after an initial Medicaid eligibility determination has been made; we are not concerned with gift-giving beyond what is needed for support, or other attempts to use protective proceedings, *before* the initial Medicaid determination for Medicaid-planning purposes. See, e.g., *In re Shah*, 95 NY2d 148, 159-162; 733 NE2d 1093 (2000); *Valliere*, 328 Conn at 323-324; *Matter of Labis*, 314 NJ Super 140, 147-149; 714 A2d 335 (App Div, 1998). In the circumstances before us, Medicaid determinations had already been made and the petitions involved requests for additional "support."

edge that the duty to support a spouse is not discharged "by furnishing only enough money to buy sufficient food to keep body and soul together." *People v Beckman*, 239 Mich 590, 592; 214 NW 950 (1927). We are not, therefore, suggesting that a showing of need under MCL 700.5401(3)(b) requires a determination that the spouse requesting support lacks even the basic necessities of life. However, we emphasize that an entitlement to support does not necessarily guarantee that a spouse may enjoy a particular standard of living regardless of the protected individual's means and circumstances. To the contrary, in Michigan, the obligation to support a spouse is contingent on the assumption that the spouse providing support has sufficient financial ability to provide that assistance. See MCL 750.161(1); *Szatynski v Szatynski*, 327 Mich 613, 617; 42 NW2d 758 (1950) ("[B]ecause of his marital obligation, the duty is upon defendant husband to furnish *to the extent of his ability* a home and other needs for plaintiff.") (emphasis added). And the level of "support" required is generally recognized as being that which is "reasonably consistent" with the supporting spouse's "own means and station." *Root v Root*, 164 Mich 638, 645; 130 NW 194 (1911). In other words, it cannot reasonably be expected that one spouse should become impoverished in order for the other spouse to maintain his or her standard of living. See *Myland v Myland*, 290 Mich App 691, 695; 804 NW2d 124 (2010) (reviewing spousal-support award in an appeal from divorce judgment).

In the context of a petition for a protective order under MCL 700.5401(3)(b), it follows that a finding that money is needed for a spouse entitled to support from the protected individual requires consideration of the requesting spouse's needs and resources as well as the protected individual's needs and circumstances.

The spouse requesting support must make a showing of need—not merely a desire to maintain a current standard of living without regard to the other spouse's circumstances. Whether the community spouse is "entitled" to "support" will depend on all the facts and circumstances, including the incapacitated individual's financial means and ability to provide assistance. For instance, when crafting a protective order, the probate court should consider the protected individual's "foreseeable needs," the interests of the protected individual's creditors, and the interests of the protected individual's dependents. See MCL 700.5408. A probate court considering a protective order should also bear in mind that the protected individual has the right to acquire, enjoy, and dispose of his or her own property. *Bittner*, 312 Mich App at 242. Weighing the various concerns will obviously depend on the facts of each case, but a protected individual's rights and interests can never be totally disregarded in an effort to provide for his or her spouse. In other words, a community spouse cannot make a showing of "need" and is not "entitled to the [incapacitated] individual's support" merely to maintain his or her current lifestyle when providing money to the spouse will leave the incapacitated individual entirely destitute and unable to meet his or her own needs.

In cases in which an institutionalized spouse is receiving Medicaid benefits, weighing *both* spouses' needs and circumstances requires consideration of those needs and circumstances as they actually exist under Medicaid. See *Gomprecht*, 86 NY2d at 52 ("The fact that one spouse is institutionalized at the public expense is a factor to be considered."); *MEF*, 393 NJ Super at 558 (recognizing that Medicaid's aims are certainly relevant considerations—"to ensure that the community spouse has sufficient, but not excessive,

income and to ensure that individuals not be permitted to avoid payment of their own fair share for long-term care"); *Tyler*, unpub order at 11 (concluding that a court support order could not be entered "without regard to the Federal Medicaid Statute"). See also *In re Johnson's Estate*, 286 Mich 213, 223; 281 NW 597 (1938) (recognizing that whether the action would leave an incompetent individual as a "public charge" is relevant in an action regarding the individual's property). Consequently, along with any other relevant facts and circumstances, probate courts must consider the CSMIA and any other resources available to the community spouse, the community spouse's "need" for additional support beyond the CSMIA, and the institutionalized spouse's need for income to meet the patient-pay amount related to his or her medical care under Medicaid. Importantly, a probate court's consideration of the couple's circumstances in light of Medicaid cannot involve a fallacious assumption that the institutionalized spouse should receive 100% free medical care under Medicaid or an assumption that a community spouse is entitled to maintain his or her standard of living.[15] In actuality, Medicaid is a need-based program, and a Medicaid recipient is obligated to contribute to his or her care. See *Mackey*, 289 Mich

[15] As noted earlier, the probate court's jurisdiction under EPIC does not extend to actually modifying the CSMIA or changing the patient-pay amount under Medicaid. Section 1396r–5(d)(5) recognizes that if a court "has entered" an order of support, the CSMIA cannot be less than the amount ordered by the court. However, this use of the order to change the CSMIA and thereby reduce the patient-pay amount is within the purview of the DHHS, not the probate court. When entering an order under EPIC, the probate court is bound by the existing Medicaid calculations, and the question before the probate court is whether—despite the existing circumstances, including the institutionalized spouse's patient-pay amount—money is "needed" to provide the community spouse with additional income to which he or she is "entitled" for "support." See MCL 700.5401(3)(b).

App at 693. The unfortunate reality is that medical costs and increased expenses related to illness may affect both spouses, see *Mathews v De Castro*, 429 US 181, 188; 97 S Ct 431; 50 L Ed 2d 389 (1976), and even with the enactment of the spousal-impoverishment provisions, Medicaid provides no guarantee that a community spouse will enjoy "the same standard of living—even if reasonable rather than lavish by some lights—that he or she enjoyed before the institutionalized spouse entered a nursing home." *Balzarini v Suffolk Co Dep't of Social Servs*, 16 NY3d 135, 144; 944 NE2d 1113 (2011). "The trade-off for a married couple, of course, is that the institutionalized spouse's costly nursing home care is heavily subsidized by the taxpayer . . . ." *Id*. Having made this trade-off, a community spouse is not entitled to have the probate court simply disregard Medicaid, ignore the institutionalized spouse's patient-pay amount, and impoverish the institutionalized spouse in order that the community spouse may maintain his or her standard of living without regard for the institutionalized spouse's needs and circumstances as they exist under Medicaid. Such a procedure is not contemplated by EPIC, and it is a gross misapplication of the probate court's authority to enter an order when money is "needed" for "those *entitled* to the [incapacitated] individual's support." See MCL 700.5401(3)(b) (emphasis added). Instead, the actual Medicaid-related realities facing the couple—all of Medicaid's pros and cons—become part of the facts and circumstances that the probate court must consider when deciding whether to enter a support order for a community spouse under MCL 700.5401(3)(b). Ultimately, when a community spouse's institutionalized spouse receives Medicaid benefits and has a patient-pay amount, the

community spouse seeking a support order under EPIC must show by clear and convincing evidence that he or she needs money and is entitled to the institutionalized spouse's support *despite* the CSMIA provided under Medicaid and the institutionalized individual's patient-pay amount under Medicaid.[16]

## IV. APPLICATION

In both cases before us, the probate courts entered orders awarding the community spouses 100% of the institutionalized spouses' monthly income, thereby leaving the institutionalized spouses destitute. These orders were entered to preserve the community spouses' standard of living without a consideration of the institutionalized spouses' needs and circumstances in light of Medicaid.

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[16] Some states have chosen to impose the administrative "exceptional circumstances" standard on this judicial determination, requiring the community spouse to show exceptional circumstances resulting in significant financial duress to obtain a support order for income from the institutionalized spouse. See, e.g., *Gomprecht*, 86 NY2d at 52; Va Code Ann 20-88.02:1(A)(2); Nev Rev Stat Ann 123.259(3)(b)(4). This language does not appear in EPIC, nor does § 1396r–5(d)(5) state that courts are required to use this standard. See *Tyler*, unpub order at 9. Thus, despite the DHHS's assertion that such a standard should apply to any request for additional income by the community spouse, we will not read into EPIC or § 1396r–5(d)(5) language that does not appear there. If the DHHS wishes for this standard to apply in judicial proceedings, its only recourse is to seek legislative action implementing such a standard. See, e.g., *Valliere*, 328 Conn at 325 & n 26. Nevertheless, we note that, as a matter of common sense, when an incapacitated person needs to be institutionalized to receive full-time medical care, it would be an unusual case for the community spouse's circumstances to trump the institutionalized spouse's need for use of his or her income to pay the medical expenses, particularly when the community spouse has the benefit of the CSMIA. In other words, an institutionalized spouse's receipt of Medicaid and a community spouse's protection under the spousal-impoverishment provisions generally weigh against the entry of a support order.

In particular, in Docket No. 334732, the probate court applied a standard of "reasonableness," concluding that Ramona had demonstrated a "need for support" from Joseph because she had submitted a budget and none of her requests was "unreasonable." The court considered only Ramona's requests, and failed to weigh Joseph's needs and his existing patient-pay obligations. Indeed, the court disregarded the DHHS's Medicaid calculations, opining that these calculations did not affect the court's ability to enter a support order and that the DHHS's determinations were "not applicable" to the court's order; rather, the court's order would be applicable to the DHHS's future determinations.[17] Quite simply, the court misunderstood the significance of Medicaid in this context, proceeding on the assumption that the probate court had authority to grant any "reasonable" request for support without considering the institutionalized spouse's needs and patient-pay amount. As a result, the probate court operated within the wrong legal framework by failing to determine by clear and convincing evidence whether Ramona needed money—not simply wanted it—and whether she was entitled to Joseph's support *despite* the CSMIA provided under Medicaid and despite Joseph's patient-pay amount under Medicaid. Thus, the court abused its discretion by ordering that Ramona receive additional support from Joseph because Joseph would be impoverished as a result.

Likewise, in Docket No. 336267, the probate court determined that Beverly needed support from Jerome.

[17] We note that the issue before us is the propriety of the probate courts entering support orders under EPIC. Questions regarding how those orders are used by the DHHS under § 1396r–5(d)(5) and whether the DHHS is obligated to honor those orders when redetermining Medicaid eligibility are not before us at this time. See *MEF*, 393 NJ Super at 554-555, 557.

The court concluded that Beverly and Jerome were "not rich people" and that Beverly's request for income was "to maintain where she was" in terms of her standard of living. The court opined that EPIC provided the authority to provide support for Beverly "to maintain what they [had] without impoverishing [Beverly] . . . ." However, missing from the probate court's analysis is an account of Jerome's needs and, in particular, a careful consideration of his patient-pay amount under Medicaid. As discussed, EPIC does not provide blanket authority to maintain a community spouse's standard of living without regard for the incapacitated spouse's needs and circumstances, which in this case included a patient-pay amount because Jerome was a Medicaid recipient. The unfortunate reality is that both spouses may feel the financial effects of a spouse's institutionalization. However, a support order under EPIC cannot be used to impoverish an institutionalized spouse as an end-run around Medicaid. Rather, there should have been a determination, by clear and convincing evidence, that Beverly needed money—not simply wanted it—and that she was entitled to Jerome's support *despite* the CSMIA provided under Medicaid and Jerome's patient-pay obligations under Medicaid. By failing to operate within the correct framework and appropriately consider Jerome's needs as well as Beverly's, the court abused its discretion by entering an order that rendered Jerome destitute in order to maintain Beverly's standard of living.

## V. CONCLUSION

In sum, probate courts have authority to enter orders requiring an institutionalized spouse to provide support for a community spouse. However, EPIC does

not give probate courts unfettered discretion to enter an order allowing the community spouse to maintain his or her current lifestyle without regard to the institutionalized spouse's needs and patient-pay obligations. In the cases before us, rather than consider the couples' needs and circumstances as they existed in light of Medicaid, the probate courts disregarded the patient-pay amounts and impoverished the institutionalized spouses so that the community spouses could maintain their standards of living. By failing to properly consider the implications of Medicaid in relation to the spouses' respective needs and circumstances, the probate courts operated under the wrong legal framework and abused their discretion.

Protective orders vacated and cases remanded for further proceedings. We do not retain jurisdiction.

O'CONNELL, P.J., and HOEKSTRA and K. F. KELLY, JJ., concurred.

ALTICOR, INC v DEPARTMENT OF TREASURY

ACCESS BUSINESS GROUP, LLC v DEPARTMENT OF TREASURY

OLD ORCHARD BRANDS, LLC v DEPARTMENT OF TREASURY

Docket Nos. 337404, 337406, and 337463. Submitted April 13, 2018, at Lansing. Decided May 22, 2018, at 9:05 a.m. Leave to appeal denied 503 Mich 989.

Alticor, Inc.; Access Business Group, LLC; and Old Orchard Brands, LLC, brought three separate actions in the Court of Claims against the Department of Treasury, challenging the deficiency assessments issued against them by the department as untimely in light of a change in the law. The department was conducting audits involving plaintiffs when the Legislature enacted 2014 PA 3, which allowed for a minimal extension of the four-year limitations period for a deficiency assessment if a department audit was commenced after September 30, 2014. However, 2014 PA 3 was silent regarding department audits commenced on or before September 30, 2014, which included plaintiffs' audits, although the statutory law in place when the audits were initiated had provided for the suspension or tolling of the four-year limitations period when an audit was performed. Plaintiffs contended that because 2014 PA 3 did not contain a saving clause tied to the old law with respect to audits commenced on or before September 30, 2014, the audits did not toll the limitations period because the tolling language had been repealed by 2014 PA 3, and, therefore, the four-year limitations period applied absent any adjustment for the audits, rendering all the deficiency assessments untimely. The department argued that because the audits had already been commenced before the 2014 change in the law and were ongoing when 2014 PA 3 became effective on February 6, 2014, as well as on September 30, 2014, those audits remained subject to the previous law allowing for the tolling of the limitations period. The Court of Claims, MICHAEL J. TALBOT, C.J., agreed with the department and granted it summary disposition under MCR 2.116(I)(2) in all three cases. Plaintiffs appealed as of right, and the cases were consolidated.

The Court of Appeals *held*:

The Court of Claims properly granted summary disposition in favor of the department in all three cases. Before the Legislature enacted 2014 PA 3, MCL 205.27a(3)(a) provided that the four-year period of limitations for the department to assess a deficiency was tolled during the pendency of an audit, plus an additional year following the conclusion of the audit. With the enactment of 2014 PA 3, MCL 205.27a now provides that the four-year limitations period is subject to certain extensions, not tolling, as had been the case. Furthermore, the current version of MCL 205.27a(3)(c) provides for an extension of the four-year limitations period for, in part, the period described in MCL 205.21(6) and (7), which were also enacted as part of 2014 PA 3. These subsections provide that, with respect to audits commenced by the department after September 30, 2014, any written preliminary audit determination must generally be completed no later than five years after the date that a tax return had to be filed or the actual filing date of the return, and any deficiency assessment must generally be issued within nine months from when the department provided the taxpayer with the audit determination. Under 2014 PA 3, it was clear that the Legislature intended to repeal the tolling provision applicable to department audits, with the goal of striking it entirely and substituting a limited extension provision in its place. However, it was equally clear that the Legislature was proceeding in this manner only in regard to audits commenced after September 30, 2014. Considering that the Legislature was presumed to be familiar with the rules of statutory construction when enacting 2014 PA 3, including the well-accepted principle that the controlling limitations period is the one in effect at the pertinent point in time, the legislative silence regarding cases involving audits commenced on or before September 30, 2014, reflected an intent to allow tolling in those cases consistently with former MCL 205.27a(3)(a). Moreover, both former and current MCL 205.27a(3) plainly reflected a legislative mindset that an audit should have some effect on the running of the statute of limitations, allowing for a greater period than four years to assess a deficiency. And the Legislature did not express that pending or earlier audits no longer allowed for tolling, nor did the Legislature indicate that the four-year limitations period inflexibly applied regardless of pending or earlier audits. Therefore, the audits in these cases continued to toll the limitations period after 2014 PA 3 took effect.

Affirmed.

TAXATION — AUDITS — DEFICIENCY ASSESSMENTS — STATUTES OF LIMITATION — TOLLING.

Under MCL 205.27a as amended by 2014 PA 3, the four-year period of limitations for the Department of Treasury to assess a deficiency against a taxpayer may be extended under certain circumstances but is no longer subject to tolling during the pendency of an audit that was commenced after September 30, 2014; however, audits commenced by the Department of Treasury on or before September 30, 2014, toll the four-year statutory limitations period pursuant to the version of MCL 205.27a(3)(a) in effect before 2014 PA 3 was enacted.

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*Varnum LLP* (by *Wayne D. Roberts* and *Toni L. Newell*) for Old Orchard Brands, LLC.

*Bill Schuette*, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *Randi M. Merchant*, Assistant Attorney General, for the Department of Treasury.

Before: MURPHY, P.J., and JANSEN and SHAPIRO, JJ.

MURPHY, P.J. Defendant, the Department of Treasury (the Department), was conducting audits in three tax cases involving plaintiffs when the Legislature enacted and the Governor signed 2014 PA 3, which was made effective February 6, 2014, and which allowed for a minimal extension of the four-year limitations period for a deficiency assessment if a Department audit was commenced after September 30, 2014. However, 2014 PA 3 was silent regarding Department audits commenced on or before September 30, 2014, such as plaintiffs' audits, although the statutory law in place when the audits were initiated had provided for the suspension or tolling of the four-year limitations period

when an audit was performed.[1] There is no dispute that if the audits conducted in these cases tolled the limitations period, the deficiency assessments issued by the Department against plaintiffs were timely, and, given the dates the audits were commenced, no party is maintaining that the audits resulted in extensions of the limitations period under the new law. Plaintiffs contend that because 2014 PA 3 did not contain a savings clause tied to the old law with respect to audits commenced on or before September 30, 2014, the audits did not toll the limitations period because the tolling language had been repealed by 2014 PA 3, and, therefore, the four-year limitations period applied absent any adjustment whatsoever for the audits, rendering all the deficiency assessments untimely. The Department argues that because the audits had already been commenced before the 2014 change in the law and were ongoing when 2014 PA 3 became effective, as well as on September 30, 2014, those audits remained subject to the previous law allowing for the tolling of the limitations period. The Court of Claims agreed with the Department, summarily dismissing all three tax challenges in which plaintiffs maintained that the deficiency assessments were time-barred. Plaintiffs appeal as of right, and we hold that the audits continued to toll the limitations period after 2014 PA 3 took effect. Accordingly, we affirm the rulings by the Court of Claims.

We review de novo a trial court's ruling on a motion for summary disposition, as well as issues of statutory

[1] Although the Legislature employed the word "suspended" in former MCL 205.27a(3) relative to the running of the statute of limitations, we shall speak in terms of "tolling" the limitations period, given that the terms are effectively interchangeable in the context of the statute. However, as explained later in this opinion, an "extension" of the limitations period is not the same as suspending or tolling the period.

construction. *Kemp v Farm Bureau Gen Ins Co of Mich*, 500 Mich 245, 251-252; 901 NW2d 534 (2017). With respect to principles of statutory interpretation, the *Kemp* Court observed:

> When interpreting statutes, our goal is to give effect to the Legislature's intent, focusing first on the statute's plain language. In so doing, we examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme. When a statute's language is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. [*Id*. at 252 (citations and quotation marks omitted).]

Before the Legislature enacted 2014 PA 3, MCL 205.27a provided, in pertinent part, as follows:

> (2) A deficiency, interest, or penalty shall not be assessed after the expiration of 4 years after the date set for the filing of the required return or after the date the return was filed, whichever is later. . . .
>
> (3) The running of the statute of limitations is suspended for the following:
>
> (a) The period pending a final determination of tax, including audit, conference, hearing, and litigation of liability for federal income tax or a tax administered by the department and for 1 year after that period.
>
> (b) The period for which the taxpayer and the state treasurer have consented to in writing that the period be extended. [MCL 205.27a, as amended by 2012 PA 211.]

Under former MCL 205.27a(3)(a), the four-year period of limitations for the Department to assess a deficiency was tolled during the pendency of an audit, plus an additional year following the conclusion of the audit. See *Krueger v Dep't of Treasury*, 296 Mich App 656, 660-661; 822 NW2d 267 (2012). Thus, as an overly simplified example, if a Department audit was initi-

ated in April 2003 regarding an April 2000 state tax return and the audit was not completed until April 2007, resulting in a tolling period of five years (four years of audit, plus one year thereafter) or until April 2008, the Department would have until April 2009 to assess a deficiency (because one year remained on the four-year limitations period when tolling began). See *id*.

With the enactment of 2014 PA 3, which was made effective February 6, 2014, MCL 205.27a now provides, in relevant part:

> (2) A deficiency, interest, or penalty shall not be assessed after the expiration of 4 years after the date set for the filing of the required return or after the date the return was filed, whichever is later. . . .
>
> (3) The statute of limitations shall be extended for the following if the period exceeds that described in subsection (2):
>
> (a) The period pending a final determination of tax through audit, conference, hearing, and litigation of liability for federal income tax and for 1 year after that period.
>
> (b) The period for which the taxpayer and the state treasurer have consented to in writing that the period be extended.
>
> (c) The period described in [MCL 205.21(6) and (7)] or pending the completion of an appeal of a final assessment.

As reflected in a comparison of former Subsection (3) of MCL 205.27a to its current version, the general four-year limitations period, which remained unchanged, is now subject to certain *extensions*, not *tolling*, as had been the case. Furthermore, the reference to taxes administered by the Department that had been found in former Subsection (3)(a) was deleted by 2014 PA 3, with Subsection (3)(a) in its present form referring only to federal income tax proceedings. How-

ever, relevant to the instant cases, the current version of Subsection (3)(c) of MCL 205.27a provides for an extension of the four-year limitations period for, in part, the period described in MCL 205.21(6) and (7). These subsections were also enacted as part of 2014 PA 3, and they provide as follows:

> (6) For *audits* commenced after September 30, 2014, the department must complete fieldwork and provide a written preliminary audit determination for any tax period no later than 1 year after the period provided for in [MCL 205.27a(2)] without regard to the extension provided for in [MCL 205.27a(3)].[2] The limitation described in this subsection does not apply to any tax period in which the department and the taxpayer agreed in writing to extend the statute of limitations described in [MCL 205.27a(2)].
>
> (7) For *audits* commenced after September 30, 2014, unless otherwise agreed to by the department and the taxpayer, the final assessment issued under [MCL 205.21(2)(f)] must be issued within 9 months of the date that the department provided the taxpayer with a written preliminary audit determination unless the taxpayer, for any reason, requests reconsideration of the preliminary audit determination or the taxpayer requests an informal conference under [MCL 205.21(2)(c)]. A request for reconsideration by a taxpayer permits, but does not require, the department to delay the issuance of a final assessment under [MCL 205.21(2)(f)]. [Emphasis added.][3]

Thus, with respect to audits commenced by the Department after September 30, 2014, any written preliminary audit determination must generally be

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[2] This latter reference clearly pertains to the extension described in MCL 205.27a(3)(a) that is based on federal income tax proceedings, such as an Internal Revenue Service (IRS) audit.

[3] MCL 205.21(7) subsequently underwent some minor modifications pursuant to 2017 PA 215 that are not pertinent to these appeals; MCL 205.21(6) remains unchanged, see 2014 PA 35 and 2017 PA 215.

completed no later than five years after the date that a tax return had to be filed or the actual filing date of the return, and any deficiency assessment must generally be issued within nine months from when the Department provided the taxpayer with the audit determination.[4] Accordingly, the time frame for the Department to act in conducting an audit and assessing a deficiency was greatly curtailed by the enactment of 2014 PA 3. Our hypothetical situation posed earlier as to tolling the limitations period under former MCL 205.27a, wherein a deficiency assessment would be timely nine years after the state tax return was filed, would produce a different result were a mere extension under 2014 PA 3 applied—the deficiency assessment in year nine would plainly be time-barred.

In regard to the three plaintiffs, there were ongoing audits when 2014 PA 3 became effective and on September 30, 2014; the audits were not commenced after September 30, 2014. However, deficiency assessments were not issued until long after 2014 PA 3 took effect. The parties all agree that 2014 PA 3 was solely prospective.[5] Plaintiffs' position is that because the deficiency assessments were not issued until after 2014 PA 3 became effective, the amended version of the statutes controls. And because the amendments incorporating MCL 205.21(6) and (7) in MCL 205.27a(3)(c) only

[4] As can be seen by examining the current language regarding extensions based on federal income tax proceedings, including an IRS audit, MCL 205.27a(3)(a), those extensions are not limited like MCL 205.21(6), allowing for consideration of, for example, the full length of a federal audit, plus one year, even if not completed within five years.

[5] We also note that "there exists a plethora of cases extending over 100 years of jurisprudence that provide that statutes of limitations enacted by the Legislature are to be applied prospectively absent a clear and unequivocal manifestation of a legislative preference for retroactive application." *Davis v State Employees' Retirement Bd*, 272 Mich App 151, 161; 725 NW2d 56 (2006).

concerned Department audits commenced after September 30, 2014, and were silent regarding earlier or ongoing audits, the expired four-year limitations period governed, *absent any extension or tolling whatsoever*. Plaintiffs posit that the absence of a pertinent savings clause in 2014 PA 3, i.e., a provision that specifically retained the tolling component of former MCL 205.27a(3) in regard to audits commenced on or before September 30, 2014, demonstrated a legislative intent to have a straightforward, unalterable application of the four-year period of limitations regardless of such audits.

The Department contends that tax-related proceedings were already pending when 2014 PA 3 became effective, with audits fully underway; therefore, prospective application of the amended version of MCL 205.27a would not inure to the three tax disputes, leaving the audits subject to the former version of the statute and the tolling of the limitations period.[6] The Court of Claims agreed with the Department and granted summary disposition in favor of the Department with respect to all three plaintiffs.

Ultimately, the crux of the tax dispute concerns the treatment of audits that were ongoing on September 30, 2014, and whether those audits tolled, extended, or, as according to plaintiffs, had no effect on the running of the four-year limitations period. It is clear that extensions of the limitations period do not apply in these cases, given that extensions are only applicable for

[6] We note that the Department argues that plaintiffs are effectively asking for retroactive application of 2014 PA 3, but this is not an accurate characterization of plaintiffs' position. Retroactive application would entail applying the new audit extension provision to the limitations period; however, as indicated, plaintiffs contend that the four-year limitations period controls without any deviation for tolling or extension.

Department audits commenced after September 30, 2014. MCL 205.27a(3)(c); MCL 205.21(6). Thus, the question is narrowed to whether there was tolling, which answer requires a determination of the import of the Legislature's silence in 2014 PA 3 with respect to audits commenced on or before September 30, 2014. Did the silence reflect a legislative intent to continue to allow for the application of tolling to the four-year limitations period if an audit had been commenced on or before September 30, 2014, or did the silence reveal a legislative intent to do away with tolling altogether, even in regard to earlier or ongoing audits?[7]

Plaintiffs argue that by operation of law through the amendment process the tolling provision found in former MCL 205.27a(3)(a) was repealed by 2014 PA 3, and absent a specific savings clause in 2014 PA 3 that would allow for tolling relative to audits commenced on or before September 30, 2014, which was not included, there could be no tolling. Stated otherwise, plaintiffs' stance concerning the Legislature's silence in 2014 PA 3 with respect to earlier or ongoing audits is that the silence effectively discontinued tolling in all cases. In support of their position, plaintiffs cite *Lahti v Fosterling*, 357 Mich 578; 99 NW2d 490 (1959), and *People v Lowell*, 250 Mich 349; 230 NW 202 (1930). In *Lahti*, 357 Mich at 587-588, our Supreme Court, quoting *Lowell*, 250 Mich at 354-356, explained:

> An amendatory act has a repealing force, by the mechanics of legislation, different from that of an independent statute. Repugnancy is not the essential element of implied repeal of specifically amended sections. The rule is:

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[7] We note that because the dispute is necessarily couched in terms of audits commenced by the Department and whether the Department is entitled to the benefit of tolling in relationship to the audits and assessing tax deficiencies, we see no reason to address principles regarding due process or vested rights.

> Where a section of a statute is amended, the original ceases to exist, and the section as amended supersedes it and becomes a part of the statute for all intents and purposes as if the amendments had always been there.
>
> * * *
>
> . . . [T]he old section is deemed stricken from the law, and the provisions carried over have their force from the new act, not from the former.
>
> It is plain from the authorities in this state and elsewhere that the effect of an act amending a specific section of a former act, in the absence of a saving clause, is to strike the former section from the law, obliterate it entirely, and substitute the new section in its place. This effect is not an arbitrary rule adopted by the courts. It is the natural and logical effect of an amendment "to read as follows." It accomplishes precisely what the words import. Any other construction would do violence to the plain language of the legislature. [Citations and quotation marks omitted.]

We do not find *Lowell* or *Lahti* to be particularly helpful. Under 2014 PA 3, it is quite clear that the Legislature was intent on repealing the tolling provision applicable to Department audits, with the goal of striking and obliterating it entirely and substituting a limited "extension" provision in its place. However, it is equally clear that the Legislature was proceeding in this manner only in regard to particular audits, i.e., audits commenced after September 30, 2014. The Legislature's decision in 2014 PA 3 to allow for audit-based extensions of the four-year limitations period was prospective only, expressly so, applying even later than the February 2014 date that 2014 PA 3 generally took effect. It absolutely cannot be ascertained from reading 2014 PA 3 that the Legislature was instantly repealing all tolling connected to Department audits, but only

that it was *eventually* repealing or disallowing all tolling. Indeed, the necessary corollary of providing for extensions of the limitations period with respect to audits commenced by the Department after September 30, 2014, is that audits commenced on or before September 30, 2014, would remain subject to tolling.

In *Davis v State Employees' Retirement Bd*, 272 Mich App 151, 162-163; 725 NW2d 56 (2006), this Court observed that "[t]he principle that statutes of limitations are to be applied prospectively parallels an accompanying well-accepted principle that the pertinent statute of limitations is the one in effect when the plaintiff's cause of action arose." (Quotation marks and brackets omitted.) Although we are not addressing a direct change in the four-year limitations period, we are confronted with an audit tolling provision that affected and altered the length of the limitations period and a change in that tolling language to now provide solely for extensions of the limitations period. Effectively, 2014 PA 3 established a change in the statute of limitations in regard to deficiency assessments entailing underlying audits. And while we are not concerned with a cause of action, an appropriate analogy in the context of these cases is that the law shaping and affecting the length of the limitations period is the law in effect when audits were commenced.[8] "The Legislature is presumed to be familiar with the rules of statutory construction and, when promulgating new laws, to be aware of the consequences of its use or omission of statutory language, and to have considered the effect of new laws on all

[8] We note that in *Davis*, 272 Mich App at 163, the Court applied this principle, even though the panel was "not speaking directly of a cause of action, but of petitioner's right to nonduty disability retirement benefits under the applicable statutes."

existing laws[.]" *In re MKK*, 286 Mich App 546, 556; 781 NW2d 132 (2009) (citations omitted). Considering the presumption that the Legislature was familiar with the rules of statutory construction when enacting 2014 PA 3 and that a well-accepted principle is that the controlling limitations period is the one in effect at the pertinent point in time, we conclude that the legislative silence regarding cases involving audits commenced on or before September 30, 2014, simply reflected an intent to allow tolling in those cases consistently with former MCL 205.27a(3)(a).

Moreover, in our view, it would defy logic to conclude that the Legislature intended to provide for no tolling or extension of the limitations period in regard to audits commenced on or before September 30, 2014, given that former and current MCL 205.27a(3) plainly reflect a legislative mindset that an audit should potentially have some type of effect on the running of the statute of limitations, allowing for a greater period than four years to assess a deficiency. And the Legislature did not express that pending or earlier audits no longer allowed for tolling, nor did the Legislature indicate that the four-year limitations period inflexibly applied regardless of pending or earlier audits. Reversal is unwarranted. In sum, we affirm the rulings of the Court of Claims that granted summary disposition in favor of the Department in all three tax cases.

Affirmed. Having fully prevailed on appeal, the Department is awarded taxable costs under MCR 7.219.

JANSEN and SHAPIRO, JJ., concurred with MURPHY, P.J.

PEOPLE v MATHEWS

Docket No. 339079. Submitted May 9, 2018, at Detroit. Decided May 22, 2018, at 9:10 a.m. Leave to appeal sought.

Laricca S. Mathews was charged in the Oakland Circuit Court with open murder, MCL 750.316, discharge of a firearm in a building, MCL 750.234b, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b, following the shooting death of defendant's boyfriend. After the shooting, defendant called 911 and told the dispatcher that she had shot her boyfriend. Police officers took defendant into custody and interviewed her twice at the police station. During the first interview, defendant signed an advice-of-rights form, which stated: "Before any questions are asked of you, you should know: (1) you have a right to remain silent; (2) anything you say may be used against you; (3) you have a right to a lawyer, and (4) if you cannot afford a lawyer, one will be provided free." The police officer conducting the interview also orally reviewed the statements on the advice-of-rights form with defendant. Defendant agreed to talk, telling the officer that she quarreled with her boyfriend, that he attacked her, and that she shot him. Later the same day, defendant was interviewed a second time by a different officer. At the beginning of the second interview, the officer asked defendant whether she remembered the earlier interview and the discussion regarding her rights, stating: "Same thing applies. Um, you don't, you don't have to even talk to me if you don't want to. You can get an attorney um, if you can't afford one, we'll make sure you get one." Defendant replied, "Ok." Defendant then answered the officer's questions and again admitted to shooting her boyfriend. Following a preliminary examination, defendant was bound over for trial in the circuit court. Before trial, defendant moved to suppress the statements she had made to the police officers, asserting that the police failed to adequately advise her of her rights as required by *Miranda v Arizona*, 384 US 436 (1966), because (1) the police failed to advise her that she could terminate the interrogation at any point and (2) the police did not inform her that she had the right to consult with an attorney before the interview and to have an attorney present during the interrogation. The court, Phyllis C. McMillen, J., did not address whether

the police were required to inform defendant that she had an ongoing right to cut off questioning at any point, but the court granted defendant's motion on the ground that the *Miranda* warnings were defective because the police failed to inform defendant that she had the right to have an attorney present before and during the interrogation. The prosecution moved for interlocutory leave to appeal, which the Court of Appeals, CAVANAGH, P.J., and GLEICHER, J. (O'BRIEN, J., dissenting), denied in an unpublished order, entered August 23, 2017. The prosecution sought leave to appeal in the Supreme Court, and in lieu of granting leave, the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted, specifically instructing the Court of Appeals to consider whether either of the bases for suppression advanced by defendant in the trial court rendered the warning in this case deficient under *Miranda*. 501 Mich 950 (2018).

The Court of Appeals *held*:

1. Under *Miranda*, a suspect must be warned before any custodial interrogation that he or she has the right to remain silent, that anything he or she says can be used against him or her in a court of law, that he or she has the right to the presence of an attorney, and that if he or she cannot afford an attorney, one will be appointed. The four warnings are invariable, but a verbatim recital of the words as set forth in the *Miranda* opinion is not required; the inquiry is whether the warnings reasonably convey to a suspect his or her rights as required by *Miranda*. Ultimately, if the custodial interrogation is not preceded by an adequate warning, a suspect's statements made during the custodial interrogation may not be introduced into evidence at the suspect's criminal trial.

2. *Miranda* provides that once the four warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he or she wishes to remain silent, the interrogation must cease. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. However, *Miranda* does not establish a "special warning requirement" regarding the right to terminate an interrogation; instead, this right to end the interrogation is merely a means of exercising the right to remain silent. Consequently, when a defendant has been advised of his or her right to remain silent as required by *Miranda*, the police need not also expressly inform the defendant that this right to remain silent may be

exercised to cut off questioning at any point during the interrogation. In this case, because defendant was advised of her right to remain silent, the *Miranda* warnings were not defective merely because she was not more specifically advised that she could exercise this right at any point during the interrogation.

3. There exists conflicting authority regarding whether a general warning before an interrogation advising the suspect that he or she has a "right to a lawyer" reasonably conveys to a suspect that he or she has the right to consult with a lawyer before questioning and to have a lawyer present during the interrogation. No binding caselaw resolved the issue, but several nonbinding decisions of the Michigan Court of Appeals that had been issued soon after *Miranda* was decided indicated that to comply with *Miranda*, the police must impart more than a broad warning regarding the right to counsel; that is, the warning must somehow convey the right to have counsel present during the interrogation. Similarly, courts from other state and federal jurisdictions have interpreted *Miranda* as requiring that the police explicitly inform a suspect of the right to the presence of counsel before and during the interrogation. These courts emphasize the significance of advising defendants of the temporal immediacy of the right to counsel. However, other federal and state courts have held that when the police provide a generalized warning regarding the "right to an attorney"—without any temporal qualifications or limitations on that right—the police have complied with *Miranda* because a reasonable person would understand that an unqualified right to an attorney begins immediately and continues forward in time without qualification. Under those cases, provided that no improper or misleading limitations on the right to counsel are expressly communicated, a general warning regarding the "right to counsel" is sufficient to comply with *Miranda*'s requirements. Ultimately, after consideration of this conflicting persuasive authority, the decisions in the nonbinding Court of Appeals cases were reaffirmed: a warning preceding a custodial interrogation is deficient when the warning contains only a broad reference to the "right to an attorney" that does not, when the warning is read in its entirety, reasonably convey the suspect's right to consult with a lawyer and to have a lawyer present during the interrogation. Basic temporal information is key to ensuring that a defendant understands what the right to counsel entails, i.e., that it applies before and during the interrogation as opposed to some future point. In this case, neither police officer conducting the interviews with defendant explained to defendant that she had the right to the presence of counsel. Although defendant was generally advised that she had a right to an

attorney, this broad warning failed to reasonably convey to defendant that she could consult an attorney before she was questioned and during her interrogation. Because defendant was not adequately advised of her right to the presence of counsel, her subsequent statements were inadmissible at trial. Accordingly, the trial court did not err by granting defendant's motion to suppress the statements.

Affirmed and remanded for further proceedings.

O'CONNELL, J., concurring in part and dissenting in part, would have held that defendant was adequately informed of her *Miranda* rights. Judge O'CONNELL agreed with the majority that the *Miranda* warnings were not defective merely because defendant was not more specifically advised that she could exercise her right to remain silent at any point during the interrogation, but he disagreed with the majority's conclusion that the *Miranda* warnings in this case were otherwise defective. Judge O'CONNELL would have held that a generalized warning that the suspect has the right to counsel, without specifying when, satisfies the *Miranda* requirement and that an ordinary layperson would understand that the right to an attorney before questioning extends to the duration of questioning. In this case, because the lower-court record was devoid of any coercion, compulsion, or wrongful conduct by the police and because there was no indication that defendant did not or was not capable of understanding that she was entitled to have a free attorney before, during, or after questioning, Judge O'CONNELL would have held that defendant was adequately informed of her *Miranda* rights.

1. CRIMINAL LAW — CONSTITUTIONAL LAW — FIFTH AMENDMENT — CUSTODIAL INTERROGATION — *MIRANDA* WARNINGS — NO SPECIAL WARNING REQUIREMENT TO CUT OFF QUESTIONING.

Under *Miranda v Arizona*, 384 US 436 (1966), a suspect must be warned before any custodial interrogation that he or she has the right to remain silent, that anything he or she says can be used against him or her in a court of law, that he or she has the right to the presence of an attorney, and that if he or she cannot afford an attorney, one will be appointed; *Miranda* does not establish a "special warning requirement" regarding the right to terminate an interrogation; instead, this right to end the interrogation is merely a means of exercising the right to remain silent; therefore, when a defendant has been advised of his or her right to remain silent as required by *Miranda*, the police need not also expressly inform the defendant that this right to remain silent may be exercised to cut off questioning at any point during the interrogation.

2. CRIMINAL LAW — CONSTITUTIONAL LAW — FIFTH AMENDMENT — CUSTODIAL INTERROGATION — *MIRANDA* WARNINGS — "RIGHT TO THE PRESENCE OF AN ATTORNEY" WARNING.

Under *Miranda v Arizona*, 384 US 436 (1966), a suspect must be warned before any custodial interrogation that he or she has the right to remain silent, that anything he or she says can be used against him or her in a court of law, that he or she has the right to the presence of an attorney, and that if he or she cannot afford an attorney, one will be appointed; a warning preceding a custodial interrogation is deficient when the warning contains only a broad reference to the "right to an attorney" that does not, when the warning is read in its entirety, reasonably convey the suspect's right to consult with a lawyer and to have a lawyer present during the interrogation.

*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.

*Law Offices of Joseph A. Lavigne* (by *Joseph A. Lavigne*) for defendant.

Before: O'CONNELL, P.J., and HOEKSTRA and K. F. KELLY, JJ.

HOEKSTRA, J. Defendant has been charged with open murder, MCL 750.316, discharge of a firearm in a building, MCL 750.234b, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. Before trial, defendant filed a motion to suppress statements she made to police based on the contention that the police failed to adequately advise her of her rights as required by *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). The trial court granted defendant's motion. The prosecution filed an interlocutory application for leave to appeal in

this Court, which we denied.[1] The prosecution then filed an application for leave to appeal in the Michigan Supreme Court, and in lieu of granting leave, the Supreme Court remanded to this Court for consideration as on leave granted, specifically instructing this Court "to consider whether either of the bases for suppression advanced by the defendant in the trial court rendered the warnings in this case deficient" under *Miranda*. *People v Mathews*, 501 Mich 950, 950 (2018). On remand, we find no merit to defendant's assertion that the police were required to inform her that she could cut off questioning at any time during the interrogation. However, because generally advising defendant that she had "a right to a lawyer" did not sufficiently convey her right to consult with an attorney and to have an attorney present during the interrogation, we conclude that the *Miranda* warnings in this case were defective and affirm the trial court's suppression of defendant's statement.

This case arises from the shooting death of defendant's boyfriend, Gabriel Dumas, who was killed in defendant's apartment on August 12, 2016. After the shooting, defendant called 911 and told the dispatcher that she had shot Dumas. Police responded to the scene, and defendant was taken into custody and transported to the Wixom Police Department. At the police station, defendant was interviewed twice. Detective Brian Stowinsky conducted the first interview. During the first interview, Stowinsky presented defendant with a written advice-of-rights form, which stated:

> Before any questions are asked of you, you should know: (1) you have a right to remain silent; (2) anything

[1] *People v Mathews*, unpublished order of the Court of Appeals, entered August 23, 2017 (Docket No. 339079).

you say may be used against you; (3) you have a right to a lawyer, and (4) if you cannot afford a lawyer, one will be provided free.

I understand what my rights are and am willing to talk.

Stowinsky also orally reviewed the statements on the advice-of-rights form with defendant. Specifically, the following exchange took place:

[*Detective Stowinsky*]: Ok, um, I'm going to review these, ok?

[*Defendant*]: Uh hmm.

[*Detective Stowinsky*]: I'm going to read these to you.

[*Defendant*]: Uh hmm.

[*Detective Stowinsky*]: Um, before I question, start asking you, you should know that you have a right to remain silent.

[*Defendant*]: Uh hmm.

[*Detective Stowinsky*]: Anything you say maybe [sic] used against you. You have a right to a lawyer, if you cannot afford a lawyer, one will be provided for free. Do you understand your rights?

[*Defendant*]: Yes.

Defendant agreed to talk with Stowinsky, and she signed the advice-of-rights form. During the questioning that followed, defendant told Stowinsky that she quarreled with Dumas, that Dumas attacked her, and that she shot him.

Later the same day, defendant was interviewed a second time by Sergeant Michael DesRosiers. At the beginning of that second interview, the following exchange took place between defendant and DesRosiers:

[*Sergeant DesRosiers*]: Alright, so um, Detective Stowinsky, remember he talked about your rights and everything?

[*Defendant*]: Uh hmm.

> [*Sergeant DesRosiers*]: Same thing applies. Um, you don't, you don't have to even talk to me if you don't want to. You can get an attorney um, if you can't afford one, we'll make sure you get one.
>
> [*Defendant*]: Ok.
>
> [*Sergeant DesRosiers*]: So, um, we're just continuing the interview that you started with him.

DesRosiers then proceeded to question defendant about inconsistencies between her previous statements and the physical evidence, including the location of Dumas's fatal bullet wound. Defendant again admitted shooting Dumas, and she attempted to explain the location of the bullet wound by suggesting that the bullet may have ricocheted. She also suggested that the shooting may have been an accident insofar as her finger may have "slipped" while on the trigger because it was "so hot and muggy."

Following a preliminary examination, defendant was bound over for trial in the circuit court. In the circuit court, defendant moved to suppress her statements to the police, asserting that the *Miranda* warnings given before her interviews were inadequate because (1) the police failed to advise her that she could terminate the interrogation at any point and (2) the police did not inform her that she had the right to consult with an attorney before the interview and to have an attorney present during the interrogation. The trial court did not address whether the police were required to inform defendant that she had an ongoing right to cut off questioning at any point. Nevertheless, the trial court granted defendant's motion to suppress, reasoning that the *Miranda* warnings were defective because the police failed to inform defendant that she had the right to have an attorney present before and during the interrogation. The prosecution filed an interlocutory application for leave to appeal, and the

case is now before us on remand from the Michigan Supreme Court for consideration as on leave granted.

On appeal, the prosecution argues that the warnings given to defendant complied with *Miranda* and that the trial court erred by suppressing defendant's statements to police. First, with regard to a suspect's right to cut off questioning, the prosecution asserts that *Miranda* does not require police to give an explicit warning that a suspect may terminate the interrogation at any time. Second, in terms of a suspect's right to the presence of counsel, the prosecution argues that, although the warnings given to defendant did not expressly advise her of her right to the presence of counsel during the interrogation, the warnings given before defendant's interrogations were sufficient because they advised defendant that she had the right to a lawyer. According to the prosecution, *Miranda* does not require the police to provide a suspect with more specific information regarding the right to the presence of an attorney before and during questioning.

When reviewing a decision on a motion to suppress, we review a trial court's factual findings for clear error. *People v Tanner*, 496 Mich 199, 206; 853 NW2d 653 (2014). "To the extent that a trial court's ruling on a motion to suppress involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo." *Id*. (quotation marks and citation omitted). "We review de novo a trial court's ultimate decision on a motion to suppress." *People v Beuschlein*, 245 Mich App 744, 748; 630 NW2d 921 (2001).

"Both the state and federal constitutions guarantee that no person shall be compelled to be a witness against himself or herself." *People v Cortez (On Remand)*, 299 Mich App 679, 691; 832 NW2d 1 (2013)

(opinion by METER, J.). To protect this constitutional guarantee against compelled self-incrimination, before any custodial interrogation, the police must give a suspect the now-familiar *Miranda* warnings. *People v Daoud*, 462 Mich 621, 624 n 1; 614 NW2d 152 (2000). In particular, under *Miranda*, a suspect must be provided four essential warnings as follows:

> "[A suspect] must be warned prior to any questioning [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." [*Florida v Powell*, 559 US 50, 59-60; 130 S Ct 1195; 175 L Ed 2d 1009 (2010), quoting *Miranda*, 384 US at 479 (alterations by the *Powell* Court).]

"The four warnings *Miranda* requires are invariable, but [the United States Supreme Court] has not dictated the words in which the essential information must be conveyed." *Powell*, 559 US at 60. In other words, "[a] verbatim recital of the words of the *Miranda* opinion is not required." *People v Hoffman*, 205 Mich App 1, 14; 518 NW2d 817 (1994). "Quite the contrary, *Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures." *California v Prysock*, 453 US 355, 359; 101 S Ct 2806; 69 L Ed 2d 696 (1981). Rather, when the "exact form" set out in *Miranda* is not used, "a fully effective equivalent" will suffice. *Duckworth v Eagan*, 492 US 195, 202; 109 S Ct 2875; 106 L Ed 2d 166 (1989) (quotation marks and emphasis omitted). "Reviewing courts therefore need not examine *Miranda* warnings as if construing a will or defining the terms of an easement." *Id*. at 203. "The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.' " *Id*., quoting *Prysock*,

453 US at 361 (alterations by the *Duckworth* Court). Ultimately, "[i]f the custodial interrogation is not preceded by an adequate warning, statements made during the custodial interrogation may not be introduced into evidence at the accused's criminal trial." *People v Elliott*, 494 Mich 292, 301; 833 NW2d 284 (2013).

## I. RIGHT TO CUT OFF QUESTIONING

In the trial court, defendant challenged the adequacy of the *Miranda* warnings on two grounds. First, defendant argued that the right to cut off questioning is a "critical safeguard" under *Miranda* and that the police were thus required to warn defendant that she could cease answering questions at any point. Although the police informed defendant of her right to remain silent, she asserts that her statement must be suppressed because she was not more specifically informed that she could terminate the interrogation at any time. This argument is without merit.

As noted, *Miranda* requires the police to provide a suspect with four—and only four—essential warnings: "[1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Powell*, 559 US at 59-60 (quotation marks and citation omitted; alterations by the *Powell* Court). See also *United States v Crumpton*, 824 F3d 593, 611 (CA 6, 2016).[2] From a simple review of these warnings, it is clear that the right to cut off questioning is not among the specific enumerated warnings

[2] "Lower federal court decisions are not binding on this Court, but may be considered on the basis of their persuasive analysis." *People v Fomby*, 300 Mich App 46, 50 n 1; 831 NW2d 887 (2013).

that must be given.[3] See *United States v Ellis*, 125 F Appx 691, 699 (CA 6, 2005) ("[A] statement instructing [a suspect] that he has the right to stop answering questions at any point after questioning has begun, is not a phrase that the Supreme Court in *Miranda* suggested should be read to criminal suspects before interrogation."). It is true that, as emphasized by defendant, "a 'critical safeguard' identified in *Miranda* was a person's right to cut off questioning." *People v Adams*, 245 Mich App 226, 230; 627 NW2d 623 (2001), quoting *Michigan v Mosley*, 423 US 96, 103; 96 S Ct 321; 46 L Ed 2d 313 (1975). As explained in *Miranda*:

> *Once warnings have been given, the subsequent procedure is clear*. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. [*Miranda*, 384 US at 473-474 (emphasis added).]

However, contrary to defendant's arguments, this "subsequent procedure" to cut off questioning as de-

[3] It is apparently not uncommon for law enforcement officials to include some type of "fifth prong" or "catch-all" provision in the recitation of *Miranda* warnings, advising suspects that their rights may be asserted at any point during the interrogation. See Rogers et al, *The Language of Miranda Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 Law & Hum Behav 124, 131 (2008) (reporting that over 80% of jurisdictions include a "fifth prong"). See, e.g., *Powell*, 559 US at 55 (involving a catch-all addition to the *Miranda* warnings in which the suspect was told that he had "the right to use any of these rights at any time you want during this interview") (quotation marks omitted). But the fact remains that *Miranda* itself did not include such a warning.

scribed in *Miranda* does not establish a "special warning requirement" regarding the right to terminate an interrogation. *People v Tubbs*, 22 Mich App 549, 555-556; 177 NW2d 622 (1970).[4] Instead, this right to end the interrogation is merely a means of exercising the right to remain silent. See *id.*; *United States v Alba*, 732 F Supp 306, 310 (D Conn, 1990) ("[T]he right to cut off questioning is not one of the essential Fifth Amendment rights"; rather, it is "a way in which [a suspect] might have manifested his wish to invoke his right to remain silent.") (quotation marks omitted). An individual who has been informed in "clear and unequivocal terms" at the outset of the interrogation that "he has the right to remain silent" will understand "that his interrogators are prepared to recognize his privilege should he choose to exercise it." *Miranda*, 384 US at 467-468. See also *Colorado v Spring*, 479 US 564, 574; 107 S Ct 851; 93 L Ed 2d 954 (1987) (recognizing that a suspect advised of his *Miranda* warnings "knows that he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time"). Consequently, when a defendant has been advised of his or her right to remain silent as required by *Miranda*, the police need not also expressly inform the defendant that this right to remain silent may be exercised to cut off questioning at any point during the interrogation. See *Tubbs*, 22 Mich App at 555-556; see also *Crumpton*, 824 F3d at 611 ("[A] defendant need not be informed of a right to stop questioning after it has begun.") (quotation marks and citation omitted); *United States v Lares-Valdez*, 939 F2d 688, 690 (CA 9, 1991) ("*Miranda* requires that

[4] Although published decisions of this Court issued before November 1, 1990, are not precedentially binding, MCR 7.215(J)(1), they may be considered as persuasive authority. *People v Barbarich*, 291 Mich App 468, 476 n 2; 807 NW2d 56 (2011).

[the suspect] understood the right to remain silent; when and how he then chose to exercise that right is up to him."). Because defendant was advised of her right to remain silent, the *Miranda* warnings were not defective merely because she was not more specifically advised that she could exercise this right at any point during the interrogation.

## II. RIGHT TO THE PRESENCE OF AN ATTORNEY

In the lower court, defendant argued, and the trial court agreed, that a general warning regarding the "right to a lawyer" did not adequately inform defendant of her right to have an attorney present before and during the interrogation. Although there is conflicting authority on this issue, we agree with the trial court and we hold that a general warning regarding a "right to a lawyer" does not comply with the dictates of *Miranda*. Consequently, we affirm the trial court's suppression of defendant's statements.

We begin our analysis by again noting what is required by *Miranda*. As explained by the United States Supreme Court:

> "[A suspect] must be warned prior to any questioning [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." [*Powell*, 559 US at 59-60, quoting *Miranda*, 384 US at 479 (alterations by the *Powell* Court).

It is the third warning—the "right to the presence of an attorney"—that is at issue in this case. Under *Miranda*, in the context of custodial interrogation, the right to the presence of counsel was recognized as "indispensable to the protection of the Fifth Amend-

ment privilege . . . .” *Miranda*, 384 US at 469. As “a corollary of the right against compelled self-incrimination,” the right to the presence of counsel “affords a way to ‘insure that statements made in the government-established atmosphere are not the product of compulsion.’ ” *Tanner*, 496 Mich at 207, quoting *Miranda*, 384 US at 466. Notably, this “need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.” *Miranda*, 384 US at 470. Thus, “as ‘an absolute prerequisite to interrogation,’ ” the United States Supreme Court has held that “an individual held for questioning ‘must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation.’ ” *Powell*, 559 US at 60, quoting *Miranda*, 384 US at 471.

Recognizing that *Miranda* mandates advice regarding the right to the presence of counsel, while also acknowledging that a talismanic incantation of the *Miranda* warnings is not required, *Prysock*, 453 US at 359, the question before us in this case is whether a general warning before an interrogation advising the suspect that he or she has a “right to a lawyer” reasonably conveys to a suspect that he or she has the right to consult with a lawyer before questioning and to have a lawyer present during the interrogation. We are not aware of any binding caselaw resolving this issue. On appeal, the prosecutor asserts that specific information regarding the right to the presence of counsel during interrogation is unnecessary in light of controlling United States Supreme Court precedent—namely, *Powell*, 559 US 50, *Duckworth*, 492 US 195, and *Prysock*, 453 US 355. Certainly, as discussed, these cases stand for the proposition that no exact, talis-

manic incantation of the *Miranda* warnings is required. See *Powell*, 559 US at 60; *Duckworth*, 492 US at 202; *Prysock*, 453 US at 359. But, none of these cases involved a bare-bones warning that the suspect had "a right to an attorney." To the contrary, *Prysock* and *Duckworth* both involved situations in which the suspect was undoubtedly told of the right to consult with an attorney and to have an attorney present during questioning, and the *Miranda* challenge related to whether information, or lack of information, regarding when counsel would be appointed rendered the warnings deficient. See *Duckworth*, 492 US at 203 (reviewing a warning in which the suspect was told, in part, that "he had the right to speak to an attorney before and during questioning" and that he had the "right to the advice and presence of a lawyer even if [he could] not afford to hire one") (quotation marks omitted; alteration by the *Duckworth* Court); *Prysock*, 453 US at 356 (involving a warning in which the suspect was told that he had "the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning"). *Powell* is perhaps the closest factual situation to the present case, but it, too, is distinguishable. In *Powell*, the suspect was told, in relevant part:

> "You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview." [*Powell*, 559 US at 54.]

The purported deficiency in the warnings in *Powell* was that informing the suspect that he had a right to talk to a lawyer *before* answering questions would

mislead a suspect by suggesting that the right to consult an attorney did not also exist *during* the interrogation. *Id*. at 55. In rejecting this argument, the Court read the warning as a whole and concluded that the warning communicated that the suspect could consult with a lawyer "before" answering questions and that, because this right could also be used at any time "during" the interview, it also conveyed the suspect's right to have an attorney present at all times.[5] *Id*. at 62. The warning in *Powell* thus plainly conveyed the critical information about a suspect's right to counsel—i.e., "the right to consult with a lawyer and to have the lawyer with him during interrogation." *Id*. at 60, quoting *Miranda*, 384 US at 471 (quotation marks omitted). See also *Powell*, 559 US at 62 n 5. In short, none of the Supreme Court cases cited by the prosecution involved warnings comparable to those in this case, and none of these cases resolved the issue now

[5] The dissent emphasizes that the warnings given to defendant in this case were prefaced with the word "before," and the dissent concludes that this was sufficient to convey to defendant her right to an attorney before questioning as well as during questioning. This reliance on the word "before" is unpersuasive for two reasons. First, the word "before" is not used in the warnings as an indication of *when* defendant's right to counsel exists. That is, she was not told that she had a right to an attorney before questioning; rather, she was told that before any questions were asked, she should know that she has a right to an attorney. Second, even if the use of "before" is read to have informed defendant of her right to counsel *before* questioning, contrary to the dissent's conclusion, there is a meaningful difference between the right to consult a lawyer before questioning and the right to have a lawyer present during questioning. Indeed, the warning in *Powell* was found adequate because it conveyed the right to counsel, "not only at the outset of interrogation, but at all times" during the interrogation. *Powell*, 559 US at 62. If anything, the argument could be made that the use of the term "before," without any indication that the right also applied during the interrogation, functioned as an improper temporal limitation, suggesting that the right to counsel existed before any questions were asked, but not during questioning.

before us. Ultimately, we are not aware of any binding caselaw addressing the precise issue before us.

Although there is no binding authority, the issue whether a general warning of the "right to an attorney" satisfies *Miranda*'s strictures has been considered by numerous courts, including this Court. In several decisions from this Court issued soon after *Miranda* was decided, this Court concluded that general warnings, such as informing a suspect that he was "entitled to an attorney," did not comply with *Miranda* because such warnings did not sufficiently convey a suspect's right to the presence of an attorney during questioning. *People v Whisenant*, 11 Mich App 432, 434, 437; 161 NW2d 425 (1968). See also *People v Hopper*, 21 Mich App 276, 279; 175 NW2d 889 (1970); *People v Jourdan*, 14 Mich App 743, 744; 165 NW2d 890 (1968). While nonbinding under MCR 7.215(J)(1), this Court's opinions indicate that to comply with *Miranda*, the police must impart more than a broad warning regarding the right to counsel; that is, the warning must somehow convey the right to have counsel *present* during the interrogation. See *People v Johnson*, 90 Mich App 415, 419-420; 282 NW2d 340 (1979) (distinguishing cases with warnings regarding the right "to an attorney" from those involving the right to have an attorney "present"). Similarly, numerous courts from other jurisdictions have interpreted *Miranda* as requiring the police to explicitly inform a suspect of the right to the presence of counsel before and during the interrogation. See, e.g., *Bridgers v Dretke*, 431 F3d 853, 860 n 6 (CA 5, 2005) ("[A] suspect must be explicitly warned that he has the right to counsel during interrogation."); *United States v Tillman*, 963 F2d 137, 141 (CA 6, 1992) ("[T]he police failed to convey to defendant that he had the right to an attorney both before, during and after questioning."); *Smith v Rhay*, 419 F2d 160, 163 (CA 9, 1969)

("Although [the suspect] was told that he had the right to an attorney, he was not . . . told, as required by *Miranda*, that he had the right to the presence of an attorney . . . ."); *State v McNeely*, 162 Idaho 413, 416; 398 P3d 146 (2017) (concluding that a warning regarding " 'the right to an attorney . . . [to] help you with—stuff' " did not adequately convey the right to the presence of counsel before and during questioning); *Coffey v State*, 435 SW3d 834, 841-842 (Tex App, 2014) (holding that a preinterrogation warning that the defendant had "the right to an attorney" did not comply with *Miranda*).

Courts requiring an explicit warning regarding the right to the presence of counsel during the interrogation—as opposed to simply the right to an attorney—have "stressed the importance of informing defendants that they have the right to the actual *physical presence* of an attorney," *United States v Noti*, 731 F2d 610, 615 (CA 9, 1984), and emphasized the significance of advising defendants of the temporal immediacy of the right to counsel, see, e.g., *State v Williams*, 144 So 3d 56, 59; 2013-1300 (La App 4 Cir 6/14/14) (recognizing that *Miranda* does not require a verbatim recitation but concluding that the "temporal requirement that the right to the lawyer attaches before and during any interrogation is key") (quotation marks and citation omitted); *United States v Takai*, 943 F Supp 2d 1315, 1326 (D Utah, 2013) (concluding that the "warning was defective because it omitted reference to Defendant's right to have an attorney present during questioning, i.e. at the present time"). See also *State v Carlson*, 228 Ariz 343, 346; 266 P3d 369 (App, 2011) (distinguishing "mere eventual representation by an attorney" from the right to the presence of an attorney that "applied before, and continued during, any questioning"). Likewise, as noted, this

Court has previously acknowledged that *Miranda* warnings must provide a suspect with temporal information regarding the immediate right to the presence of counsel during questioning. See *Whisenant*, 11 Mich App at 437. For example, in *Johnson*, 90 Mich App at 420, we found a warning that the defendant " 'had the right to have an attorney present' " sufficient to convey the essential information required by *Miranda* because the right to have an attorney *present* "cannot reasonably be understood otherwise than as informing defendant of his right to counsel *during interrogation* and not merely at some subsequent trial."[6] While no specific language is required, these cases persuasively recognize, based on *Miranda*'s requirements, that the advice regarding counsel must convey "the immediacy of the right in the sense that it exists both before and during interrogation." 2 LaFave et al, Criminal Procedure (4th ed), § 6.8(a), pp 886-887.

While there is authority recognizing the necessity of an explicit warning regarding the presence of counsel during the interrogation, courts are by no means uniform in reaching this conclusion. See *Bridgers*, 431 F3d at 859 (describing the split among federal circuit courts as to whether *Miranda* warnings must explicitly provide that a suspect is entitled to the presence of counsel during an interrogation). Unlike courts concluding that *Miranda* warnings must contain information regarding the right to the presence of counsel during an interrogation, numerous other courts reason that *Miranda* does not require "highly particularized

[6] Numerous decisions from the Michigan Supreme Court have similarly quoted formulations of the *Miranda* warnings that convey the right to the "presence of an attorney" or, more specifically, the right to "the presence of an attorney during any questioning." See, e.g., *Tanner*, 496 Mich at 207 n 3; *Elliott*, 494 Mich at 301; *Daoud*, 462 Mich at 624 n 1.

warnings" regarding "all possible circumstances in which *Miranda* rights might apply." *United States v Frankson*, 83 F3d 79, 82 (CA 4, 1996). Consequently, these cases conclude that when the police provide a generalized warning regarding the "right to an attorney"—without any temporal qualifications or limitations on that right—the police have complied with *Miranda* because a reasonable person would understand that an unqualified right to an attorney begins immediately and continues forward in time without qualification. *Id*. See also *United States v Warren*, 642 F3d 182, 185 (CA 3, 2011) ("[I]t cannot be said that the *Miranda* court regarded an express reference to the temporal durability of [the right to an attorney] as elemental to a valid warning."); *United States v Caldwell*, 954 F2d 496, 502 (CA 8, 1992) (concluding, under plain-error review, that warning of the "right to an attorney" was not deficient because there was nothing "suggesting a false limitation" on the right to counsel and thus the suspect was not "actively misled"); *United States v Lamia*, 429 F2d 373, 376-377 (CA 2, 1970) (holding that failure to inform the defendant that he had the right to the "presence" of an attorney did not render warnings deficient when he had been told "without qualification that he had the right to an attorney"); *Carter v People*, 398 P3d 124, 128; 2017 CO 59M (Colo, 2017), as mod on denial of reh (July 31, 2017) ("[I]t would be highly counterintuitive for a reasonable suspect in a custodial setting, who has just been informed that the police cannot talk to him until after they advise him of his rights to remain silent and to have an attorney, to understand that an interrogation may then proceed without permitting him to exercise either of those rights."); *People v Walton*, 199 Ill App 3d 341, 344-345; 556 NE2d 892 (1990) ("While the better practice would be for the

police to make explicit that defendant's right to consult with a lawyer may be both before and during any police interrogation, we hold that the language used in this case [that the defendant had a right to consult with a lawyer] was sufficient to *imply* the right to counsel's presence during questioning" because "no restrictions were stated by the police in the present case as to *how*, *when*, or *where* defendant might exercise his right 'to consult with a lawyer.' ").[7] Under these cases, provided

[7] In support of the conclusion that general warnings are sufficient, some of these cases also note that *Miranda* discussed, with apparent approval, the warnings given by the Federal Bureau of Investigation (FBI) at the time *Miranda* was decided. See, e.g., *Warren*, 642 F3d at 184-185; *Lamia*, 429 F2d at 376. As set forth in *Miranda*, at that time the FBI's practice was to warn a suspect that "he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice and, more recently, that he has a right to free counsel if he is unable to pay." *Miranda*, 384 US at 483. Because the FBI warnings discussed in *Miranda* did not contain a temporal reference to a suspect's right to the presence of counsel during the interrogation, cases such as *Warren* and *Lamia* reason—and the prosecutor argues on appeal—that *Miranda* does not contain such a requirement. Admittedly, there is tension between what *Miranda*, 384 US at 479, demanded and what the FBI warnings discussed in *Miranda* conveyed. Indeed, in dissenting opinions to *Miranda*, Justice Clark and Justice Harlan both opined that the FBI warnings in question did not satisfy the strictures laid down by the *Miranda* majority. See *id*. at 500 n 3 (Clark, J., dissenting); *id*. at 521 (Harlan, J., dissenting). It does not appear that the Supreme Court has resolved this tension. See *Powell*, 559 US at 73 n 8 (Stevens, J., dissenting) (expressing doubt as to whether "warning a suspect of his 'right to counsel,' without more, reasonably conveys a suspect's full rights under *Miranda*"). Moreover, we note that the discussion of FBI practices in the *Miranda* majority was immediately followed by a discussion of the then-current practices in England, Scotland, India, Ceylon, and the United States military courts in the larger context of responding to concerns that preinterrogation warnings would place an undue burden on investigators and detrimentally affect criminal law enforcement. See *Miranda*, 384 US at 481-489. Given the context in which the *Miranda* Court expressed approval of the FBI's warnings and the difference of opinion that currently exists among the various courts

that no improper or misleading limitations on the right to counsel are expressly communicated, a general warning regarding the "right to counsel" is sufficient to comply with *Miranda*'s requirements.

Considering the conflicting persuasive authority, we conclude that the essential information required by *Miranda* includes a temporally related warning regarding the right to consult an attorney and to have an attorney present during the interrogation, not merely general information regarding the "right to an attorney." Consequently, we reaffirm our decision in *Whisenant*, 11 Mich App at 437, and we hold that a warning preceding a custodial interrogation is deficient when the warning contains only a broad reference to the "right to an attorney" that does not, when the warning is read in its entirety, reasonably convey the suspect's right to consult with an attorney and to have an attorney present during the interrogation. See *Powell*, 559 US at 60; *Miranda*, 384 US at 471. In reaching this conclusion, we fully acknowledge that there is a certain logic in the proposition that an unqualified general warning about a "right to an attorney" encompasses *all* facets of the right to counsel such that a broad warning before interrogation regarding the "right to an attorney" impliedly informs a suspect of the right to consult an attorney and to have an attorney present during the interrogation. See *Warren*, 642 F3d at 186-187; *Frankson*, 83 F3d at 82; *Walton*, 199 Ill App 3d at 344-345. But, in our view, this conclusion is disingenuous in light of *Miranda*'s mandate for clear and unambiguous warnings, and it

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regarding the necessity of warning a suspect about the right to the presence of counsel during interrogation, it is not clear to us that *Miranda*'s discussion of the FBI practices compels the conclusion that advising a suspect of the right to counsel is sufficient to convey the right to the presence of counsel during an interrogation.

assumes—contrary to *Miranda*—that all suspects, regardless of their backgrounds, have a working knowledge of everything implied by a reference to their "right to an attorney."

In this regard, as noted, *Miranda* was focused on the right to counsel as a corollary to the right against compelled self-incrimination, i.e., the right to counsel that exists during custodial interrogation to "protect an accused's Fifth Amendment privilege in the face of interrogation." *Miranda*, 384 US at 471. This is a specific right, and it is this right to counsel in connection with custodial interrogation that must be overtly conveyed to a suspect under *Miranda*.[8] See *id*. In this context, basic temporal information is key to ensuring that a defendant understands what the right to counsel entails, i.e., that it applies before and during the interrogation as opposed to some future point. In contrast to decisions like *Frankson*, 83 F3d at 82, we are simply not persuaded by the conclusion that a reasonable person facing custodial interrogation, regardless of the person's background, would understand from a general reference to the "right to an attorney" that this right includes the right to consult an attorney and to have an attorney present during

[8] In comparison to the right to counsel during custodial interrogation incident to the Fifth Amendment, the Sixth Amendment right to counsel attaches at, or after, the initiation of adversary judicial proceedings and extends to all critical stages of the proceedings. See *People v Buie (On Remand)*, 298 Mich App 50, 61; 825 NW2d 361 (2012); *People v Williams*, 244 Mich App 533, 538; 624 NW2d 575 (2001). Obviously, the police do not have to provide suspects with a constitutional exegesis on the right to counsel. But for *Miranda* warnings to be meaningful, there needs to be an overt expression of the immediacy of the right to counsel—that it "exists both before and during interrogation." 2 LaFave et al, Criminal Procedure (4th ed), § 6.8(a), pp 886-887. See also *Noti*, 731 F2d at 615 ("The right to have counsel present during questioning is meaningful. Advisement of this right is not left to the option of the police . . . .").

the interrogation. Undoubtedly, such an inference can reasonably be drawn by individuals with a preexisting understanding of the right to an attorney, including the fact that this right exists during custodial interrogation. But, "[c]onstitutional rights of an accused at the preliminary stage of the in-custody interrogation process is not commonplaced," and absent information regarding the immediacy of this right to counsel, the right to counsel could be "interpreted by an accused, in an atmosphere of pressure from the glare of the law enforcer and his authority, to refer to an impending trial or some time or event other than the moment the advice was given and the interrogation following."[9] *Atwell v United States*, 398 F2d 507, 510 (CA 5, 1968).

Rather than assume people are capable of inferring their constitutional rights, *Miranda* provides specific, clear-cut warnings that must be given regardless of "age, education, intelligence, or prior contact with authorities . . . ."[10] *Miranda*, 384 US at 468-469. With regard to the right to counsel, *Miranda* and its progeny categorically provide that, "as 'an absolute prerequisite

[9] See also *Carlson*, 228 Ariz at 346 (discussing the fact that the suspect was unaware "that he had a right to the presence of an attorney (as distinguished from mere eventual representation by an attorney), and that the right applied before, and continued during, any questioning"); *Roberts v State*, 874 So 2d 1225, 1226 (Fla App, 2004) (noting that the suspect believed he could only have a lawyer " 'in the courtroom' "). Indeed, even among cases concluding that general warnings may suffice, those courts have acknowledged that generality in the warnings may potentially lead to ambiguity, *Caldwell*, 954 F2d at 502, and that general warnings merely "imply" the right to counsel during the interrogation, *Walton*, 199 Ill App 3d at 344-345.

[10] "The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Miranda*, 384 US at 468.

to interrogation,' . . . an individual held for questioning 'must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation.' " *Powell*, 559 US at 60, quoting *Miranda*, 384 US at 471. "Only through such a warning is there ascertainable assurance that the accused was aware of this right." *Miranda*, 384 US at 472. In the face of *Miranda*'s clear dictates, we fail to see how a warning lacking this essential information regarding the right to consult an attorney and have an attorney present during an interrogation can be considered adequate. See *Powell*, 559 US at 60, quoting *Miranda*, 384 US at 471.

In this case, neither Stowinsky nor DesRosiers explained to defendant that she had the right to the presence of counsel. Although defendant was generally advised that she had a right to an attorney, this broad warning failed to reasonably convey to defendant that she could consult an attorney before she was questioned and during her interrogation. Because defendant was not adequately advised of her right to the presence of counsel, her subsequent statements are inadmissible at trial. *Miranda*, 384 US at 444-445; *Elliott*, 494 Mich at 301. Accordingly, the trial court did not err by granting defendant's motion to suppress her statements.

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

K. F. KELLY, J., concurred with HOEKSTRA, J.

O'CONNELL, P.J. (*concurring in part and dissenting in part*). At 11:33 a.m., on August 12, 2016, defendant called the Wixom Police Department and informed the police that she had shot her boyfriend, Gabriel Dumas. The police were immediately dispatched to defendant's home. Defendant was arrested and transported to the Wixom Police Department.

At the police station, defendant was interviewed by Detective Brian Stowinsky and Sergeant Michael DesRosiers. Detective Stowinsky first told defendant that he was going to question her about what happened. Before he began questioning defendant, he gave her the following warnings:

> [B]efore I question, start asking you, you should know that you have a right to remain silent.
>
> * * *
>
> Anything you say maybe [sic] used against you. You have a right to a lawyer, if you cannot afford a lawyer, one will be provided for free. Do you understand your rights?

Defendant answered, "Yes." Importantly, in addition to the oral *Miranda*[1] rights, defendant signed a written advice of rights, which read:

> Before any questions are asked of you, you should know: (1) you have a right to remain silent; (2) anything you say may be used against you; (3) you have a right to a lawyer, and (4) if you cannot afford a lawyer, one will be provided free.
>
> I understand what my rights are and am willing to talk.

Defendant's interview lasted approximately 61 minutes.

At the beginning of defendant's second interview later that day, Sergeant DesRosiers said to defendant:

> Detective Stowinsky, remember he talked about your rights and everything?
>
> * * *
>
> Same thing applies. . . . [Y]ou don't have to even talk to me if you don't want to. You can get an attorney . . . . [I]f you can't afford one, we'll make sure you get one.

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant indicated that she understood, and she answered Sergeant DesRosiers's questions.

It is clear from these warnings that defendant's right to a lawyer related to the forthcoming questioning by both Detective Stowinsky and Sergeant DesRosiers. The lower-court record is devoid of any coercion, compulsion, or wrongful conduct by the police. Also, there is no indication that defendant did not or was not capable of understanding that she was entitled to have a free attorney before, during, or after questioning.

Moreover, the ordinary layperson understands that the right to an attorney *before* questioning extends to the duration of questioning. There is no meaningful difference between a right to a lawyer *before* questioning and *during* questioning. In addition, by the time Sergeant DesRosiers interviewed her, defendant had already been interviewed once. Sergeant DesRosiers's reminder about defendant's rights reinforced her right to an attorney even though she had already been questioned by Detective Stowinsky. For these reasons, I concur with those cases cited in the majority opinion holding that a generalized warning that the suspect has the right to counsel, without specifying when, satisfies the *Miranda* requirements.[2]

I conclude that defendant was adequately informed of her *Miranda* rights. I would reverse the decision of the trial court and remand for further proceedings consistent with this opinion.

I concur with the balance of the majority opinion.

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[2] Only lawyers are capable of dissecting words and phrases so finely as to confuse the meaning of the *Miranda* warnings. The ordinary layperson clearly understands the right to have an attorney before, during, and after questioning. When the police warn a suspect before the start of questioning that the suspect has the right to counsel, for what other purpose than questioning—the entire duration of questioning—would a suspect be entitled to a lawyer?

MIDWEST POWER LINE, INC v DEPARTMENT OF TREASURY

Docket No. 336451. Submitted March 7, 2018, at Lansing. Decided May 22, 2018, at 9:15 a.m.

Midwest Power Line, Inc. (Midwest) filed a petition with the Michigan Tax Tribunal, challenging a Department of Treasury (Department) assessment of use tax. Midwest alleged that it qualifies for the MCL 205.94k(4) rolling-stock exemption from use tax because it regularly transports customer supplies across state lines. The tribunal affirmed the Department's assessment. Plaintiff appealed.

The Court of Appeals *held*:

Under MCL 205.94k(4), an interstate fleet motor carrier is exempt from use tax on rolling stock used in interstate commerce. MCL 205.94k(6) defines "interstate fleet motor carrier" as one who is "engaged in the business of carrying persons or property . . . for hire across state lines." The Legislature's use of the definite article "the" in the definition indicates an intent to focus on the business's primary purpose. Thus, to qualify for the rolling-stock exemption, a business must, as its primary purpose, transport people or property for hire across state lines. When the transportation of people or property is merely incidental to the business's primary purpose, the business is not an interstate fleet motor carrier, and therefore, the rolling-stock exemption does not apply. Defendant's primary business purpose is to repair storm damage to power lines and to restore power to affected areas. Therefore, the tribunal correctly affirmed the Department's use-tax assessment against plaintiff.

Affirmed.

TAXATION — USE TAX — EXEMPTIONS — MOTOR CARRIERS.

The rolling-stock exemption to use tax under MCL 205.94k(4) is available only to a person whose primary business purpose is to transport people or property across state lines for hire; it is not available to those who transport people or property incidentally to the business's primary purpose.

*James L. Juhnke* for petitioner.

*Bill Schuette*, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *Emily C. Zillgitt*, Assistant Attorney General, for respondent.

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

SAWYER, P.J. At issue in this case is whether MCL 205.94k(4) entitles petitioner to a use-tax exemption given that petitioner carries customers' property across state lines incidentally to its business of providing repair services. We conclude that it does not.

Petitioner provides repair and maintenance services to electrical utilities, specializing in emergency restoration services. While based in Battle Creek, petitioner provides services in a number of other states. For example, if a storm knocks out power, petitioner may be dispatched to another state to assist in power restoration. Petitioner's trucks leave its facility in Battle Creek empty, stop at the customer's storage yard to pick up the necessary supplies, such as power poles and transformers, and then proceed to the repair site. When finished, the trucks return to Battle Creek empty. It is undisputed that petitioner is subject to the Michigan use tax unless it qualifies for the rolling-stock exemption available to interstate fleet motor carriers under MCL 205.94k(4). The Tax Tribunal rejected petitioner's claim for the exemption because it determined that petitioner is not an "interstate fleet motor carrier." We agree.

MCL 205.94k(4) provides the exemption at issue here:

> For taxes levied after December 31, 1992, the tax levied under this act does not apply to the storage, use, or consumption of rolling stock used in interstate commerce and purchased, rented, or leased by an interstate fleet

> motor carrier. A refund for taxes paid before January 1, 1997 shall not be paid under this subsection if the refund claim is made after June 30, 1997.

MCL 205.94k(6) defines the terms relevant to this appeal:

> (d) "Interstate fleet motor carrier" means a person engaged in the business of carrying persons or property, other than themselves, their employees, or their own property, for hire across state lines, whose fleet mileage was driven at least 10% outside of this state in the immediately preceding tax year.
>
> * * *
>
> (g) "Qualified truck" means a commercial motor vehicle power unit that has 2 axles and a gross vehicle weight rating in excess of 10,000 pounds or a commercial motor vehicle power unit that has 3 or more axles.
>
> * * *
>
> (i) "Rolling stock" means a qualified truck, a trailer designed to be drawn behind a qualified truck, and parts or other tangible personal property affixed to or to be affixed to and directly used in the operation of either a qualified truck or a trailer designed to be drawn behind a qualified truck.

Our review of decisions of the tribunal is limited.[1] Absent fraud, we review the decision for the adoption of a wrong principle or an error of law.[2] We review questions of statutory construction de novo.[3] The taxpayer bears the burden of establishing its entitlement to the exemption.[4]

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[1] *Drew v Cass Co*, 299 Mich App 495, 498; 830 NW2d 832 (2013).

[2] *Id*. at 498-499.

[3] *Id*. at 499.

[4] *Andrie Inc v Dep't of Treasury*, 496 Mich 161, 171; 853 NW2d 310 (2014).

MCL 205.94k(6)(d) defines "interstate fleet motor carrier" as "a person engaged in *the* business of carrying persons or property . . . for hire across state lines . . . ." (Emphasis added.) The definite article "the" has a specifying or particularizing effect.[5] A good illustration of this is the Supreme Court's discussion in *Robinson v Detroit*[6] regarding the meaning of "the proximate cause" versus "a proximate cause": "The Legislature's use of the definite article 'the' clearly evinces an intent to focus on one cause. The phrase 'the proximate cause' is best understood as meaning the one most immediate, efficient, and direct cause preceding an injury."

This leads us to conclude that the Legislature's use of "the" in the phrase "the business of carrying persons or property . . . for hire across state lines" indicates the intent to focus not on what activities a business might include, but on the primary purpose of the business. That is, to qualify as an "interstate fleet motor carrier," the primary purpose of the business must be to transport persons or property for hire across state lines. It is insufficient that the business's activities might incidentally include such actions.

In this case, petitioner is not hired by the utility companies to transport power-line supplies across state lines. Rather, it is hired to repair storm damage to power lines and to restore power to the affected areas. The fact that petitioner picks up those supplies from the customers' supply depots and transports them to the job site is merely incidental to its primary task of repairing the power systems. The fact that petitioner hauls customers' property across state lines is not, by

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[5] *Robinson v Lansing*, 486 Mich 1, 14; 782 NW2d 171 (2010).

[6] 462 Mich 439, 458-459; 613 NW2d 307 (2000).

itself, sufficient to establish that it is an "interstate fleet motor carrier."

We conclude that an "interstate fleet motor carrier" is a business that is particularly engaged in providing transportation for hire. In this case, that is not petitioner's particular business. Accordingly, the Tax Tribunal did not err by determining that petitioner was not entitled to the rolling-stock exemption to the use tax.

Affirmed. Respondent may tax costs.

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

REED v STATE OF MICHIGAN

Docket No. 339835. Submitted May 9, 2018, at Lansing. Decided May 24, 2018, at 9:00 a.m. Leave to appeal denied 503 Mich 914.

Jacqueline A. Reed brought an action in the Court of Claims against the state and the Department of Technology, Management and Budget (DTMB) for injuries she sustained after she tripped on an uneven paving stone in front of the Hall of Justice in Lansing, Michigan. In accordance with MCL 691.1404(2) of the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., plaintiff filed, in triplicate, a notice of injury and defect with the clerk of the Court of Claims. Defendants moved for summary disposition under MCR 2.116(C)(7), arguing that plaintiff failed to comply with the notice requirements of MCL 691.1406 because she did not separately serve notice on the DTMB. The court, CHRISTOPHER M. MURRAY, J., denied defendants' motion, holding that the notice requirements of MCL 691.1404 and MCL 691.1406 were satisfied when the notice was filed in triplicate with the clerk of the Court of Claims. Defendants appealed.

The Court of Appeals *held*:

The GTLA provides governmental agencies with immunity from tort liability when the governmental agencies are engaged in the exercise or discharge of a governmental function. An exception to the broad immunity offered by the GTLA is the public-building exception set forth in MCL 691.1406, which obligates governmental agencies to repair and maintain public buildings under their control when open for use by members of the public. Consequently, governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring that knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition. In order to recover damages under the public-building exception, MCL 691.1406 provides that an injured person must, within 120 days of the date the injury occurred, serve a notice of the injury and defect on the responsible governmental agency. MCL 691.1406 states that the

notice may be served on any individual, either personally or by certified mail, return receipt requested, who may be lawfully served with civil process against the responsible governmental agency. However, when notice must be given to the state, MCL 691.1406 mandates that notice be given as set forth in MCL 691.1404. According to MCL 691.1404(2), when notice must be served on the state, the notice must be filed in triplicate with the clerk of the Court of Claims; the clerk of the Court of Claims then transmits a copy of the notice to the Attorney General and to the governmental agency designated in the notice. Thus, when a party asserts the public-building exception to governmental immunity and the defendant is the state, filing notice in triplicate in the Court of Claims is all that is necessary to effectuate service of the notice. This analysis is consistent with the plain language of MCL 691.1404(2) and MCL 691.1406 and with the interpretation of MCL 691.1404 in *Goodhue v Dep't of Transp*, 319 Mich App 526 (2017). MCL 691.1406 did not require that plaintiff serve a separate notice on the state. Rather, when plaintiff filed notice in triplicate in the Court of Claims, she satisfied the service requirement in MCL 691.1404(2). Plaintiff also satisfied the deadline for serving the notice, so her notice was both proper and timely.

Affirmed.

GOVERNMENTAL IMMUNITY — PUBLIC-BUILDING EXCEPTION — SERVING NOTICE OF INJURY AND DEFECT — STATE AS A DEFENDANT.

When a plaintiff invokes the public-building exception to governmental immunity and the state is a defendant, filing notice in triplicate with the clerk of the Court of Claims is all that is necessary to effectuate service of the notice for purposes of MCL 691.1406 and MCL 691.1404(2); separate service on the responsible governmental agency is not required.

*Stefani A. Carter PLLC* (by *Stefani A. Carter*) for plaintiff.

*Bill Schuette*, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *John G. Fedynsky*, Assistant Attorney General, for defendants.

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

PER CURIAM. In this case brought under the public-

building exception to governmental immunity, MCL 691.1406, defendants appeal as of right the order of the Court of Claims denying their motion for summary disposition pursuant to MCR 2.116(C)(7). We affirm.

On June 12, 2015, plaintiff was walking on the "front porch" of the Michigan Hall of Justice in Lansing when she tripped on "sunken and uneven brick pavers," causing her to fall and sustain personal injuries. On September 29, 2015, plaintiff filed, in triplicate, a "Notice of Injury and Defect pursuant to MCL 691.1406" with the clerk of the Court of Claims. Plaintiff later filed a complaint in the Court of Claims on July 12, 2016.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), claiming that they were immune from suit because plaintiff failed to comply with the notice requirements of MCL 691.1406 by not serving notice on "the responsible governmental agency," defendant Department of Technology, Management and Budget (DTMB). In response, plaintiff argued that she satisfied the notice requirements by filing her notice in triplicate with the Court of Claims, as required by MCL 691.1404. The trial court denied defendants' motion, holding that based on MCL 691.1404, MCL 691.1406, and this Court's decision in *Goodhue v Dep't of Transp*, 319 Mich App 526; 904 NW2d 203 (2017), filing the notice in triplicate with the clerk of the Court of Claims was all that was required to fulfill the notice requirements of MCL 691.1404 and MCL 691.1406.

Defendant argues that governmental immunity bars this action because the statute required plaintiff to serve notice on the DTMB individually and to *also* file the notice in triplicate with the Court of Claims. We disagree.

We review de novo a trial court's decision on a motion for summary disposition. *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012). In deciding a motion for summary disposition under MCR 2.116(C)(7), a court must consider any affidavits, pleadings, depositions, admissions, and documentary evidence in the action or submitted by the parties. MCR 2.116(G)(5). The facts as alleged in the complaint "must be accepted as true unless contradicted" by the submitted evidence, and the court must evaluate all the evidence "in a light most favorable to the nonmoving party for purposes of MCR 2.116(C)(7)." *Moraccini*, 296 Mich App at 391. We also review de novo the application of a statutory exception to governmental immunity. *Snead v John Carlo, Inc*, 294 Mich App 343, 354; 813 NW2d 294 (2011).

When interpreting a statute, the "primary goal is to give effect to the intent of the Legislature." *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007). "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." *Dep't of Environmental Quality v Worth Twp*, 491 Mich 227, 237-238; 814 NW2d 646 (2012). When the words are unambiguous, the court gives them "their plain meaning." *Rowland*, 477 Mich at 202. When the Legislature's intent is not clear from the plain language, "courts must interpret statutes in a way that gives effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *Haynes v Village of Beulah*, 308 Mich App 465, 468; 865 NW2d 923 (2014) (quotation marks and citation omitted).

The governmental tort liability act (GTLA), MCL 691.1401 *et seq*., provides immunity from tort liability to governmental agencies when they are engaged in the exercise or discharge of a governmental function. MCL 691.1407(1); *Moraccini*, 296 Mich App at 391. However, the GTLA also provides several exceptions to this broad grant of immunity. *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 84; 746 NW2d 847 (2008). One of those exceptions is the public-building exception, MCL 691.1406, which states in relevant part:

> Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition. . . . *As a condition to any recovery for injuries sustained by reason of any dangerous or defective public building, the injured person, within 120 days from the time the injury occurred, shall serve a notice on the responsible governmental agency of the occurrence of the injury and the defect*. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.
>
> The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the responsible governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding. . . . *Notice to the state of Michigan shall be given as provided in* [*MCL 691.1404*]. [Emphasis added.]

MCL 691.1404(2), in turn, provides in pertinent part:

> The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding. In case of the state,[1] such notice shall be filed in triplicate with the clerk of the court of claims. Filing of such notice shall constitute compliance with [MCL 600.6431 of the Court of Claims Act, MCL 600.6401 *et seq*.][2]

Once the notice is filed with the clerk of the Court of Claims, the clerk transmits a copy to the Attorney General and to the governmental agency designated in the notice. MCL 600.6431(2).

This Court recently addressed the interaction between MCL 691.1404, the highway exception to governmental immunity, and MCL 600.6431 of the Court of Claims Act. *Goodhue*, 319 Mich App 526. In *Goodhue*, the issue was whether the plaintiff's claims under the GTLA's highway-defect and public-building exceptions were barred under MCL 691.1404 when the plaintiff filed notice in the Court of Claims more than 120 days after an accident; that is, the issue was which time limit applied to the plaintiff's claims—the 120-day time limit applicable to these GTLA exceptions or the higher six-month time limit of MCL 600.6431(3) for filing an injury claim in the Court of Claims. *Id*. at 529-530, 534-536. The *Goodhue* Court concluded that "the notice provisions of MCL 691.1404 control[led]"

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[1] The GTLA defines "state" as including the state of Michigan and, in pertinent part, "its agencies" and "departments." MCL 691.1401(g).

[2] As explained later in this opinion, although MCL 600.6431(3) provides that if the action is for property damage or personal injuries, a claimant must file written notice "within 6 months following the happening of the event giving rise to the cause of action," if the pertinent governmental-immunity statute has a timing requirement, it is that requirement that controls. See *Goodhue*, 319 Mich App at 535-536.

and that because the plaintiff filed his notice with the clerk of the Court of Claims more than 120 days after the injury occurred, his filing was deficient and fatal to his claim. *Id*. at 534-537.

Defendants argue that the trial court, in denying defendants' motion for summary disposition, should not have relied on *Goodhue*. According to defendants, *Goodhue* is inapplicable because the issue in that case was the timeliness of the plaintiff's notice, rather than the manner of service. Defendants, while relying on the fact that *filing* and *serving* have different definitions and effects, further argue that the trial court's construction of MCL 691.1404(2) renders as surplusage its service requirement, and that the language of MCL 691.1404(2) makes plain that a plaintiff must both serve *and* file the required notice. We disagree and instead agree with the trial court that *Goodhue*, together with the plain language of MCL 691.1404(2) and MCL 691.1406, compels the conclusion that "[c]ompliance with the triplicate filing requirement is what is required of a plaintiff contemplating suit against the state under [the public-building] exception to governmental immunity, not the service requirements on individuals within [MCL 691.1404(2)]."

At issue is the correct interpretation of MCL 691.1406. We hold that the statute does not require a plaintiff to both separately serve the state *and* to file his or her notice in the Court of Claims. Instead, filing the notice in the Court of Claims fulfills the service requirement. Indeed, *Goodhue* compels this result. *Goodhue* interpreted the *exact same language* concerning how notice may be served, although contained in MCL 691.1404 instead of MCL 691.1406, and came to the same conclusion. *Goodhue*, 319 Mich App at 534-535; see also *Empire Iron Mining Partnership v Orhanen*,

455 Mich 410, 426 n 16; 565 NW2d 844 (1997) (stating that identical language in the same act should be interpreted in an identical manner).

For the public-building exception, the first paragraph of MCL 691.1406 establishes the requirement of serving notice "within 120 days from the time the injury occurred . . . on the responsible governmental agency" and further describes what needs to be included in the notice. See *Goodhue*, 319 Mich App at 534-535 (interpreting the nearly identical language found in MCL 691.1404(1)). The second paragraph of MCL 691.1406 specifies *how* that service is to be effectuated, which is consistent with *Goodhue*'s reading of MCL 691.1404(2). See *Goodhue*, 319 Mich App at 535. While the paragraph generally states that "notice may be served upon any individual" who can accept civil process, it further explains that when notice is to be given to the state, notice "shall be given as provided in [MCL 691.1404]." MCL 691.1406. Thus, when the notice is to be provided to the state, the provisions in MCL 691.1404 pertaining to how notice is to be provided control.

The *Goodhue* Court has already interpreted MCL 691.1404. Subsection (1) is not relevant to the instant case because it does not address how notice is to be provided.[3] But Subsection (2)

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[3] The *Goodhue* Court stated that when a claim against the state is related to the public-building exception, then MCL 691.1406 dictates that notice is governed by MCL 691.1404. *Goodhue*, 319 Mich App at 534. This is true, but it is important to clarify that only the provisions of MCL 691.1404 that pertain to *how notice is provided* govern. In *Goodhue*, the Court, after stating that "the notice provisions of MCL 691.1404 control," quoted MCL 691.1404(1) and (2), *Goodhue*, 319 Mich App at 534-535, but Subsection (1), which provides that notice is a condition to recovering for any injuries and provides the 120-day deadline in which to provide notice, technically is not relevant to public-building-exception cases because the first paragraph of MCL 691.1406 describes these requirements for public-building cases.

> details how that notice is to be effectuated. Specifically, the first sentence of Subsection (2) provides that the notice may be served upon an appropriate individual. However, the very next sentence clarifies that when the "state" is a defendant, "such notice shall be filed in triplicate with the clerk of the court of claims." [*Goodhue*, 319 Mich App at 535.]

Accordingly, we hold that MCL 691.1404(2) does not require a plaintiff to serve notice *in addition* to filing notice in the Court of Claims. Instead, when the state is a party, Subsection (2) provides that service, in the case of the state, is effectuated by filing the notice in triplicate in the Court of Claims. If the Legislature had intended for the notice to be served as described in the first sentence of MCL 691.1404(2) or the first sentence of the second paragraph of MCL 691.1406, then the Legislature would have used a word comparable to "also" in those provisions stating that the notice is to be filed with the clerk of the Court of Claims.[4]

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The *Goodhue* Court quoted MCL 691.1404(1) because the Court was simultaneously addressing a claim under the highway exception, MCL 691.1404, and a claim under the public-building exception, MCL 691.1406. See *Goodhue*, 319 Mich App at 534. Moreover, we note that any incorrect inferences one could take from *Goodhue* would have no practical effect because both MCL 691.1404 for the highway exception and MCL 691.1406 for the public-building exception have nearly identical requirements, including that notice be served on the governmental agency within 120 days of the injury. MCL 691.1404(1); MCL 691.1406. Further, both statutes provide the same general description of how notice is to be provided:

> The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the responsible governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding. [MCL 691.1404(2); MCL 691.1406.]

[4] As an example, if the Legislature had intended to require that a plaintiff serve the notice as described in the first sentence of MCL 691.1404(2) *and* file that same notice with the Court of Claims, the

As a result, when a plaintiff invokes the public-building exception to governmental immunity and the defendant is the "state" under the GTLA, filing notice in triplicate with the clerk of the Court of Claims is all that is necessary to effectuate service of the notice. Because plaintiff filed notice with the clerk of the Court of Claims, she satisfied the requirements of service under MCL 691.1406 and MCL 691.1404(2). And because plaintiff filed the notice on September 29, 2015, which defendants acknowledge was within 120 days of her June 12, 2015 accident, the notice was timely. The fact that she filed a subsequent notice after the 120-day deadline is not pertinent.

Affirmed.

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

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second sentence of MCL 691.1404(2) might have read as follows: "In the case of the state, such notice shall *also* be filed in triplicate with the clerk of the court of claims." Instead, the statute as written directs how service is to be provided in two different situations—one for when the state is a party and another for when the state is not a party.

PEOPLE v SCOTT

Docket No. 337455. Submitted April 3, 2018, at Detroit. Decided April 12, 2018. Approved for publication May 29, 2018, at 9:00 a.m.

In 2016, Nelson K. Scott was charged in the Wayne Circuit Court with two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b, for allegedly assaulting PM in 1997. Defendant was charged in 1997 with various counts of CSC involving three victims: PM, RO, and GF. PM failed to appear at the preliminary examination, and the hearing was adjourned. The case was dismissed without prejudice when PM failed to appear at the rescheduled preliminary examination. Defendant subsequently entered into a plea agreement regarding the charges related to RO and GF, pleading guilty to three counts of first-degree CSC and one count of first-degree home invasion, MCL 750.110a(2) as enacted by 1994 PA 270; he was released from prison in November 2015. In 2016, the prosecution refiled the 1997 charges arising from the assault of PM after DNA evidence linked defendant to that assault. Defendant moved to dismiss, arguing that the delayed prosecution violated his right to due process of the law. The circuit court, Michael M. Hathaway, J., granted the motion, concluding that the delay had prejudiced defendant because defendant might have had an alibi witness in 1997 who was no longer available. The circuit court also reasoned that because the charges related to PM could have been included in the plea agreement related to the assaults against RO and GF, defendant would be prejudiced if the charges were reinstated given that a conviction and sentence would effectively result in consecutive sentencing when the plea bargain had included concurrent sentencing. The prosecution appealed.

The Court of Appeals *held*:

A prearrest delay that causes substantial prejudice to a defendant's right to a fair trial and that was used to gain tactical advantage violates the constitutional right to due process. Substantial prejudice meaningfully impairs a defendant's ability to defend against the charge in such a manner that the outcome of the proceeding was likely affected. A defendant has the initial burden of demonstrating some prejudice, after which the pros-

ecution bears the burden of persuading the court that the reason for the delay was sufficient to justify the resulting prejudice. To establish prejudice, the defendant must present evidence of actual and substantial prejudice to his or her right to a fair trial, not merely evidence that the delay had an adverse impact on the sentence imposed on the defendant. Mere speculation that the delay resulted in lost memories, witnesses, and evidence is not sufficient to demonstrate actual prejudice, even if the delay was especially long. The death of a witness, by itself, is insufficient to establish actual and substantial prejudice. In this case, defendant's possible alibi, the potential for adverse sentencing consequences, and speculation regarding whether the 1997 plea agreement included the charges at issue in this case did not constitute actual and substantial prejudice to defendant's right to a fair trial. The death of PM's son, a witness to the assault of PM, did not establish prejudice because defendant did not know what testimony the witness would have offered. In addition, whether defendant might have received a better plea bargain or served concurrent sentences if the case had been litigated in 1997 was not relevant to whether defendant's ability to defend against the charges had been meaningfully impaired by the prearrest delay. Because defendant failed to demonstrate prejudice, the burden of persuasion did not shift to the prosecution to justify the delay to the court, and the circuit court abused its discretion by dismissing the charges against defendant.

Reversed and remanded for further proceedings.

*Bill Schuette*, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Amy M. Somers*, Assistant Prosecuting Attorney, for the people.

*Daniel J. Rust* for defendant.

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

PER CURIAM. In August 2016, defendant was charged with two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b, for conduct that allegedly occurred approximately 19 years earlier, on September 6, 1997. Defendant moved to dismiss the charges. The

trial court granted the motion, concluding that the delay violated defendant's due-process rights. The prosecution now appeals as of right the trial court's order dismissing the charges with prejudice. Because defendant failed to show that he was prejudiced by the delay, the trial court abused its discretion by granting defendant's motion to dismiss. Accordingly, we reverse and remand for reinstatement of the charges.

The procedural history in this case is uncontested. Defendant was originally charged with CSC in 1997 for allegedly assaulting PM, the victim in this case. In 1997, defendant was also charged with CSC for crimes perpetrated against two additional victims—RO and GF. At the preliminary examination for the PM case, PM failed to appear, purportedly because she was never subpoenaed. The examination was adjourned, but when PM failed to appear at the rescheduled preliminary examination, the trial court dismissed the case without prejudice.

Meanwhile, proceedings related to the RO and GF cases were ongoing, and defendant eventually reached a plea agreement with the prosecution regarding those cases. On March 4, 1998, defendant was sentenced to concurrent terms of 15 to 25 years' imprisonment for three counts of first-degree CSC and one count of first-degree home invasion, MCL 750.110a(2), as enacted by 1994 PA 270. Defendant was released from prison on November 19, 2015.

In August 2016, after obtaining DNA evidence implicating defendant in the PM case, the prosecution refiled the CSC charges that had been dismissed in 1997. Defendant moved to dismiss, arguing that the prosecution's delay in refiling the charges violated his constitutional due-process rights. The trial court agreed and granted defendant's motion. The prosecu-

tion now appeals, arguing that defendant failed to establish that he was prejudiced by the delay and that the trial court therefore abused its discretion by granting defendant's motion. We agree.

"This Court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion." *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998). "A trial court may be said to have abused its discretion only when its decision falls outside the range of principled outcomes." *People v Nicholson*, 297 Mich App 191, 196; 822 NW2d 284 (2012). The underlying legal question, "whether the delay in charging defendant violated his right to due process of law," is a question of law that we review de novo. *People v Reid (On Remand)*, 292 Mich App 508, 511; 810 NW2d 391 (2011).

"A prearrest delay that causes substantial prejudice to a defendant's right to a fair trial and that was used to gain tactical advantage violates the constitutional right to due process." *People v Woolfolk*, 304 Mich App 450, 454; 848 NW2d 169 (2014). Michigan applies a balancing test to determine whether a delay violates a defendant's constitutional right to due process of law. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999). Under this balancing test, a defendant bears the initial burden of demonstrating prejudice. *Adams*, 232 Mich App at 134.

> [O]nce a defendant has shown some prejudice, the prosecution bears the burden of persuading the court that the reason for the delay is sufficient to justify whatever prejudice resulted. This approach places the burden of coming forward with evidence of prejudice on the defendant, who is most likely to have facts regarding prejudice at his disposal. The burden of persuasion rests with the state, which is most likely to have access to facts concerning the reasons for delay and which bears the responsibil-

> ity for determining when an investigation should end. [*Id.* (quotation marks and citation omitted).]

To meet the initial burden of demonstrating prejudice, the defendant must present evidence of "actual and substantial prejudice to his right to a fair trial." *Id.* (quotation marks and citation omitted). Actual prejudice cannot be shown by mere speculation; that is, "[a] defendant cannot merely speculate generally that any delay resulted in lost memories, witnesses, and evidence, even if the delay was an especially long one." *Woolfolk*, 304 Mich App at 454 (citations omitted). "Substantial prejudice is that which meaningfully impairs the defendant's ability to defend against the charge in such a manner that the outcome of the proceedings was likely affected." *People v Patton*, 285 Mich App 229, 237; 775 NW2d 610 (2009).

In this case, the court found that defendant was prejudiced by the passage of time between the dismissal of charges in 1997 and the refiling of the charges in 2016. Specifically, the trial court concluded that defendant was prejudiced by the delay because, had the charges been pursued in 1997, (1) defendant "might have had an alibi witness" and (2) the charges relating to PM could have been included in the plea agreement relating to RO and GF, whereas defendant now essentially faces consecutive sentencing "that was never contemplated or bargained for or agreed upon in his original plea." Contrary to the trial court's conclusions, speculations regarding a possible alibi and the potential for adverse sentencing consequences do not constitute actual and substantial prejudice to defendant's right to a fair trial, and therefore defendant's due-process argument must fail because he has not shown prejudice. *Adams*, 232 Mich App at 134.

In particular, the trial court first reasoned that defendant "might" have lost an alibi witness. The trial court hypothesized that, for all anyone knew, defendant "might have been on the clock at McDonald's that day . . . ." However, regardless of the passage of time, speculation as to lost witnesses or evidence is insufficient to establish prejudice. See *Woolfolk*, 304 Mich App at 454. Defendant is tasked with presenting evidence of prejudice that is actual and substantial. *Id*.; *Adams*, 232 Mich App at 134. Defendant has failed, however, to name any actual alibi witnesses, and he has failed to provide any details of a possible alibi defense. Cf. *Patton*, 285 Mich App at 237. Defendant has not shown prejudice based on the speculative possibility that he *might* have had an alibi.

In attempting to establish prejudice, on appeal defendant refers to a specific witness—PM's son—who has died and is therefore no longer available as a witness. PM's son witnessed the assault on PM, and defendant now claims prejudice because this witness is unavailable. However, defendant also admits that he has no idea what testimony the witness would have offered, and there is no indication that the loss of this testimony actually and substantially prejudiced defendant's ability to receive a fair trial. "[A] defendant does not show actual prejudice based on the death of a potential witness if he has not given an indication of what the witness's testimony would have been . . . ." *Adams*, 232 Mich App at 136 (quotation marks and citation omitted). Indeed, given that the witness was a potential prosecution witness, it would seem that if any party has been prejudiced by the passage of time, it is the prosecution that will be detrimentally affected by the loss of this witness. See *id*. at 137. In short, the death of PM's son does not establish that defendant has suffered actual and substantial prejudice.

Finally, the trial court also found that defendant was prejudiced with regard to sentencing because of the plea agreement in the RO and GF cases. The trial court theorized that defendant would have been able to include the charges relating to PM in that plea agreement and that defendant could have served his sentences concurrently, whereas now, if convicted and sentenced, defendant will effectively have received consecutive sentences. There are two flaws with the trial court's reasoning. First, while it is possible that the charges relating to PM could have been included in the plea agreement in 1997, there is nothing in the record to suggest that this possibility is anything more than speculation. That is, there is no indication that the parties intended for the plea agreement to apply to the PM case. Defendant cannot establish prejudice based on speculation regarding his plea agreement. See *Woolfolk*, 304 Mich App at 454. Second, and more importantly, defendant's attempt to show prejudice by demonstrating unfavorable sentencing ramifications is misplaced in the context of the due-process analysis before us. When considering whether a defendant was prejudiced by a delay in pursuing charges, "[w]hat must be kept in mind is that the prejudice to the defendant must impair his right to a fair trial, not merely that it has an adverse impact upon the sentence imposed upon the defendant." *People v Ervin*, 163 Mich App 518, 520; 415 NW2d 10 (1987). See also *United States v Ivy*, 678 Fed Appx 369, 374 n 3 (CA 6, 2017) (finding that the defendant cited "no authority for the proposition that a delay that may affect one's ability to serve sentences concurrently . . . implicates due process"). In other words, the question before the trial court was whether defendant's ability to defend against the charges had been meaningfully impaired by the prearrest delay, *Patton*, 285 Mich App at 237,

not whether defendant might have received a better "package" deal or served concurrent sentences had the PM case been litigated in 1997,[1] see *Ervin*, 163 Mich App at 520. Accordingly, the trial court erred by finding prejudice to defendant based on potentially negative sentencing consequences.

Overall, defendant has not shown that his ability to defend against the CSC charges was impaired by the delay, and the burden therefore did not shift to the prosecution to establish the reasonableness of the delay. See *Adams*, 232 Mich App at 137. Because defendant has not presented evidence of prejudice, his due-process claim is without merit. Accordingly, the trial court abused its discretion by granting defendant's motion to dismiss based on the delay in pursuing the charges related to PM. *Id*. at 138-139.

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

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

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[1] The trial court also suggested that defendant's original attorney, who has since died, could be considered ineffective for failing to ensure that the PM charges were included in the plea agreement; but without some indication that the prosecution was amenable to including the PM charges in the plea offer, there is no basis for concluding that defense counsel was ineffective during the plea-bargaining process, and defendant is not entitled to relief on this basis. See *People v Douglas*, 496 Mich 557, 592; 852 NW2d 587 (2014). Moreover, defendant's claim is not one for ineffective assistance; instead, he claimed a due-process violation based on the delay in pursuing charges relating to PM. As noted, the due-process inquiry focuses on a defendant's ability to defend against the charges, not his ability to obtain a plea bargain that would include concurrent sentencing. We see no basis for concluding that defendant's due-process rights were violated because his attorney failed to obtain resolution of the PM charges in 1997.

MEEMIC INSURANCE COMPANY v FORTSON

Docket No. 337728. Submitted February 7, 2018, at Grand Rapids. Decided May 29, 2018, at 9:05 a.m. Leave to appeal sought.

Meemic Insurance Company brought an action in the Berrien Circuit Court against Louise M. Fortson and Richard A. Fortson, individually and as conservator for their son, Justin Forston, alleging that Louise and Richard had fraudulently obtained payment for attendant-care services for Justin. Justin had been involved in a motor-vehicle incident and suffered extensive injuries. He was initially hospitalized but eventually returned to his parents' home, where his parents purportedly provided him with daily attendant care. Justin received benefits under his parents' no-fault policy with Meemic, and from 2009 until 2015, Louise submitted payment requests to Meemic for the attendant-care services she and her husband provided. She indicated that they provided "24/7" supervision, and Meemic routinely paid the benefits. Around 2014, Meemic initiated an investigation into Louise and Richard's supervision of Justin and discovered that they had not provided him with daily direct supervision; Justin had been periodically jailed for traffic and drug offenses and had spent time at an inpatient substance-abuse rehabilitation facility. Meemic terminated Justin's no-fault benefits and filed suit, alleging that Louise and Richard had fraudulently represented the attendant-care services they claimed to have provided. Louise and Richard filed a counterclaim, arguing that Meemic breached the insurance contract by terminating Justin's benefits and refusing to pay for attendant-care services. Both parties moved for summary disposition, and the court, John M. Donahue, J., granted summary disposition in favor of Meemic. Louise and Richard appealed.

The Court of Appeals *held*:

1. In order to establish that an individual committed fraud, the insurer must establish (1) that the individual made a material misrepresentation, (2) that the representation was false, (3) that when the individual made the representation he or she knew it was false or made it with reckless disregard as to whether it was true or false, (4) that the misrepresentation was

made with the intention that the insurer would act upon it, and (5) that the insurer acted on the misrepresentation to its detriment. In this case, Louise and Richard made a material misrepresentation because they admitted that they were aware that Justin was incarcerated and that he spent time at an inpatient drug rehabilitation facility, yet they submitted payment requests to Meemic stating that they had provided constant attendant care. The payment requests were submitted with the intention that Meemic would rely on them and remit payment to Louise and Richard for constant attendant-care services, and Meemic made those payments. Accordingly, the trial court did not err by finding that Louise and Richard had committed fraud in connection with their request for payment for attendant-care services.

2. *Bazzi v Sentinel Ins Co*, 315 Mich App 763 (2016), lv gtd 500 Mich 990 (2017), determined that the "innocent third party" rule, under which an insurer could not use fraud as a defense to avoid paying no-fault benefits if fraud in the procurement of the policy was easily ascertainable and an innocent third-party claimant was involved, was abolished by the Supreme Court's decision in *Titan Ins Co v Hyten*, 491 Mich 547 (2012). However, *Bazzi* and *Titan* addressed fraud in the procurement of an insurance policy rather than fraud arising after the policy had been issued; therefore, neither *Titan* nor *Bazzi* was dispositive in this case. There is a meaningful distinction between fraud in the procurement of a no-fault policy and fraud arising after a claim was made under a properly procured policy: when a policy is rescinded on the basis of fraud in the procurement of the policy, it is as if no valid policy ever existed, but when there is a valid policy in force, the statute controls the mandated coverages. In this case, Justin was properly considered an innocent third party because there were no allegations or evidence that Justin participated in or even benefited from his parents' fraud. When Justin submitted his claim, there was a valid policy in place; there were no allegations of fraud in the application tainting the validity of the policy. Therefore, under MCL 500.3114(1) of the no-fault act, MCL 500.3101 *et seq*., Justin was required to seek no-fault benefits from his parents' no-fault policy. The mere fact that fraud arose in connection with attendant-care-services forms submitted after Justin made his claim had no bearing as to whether there was a valid policy in effect at the time he made his claim. Accordingly, the trial court erred by finding *Bazzi* dispositive.

3. An insurer who elects to provide automobile insurance is liable to pay no-fault benefits subject to the provisions of the no-fault act. Contractual provisions in an insurance policy that conflict with statutes are invalid. MCL 500.3114(1) provides that a person sustaining an accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle must first look to his or her own no-fault policy, to his or her spouse's policy, or to a no-fault policy issued to a relative with whom he or she is domiciled. In this case, Justin's statutory right to receive benefits under the no-fault act was triggered because his parents had a validly procured no-fault policy in place at the time of the motor-vehicle incident. Accordingly, because MCL 500.3114(1) mandates coverage for a resident relative domiciled with a policyholder, the fraud-exclusion provision, as applied to Justin's claim, was invalid because it conflicted with Justin's statutory right to receive benefits under MCL 500.3114(1).

4. Even if the fraud-exclusion clause were valid, Louise and Richard's fraud was insufficient to trigger it because, at the time they committed fraud, they were no longer "insured persons" under the policy. Generally, once a contract of insurance is cancelled, neither the insured nor the insurer retains any rights or obligations pursuant to the cancelled agreement. In this case, Meemic cancelled the policy on July 29, 2010; accordingly, Louise and Richard were no longer named insureds under the policy. However, the cancellation of the policy did not have any effect on Justin's claim because his claim was made before the policy was cancelled. Automobile no-fault insurance policies are "occurrence" policies, and under an occurrence policy, coverage is provided no matter when the claim is made, subject to contractual and statutory notice and limitations of actions provisions, providing the act complained of occurred during the policy period. Additionally, Meemic's policy contained a cancellation clause stating that cancellation would not affect any claim that originated prior to the date of cancellation. In this case, the only person with a claim was Justin. He was the person who sustained an injury, and it was he who had an application for benefits submitted to Meemic on his behalf. Therefore, according to the terms of the policy, Justin's claim was covered and "locked in" as of the date of the injury, irrespective of whether the policy was cancelled at a later date. Louise and Richard did not have a claim with Meemic; instead, they were merely attendant-care providers for Justin when they committed fraud. Because the fraud was committed after the cancellation of the policy, when they were no longer

insured persons, their actions were irrelevant for purposes of triggering the fraud-exclusion clause.

Reversed and remanded.

CAMERON, J., dissenting, would have held that the trial court did not err by granting summary disposition to Meemic because there was no genuine issue of material fact and Meemic was entitled to relief. Louise and Richard submitted fraudulent claims in contravention to the policy's fraud provision, and the innocent-third-party rule should not have allowed Justin to continue receiving benefits. While the fraud did not occur in the procurement of the policy, there was no basis to apply the abolished innocent-third-party rule to the circumstances of this case. Therefore, the only question was whether the fraud provision was valid. In this case, there was no meaningful distinction between a policyholder and a resident relative for purposes of coverage; whether a policyholder or a resident relative, the policy's provisions were applicable to the no-fault claim as long as they did not conflict with the no-fault act. The policy in this case, including the fraud provision, applied to Justin's claim as a resident relative, and the fraud provision did not contravene the no-fault act because Justin's claim was not governed solely by statute. Furthermore, Meemic was entitled to void the policy under the fraud-exclusion clause because an insured person, Louise, made a material misrepresentation in a claim made under the policy. Louise and Richard were at all times named insureds under the policy on which Justin's claim was based; the fact that Meemic cancelled the policy after Justin's claim was filed did not affect the terms of the policy as it was written. For purposes of Justin's claim, Louise and Richard were still considered insureds for servicing any and all future claims based on the occurrence at issue—Justin's injuries from the accident. Accordingly, summary disposition in favor of Meemic was proper.

INSURANCE — FRAUD — INNOCENT THIRD PARTY — DEFENSES — INNOCENT-THIRD-PARTY RULE — FRAUD ARISING AFTER THE ISSUANCE OF A POLICY.

*Bazzi v Sentinel Ins Co*, 315 Mich App 763 (2016), lv gtd 500 Mich 990 (2017), determined that the "innocent third party" rule, under which an insurer could not use fraud as a defense to avoid paying no-fault benefits if fraud in the procurement of the policy was easily ascertainable and an innocent third-party claimant was involved, was abolished by the Supreme Court's decision in *Titan Ins Co v Hyten*, 491 Mich 547 (2012); *Bazzi* and *Titan* addressed fraud in the procurement of an insurance policy rather

than fraud arising after the policy had been issued; therefore, neither *Bazzi* nor *Titan* is dispositive when fraud arises after the policy has been issued.

*Kreis, Enderle, Hudgins & Borsos, PC* (by *Mark E. Kreter*, *Robb S. Krueger*, and *Stephen J. Staple*) for Meemic Insurance Company.

*Chasnis, Dogger & Grierson, PC* (by *Robert J. Chasnis*) and the *Law Office of Joseph S. Harrison PC* (by *Joseph S. Harrison*) for Louise, Richard, and Justin Fortson.

Before: MARKEY, P.J., and M. J. KELLY and CAMERON, JJ.

M. J. KELLY, J. Defendants/counterplaintiffs, Louise Fortson and Richard Fortson, individually and as conservator for their son, Justin Fortson, appeal as of right the trial court's order granting the motion of plaintiff/counterdefendant, Meemic Insurance Company, for summary disposition under MCR 2.116(C)(10) and denying the Fortsons' motion for summary disposition under MCR 2.116(I)(2). For the reasons stated in this opinion, we reverse.

## I. BASIC FACTS

This case arises out of a motor-vehicle incident that occurred in September 2009. On that day, Richard and Louise's 19-year-old son, Justin, was riding on the hood of a vehicle when the driver suddenly accelerated and turned. The motion flung Justin from the vehicle, and he struck his head. Justin suffered extensive injuries, including a fractured skull, a traumatic brain injury, and shoulder bruising. He was initially hospitalized but eventually returned to his parents' home. Accord-

ing to Louise, Justin's brain injury continued to manifest itself after he returned home.

Justin received benefits under his parents' no-fault policy with Meemic. Relevant to this appeal, Louise and Richard provided attendant care to Justin. The record reflects that from 2009 until 2015, Louise submitted payment requests to Meemic for attendant-care services. On each request, Louise simply noted "24" on each day of the calendar, indicating that she and Richard had provided Justin with constant daily supervision. Meemic routinely paid these benefits, and Meredith Valko, a claims representative employed by Meemic, testified that these payment requests were sufficient because she knew that Justin had a serious traumatic brain injury with significant residual effects requiring "24/7" supervision.

Around 2014, Meemic initiated an investigation into Louise and Richard's supervision of Justin and discovered that they had not provided him with daily direct supervision. Indeed, the investigation showed that Justin had been periodically jailed for traffic and drug offenses and had spent time at an inpatient substance-abuse rehabilitation facility. Additionally, on social media, Justin had reported spending time with his girlfriend and smoking marijuana. Based on its investigation, Meemic concluded that Louise and Richard had fraudulently represented the attendant-care services they claimed to have provided. Meemic terminated Justin's no-fault benefits and filed suit against Louise and Richard, alleging that they had fraudulently obtained payment for attendant-care services that they had not provided. Louise and Richard filed a counterclaim, arguing that Meemic breached the insurance contract by terminating Justin's benefits and refusing to pay for attendant-care services. The parties

filed cross-motions for summary disposition. Relying on this Court's decision in *Bazzi v Sentinel Ins Co*, 315 Mich App 763; 891 NW2d 13 (2016), lv gtd 500 Mich 990 (2017), the trial court granted summary disposition in Meemic's favor.

## II. SUMMARY DISPOSITION

### A. STANDARD OF REVIEW

Louise and Richard argue that the trial court erred by granting summary disposition in Meemic's favor. We review de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

### B. ANALYSIS

#### 1. FRAUD

Louise and Richard first argue that the trial court erred by finding that there was no genuine question of material fact with regard to whether they committed fraud. We disagree.

Generally, whether an insured has committed fraud is a question of fact for a jury to determine. See *Shelton v Auto-Owners Ins Co*, 318 Mich App 648, 658-660; 899 NW2d 744 (2017). However, under some circumstances, a trial court may decide as a matter of law that an individual committed fraud. See *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 425-426; 864 NW2d 609 (2014). In order to establish that an individual committed fraud, the insurer must establish (1) that the individual made a material misrepresentation, (2) that the representation was false, (3) that when the individual made the representation he or she knew it was

false or made it with reckless disregard as to whether it was true or false, (4) that the misrepresentation was made with the intention that the insurer would act upon it, and (5) that the insurer acted on the misrepresentation to its detriment. *Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012). Here, Louise and Richard admit that they were aware that Justin was incarcerated and that he spent time at an inpatient drug rehabilitation facility. Despite the fact that Louise and Richard did not provide care for Justin during those times, Louise submitted payment requests to Meemic, stating that they had provided constant attendant care to Justin. That constituted a material misrepresentation. In addition, the payment requests were submitted with the intention that Meemic would rely on them and remit payment to Louise and Richard for constant attendant-care services, despite the fact that Louise and Richard knew that they were not providing constant physical care for their son. Further, although Louise and Richard provided other services to Justin while he was incarcerated or at inpatient rehabilitation, such as paying his car loan or lease and contacting his lawyers, those general tasks are not properly compensable as attendant-care services. See *Douglas v Allstate Ins Co*, 492 Mich 241, 259-260, 262-263; 821 NW2d 472 (2012) (stating that allowable attendant-care services must be for an injured person's care, recovery, or rehabilitation); see also MCL 500.3107(1)(a). Moreover, even if they were compensable, it cannot be seriously argued that Louise and Richard provided those services to their son on a "24/7" basis, as was claimed on the payment request form. As a result, the trial court did not err by finding that Louise and Richard had committed fraud in connection with their request for payment for attendant-care services.

2. APPLICABILITY OF *BAZZI*

Louise and Richard next argue that the trial court erred by determining that Justin's argument—i.e., that Meemic could not deny him coverage on the basis of fraud committed by other individuals—was, essentially, barred by *Bazzi*. In *Bazzi*, this Court concluded that the "innocent third party rule," also known as the "easily ascertainable rule," from *State Farm Mut Auto Ins Co v Kurylowicz*, 67 Mich App 568; 242 NW2d 530 (1976), was abolished by our Supreme Court's decision in *Titan*. *Bazzi*, 315 Mich App at 767-768, 771. Under the innocent-third-party rule, an insurer could not use fraud as a defense to avoid paying no-fault benefits if (1) fraud in the procurement of the policy was easily ascertainable and (2) an innocent third-party claimant was involved. *Id*. at 771-772; see also *Titan*, 491 Mich at 563-564. Here, because there are no allegations or evidence that Justin participated in or even benefited from his parents' fraud, he is properly considered an innocent third party, which implicates the holdings in *Bazzi* and *Titan*.

Nevertheless, *Bazzi* and *Titan* addressed fraud in the *procurement* of an insurance policy, not fraud arising after the policy was issued. *Titan*, 491 Mich at 571 (stating "that an insurer is not precluded from availing itself of traditional legal and equitable remedies to avoid liability under an insurance policy on the ground of fraud in the application for insurance, even when the fraud was easily ascertainable and the claimant is a third party"); *Bazzi*, 315 Mich App at 781-782 (holding that "if an insurer is able to establish that a no-fault policy was obtained through fraud, it is entitled to declare the policy void *ab initio* and rescind it, including denying the payment of PIP benefits to innocent third parties"). Here, because the fraud in

this case was not fraud in the procurement of the policy and instead arose after the policy was issued, neither *Titan* nor *Bazzi* is dispositive.

This is because there is a meaningful distinction between fraud in the procurement of a no-fault policy and fraud arising *after* a claim was made under a properly procured policy. For instance, when a policy is rescinded on the basis of fraud in the procurement of the policy, it is as if no valid policy ever existed. As this Court explained in *Bazzi*, mandating no-fault benefits when an insurer can declare a policy void *ab initio* on the basis of fraud in the procurement would be akin to requiring the insurer to provide benefits in a case in which the automobile owner had never obtained an insurance policy in the first place. *Id*. at 774. Thus, fraud in the procurement essentially taints the entire policy and all claims submitted under it. In contrast, "if there is a valid policy in force, the statute controls the mandated coverages." *Id*. Here, when Justin submitted his claim, there *was* a valid policy in place; there were no allegations of fraud in the application tainting the validity of the policy. Therefore, under the no-fault act, Justin was required to seek no-fault benefits from his parents' no-fault policy. See MCL 500.3114(1). The mere fact that fraud arose in connection with attendant-care-services forms submitted *after* Justin made his claim simply has no bearing as to whether there was a valid policy in effect at the time he made his claim. Accordingly, we conclude that the trial court erred by finding *Bazzi* dispositive.[1]

[1] It is worth noting that the remedy sought by Meemic is to void or rescind the policy on the basis of fraud. Generally, "[i]n order to warrant recision [sic], there must be a *material* breach affecting a substantial or essential part of the contract." *Holtzlander v Brownell*, 182 Mich App 716, 721; 453 NW2d 295 (1990) (emphasis added).

3. VALIDITY OF THE FRAUD-EXCLUSION CLAUSE

We next address whether the fraud-exclusion clause—as applied to Justin's claim—is a valid contractual provision. MCL 500.3114(1) provides that a person sustaining an accidental bodily injury arising out of the ownership, operation, maintenance, or use of

> To rescind a contract is not merely to terminate it, but to abrogate and undo it from the beginning; that is, not merely to release the parties from further obligation to each other in respect to the subject of the contract, but to annul the contract and restore the parties to the relative positions which they would have occupied if no such contract had ever been made. Rescission necessarily involves a repudiation of the contract and a refusal of the moving party to be further bound by it. But this by itself would constitute no more than a breach of the contract or a refusal of performance, while the idea of rescission involves the additional and distinguishing element of a restoration of the *status quo*. [*Lash v Allstate Ins Co*, 210 Mich App 98, 102; 532 NW2d 869 (1995) (quotation marks and citation omitted).]

"[A] material misrepresentation *made in an application for no-fault insurance* entitles the insurer to rescind the policy." *Id*. at 103 (emphasis added). This is because the policy would not have been issued had the material misrepresentation not been made. *Id*. at 103-104.

Here, regardless of Louise and Richard's fraudulent attendant-care payment requests, the policy still would have been issued. Therefore, there are no grounds for *automatic* rescission of the policy on the basis of fraud arising after the policy was issued, i.e., fraud that does not affect whether the policy would have been issued in the first place. Instead, at a minimum, Meemic must establish that Louise and Richard's misrepresentation affected "a substantial or essential part of the contract." *Holtzlander*, 182 Mich App at 721. And because rescission is generally viewed as an equitable remedy, *Madugula v Taub*, 496 Mich 685, 712; 853 NW2d 75 (2014), it should not be routinely granted if it would achieve an inequitable result. We recognize that in *Bahri*, this Court held that when an insured claimant makes a fraudulent claim for replacement services, an insurer may use a fraud-exclusion clause to void the entire contract despite the fact that the fraud arose after the policy was procured. *Bahri*, 308 Mich App at 424-426. However, in this case, equity appears to lean in favor of protecting the innocent third party who was statutorily mandated to seek coverage under a validly procured policy and was, unlike the claimant in *Bahri*, wholly uninvolved in the fraud committed *after* the policy was procured.

a motor vehicle as a motor vehicle must first look to his or her own no-fault policy, to his or her spouse's policy, or to a no-fault policy issued to a relative with whom he or she is domiciled. Therefore, if Justin were not an "insured person" as defined by the policy,[2] he would be statutorily entitled to benefits under his parents' no-fault policy by virtue of the fact that he is a relative of his parents and was domiciled with them. In other words, if the policy did not define a resident relative as an "insured person," then Meemic would be required *by statute* to pay Justin benefits and would be unable to terminate his coverage because of fraud committed by a policyholder with regard to his claim. See *Shelton*, 318 Mich App at 653-654 (stating that when a claimant's no-fault benefits are governed solely by statute, an insurer cannot use a fraud-exclusion clause to bar the claimant's claim).

Under Meemic's logic, by duplicating statutory benefits in a no-fault policy, an insurer can avoid paying no-fault benefits to an injured claimant if someone other than the claimant commits fraud and triggers a fraud-exclusion clause that allows the policy to be voided. We do not agree that the statutory provisions can be so easily avoided. "An insurer who elects to provide automobile insurance is liable to pay no-fault benefits subject to the provisions of the [no-fault] act." *Lewis v Farmers Ins Exch*, 315 Mich App 202, 209; 888 NW2d 916 (2016) (quotation marks and citation omitted; brackets in original). Contractual provisions in an insurance policy that conflict with statutes are invalid. *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242, 261; 819 NW2d 68 (2012). Because MCL 500.3114(1) mandates coverage for a resident relative domiciled

[2] As explained later, Justin is an "insured person" as that term is defined in Louise and Richard's no-fault policy with Meemic.

with a policyholder, the fraud-exclusion provision, as applied to Justin's claim, is invalid because it conflicts with Justin's statutory right to receive benefits under MCL 500.3114(1). And, as explained earlier, his statutory right to receive benefits under the no-fault act was triggered because his parents had a validly procured no-fault policy in place at the time of the motor-vehicle incident. See *Bazzi*, 315 Mich App at 774.

4. CONTRACT INTERPRETATION

Finally, even if the fraud-exclusion clause were valid, Louise and Richard's fraud is insufficient to trigger it because, at the time they committed fraud, they were no longer "insured persons" under the policy. The fraud-exclusion clause in the no-fault policy provides:

> This entire Policy is void if any **insured person** has intentionally concealed or misrepresented any material fact or circumstance relating to:
>
> A. This insurance;
>
> B. The Application for it;
>
> C. Or any claim made under it.

The policy defines the term "insured person" as a named insured or the "resident relative" of a named insured. Because Louise and Richard were named insureds under the policy, they are "insured persons" as defined by the policy *so long as that policy remains in effect*.

The policy, however, was cancelled by Meemic. Specifically, on June 14, 2010, Meemic sent a notice of cancellation to Louise and Richard. The notice stated that as of July 29, 2010, at 12:01 a.m., the policy would no longer be in effect. Generally, once a contract of insurance is cancelled, neither the insured nor the

insurer retains any rights or obligations pursuant to the cancelled agreement. See 2 Couch, Insurance, 3d, § 30:22, pp 30-49 through 30-50 ("Cancellation of a policy at a time and in the manner specified therein cuts off all rights of the insured and bars recovery on the policy for any subsequent accident. . . . By definition, there can be no breach of a contract with respect to transactions arising after the contract of insurance has been effectively cancelled."). See also *Titan*, 491 Mich at 567 ("When a policy is cancelled, it is terminated as of the cancellation date and is effective up to such date[.]") (quotation marks and citation omitted; brackets in original). Accordingly, once the policy was cancelled on July 29, 2010, Louise and Richard were no longer named insureds under the policy, which means that they were no longer "insured persons" as defined in the policy. Further—and this is key—because the fraud was committed *after* the cancellation of the policy, when they were no longer insured persons, their actions were irrelevant for purposes of triggering the fraud-exclusion clause.

The cancellation of the policy did not have any effect on Justin's claim because his claim was made before the policy was cancelled. Automobile no-fault insurance policies are "occurrence" policies as opposed to "claims made" or "discovery" policies. *Stine v Continental Cas Co*, 419 Mich 89, 98; 349 NW2d 127 (1984). Under an occurrence policy, coverage "is provided no matter when the claim is made, subject, of course, to contractual and statutory notice and limitations of actions provisions, providing the act complained of occurred during the policy period." *Id*. Moreover, the policy in this case contains a cancellation clause that expressly limits the effect of cancellation. The policy states, "Cancellation will not affect any *claim* that originated prior to the date of cancellation." (Emphasis

added.) There are no other limitations on the effect of cancellation on the rights and obligations of the parties.

When interpreting a contract, such as an insurance policy, the primary goal "is to honor the intent of the parties." *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 444; 761 NW2d 846 (2008). When a contract is unambiguous, it must be enforced according to its terms, and this Court must resist "the temptation to rewrite the plain and unambiguous meaning of the policy under the guise of interpretation." *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 207; 476 NW2d 392 (1991). Because, by its unambiguous terms, only a claim predating the cancellation of a policy survives the cancellation of the policy, we must determine what constitutes a claim. Because the policy does not define "claim," we must give it its commonly used meaning. See *Group Ins Co of Mich v Czopek*, 440 Mich 590, 596; 489 NW2d 444 (1992). According to *Black's Law Dictionary* (9th ed), a "claim" is "[t]he assertion of an existing right[.]" A "claimant" is the person who makes a claim, i.e., "[o]ne who asserts a right or demand, esp. formally[.]" *Id*.

Under the heading of "What Must Be Done in Case of Car Accident or Loss," the Meemic policy mandates that:

> In the event of an accident, occurrence or **loss**, **you** (or someone acting for **you**) must inform **us** or **our** authorized agent promptly. The time, place and other facts must be given, to include the names and addresses of all involved persons and witnesses. [Capitalization altered.]

It then sets forth a list of "other duties" that "[a] person claiming any coverage under this Policy must" perform, which includes cooperating with Meemic, promptly sending copies of notice or legal papers

received in connection with the accident, providing written proofs of loss upon request, and submitting to examinations under oath for matters related to the claim. The policy provides a list of additional requirements for a person claiming personal injury protection insurance, underinsured motorist coverage, uninsured motorist coverage, or "car damage insurance" coverage. The common element is that *the person seeking coverage* is required to take actions or provide assistance to Meemic. There is no language mandating that *other individuals covered by the policy* have any rights or obligations with respect to that claim. The only individual who has obligations with respect to making a claim is the insured person who is claiming benefits under the policy, i.e., the claimant. Given the complete absence of language extending the obligations on the claim to all insured persons under the policy, there is no basis to extend Louise and Richard's status as insured persons beyond the date the policy was cancelled. "Just as courts are not to rewrite the express language of statutes, it has long been the law in this state that courts are not to rewrite the express terms of contracts." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 199-200; 747 NW2d 811 (2008).

Here, the only person with "a claim" is Justin. He is the person who sustained an injury arising out of the ownership, operation, maintenance, or use of a motor vehicle, MCL 500.3105(1), and it is he who had an application for benefits submitted to Meemic on his behalf.[3] Therefore, as set forth in the policy, his claim

[3] An application-for-benefits form is required to be completed by a claimant. In this case, a review of Justin's application is consistent with the language in the policy. The application-for-benefits form submitted to Meemic states that the applicant is Justin, and no other applicant is listed. It provides Justin's name and contact information in the blanks left for information about the "applicant." It provides details about when,

continues to be covered and was "locked in" as of the date of the injury, irrespective of whether the policy was cancelled at a later date. Louise and Richard, however, did not sustain an injury arising out of a motor-vehicle incident. They do not have a "claim" with Meemic, nor do they have any obligations with respect to Justin's claim. Instead, Louise and Richard were merely attendant-care providers for Justin when they committed fraud.[4]

Meemic asserts that it would be illogical to allow Louise and Richard to escape their obligations under the policy—in this case an obligation not to commit fraud—while simultaneously mandating that Meemic continue to provide benefits under the policy. We disagree. If Louise and Richard had made a claim under the policy before it was terminated, then their obligations under the policy would continue *with respect to their claim*, and Meemic's obligations with respect to that claim would also continue. Because Louise and Richard's obligations would continue under that scenario, if they committed fraud, then the policy's fraud-exclusion clause would apply. See *Bahri*, 308 Mich App at 424-426 (stating that when an insured claimant commits fraud in connection with his or her claim, the insurer may use a fraud-exclusion clause to deny benefits under the policy). Here, however, because we

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where, and how Justin was injured, as well as the type of injuries he sustained. Further, the signature line requests the signature of the "applicant or parent/guardian." Absent from the application is any language even hinting that other individuals insured under the policy but not making a claim have any rights or obligations with respect to the claim.

[4] Being a named insured is not a prerequisite to providing attendant-care services under a no-fault policy. Rather, any person approved by the insurance company can provide attendant-care services. The particular responsibilities of the provider are typically based on the need of the injured person and the skill and training of the provider.

are obligated to enforce the terms of the contract as they are stated in the contract, we conclude that at the time they committed fraud, Louise and Richard were not insured persons under the policy. Consequently, their fraud did not trigger the fraud-exclusion clause, so Meemic cannot use it to void the policy and deny Justin's claim.[5]

## III. CONCLUSION

In sum, we reverse the trial court's order granting summary disposition in favor of Meemic. We do not read *Bazzi* as dispositive or applicable because there was no fraud in the procurement of the Fortsons' no-fault policy with Meemic. Further, the fraud-exclusion clause in the policy is invalid to the extent that it conflicts with MCL 500.3114(1), which entitled Justin to claim statutory benefits under his parents' properly procured no-fault policy. Finally, under the plain language of the policy, Louise and Richard were not insured persons under the policy when they committed fraud, so the fraud-exclusion clause is inapplicable and cannot be used to void the policy and deny Justin's claim.

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

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

CAMERON, J. (*dissenting*). The majority resurrects, albeit in a new form, the abolished innocent-third-

[5] This is not to say that a defrauded insurer does not have a remedy against the person who committed the fraud. See *Titan*, 491 Mich at 555 (stating the elements required to establish fraud and noting that if someone commits fraud, the defrauded party may be entitled to legal or equitable remedies). See also *Shelton*, 318 Mich App at 655 (noting remedies an insurer may use in the event that someone makes a fraudulent claim).

party rule.[1] It also concludes that an insurance policy's fraud provision contravenes the no-fault act when applied to resident relatives. Finally, it concludes that, after cancellation, the policy's provisions will no longer apply to the policyholder who committed the fraud when the claimant is a third party. Because I disagree with all three holdings, I respectfully dissent.

Defendants, Louise Fortson and Richard Fortson, submitted false requests for attendant-care benefits to plaintiff, Meemic Insurance Company, from 2009 to 2015. Defendants provided care for their son, Justin Fortson, who was injured while riding on the hood of a car. Because Justin was a "resident relative" under defendants' policy, plaintiff provided personal injury protection (PIP) benefits under MCL 500.3114(1). In 2014, plaintiff discovered that defendants were fraudulently claiming 24/7 attendant-care services even when Justin was incarcerated, in drug rehabilitation programs, or staying with his girlfriend. Defendants collected over $100,000 in payments over six years.

## I. INNOCENT-THIRD-PARTY RULE

The majority first concludes that Justin, as an innocent third party, can continue to collect PIP benefits because there was no fraud in the procurement of the policy. While I agree that the fraud did not occur in the procurement of the policy, there is no basis to apply the now-abolished innocent-third-party rule to the circumstances in this case.

As the majority correctly states, the innocent-third-party rule prevented insurers from voiding a policy

[1] See *Bazzi v Sentinel Ins Co*, 315 Mich App 763; 891 NW2d 13 (2016), lv gtd 500 Mich 990 (2017).

using fraud as a defense to paying no-fault benefits, but the rule only applied when (1) there was fraud in the procurement of the policy that was easily ascertainable and (2) an innocent third-party claimant was involved. *Bazzi v Sentinel Ins Co*, 315 Mich App 763, 771-772; 891 NW2d 13 (2016), lv gtd 500 Mich 990 (2017). Neither the majority nor defendants have provided support for the proposition that the innocent-third-party rule may be applied in cases that *do not* involve fraud in the procurement. Yet, the majority concludes that "because the fraud in this case was not fraud in the procurement of the policy and instead arose after the policy was issued, neither *Titan* nor *Bazzi* is dispositive." We concluded that our Supreme Court abolished the innocent-third-party rule, and there is no indication that any application of this rule was left open for future use. *Id*. at 767-768, 781-782.

Furthermore, we should not adopt the rule in a new form in order to allow a third-party claimant to collect PIP benefits when an insurer is entitled to void the policy for fraudulent conduct on the part of the policyholder. This Court clearly held in *Bazzi* that "if an insurer is entitled to rescind a no-fault insurance policy because of fraud, it is not obligated to pay any benefits under that policy, *including PIP benefits to a third party innocent of the fraud*." *Id*. at 770 (emphasis added). The majority claims that there is a "meaningful distinction" between fraud in the procurement of an insurance policy and fraud arising after a claim was made under a properly procured policy. However, in both instances, the insurer is allowed to void the policy, and under *Bazzi*, "if an insurer is entitled to rescind a no-fault insurance policy because of fraud," an innocent third party cannot collect PIP benefits under that policy. *Id*. As discussed in more detail later in this opinion, plaintiff is entitled to rescind, i.e., void, the

no-fault insurance policy, and Justin, as an innocent third party, should not be allowed to continue to collect PIP benefits. The fact that the fraud here occurred in subsequent claims for services—and not in the procurement of the policy—is of no consequence to the outcome of this case. The only question here is whether the fraud provision at issue was valid and should be applied to the circumstances of this case.

## II. FRAUD PROVISION

### A. VALIDITY

The majority's application of the innocent-third-party rule is premised on the conclusion that the fraud provision does not void the insurance policy governing Justin's claim. To reach this conclusion, the majority determines that the fraud provision contravenes MCL 500.3114(1) and, therefore, cannot apply to Justin's claim. I disagree.

According to the majority, "[b]ecause MCL 500.3114(1) mandates coverage for a resident relative domiciled with a policyholder, the fraud-exclusion provision, as applied to Justin's claim, is invalid because it conflicts with Justin's statutory right to receive benefits under MCL 500.3114(1)." This reasoning is flawed, and the majority's holding carves out an unprecedented exception to the general rule that a fraud provision in an insurance policy is valid. First, in *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 424-425; 864 NW2d 609 (2014), this Court concluded that a fraud provision in an insurance policy applies to a policyholder's claim and can preclude all PIP benefits if the claimant submits fraudulent claims for replacement services. The majority concludes that *Bahri* is not binding in this case because the fraud provision at issue applies to a resi-

dent relative, not to the named insured under the policy, and a resident relative's entitlement to PIP benefits is governed by statute. However, there is no meaningful distinction between a policyholder and a resident relative for purposes of coverage. MCL 500.3114(1) states, in pertinent part, that "a personal protection insurance policy . . . applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident." Whether a policyholder or a resident relative, the policy's provisions are applicable to the no-fault claim as long as they do not conflict with the no-fault act. See *Auto-Owners Ins Co v Martin*, 284 Mich App 427, 434; 773 NW2d 29 (2009) ("Insurance policy provisions that conflict with statutes are invalid . . . ."). In this case, the policy, including the fraud provision, applies to Justin's claim as a resident relative, and that fraud provision does not contravene the no-fault act. See *Bahri*, 308 Mich App at 424-425.[2] Contrary to what the majority claims, the policy is not "duplicating statutory benefits." Instead, it is providing the terms of coverage, which are subject to the no-fault act. *Lewis v Farmers Inc Exch*, 315 Mich App 202, 209; 888 NW2d 916 (2016).

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[2] The majority holds that the fraud provision conflicts with the no-fault act, but there is no provision in the no-fault act that prevents the use of a fraud exclusion in a policy. Instead, the majority concludes that because a resident relative is entitled to PIP benefits by operation of the statute, no policy provision can prevent the resident relative, or for that matter anyone entitled to claim benefits under another's policy, from his or her "statutory right to receive benefits under MCL 500.3114(1)." Of course, insurers are allowed to include various exclusions to manage their risk when insuring drivers so long as those exclusions do not conflict with the no-fault act. "It is a bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent . . . a contract in violation of law or public policy." *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242, 256; 819 NW2d 68 (2012) (quotation marks and citation omitted).

The majority relies on *Shelton v Auto-Owners Ins Co*, 318 Mich App 648, 653-654; 899 NW2d 744 (2017), for the proposition that a resident relative's claim cannot be subject to a fraud provision because the claim is governed solely by statute; however, the majority misconstrues the holding in that case. In *Shelton*, we concluded that the plaintiff "was not a party to, nor an insured under, the policy; she was injured while a passenger, and because neither she nor her spouse or resident relative had a no-fault policy, [the] defendant was required to pay her benefits pursuant to statute, not pursuant to a contractual agreement." *Id*. at 652. Thus, the plaintiff in *Shelton* was entitled to benefits by operation of the statute only and was not bound by any fraud provision in the other driver's policy because she was not the policyholder, a spouse, or a resident relative. *Id*. at 652-654. Therefore, the plaintiff's claim in *Shelton* was not subject to any fraud provision, and because the no-fault act does not have its own fraud exclusion, the defendant could not avoid paying any remaining PIP benefits.

Unlike the plaintiff in *Shelton*, Justin is an insured under the policy because he is a resident relative. There is no question that the relevant insurance policy applies to his claim for PIP benefits under MCL 500.3114(1). Therefore, Justin's claim is not governed "solely by statute," and just as the fraud provision was valid in *Bahri*, the fraud provision in defendants' policy should also be deemed valid.

### B. APPLICABILITY OF THE FRAUD PROVISION

Finally, the majority concludes that the fraud provision, even if it is valid, would not apply to Justin's claim and cannot void the insurance policy. I disagree.

Insurance policies are agreements between parties, and "[t]he primary goal in the interpretation of an insurance policy is to honor the intent of the parties." *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 444; 761 NW2d 846 (2008). Unless an ambiguity is present within the policy, an insurance policy must be enforced in accordance with its terms. *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 206-207; 476 NW2d 392 (1991). The terms of an insurance policy are interpreted in accordance with their common meanings. *Group Ins Co of Mich v Czopek*, 440 Mich 590, 596; 489 NW2d 444 (1992). If an ambiguity is present, it must be construed in favor of the insured. *Auto Club Ins Ass'n v DeLaGarza*, 433 Mich 208, 214-215; 444 NW2d 803 (1989). Further, "when a provision in an insurance policy is mandated by statute, the rights and limitations of the coverage are governed by that statute." *Titan Ins Co v Hyten*, 491 Mich 547, 554; 817 NW2d 562 (2012). However, if a provision is not mandated by statute, the rights and limitations of the coverage are interpreted without reference to the statute. *Id*.

This case concerns the fraudulent acquisition of payments for allowable expenses. The insurance policy issued to defendants contained the following fraud provision:

> **22. CONCEALMENT OR FRAUD**
>
> This entire Policy is void if any **insured person**[3] has intentionally concealed or misrepresented any material fact or circumstance relating to:

[3] The policy defines an "insured person," in part, as "**You**, if an individual[.]" The policy further defines "you" as "any person or organization listed as a **Named Insured** on the Declarations Page" as an assigned driver or another named insured. Louise and Richard were the named insureds on the declarations page.

A. This insurance;

B. The Application for it;

C. Or any claim made under it.

To prove fraud and void a policy, the insurer must demonstrate that

> (1) the misrepresentation was material, (2) that it was false, (3) that the insured knew that it was false at the time it was made or that it was made recklessly, without any knowledge of its truth, and (4) that the insured made the material misrepresentation with the intention that the insurer would act upon it. [*Bahri*, 308 Mich App at 424-425 (quotation marks and citation omitted).]

In *Bahri*, we concluded that clear evidence of fraud would operate to void a policy under that policy's fraud provision. *Id*. at 425.

I agree with the majority that the evidence clearly demonstrates that defendants defrauded plaintiff. However, according to the plain terms of the policy, plaintiff was entitled to void the policy if an insured person made a material misrepresentation in a claim made under the policy. See *Upjohn Co*, 438 Mich at 207 (stating that an insurance policy must be enforced in accordance with its terms). Louise was a named insured on the policy, and her fraudulent requests for attendant-care benefits constituted a material misrepresentation in a claim made under the policy. Moreover, defendants have not provided statutory authority that would specifically prohibit plaintiff from exercising its rights under this clause of the policy. See *Titan*, 491 Mich App at 554. There was no genuine issue of material fact precluding the trial court from granting summary disposition to plaintiff.

Finally, the majority concludes that defendants were only attendant-care providers for Justin and were no

longer the named insureds because of plaintiff's cancellation of the insurance policy in 2010. The majority maintains that "there is no basis to extend [defendants'] status as insured persons beyond the date the policy was cancelled." I disagree.

Plaintiff provided Justin coverage by virtue of his status as a "resident relative" of the named insureds, i.e., defendants. Justin's claim is subject to the terms of the policy even if it was subsequently cancelled, and defendants remain the named insureds under the policy. The policy at issue is an "occurrence" policy, which provides coverage "no matter when the claim is made, subject, of course, to contractual and statutory notice and limitations of actions provisions, providing the act complained of occurred during the policy period." *Stine v Continental Cas Co*, 419 Mich 89, 98; 349 NW2d 127 (1984). One contractual provision under the policy provides a consequence for fraudulent conduct. That provision clearly states that the "entire Policy is void if any **insured person** has intentionally concealed or misrepresented any material fact or circumstance relating to . . . any claim made under it." An "insured person" includes the "**Named Insured** on the Declarations Page." Defendants have been at all times named insureds under the policy on which Justin's claim is based. This makes sense because Justin's claim is governed by the named insureds' policy. The fact that plaintiff cancelled the policy *after* Justin's claim was filed does not affect the terms of the policy as it was written. Defendants are still named insureds on the declarations page of that policy, and it would be illogical to treat the policy, for purposes of Justin's claim, as not having any named insured simply because plaintiff cancelled the policy after Justin filed his claim. Moreover, the fraud provision at issue states that *any* insured person—rather than *the* insured

person—who commits fraud will void the entire policy. For purposes of Justin's claim, defendants were still considered insureds for servicing any and all future claims based on the occurrence at issue—Justin's injuries from the accident.

As a final point, the majority relies on the language of the cancellation clause, which states, "Cancellation will not affect any claim that originated prior to the date of cancellation." The claims for attendant-care benefits—even if sought after the cancellation of the contract—still originate from the initial claim for no-fault benefits. Defendants cannot avoid the consequences of committing fraud simply because the policy is no longer in effect. Any such outcome contravenes the purpose of an occurrence-based policy.

## III. CONCLUSION

I would conclude that the trial court did not err by granting summary disposition to plaintiff because there is no genuine issue of material fact and plaintiff is entitled to relief. Defendants submitted fraudulent claims in contravention to the policy's fraud provision, and the innocent-third-party rule should not allow Justin to continue collecting PIP benefits.

*In re* GERSTLER GUARDIANSHIP/CONSERVATORSHIP

Docket No. 338935. Submitted April 11, 2018, at Grand Rapids. Decided June 5, 2018, at 9:00 a.m.

Janice Rowland petitioned the Allegan County Probate Court to be appointed as conservator for and guardian of her brother, Harold Gerstler (Harold), who had been diagnosed with Alzheimer's disease in 2016 and suffered from dementia. Rowland had brought Harold to Michigan from his home in California shortly before his wife died in October 2016. One week after his wife's death, Harold signed a power of attorney in Rowland's favor, which enabled Rowland to control Harold's finances and estate. Three years before his Alzheimer's diagnosis, Harold had given durable powers of attorney to his only surviving child, Angelee Gerstler, who lived in Texas. On November 4, 2016, Rowland filed in California for a restraining order against Angelee, alleging that Angelee was financially abusing Harold and attempting to coerce him to move to Texas, among other allegations relating to Angelee's unemployment, drug use, and fitness as a parent. A subsequent investigation revealed that Rowland's allegations were unfounded; however, by that time, a hearing had already been held in the Allegan County Probate Court on the instant petitions, and the unsubstantiated allegations were related to the court by Kenneth Prins, Harold's appointed guardian ad litem. Angelee did not receive notice of the hearing because Rowland had listed an incorrect address for Angelee on her petitions—specifically, that of an industrial facility—despite having listed Angelee's correct address on her petition for a restraining order. After an emergency hearing on December 9, 2016, the court, Michael L. Buck, J., appointed Rowland as Harold's temporary guardian but opted for a temporary public conservator, Kimberly Milbocker, and appointed Jeremy Baier to serve as Harold's attorney. After a December 16, 2016 hearing, the court reaffirmed Harold's need for a guardian and a conservator and opined that an independent person should manage Harold's finances. In light of the circumstances surrounding Harold's grant of powers of attorney to Rowland and the fact that he had dementia at that time, the court suspended them. Because Rowland and Angelee could not work together, the trial court appointed Milbocker

as Harold's guardian and conservator. In April 2017, Milbocker filed a petition to modify Harold's guardianship and conservatorship by permitting Milbocker's resignation, after which Angelee filed her own petitions for appointment as Harold's guardian and conservator, which challenged the evidence introduced through Prins at the earlier hearings and accused Rowland of impropriety and breaches of fiduciary duties. After a hearing, the probate court opined that Angelee had failed to identify any problems with having a public guardian and determined that the best arrangement for Harold was to maintain an independent public guardian and conservator. The court appointed Tammy Dykstra as successor guardian and conservator on Milbocker's recommendation. The probate court denied Angelee's motion for reconsideration, and she appealed.

The Court of Appeals *held*:

1. The probate court abused its discretion by appointing Dykstra as Harold's successor guardian and conservator because the court failed to make any factual findings relevant to the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., which is the statutory framework that governs this case, and otherwise neglected to apply the law governing guardianship and conservatorship appointments. MCL 700.5106(2) provides that, before appointing a professional guardian or a professional conservator for an adult, a probate court must find that the appointment of a professional fiduciary is in the incapacitated person's best interests and that there is no other person who is competent, suitable, and willing to serve in that fiduciary capacity in accordance with MCL 700.5313 or MCL 700.5409. MCL 700.5313(4) similarly allows appointment of a professional guardian only if none of the persons listed in MCL 700.5313(2) or (3) are suitable or willing to serve. With respect to the appointment of a conservator, MCL 700.5409(2) likewise allows for departure from the statutory order of priority in the best interests of the protected individual, and MCL 700.5409(1)(h) allows appointment of any person that is suitable and willing to serve if none of the persons listed in MCL 700.5409(1)(a) through (g) are suitable and willing to serve. A suitable guardian is one who is qualified and able to provide for the ward's care, custody, and control. Angelee claimed priority as Harold's sole surviving adult child, and there was no dispute that Angelee held the highest position of priority or preference for appointment as Harold's guardian and conservator under the relevant statutory provisions. In order to appoint a professional fiduciary such as Dykstra, the trial court was required to find by a preponderance of the evidence that the appointment of such a professional served Harold's best interests and that no other

person was competent, suitable, and willing to serve in that fiduciary capacity in accordance with the governing statutory provisions. When Milbocker resigned as Harold's guardian and conservator, Angelee petitioned to be appointed to fill those roles. At that juncture, the probate court was required to reconsult the statutory framework before appointing another public administrator. The court never articulated any findings regarding Angelee's competence and suitability to serve. Absent those findings, the court erred by appointing Dykstra.

2. On remand, the probate court was required to reconsider the appointment of a new guardian and conservator in conformity with EPIC. Specifically, the court was required make specific findings of fact regarding Angelee's competence, suitability, and willingness to serve in those capacities. Relevant facts that should enter into the court's analysis included Angelee's history of satisfactory care for her father and that, unlike Rowland, Angelee does not charge her father for rent or any of his living expenses. Should Rowland provide evidence in the remand proceedings, the court was directed to weigh her credibility carefully in light of the incorrect information she provided in her initial petition regarding Angelee's address and telephone number and her conduct in obtaining Harold's power of attorney despite her awareness that he was incompetent to give it. Given the determination that further proceedings were required, it was unnecessary to address Angelee's remaining issues on appeal.

Guardianship and conservatorship orders vacated; case remanded for further proceedings.

GUARDIANS AND WARDS — ESTATES AND PROTECTED INDIVIDUALS CODE — APPOINTMENTS OF PROFESSIONAL GUARDIANS AND CONSERVATORS — DEPARTURES FROM STATUTORY PRIORITIES — STANDARD OF PROOF.

In order to appoint a professional guardian or professional conservator, a probate court must find by a preponderance of the evidence that the appointment of such a professional is in the incapacitated person's best interests and that no other person in priority under the applicable statutes for appointment of guardians and conservators is competent, suitable, and willing to serve in that fiduciary capacity (MCL 700.5106(2); MCL 700.5313; MCL 700.5409).

*Goeman Law Firm PLLC* (by *Daniel J. Goeman*) for appellant.

Before: GLEICHER, P.J., and M. J. KELLY and CAMERON, JJ.

GLEICHER, P.J. The issue presented is whether the probate court erred by appointing a public guardian and conservator for Harold Gerstler, bypassing Gerstler's daughter, Angelee Gerstler. The Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., establishes an order of priority that must be followed when a probate court selects a guardian and conservator for a protected person. MCL 700.5313; MCL 700.5409. Angelee was at the top of the list, and no evidence suggests that she was incompetent to serve or otherwise unsuitable for the position. The probate court failed to make any factual findings in this regard, however, and refused to apply the statutory priority framework. We vacate the guardianship and conservatorship orders and remand for further proceedings consistent with this opinion.

I

Harold Gerstler is 75 years old and suffers from dementia. He and his wife, Penni, lived for many years in Texas while Harold worked as a mechanical engineer for a steel company. He and Penni retired to California. Angelee Gerstler is Harold's adult daughter and only surviving child. Angelee lives in a home in Texas that Harold and Penni helped her purchase. There is no dispute about Harold's current need for a guardian and conservator.

Janice Rowland is Harold's sister and a resident of Allegan County, Michigan. Before the events giving rise to this case, Harold had no ties to Michigan other than the presence of Rowland and another sister.

In May 2013, Harold and Penni signed California "statutory durable powers of attorney" granting Angelee the power to carry out real estate transactions on their behalf. Two years later, Harold signed another

California statutory durable power of attorney empowering Angelee to engage in his real estate transactions and "banking and other financial institution transactions."

In early 2016, a neurologist determined that Harold suffered from Alzheimer's disease. Penni died that same year, on October 4, 2016.

Shortly before Penni's death, Rowland brought Harold to Michigan. The circumstances surrounding this trip are unclear. On October 11, 2016, one week after Penni died, Rowland persuaded Harold to sign a power of attorney in Rowland's favor. That document enabled Rowland to control Harold's finances and estate. A short time later, Rowland sent Angelee this text message:

> Angie, this is your Aunt Janice' [sic]. As you may know by now, I have durable and medical power of attorney for your dad's money and estate. I want you to be comfortable with this, knowing that this is not for my benefit. This is for your dad's care. The money transfer from Texas to his Raymond James account here will be completed by the end of today. I need to put you down as beneficiary and therefore I need your Social Security number. *I have your phone number and address already.* I have a meeting with the Financial people tomorrow and would like to finish the paperwork. Please give me a call . . . . [Emphasis added.]

Apparently, Angelee balked at these demands.

On November 7, 2016, Rowland filed in California a "Request for Elder or Dependent Adult Abuse Restraining Order[]," asserting that Angelee was engaged in "financial abuse," "talked [Harold] into giving her money," and attempted to "coerce" Harold to move to Texas. For good measure, Rowland alleged in an attachment that Angelee "has 5 children (4 are illegitimate) by different fathers"; that one was "give[n] to the

father," a second "given up for adoption," and another "taken" by child services because of Angelee's "drug use"; and that Angelee "is currently unemployed by choice." There is no proof of any of these allegations in the record, which includes multiple pages of California social services reports and several guardian ad litem reports authored in Michigan. We recount them only because Rowland's troubling accusations help explain the decisions initially made by the probate court.[1]

Rowland's request for a California restraining order is notable for two additional reasons. First, it fails to mention that Harold had twice granted Angelee powers of attorney *before* Harold's dementia diagnosis, specifically authorizing Angelee to make financial and real estate transfers on his behalf. Second, the form Rowland filled out in support of her request for a restraining order includes Angelee's correct address on Rolling Forest Lane in Hockley, Texas.

Predictably and appropriately, California launched an investigation into Rowland's charges. Ultimately, the allegations were found "unsubstantiated," but that determination came long after the Allegan Probate Court's wheels had firmly turned in Rowland's direction.

On November 22, 2016, Rowland filed a petition in the Allegan Probate Court, seeking appointment as

[1] While we understand that a court hearing Rowland's unproven charges about Angelee may have harbored justifiable concerns about Angelee's suitability to serve as Harold's guardian or conservator, we are far less sanguine about the performance of Kenneth Prins, who was appointed by the probate court as Harold's guardian ad litem. As we discuss later in this opinion, Prins recounted Rowland's allegations to the court without bothering to verify them, poisoning the probate waters. As a result, Angelee entered the litigation at a significant and undeserved disadvantage. In our view, Prins acted as Rowland's advocate rather than Harold's.

Harold's guardian. The petition identified Angelee as Harold's daughter, but listed her address as "17600 Badtke Road" in Hockley, Texas, and her telephone number as "unknown." Angelee did not receive this petition, as the address Rowland identified belongs to an industrial facility.

Rowland averred that the emergency appointment of a temporary guardian was necessary so that Harold's investments could be transferred to an Edward D. Jones account in Douglas, Michigan. She announced her intention to sell Harold's California property under the power of attorney he had granted her, but acknowledged that Edward D. Jones's legal department questioned Harold's mental capacity and required a guardianship before effectuating any transfers. Rowland's petition for conservatorship rehashed the same information and misinformation.

The probate court appointed Kenneth Prins as Harold's guardian ad litem and conducted an emergency hearing on December 9, 2016. Rowland, Prins, and Michael McClellan, a representative of the Michigan Department of Health and Human Services, attended the hearing.

Prins testified that according to Rowland, Angelee persuaded Harold to give her at least $73,000 in addition to monthly checks of approximately $1,500. Harold had an estate worth $660,000, Rowland advised, consisting of a Texas Wells Fargo account and a California home. Prins relayed the "concern" of "family members" that Angelee "is going to try to get this money and take custody of the dad and take conservatorship and take the money and then basically, run." Relying solely on information provided by Rowland, Prins testified that Angelee "has had a very difficult life" and that "[a]ll five [of her] children were taken

away from her through adoption or Child Protective Services." Prins reiterated Rowland's claim that Angelee "does have a drug problem, a prescription drug problem, in the past, so that's why we [are] here today." After expressing that Angelee is "a little bit untrustworthy from what I hear," Prins told the court that Rowland took "very good care" of Harold.

Prins added that he had talked to Harold, who "wouldn't mind living" in Michigan but preferred warm weather. Harold told Prins that "if I do go to Texas . . . my daughter says she wants $93,000 to pay off the house, and she can have it . . . ." According to Prins, Harold was "just not thinking straight[.]" McClellan advised that his counterparts in California were still investigating Rowland's allegations. He and Prins recommended the appointment of a temporary guardian.

Rowland explained that Harold had lived and worked in Texas, then retired to California with his wife. She described that he developed dementia symptoms three years previously and currently was unable to recognize and understand common, everyday things. Rowland went to California and decided "to take charge" after Penni died. She obtained Harold's power of attorney and arranged with an Edward D. Jones agent to bring Harold's money from Texas to Michigan.

The probate court appointed Rowland as Harold's temporary guardian but opted for a public conservator, Kimberly Milbocker, "until we get this sorted out." The court appointed Jeremy Baier to serve as Harold's attorney.

Prins filed a guardian ad litem report three days later. For the most part, his report recapitulated the information he provided at the emergency hearing. He added that he had since spoken with Angelee and learned her correct phone number and address.

Angelee told him that her father bought the house in which she lived in Texas, the home was ready for Harold to live in, and that she wanted to be her father's guardian and conservator. Nevertheless, Prins recommended that the trial court appoint Rowland as Harold's guardian and conservator.

At a December 16, 2016 hearing, Prins advised that both Rowland and Angelee desired appointment as Harold's guardian and conservator. He verified that Rowland went to California and brought Harold back to her home in Fennville, Michigan, where Harold then resided, and that Angelee had a place for him to live in Texas. Harold told Prins that he wanted to give Angelee $99,000 to pay off the debt on the Texas home and that he disliked winter weather and wanted to live in Texas during the winter and with Rowland during the summer. Prins testified that he knew that Rowland would provide Harold excellent care. After admitting that he "didn't know Angie very well," Prins recommended that Rowland serve as Harold's guardian and conservator.

Baier, Harold's attorney, testified that Harold would "much rather be in Texas," as he felt "more comfortable there . . . ." He recommended that Angelee serve as Harold's guardian, but was "not fully convinced" that she should also be his conservator. "[I]t may be in [Harold's] better interests," Baier suggested, "to have a public conservator."

McClellan told the court that he had communicated with California Adult Protective Services (APS), which questioned how Harold came to Michigan and whether he did so by his own choosing. McClellan also interviewed Harold, who indicated that he planned to go with Angelee to Texas. However, McClellan claimed, APS substantiated that Angelee had financially ex-

ploited Harold and that Harold had given Angelee checks and large sums of money. McClellan expressed concern regarding appointing Angelee as the conservator, but he had no opinion regarding the guardianship appointment.

Milbocker suggested that the money transferred to Angelee might be considered during a "look-back period" if Harold ever needed long-term care benefits, and she speculated that the residence in Texas might be construed as a second home. She recommended that the conservatorship be awarded to someone other than Angelee.

Rowland urged the court to appoint her as both Harold's guardian and conservator. She claimed that she brought Harold to Michigan because she needed to secure his money in an Edward D. Jones investment account. Harold executed the powers of attorney only three or four days after his wife died, Rowland admitted. Rowland maintained that she did not trust Angelee and that Angelee could not provide Harold needed care.

Angelee asserted that Rowland fraudulently obtained the power of attorney five days after her mother's death and then filed an abuse case in California that required her to go to California to defend herself. Angelee explained that the house in Texas belonged to Harold, that she paid him rent and the mortgage, and that Harold bought it with the understanding that she would care for him in that home. Her father always intended to return to Texas, Angelee declared. She affirmed her love for Harold and lamented that Rowland took him away.

The court reaffirmed Harold's need for a guardian and a conservator and opined that an independent person should manage Harold's finances. In light of the

circumstances surrounding Harold's grant of powers of attorney to Rowland and the fact that he had dementia at that time, the court suspended them. Because Rowland and Angelee could not work together, the trial court appointed Milbocker as Harold's guardian and conservator. Milbocker thereafter approved a plan to have Harold visit Angelee in Texas to finish out the winter months.

In April 2017, Milbocker filed a petition to modify Harold's guardianship and conservatorship by permitting her resignation. Milbocker's petition prompted Angelee to file her own petitions for appointment as Harold's guardian and conservator.

In a lengthy probate court submission, Angelee described the gradual onset of Harold's dementia and contended that he lacked the capacity to execute the power of attorney in favor of Rowland. The petition chronicled Angelee's contacts with Rowland before Rowland filed the Michigan petition, demonstrating Rowland's awareness of Angelee's correct address and telephone number. Angelee charged that Rowland had knowingly misrepresented Angelee's address in the initial petition to deny her timely notice of the proceedings.

Angelee also took issue with much of the evidence introduced through Prins at the earlier hearings. She supplied the court with copies of the powers of attorney that Harold signed in 2013 and 2015 and other documents refuting Rowland's claims. No evidence supported that Angelee financially abused Harold, the petition averred. Therefore, as Harold's only adult child and his sole heir, no good cause existed to prevent her from being appointed Harold's guardian and conservator. Angelee also sought an accounting of Rowland's handling of Harold's assets, personal property,

and financial affairs. Angelee accused Rowland of impropriety and breaches of fiduciary duties.

Rowland responded by denying Angelee's allegation that Rowland had acted improperly. She asserted that she had four different addresses for Angelee and did not know Angelee's current address so she mailed her petitions to one of the addresses. She admitted that she obtained an invalid power of attorney from Harold as he lacked the capacity at the time to make such a grant. Rowland argued that Angelee had no right to an accounting because the transfers of Harold's assets occurred at Milbocker's direction.

During the subsequent hearing, Angelee's counsel contended that she had priority for appointment and sought to prove that all of the money transfers condemned by Rowland had been proper. He emphasized that no evidence supported that Angelee was unqualified to be Harold's guardian or conservator. Milbocker testified that Harold had received good care in Michigan and in Texas, and she expressed no concerns about either placement. She reported that California had reopened the APS case and concluded that none of the allegations against Angelee could be substantiated.[2] Milbocker, too, believed that Harold's transfers to Angelee reflected no wrongdoing on her part. In a report prepared two days later, Milbocker advised the court that "[t]he [Texas] home was obtained in August 2015, prior to any documented knowledge of Harold's dementia, that I have been able to find within his physician evaluations and documentation in California. Angelee has maintained the mortgage payments with Harold maintaining the cost of home insurance

[2] The APS report also observed that Harold "never expressed any concerns against Angelee and did not appear to be fearful or intimidated by Angelee."

and property taxes." Milbocker expressed at the hearing that either Angelee or Rowland could serve as Harold's guardian.

The probate court opined that Angelee had failed to identify any problems with having a public guardian and maintaining the status quo. In the court's view, the arrangement had worked well. "[T]he focus here is not the rights of either the sister or the daughter," the court ruled; "the focus here is Mr. Gerstler himself. What's in his best interest . . . for him right now, no matter what the history is . . . ." Because Harold seemed happy and was able to see his sisters and Angelee, and "despite any presumption or priority as far as relatives," the court determined that the best arrangement for Harold was to maintain an independent public guardian and conservator. The court appointed Tammy Dykstra as successor guardian and conservator per Milbocker's recommendation.

A few days later, Milbocker filed a final report clarifying certain facts for the court's records. Milbocker noted that "Harold has verbalized a desire to take care of his only daughter stating 'Of course, I want to help her.' " In a private conversation with Milbocker, Harold expressed "guilt for the extensive time spent on caring for Angelee's [deceased] brothers [who suffered from muscular dystrophy] and a neglect of Angelee which he believed led to her previous problems of substance abuse." Milbocker noted that Angelee had taken an unannounced drug test at Milbocker's request and that Angelee had passed the test.

Milbocker's report also clarified that Rowland received $72 per day for Harold's personal care and $800 per month for Harold's room and board. She noted that Rowland did not cooperate with Angelee to enable her to visit Harold despite Milbocker's attempts to inter-

vene and that APS never substantiated any malfeasance by Angelee regarding use or abuse of Harold's funds. She advised that she and APS reviewed transactions and receipts respecting all funds given to Angelee and found only a minimal discrepancy that raised no concern. Harold told her he desired to help Angelee, and the Texas home was purchased in 2015 before any documentation of Harold's dementia. Angelee paid the mortgage, and Harold had paid the insurance and taxes. Milbocker advised that when Harold first traveled to Texas he lived in an assisted-living facility briefly, did not like it, and moved into Angelee's Texas home with Milbocker's knowledge. Rowland called the police and claimed that Angelee kidnapped Harold even though the assisted-living facility had discharged Harold to live with Angelee. While in Texas, Harold had a comfortable stay. Angelee communicated with Milbocker consistently.

The probate court denied Angelee's motion for reconsideration, and she now appeals.

II

This Court has recently summarized the standard of review applicable to this case as follows:

> We review the probate court's dispositional rulings for an abuse of discretion. A probate court abuses its discretion when it chooses an outcome outside the range of reasonable and principled outcomes. We review the probate court's findings of fact for clear error. A factual finding is clearly erroneous when this Court is left with a definite and firm conviction that a mistake has been made. We review de novo any statutory or constitutional interpretation by the probate court. [*In re Redd Guardianship*, 321 Mich App 398, 403-404; 909 NW2d 289 (2017) (quotation marks and citations omitted).]

We conclude that the probate court abused its discretion by appointing Dykstra as Harold's successor guardian and conservator because the court failed to make any factual findings relevant to the statutory framework that governs this case and otherwise neglected to apply the law governing guardianship and conservatorship appointments.

III

MCL 700.5313 addresses the appointment of a guardian of a legally incapacitated person. The statute provides for orders of priority and preference as follows:

> (2) In appointing a guardian under this section, the court shall appoint a person, if suitable and willing to serve, in the following order of priority:
>
> (a) A person previously appointed, qualified, and serving in good standing as guardian for the legally incapacitated individual in another state.
>
> (b) A person the individual subject to the petition chooses to serve as guardian.
>
> (c) A person nominated as guardian in a durable power of attorney or other writing by the individual subject to the petition.
>
> (d) A person named by the individual as a patient advocate or attorney in fact in a durable power of attorney.
>
> (3) If there is no person chosen, nominated, or named under subsection (2), or if none of the persons listed in subsection (2) are suitable or willing to serve, the court may appoint as a guardian an individual who is related to the individual who is the subject of the petition in the following order of preference:
>
> (a) The legally incapacitated individual's spouse. This subdivision shall be considered to include a person nominated by will or other writing signed by a deceased spouse.

(b) *An adult child of the legally incapacitated individual*.

(c) A parent of the legally incapacitated individual. This subdivision shall be considered to include a person nominated by will or other writing signed by a deceased parent.

(d) A relative of the legally incapacitated individual with whom the individual has resided for more than 6 months before the filing of the petition.

(e) A person nominated by a person who is caring for the legally incapacitated individual or paying benefits to the legally incapacitated individual.

(4) *If none of the persons as designated or listed in subsection (2) or (3) are suitable or willing to serve, the court may appoint any competent person who is suitable and willing to serve, including a professional guardian as provided in* [*MCL 700.5106*]. [Emphasis added.]

With respect to the appointment of a conservator, MCL 700.5409 provides as follows:

(1) The court may appoint an individual, a corporation authorized to exercise fiduciary powers, or a professional conservator described in [MCL 700.5106] to serve as conservator of a protected individual's estate. The following are entitled to consideration for appointment in the following order of priority:

(a) A conservator, guardian of property, or similar fiduciary appointed or recognized by the appropriate court of another jurisdiction in which the protected individual resides.

(b) An individual or corporation nominated by the protected individual if he or she is 14 years of age or older and of sufficient mental capacity to make an intelligent choice, including a nomination made in a durable power of attorney.

(c) The protected individual's spouse.

(d) *An adult child of the protected individual*.

(e) A parent of the protected individual or a person nominated by the will of a deceased parent.

(f) A relative of the protected individual with whom he or she has resided for more than 6 months before the petition is filed.

(g) A person nominated by the person who is caring for or paying benefits to the protected individual.

(h) *If none of the persons listed in subdivisions (a) to (g) are suitable and willing to serve, any person that the court determines is suitable and willing to serve*.

(2) A person named in subsection (1)(a), (c), (d), (e), or (f) may designate in writing a substitute to serve instead, and that designation transfers the priority to the substitute. If persons have equal priority, the court shall select the person the court considers best qualified to serve. *Acting in the protected individual's best interest, the court may pass over a person having priority and appoint a person having a lower priority or no priority*. [Emphasis added.]

MCL 700.5106 addresses the appointment of a professional guardian or a professional conservator in relevant part as follows:

(1) Subject to subsections (2) and (3), the court may appoint or approve a professional guardian or professional conservator, as appropriate, as a guardian or conservator under this act, or as a plenary guardian or partial guardian as those terms are defined in . . . MCL 330.1600.

(2) *The court shall only appoint a professional guardian or professional conservator as authorized under subsection (1) if the court finds on the record all of the following*:

(a) The appointment of the professional guardian or professional conservator is in the ward's, developmentally disabled individual's, incapacitated individual's, or protected individual's best interests.

(b) *There is no other person that is competent, suitable, and willing to serve in that fiduciary capacity* in accor-

> dance with [MCL 700.5212, MCL 700.5313, or MCL 700.5409]. [Emphasis added.]

In short, MCL 700.5106(2) provides that, before appointing a professional guardian or a professional conservator, a probate court must find that the appointment of a professional fiduciary is in the incapacitated person's best interests *and* that there is no other person who is competent, suitable, and willing to serve in that fiduciary capacity in accordance with, as relevant here, MCL 700.5313 or MCL 700.5409. MCL 700.5313(4) similarly allows appointment of a professional guardian only if none of the persons listed in MCL 700.5313(2) or (3) are suitable or willing to serve. With respect to the appointment of a conservator, MCL 700.5409(2) likewise allows for departure from the statutory order of priority in the best interests of the protected individual, and MCL 700.5409(1)(h) allows appointment of any person that is suitable and willing to serve if none of the persons listed in MCL 700.5409(1)(a) through (g) are suitable and willing to serve. This Court has explained the meaning of suitability in the context of a guardianship by holding that "a 'suitable' guardian is one who is qualified and able to provide for the ward's care, custody, and control." *Redd*, 321 Mich App at 408.

Here, Angelee claimed priority as Harold's sole surviving adult child, and there is no dispute that Angelee holds the highest position of priority or preference for appointment as Harold's guardian and conservator under the statutory provisions set forth above. Yet the trial court instead appointed Dykstra, a professional guardian and conservator. In order to appoint a professional fiduciary such as Dykstra, the trial court was required to find that the appointment of such a professional served Harold's best interests *and* that no other

person was competent, suitable, and willing to serve in that fiduciary capacity in accordance with the governing statutory provisions. MCL 700.5106(2).

The trial court made terse findings regarding Harold's best interests by stating that "perfect harmony" had been achieved by the appointment of the previous professional guardian and conservator, Kimberly Milbocker, and that Harold was "happy" in the existing arrangement because he was traveling back and forth between Texas and Michigan in order to see both Angelee and his sisters. According to the court, this arrangement was "working . . . because we've an independent third party that's keeping track." The court also noted that if Harold ever needed Medicaid or other benefits, a clear record from an independent third party would exist and there would be no need to "prov[e] the nuances that might be there as far as making it work." The court emphasized that its "main focus is [Harold's] welfare. And I do find, despite any presumption or priority as far as relatives, the best resource, the best answer for him at this point is independent." The court again stated that Harold presently "likes what's happening, he likes what's taking place, it's working, and so the best way to accomplish as pointed out by [Harold's court-appointed attorney] is to have a public guardian and conservator and we're lucky to have another one."

While the probate court's focus on Harold's welfare is commendable, the court missed a critical step in its analysis. When Milbocker resigned as Harold's guardian and conservator, Angelee petitioned to be appointed to fill those roles. At that juncture, the probate court was required to reconsult the statutory framework before appointing another public administrator. The court never articulated any findings regarding

Angelee's competence and suitability to serve. Absent those findings, the court erred by appointing Dykstra.

Neither MCL 700.5313 nor MCL 700.5409 indicates the standard of proof applicable to a probate court's determination of whether to depart from the statutory priority and appoint a public administrator as guardian and conservator. This Court has noted in the analogous context (a petition for removal of a guardian) that when a standard of proof is undescribed, the default preponderance-of-the-evidence standard applies in determining a person's suitability. See *Redd*, 321 Mich App at 408-410. By using the mandatory term "shall,"[3] MCL 700.5106(2) *requires* that, in order to appoint a professional guardian or professional conservator, the probate court must find that the appointment of such a professional is in the incapacitated person's best interests *and* that no other person in priority under the applicable statutes for appointment of guardians and conservators is competent, suitable, and willing to serve in that fiduciary capacity. See *Redd*, 321 Mich App at 409 (noting that the use of the word "shall" "indicates a mandatory and imperative directive") (quotation marks and citation omitted). It follows that to depart from the statutory priority provisions and appoint a public guardian and public conservator, the probate court was tasked with finding by a preponderance of the evidence that Angelee was not competent and suitable to serve in that fiduciary capacity. That analysis was not done. Alternatively stated, the probate court failed to make any determination of whether Angelee was competent, suitable, and willing to serve as Harold's guardian and conser-

[3] Again, MCL 700.5106(2) states that "[t]he court shall only appoint a professional guardian or professional conservator . . . if the court finds on the record all of the following . . . ."

vator. Absent this requisite finding, the court abused its discretion by appointing a professional fiduciary in lieu of appointing Angelee, who held the position of statutory priority or preference for appointment.

On remand, the probate court must reconsider the appointment of a new guardian and conservator in conformity with EPIC. The court must make specific findings of fact regarding Angelee's competence, suitability, and willingness to serve in those capacities. Relevant facts that should enter into the court's analysis include Angelee's history of satisfactory care for her father and that, unlike Rowland, Angelee does not charge her father for rent or any of his living expenses. Should Rowland provide evidence in the remand proceedings, we direct the court to weigh her credibility carefully in light of the incorrect information she provided in her initial petition regarding Angelee's address and telephone number and her conduct in obtaining Harold's power of attorney despite her awareness that he was incompetent to give it. Given our determination that further proceedings are required, we need not consider Angelee's remaining issues on appeal.

We vacate the guardianship and conservatorship orders and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

M. J. KELLY and CAMERON, JJ., concurred with GLEICHER, P.J.

BREAKEY v DEPARTMENT OF TREASURY

Docket No. 339345. Submitted May 10, 2018, at Lansing. Decided June 7, 2018, at 9:00 a.m.

Petitioner, Ann Breakey, appealed in the Tax Tribunal the decision of respondent, the Department of Treasury, to deny her a principal residence exemption (PRE) for residential property held in an irrevocable trust for her lifetime benefit. The subject property was located in Bath, Michigan, and was originally owned by petitioner and her late husband, William. In November 1994, William created the trust and conveyed by quitclaim deed their ownership of the Bath home to the trust. In February 2011, William restated the trust, naming himself and petitioner as cotrustees and stating that the trust would become irrevocable at his death. The trust also created a marital trust that directed the trustee to hold the trust property for the benefit of petitioner and to use the trust assets to maintain the standard of living that petitioner enjoyed before William's death. The trust further mandated that the trustee permit petitioner to use any real estate held in the marital trust rent free and that petitioner retained the right to remove any successor trustee without cause. William died in 2012, and his son was appointed successor trustee. In October 2015, petitioner received a letter from respondent informing her that it was denying the PRE for the Bath home for the years 2012, 2013, 2014, and 2015 because "the parcel did not contain a dwelling owned and occupied by a person(s) as his or her principal residence." Petitioner challenged the denial, and a referee recommended that the PRE remain denied. Respondent upheld the denial, and petitioner appealed in the tribunal. Before a hearing could be held, petitioner moved for partial summary disposition on the question whether she qualified as an "owner" within the meaning of MCL 211.7dd(a). The tribunal denied petitioner's motion and instead granted summary disposition in favor of respondent, concluding that petitioner was not an owner within the meaning of the statute. Petitioner appealed.

The Court of Appeals *held*:

1. MCL 211.7cc(2) of the General Property Tax Act, MCL 211.1 *et seq*., provides that in order to claim a PRE, a person must

(1) own the property and (2) occupy it as his or her principal residence. MCL 211.7dd(c) defines "principal residence" as the one place where an owner of the property has his or her true, fixed, and permanent home to which, whenever absent, he or she intends to return and that shall continue as a principal residence until another principal residence is established. MCL 211.7dd(a) provides, in relevant part, that "owner" means any of the following: under MCL 211.7dd(a)(*ii*), a person who is a partial owner of property; under MCL 211.7dd(a)(*iii*), a person who owns property as a result of being a beneficiary of a will or trust or as a result of intestate succession; and under MCL 211.7dd(a)(*vi*), a grantor who has placed the property in a revocable trust or a qualified personal residence trust. There was no dispute that petitioner resided at the Bath home under MCL 211.7dd(a)(*iii*) as a result of being a beneficiary of a trust; accordingly, the question was whether petitioner owned the home under this statutory provision. Because the definition of the term "owner" contained within MCL 211.7dd(a)(*ii*) is circular in that it uses the very term to be defined in the definition, the Court of Appeals in *Flowers v Bedford Twp*, 304 Mich App 661 (2014), defined the term "owner" according to a lay dictionary and held that the petitioner, who had been granted a life estate in a parcel of property, was an owner because the life estate gave the petitioner the right to possess the property during the petitioner's lifetime. Accordingly, in this case, petitioner was an owner under MCL 211.7dd(a)(*iii*) because she held as her own the Bath home as a result of being a beneficiary of the marital trust. There was no dispute that petitioner possessed the property; she resided on it, made use of it as she saw fit, and had done so for many years. Although the trust owned the property, the trust held it for petitioner's benefit, the trust permitted her to use the property rent free for the remainder of her life, and the trust gave petitioner the right to remove any successor trustee without cause; therefore, petitioner held the equitable interest in the property. Additionally, although lacking the force of law, respondent's own interpretation of the statute in its PRE guidelines included trust beneficiaries as "owners." Accordingly, petitioner was an owner of the Bath home under MCL 711.7dd(a)(*iii*).

2. The tribunal's reliance on *Johnson v Dep't of Treasury*, unpublished opinion of the Michigan Tax Tribunal, issued October 13, 2015 (Docket No. 14-007849), which expanded upon the definition of "owner" in *Flowers v Bedford Twp*, 304 Mich App 661 (2014), by including the element of control, was erroneous because it improperly altered the definition provided to "owner" and "own" in *Flowers*. As determined by *Flowers*, MCL 211.7dd(a) and

its circular definition of the term "owner" does not include the term "control." The tribunal's use of a legal dictionary in *Johnson* to define "possession," which definition included the element of "control," was contrary to *Flowers* and to settled precedent. Accordingly, by using the legal definition of "possession," the tribunal erroneously concluded that control was a necessary element of ownership.

Reversed and remanded for further proceedings on petitioner's claim of entitlement to a PRE.

TAXATION — PRINCIPAL RESIDENCE EXEMPTIONS — PROPERTY HELD IN AN IRREVOCABLE TRUST FOR A PERSON'S LIFETIME BENEFIT — WORDS AND PHRASES — "OWNER."

For purposes of a principal residence exemption under the General Property Tax Act, MCL 211.1 *et seq*., the term "owner" as defined in MCL 211.7dd(a)(*iii*) includes a person who has an interest in property held in an irrevocable trust for that person's lifetime benefit.

*Bill Schuette*, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *Michael R. Bell*, Assistant Attorney General, for the Department of Treasury.

*McClelland & Anderson, LLP* (by *Gail A. Anderson* and *Melissa A. Hagen*) for Ann Breakey.

Amicus Curiae:

*Foster, Swift, Collins & Smith, PC* (by *Douglas A. Mielock* and *Mark J. DeLuca*) for the Probate and Estate Planning Section of the State Bar of Michigan.

Before: MURRAY, C.J., and SERVITTO and BOONSTRA, JJ.

MURRAY, C.J. The question presented is whether petitioner, Ann Breakey, as a result of an irrevocable trust granting her the ability to remain in the marital home rent-free in order to maintain the standard of living she enjoyed prior to her husband's death, is an

"owner" of the property for purposes of MCL 211.7dd(a), the principal residence exemption (PRE) under the General Property Tax Act (GPTA), MCL 211.1 *et seq*. The Tax Tribunal held that she was not an owner as defined by the statute and, as a result, denied her the use of the PRE. We conclude that she is an owner under MCL 211.7dd(a)(*iii*), reverse the decision of the tribunal, and remand for further proceedings to determine whether she is entitled to the PRE.

## I. FACTS AND PROCEEDINGS

The subject property is a residential property located in the city of Bath and was originally owned by petitioner and her late husband, William Breakey. On November 11, 1994, William Breakey created the "William E. Breakey Trust No. 1" (the Trust). That same day, petitioner and William conveyed by quit-claim deed their ownership of the Bath home to the Trust. Years later, in February 2011, "[p]ursuant to the power to make amendments which [he] reserved in the Trust," William "completely restat[ed] the Trust" in the "First Restatement of the William E. Breakey Trust No. 1," naming himself and petitioner as co-trustees. The Trust was revocable by William, who "reserve[d] the right to amend or revoke this [Trust] Agreement, wholly or partly, by a writing signed by [him] or on [his] behalf and delivered to Trustee during [his] life," and would "become irrevocable at [his] death."

According to petitioner, she and William continued to reside in the Bath home until he passed away in 2012. Upon William's death, William's son, Thomas W. Breakey, was appointed successor trustee. The Trust also created a Marital Trust to provide for petitioner upon William's death. The Marital Trust clause directs the trustee to hold the Trust property for the benefit of

petitioner and to use the Trust assets to "maintain the standard of living" that petitioner enjoyed prior to William's death. It also mandates that the trustee permit petitioner "to use any real estate held in the Marital Trust rent free." According to the Trust, petitioner has the right to remove any successor trustee without cause.

On October 15, 2015, petitioner received a letter from respondent, the Department of Treasury, informing her that it was denying her the PRE for the Bath home for the years 2012, 2013, 2014, and 2015 because "[*t*]*he parcel did not contain a dwelling owned and occupied by a person(s) as his or her principal residence*." Petitioner challenged the denial and, after the Department held an informal telephone conference, the referee recommended that the PRE remain denied because petitioner "did not prove by a preponderance of the evidence that she owned the parcel at issue and that the parcel at issue was her principal residence during the years at issue." The Department adopted this recommendation and upheld the denial.

Petitioner appealed the Department's decision to the Tax Tribunal's Small Claims Division. Before a hearing could be held, petitioner filed a motion for partial summary disposition on the legal question of whether she qualified as an "owner" within the meaning of MCL 211.7dd(a). In response, the Department maintained its position that petitioner was not an "owner" as defined by statute and asked that summary disposition be entered in its favor. On July 3, 2017, the tribunal entered an order denying petitioner's motion for partial summary disposition and granting summary disposition in favor of the Department pursuant to MCR 2.116(I)(2) (opposing party entitled to judgment) because "Petitioner is not an owner or partial owner of the subject property . . . ."

II. ANALYSIS

This Court reviews the grant or denial of a motion for summary disposition de novo. *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 75; 780 NW2d 753 (2010). However, "[t]his Court's authority to review a decision of the Tax Tribunal is very limited." *Inter Coop Council v Dep't of Treasury*, 257 Mich App 219, 221; 668 NW2d 181 (2003) (quotation marks and citation omitted). "In the absence of an allegation of fraud," review is restricted "to determining whether the tribunal committed an error of law or adopted a wrong legal principle." *Stege v Dep't of Treasury*, 252 Mich App 183, 187-188; 651 NW2d 164 (2002) (quotation marks and citation omitted).

"Statutory interpretation is a question of law that is reviewed de novo." *Inter Coop Council*, 257 Mich App at 222. This Court's primary goal in interpreting statutes is to determine and give effect to the Legislature's intent. *Briggs Tax Serv, LLC*, 485 Mich at 76. However, this Court affords some deference to the Tax Tribunal's interpretation of a tax statute. *Inter Coop Council*, 257 Mich App at 222. "Although tax laws are construed against the government, tax-exemption statutes are strictly construed in favor of the taxing unit." *Id*.

As noted at the outset of this opinion, the issue before this Court is whether petitioner's interest in a residential property held in an irrevocable trust for her lifetime benefit renders her an "owner" for purposes of the PRE. We hold that petitioner qualifies as an "owner" under the plain language of MCL 211.7dd(a).

Under the GPTA, all real property not expressly exempted is subject to taxation. MCL 211.1. One exemption under the GPTA is the PRE,[1] which exempts

[1] This exemption is also commonly known as the "homestead exemption." *EldenBrady v Albion*, 294 Mich App 251, 256; 816 NW2d 449 (2011).

qualifying property from "the tax levied by a local school district for school operating purposes . . . ." MCL 211.7cc(1). In order to claim the PRE, a person must (1) own the property and (2) occupy it as his or her principal residence. MCL 211.7cc(2). A principal residence is "the 1 place where an owner of the property has his or her true, fixed, and permanent home to which, whenever absent, he or she intends to return and that shall continue as a principal residence until another principal residence is established." MCL 211.7dd(c).[2] MCL 211.7dd(a) provides, in relevant part, that for purposes of the PRE:

> (a) "Owner" means any of the following:
>
> * * *
>
> (*ii*) A person who is a partial owner of property.
>
> (*iii*) A person who owns property as a result of being a beneficiary of a will or trust or as a result of intestate succession.
>
> * * *
>
> (*vi*) A grantor who has placed the property in a revocable trust or a qualified personal residence trust.

Petitioner argues that she is an "owner" under both MCL 211.7dd(a)(*ii*) and (*iii*).[3]

We first turn our attention to MCL 211.7dd(a)(*iii*), since there is no dispute that petitioner resides at the

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[2] Importantly, petitioner acknowledges that this is an issue of fact that she must establish before the tribunal; the only issue before the tribunal to date, and what is at issue here, is petitioner's status as an "owner" of the Bath home. Whether she occupies the house as her principal residence must be decided on remand.

[3] Additionally, amicus curiae, the Probate and Estate Planning Section of the State Bar, asserts that petitioner is an owner under MCL 211.7dd(a)(*vi*) as "[a] grantor who has placed the property in a revocable

Bath house "as a result of being a beneficiary of a . . . trust . . . ." To determine whether petitioner "owns" the Bath house under this statutory provision, we look to *Flowers v Bedford Twp*, 304 Mich App 661, 665; 849 NW2d 51 (2014), where this Court concluded that the definition of the term "owner" contained within MCL 211.7dd(a)(*ii*) is circular because it uses the very term to be defined in the definition.[4] Accordingly, the *Flowers* Court consulted a dictionary to provide meaning to the terms "own" and "owner." *Flowers*, 304 Mich App at 665. Consulting *Random House Webster's College Dictionary* (1997), the Court explained:

> "Owner" is the derived, undefined noun form of "own." "Own" is defined, in part, as "something that belongs to oneself" or "to have or hold as one's own; possess." And "ownership" is defined as "the state or fact of being an owner" or "legal right of possession; proprietorship." [*Flowers*, 304 Mich App at 665 (citations omitted).]

This Court continued, quoting from our Supreme Court's opinion in *Barnes v Detroit*, 379 Mich 169; 150 NW2d 740 (1967):

> "This Court has many times held that a person does not have to own property in fee simple to claim a homestead. The word 'owner' as used in the law has generally been treated as including all parties who had a claim or interest in the property, although the same might be an undivided one or fall short of an absolute ownership, and possession alone has frequently been held, in reference to personal property, as prima facie evidence of ownership." [*Flowers*, 304 Mich App at 665, quoting *Barnes*, 379 Mich at 177.]

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trust . . . ." Amici curiae, however, cannot raise issues not raised by the parties, *Ketchum Estate v Dep't of Health & Human Servs*, 314 Mich App 485, 498 n 8; 887 NW2d 226 (2016), and petitioner did not make that argument before this Court.

[4] This is similarly true of MCL 211.7dd(a)(*iii*), defining "owner" as "[a] person *who owns* property as a result of being a beneficiary of a will or trust . . . ." (Emphasis added.)

Applying these definitions, the *Flowers* Court held that the petitioner was an "owner" for purposes of MCL 211.7dd(a)(*iii*), and a partial owner under MCL 211.7dd(a)(*ii*), because her deceased husband's will granted her a life estate in the property. *Flowers*, 304 Mich App at 665-666. And a life estate allowed the petitioner to come within the definition of "owner" because, as the Court recognized, it gave the petitioner "the right to possess, control, and enjoy the property during the [petitioner]'s lifetime." *Id*. at 665.

Utilizing these same definitions, we conclude that petitioner is an "owner" under MCL 211.7dd(a) because she holds as her own the Bath property as a result of being a beneficiary of the Marital Trust. MCL 211.7dd(a)(*iii*). There is no dispute that petitioner currently possesses the property. She resides on the property, makes use of it as she sees fit, and has done so for many years. Although the Trust owns the Bath home property, it holds it for petitioner's benefit. Petitioner is granted the use "rent free" so that it will not be cost prohibitive for her to continue living the lifestyle she lived when her husband was alive, and there are no restrictions preventing her from exclusively using the property for the remainder of her life. Indeed, as petitioner argues, she has the unfettered right to remove the successor trustee, ensuring that if that trustee were to seek her removal (or, for example, to sell the house without her permission), she could remove him for taking action inconsistent with the Trust and her wishes. Therefore, though the Trust is the legal owner of the Bath home, petitioner holds the equitable interest. See *Equitable Trust Co v Milton Realty Co*, 261 Mich 571, 577; 246 NW 500 (1933) (holding that "[t]o create a trust, there must be an assignment of designated property to a trustee with the intention of passing title thereto, to hold for the

benefit of others"); MCL 555.16. Under these undisputed facts, petitioner held the Bath house as her own, and she qualifies as an owner under MCL 211.7dd(a)(*iii*).

Petitioner cites *Barnes* to support her claim that "possession alone" is the most relevant consideration in determining whether a person is an "owner." But *Barnes* is not particularly helpful to petitioner. In that case, Mr. Barnes was attempting to claim a veteran's homestead exemption, which contained language similar to that for the PRE.[5] *Barnes*, 379 Mich at 172. However, Mr. Barnes had a two-fifths undivided interest in common in a residential property, which, in conjunction with his possession of the property, made him an "owner." *Id*. at 177. Petitioner's selective extraction of the phrase "possession alone" from the *Barnes* Court's analysis ignores that the plaintiff had a two-fifths "claim or interest in the property." *Id*.[6] Further, although *Barnes* noted that control was not an element of the homestead exemption statute at issue, the discussion of control that did occur in *Barnes* was focused on the rights of owners who hold property as part of a tenancy in common. *Id*. at 176. *Barnes* is helpful because "possess" is part of what "own" means, but it is not as dispositive as petitioner thinks.

In relation to the tribunal's reference to the control one must maintain over the property to be an owner, we note that the *Flowers* Court did not utilize "control" in its definition of "owner" or "own." *Flowers*, 304 Mich

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[5] That exemption required that a property be "used and owned as a homestead" by a veteran. *Barnes*, 379 Mich at 176 (quotation marks and emphasis omitted).

[6] Furthermore, if "possession alone" is what "the definition of 'owner' revolves around," as petitioner argues, then a renter who has no other discernable interest in the land would be an owner, but a renter is undoubtedly different under the law than an "owner."

App at 665. Yet, in granting summary disposition in favor of the Department, the tribunal relied on one of its prior unpublished opinions, *Johnson v Dep't of Treasury*, unpublished opinion of the Michigan Tax Tribunal, issued October 13, 2015 (Docket No. 14-007849), which expanded upon the *Flowers* definition by including the element of control. In *Johnson*, a trust held property for the petitioner that expressly allowed her to "occupy" and reside at the property "rent-free." *Johnson*, unpub op at 3. An administrative law judge (ALJ) found that the petitioner was a partial owner of the property because of her legal right of possession. *Id*. The tribunal disagreed, explaining that the ALJ's interpretation erroneously encompassed only occupation, that the definition of "possession" also includes " '[t]o have in one's actual control,' " and that control meant " '[t]o exercise power or influence over.' " *Id*., quoting *Black's Law Dictionary* (10th ed) (alterations in original). Finding that the petitioner's rent-free occupancy did not amount to "actual control" over the property, the tribunal concluded that she was not an "owner." *Johnson*, unpub op at 3.

Although it was understandable for the tribunal to have relied upon the analogous *Johnson* decision, the definition of "owner" adopted in *Johnson*—and applied to petitioner here—is erroneous because it improperly alters the definition of "owner" and "own" in *Flowers*.

The words used by the Legislature are "the most reliable evidence of the Legislature's intent." *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 345; 745 NW2d 137 (2007). As determined by *Flowers*, MCL 211.7dd(a) and its circular definition of the term "owner" does not include the term "control." After properly consulting a *lay* dictionary to ascertain the meaning of "owner," this Court provided a definition

that did not include the term "control." *Flowers*, 304 Mich App at 665.[7] Although the *Johnson* tribunal consulted a legal dictionary, this Court had determined that, for purposes of defining "owner" for the PRE, it was appropriate to consult a lay dictionary. *Flowers*, 304 Mich App at 665. Utilizing a legal definition was contrary to *Flowers* and to settled precedent. See *Robinson v Detroit*, 462 Mich 439, 456 n 13; 613 NW2d 307 (2000) (recognizing that "[i]t is appropriate to consult a lay dictionary when defining common words or phrases that have not acquired a unique meaning at law because 'the common and approved usage of a nonlegal term is most likely to be found in a standard dictionary and not a legal dictionary' ") (citation omitted). By using the legal definition of "possession," the tribunal erroneously concluded that control[8] was a necessary element of ownership.

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[7] As noted, the term "control" was brought up in relation to the Court's explanation of the general rights of a life estate holder—"to possess, *control*, and enjoy the property during the holder's lifetime." *Flowers*, 304 Mich App at 665 (emphasis added). The *Flowers* Court never discussed or relied upon any control that the petitioner exerted over the property in that case.

[8] In the legal sense, to "own" is "[t]o rightfully have or possess as property; to have legal title to." *Black's Law Dictionary* (10th ed). To "possess" is "[t]o have in one's actual control; to have possession of." *Id*. To "control" is "[t]o exercise power or influence over . . . ." *Id*. Hence, even if control was a dispositive factor, the terms of the Trust direct the trustee to hold the residue of the Trust, including the Bath home, for the benefit of petitioner only. We agree with petitioner and amicus curiae that petitioner has "control" over the Bath home because she has the "right to exclude others" for the entirety of her life and because she has power over the Trust administration. It can be inferred, because petitioner is the only beneficiary of the Trust property, including the Bath home, that she is the only person permitted to use it. The trustee is not afforded any power to convey or grant ownership of the real estate. Finally, petitioner is solely afforded the right to remove any trustee without cause. In essence, because the Trust owns the property and because only petitioner may determine who the trustee is and how the Trust operates, she has "control" over the Bath home.

We also cannot help but recognize that application of the Department's own published guidelines confirms petitioner's status as an owner. The Department provides the following published guidance to the public:

> **3. As the beneficiary of a trust, when are you considered eligible for a principal residence exemption?**
>
> Upon the death of the grantor of the trust, provided you occupy the property as your principal residence.
>
> * * *
>
> **6. The owner of the principal residence died. Before his/her death, the owner placed the property in a revocable trust that specified that the surviving spouse was a life beneficiary. The surviving spouse occupies the home as a principal residence. Can he/she claim the exemption?**
>
> Yes. Upon the death of the grantor of the trust, the life beneficiary is considered the owner of the home and may claim a principal residence exemption on the property.[9]

The tribunal ignored these guidelines because agency interpretations do not have the force of law. That is certainly a true statement, but this Court still affords an agency's construction of a statute " 'respectful consideration,' " *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008), as an agency's interpretation can be "helpful in ascertaining the legislative intent," *id*. at 118. Although lacking the force of law, the Department's own interpretation of the statute to include trust beneficiaries as "owners" is consistent with *Flowers* and our resolution of this case.

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[9] Michigan Department of Treasury, *Guidelines for the Michigan Principal Residence Exemption Program* (revised May 2018), p 9, available at <https://www.michigan.gov/documents/taxes/2856_PRE_guidelines_607370_7.pdf> (accessed June 7, 2018) [https://perma.cc/TF7M-Q7FR].

For these reasons, we reverse the tribunal's order and remand for further proceedings on petitioner's claim of entitlement to a PRE. We do not retain jurisdiction.

SERVITTO and BOONSTRA, JJ., concurred with MURRAY, C.J.

PEOPLE v SHORTER

Docket No. 338629. Submitted May 1, 2018, at Lansing. Decided June 7, 2018, at 9:05 a.m. Leave to appeal denied 503 Mich 921.

Dakota L. Shorter was convicted after a jury trial of one count of third-degree and one count of fourth-degree criminal sexual conduct, MCL 750.520d and MCL 750.520e, on the ground that he had sexual contact with a woman while she slept. At the outset of trial, the prosecution sought to allow the complainant to be accompanied by a support dog and its handler during her testimony in order to help her control her emotions. Defense counsel objected, noting that the complainant was an adult and that this procedure was ordinarily used with minors. The trial court, Joyce A. Draganchuk, J., ruled that limiting the complainant's emotional displays while testifying was a sufficient reason to allow the use of a support dog. Defendant appealed his convictions on this basis.

The Court of Appeals *held*:

1. The trial court erred by allowing a fully abled adult witness to be accompanied by a support dog while testifying. Allowing support animals for fully abled adults would be unprecedented, not only in Michigan, but apparently nationwide. Further, MCL 600.2163a, which grants a trial court the authority to allow a support person or take other action to protect a witness, provides no authority for allowing a support animal for a fully abled adult because that statute applies only if the witness is a child or a developmentally disabled adult. Although the Court of Appeals held in *People v Johnson*, 315 Mich App 163 (2016), that the trial court had the inherent authority to allow the use of a support animal, it did so in the context of allowing a support animal for a child witness, which is common, whereas doing so for an adult witness is unprecedented. Moreover, unlike in *Johnson*, in this case the witness was also accompanied by the support dog's handler, which would have triggered the requirements of MCL 600.2163a(4). Even if a trial court had the inherent authority to allow such a procedure, it should not be allowed simply to make a witness more comfortable, and its use to allow a witness to be able to control her emotions does not

necessarily aid the truth-finding process. It was particularly improper to allow a comfort dog to help the complainant in this case control her emotions while testifying given that the prosecution argued to the jury that her emotional reactions were evidence of defendant's guilt. If the adult complainant's emotional state constituted evidence of guilt, the jury was entitled to evaluate her emotional state uninfluenced by outside support, not only as it pertained to her own credibility, but also to determine the weight to be given to testimony by others who described her emotional state.

2. The erroneous decision to allow the use of a support dog was not harmless because it undermined the reliability of the verdict. Because there were no witnesses to the actual events other than defendant and complainant, and the only forensic evidence consisted of a different male's DNA, the case turned almost exclusively on the jury's evaluation of their respective credibility. The case also turned in part on the weight the jury gave to the testimony concerning complainant's emotional state on the morning of the incident. These determinations were likely affected by the use of the support dog and handler. When a support animal is present with a fully abled adult rather than a child, a juror is far more likely to conclude that the reason for the support animal or support person is that the complainant was traumatized by the actions for which the defendant was charged.

Reversed and remanded for a new trial.

Judge O'BRIEN, concurring in part and dissenting in part, agreed that the trial court erred by allowing the complainant to use a support dog while testifying, but she would have held that the error was harmless in light of the untainted evidence that bolstered the victim's credibility and damaged defendant's.

TRIAL — WITNESSES — SUPPORT ANIMALS — INHERENT AUTHORITY OF TRIAL COURTS.

Trial courts do not have the inherent authority to allow a support animal to accompany a fully abled adult witness.

*Bill Schuette*, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Carol A. Siemon*, Prosecuting Attorney, *Joseph B. Finnerty*, Appellate Division Chief, and *Elizabeth L. Allen*, Assistant Prosecuting Attorney, for the people.

*Law Offices of Casey D. Conklin, PLC* (by *Donald J. Baranski*) for defendant.

Before: SHAPIRO, P.J., and M. J. KELLY and O'BRIEN, JJ.

SHAPIRO, P.J. Defendant appeals his jury conviction of third-degree criminal sexual conduct (CSC-III) (incapacitated complainant), MCL 750.520d(1)(c), and fourth-degree criminal sexual conduct (CSC-IV) (incapacitated complainant), MCL 750.520e(1)(c).[1] The trial court sentenced defendant to 30 to 180 months' imprisonment for the CSC-III conviction and 12 to 24 months' imprisonment for the CSC-IV conviction. On appeal, defendant argues that the trial court erred by granting the prosecution's motion to allow the complaining witness to testify while accompanied by a support dog and its handler. We agree, and so reverse and remand for a new trial.

## I. FACTS AND PROCEDURAL BACKGROUND

The incident giving rise to the charges occurred early in the morning of May 1, 2016, in complainant's home in a mobile home community. Complainant and defendant both testified at trial, and their statements about the events of the day were generally consistent until the point in time when they prepared to go to sleep. Complainant and defendant, along with two other friends, traveled to a rodeo together in complainant's car. The group had planned to camp nearby that night after the rodeo, but it rained and they decided to drive home instead. Defendant drove the group home

[1] The judgment of sentence describes the crime as involving an "incapacitated victim" but incorrectly lists the statute as MCL 750.520e(1)(b), which corresponds to CSC-IV by force or coercion.

in complainant's car and dropped off the other two friends first. When they arrived at complainant's home, it was about 4:30 a.m., so she told defendant that he could sleep on an air mattress at her home that night and that she would drive him to his house when they woke up. Defendant and complainant had known each other for some time as friends. They had never spent the night together or had any sexual contact with each other, although they both agreed that they had been flirting during the day. After entering the complainant's home, they discovered that the air mattress had been left in the car, and because it was raining, neither wanted to go back outside to get it. Complainant answered a phone call and sat on her bed when conversing. During that time, defendant lay down with his head on her upper leg, and complainant did not object. From this point in the chronology, the complainant's testimony and defendant's testimony differ significantly.

Complainant testified that she told defendant that he could sleep with her in her queen-sized bed but that she would not engage in any sexual contact. She testified that "[w]e agreed that we could—as both adults we could sleep in my bed without being intimate, and I made that very clear to him." She explained that they dressed in separate rooms, and that she was clothed in leggings and a t-shirt with a bra underneath. According to complainant, at about 6:30 a.m., she woke to the sound of her roommate leaving for work, and discovered that defendant was sexually assaulting her. She testified that "[w]hen I woke up to my roommate leaving for work I was on my back and [defendant] was to the left of me and he had unfastened my bra and his left hand was in my pants." She explained that defendant had pulled down the front of her leggings, that he was penetrating her vagina with

his fingers, and that his other hand was underneath her shirt and bra on her breast. Complainant stated that she was "terrified" and that she immediately jumped up, told defendant she needed to go to the bathroom, and went to the end of the hallway to her roommate's room to seek help from Tyler Johnson, her roommate's boyfriend.

Defendant's testimony as to what occurred before they fell asleep differed from complainant's only in that he testified that she did not make any statements about not wanting to have any sexual contact. Defendant testified, however, that he did not expect that there would be any sexual activity and that they changed clothes in separate rooms. Defendant testified that he was awakened by the sounds of the roommate leaving and that when he awoke, he found that complainant had wrapped herself around him, i.e. she had "cuddled up" to him. According to defendant, complainant's leg was across his waist and her head was on his chest. He stated that he attempted to roll her off him by pushing her hip and thigh, but that she "snuggled" back. He admitted that he kissed her on the forehead. Defendant testified that he then fell back asleep. He testified that there had been no sexual contact, and he stated that the complainant's behavior after she awoke was a complete surprise and that he did not understand it. On cross-examination, he agreed that he did not have the complainant's consent to do anything sexual, and he repeated that he had not done so. He was also asked about statements he had made to the officer that the prosecution argued were inconsistent with his testimony. Defendant agreed that he told the officer that he touched complainant's butt and thigh and explained that this occurred while he was attempting to move her off him. When asked whether he had admitted to the officer

that he had touched complainant's belly and back under her shirt, defendant denied making such a statement. Defendant also testified that he could not offer a reason why the complainant would make up the charges against him.

Johnson, complainant's housemate's boyfriend, testified that when complainant entered his room that morning, she was so upset that he could barely understand her. Because Johnson's phone was dead, he and complainant walked to the park manager's home to call the police. The manager described complainant's emotional state as "absolutely hysterical to the point I couldn't understand her." He concluded that complainant was saying that there was a dead body in her bed and he informed the police of this in his 911 call. The manager testified that he then walked back to complainant's house just as defendant was coming out the door and he told defendant that he should come with him because he had been reported as dead. Finally, he testified that when he and defendant reached his house, he asked defendant if he had done something wrong and defendant responded, " 'Yea, I did.' "[2] The police officers, who testified, agreed that complainant was very upset when they arrived. One officer testified that "[s]he was shaking and her breathing was to the point where [she was] almost hyperventilating."

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[2] Defendant testified on cross-examination that he was not certain whether the manager asked him this question. When asked if he responded, "Yea, I did," to that question he stated, "I don't remember me saying that, but I can tell you I didn't do anything to even reason my saying that." He then agreed that he didn't remember whether he said it or not, and the prosecutor pursued it further, asking, "Okay, so it's possible you said that to him?" Defendant responded, "Yes, it is possible, but no, it's not probable because I didn't do anything to cause me saying that."

After giving her statement to the police, the complainant went to Sparrow Hospital for a sexual-assault examination. The sexual-assault nurse examiner found no injury to the complainant's vaginal area. A DNA test of the surface of her breast revealed male DNA, but upon testing, it was determined that the DNA did not belong to defendant. Before the start of trial, the prosecutor and defense counsel informed the court of these results, and the parties agreed that it was not necessary to present a full chain of custody for the DNA.

It appears uncontested that the defense counsel was not informed before trial that the prosecution intended to have complainant testify while accompanied by a support dog and the animal's handler. It was first raised during voir dire when the prosecutor asked potential jurors about the possibility of a support animal in the courtroom while the complainant testified. On the following trial day, before opening statements, the prosecution raised the issue again. When the judge learned that in addition to the dog, a handler would have to be present next to the witness stand to hold the dog's leash, she expressed concern about whether there was evidence of a "necessity for that support animal." Defense counsel objected to the use of a support dog, noting that there had to be "some basis for the need for that animal to be here. You know, I usually experience this in kid's cases or something of that nature, and we're dealing with an adult woman here. I'm not sure if there's some special exception that gives rise to the need for this, but at this point I would ask that she testify solely on her own." The trial court, citing *People v Johnson*, 315 Mich App 163; 889 NW2d 513 (2016), stated that "there should be some kind of a showing of a need that

it would promote the expeditious and effective ascertainment of the truth." The prosecution responded:

> Judge, I think my response to that is it will limit her emotional outbursts when she's testifying. This is a victim who has been teary eyed multiple times when I've spoken to her, without even getting into, you know, the facts of what occurred to her and the actual testimony that she will be giving. We did a trial preparation meeting at my office last week where Preston, the dog, was present. She was less emotional with him in the room. She indicated she felt more comfortable and that this is something she wants. I think that it—it would be a benefit to both sides to have her control her emotions through the use of the support dog.

The trial court then granted the prosecution's request, concluding: "That's sufficient for this Court in that it will limit her emotional display on the stand. I agree that that could even be beneficial to the Defendant. And that there's already been, sort of, a trial run with the dog and it's been a successful one at that. So, I think that's a sufficient basis for her to use the support animal while testifying."

When instructing the jury at the outset of the complainant's testimony and, again, at the end of the trial, the court instructed the jury that it must "not allow the use of a support animal to influence your decision in any way" and that it "should not consider the witness's testimony to be any more or less credible because of the animal's presence." Closing arguments focused on the credibility of the complainant and defendant, and whom the jury should believe. The jury returned, after several hours, and advised the court that they had reached a verdict as to the CSC-IV charge, but not as to the CSC-III charge. The court gave them the deadlocked jury instruction; they re-

sumed deliberations and, sometime later, returned a verdict of guilty on both counts.

## II. ANALYSIS

Defendant contends that the trial court erred by allowing the complainant to testify while accompanied by a support animal and its handler.[3]

In making its ruling, the trial court relied on *Johnson*, 315 Mich App 163. In that case, the defendant was accused of sexually assaulting his six-year-old niece, and the trial court permitted a support dog to be with the six-year-old and her ten-year-old brother during their testimony. *Id*. at 171-172. The defense appealed on the ground that allowing the support dog was improper. *Id*. at 173. The *Johnson* Court affirmed the conviction, finding no error and concluding, as a matter of first impression, that allowing the use of a support dog is within the authority of a trial court and is not "inherently prejudicial." *Id*. at 181. *Johnson* also held that the statute governing the use of a support person, MCL 600.2163a(4), did not apply to support animals. *Id*. at 175-176.

The first question before us, therefore, is whether *Johnson* controls our decision. We conclude that it does not. In reaching this conclusion, we are cognizant of the fact that the language used in *Johnson* sweeps with a broad brush and that the opinion contains language which, if one does not consider the facts of the case, could seem to be dispositive here. However, we

[3] Defendant argues that the prosecution committed misconduct by failing to give proper notice and that his attorney was ineffective for failing to object. Because of our decision, we need not address the question of notice or the performance of defense counsel. We note, however, that defense counsel did object to the use of the support dog as quoted earlier.

conclude that there is a fundamental difference between allowing a support animal to accompany a child witness, as in *Johnson*, and allowing the animal to accompany a fully abled adult witness, as in the instant case. Accordingly, we conclude that *Johnson*'s holding was tied to the facts presented, i.e., the use of a support animal during a *child's* testimony. We do so for several reasons.

First, allowing support animals for fully abled adults would be unprecedented, not only in Michigan, but apparently nationwide. *Johnson* cites many out-of-state cases in support of its conclusion, but each of the cited cases involved a witness who was either a child or an adult with a developmental disability. Indeed, despite our efforts, we have been unable to find a case in *any* jurisdiction allowing the use of a support animal or a support person when the witness is a nondisabled adult. Therefore, *Johnson*'s observation that "other jurisdictions have upheld this procedure as part of a trial court's inherent authority to control the courtroom," *id*. at 171, while broadly stated, rests solely on cases involving children or developmentally disabled adults.

Second, any reliance placed on MCL 600.2163a in *Johnson* was inapposite because that statute, by its terms, applies only if the witness is a child or a developmentally disabled adult. *Johnson* noted that this statute grants a trial court the authority to allow a support person or take other action to protect a witness, such as using a screen. *Johnson*, 315 Mich App at 176-177. However, by its terms, MCL 600.2163a limits this authority to cases in which the witness is either "a person under 16 years of age," "a person 16 years of age or older with a developmental disability," or a "vulnerable adult." MCL 600.2163(1)(f). The statute defines "developmental disability" as "a condition that is attrib-

utable to a mental impairment or to a combination of mental and physical impairments . . . ." MCL 600.2163a(1)(c). The term "vulnerable adult" is defined in other statutes as "an individual age 18 or over who, because of age, developmental disability, mental illness, or physical disability requires supervision or personal care or lacks the personal and social skills required to live independently"[4] or a person who is "unable to protect himself or herself from abuse, neglect, or exploitation because of a mental or physical impairment or because of advanced age."[5] There is nothing in the record to suggest that the complainant was developmentally disabled, mentally ill, or physically disabled so as to require supervision, or that she was unable to live independently. MCL 600.2163a; MCL 750.145m(u)(*i*). Accordingly, MCL 600.2163a provides no authority for the situation presented in this case.

Third, *Johnson* refers to the trial court's inherent authority over the courtroom. We agree that this authority is broad and that the practice of allowing child witnesses to have a support animal or person is common enough that it is comparable to the examples offered in *Johnson* of that authority. However, allowing a nondisabled adult witness to have a support animal or person with them during testimony is a different circumstance. Given that we cannot find a single prior example of any court allowing such a procedure, we hesitate to conclude that it is simply a matter of a trial judge's inherent authority. If that were so, one would presumably be able to find prior examples of that authority being exercised somewhere.

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[4] MCL 750.145m(u)(*i*).

[5] MCL 400.11(f) (defining "vulnerable"); see also MCL 400.11(b) (defining "adult in need of protective services" or "adult" as a "vulnerable person").

Fourth, we note that the *Johnson* decision repeatedly and properly notes the tender ages of the children testifying. Moreover, we find nothing in the opinion, despite its broad language, that indicates that the Court even considered whether its holding would apply in the setting of a fully abled adult. As already discussed, none of the cases relied on in *Johnson* considered the issue in that context.[6]

Lastly, we note that *Johnson* made no mention of allowing an animal handler to also accompany the witness during testimony. In the instant case, the complainant was accompanied not only by the dog, but also by the handler, who is a human being, which, unlike the situation in *Johnson*, triggers the requirements of MCL 600.2163a(4) even if the witness is a child.

Even assuming a trial court had the inherent authority to allow such a procedure, we would not approve its use if the basis for it was simply that doing so would allow the witness to be "more comfortable" or because "this is something she wants." Nor are we convinced that allowing a support animal or person so that the witness would be better able to "control her emotions" necessarily aids the truth-finding process. This is particularly so in this case, where the prosecution presented evidence from four different witnesses that the complainant was hysterical, shaking, and

[6] By way of example, the very first line from a passage *Johnson* quoted from *People v Tohom*, 109 App Div 3d 253; 969 NYS2d 123 (2013), reads, " 'In fact, permitting a comfort dog to accompany *a child victim* to the stand can be considered less prejudicial than allowing "support persons." ' " *Johnson*, 315 Mich App at 181, quoting *Tohom*, 109 App Div at 272 (emphasis added). Similarly, the court in *State v Dye*, 178 Wash 2d 541, 544; 309 P3d 1192 (2013), on which *Johnson* relied, described the witness in that case as "suffer[ing] from significant developmental disabilities, including cerebral palsy, Kallman Syndrome, and mild mental retardation. He has an IQ (intelligence quotient) [of] 65, and although he is 56 years old, he functions at a mental age ranging from 6 to 12 years old."

barely able to speak following the alleged assault and argued to the jury that her emotional reactions were evidence of defendant's guilt. In that context, it was particularly improper to allow a comfort dog to help the complainant "control her emotions" while testifying. If the adult complainant's emotional state constitutes evidence of guilt, the jury is entitled to evaluate her emotional state uninfluenced by outside support, not only as it pertains to her own credibility, but also to determine the weight to be given to testimony by others who described her emotional state.

For all these reasons, we conclude that allowing the complainant to be accompanied by a support dog during her testimony was error.

Although the prosecution does not ask that we consider whether any such error was harmless, we have done so, and we conclude that the error was not harmless because it undermined the reliability of the verdict. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010).[7] There were no witnesses to the actual

[7] In considering whether an error was harmless, the relevant inquiry is "the 'effect the error had or reasonably may be taken to have had upon the jury's decision.' " *People v Straight*, 430 Mich 418, 427; 424 NW2d 257 (1988) (citation omitted). The error justifies reversal if it is more probable than not that it affected the outcome. *People v Young*, 472 Mich 130, 141-142; 693 NW2d 801 (2005). An error is "outcome determinative if it undermined the reliability of the verdict." *Id*. at 142 (quotation marks and citation omitted). In making this determination, this Court should focus "on the nature of the error and assess[] its effects in light of the weight and strength of the untainted evidence." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999) (quotation marks and citations omitted). Also, an error should not be considered harmless if "the error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings . . . ." *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004) (quotation marks and citation omitted). If the error is sufficiently "offensive to the maintenance of a sound judicial process," then "it can never be regarded as harmless[.]" *People v Robinson*, 386 Mich 551, 563; 194 NW2d 709 (1972).

events other than defendant and complainant, and the only forensic evidence consisted of a different male's DNA. Thus, the case turned almost exclusively on the jury's evaluation of their respective credibility. Secondarily, it turned, in part, on the weight given by the jury to the testimony concerning complainant's emotional state after leaving her bedroom that morning. These determinations were likely affected by the use of the support dog and handler. A juror can readily accept that a child might need support simply to be in a courtroom to be able to answer questions. With a fully abled adult, a juror is far more likely to conclude that the reason for the support animal or support person is because the complainant was traumatized by the actions for which the defendant is charged.[8]

In sum, we conclude that a fully abled adult witness may not be accompanied by a support animal or support person while testifying. Indeed, were we to rule that that a fully abled adult may be accompanied by a support dog or person simply because they will be "more comfortable," we would unlock a door that we have great hesitation about opening. At a minimum, this unprecedented change, if adopted, should be made by legislation, court rule, or a decision of our Supreme Court.[9]

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[8] Our dissenting colleague observes that the testimony of the police officer provided substantive evidence sufficient to uphold the conviction. One could argue to the contrary, but more importantly, the issue of harmless error is not determined by whether a jury could have convicted regardless of the error. Harmless-error review turns on whether it was "more probable than not that the error affected the outcome" or "undermined the validity of the verdict." *Young*, 472 Mich at 141-142.

[9] One example of the unexpected consequences from permitting this practice will arise the first time a criminal defendant requests a support animal while testifying. And allowing support animals for complainants but not defendants may implicate due-process concerns.

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

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

O'BRIEN, J. (*concurring in part and dissenting in part*). I agree with the majority that the trial court erred in this case by allowing the victim to use a support dog while testifying. However, I believe that the error was harmless. Therefore, I respectfully dissent in part.

For preserved, nonconstitutional errors, reversal is not required unless the defendant establishes that it is more probable than not that the error was outcome-determinative. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). This standard does not "require actual innocence, but, rather, it should be viewed as a legislative directive to presume the validity of verdicts and to reverse only with respect to those errors that affirmatively appear to undermine the reliability of the verdict." *People v Mateo*, 453 Mich 203, 211; 551 NW2d 891 (1996); see also MCL 769.26. Thus, "[a]n error is deemed to have been 'outcome determinative' if it undermined the reliability of the verdict." *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000). When determining whether an error was harmless, the focus is on the nature of the error "in light of the weight and strength of the untainted evidence." *Mateo*, 453 Mich at 215.

I agree with the majority that this case—like the vast majority of criminal sexual-assault cases—had "no witnesses to the actual events other than" defendant and the victim and, therefore, largely came down to "their respective credibility." However, unlike the majority, I believe that the effect—if any—of the support

dog on the victim's and defendant's credibility was harmless in light of the untainted evidence that bolstered the victim's credibility and damaged defendant's.

The manager of the trailer park where the victim lived, Joshua Kaimon, testified that, shortly after the assault occurred, defendant admitted to him that he had done something wrong. Specifically, Kaimon testified that, on the morning of the incident, he was outside his trailer with defendant waiting for the police to arrive and asked defendant if he did "something [he] shouldn't have," to which defendant replied, " 'Yea, I did.' "[1] Officer Aaron Reynolds, who interviewed defendant on the morning of the assault, testified that defendant initially denied that anything occurred while he was sleeping with the victim in her bed. However, according to Officer Reynolds, defendant later changed his story and admitted that, while the victim was sleeping, he attempted to kiss her, touched her butt, placed his hand on her upper thigh, and placed his hand underneath the victim's shirt and touched her belly and back area. Officer Reynolds also testified that defendant told him that he had an erection "while they were cuddling."[2] The testimony of Officer Reynolds, besides damaging defendant's credibility, provided substantive evidence to convict defendant of fourth-degree criminal sexual assault (CSC-IV), MCL 750.520e(1)(c), if the jury found that defendant's touching of the victim's buttock while she

[1] As recognized by the majority, defendant testified that he could not remember whether he made the incriminating statement to Kaimon but admitted that it was possible he made the statement.

[2] Defendant denied some, but not all, of the statements that Officer Reynolds attributed to him, and he corroborated the officer's testimony that he initially told the officer that nothing happened with the victim that morning.

was asleep was intentional and for a sexual purpose, see MCL 750.520a(f) and (q).[3] The majority does not contend that Officer Reynolds's testimony was tainted by the victim's use of a support dog. Therefore, even under the majority's analysis, defendant's CSC-IV conviction should be upheld. See *Mateo*, 453 Mich at 215.

In contrast to defendant's changing story, the victim's story remained unchanged: she testified at trial that she woke up to defendant's fingers inside her vagina and another hand on her bare breast. The officer who interviewed the victim following the incident, as well as the sexual-assault nurse examiner who examined the victim, testified that, when they spoke with the victim on the morning of the incident, she told them that she woke up to defendant's fingers inside her vagina and his other hand on her breast. Evidence of the victim's unchanging story bolstered her credibility, while evidence of defendant's incriminating admissions and changing story damaged his credibility. All this evidence was untainted by the trial court's error of allowing a support dog to accompany the victim.

The majority's harmless-error analysis does not appear to assess the effect of the trial court's error "in light of the weight and strength of the untainted evidence." *Mateo*, 453 Mich at 215. Instead, it rests on the following analysis:

> A juror can readily accept that a child might need support simply to be in a courtroom to be able to answer questions. With a fully abled adult, a juror is far more likely to conclude that the reason for the support animal or support

[3] Defendant admitted that he told the officer that he grabbed the victim's buttock, but explained that it was accidental. He also admitted that he had an erection while he was in bed with the victim that morning, but explained that it was not due to sexual arousal.

> person is because the complainant was traumatized by the actions for which the defendant is charged.[4]

When reviewing the information—more accurately, the lack of information—placed before the jurors regarding the support dog, the majority's holding becomes unduly speculative. The support dog was barely mentioned during the course of the three-day trial. The first time it was mentioned was during voir dire when the prosecutor told jurors that the victim may be accompanied by a support dog. The prosecutor asked jurors not to draw any conclusions from the dog's presence, and all jurors confirmed that they could ignore the dog. The prosecutor did not discuss the dog any further.

The next time that the dog was mentioned to jurors was before the victim testified. At that time, the trial court told jurors that the victim would be accompanied by a support animal and gave the following instruction:

> You should disregard the [support] animal's presence and decide the case based solely on the evidence presented. You should not consider the witness's testimony to be any more or less credible because of the animal's presence. You must not allow the use of a support animal to influence your decision in any way.

The support dog was not mentioned at any point during the victim's testimony, no other witness was asked about or mentioned the support dog, and neither party referred to the support animal during closing arguments. The dog was only mentioned one other

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[4] This analysis does not appear to be fact-specific. Rather, the majority opinion appears to require automatic reversal if a fully abled adult is accompanied by a support animal. This conclusion is contrary to this state's harmless-error jurisprudence. See *People v Graves*, 458 Mich 476, 483-484; 581 NW2d 229 (1998) (rejecting a rule for automatic reversal in harmless-error review).

time: during final jury instructions, the trial court repeated its instruction that the jurors were to ignore the support animal and not draw any conclusions from its presence.

On this record, I see no reason to make the leaps necessary to find that a juror was "likely to conclude that the reason for the support animal . . . [was] because the complainant was traumatized by the actions for which the defendant [was] charged." No one gave any reason to jurors for why the support dog was accompanying the victim. In fact, no one even explained to jurors what a support animal was. Thus, the majority's conclusion assumes (1) that a juror had general knowledge about why someone may use a support animal and (2) what the juror was "likely to conclude" from the animal's presence. With respect to this second point, this Court has recognized that the use of a support dog "does not give rise to *primarily* prejudicial inferences, as it is possible for the jury to make a wide range of inferences from the use of this procedure that are unrelated to defendant." *People v Johnson*, 315 Mich App 163, 180; 889 NW2d 513 (2016). Yet, without explanation, the majority concludes that "a juror is far more likely to conclude that the reason for the support animal" is related to defendant.[5] The majority's conclusion also assumes that (1) the juror disregarded the trial court's instructions, despite the general rule that jurors are presumed to follow those instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and (2) the juror lied when he or she confirmed during voir dire that they

[5] The majority's conclusion appears to be based on the fact that the victim was a "fully abled adult" without developmental disabilities. However, neither the victim's age nor her lack of developmental disabilities was ever placed before the jury. Accordingly, it is speculation to even conclude that the jury viewed the victim as a fully abled adult.

could ignore the dog's presence. In my opinion, the majority's conclusion is "unduly speculative" and does not warrant finding that the error in this case was not harmless. *Id*. at 485-486 (recognizing that an error is harmless if a conclusion to the contrary is "unduly speculative").

In sum, the only error was the trial court's allowing a support dog to accompany the victim. This dog—which was barely mentioned throughout trial—did not, by its mere presence, add credibility to the victim's claim of a traumatic experience because none of the jurors knew why the dog accompanied the victim. More importantly, any credibility that the support dog's presence may have added to the victim—or taken away from defendant—was minimal in light of the significant untainted evidence that damaged defendant's credibility and supported the victim's. Considering the untainted evidence, it is not more probable that, had the victim testified without the aid of a support dog, a different outcome would have resulted. See *Lukity*, 460 Mich at 495.

Because I do not believe that the error affected the reliability of the jury verdict, I would leave the jury's verdict untouched.

HARSTON v EATON COUNTY

PEARCE ESTATE v EATON COUNTY ROAD COMMISSION

Docket Nos. 338981 and 338990. Submitted June 5, 2018, at Lansing. Decided June 7, 2018, at 9:10 a.m. Leave to appeal sought in Docket No. 338990.

Following a car accident, Ryan Harston and Joseph Grinage filed a complaint in the Eaton Circuit Court against Eaton County, the Eaton County Road Commission, the estate of Melissa S. Musser, and Patricia J. Musser, alleging that the Musser defendants were negligent and that the Road Commission breached its statutory duty under MCL 691.1402 to maintain the roads. Lynn Pearce, the personal representative of the estate of Brendon Pearce, filed a separate complaint in the Eaton Circuit Court against the Road Commission and the Musser defendants, alleging claims of negligence and breach of statutory duty arising from the same accident. On March 8, 2015, Melissa was driving a minivan owned by her mother, Patricia. Grinage, Harston, and Brendon Pearce were also in the car. Melissa lost control of the minivan when she came to standing water in the roadway. The minivan went off the road and rolled over. Brendon and Melissa died, and Grinage and Harston were seriously injured. All three plaintiffs served a notice of intent to file a claim on the Road Commission: Lynn Pearce on May 5, 2015; Harston on June 29, 2015; and Grinage on July 2, 2015. In Pearce's case, the Road Commission moved for summary disposition, arguing that Pearce's notice was inadequate. On May 5, 2016, Edward J. Grant, J., on assignment from the State Court Administrative Office, issued an opinion and findings denying the motion. On May 26, 2016, the court, John D. Maurer, J., entered an order denying the motion for the reasons set forth in Judge Grant's May 5, 2016 opinion. The Road Commission appealed, and Pearce moved to affirm the trial court's written opinion on appeal, arguing that her notice was sufficient. The Court of Appeals granted Pearce's motion to affirm in an unpublished order, entered October 25, 2016, and the Road Commission sought leave to appeal in the Supreme Court. The Supreme Court denied leave to appeal. 500 Mich 1021 (2017). The Road Commission returned to the trial court and moved for summary disposition in the consoli-

dated cases, arguing that all three plaintiffs' notices were insufficient under MCL 224.21(3). The parties disputed whether *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449 (2016), applied retroactively and whether MCL 224.21(3), as applied in *Streng*, or MCL 691.1404(1), the notice provision of the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., governed plaintiffs' notices. Two of the plaintiffs further argued that the Road Commission waived its challenge to plaintiffs' notices because it did not assert defective notice under MCL 224.21 as an affirmative defense. Judge Maurer denied the Road Commission's motion and rejected Pearce's argument that the Road Commission was required to assert insufficient notice as an affirmative defense. The court further concluded that *Streng* did not apply retroactively. The Road Commission appealed in both the Harston (Docket No. 338981) and Pearce (Docket No. 338990) cases. The Court of Appeals consolidated the cases in an unpublished order, entered October 20, 2017. In addition, by the parties' stipulation, Harston was dismissed as a plaintiff.

The Court of Appeals *held*:

1. MCL 224.21(3) contains a provision requiring potential plaintiffs to give notice to the clerk and the chairperson of the board of county road commissioners within 60 days of the injury. For all other highway-defect claims, the GTLA's 120-day notice provision at MCL 691.1404(1) governs. In 2016, the Court of Appeals in *Streng* held that MCL 224.21(3) governs claims brought against county road commissions, and in May 2018, the Court of Appeals held in *Brugger v Midland Co Bd of Rd Comm'rs*, 324 Mich App 307 (2018), that *Streng* applies prospectively only. However, *Brugger* did not cite or discuss *W A Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159 (2017), issued in August 2017, which addressed the retroactivity of a judicial interpretation of a statute. Because *Foote* was published before *Brugger* and controlled the issue in this case, *Foote* had to be followed. *Foote* applied the retroactivity test announced in *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503 (2012), which stated that the general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law; the only exception to this rule occurs when a statute has received a given construction by a court of last resort and contracts have been made and rights acquired under and in accordance with that construction. *Foote* also concluded that the *Spectrum Health* test overrode the "threshold" test and the "three-factor" test. The threshold test asks whether the

decision announces a new rule of law; if so, the three-factor test considers (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. *Foote* applied the *Spectrum Health* test, the threshold test, and the three-factor test to conclude that a recent Supreme Court decision overruling prior precedent applied retroactively, and *Foote* controlled this case in all respects. First, *Streng* followed the Supreme Court's decision in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007), and interpreted the text of MCL 224.21, so *Streng* was not new law. For the same reason, *Streng* was retroactive under the threshold test. In addition, plaintiffs' claims did not meet the exception in the *Spectrum Health* retroactivity test: the parties' dispute in this case did not arise out of a contract, and plaintiffs' claims did not find support in *Rowland*. Finally, *Streng* was also retroactive using the three-factor test; *Foote* decided that the proper, consistent interpretation of the statutory text outweighed the reliance concerns. Accordingly, the trial court erred by ruling that *Streng* did not apply retroactively.

2. Applying *Streng* and MCL 224.21(3), plaintiffs' notices were noncompliant. MCL 224.21(3) requires service of the notice of defect on the Road Commission and the county clerk within 60 days of the accident, and it was not clear if Grinage served his notice on the county clerk. Even if he did, his notice was deficient because he served it more than 60 days after the accident. Pearce's notice was defective because she did not serve it on the county clerk, even though the notice was timely. Therefore, the trial court erred by measuring plaintiffs' notices against MCL 691.1404(1) and finding them sufficient.

3. Governmental immunity is not an affirmative defense. Rather, it is a characteristic of government, and a plaintiff must plead in avoidance of governmental immunity. MCL 691.1402(1) in the GTLA refers to MCL 224.21 for claims brought against county road commissions, and this section includes the notice provision at MCL 224.21(3); therefore, the notice requirements in MCL 224.21(3), including the deadline and service requirements, are a component of pleading a claim in avoidance of governmental immunity. Accordingly, the burden was on plaintiffs to meet the requirements for bringing a claim against the Road Commission, and the trial court correctly rejected the argument that the Road Commission waived its challenge to the sufficiency of plaintiffs' notices by failing to plead defective notice as an affirmative defense.

Affirmed in part, reversed in part, and remanded for further proceedings.

GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — CLAIMS BROUGHT AGAINST A COUNTY ROAD COMMISSION — NOTICE REQUIREMENTS.

*Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449 (2016), held that the notice provision at MCL 224.21(3) in the highway code, MCL 220.1 *et seq*., rather than the notice provision at MCL 691.1404(1) in the governmental tort liability act, MCL 691.1401 *et seq*., governs a claim brought against a county road commission; *Streng* applies retroactively.

*The Sam Bernstein Law Firm* (by *Leonard E. Miller*) for Ryan Harston.

*Smith Haughey Rice & Roegge* (by *Jon D. Vander Ploeg* and *D. Adam Tountas*) for the Eaton County Road Commission.

*Collison & Collison* (by *Joseph T. Collison*) for the estate of Brendon Pearce.

Before: O'CONNELL, P.J., and K. F. KELLY and RIORDAN, JJ.

O'CONNELL, P.J. These consolidated cases[1] arise out of a fatal car crash. Defendant Eaton County Road Commission appeals as of right the trial court's order denying the Road Commission's motion for summary disposition brought under MCR 2.116(C)(7) (immunity granted by law). The parties dispute the retroactivity of *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449; 890 NW2d 680 (2016), holding that the notice provision at MCL 224.21(3) in the highway code, MCL 220.1 *et seq*., rather than the notice provision at MCL 691.1404(1) in the governmental tort liability act

[1] *Harston v Eaton Co*, unpublished order of the Court of Appeals, entered October 20, 2017 (Docket Nos. 338981 and 338990). In addition, by the parties' stipulation, we previously dismissed Ryan Harston as a plaintiff. *Harston v Eaton Co*, unpublished order of the Court of Appeals, entered May 25, 2018 (Docket No. 338981).

(GTLA), MCL 691.1401 *et seq*., governs a claim brought against a county road commission. We hold that *Streng* applies retroactively. We reverse the trial court's order ruling otherwise, although we affirm the trial court's ruling that the Road Commission was not required to assert defective notice as an affirmative defense, and we remand these cases for further proceedings consistent with this opinion.

## I. BACKGROUND

On March 8, 2015, Melissa Musser, whose estate is a defendant, was driving a minivan owned by defendant Patricia Musser. Plaintiff Joseph Grinage and Brendon Pearce, whose estate is a plaintiff, were passengers in the car. Melissa lost control of the minivan when she came to standing water in the roadway. The minivan went off the road, rolled over, and came to rest on its roof against a tree. Everyone except Pearce had been drinking, and the minivan was traveling about 20 miles per hour over the speed limit. Pearce died at the scene of the crash. Melissa died at the hospital. Grinage was seriously injured.

On May 5, 2015, Lynn Pearce, the personal representative of the estate of Brendon Pearce, served a "Notice to Eaton County of Fatal Injuries due to Defective Highway" on the Road Commission. Grinage served a "Notice of Intent to File a Claim" on the Road Commission on July 2, 2015.

Grinage and Pearce each filed a complaint, alleging that the Musser defendants were negligent and that the Road Commission breached its statutory duty under MCL 691.1402 to maintain the roads. In Pearce's case, the Road Commission first filed a motion for summary disposition under MCR 2.116(C)(7), arguing that Pearce's notice was inadequate. The trial court

disagreed and denied the motion. The Road Commission appealed the trial court's decision. Pearce then filed a motion to affirm on appeal, arguing that her notice was sufficient under *Streng* and the provision in MCL 224.21(3) that the notice should state "substantially" the details of the injury. This Court granted Pearce's motion to affirm.[2] The Road Commission sought leave to appeal in the Supreme Court, which denied leave to appeal.[3]

After this Court granted Pearce's motion to affirm, the Road Commission returned to the trial court and filed a motion for summary disposition in the consolidated cases, arguing that all three plaintiffs' notices were insufficient under MCL 224.21(3). The parties disputed whether *Streng* applied retroactively and whether MCL 224.21(3), as applied in *Streng*, or MCL 691.1404(1), the GTLA notice provision, governed plaintiffs' notices. Two of the plaintiffs further argued that the Road Commission waived its challenge to plaintiffs' notices because it did not assert defective notice under MCL 224.21 as an affirmative defense.

The trial court denied the Road Commission's motion. The trial court rejected Pearce's argument that the Road Commission was required to assert insufficient notice as an affirmative defense because inadequate notice was a component of governmental immunity, which is not an affirmative defense. Nonetheless, the trial court concluded that *Streng* did not apply retroactively because it announced a new rule, reliance on the old rule was widespread, and retroactive application of *Streng* would adversely affect the administration of justice.

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[2] *Pearce Estate v Eaton Co Rd Comm*, unpublished order of the Court of Appeals, entered October 25, 2016 (Docket No. 333387).

[3] *Pearce v Eaton Co Rd Comm*, 500 Mich 1021 (2017).

II. DISCUSSION

This Court reviews a trial court's ruling on a motion for summary disposition de novo. *Stevenson v Detroit*, 264 Mich App 37, 40; 689 NW2d 239 (2004). This Court also reviews the legal question of retroactivity de novo. *Johnson v White*, 261 Mich App 332, 336; 682 NW2d 505 (2004). Summary disposition is proper if a party has "immunity granted by law . . . ." MCR 2.116(C)(7). When reviewing a motion for summary disposition under Subrule (C)(7), this Court reviews the documentary evidence and accepts the plaintiffs' well-pleaded allegations as true unless documentation contradicts those allegations. *Stevenson*, 264 Mich App at 40.

Governmental agencies are generally immune from liability when they are performing a governmental function, unless otherwise provided by statute. MCL 691.1407(1); *Streng*, 315 Mich App at 455. The GTLA provides that the "liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in . . . MCL 224.21." MCL 691.1402(1). MCL 224.21(3) contains a notice provision requiring potential plaintiffs to give notice to the clerk and the chairperson of the board of county road commissioners within 60 days of the injury. For all other highway-defect claims, the GTLA's 120-day notice provision at MCL 691.1404(1) governs. In 2016, this Court held that MCL 224.21(3) governs claims brought against county road commissions. *Streng*, 315 Mich App at 462-463.

In May 2018, a panel of this Court concluded that *Streng* applies prospectively only. *Brugger v Midland Co Bd of Rd Comm'rs*, 324 Mich App 307; 920 NW2d 388 (2018). That decision, however, does not cite or discuss *W A Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159; 909 NW2d 38 (2017), issued in

August 2017, soon after the trial court's order in this case.[4] In *Foote*, a panel of this Court addressed the retroactivity of a judicial interpretation of a statute. "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). Because *Foote* was published before *Brugger* and controls the issue in this case, we are required to follow *Foote*.[5]

*Foote*, 321 Mich App at 182-183, followed the retroactivity test announced in *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 536; 821 NW2d 117 (2012):

> " 'The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law.' " This principle does have an exception: When a
>
> > "statute law has received a given construction by the courts of last resort and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated, nor vested rights acquired under them impaired, by a change of construction made by a subsequent decision."
>
> [*Spectrum Health*, 492 Mich at 536, quoting *Gentzler v Constantine Village Clerk*, 320 Mich 394, 398; 31 NW2d 668 (1948) (citation omitted).]

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[4] At oral argument in the present case, counsel for appellant stated that he had informed the *Brugger* panel that *Foote* controlled the outcome of the *Brugger* case.

[5] Even if we were not required to follow *Foote*, we would agree with Judge O'BRIEN's excellent dissent in *Brugger*.

The *Foote* Court noted that this rule only pertains to the retroactivity of decisions interpreting a statute, *Foote*, 321 Mich App at 190 n 15, and concluded that the *Spectrum Health* test, the Supreme Court's most recent resolution of a retroactivity question, overrides the "threshold" test and the "three-factor" test,[6] *id*. at 191. The threshold test asks whether the decision announces a new rule of law. *Id*. at 177. If so, the three-factor test considers "(1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice." *Id*. at 193 (citation and quotation marks omitted).

*Foote*, *id*. at 189-195, applied the *Spectrum Health* test, the threshold test, and the three-factor test to conclude that a recent Supreme Court decision overruling prior precedent applied retroactively. Because the interpretation of statutory text was not new law, retroactivity was proper under the *Spectrum Health* test and the threshold test. *Id*. at 189-192. In addition, the exception in the *Spectrum Health* test did not apply because the plaintiff's claim was based on the absence of a contract and the plaintiff's claim did not arise from a Supreme Court case. *Id*. at 191 n 17. Finally, apply-

[6] In response to plaintiffs' reliance on *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002), and *Tebo v Havlik*, 418 Mich 350; 343 NW2d 181 (1984), *Foote*, 321 Mich App at 186 n 14, 195 n 19, noted that the Supreme Court effectively repudiated *Pohutski* and undermined *Tebo* in *Spectrum Health*. In addition, the Supreme Court has repeatedly demonstrated that interpreting the straightforward statutory text merits overruling prior precedent and applying its interpretation retroactively. See *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 220-222; 731 NW2d 41 (2007) (applying its decision retroactively to restore the law to what was mandated by the statutory text); *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 587; 702 NW2d 539 (2005) (same). See also *Wayne Co v Hathcock*, 471 Mich 445, 483-484; 684 NW2d 765 (2004) (applying its decision retroactively to give effect to a constitutional provision).

ing the three-factor test, the Court concluded that the purpose of the "new" rule was to conform caselaw to the terms of the statute and noted that the parties had extensively relied on prior caselaw, but decided that promoting consistency in the law served the administration of justice. *Id*. at 193-195.

*Foote* controls this case in all respects. First, *Streng* followed the Supreme Court's decision in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007), and interpreted the text of MCL 224.21, so *Streng* is not new law.[7] For the same reason, *Streng* is retroactive under the threshold test. In addition, plaintiffs' claims do not meet the exception in the *Spectrum Health* retroactivity test. The parties' dispute in this case does not arise out of a contract, and plaintiffs' claims do not find support in *Rowland*.[8]

*Streng* is also retroactive using the three-factor test. The trial court and plaintiffs championed widespread reliance on the "old" rule and the unjust effect of applying *Streng* retroactively. *Foote*, 321 Mich App at 195, decided that the proper, consistent interpretation of the statutory text outweighed these reliance concerns. Further, the cause of action in this case can defeat governmental immunity, which is especially significant for enforcing only those causes of action enacted by the

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[7] Even if we were not bound to follow *Foote*, we note that MCL 224.21(3) has always been the law and is currently the law. No changes have been made to this statute, so we are required to apply it as written. That is, the issue in this case concerns statutory interpretation, not retroactivity.

[8] *Streng* addressed this concern by noting that *Rowland* discarded the entirety of the analysis in *Brown v Manistee Co Rd Comm*, 452 Mich 354, 361-364; 550 NW2d 215 (1996), overruled by *Rowland*, 477 Mich 197, as " 'deeply flawed,' " *Rowland* did not mention MCL 224.21 or discuss the notice deadline, and *Rowland* did not approve or disapprove of the use of one notice provision over another. *Streng*, 315 Mich App at 459-460 (citation omitted).

Legislature, as noted in the context of no-fault benefits in *Foote*, *id*. at 192. Accordingly, the trial court erred by ruling that *Streng* did not apply retroactively.[9]

Applying *Streng* and MCL 224.21(3), plaintiffs' notices were noncompliant. MCL 224.21(3) requires service of the notice of defect on the Road Commission and the county clerk within 60 days of the accident. MCL 224.21(3); *Streng*, 315 Mich App at 466-467. It is not clear if Grinage served his notice on the county clerk. Even if he did, his notice was deficient because he served it more than 60 days after the accident. Pearce's notice was defective because she only served it on the Road Commission, not the county clerk, even though the notice was timely. Therefore, the trial court erred by measuring plaintiffs' notices against MCL 691.1404(1) and finding them sufficient.

Finally, the trial court determined that the Road Commission was not required to plead defective notice under MCL 224.21 as an affirmative defense. We agree. Governmental immunity is not an affirmative defense. *Kendricks v Rehfield*, 270 Mich App 679, 681; 716 NW2d 623 (2006). Rather, it is a characteristic of government, and a plaintiff must plead in avoidance of governmental immunity. *Mack v Detroit*, 467 Mich 186, 203; 649 NW2d 47 (2002).

The notice provision is an integral component of defeating governmental immunity. Interpreting the effect of a notice provision at MCL 600.6431, the

[9] Pearce maintains that the Road Commission has taken inconsistent positions on the applicability of *Streng*. Pearce is correct that the Road Commission strenuously objected to *Streng* as wrongly decided in Pearce's prior appeal, but Pearce invoked *Streng* to argue that her notice was substantially compliant. When this Court granted Pearce's motion to affirm, the Road Commission reasonably understood *Streng* to be controlling. Therefore, we are not concerned by the Road Commission's apparent about-face.

Supreme Court held that this provision "establishes conditions precedent for avoiding the governmental immunity conferred by the GTLA, which expressly incorporates MCL 600.6431." *Fairley v Dep't of Corrections*, 497 Mich 290, 297; 871 NW2d 129 (2015). Similarly, MCL 691.1402(1) in the GTLA refers to MCL 224.21 for claims brought against county road commissions, and this section includes the notice provision at MCL 224.21(3). Therefore, the notice requirements in MCL 224.21(3), including the deadline and service requirements, are a component of pleading a claim in avoidance of governmental immunity. Accordingly, the burden was on plaintiffs to meet the requirements for bringing a claim against the Road Commission. The trial court correctly rejected the argument that the Road Commission waived its challenge to the sufficiency of plaintiffs' notices by failing to plead defective notice as an affirmative defense.

## III. CONCLUSION

We reverse the trial court's denial of the Road Commission's motion for summary disposition. We hold that *Streng* applies retroactively and that plaintiffs' notices were deficient under MCL 224.21(3). We affirm the trial court's ruling that the Road Commission was not required to plead defective notice as an affirmative defense. Accordingly, we direct the trial court to grant the Road Commission's motion for summary disposition.

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

K. F. KELLY and RIORDAN, JJ., concurred with O'CONNELL, P.J.

CITIZENS PROTECTING MICHIGAN'S CONSTITUTION v SECRETARY OF STATE

Docket No. 343517. Submitted June 1, 2018, at Detroit. Decided June 7, 2018, at 9:15 a.m. Affirmed 503 Mich 42 (2018).

Citizens Protecting Michigan's Constitution (CPMC), Joseph Spyke, and Jeanne Daunt sought a writ of mandamus in the Court of Appeals ordering that defendants, the Secretary of State and the Board of State Canvassers (the Board), reject an initiative petition filed by intervening defendant Voters Not Politicians (VNP) to place on the November 2018 general election ballot a proposed amendment of Article 4, § 6 of the 1963 Michigan Constitution that would create an independent citizens commission to oversee legislative redistricting. Article 4, § 6 of the 1963 Michigan Constitution established a commission to regulate legislative redistricting, but the Supreme Court subsequently declared that provision was not severable from apportionment standards that were unconstitutional. Accordingly, in more recent years, the Legislature has overseen redistricting. VNP's proposal sought to bring the commission in line with constitutional requirements and revive the commission's authority to set redistricting plans for the state house, state senate, and federal congressional districts. VNP gathered sufficient signatures for the petition to be placed on the ballot, but before the Board could certify the petition, plaintiffs sough a writ of mandamus directing the Secretary of State and the Board to reject the VNP proposal, arguing that the proposal was not an "amendment" of the Constitution that could be proposed by petition under Article 12, § 2 of the 1963 Michigan Constitution but rather was a "general revision" of the Constitution that could only be enacted through a constitutional convention under Article 12, § 3. VNP and other parties moved to intervene as defendants and to file a cross-claim seeking a writ of mandamus to require that the proposal be placed on the ballot. The Court of Appeals granted the motion.

The Court of Appeals *held*:

1. The people have reserved the right to amend their Constitution. In that regard, Article 12, § 2 of the 1963 Michigan

Constitution grants the people the power to initiate by petition proposed constitutional amendments that, if various requirements are met, will be placed on the ballot and voted on at an election. Specifically, Const 1963, art 12, § 2 requires every petition to include the full text of the proposed amendment and to be signed by registered electors of the state equal in number to at least 10% of the votes cast for Governor in the most recent general gubernatorial election. Once the person authorized by law to receive the petition determines that the petition signatures are valid and sufficient, the proposed amendment is placed on the ballot. In contrast, the Constitution also provides, in Const 1963, Article 12, § 3, that the question of a general revision of the Constitution, through a constitutional convention, shall be submitted to the electors of the state every 16 years and at such times as may be provided by law.

2. Any person or organization opposing the submission of an initiative petition may bring an action for mandamus to preclude the placement of that petition on the ballot. While courts have authority to issue a prerogative writ of mandamus, it is an extraordinary remedy that is issued in only rare cases. In a mandamus action, the plaintiff has the burden to show a clear legal right to the act sought to be compelled; a clear legal duty by the defendant to perform the act; that the act is ministerial, leaving nothing to the judgment or discretion of the defendant; and that no other adequate remedy exists. Because the determinations regarding whether a proposal is a general revision or an amendment to the Constitution and whether a proposal serves more than a single purpose require judgment, those determinations are not ministerial tasks to be performed by the Secretary of State or the Board. Rather, it is the court's duty to make the threshold determination whether an initiative petition meets the constitutional prerequisites for acceptance on the ballot. In this case, the Secretary of State had a clear legal duty to prepare the form of ballot for the VNP proposal, and the Board had a clear legal duty to examine the VNP petition to ascertain that it had sufficient signatures and to officially declare whether the form of the petition was sufficient. Accordingly, once the Court of Appeals made the threshold determination regarding constitutionality, the Secretary of State's and the Board's actions in placing the proposal on the ballot would be ministerial in nature.

3. An amendment to the Constitution is different from a revision. An initiative petition may encompass only one proposed amendment but may involve more than one section of the Constitution, provided that all the sections are germane to the

purpose of the amendment. To determine whether a proposal effects a "general revision" of the Constitution—and therefore is not eligible for placement on the ballot as a voter-initiated constitutional amendment—the court must consider both the quantitative nature and the qualitative nature of the proposed changes. The determination depends on not only the number of proposed changes or whether a wholly new constitution is being offered, but on the scope of the proposed changes and the degree to which those changes would interfere with, or modify, the operation of government. In this case, the VNP proposal created an independent citizens commission regarding legislative apportionment; set forth parameters for the commission regarding its structure, operation, and funding; eliminated legislative oversight over the independent commission; and vested original jurisdiction in the Supreme Court for challenges related to the commission. In addition, the VNP proposal increased the commission members to 13, consisting of four Republicans, four Democrats, and 5 independent voters. Considering the qualitative nature of the VNP proposal, it had a singular purpose: to create an independent citizens redistricting commission with exclusive authority to establish redistricting plans for legislative districts. Because the Legislature retained the power to veto potential commission members and the judiciary retained control over challenges to the commission, the VNP proposal did not take complete power away from the legislative and judicial branches. In addition, the power of the executive branch was not materially changed, even though the governor no longer controlled the commission's functions. Considering the quantitative nature of the VNP proposal, although the proposal changed 11 sections within three articles of the 1963 Constitution, the essential changes could be quickly enumerated. In addition, the VNP proposal was targeted to achieve a single, specific purpose. Although the VNP proposal introduced new concepts, it did not interfere with or modify the operation of government in such a way as to render it a general revision. Because the proposal was an amendment of the Constitution, not a revision, it was eligible for placement on the ballot as a voter-initiated constitutional amendment under Article 12, § 2 of the 1963 Constitution. Plaintiffs' remaining arguments were irrelevant because they pertained to the merits of the proposal, rather than the threshold question regarding whether the proposal was eligible to be placed on the ballot.

4. Article 12, § 2 of the 1963 Michigan Constitution provides, in part, that proposals to amend the Constitution must publish those sections that the proposal will alter or amend; the provision

aims to advise the voter of the amendment's purpose and to identify which provisions of the Constitution that it changes or replaces. MCL 168.482(3), in turn, provides that if the proposal would alter or abrogate an existing provision of the Constitution, the petition must so state and the provision to be altered or abrogated must be inserted, preceded by certain language; petitions must comply with the statutorily required republication mandate if the amendment alters or abrogates an existing constitutional provision. A provision is altered or abrogated if the proposed amendment would add to, delete from, or change the existing wording of the provision or would render it wholly inoperative. The fact that a proposed amendment will affect a provision does not inevitably mean the provision is altered or abrogated. An amendment alters an existing provision when it adds words to an existing provision, deletes words from an existing provision, or changes the wording in an existing provision. In contrast, an amendment abrogates an existing provision when the amendment essentially eviscerates the provision, rendering the existing provision wholly inoperative. An existing provision is not rendered wholly inoperative if it can be reasonably construed in a manner consistent with the new provision. In this case, the VNP proposal did not alter the challenged sections of the existing Constitution because it did not add words, delete words, or change words in the existing sections. The VNP proposal also did not abrogate existing constitutional provisions related to a circuit court's jurisdiction, the right of freedom of speech, the Appropriations Clause, and the oath of office taken by public officers. Accordingly, the VNP proposal did not have to republish in the petition the constitutional provisions affected by the proposal.

5. Because plaintiffs' complaint for mandamus was denied, VNP's cross-claim for mandamus was granted with respect to the Board.

Complaint for mandamus denied; cross-claim for mandamus granted.

*Dickinson Wright PLLC* (by *Peter H. Ellsworth*, *Robert P. Young*, and *Ryan M. Shannon*) and *Doster Law Offices PLLC* (by *Eric E. Doster*) for plaintiffs.

*Bill Schuette*, Attorney General, *B. Eric Restuccia*, Chief Legal Counsel, and *Heather S. Meingast* and *Denise C. Barton*, Assistant Attorneys General, for defendants.

*Fraser Trebilcock Davis & Dunlap, PC* (by *Peter D. Houk*, *Graham K. Crabtree*, and *Jonathan E. Raven*) and *Lancaster Associates PLC* (by *James R. Lancaster*) for intervening defendants.

Before: CAVANAGH, P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM. Plaintiffs Citizens Protecting Michigan's Constitution (CPMC), Joseph Spyke, and Jeanne Daunt seek a writ of mandamus that orders defendants Secretary of State (the Secretary) and the Board of State Canvassers (the Board) to reject an initiative petition filed by Voters Not Politicians (VNP) concerning the formation of an independent citizens commission to oversee legislative redistricting and to not place the petition on the 2018 general-election ballot. Intervening defendants Voters Not Politicians Ballot Committee and Count MI Vote, both doing business as VNP, Kathryn A. Fahey, William R. Bobier, and Davia C. Downey filed a cross-complaint, asking this Court to direct defendants to immediately execute their clear legal duties regarding the initiative petition. We deny the relief sought in the complaint for a writ of mandamus and grant the cross-complaint.

## I. FACTS AND PROCEDURAL HISTORY

### A. THE PARTIES

Plaintiff CPMC is a ballot-question committee. Plaintiff Spyke is a qualified elector registered to vote in Ingham County and is a former paid employee of a political candidate. Plaintiff Daunt, a qualified elector registered to vote in Genesee County, is the parent of a person otherwise disqualified from serving on the proposed commission.

Defendant Secretary is the chief election officer of the state and has supervisory authority over local election officials. MCL 168.21. See also Const 1963, art 5, § 3. Defendant Board is a constitutionally created board. Const 1963, art 2, § 7. Its duties are established by law. See MCL 168.22(2) and MCL 168.841. The Board canvasses initiative petitions to determine if the requisite number of qualified and registered electors have signed the petition. It makes the final decision regarding the sufficiency of the petition. MCL 168.476.

Intervening defendant VNP Ballot Committee is a ballot-question committee. Intervening defendant Fahey, a qualified elector registered to vote in Kent County, is the founder and treasurer of VNP. Intervening defendant Bobier, who signed the VNP petition, is a qualified elector registered to vote in Oceana County and a former elected member of the Michigan House of Representatives. Intervening defendant Downey, who signed the VNP petition, is a qualified elector registered to vote in Ingham County.

### B. THE INITIATIVE PETITION

On June 28, 2017, VNP Ballot Committee filed an initiative petition for the ballot proposal (the VNP Proposal) with the Secretary as required by MCL 168.471.[1] After staff at the Bureau of Elections (the Bureau) initially refused to recommend that the petition be approved, VNP redrafted the proposal to further address issues of abrogation and alteration. The Board approved the form of the petition on August 17,

[1] That statute provides, in pertinent part, "Petitions under section 2 of article XII of the state constitution of 1963 proposing an amendment to the constitution shall be filed with the secretary of state at least 120 days before the election at which the proposed amendment is to be voted upon."

2017, noting that its approval did not extend to the substance of the proposal, the substance of the summary of the proposal, the manner in which the proposal language is affixed to the petition, or whether the petition properly characterizes those provisions of the 1963 Michigan Constitution that have been altered or abrogated.

On December 18, 2017, VNP submitted the initiative petition, supported by more than 425,000 signatures[2] of registered voters, for an amendment to the Constitution to be placed on the November 2018 general-election ballot. Primarily, the VNP Proposal would amend Article 4, § 6 of Michigan's 1963 Constitution regarding the commission on legislative redistricting by changing the composition of the commission and its administration.[3] A new independent citizens commission would have exclusive authority to develop and establish redistricting plans for the senate, the house, and congressional districts.

To prevent the VNP Proposal from appearing on the ballot, and before the Board could certify the petition

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[2] According to the Secretary and the Board, only 315,654 signatures were needed.

[3] On the initiative petition, the proposal is summarized as follows, in pertinent part:

> A proposal to amend the Michigan Constitution to create an Independent Citizens Redistricting Commission. If adopted, this amendment would transfer the authority to draw Congressional and State Legislative district lines from the Legislature and the Governor to the Independent Commission. The selection process will be administered by the Secretary of State. Thirteen commissioners will be randomly selected from a pool of registered voters, and consist of four members who self-identity with each of the two major political parties, and five non-affiliated, independent members. Current and former partisan elected officials, lobbyists, party officers and their employees are not eligible to serve.

as sufficient or insufficient, counsel for CPMC sent a letter to the Secretary, urging her to reject the VNP Proposal on the ground that it should not be submitted to voters because it was massive and would enact sweeping changes to the Constitution. CPMC contended that it was a general revision of the Constitution and that it therefore could not be accomplished by ballot initiative. Further, the VNP Proposal purportedly omitted multiple sections of the Constitution that would be abrogated by the proposal. CPMC asserted that the Secretary had a clear legal duty to reject the petition.

Counsel for VNP then sent a letter to the Board, requesting that it certify the VNP Proposal for the November 2018 general-election ballot. VNP observed that no challenges to the 428,587 signatures had been filed by the deadline. Further, VNP stated that two separate entities had analyzed the sampled signatures and determined that 466 out of 505 sample signatures were valid, thereby confirming that a sufficient number of signatures support the proposal. VNP indicated that the instant suit by CPMC was irrelevant to the Board's clear legal duty to certify the VNP Proposal.

On May 22, 2018, the Bureau released its staff report pursuant to MCL 168.476(3). In the report, the Bureau staff recommended that the Board certify the petition.

After plaintiffs filed the instant complaint for mandamus, intervening defendants moved to intervene. This Court granted the motion to intervene and accepted the cross-complaint filed by intervening defendants. *Citizens Protecting Michigan's Constitution v Secretary of State*, unpublished order of the Court of Appeals, entered May 11, 2018 (Docket No. 343517).

The Board notes that it must complete its canvass of the VNP petition at least two months before the November 2018 general election. Const 1963, art 12, § 2; MCL 168.476(2); MCL 168.477(1). The Director of Elections also must prepare a statement of not more than 100 words—regarding the purpose of the proposed amendment—for placement on the ballot. MCL 168.32(2).

C. BACKGROUND

VNP asserts that its proposal is "a desired means to remedy the widely-perceived abuses associated with partisan 'gerrymandering'[4] of state legislative and congressional election districts by the establishment of new constitutionally-mandated procedures designed to ensure that the redistricting process can no longer be dominated by one political party." More than a century ago, Chief Justice MORSE of our Supreme Court warned that the "greatest danger to our free institutions" occurs when a political party retains its political power by dividing election districts in a manner to give special advantages to one group. *Giddings v Secretary of State*, 93 Mich 1, 13; 52 NW 944 (1892) (MORSE, C.J., concurring). He explained the danger as follows:

> By this system of gerrymandering, if permitted, a political party may control for years the government, against the wishes, protests, and votes of a majority of the people of the State, each Legislature, chosen by such means, per

[4] The term "gerrymander" is a portmanteau of the name of Elbridge Gerry—a signer of the Declaration of Independence, fifth Vice President of the United States, and the eighth Governor of Massachusetts—who was known for designing legislative districts in strange shapes, one of which resembled a salamander. See *Arizona State Legislature v Arizona Indep Redistricting Comm*, 576 US 787, 791 n 1; 135 S Ct 2652; 192 L Ed 2d 704 (2015).

> petuating its political power by like legislation from one apportionment to another. [*Id*.][5]

Ninety years later, our Supreme Court commented that "[i]n many states, the most egregious gerrymandering is practiced by the Legislature with the aid of computers to achieve results which will pass muster under federal standards yet favor the partisan interests of the dominant political faction." *In re Apportionment of State Legislature—1982*, 413 Mich 96, 137; 321 NW2d 565 (1982). In short, "[i]t is axiomatic that apportionment is of overwhelming importance to the political parties." *In re Apportionment of State Legislature—1992*, 439 Mich 715, 716; 486 NW2d 639 (1992). Or, as Senator John Cornyn of Texas once said, " 'You can't take the politics out of politics, and there is nothing more political than redistricting.' "[6]

We are not alone in analyzing redistricting issues. Challenges to alleged unconstitutional partisan gerrymandering are pending in the United States Supreme Court in two cases.[7] Further, suit has been brought in the United States District Court for the Eastern District of Michigan to contest Michigan's existing apportionment plan.[8]

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[5] Justice MCGRATH concurred with his brethren justices and added with regard to gerrymandering that "[t]he greatest danger to the Republic is not from ignorance, but from machinations to defeat the expression of the popular will." *Id*. at 13-14 (MCGRATH, J., concurring).

[6] Aarab & Regnier, *Mapping the Treasure State: What States Can Learn from Redistricting in Montana*, 76 Mont L Rev 257 (2015) (citation omitted), available at <http://www.montanalawreview.org/mont-l-rev/mapping-the-treasure-state-what-states-can-learn-from-redistricting-in-montana> (accessed May 25, 2018) [https://perma.cc/2QBE-4DUW].

[7] *Gill v Whitford*, United States Supreme Court Docket No. 16-1161 (Wisconsin); *Benisek v Lamone*, United States Supreme Court Docket No. 17-333 (Maryland).

[8] *League of Women Voters of Mich v Secretary of State*, United States District Court for the Eastern District of Michigan, Case No. 17-14148.

In the United States, a minority of states employ a nonpartisan independent mechanism for the drawing of legislative districts.[9] In most of the remaining states, including Michigan, whichever party is in control of the state Legislature draws the districts.[10]

### D. THE 1963 CONSTITUTION—REDISTRICTING

Under the 1963 Michigan Constitution, the 38 members of Michigan's senate and the 110 members of the house of representatives are elected according to the district in which they reside. The Constitution sets forth the apportionment factors and rules for individual districts, which are redrawn after the publication of the total population within the federal decennial census. Const 1963, art 4.

The apportionment of districts for representatives and senators is not a recent phenomenon: the Michigan Constitution of 1835 addressed apportionment[11] and set forth parameters for representative districting[12]

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[9] See Levitt, All About Redistricting, *Who Draws the Lines* <http://redistricting.lls.edu/who.php> (accessed May 24, 2018) [https://perma.cc/BTB9-2QVR], and National Conference of State Legislatures, *Redistricting Law 2010* (November 2009), pp 161-162, available at <http://www.ncsl.org/Portals/1/Documents/Redistricting/Redistricting_2010.pdf> (accessed May 25, 2018) [https://perma.cc/QR8V-WJZW].

[10] See All About Redistricting, *Who Draws the Lines*.

[11] Const 1835, art 4, § 3 provided, in pertinent part, that the Legislature "shall apportion anew the representatives and senators among the several counties and districts, according to the number of white inhabitants."

[12] Const 1835, art 4, § 4 provided, in part, that representatives were to be chosen "by the electors of the several counties or districts into which the State shall be divided for that purpose." That section added that there would be one representative for each organized county "but no county hereafter organized shall be entitled to a separate representative until it shall have attained a population equal to the ratio of representation hereafter established." *Id*.

and for senate districts.[13] Fifteen years later, Article 4 was revised to provide for the division of a county into representative districts, when necessary, by board of supervisors.[14] The 1908 Constitution continued the division of counties into districts by a board of supervisors.[15] In the general election in 1952, the voters passed Proposition 3, which amended Articles 2 and 4 of § 5 of the 1908 Constitution to establish senate districts with geographic boundaries that were not subject to alteration based on a population change.[16] After the 1961 Constitutional Convention, the 1963 Constitution called for districts to be apportioned under a weighted formula based on land area and population.

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[13] Const 1835, art 4, § 6 provided: "The State shall be divided, at each new apportionment, into a number of not less than four nor more than eight senatorial districts, to be always composed on contiguous territory; so that each district shall elect an equal number of senators annually, as nearly as may be: and no county shall be divided in the formation of such districts."

[14] Const 1850, art 4, § 3 provided that representative districts should have "as nearly as may be, an equal number of white inhabitants," and it further provided, in pertinent part, that "[i]n every county entitled to more than one representative, the board of supervisors shall assemble at such time and place as the legislature shall prescribe, and divide the same into representative districts, equal to the number of representatives to which such county is entitled by law . . . ."

[15] Const 1908, art 5, § 3 provided, in pertinent part, that "[i]n every county entitled to more than one representative, the board of supervisors shall assemble at such time and place as shall be prescribed by law, divide the same into representative districts equal to the number of representatives to which such county is entitled by law . . . ."

[16] In 1960, an elector brought a mandamus action to prevent the Secretary of State from performing acts related to the senate districting, alleging that the 1952 amendments were violative of equal protection. Our Supreme Court dismissed the action, and the United States Supreme Court remanded. See *Scholle v Secretary of State*, 360 Mich 1; 104 NW2d 63 (1960), vacated and remanded sub nom *Scholle v Hare*, 369 US 429 (1962). On remand, our Supreme Court decided that the amendments concerning senate districts were invalid. *Scholle v Secretary of State (On Remand)*, 367 Mich 176; 116 NW2d 350 (1962).

Under the current Constitution, senate districts are aligned with Michigan's counties, each of which is assigned an apportionment factor based on the state's population as set by the federal census, multiplied by four and the county's percentage of the state's total land area. Const 1963, art 4, § 2. The Constitution also sets forth particular rules for the dividing of the state into senatorial districts. Const 1963, art 4, § 2.

House districts are defined by representative areas that "shall consist of compact and convenient territory contiguous by land." *Id*. The districts also are defined by county and based on population. *Id*.

After one representative is assigned to each representative area as already defined, the remaining house seats are apportioned on the basis of population. *Id*. Counties that are entitled to two or more representatives are divided into single-member representative districts that are created on the basis of population. If possible, those districts should follow city and township boundaries and "be composed of compact and contiguous territory as nearly square in shape as possible." *Id*. Representative areas that contain more than one county and are entitled to more than one representative are divided into single-member districts, which adhere to county lines and are as equal as possible in population.[17] *Id*.

Thus, over half a century ago, the Constitution of 1963 established criteria and procedures to appoint a commission to decide the apportionment of legislative districts for the Senate and the House of Representatives. Const 1963, art 4, § 6; *In re Apportionment of State Legislature—1972*, 387 Mich 442, 450; 197 NW2d

[17] The Constitution also provides for procedures for territory that is annexed or merged with a city between apportionments. Const 1963, art 4, § 4. Islands also are taken into account. Const 1963, art 4, § 5.

249 (1972) ("The people, in adopting the 1963 State Constitution, provided the procedure to carry out legislative reapportionment."). The Constitution provided for an eight-member commission whose purpose was to "district and apportion the senate and house of representatives according to the provisions of this constitution." Const 1963, art 4, § 6, ¶ 5. A new commission would be appointed whenever the Constitution requires apportionment or districting. Const 1963, art 4, § 6, ¶ 3. Four members were selected by the state organizations of the Democratic and Republican parties.[18] Const 1963, art 4, § 6, ¶ 1. The state political organizations also selected a resident from four specific regions, including the Upper Peninsula and three portions of the Lower Peninsula—the north, the southwest, and the southeast. Const 1963, art 4, § 6, ¶ 1. With two exceptions, commission members could not be officers or government employees and could not serve in the Legislature for two years after the apportionment in which they participated became effective. Const 1963, art 4, § 6, ¶ 2. Members held office until the apportionment they worked on became operative. *Id*.

When a majority of the commission could not agree on redistricting, the members could submit a proposed plan to our Supreme Court. Const 1963, art 4, § 6, ¶ 7. The Supreme Court was required to "determine which plan complie[d] most accurately with the constitutional requirements and . . . direct that it be adopted by the commission and published as provided in this section." Const 1963, art 4, § 6, ¶ 7.[19]

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[18] If a third political party offered a candidate for governor who received over 25% of the gubernatorial vote, the commission would increase to 12 members, with four chosen from the third political party's state organization. Const 1963, art 4, § 6, ¶ 1.

[19] The Supreme Court also had original jurisdiction over an elector's application filed within 60 days of the final publication of the plan. The

Since the commission's inception, the apportionment of legislative districts has not been without conflict, causing our Supreme Court to preside over apportionment issues on several occasions. Or, as stated by Justice BRENNAN:

> The constitution creates a Commission on Legislative Apportionment. Four members are Republicans, four members are Democrats. Every ten years the Commission meets. Every ten years the Commission is unable to agree. [*In re Apportionment of State Legislature—1972*, 387 Mich at 459 (BRENNAN, J., dissenting).]

The very first commission after the adoption of the 1963 Constitution illustrates Justice BRENNAN's point. In May 1964, our Supreme Court directed the commission to adopt a particular plan when the commissioners could not agree. *In re Apportionment of State Legislature—1964*, 372 Mich 418, 480; 127 NW2d 862 (1964). The United States Supreme Court then issued *Reynolds v Sims*, 377 US 553; 84 S Ct 1362; 12 L Ed 2d 506 (1964), ruling that the weighted land area/population formula rules violated the Equal Protection Clause of the United States Constitution. The Court indicated that the states should "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Id*. at 577.

Our Supreme Court ordered the commission to adopt a different plan in accordance with the ruling in *Reynolds*; the commission failed to reach agreement, so the Court then ordered adoption of the Austin-Kleiner

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Court could direct the Secretary of State or the commission to perform their duties, review any final plan adopted by the commissioners, and "remand such plan to the commission for further action if it fail[ed] to comply with the requirements of this constitution." Const 1963, art 4, § 6, ¶ 8.

plan because it most closely aligned with *Reynolds* in that the plan's districts contained population as nearly equal as practicable. *In re Apportionment of State Legislature—1964*, 373 Mich 250, 251-254; 128 NW2d 722 (1964). An original petition was then filed challenging the Austin-Kleiner plan; the Court remanded the matter to the commission. *In re Apportionment of State Legislature—1965*, 376 Mich 410, 481-482; 137 NW2d 495 (1965). Again the commission could not agree, so again our Supreme Court was called upon to make an apportionment decision. *In re Apportionment of State Legislature—1965-1966*, 377 Mich 396; 140 NW2d 436 (1966). The Court ultimately dismissed the challenge, *id*. at 474 (order of the Court), but not before Justice BLACK suggested that the eight commissioners' names be placed in a jury box, that seven of the names be chosen at random, and that those seven commissioners be directed to apportion the districts.[20] *Id*. at 413 (memorandum by BLACK, J.).

In 1972, after the commission failed to settle on a plan,[21] the apportionment issue again was before our Supreme Court. The Court decided that the Hatcher-Kleiner plan most closely complied with the constitutional requirements but did not address the constitutionality of the requirements themselves. *In re Apportionment of State Legislature—1972*, 387 Mich at 458.

Ten years later, our Supreme Court examined whether the commission's authority continued despite

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[20] Perhaps that suggested procedure could be considered somewhat of a precursor to the VNP Proposal of randomly drawing the names of candidates for the commission.

[21] Notably, the commission still met, notwithstanding that the United States Supreme Court and the Michigan Supreme Court had ruled that much of the language regarding apportionment was not to be enforced. It was to be the final time that the commission was used.

the holding from the United States Supreme Court that the apportionment rules were unconstitutional and, if so, what standards governed. The Court held that *Reynolds* invalidated the weighted land area/population formula and that the remaining apportionment rules in Article 4 were "inextricably interdependent" and thus were not severable. *In re Apportionment of State Legislature—1982*, 413 Mich at 116. Likewise, the commission's functions, and the commission itself, were dependent on the rules and could not be severed. *Id*. The Court added that "[t]he matter should be returned to the political process in a manner which highlights rather than hides the choices the people should make." *Id*. at 138.

Thereafter, rather than relying on a commission that was held to be inextricably tied to the apportionment formula negated by the United States Supreme Court, the Michigan Supreme Court appointed Bernard J. Apol, former Director of Elections, to produce maps to conform with the pertinent apportionment rules. *Id*. at 142. In 1982, the Court adopted Apol's plan. *Id*. at 146 (order of the Court entered May 13, 1982).[22]

Almost 10 years later, in a statement reflecting upon the 1982 decision, Justice LEVIN indicated that the people were to have adopted new apportionment rules:

> Another assumption of the compromise [within the 1982 decision] was that responsible persons would come forth and place on the ballot, and the people would adopt, new apportionment rules in time for the 1992 and 1994 elections. Indeed, that was one of the arguments for non-severability—to highlight the need for a new constitutional provision regarding legislative apportionment. The Court's exhortation has not been heeded. [*In re*

[22] The Apol standards require contiguous, single-member districts drawn by as equal population as possible.

*Apportionment of State Legislature*, 437 Mich 1208, 1211 (1990) (LEVIN, J., concurring) (citation omitted).]

In 1990, the Legislature failed to arrive at an apportionment. *In re Apportionment of State Legislature—1992*, 439 Mich at 723. Lawsuits were filed, and in 1991, our Supreme Court appointed a panel of special masters to accomplish the reapportionment. *Id*. at 724. This Court ultimately accepted, for the most part, the plan that the masters proffered. *In re Apportionment of the State Legislature—1992*, 439 Mich 251 (1992) (order of the Court).

In 1996, the Legislature enacted guidelines for the redistricting of senate and house of representatives districts. See MCL 4.261 *et seq*. In 1999, the Legislature passed the Congressional Redistricting Act, MCL 3.61 *et seq*. Thus, after the past two federal decennial censuses, redistricting has occurred without a commission because the Legislature has decided the districts. With that history in mind, we turn to the VNP Proposal to amend the Constitution to create an independent citizens redistricting commission.

### E. THE VNP PROPOSAL

The VNP Proposal seeks to make changes to 11 sections within three articles of Michigan's 1963 Constitution: Article 4 (legislative branch), Article 5 (executive branch), and Article 6 (judicial branch).[23] The majority of those changes are to Article 4, involving the existing commission on legislative apportionment. The VNP Proposal essentially would accomplish the following:

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[23] Specifically, the VNP Proposal modifies Article 4, §§ 1 through 6; Article 5, §§ 1, 2, and 4; and Article 6, §§ 1 and 4 of Michigan's 1963 Constitution.

- Create an independent citizens commission regarding legislative apportionment.
- Set forth the parameters for the independent commission regarding its structure, operation, and funding.
- Eliminate legislative oversight over the independent commission, vest original jurisdiction in the Supreme Court regarding challenges related to the independent commission, and create an exception in the power of the executive branch to the extent limited or abrogated by the independent commission.

The VNP Proposal creates an exception to the legislative power of the state senate and the state house of representatives by exempting the new independent citizens redistricting commission from legislative control.[24] The VNP Proposal retains the structure of the senate at 38 members elected from single-member districts,[25] and it retains the structure of the house of representatives at 110 members elected from single-member districts apportioned on the basis of population.[26] However, the VNP Proposal eliminates the existing constitutional provisions in Const 1963, art 4, §§ 2 through 5 relating to senate districts and representative areas and their corresponding rules for apportionment.[27]

The VNP Proposal's primary change is the replacement of the current commission on legislative apportionment with parameters for a new independent citizens redistricting commission. In place of the eight-member commission, the VNP proposal provides for 13

[24] VNP Proposal, art 5, § 2.

[25] VNP Proposal, art 4, § 2.

[26] VNP Proposal, art 4, § 3.

[27] VNP Proposal, art 4, §§ 2 through 5.

commissioners; each major political party would have four members, and the remaining five members would be self-declared independent voters.[28] The pool of candidates would be drawn from eligible registered Michigan voters.[29] With certain exceptions, candidates would not be eligible to serve if they were current or former lobbyists, partisan elected officials or candidates, or a relative of a disqualified individual.[30]

Under the VNP Proposal, commissioners are to be chosen from a pool of applicants, which may include randomly selected voters.[31] Applicants must submit a completed application, must attest under oath that they meet the qualifications, and must identify which of the two major political parties with which they are affiliated, or whether they do not affiliate with either party.[32]

The VNP Proposal sets forth specific parameters and timelines for the application procedure, including that legislative leaders may strike from consideration five candidates from any pool.[33] The proposal also designates the funding process and provides for a cause of action should funding not occur.[34]

The VNP Proposal includes considerable detail regarding the commission's public hearings and contact with the public. It specifies directives regarding the commissioners' discussion of commission business, and it aims to make records available to the public.[35]

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[28] VNP Proposal, art 4, § 6(1); VNP Proposal, art 4, § 6(2)(F).

[29] VNP Proposal, art 4, § 6(1)(A).

[30] VNP Proposal, art 4, § 6(1)(B) through (E).

[31] VNP Proposal, art 4, § 6(2)(A)(i).

[32] VNP Proposal, art 4, § 6(2)(A).

[33] VNP Proposal, art 4, § 6(2)(E).

[34] VNP Proposal, art 4, § 6(5) through (6).

[35] VNP Proposal, art 4, § 6(8) through (12).

The VNP Proposal lists seven criteria for a redistricting plan, giving the most weight to population and geographic contiguity.[36] Additionally, the VNP Proposal describes procedures for the commission's adoption of a new redistricting plan and the publication of its related data.[37]

Under the VNP Proposal, the Michigan Supreme Court has original jurisdiction regarding the independent citizens redistricting commission to do the following: (1) direct the Secretary or commission to perform their respective duties, (2) review a challenge to any plan that the commission adopts, and (3) remand a plan to the commission for further action if the plan does not comply with the requirements of the Michigan Constitution, the United States Constitution, or superseding federal law.[38] Only the commission, and no other body, can promulgate and adopt a redistricting plan.[39]

In Article 5, involving the executive branch, the VNP Proposal continues vesting the power in the executive branch but excepts the independent citizens redistricting commission, noting that the commission's powers are exclusively reserved for the commission.[40] The VNP Proposal alters § 4, involving the establishment of executive branch commissions or agencies, by adding the language "except to the extent limited or abrogated by Article V, section 2 or Article IV, section 6,"[41] which are the sections involving the independent citizens

[36] VNP Proposal, art 4, § 6(13)(A through G).

[37] VNP Proposal, art 4, § 6(14) through (15).

[38] VNP Proposal, art 4, § 6(19).

[39] *Id*.

[40] VNP Proposal, art 5, §§ 1 through 2.

[41] The proposed language appears on the petition in all capital letters, but for ease of readability, we have not used all capital letters when quoting the proposal's language in this opinion.

redistricting commission.[42] With regard to Article 6, concerning the judicial branch, the VNP Proposal leaves intact the power of the branch, except to the extent limited or abrogated by the independent citizens redistricting commission.[43]

## II. ANALYSIS

> [I]n the very rare case . . . when an 'initiative petition does not meet the constitutional prerequisites for acceptance,' a court may find it necessary to intervene in the initiative process. But because the judicial branch should rarely interfere with the legislative process, such cases should be, and are, rare . . . . [*Coalition for a Safer Detroit v Detroit City Clerk*, 295 Mich App 362, 372; 820 NW2d 208 (2012) (citations omitted).]

This case is not one of the rare cases in which this Court should intervene.

The people of Michigan long have reserved the right to amend their Constitution. *City of Jackson v Comm'r of Revenue*, 316 Mich 694, 710; 26 NW2d 569 (1947); *Scott v Secretary of State*, 202 Mich 629, 643; 168 NW 709 (1918). To do so, they may bring an initiative petition before the voters by submitting a proposal to be placed on the ballot. Const 1963, art 12, § 2; *Wolverine Golf Club v Secretary of State*, 24 Mich App 711, 716; 180 NW2d 820 (1970) (opinion by LESINSKI, C.J.), aff'd 384 Mich 461 (1971). Any person or organization opposing the submission of an initiative petition may bring an action for mandamus to preclude the placement of that petition onto the ballot. See *Hamilton v Secretary of State*, 212 Mich 31, 33; 179 NW 553 (1920); *Coalition for a Safer Detroit*, 295 Mich App at 371. In an exceptional case, a court may deem it necessary to intervene in the

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[42] VNP Proposal, art 5, § 4.

[43] VNP Proposal, art 6, §§ 1 and 4.

initiative process. See *Detroit v Detroit City Clerk*, 98 Mich App 136, 139; 296 NW2d 207 (1980).

A. MANDAMUS

This Court has jurisdiction over this original action pursuant to MCL 600.4401(1) ("An action for mandamus against a state officer shall be commenced in the court of appeals . . . ."). See also MCR 7.203(C)(2).[44] The Secretary and the Board are "state officers" for mandamus purposes. See *Comm for Constitutional Reform v Secretary of State*, 425 Mich 336, 338 n 2, 339; 389 NW2d 430 (1986). Further, the Michigan Election Law provides that a person aggrieved by a decision of the Board may seek relief in the form of mandamus. MCL 168.479.[45] Accordingly, mandamus is the proper remedy for a party seeking to compel election officials to carry out their duties. See, e.g., *Wolverine Golf Club*, 24 Mich App at 716 (opinion by LESINSKI, C.J.).

This Court has the authority to issue a prerogative writ of mandamus, but mandamus is an extraordinary remedy. *LeRoux v Secretary of State*, 465 Mich 594, 606; 640 NW2d 849 (2002); *O'Connell v Dir of Elections*, 316 Mich App 91, 100; 891 NW2d 240 (2016). Whether a writ issues is within the discretion of the court. *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 438; 722 NW2d 243 (2006). In a mandamus action, this Court considers whether the defendant has a clear legal duty and whether the plaintiff has a clear right to performance of that duty. *Attorney General v Bd of State Canvassers*, 318 Mich App 242, 248; 896 NW2d 485

[44] Under that rule, this Court has jurisdiction over an action for "mandamus against a state officer."

[45] MCL 168.479 provides, "Any person or persons, feeling themselves aggrieved by any determination made by said board, may have such determination reviewed by mandamus, certiorari, or other appropriate remedy in the supreme court."

(2016). Specifically, the plaintiff has the burden to show:

> (1) a clear legal right to the act sought to be compelled; (2) a clear legal duty by the defendant to perform the act; (3) that the act is ministerial, leaving nothing to the judgment or discretion of the defendant; and (4) that no other adequate remedy exists. [*Casco Twp v Secretary of State*, 472 Mich 566, 621; 701 NW2d 102 (2005) (YOUNG, J., concurring in part and dissenting in part).]

A clear legal right has been defined as a right " 'clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided.' " *Univ Med Affiliates, PC v Wayne Co Executive*, 142 Mich App 135, 143; 369 NW2d 277 (1985) (citation omitted). The plaintiff has the burden to demonstrate an entitlement to the extraordinary remedy of a writ of mandamus. *Herp v Lansing City Clerk*, 164 Mich App 150, 161; 416 NW2d 367 (1987).

Plaintiffs here include a duly registered ballot-question committee (CPMC), a former paid employee of a political candidate (Spyke), and the parent of a person otherwise disqualified from serving on the proposed commission (Daunt). Spyke and Daunt contend that they will be aggrieved by the VNP Proposal because they would be precluded from serving on the redistricting commission pursuant to the revised criteria. They assert a clear legal right to have the Secretary and the Board reject the petition and not place it on the ballot.

The Secretary has a clear legal duty to "[p]repare the form of ballot for any proposed amendment to the constitution or proposal under the initiative or referendum provision of the constitution to be submitted to the voters of this state." MCL 168.31(1)(f). The Secretary argues, however, that her only remaining duty is to

certify the ballot to the counties after Board certification.

The Board has a clear legal duty regarding ballot questions because it examines petitions to ascertain whether they have sufficient signatures. MCL 168.476. The Board also makes an official declaration regarding the sufficiency of the petition. MCL 168.477(1). The Board's duty is to certify the proposal after determining whether the form of the petition substantially complies with statutory requirements and whether the proposal has sufficient signatures in support. See *Protecting Mich Taxpayers v Bd of State Canvassers*, 324 Mich App 240, 248 n 3; 919 NW2d 677 (2018). In essence, the Board ascertains whether sufficient valid signatures support the petition and whether the petition is in proper form.

"A ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Hillsdale Co Senior Servs, Inc v Hillsdale Co*, 494 Mich 46, 58 n 11; 832 NW2d 728 (2013) (quotation marks and citation omitted).

This Court has settled the question of whether the Board's and the Secretary's clear legal duties are ministerial where, as here, the parties dispute whether an initiative-petition proposal is an "amendment" to, or a "general revision" of, the Constitution. In *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 286-287; 761 NW2d 210 (2008), aff'd in result only 482 Mich 960 (2008), the panel explained that, because the determinations of whether a proposal is a general revision of or an amendment to the Constitution and whether a proposal serves more than a single purpose require judgment, they are not ministerial tasks to be performed by the Secretary or the Board. However, *this Court* is obliged to make the threshold determination of whether an initiative peti-

tion meets the constitutional prerequisites for acceptance on the ballot. *Id*. at 283, 291. As a result of this Court's decision, the Board and the Secretary would have a clear legal duty regarding the initiative petition. At that point, the act of the Board and the Secretary regarding the petition would be ministerial in nature, not requiring the exercise of judgment or discretion. *Id*. at 291-292. Consequently, as we have determined that the VNP Proposal meets the constitutional prerequisites, the Secretary's and the Board's actions in placing it on the ballot will be ministerial.

It does not appear to be disputed that the parties have no other adequate remedy available in law or equity.

Historically, challenges regarding a petition's substance have been viewed as premature if brought before the initiative legislation comes into effect, see *Hamilton*, 212 Mich at 34, but challenges regarding the legality or sufficiency of the form of the petitions themselves may be entertained earlier, *Leininger v Secretary of State*, 316 Mich 644; 26 NW2d 348 (1947). Questions about whether a petition meets the constitutional prerequisites for acceptance are ripe for review. *Mich United Conservation Clubs v Secretary of State*, 463 Mich 1009 (2001). Because the instant challenge involves whether the VNP Proposal is eligible to be on the ballot, the issue is ripe for review. See also *Citizens Protecting Michigan's Constitution*, 280 Mich App at 283, 288.

B. AMENDMENT VERSUS GENERAL REVISION

Article 12, § 2 of Michigan's 1963 Constitution addresses the amendment of the Constitution via initiative petition. It sets forth the requirements for such a petition to be placed on the ballot and provides:

Amendments may be proposed to this constitution by petition of the registered electors of this state. Every petition shall include the full text of the proposed amendment, and be signed by registered electors of the state equal in number to at least 10 percent of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected. Such petitions shall be filed with the person authorized by law to receive the same at least 120 days before the election at which the proposed amendment is to be voted upon. Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law. The person authorized by law to receive such petition shall upon its receipt determine, as provided by law, the validity and sufficiency of the signatures on the petition, and make an official announcement thereof at least 60 days prior to the election at which the proposed amendment is to be voted upon.

Any amendment proposed by such petition shall be submitted, not less than 120 days after it was filed, to the electors at the next general election. Such proposed amendment, existing provisions of the constitution which would be altered or abrogated thereby, and the question as it shall appear on the ballot shall be published in full as provided by law. Copies of such publication shall be posted in each polling place and furnished to news media as provided by law.

The ballot to be used in such election shall contain a statement of the purpose of the proposed amendment, expressed in not more than 100 words, exclusive of caption. Such statement of purpose and caption shall be prepared by the person authorized by law, and shall consist of a true and impartial statement of the purpose of the amendment in such language as shall create no prejudice for or against the proposed amendment.

If the proposed amendment is approved by a majority of the electors voting on the question, it shall become part of the constitution, and shall abrogate or amend existing provisions of the constitution at the end of 45 days after the date of the election at which it was approved. If two or

> more amendments approved by the electors at the same election conflict, that amendment receiving the highest affirmative vote shall prevail.[46]

The above language does not impose, or even suggest, limitation on the scope of a voter initiative proposing a constitutional amendment.

In contrast, Article 12, § 3 of the 1963 Constitution involves general revision of the Constitution via a constitutional convention, and it provides:

> At the general election to be held in the year 1978, and in each 16th year thereafter and at such times as may be provided by law, the question of a general revision of the constitution shall be submitted to the electors of the state. If a majority of the electors voting on the question decide in favor of a convention for such purpose, at an election to be held not later than six months after the proposal was certified as approved, the electors of each representative district as then organized shall elect one delegate and the electors of each senatorial district as then organized shall elect one delegate at a partisan election. The delegates so elected shall convene at the seat of government on the first Tuesday in October next succeeding such election or at an earlier date if provided by law.
>
> The convention shall choose its own officers, determine the rules of its proceedings and judge the qualifications, elections and returns of its members. To fill a vacancy in the office of any delegate, the governor shall appoint a qualified resident of the same district who shall be a member of the same party as the delegate vacating the office. The convention shall have power to appoint such officers, employees and assistants as it deems necessary and to fix their compensation; to provide for the printing and distribution of its documents, journals and proceed-

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[46] The 1835 Michigan Constitution included a passage regarding constitutional amendments, Const 1835, art 13, § 1, but limited those amendments to the Legislature. The 1908 Constitution permitted amendments by petition. Const 1908, art 17, § 2.

> ings; to explain and disseminate information about the proposed constitution and to complete the business of the convention in an orderly manner. Each delegate shall receive for his services compensation provided by law.
>
> No proposed constitution or amendment adopted by such convention shall be submitted to the electors for approval as hereinafter provided unless by the assent of a majority of all the delegates elected to and serving in the convention, with the names and vote of those voting entered in the journal. Any proposed constitution or amendments adopted by such convention shall be submitted to the qualified electors in the manner and at the time provided by such convention not less than 90 days after final adjournment of the convention. Upon the approval of such constitution or amendments by a majority of the qualified electors voting thereon the constitution or amendments shall take effect as provided by the convention.[47]

Our courts long have recognized that an amendment is not the same as a general revision and have attempted to define the differences between them where the constitutional provisions themselves do not define the terms. Eight decades ago, in 1932, our Supreme Court discussed the fundamental distinctions between revision and amendment in *Kelly v Laing*, 259 Mich 212; 242 NW 891 (1932). The Court held that an initiative petition may encompass only one proposed amendment but may involve more than one section, provided that "all sections are germane to the purpose of the amendment." *Id*. at 216. Another question raised in *Laing* was whether the changes at issue could be raised by amendment, or whether they constituted a general revision. The Court described the differences between the two concepts:

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[47] Michigan's 1835 Constitution contained a section regarding a constitutional convention. See Const 1835, art 13, § 2.

> 'Revision' and 'amendment' have the common characteristics of working changes in the charter and are sometimes used inexactly, but there is an essential difference between them. Revision implies a re-examination of the whole law and a redraft without obligation to maintain the form, scheme, or structure of the old. As applied to fundamental law, such as a constitution or charter, it suggests a convention to examine the whole subject and to prepare and submit a new instrument, whether the desired changes from the old be few or many. Amendment implies continuance of the general plan and purport of the law, with corrections to accomplish its purpose. Basically, revision suggests fundamental change, while amendment is a correction of detail. [*Id*. at 217.]

Our Supreme Court added:

> An amendment is usually proposed by persons interested in a specific change and little concerned with its effect upon other provisions of the charter. [In contrast, the] machinery of revision is in line with our historical and traditional system of changing fundamental law by convention, which experience has shown best adapted to make necessary readjustments. [*Id*. at 221-222.]

One year after *Laing*, our Supreme Court had occasion to consider whether a proposal was a revision or an amendment in *City of Pontiac Sch Dist v City of Pontiac*, 262 Mich 338, 344; 247 NW 474 (1933). The plaintiff argued that the proposal to limit property taxes that had been approved in the general election was so far-reaching as to invalidate the Constitution and thus was a general revision. *Id*. at 345. The Court disagreed, concluding that it was an amendment because the proposal did not "interfere with" or "modify" the operation of governmental agencies in such a way as to render it a general revision.[48] *Id*. at 345.

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[48] In light of the Supreme Court's holdings in *Laing* and *Pontiac*, it is puzzling why intervening defendants chose to discuss alternate defini-

In 2008, building on the precepts from *Laing* and *Pontiac*, this Court discussed the difference between an amendment of the Constitution and a general revision of the Constitution in *Citizens Protecting Michigan's Constitution*, 280 Mich App 273. Regarding a complaint for mandamus filed by the plaintiff CPMC concerning an initiative petition from the intervening defendant Reform Michigan Government Now (RMGN) for the general-election ballot, this Court analyzed the constitutional provisions governing an amendment, as compared to a general revision. The Court held that it was "absolutely clear" that the procedures for constitutional amendment could not achieve a general revision of the Constitution. *Id*. at 277. While the Constitution provides for amendment under the initiative-petition procedure—that is, through Article 12, § 2—a general revision of the constitution can occur only by the constitutional convention procedure in Article 12, § 3. *Id*.

This Court decided that the courts also must consider "the degree to which the proposal interferes with, or modifies, the operation of government." *Id*. at 298. The more the proposal modifies or interferes with the operation of government, the more likely it is to be a general revision. *Id*. The Court held:

> [T]o determine whether a proposal effects a "general revision" of the constitution, and is therefore not subject to the initiative process established for amending the constitution, the Court must consider both the quantitative nature and the qualitative nature of the proposed changes. More specifically, the determination depends on not only the number of proposed changes or whether a wholly new constitution is being offered, *but on the scope*

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tions of "amendment" and "revision." We rely on the terms as defined in *Laing*, rather than the dictionary definitions proffered by intervening defendants.

> *of the proposed changes and the degree to which those changes would interfere with, or modify, the operation of government*. [*Id*. at 305 (emphasis added).]

The RMGN proposal in *Citizens Protecting Michigan's Constitution* would have made myriad changes to the 1963 Michigan Constitution related to a far-ranging field of topics, from reducing the number of senators, representatives, and appellate justices and judges, to granting any citizen standing for certain environmental lawsuits, to limiting lobbying activities; the opinion listed 29 distinct changes to a multitude of constitutional provisions. *Id*. at 279-281. The proposal also would have created a new commission with authority over legislative districting, established rules for creating legislative districting plans, and eliminated judicial review over districting plans. *Id*. at 280. In total, it would have altered over two dozen sections of four articles within the Constitution and added four additional sections. *Id*. at 305.

This Court decided that the RMGN proposal did not "even approach the 'field of application' for the amendment procedure." *Id*. (citation omitted). The Court observed that the proposal would have modified "the fundamental governmental structure" under the Constitution. *Id*. at 306. Moreover, it would have done so in an abrupt manner, within less than six months of the November 2008 election. *Id*. at 306-307. The Court concluded that "[t]he substantial entirety of the petition alters the core, fundamental underpinnings of the constitution, amounting to a wholesale revision, not a mere amendment." *Id*. at 307. Our Supreme Court affirmed in result only and did not adopt this Court's reasoning.[49]

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[49] In Justice CORRIGAN's concurrence, she noted that this Court did not clearly err in its articulation of the difference between an amendment

The RMGN proposal would have reorganized the operation of the whole state government. The same is simply not true in this case. Here, rather than proposing "sprawling compilations of changes" as characterized by plaintiffs, the VNP Proposal has a singular focus: to create an independent citizens redistricting commission with exclusive authority to establish redistricting plans for legislative districts. This case therefore is distinguishable from the much broader RMGN proposal in *Citizens Protecting Michigan's Constitution*.

The question then becomes whether, under the legal framework of *Citizens Protecting Michigan's Constitution*, the VNP Proposal falls within the description of an amendment. Intervening defendants argue that this Court should limit *Citizens Protecting Michigan's Constitution* to its own "highly unusual" facts, particularly because the Court set forth a qualitative/quantitative standard borrowed primarily from the decisions of other state courts. Nevertheless, we are bound by *Citizens Protecting Michigan's Constitution* as a published decision issued after 1990. MCR 7.215(J)(1). But even in following *Citizens Protecting Michigan's Constitution*, we keep in mind the Court's clarification at the outset that its decision was not "to prevent the citizens from voting on a proposal simply because that proposal is allegedly too complex or confusing." *Citizens Protecting Michigan's Constitution*, 280 Mich App at 276.

Four years after *Citizens Protecting Michigan's Constitution* was decided, our Court considered in *Protect Our Jobs v Bd of State Canvassers*, unpublished per curiam opinion of the Court of Appeals,

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and a general revision or in its ultimate conclusion. Two justices agreed with her. *Citizens Protecting Michigan's Constitution*, 482 Mich at 964 (CORRIGAN, J., concurring). However, as noted, a majority of our Supreme Court did not adopt this Court's reasoning.

issued August 27, 2012 (Docket No. 311828), aff'd on other grounds 492 Mich 763 (2012), whether a ballot initiative was an amendment or a general revision.[50] The proposal would have added a new Article 1, § 28 to provide the right to bargain collectively, and a new paragraph to Article 11, § 5 to protect the collective-bargaining right for classified civil service employees. The plaintiff, CPMC, challenged the proposal as, among other things, being a general revision rather than an amendment. *Id*. at 1-2. This Court relied on the qualitative and quantitative test in *Citizens Protecting Michigan's Constitution* to analyze the issue. The Court acknowledged that the proposal might have an effect on provisions and statutes, but it also observed that the proposal was confined to a single subject matter and that it directly added only one section to the Constitution and changed one other. This Court resolved that the initiative proposal was "far more akin to a correction of detail than a fundamental change, when viewed in the proper context of the constitution as a whole." *Id*. at 2-3.

This case falls somewhere between *Citizens Protecting Michigan's Constitution* and *Protect Our Jobs*. The VNP Proposal is nowhere near as diverse and titanic as the RMGN proposal, but nor is it as concise as the proposal in *Protect Our Jobs*.

The VNP Proposal maintains the structure of a commission for legislative districting. It continues the general plans for a commission, but it changes the details of how the commission members are chosen and the specifics regarding the commission's operation. It

[50] On appeal in *Protect Our Jobs*, our Supreme Court did not address the general revision/amendment argument raised in this Court, limiting its analysis to the republication requirement of Const 1963, art 12, § 2 and MCL 168.482(3).

does not seek to change fundamental law—senate and house members still will represent, and be chosen by, voters in legislative districts, and the number of senators and representatives will not change, unlike the RMGN proposal. The VNP proposal was put forward by a ballot-question committee intent on a specific change: to modify the commission membership to provide for an independent commission to draw legislative lines and to restrict membership on the commission to those who essentially are not partisan elected officials or lobbyists. In short, the VNP Proposal is intended to remedy perceived abuses from partisan gerrymandering of districts. This proposal does not interfere with or modify the operation of the government in such a way as to render it a general revision. The proposal seeks only to modify the sections of the Constitution that involve a single, narrow focus—the independent citizens redistricting commission.

We acknowledge that the *Citizens Protecting Michigan's Constitution* Court commented on a portion of the RMGN proposal dealing with the proposed changes to the districting commission:

> As just one example, the proposal strips the Legislature of any authority to propose and enact a legislative redistricting plan. It abrogates a portion of the judicial power by giving a new executive branch redistricting commission authority to conduct legislative redistricting. It then removes from the judicial branch the power of judicial review over the new commission's actions. We agree with the Attorney General that the proposal affects the "foundation power" of government by "wresting from" the legislative branch and the judicial branch any authority over redistricting and consolidating that power in the executive branch, albeit in a new independent agency with plenary authority over redistricting. [*Citizens Protecting Michigan's Constitution*, 280 Mich App at 306.]

The instant proposal does not wrest complete power from the legislative branch and the judicial branch, given that the Legislature retains the power to veto potential commission members and the judiciary retains control over challenges related to the commission. The proposal does shift the duty of redistricting from the Legislature to the independent commission, a commission that is similar in structure to the one described in our existing Constitution. The proposal does not otherwise reduce general legislative power.

With regard to our Supreme Court, the proposal provides for Supreme Court oversight in a manner similar to the existing constitutional provisions, but it does preclude the Supreme Court from ordering the adoption of a plan other than that arrived at by the independent commission. The power of the executive branch would not be materially changed, although the commission's functions would not be subject to control by the governor. Plaintiffs seek to parse out these changes into 14 enumerated points, but those points merely seek to shift the Court's focus from the forest to the trees. This issue should not be made more complicated than necessary.

Further, the *Citizens Protecting Michigan's Constitution* Court did not consider the proposed change in isolation but as one of the 29 items in the vast proposal. *Citizens Protecting Michigan's Constitution* did not hold that an initiative could not succeed on any *one* of those 29 subjects; rather, it held that because the petition encompassed *all* 29 changes, it could not be considered a mere amendment. We do not construe the proposed amendment here as so far-reaching in the framework of the Constitution so as to be a reexamination of the whole section. Because our existing Constitution has provided for a commission to draw

the districting lines, it follows that an independent commission to do the same would not be so violative of the Constitution so as to preclude this proposal from placement on the ballot.

Moreover, the VNP Proposal is not wholly new. It does not create an entirely new commission regarding redistricting; the commission already exists in our Constitution, although admittedly it has not been active for decades given *Reynolds*. The VNP Proposal merely changes the method by which the commissioners will be chosen going forward and adds additional members who are avowed independent voters. It does not wholly impede legislative power because legislative leaders retain the power to veto proposed commission members. Undeniably, it introduces new concepts,[51] but it does so in a finite manner. The body of Michigan caselaw does not hold that the addition of new concepts within the framework of our existing Constitution precludes an initiative petition.

Plaintiffs maintain that the VNP Proposal abandons core redistricting criteria that have existed since the state's founding. Our Supreme Court has ruled that "[t]he basic building blocks of the apportionment rules are the counties." *In re Apportionment of State Legislature—1982*, 413 Mich at 125. The public-policy issues raised by the proposal's nonadherence to the county framework are not the province of this branch of government at this stage of the initiative-petition process. We do not believe that the choosing of geo-

[51] VNP's general counsel admitted as much in his August 9, 2017 memorandum to the Board: "Creating a 'commission' that is not subject to the oversight or authority of the executive branch is a new and significantly different concept not previously found within the 1963 Constitution. Further, though this commission would be housed within the legislative branch, its actions are not subject to approval or oversight by the Legislature. This is another new concept."

graphical legislative districts for representation is truly a "fundamental function" or an "operation of government."

With regard to the quantitative portion of the *Citizens Protecting Michigan's Constitution* holding, the VNP Proposal changes 11 sections within three articles of the Constitution. The *essential* changes can be quickly enumerated, yet plaintiffs repeatedly point out that the proposal would add 4,834 words to the Constitution and even included a bar graph in their reply brief. VNP should not be penalized for including specific details within its proposal, particularly when many of the proposed additions are merely operational details.

Plaintiffs also argue that the proposal is multifarious and goes beyond the scope of a single amendment. The VNP Proposal is undeniably detailed, but it is targeted to achieve a single, specific purpose. To the extent that plaintiffs urge this Court to accept that the meaning of an amendment includes a "short" correction to the existing Constitution, we have found no such limitation in legal authority.

Further, plaintiffs maintain that the VNP Proposal should have a lengthy explanation of its changes, pointing out that the information disseminated after the 1961–1962 constitutional convention included a 109-page pamphlet. Here, such a lengthy pamphlet would not be necessary to describe the changes proposed by the VNP Proposal, particularly when the most recent constitutional convention resulted in myriad innovative changes to the existing Constitution, including the mandate of equal-rights protections and the establishment of the Civil Rights Commission.

Plaintiffs also argue that the multifarious nature of the VNP Proposal is illustrated by the fact that it

cannot be easily summarized in 100 words. This argument is premature because the Director of Elections has not yet fulfilled her duty under MCL 168.32(2) to draft the 100-word summary.

Plaintiffs add that some of the VNP Proposal requirements would be impossible to comply with, focusing on the requirement that the Secretary select commissioners in a manner that mirrors the demographic makeup of the state. That argument is irrelevant to the threshold question before this Court regarding whether the proposal is eligible to be placed on the ballot, but instead pertains to the merits of the proposal, an issue that is not before this Court.

In sum, we opine that the VNP Proposal is closer to the proposal in *Protect Our Jobs* than to the proposal in *Citizens Protecting Michigan's Constitution*. We hold that the VNP Proposal, although undeniably introducing new concepts, does not modify or interfere with the fundamental operation of government or create a wholly new constitutional provision so as to make it a general revision to the Constitution rather than an amendment.

### C. REPUBLICATION

Proposals to amend the Constitution must publish those sections that the proposal will alter or abrogate. Article 12, § 2 of the 1963 Constitution governs amendment of the Constitution by petition and vote, and it provides, in pertinent part: "Such proposed amendment, existing provisions of the constitution which would be altered or abrogated thereby, and the question as it shall appear on the ballot shall be published in full as provided by law." The provision's aim is to advise the voter of the amendment's purpose and to identify which provision(s) of the constitutional law it

changes or replaces. *Massey v Secretary of State*, 457 Mich 410, 417; 579 NW2d 862 (1998). Care must be taken, however, not to confuse the voter by publishing myriad constitutional provisions "which were or might be directly or only remotely, and possibly only contingently, affected by the proposed amendment." *City of Pontiac Sch Dist*, 262 Mich at 344.

The Legislature has enacted the publishing requirements for petitions. MCL 168.482(3) provides, in relevant part: "If the proposal would alter or abrogate an existing provision of the constitution, the petition shall so state and the provisions to be altered or abrogated shall be inserted, preceded by the words: 'Provisions of existing constitution altered or abrogated by the proposal if adopted.' "[52] (Formatting altered.)

Our Supreme Court has held that an initiative petition must comply with the mandatory statutory provisions that set forth requirements regarding a petition's form. *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 594, 601-602; 822 NW2d 159 (2012) (opinion by MARY BETH KELLY, J.); *id*. at 620 (opinion by YOUNG, C.J.); *id*. at 637, 640-641 (opinion by MARKMAN, J.).[53] Given that MCL 168.482(3) contains the mandatory term "shall," petitions must comply

[52] We reject intervening defendants' contention that the statutory republication requirement in MCL 168.482(3) is unconstitutional because it imposes undue burdens on the exercise of the people's right to propose amendments via voter initiative. When our Supreme Court has applied the requirements of MCL 168.482 to voter-initiative petitions, this Court is bound by that legal authority and, for that reason, does not consider the constitutionality of the statute.

[53] Intervening defendants argue that *Stand Up* does not apply here because the language of Const 1963, art 2, § 9, which was at issue in *Stand Up*, is substantially different from the language of Const 1963, art 12, § 2 at issue here. Notwithstanding, because our Supreme Court cited *Stand Up* in *Protect Our Jobs*, 492 Mich at 778—which involved Const 1963, art 2, § 2—this Court does likewise.

with the republication requirement. *Protect Our Jobs*, 492 Mich at 778. Provisions of the Constitution must be republished on petitions when "a proposed constitutional provision amends or replaces ('alters or abrogates') a specific provision of the Constitution, that such provision should be published along with the proposed amendment . . . ." *City of Pontiac Sch Dist*, 262 Mich at 344. Our Supreme Court has explained that an alteration or abrogation ensues "if the proposed amendment would add to, delete from, or change the existing wording of the provision, or would render it wholly inoperative." *Ferency v Secretary of State*, 409 Mich 569, 597; 297 NW2d 544 (1980). The fact that a proposed amendment will affect a provision does not inevitably mean the provision is "altered or abrogated." *Id*. at 596-597.

In 2012, our Supreme Court observed that the republication requirement continued to be subject to debate, which inspired the Court to provide additional clarity. It reasoned that to establish that a proposed amendment "alters" an existing provision such that republication is required, an amendment must: (1) add words to an existing provision, (2) delete words from an existing provision, or (3) change the wording in an existing provision. *Protect Our Jobs*, 492 Mich at 782. Consequently, the Court concluded that a new constitutional provision does not "alter" an existing provision when the new provision leaves completely intact the text of all existing provisions.[54] *Id*.

With regard to whether an amendment "abrogates" an existing provision, the *Protect Our Jobs* Court stated that "the 'abrogation' standard makes clear that

[54] "The phrase 'the existing wording' should be taken literally." *Massey*, 457 Mich at 418.

republication is only triggered by a change that would essentially eviscerate an existing provision." *Id*. The Court went on to state:

> Our caselaw establishes that an existing provision of the Constitution is abrogated and, thus, must be republished if it is rendered 'wholly inoperative.' An existing constitutional provision is rendered wholly inoperative if the proposed amendment would make the existing provision a nullity or if it would be impossible for the amendment to be harmonized with the existing provision when the two provisions are considered together. That is, if two provisions are incompatible with each other, the new provision would abrogate the existing provision and, thus, the existing provision would have to be republished. An existing provision is not rendered wholly inoperative if it can be reasonably construed in a manner consistent with the new provision, i.e., the two provisions are not incompatible.
>
> Determining whether the existing and new provisions can be harmonized requires careful consideration of the actual language used in both the existing provision and the proposed amendment. An existing provision that uses nonexclusive or nonabsolute language is less likely to be rendered inoperative simply because a proposed new provision introduces in some manner a change to the existing provision. Rather, when the existing provision would likely continue to exist as it did preamendment, although it might be affected or supplemented in some fashion by the proposed amendment, no abrogation occurs. On the other hand, a proposed amendment more likely renders an existing provision inoperative if the existing provision creates a mandatory requirement or uses language providing an exclusive power or authority because any change to such a provision would tend to negate the specifically conferred constitutional requirement. [*Id*. at 782-783 (citations omitted).]

The abrogation inquiry requires examination of the entire existing constitutional provision, as well as the provision's "discrete subparts, sentences, clauses, or

even, potentially, single words." *Id*. at 784. The petition must republish the entire provision if the proposed amendment "renders wholly inoperative" any of the existing provision's components. *Id*.

The Court summarized its holding regarding republication as follows:

> 1. When the existing language of a constitutional provision would be altered or abrogated by the proposed amendment, republication of the existing provision is required.
>
> 2. The language of the amendment itself, rather than how proponents or opponents of the amendment characterize its meaning, controls whether an existing provision would be altered or abrogated by the proposed amendment.
>
> 3. When the existing language of a constitutional provision would not be altered, but the proposed amendment would render the entire provision or some discrete component of the provision wholly inoperative, abrogation would occur and republication of the existing language is required.
>
> 4. When the existing language would not be altered or abrogated, but the proposed amendment would only have an effect on the existing language, and the new and existing provisions can be harmoniously construed, republication of the existing provision is not required.
>
> 5. When the existing language would not be altered or abrogated, but the proposed amendment would only have an effect on the existing language, thereby requiring that the new and existing provisions be interpreted together, republication of the existing provision is not required. [*Id*. at 791-792.]

Additionally, the *Protect Our Jobs* Court cited *Ferency*'s caution against adopting an overly expansive definition of the terms "alter or abrogate" so as not to "chill" the people's ability to amend the Constitution. It

added that petition circulators should not be required to append the entire Constitution to their petition. *Id*. at 780, citing *Ferency*, 409 Mich at 597-598. The courts and the Legislature may not impose "undue burdens" on the people's right to amend. *Wolverine Golf Club v Secretary of State*, 384 Mich 461, 466; 185 NW2d 392 (1971) (citation omitted).

The VNP Proposal does not *alter* the challenged sections at issue because it does not add words, delete words, or change words in the existing sections. Consequently, the analysis that follows examines only whether the VNP Proposal *abrogates* existing constitutional provisions.

1. CIRCUIT COURT JURISDICTION

Const 1963, art 6, § 13 provides:

> The circuit court shall have original jurisdiction in all matters not prohibited by law; appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law; power to issue, hear and determine prerogative and remedial writs; supervisory and general control over inferior courts and tribunals within their respective jurisdictions in accordance with rules of the supreme court; and jurisdiction of other cases and matters as provided by rules of the supreme court.

In the VNP Proposal, Article 4, § 6(19) provides, in relevant part:

> The Supreme Court, in the exercise of original jurisdiction, shall direct the Secretary of State or the Commission to perform their respective duties, may review a challenge to any plan adopted by the commission, and shall remand a plan to the commission for further action if the plan fails to comply with the requirements of this Constitution, the Constitution of the United States or superseding federal law.

Plaintiffs contend that the proposal creates original jurisdiction over redistricting matters in the Supreme Court instead of in the circuit court and that Article 4, § 6(19) abrogates Const 1963, art 6, § 13 because it would divest the circuit court of its exclusive original jurisdiction. Notably, our current Constitution already gives the Supreme Court authority over redistricting commission matters. Const 1963, art 4, § 6, ¶¶ 7 to 8.

Also, the substance of Const 1963, art 6, § 13 would not be changed by the VNP Proposal. Article 6, § 13 does not have exclusive language. Rather, it provides the circuit court with jurisdiction in *all matters not prohibited by law*, which illustrates that the framers intended that the circuit courts' jurisdiction would have exceptions. Article 6, § 13 therefore does not suggest that such jurisdiction cannot be limited or affected by other constitutional provisions.

Indeed, our Courts recognize that exceptions to circuit court jurisdiction exist. Plaintiffs cite *Bowie v Arder*, 441 Mich 23; 490 NW2d 568 (1992), to support their argument that the VNP Proposal abrogates Const 1963, art 6, § 13 because the change would be not "by law," but by constitutional decree. The *Bowie* Court recognized however that circuit court jurisdiction may be subject to an exception when jurisdiction is "given exclusively to another court by constitution or statute . . . ." *Id*. at 38. See MCL 600.605.[55] See also *Prime Time Int'l Distrib, Inc v Dep't of Treasury*, 322 Mich App 46, 52; 910 NW2d 683 (2017) (observing that the circuit courts are presumed to have jurisdiction

[55] That statute provides, "Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state."

unless expressly prohibited or unless jurisdiction is given to another court by Constitution or statute).

Further, the VNP Proposal can be harmonized with Const 1963, art 6, § 13 because the only effect is that the circuit court will not have jurisdiction over the commission. In all other respects, Const 1963, art 6, § 13 remains unaffected. The existing constitutional provision has not been eviscerated. No abrogation therefore would occur because the existing provision would be neither negated nor rendered wholly inoperative.

2. FREEDOM OF SPEECH

Const 1963, art 1, § 5 provides as follows:

> Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press.

The VNP Proposal provides in Article 4, § 6(11), in relevant part:

> The Commission, its members, staff, attorneys, and consultants shall not discuss redistricting matters with members of the public outside of an open meeting of the Commission, except that a commissioner may communicate about redistricting matters with members of the public to gain information relevant to the performance of his or her duties if such communication occurs (a) in writing or (b) at a previously publicly noticed forum or town hall open to the general public.

Plaintiffs suggest that the VNP Proposal would restrict the free speech of commissioners. They argue that the restrictions on the commissioners' liberty of speech would extend to matters beyond the commission, and they suggest that the restrictions are neither

in the public interest nor in keeping with the rights of the public officials. We reject these policy arguments because the issue before this Court is the alleged abrogation of existing constitutional provisions, not whether the VNP Proposal promotes sound social policy. We also point out that the speech of government employees may be subject to certain restrictions given the public employees' potential to express views that are contrary to governmental policies; a citizen entering government service "must accept certain limitations on his or her freedom [of speech]." *Shirvell v Dep't of Attorney General*, 308 Mich App 702, 733; 866 NW2d 478 (2015) (quotation marks and citation omitted).

Abrogation would not occur because Const 1963, art 1, § 5 would remain fully operative. Article 4, § 6(11) of the VNP Proposal does not restrict all speech but does place limits on matters related to official commission work. Commissioners would retain their right to speak freely, but when speaking on official business, they would be restricted to doing so in an open meeting, in writing, or at a publicly noticed public forum. That constraint is accounted for by the condition in Const 1963, art 1, § 5 that every person "is responsible for the abuse of such right [to free speech.]" Accordingly, the right to free speech is not wholly unrestricted.

Additionally, Const 1963, art 1, § 5 is not rendered a nullity because it has relevancy well beyond the scope of matters related to the commission. The VNP Proposal does not replace Const 1963, art 1, § 5, nor does it render that section wholly inoperative. Plaintiffs have taken a very broad view of the *Protect Our Jobs* standard, arguing that "*any* abrogation," even a slight one, requires republication. A restriction, however, is not an abrogation—and *Protect Our Jobs* holds that the provisions must be impossible to har-

monize. *Protect Our Jobs*, 492 Mich at 784. Republication is not required when the new proposed amendment would have only an effect on existing language. *Id*. at 792.

3. APPROPRIATIONS CLAUSE

The Appropriations Clause, Const 1963, art 9, § 17, provides:

> No money shall be paid out of the state treasury except in pursuance of appropriations made by law.

The VNP Proposal sets forth Article 4, § 6(5), which provides, in relevant part:

> Each commissioner shall receive compensation at least equal to 25 percent of the governor's salary. The State of Michigan shall indemnify commissioners for costs incurred if the Legislature does not appropriate sufficient funds to cover such costs.

Plaintiffs contend that the existing provision is incompatible with the proposed requirement that the state compensate and indemnify commissioners for costs incurred even absent an appropriation. They note that the proposal mandates indemnification of commissioners even if the Legislature does not approve sufficient funding.

In examining the Appropriations Clause from the 1908 Constitution,[56] our Supreme Court recognized that "the weight of authority" held that the clause did not restrict appropriations to enactments from the Legislature but also allowed for "a constitutional appropriation apart from any action by the legislature." *Civil Serv Comm v Auditor General*, 302 Mich 673, 679;

[56] The language from the 1908 Appropriations Clause, Const 1908, art 10, § 16, is the same as the language in the current version.

5 NW2d 536 (1942). But even so, the VNP Proposal accounts for the legislative appropriation because it provides for a cause of action if the Legislature does not appropriate the funds—thereby indicating that the money is to come from the Legislature via an appropriation.

Plaintiffs' claims that the commission will have an unlimited budget and that the state's assets will be subject to the "unrestricted whims" of the commissioners are irrelevant because they do not pertain to the question of whether the VNP Proposal abrogates the existing Appropriations Clause by setting forth a particular minimum budget for the commission and providing for a cause of action if the Legislature fails to appropriate the funds. The proposed Article 4, § 6(5) does not require a payment from the state treasury absent an appropriation, but merely provides for a constitutional cause of action should the Legislature fail to fulfill its obligation to fund the commission. To the extent that plaintiffs argue that the courts cannot order the Legislature to make an appropriation, that question need not be settled at this time. The only question in this case is whether the VNP Proposal replaces, renders wholly inoperative, or eviscerates the Appropriations Clause. It does not.

#### 4. OATH OF OFFICE

Const 1963, art 11, § 1 concerns the oath taken by public officers and provides as follows:

> All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the

> office of ..... according to the best of my ability. No other oath, affirmation, or any religious test shall be required as a qualification for any office or public trust.

The VNP Proposal sets forth Article 4, § 6(2), which provides, in relevant part:

> Commissioners shall be selected through the following process:
>
> (A) The Secretary of State shall do all of the following:
>
> * * *
>
> (III) Require applicants to attest under oath that they meet the qualifications set forth in this section; and either that they affiliate with one of the two political parties with the largest representation in the Legislature (hereinafter, "major parties"), and if so, identify the party with which they affiliate, or that they do not affiliate with either of the major parties.

Plaintiffs maintain that the existing provision requires only one oath and the new provision would render the existing provision a nullity. The affirmation in proposed Article 4, § 6(2)(A)(III) is not an oath of office, but is merely an affirmation that the applicant satisfies the commissioner qualifications, which are enumerated in a separate section, § 6(1). This position finds support in *Advisory Opinion on Constitutionality of 1975 PA 227*, 396 Mich 465, 510; 242 NW2d 3 (1976), wherein our Supreme Court ruled that an oath regarding financial disclosure was akin to the affidavits required to file a nominating petition under MCL 168.558.

In contrast, the oath in *Harrington v Secretary of State*, 211 Mich 395, 395-396; 179 NW2d 283 (1920), cited by plaintiffs, required the candidate to swear in part that he would "support the principles of [the] political party of which he is a member if nominated

and elected[.]" That loyalty oath was to cover the entire term of office, even after election, and for so long as he or she remained in office. In ruling that the oath was unconstitutional, the Court cited with approval the Attorney General's reasoning that the candidate would be bound by an oath other than the constitutional oath of office. *Id*. at 397. The same is not true here because the oath required by the VNP Proposal relates only to the information on the application and does not bind a candidate once he or she becomes a commissioner.

Thus, the existing oath-of-office provision is unaffected by the affirmation. The proposal does not make the existing constitutional provision a nullity.

5. CIVIL SERVICE EMPLOYEES

In a footnote, plaintiffs add a final example, stating that VNP Proposal should have republished Const 1963, art 11, § 5, regarding civil service employees, given that the Civil Service Commission has the authority to regulate "all conditions of employment in the classified service." The VNP Proposal in Article 4, § 6(21) provides:

> Notwithstanding any other provision of law, no employer shall discharge, threaten to discharge, intimidate, coerce, or retaliate against any employee because of the employee's membership on the commission or attendance or scheduled attendance at any meeting of the commission.

Plaintiffs argue that if a civil service employee becomes a member of the commission, the Civil Service Commission's authority over "all conditions of employment" will no longer be exclusive. This argument has been abandoned because plaintiffs opted to give it cursory treatment. *Huntington Nat'l Bank v Daniel J Aronoff Living Trust*, 305 Mich App 496, 517; 853

NW2d 481 (2014). Even so, the two provisions can be harmonized. Therefore, we cannot conclude that the proposal abrogates the existing provision.

### D. CROSS-COMPLAINT

Intervening defendants seek a writ of mandamus directing defendants to comply with their duties concerning certification, approval, and placement of the VNP Proposal on the 2018 general-election ballot. We have concluded that plaintiffs' complaint for mandamus should be denied. Consequently, intervening defendants' cross-claim should be granted with respect to the Board, because the Board has the duty to make the final decision regarding the sufficiency of the petition. Intervening defendants also ask that this Court designate that its order have immediate effect pursuant to MCR 7.215(F)(2).

## III. CONCLUSION

Plaintiffs' complaint is without merit. The VNP Proposal is not a general revision of the Constitution because it is narrowly tailored to address a single subject: the replacement of the current constitutional provision providing for an eight-member redistricting commission with a thirteen-member commission comprised of eight partisan members and five members who are self-declared independent voters not affiliated with either major political party. The VNP Proposal is confined to a single purpose, that of correcting the partisan aspects of the constitutional provisions regarding the redistricting commission, and it does so without interfering with the operation of government. Hence, we conclude that the proposal is an amendment, albeit an amendment set forth in considerable detail, permitted by voter initiative. Also, the petition

complies with the republication requirement. The petition neither abrogates nor alters the existing sections of the Constitution as asserted by plaintiffs.

The complaint for mandamus is denied and the cross-complaint is granted. Defendant Board is directed to take the necessary steps to place the proposal on the ballot for the general election. No costs, a public question being involved. This opinion is given immediate effect pursuant to MCR 7.215(F)(2).

CAVANAGH, P.J., and K. F. KELLY and FORT HOOD, JJ., concurred.

BOLER v GOVERNOR

Docket No. 337383. Submitted April 4, 2018, at Detroit. Decided June 14, 2018, at 9:00 a.m. Leave to appeal denied 503 Mich 997.

Beatrice Boler and others filed a purported class action in the Court of Claims against the Governor, the state of Michigan, the Department of Environmental Quality and several of its employees, three former emergency managers for the city of Flint, and others, alleging breach of contract and unjust enrichment and seeking injunctive and declaratory relief, money damages, and refunds. Plaintiffs claimed that defendants conspired to keep from them the seriousness of the pollution and contamination of the water supply in the city and that defendants allowed delivery of the contaminated water supply to continue, which put plaintiffs' health at risk and caused them damages. Several defendants, including the city and its former mayor, moved for summary disposition in lieu of answering the complaint. Before ruling on the motion, the court, MARK T. BOONSTRA, J., sua sponte dismissed plaintiffs' claims against the former mayor, the city, and several employees of the city (the city defendants), citing an unpublished opinion and order issued by the Court of Claims in *Collins v Flint* (Docket No. 16-115-MZ) and *Vale v Flint* (Docket No. 16-116-MK), consolidated cases involving issues similar to those in the instant case. The Court of Claims had ruled in *Collins* and *Vale* that the city was not an arm of the state and that the claims against the city and its employees were within the exclusive subject-matter jurisdiction of the circuit court, i.e., the claims were not within the Court of Claims' jurisdiction. The city appealed.

The Court of Appeals *held*:

1. Under MCL 600.6419(1)(a), the Court of Claims has exclusive jurisdiction to hear and determine any claim or demand against the state or any of its departments or officers, notwithstanding another law that confers jurisdiction of the case in the circuit court. MCL 600.6419(7) defines "the state or any of its departments or officers" to include an "arm of the state." A city exercises dual powers and at any given time may be acting as a "public" or "private" corporation. Determining whether a city or municipality acted as an arm of the state requires a determina-

tion of which power the city or municipality was exercising at the time. When a municipality supplies a utility to a group of citizens and the citizens pay for the utility, the municipality is operating the utility as a private business or corporation. On the other hand, when the municipality supplies water for the purpose of protecting its citizens from fire or anything else with the potential to have statewide impact and the municipality is not profiting from providing that water, then it is performing a governmental function that serves the public in general—that is, it is acting as an arm of the state. The city defendants provided no persuasive argument or binding authority indicating that the city was acting as an arm of the state when operating its waterworks. Therefore, the Court of Claims did not have exclusive jurisdiction over plaintiffs' claims against the city defendants.

2. The city defendants did not cite any persuasive authority indicating that the state's emergency management of a municipality under the Local Financial Stability and Choice Act, MCL 141.15641 *et seq*., transforms the municipality into an arm of the state. Under the act, the state of Michigan provides the financial compensation for the emergency manager, and, as an appointee of the state government, the emergency manager is an employee of the state government. This means that claims against an emergency manager acting in his or her official capacity fall within the jurisdiction of the Court of Claims, but it does not necessarily follow that a municipality under the direction of an emergency manager is transformed into an arm of the state. Given the law-dictionary definition of "arm of the state," the city was not operating as an arm of the state—that is, as an alter ego or instrumentality of the state—when the city was under emergency management. The city was at no time operating as a means or agency through which a function or a purpose of the state was accomplished. The city was at all times operating as a means through which its own functions were accomplished. A city operating to accomplish its own purposes—even when operating under a state-appointed emergency manager—is not an arm of the state for purposes of jurisdiction in the Court of Claims. Therefore, the plaintiffs' claims against the city defendants were properly dismissed.

Affirmed.

1. COURT OF CLAIMS — JURISDICTION — MUNICIPAL UTILITY OPERATIONS — PRIVATE OR PUBLIC CORPORATION.

Under MCL 600.6419(1)(a), the Court of Claims has exclusive jurisdiction over claims against the state, including claims

against an entity operating as an arm of the state; when a municipality uses its waterworks to supply water to a group of citizens and those citizens pay for the utility, the municipality is not engaging in a governmental function and is not, therefore, functioning as an arm of the state; rather, the municipality is operating the utility as a private business or corporation; because a municipality is not acting as an arm of the state when it operates its waterworks as a private business, the Court of Claims does not have exclusive jurisdiction over a dispute involving the operation of a municipality's waterworks as a private business.

2. COURT OF CLAIMS — JURISDICTION — MUNICIPALITIES — EMERGENCY MANAGER OVERSIGHT.

An arm of the state is an entity created by the state that operates as an alter ego or instrumentality of the state through which the state's objectives are accomplished; a municipality operating under the direction of an emergency manager is not transformed into an arm of the state simply because the emergency manager is a state government employee who, when acting in his or her official capacity, would fall within the jurisdiction of the Court of Claims; in order to fall within the jurisdiction of the Court of Claims, the municipality itself must be engaged in a governmental function that qualifies the municipality as an arm of the state (MCL 141.1541 *et seq*.; MCL 600.6419).

*Butzel Long, PC* (by *Joseph E. Richotte*, *Frederick A. Berg, Jr.*, and *Sheldon H. Klein*) for the city of Flint.

The city of Flint Law Department (by *Angela N. Wheeler*, *Reed E. Erickson*, and *William Y. Kim*) for the city of Flint and, in their official capacities only, Dayne Walling, Howard Croft, Michael Glasgow, and Daugherty Johnson III.

*White Law, PLLC* (by *Alexander S. Rusek*) for Howard Croft, in his individual capacity.

*O'Neill, Wallace & Doyle, PC* (by *Brett T. Meyer*) for Michael Glasgow, in his individual capacity.

*Law Office of David Meyers* (by *David W. Meyers*) and *Law Office of Edwar A. Zeineh, PLLC* (by *Edwar Zeineh*) for Daugherty Johnson III, in his individual capacity.

*Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *Richard S. Kuhl*, *Margaret A. Bettenhausen*, *Nathan A. Gambill*, and *Zachary C. Larsen*, Assistant Attorneys General, for Governor Rick Snyder, the state of Michigan, the Department of Environmental Quality, and the Department of Health and Human Services.

*Eugene Driker*, *Morley Witus*, and *Todd R. Mendel*, Special Assistant Attorneys General, for Governor Rick Snyder.

Before: SERVITTO, P.J., and MARKEY and O'CONNELL, JJ.

PER CURIAM. Defendants Dayne Walling, Howard Croft, Michael Glasgow, Daugherty Johnson III, and the city of Flint (defendants)[1] appeal as of right the trial court's sua sponte order dismissing plaintiffs' claims against them for lack of subject-matter jurisdiction. We affirm.

Plaintiffs, residents of and a company located in the city of Flint, filed this lawsuit in June 2016 (purportedly as a class action) against the city, various officers and employees of the city, former emergency managers of the city, the Governor, the state of Michigan, the Michigan Department of Environmental Quality (MDEQ), and various employees of the MDEQ. The lawsuit concerns the contaminated water supply in

[1] We refer to these particular defendants-appellants as "defendants" throughout this opinion for ease of reference even though the action was filed against additional parties.

Flint, Michigan. Plaintiffs allege that defendants conspired to keep from plaintiffs the seriousness of the pollution and contamination and that defendants allowed delivery of the water supply to continue, which put plaintiffs' health at risk and caused them damages. The specific causes of action were breach of contract, unjust enrichment, and declaratory relief.

Darnell Earley, Gerald Ambrose, and defendants moved for summary disposition in lieu of answering the complaint. Before a decision was rendered on that motion, the court, on its own motion, dismissed plaintiffs' claims against defendants "in accordance with the August 25, 2016 Opinion and Order issued in *Collins v City of Flint, et al*., Court of Claims Docket No. 16-115-MZ and *Vale v City of Flint*, Court of Claims Docket No. 16-116-MK[.]" In those cases, the plaintiffs commenced intended class actions in the Genesee Circuit Court regarding the water crisis in Flint against the Governor, the state of Michigan, the city of Flint, the city's former emergency managers, and several city employees. The plaintiffs asserted that the defendants (1) breached a contract with residents to provide potable water, (2) breached an implied warranty of fitness for a particular purpose, (3) violated the Michigan Consumer Protection Act, and (4) unjustly enriched the city. In *Collins* and *Vale*, the city transferred the claims against the city, the former emergency manager, and the city employees from the Genesee Circuit Court to the Court of Claims. The plaintiffs in *Collins* challenged the validity of the notice of transfer, contending that the city was not an "arm of the state" as set forth in MCL 600.6419(1)(a). The plaintiff in the *Vale* case sought summary disposition alleging that the Court of Claims lacked subject-matter jurisdiction. The Court of Claims ruled that the city was not an arm of the state and that the claims

against the city and its employees were within the exclusive subject-matter jurisdiction of the circuit court.[2]

In this case, defendants assert that municipalities act as arms of the state whenever they act in the name of public health and that municipalities operate waterworks in the name of public health. Defendants additionally assert that the state's emergency management of a municipality under the Local Financial Stability and Choice Act, MCL 141.1541 *et seq*., transforms the municipality into an arm of the state and that the Court of Claims has exclusive jurisdiction over claims brought against arms of the state. We disagree and conclude (1) that a municipality is not an arm of the state when it operates a waterworks plant and (2) that a municipality and its employees operating under the state's emergency-manager laws are not arms of the state for purposes of jurisdiction in the Court of Claims.

"A challenge to the jurisdiction of the Court of Claims presents a statutory question that is reviewed de novo as a question of law." *AFSCME Council 25 v State Employees' Retirement Sys*, 294 Mich App 1, 6; 818 NW2d 337 (2011). "Challenges to subject-matter jurisdiction cannot be waived, and a court must entertain such challenges regardless of when they are raised, or even raise such challenges sua sponte." *O'Connell v Dir of Elections*, 316 Mich App 91, 100; 891 NW2d 240 (2016).

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[2] The Court of Claims concluded that it did have jurisdiction over claims against emergency manager Darnell Earley because he was an officer of the state at all times during his oversight of the city's receivership. Nevertheless, because Earley had the right to a jury trial and because the circuit court had concurrent jurisdiction of the case, the Court of Claims concluded that the circuit court was the more appropriate venue to resolve the claims against Earley.

" 'The Court of Claims is created by statute and the scope of its subject-matter jurisdiction is explicit.' " *Id*. at 101, quoting *Dunbar v Dep't of Mental Health*, 197 Mich App 1, 5; 495 NW2d 152 (1992). The Court of Claims has exclusive jurisdiction to hear and determine "any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court." MCL 600.6419(1)(a). Included in the definition of "the state or any of its departments or officers" are the state of Michigan and

> any state governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of the state, or an officer, employee, or volunteer of this state or any governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of this state, acting, or who reasonably believes that he or she is acting, within the scope of his or her authority while engaged in or discharging a government function in the course of his or her duties. [MCL 600.6419(7).]

The determination whether the Court of Claims possesses jurisdiction is governed by the actual nature of the claim, not how the parties characterize the nature of the claim or phrase the request for relief. *AFSCME*, 294 Mich App at 6.

At issue in this case is the phrase "arm of the state" in MCL 600.6419(7). More specifically, we must determine when an individual or entity is an arm of the state such that the individual or entity may be considered "the state or any of its departments or officers" and thus an action against that individual or entity would fall under the exclusive jurisdiction of the Court of Claims.

The difficulty in determining when a city or municipality acts as an arm of the state has a long history. In *Tzatzken v Detroit*, 226 Mich 603, 604; 198 NW 214 (1924), our Supreme Court indicated that a municipality exercises dual powers, acting sometimes as an arm of the state, in which all members of the public are concerned, and acting at other times independently by exercising powers of a proprietary character. This Court explained the dual roles undertaken by a city or municipality:

> It developed historically that cities operated under one of two personalities. The municipality when acting as an arm of the state possessed a "public" character, but when acting for the concerns of the citizenry of the city it was functioning within its "private" personality. This public versus private analysis was utilized in evaluating questions of municipal tort immunity. If wearing the public hat, the municipal corporation was said to be performing governmentally and was immune from tort liability as was the state. On the other hand, if the activity was for the benefit of the peculiar locality, then the municipal corporation was deemed equivalent to a private corporation. [*Beauchamp v Saginaw Twp*, 74 Mich App 44, 48; 253 NW2d 355 (1977).]

The conclusions about what municipal activities constitute "public" (i.e., arm of the state) action or "private" (i.e., municipal) action have changed throughout the years. In *Curry v Highland Park*, 242 Mich 614, 620-621; 219 NW 745 (1928), our Supreme Court recognized and accepted out-of-state authority holding that a city is discharging a governmental function when it engages in the collection and disposal of garbage and in the collection of ashes, refuse, and street sweepings. The *Curry* Court noted, "In each instance the act of the municipality is in the interest of the public health and the municipality acts as the arm

of the State." *Id*. The *Curry* Court also cited Michigan cases "sustain[ing] ordinances regulating the collection and disposal of garbage upon the ground that they were a valid exercise of the police power" and concluded that the collection and disposal of garbage is a state government function. *Id*. at 621-622. In *Detroit v Corey*, 9 Mich 165, 184 (1861), our Supreme Court held that

> [t]he sewers of the city, like its works for supplying the city with water, are the private property of the city—they belong to the city. The corporation and its corporators, the citizens, are alone interested in them—the outside public or people of the state at large have no interest in them, as they have in the streets of the city, which are public highways.

In *Beauchamp*, 74 Mich App at 51, however, this Court stated, "[w]e cannot distinguish sewers [from the collection and disposal of garbage], and find that the construction of sewers as a public health measure is a governmental function."

In *Attorney General ex rel Lennane v Detroit*, 225 Mich 631; 196 NW 391 (1923),[3] the city of Detroit adopted an ordinance regulating the wages paid to third-party employees working on municipal construction contracts. The Supreme Court stated:

> That the municipality performs dual functions, some local in character, the others as agent of the State, will be presently considered; and, while this court from the beginning has vigilantly sustained the right of local self-government, it has with equal vigilance sustained the right of the state in the exercise of its sovereign power. Attempts of the State to meddle with the purely local affairs of a municipality have been promptly checked by

[3] Overruled by *Associated Builders & Contractors v Lansing*, 499 Mich 177 (2016), as discussed later in this opinion.

> this court, and attempts of municipalities to arrogate to themselves power possessed by the State alone in its sovereign capacity must meet a like check at the hands of this court. Neither may trench upon the power possessed by the other alone. [*Id*. at 636.]

The Court held that in enacting the ordinances at issue, "the city has undertaken to exercise the police power not only over matters of municipal concern but also over matters of State concern; it has undertaken not only to fix a public policy for its activities which are purely local but also for its activities as an arm of the State." *Id*. at 640-641. The Court thus found that wage rates were a matter of state concern.

Our Supreme Court, however, overruled *Lennane* in the recent case of *Associated Builders & Contractors v Lansing*, 499 Mich 177; 880 NW2d 765 (2016). In *Associated Builders*, the Court stated that *Lennane*'s

> conception of municipal power may or may not have been well-grounded in Michigan's 1908 Constitution and the legal landscape of the time, but it is certainly incongruent with the state of our law as reflected in our current Constitution. We therefore conclude that *Lennane* has no continuing viability in light of the adoption of our 1963 Constitution. [*Associated Builders*, 499 Mich at 183.]

The *Associated Builders* Court explained that the revisions found in Michigan's 1963 Constitution reflected Michigan's successful experience with home rule and "expresse[d] the people's will to give municipalities even greater latitude to conduct their business[.]" *Id*. at 186. Michigan's revised Constitution thus expanded the scope of authority of Michigan's cities and villages. *Id*. at 187. The Court determined that the wage rates at issue "concern how a municipality acts as a market participant, spending its own money on its own projects" and how "[u]nder our

Constitution, cities and villages may enact ordinances relating to 'municipal concerns, property and government,' including ordinances and charter provisions regulating the wages paid to third-party employees working on municipal construction contracts, 'subject to the constitution and law.' " *Id*. at 187, 192 (citation omitted). Thus, as the legal landscape has changed, so too has the interpretation of what constitutes an action taken as an arm of the state. This is particularly so in the realm of utilities or services.

With respect to waterworks in particular, the Home Rule City Act, MCL 117.1 *et seq*.,[4] authorizes a municipality to provide for the installation and connection of sewers and waterworks in its charter. MCL 117.4b. The operation and maintenance of waterworks is generally found to be a proprietary or private function of a municipality as opposed to a governmental function. Exceptions, as always, do exist, but they are easily identifiable. "Although a city may in the construction, operation and maintenance of a water works system be acting, under certain factual circumstances, in a governmental capacity, as a general proposition the weight of authority is to the effect that in engaging in such an enterprise the city acts in a proprietary or private capacity." *Taber v Benton Harbor*, 280 Mich 522, 525; 274 NW 324 (1937). The cases cited in *Taber* were out-of-state cases and only one, *Miller Grocery Co v Des Moines*, 195 Iowa 1310; 192 NW 306 (1923), set forth a factual situation in which maintenance of a waterworks was deemed a governmental function.

In *Miller*, the court held that a municipality, acting in a governmental capacity, had the right to maintain

[4] Enacted in 1909, the Home Rule City Act provided for the incorporation of cities and set out specific powers and duties, among other things.

and operate waterworks for the purpose of fire protection and also had the right, in its proprietary capacity, to operate waterworks to distribute water to citizens and receive money for the same. *Id*. at 307. The majority of cases cited in *Taber* reiterated that a municipality supplying water to its citizens did so in a proprietary function. *Taber*, 280 Mich at 525. See *Woodward v Livermore Falls Water Dist*, 116 Me 86; 100 A 317 (1917) (holding that a municipal corporation engaged in the business of supplying water to its inhabitants was engaged in an undertaking of a private nature because it entered into an enterprise that involved the ordinary incidents of a business wherein it sold what people desired to buy and that might become a source of profit); *Canavan v Mechanicville*, 229 NY 473, 476; 128 NE 882 (1920) ("While the business of maintaining a municipal water system and supplying water to private consumers at fixed compensation is public in its nature and impressed with a public interest, it is not an exercise of governmental or police power. A municipal corporation in aggregating and supplying water for the extinguishment of fires discharges a governmental function. In operating a water works system, distributing water for a price to its inhabitants, it acts in its private or proprietary capacity, in which it is governed by the same rules that apply to a private corporation so acting.").

What is gleaned from these cases is that if a municipality is supplying a utility—or specifically, waterworks—to its citizens and the citizens are paying for the waterworks, the municipality is operating the waterworks as a business, and it is doing so as a businessman or corporation, not as a concern of the state government or as the arm of the state. It is, after all, serving only a limited number of people within its boundaries, not the state as a whole. If, on the other

hand, the municipality is supplying water for the purpose of protecting its citizens from fire or natural disaster or anything else that has the potential to have statewide impact and it is not profiting from the provision of that water, it could be deemed to be serving a government function and serving the public in general. Then the municipality could be deemed to be acting as an arm of the state in maintaining and operating waterworks.

Taking all of this into account, we conclude that the city of Flint was not acting as an arm of the state when operating its waterworks. Historically, a municipality's provision of drinking water to its citizens—which is precisely the issue here—was not considered a government function because the municipality was acting in its role as a proprietor, and not in a governmental capacity. And, with the enactment of the Home Rule City Act and the adoption of the 1963 Constitution, municipalities were provided with even more power and control over activities such as providing utilities or services to their populations. The city has provided no persuasive argument or binding authority to indicate that the city was acting as an arm of the state when operating its waterworks. The Court of Claims therefore did not have exclusive jurisdiction over plaintiffs' claims against defendants.

The city has also provided no persuasive argument or binding authority to indicate that the state of Michigan's emergency management of a municipality under the Local Financial Stability and Choice Act transforms the municipality into an "arm of the state." The Act states, at MCL 141.1543:

> The legislature finds and declares all of the following:
>
> (a) That the health, safety, and welfare of the citizens of this state would be materially and adversely affected by

> the insolvency of local governments and that the fiscal accountability of local governments is vitally necessary to the interests of the citizens of this state to assure the provision of necessary governmental services essential to public health, safety, and welfare.
>
> (b) That it is vitally necessary to protect the credit of this state and its political subdivisions and that it is necessary for the public good and it is a valid public purpose for this state to take action and to assist a local government in a financial emergency so as to remedy the financial emergency by requiring prudent fiscal management and efficient provision of services, permitting the restructuring of contractual obligations, and prescribing the powers and duties of state and local government officials and emergency managers.
>
> (c) That the fiscal stability of local governments is necessary to the health, safety, and welfare of the citizens of this state and it is a valid public purpose for this state to assist a local government in a condition of financial emergency by providing for procedures of alternative dispute resolution between a local government and its creditors to resolve disputes, to determine criteria for establishing the existence of a financial emergency, and to set forth the conditions for a local government to exercise powers under federal bankruptcy law.
>
> (d) That the authority and powers conferred by this act constitute a necessary program and serve a valid public purpose.

Under the act, the governor appoints an emergency manager after the governor has determined that a local government is in a state of financial emergency. MCL 141.1546(1)(b); MCL 141.1549(1). When appointed, an emergency manager

> shall act for and in the place and stead of the governing body and the office of chief administrative officer of the local government. The emergency manager shall have broad powers in receivership to rectify the financial emergency and to assure the fiscal accountability of the local

> government and the local government's capacity to provide or cause to be provided necessary governmental services essential to the public health, safety, and welfare. [MCL 141.1549(2).]

The state of Michigan provides the financial compensation for the emergency manager, MCL 141.1549(2), (3)(e) and (f), and all powers and duties of the emergency manager are conferred on that position by the Legislature, MCL 141.1549(4) and (5); MCL 141.1550 to MCL 141.1559. An emergency manager, as an appointee of the state government, is an employee of the state government. *Mays v Governor*, 323 Mich App 1, 54; 916 NW2d 227 (2018). While this means that claims against an emergency manager acting in his or her official capacity clearly fall within the subject-matter jurisdiction of the Court of Claims, it does not necessarily follow that the municipality itself is transformed into an arm of the state while under the direction of an emergency manager.

The only Michigan authority that attempted to specifically define "arm" of the state was *Manuel v Gill*, 481 Mich 637; 753 NW2d 48 (2008). In that case, our Supreme Court noted that though it was not aware of any law creating an "arm" of the state, "the term is commonly defined as 'an administrative or operational branch of an organization' . . . ." *Id*. at 650. The *Manuel* Court had to determine whether the Tri-County Metro Narcotics Squad was a *state agency* that could only be sued in the Court of Claims, and the Court consulted MCL 600.6419(1)(a) and the various listed state entities over which the Court of Claims had exclusive jurisdiction. In doing so, the *Manuel* Court reviewed examples of those various entities—departments, commissions, boards, institutions, agencies—and employed a standard dictionary to define an "arm" of the state. The definition recited in *Manuel* is dicta; the

Court attempted to define only the term "arm," and the definition provided gives only limited guidance on the matter at hand.

Because the term is not defined in the relevant statute, we are to ascribe to the term its plain and ordinary meaning. *Inter Coop Council v Dep't of Treasury*, 257 Mich App 219, 223; 668 NW2d 181 (2003). It is appropriate to consult a dictionary for definitions. *Anzaldua v Neogen Corp*, 292 Mich App 626, 632; 808 NW2d 804 (2011). "Arm of the state" is defined in *Black's Law Dictionary* (10th ed) as "[a]n entity created by a state and operating as an alter ego or instrumentality of the state, such as a state university or a state department of transportation." "Instrumentality" is defined as "[a] means or agency through which a function of another entity is accomplished, such as a branch of a governing body." *Id*. It is unclear why the *Manuel* Court chose to look to a standard dictionary rather than the law dictionary when touching on the definition of an "arm" of the state. In any event, employing the definitions set forth in *Black's Law Dictionary*, it is clear that even while under emergency management, the city was not operating as an alter ego or instrumentality of the state.

As indicated in the Local Financial Stability and Choice Act, "it is a valid public purpose for this state to take action and to assist a local government in a financial emergency so as to remedy the financial emergency . . . ." MCL 141.1543(b). The primary purpose of the act, then, is for the state of Michigan to temporarily *assist* local governments during a financial crisis. The emergency manager, in place of the chief administrative officer and governing body, acts for and on behalf of the local government only. MCL 141.1549(2); MCL 141.1552(2). At all times, then, the

city remained a municipality, albeit with a state employee temporarily overseeing the financial management of the municipality's affairs. The city was at no time operating as "a means or agency through which a function of another entity [i.e., the state] is accomplished[.]"[5] No function or purpose of the state was accomplished by the emergency manager's oversight of the city. The city was instead always operating as a means through which its own functions were accomplished. The state simply engaged a state employee to temporarily assist the city with performing its local functions and serving its local purposes on behalf of its citizens. Moreover, were we to find that whenever a state employee assists in, or even temporarily takes over the management of a private (for lack of a better word) entity, that entity then becomes an arm of the state, we would be opening the state of Michigan up to liabilities that were never intended and undermining the Governmental Tort Liability Act, MCL 691.1401 *et seq*. We thus do not find that the state's emergency management of a municipality under the Local Financial Stability and Choice Act transforms the municipality into an "arm of the state." Therefore, the Court of Claims does not have exclusive jurisdiction over plaintiffs' claims against defendants.

Affirmed.

SERVITTO, P.J., and MARKEY and O'CONNELL, JJ., concurred.

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[5] *Black's Law Dictionary* (10th ed) (defining "instrumentality").

PATEL v PATEL

Docket No. 339878. Submitted June 5, 2018, at Grand Rapids. Decided June 19, 2018, at 9:00 a.m.

Plaintiff, Shambhu (Sam) Patel, brought a shareholder oppression action in the Ottawa Circuit Court against his brothers, Hemant Patel and Jaimin (Jimmy) Patel, and Shree Vishnu II, Inc. (SVII). Plaintiff, Hemant, and Jimmy incorporated SVII in 2001 to purchase and operate a hotel in Holland, Michigan. On June 17, 2006, plaintiff wrote a letter that he addressed and delivered to Hemant and Jimmy. A translation of the letter revealed that plaintiff stated, among other things, that "I don't want from [the Holland hotel] whatever comes you share it." In 2016, plaintiff brought this suit, asserting that he had a one-third ownership interest in the business. Defendants alleged that plaintiff waived his interest in the hotel by means of the June 17, 2006 letter. Following a bench trial on the issue of waiver, the court, Jon A. Van Allsburg, J., ruled in defendants' favor and entered a judgment of no cause of action. Plaintiff appealed.

The Court of Appeals *held*:

1. A waiver consists of the intentional relinquishment or abandonment of a known right. Waiver is a mixed question of law and fact. The definition of a waiver is a question of law, but whether the facts of a particular case constitute a waiver is a question of fact. The party asserting the waiver bears the burden of proof. A waiver must be explicit, voluntary, and made in good faith. In order to ascertain whether a waiver exists, a court must determine if a reasonable person would have understood that he or she was waiving the interest in question; therefore, a valid waiver may be an express waiver, which is shown by express declarations or by declarations that manifest the parties' intent and purpose, or a valid waiver may be an implied waiver, which is evidenced by a party's decisive, unequivocal conduct reasonably indicating the intent to waive. In this case, the trial court did not clearly err by finding that plaintiff intentionally and voluntarily relinquished his right to an ownership interest in the corporation owning the Holland hotel by writing and delivering to his brothers the June 17, 2006 letter. The letter stated that plaintiff

did not want "anything" or "whatever" from the hotel and further stated that Hemant and Jimmy should "share" or "split" the profits of the hotel. Additionally, the record evidence showed that after 2006, plaintiff never participated in hotel operations and did not provide assistance to save the hotel from bank foreclosure or alleged ordinance violations. Consequently, the trial court did not err by holding that because plaintiff waived his rights as a shareholder in 2006, he did not have standing to pursue claims for damages, accounting, or dissolution of SVII in 2016. The trial court properly dismissed plaintiff's shareholder action.

2. The power to tax costs is purely statutory, and the prevailing party cannot recover such expenses absent statutory authority. MCL 600.2405(2) provides that matters specially made taxable elsewhere in the statutes or rules may be taxed and awarded as costs. MCR 2.625(A)(1) provides that the prevailing party may tax its costs unless a statute, other court rule, or the presiding judge has ordered otherwise, for reasons stated in writing and filed in the action. In this case, plaintiff does not point to a statute, court rule, or decision by the trial court that would prohibit mediation expenses as a taxable cost under MCR 2.625(A)(1). The trial court ruled that defendants' mediation expense was a taxable cost under MCR 2.411(D)(4), which provides that a mediator's fee is deemed a cost of the action, and the court may make an appropriate order to enforce the payment of the fee. The trial court did not err by applying the plain terms of MCL 600.2405(2), which includes as a taxable cost any matter made taxable elsewhere in the statutes or rules. Consequently, the trial court properly awarded defendants' mediation expense as a taxable cost under MCR 2.625(A)(1).

Affirmed.

*Carey & Jaskowski, PLLC* (by *William L. Carey*) for plaintiff.

*Gielow Groom Terpstra & McEvoy* (by *W. Brad Groom* and *Daniel R. Olson*) for defendants.

Before: MURRAY, C.J., and MARKEY and TUKEL, JJ.

PER CURIAM. Plaintiff, Shambhu (Sam) Patel, and his two brothers, defendants Hemant Patel and Jaimin (Jimmy) Patel, in 2001, incorporated defendant Shree

Vishnu II (SVII) to purchase and operate a hotel in Holland, Michigan, known as the Holland Econolodge or the Holland Economy Inn.[1] Sam brought a shareholder oppression suit against defendants in 2016. Among the defenses that defendants asserted were waiver and promissory estoppel based on a handwritten letter plaintiff wrote on June 17, 2006; defendants allege that plaintiff in the letter surrendered all of his interest in the hotel to his two brothers. After a bench trial on the issue of waiver, the trial court ruled in defendants' favor in an opinion and order dated July 28, 2017. The trial court entered its judgment of no cause of action on August 18, 2017. Plaintiff appeals by right. He also appeals the trial court's award of mediation fees as taxable costs. We affirm.

## I. WAIVER

### A. STANDARD OF REVIEW

This Court reviews for clear error the trial court's factual findings following a bench trial and reviews de novo the trial court's conclusions of law. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). "A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made." *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003). On appellate review, this Court must afford deference to the trial court's superior ability to judge the credibility of the witnesses who appear before it. *Id.*; MCR 2.613(C).

[1] For convenience and to avoid confusion, we will refer to the brothers by their first name (Hemant) or nicknames (Sam and Jimmy).

A waiver consists of the intentional relinquishment or abandonment of a known right. *Sweebe v Sweebe*, 474 Mich 151, 156-157; 712 NW2d 708 (2006). "Waiver is a mixed question of law and fact. The definition of a waiver is a question of law, but whether the facts of a particular case constitute a waiver is a question of fact." *Id*. at 154 (citation omitted). "The party asserting the waiver bears the burden of proof." *Cadle Co v City of Kentwood*, 285 Mich App 240, 255; 776 NW2d 145 (2009). Magic words are unnecessary to effectuate a valid waiver, but a waiver must be explicit, voluntary, and made in good faith. *Sweebe*, 474 Mich at 157. In order to ascertain whether a waiver exists, a court must determine if a reasonable person would have understood that he or she was waiving the interest in question. *Id*.; *Reed Estate v Reed*, 293 Mich App 168, 176; 810 NW2d 284 (2011). Thus, a valid waiver may be shown by "express declarations or by declarations that manifest the parties' intent and purpose," *Sweebe*, 474 Mich at 157, or may be an implied waiver, "evidenced by a party's decisive, unequivocal conduct reasonably inferring the intent to waive." *Reed Estate*, 293 Mich App at 177 (citation and quotation marks omitted).

B. ANALYSIS

We conclude that the trial court did not clearly err by finding that "plaintiff intentionally and voluntarily relinquished his known right to [an ownership interest in the corporation owning] the Holland hotel" by writing and delivering to his two brothers the June 17, 2006 letter that "explicitly indicated that [plaintiff] did not want 'anything' or 'whatever' . . . from the Holland hotel" and that defendants Hemant and Jimmy Patel "should 'share' or 'split' what would come from the hotel . . . ." The trial court's finding is supported by the

plain meaning of the words that plaintiff voluntarily wrote in the letter addressed to his two brothers. The three brothers' conduct after 2006, which showed that plaintiff never participated in hotel operations and did not provide any assistance to save the hotel from bank foreclosure (2013) or from being shut down by the city of Holland because of alleged ordinance violations (2014), also supports the trial court's finding. Consequently, the trial court did not clearly err by ruling that because plaintiff "waived his rights as a shareholder in 2006, he did not have standing to pursue claims for damages, accounting, or dissolution of SVII in 2016." We affirm the trial court's judgment dismissing plaintiff's shareholder action.

Plaintiff asserts that the trial court's findings were against the great weight of the evidence. Plaintiff, while professing not to quarrel with the trial court's findings of fact, argues that the trial court erred by concluding that defendants satisfied their burden of proof by the preponderance of the evidence that plaintiff waived his interest in the Holland hotel by writing and delivering the June 17, 2006 letter. See *Cadle Co*, 285 Mich App at 255 ("The party asserting the waiver bears the burden of proof."). But plaintiff does attack certain of the trial court's individual findings of fact and also attacks the trial court's ultimate finding of fact of a valid waiver. *Sweebe*, 474 Mich at 154 ("[W]hether the facts of a particular case constitute a waiver is a question of fact."). Ultimately, we conclude that the trial court's findings are not clearly erroneous because the evidence supports them, and where testimony conflicts, we must afford deference to the trial court's superior ability to judge the credibility of the witnesses who appear before it. *Ambs*, 255 Mich App at 652; MCR 2.613(C).

Plaintiff argues that the plain meaning of the words he wrote should not be applied because he only intended to comfort the brothers' father by showing that there was not a family feud over money and because he delivered the letter to his father, not his brothers. But plaintiff's testimony in this regard was contradicted by the testimony of his brothers. The trial court found defendants' testimony on this point more credible than plaintiff's testimony. Moreover, the trial court's finding was supported by the fact that the letter was addressed to plaintiff's brothers. The finding was further supported by the lack of evidence that the June 17, 2006 letter was ever in the possession of the brothers' father, other than plaintiff's own testimony that the trial court determined lacked credibility. The trial court's findings that plaintiff delivered the letter to his brothers and intended the plain meaning of the words he wrote are not clearly erroneous. MCR 2.613(C); *Ambs*, 255 Mich App at 652.

Plaintiff's other arguments also lack merit because they do not undermine the trial court's factual findings. Plaintiff argues the "fact" that he remains personally liable for the Holland hotel's debt undercuts the trial court's finding. But plaintiff points to no part of the record where this "fact" is established. Rather, the record evidence shows that in 2013, the Holland hotel's bank called its outstanding loan balance, and defendants refinanced the debt without plaintiff's assistance or participation. Whether plaintiff remains liable regarding any personal guarantees he gave before 2006 is pure speculation. Plaintiff's argument does not undermine the trial court's factual findings that "plaintiff intentionally and voluntarily relinquished his known right to [an ownership interest in the corporation owning] the Holland hotel" by writing and delivering to his two brothers the June 17, 2006 letter.

Similarly, plaintiff's argument—that the Hindu phrase "Oh Namoh Shivay" would not be written at the top of the June 2006 letter if it were a business document—also does not undermine the trial court's factual findings. The evidence at trial showed that all three brothers did not attend to legal details as a lawyer or accountant would. Further, the letter was written after plaintiff had accused his brothers of stealing money from SVII. Immediately before writing that he did not want anything from the hotel, plaintiff wrote: "I don't have any hard feelings. If I did something wrong I am sorry." Plaintiff testified at trial that the phrase at issue had religious implications similar to invoking a deity; however, its placement on a letter to brothers with whom he was in business, to settle past differences, does not undercut the trial court's finding that plaintiff meant what he wrote: "I don't want from [the Holland hotel] whatever comes you share it."

Plaintiff argues that he did not waive his interest in the Holland hotel because he continued to receive payments from hotel profits between 2006 and 2011. But all three brothers agreed that the money plaintiff received during that time period was for the necessities of plaintiff and his family when plaintiff was not succeeding in business. Further, the trial court found credible defendant brothers' testimony that the payments were essentially charitable gifts, not business profit distributions. Further, the testimony of Hemant and Jimmy was supported by bank and tax records that showed the distributions were included in defendants' taxable income but were not taxable to plaintiff. The trial court's findings regarding the payments plaintiff received are not clearly erroneous. MCR 2.613(C); *Ambs*, 255 Mich App at 651-652.

Plaintiff's remaining arguments also lack merit. Plaintiff's argument that defendant brothers set up Jai Gain, LLC, to siphon hotel profits away from plaintiff is totally without evidentiary support. Plaintiff's argument concerning corporate filings of SVII in 2013 does not alter or affect the plain meaning of plaintiff's June 17, 2006 letter. Similarly, plaintiff's contention that he had no motive to waive his interest in SVII is unavailing. The testimony at trial and the letter itself speak to plaintiff's motivation—to make amends with his brothers for his actions and to heal their brotherly relationship. Plaintiff wrote in the June 17, 2006 letter, "If you wish to keep relation as brother it up to you." Plaintiff also wrote: "I don't have any hard feelings. If I did something wrong I am sorry." This clearly demonstrates plaintiff's motivation and supports, not undercuts, the trial court's factual determination that "plaintiff intentionally and voluntarily relinquished his known right to [an ownership interest in the corporation owning] the Holland hotel." The trial court's finding of waiver is not clearly erroneous. MCR 2.613(C).

In sum, the trial court did not clearly err by finding that plaintiff waived his interest in the Holland hotel by writing and delivering to his two brothers the June 17, 2006 letter that "explicitly indicated that [plaintiff] did not want 'anything' or 'whatever' . . . from the Holland hotel" and that defendants Hemant and Jimmy Patel "should 'share' or 'split' what would come from the hotel . . . ." MCR 2.613(C); *Ambs*, 255 Mich App at 651-652. The record supports that defendants proved plaintiff's waiver by a preponderance of the evidence. *Cadle Co*, 285 Mich App at 255. Although the June 17, 2006 letter did not contain legal terminology, magic words are not necessary for a valid waiver. *Sweebe*, 474 Mich at 157. Plaintiff's letter

contained "express declarations" and "declarations that manifest[ed] [plaintiff's] intent and purpose" to waive his interest in the Holland hotel and convey it equally to his two brothers. *Id*. As a result, the trial court properly dismissed plaintiff's shareholder action under MCL 450.1489.

## II. TAXABLE COST — MEDIATION

### A. STANDARD OF REVIEW

The proper interpretation and application of a court rule is a question of law that is reviewed de novo. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009). Likewise, whether a particular expense is taxable as a cost is a question of law that is also reviewed de novo. *Guerrero v Smith*, 280 Mich App 647, 670; 761 NW2d 723 (2008).

### B. ANALYSIS

We conclude that under the plain meaning of MCR 2.625(A)(1), MCR 2.411(D)(4), and MCL 600.2405(2), the trial court did not err by assessing mediation fees as taxable costs.

"The power to tax costs is purely statutory, and the prevailing party cannot recover such expenses absent statutory authority." *Guerrero*, 280 Mich App at 670; see also *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 621; 550 NW2d 580 (1996). MCL 600.2405 lists various items that may be taxed as costs and awarded to a prevailing party, including "[m]atters specially made taxable elsewhere in the statutes or rules." MCL 600.2405(2).

When interpreting a court rule, the principles used to interpret statutes apply. *Henry*, 484 Mich at 495. Construction begins by considering the plain language

of the statute or court rule in order to ascertain its meaning. *Id*. Generally, clear statutory language must be enforced as written. *Velez v Tuma*, 492 Mich 1, 16-17; 821 NW2d 432 (2012). So, too, with court rules, "unambiguous language is given its plain meaning and is enforced as written." *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 591; 735 NW2d 644 (2007).

The starting point is MCR 2.625(A)(1). It provides, "Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action." *Id*. The court rule presumes that the prevailing party may tax its costs unless a statute, other court rule, or the presiding judge has ordered otherwise. See *Guerrero*, 280 Mich App at 670. In this case, plaintiff does not point to a statute, court rule, or decision by the trial court that would prohibit mediation expenses as a taxable cost under MCR 2.625(A)(1).

The trial court ruled that defendants' mediation expense was a taxable cost under MCR 2.411(D)(4), which provides that a "mediator's fee is deemed a cost of the action, and the court may make an appropriate order to enforce the payment of the fee." The trial court did not err by applying the plain terms of MCL 600.2405(2), which includes as a taxable cost any matter "made taxable elsewhere in the statutes or rules." MCR 2.411(D)(4) plainly provides that a "mediator's fee is deemed a cost of the action"—thus becoming a taxable cost under MCL 600.2405(2) and authorizing the assessment of mediation fees as a taxable cost under MCR 2.625(A)(1). That the second clause of MCR 2.411(D)(4) authorizes a court to "make an appropriate order to enforce the payment of the

[mediator's] fee" does not diminish the plain terms of the first clause of MCR 2.411(D)(4). When interpreting a statute or court rule, "[a]s far as possible, effect should be given to every sentence, phrase, clause, and word." *Diallo v LaRochelle*, 310 Mich App 411, 418; 871 NW2d 724 (2015) (citation and quotation marks omitted). Consequently, we affirm the trial court's award of defendants' mediation expense as a taxable cost under MCR 2.625(A)(1).

We affirm. As the prevailing party, defendants may tax their costs under MCR 7.219.

MURRAY, C.J., and MARKEY and TUKEL, JJ., concurred.

CADWELL v CITY OF HIGHLAND PARK

Docket No. 338070. Submitted June 13, 2018, at Detroit. Decided June 19, 2018, at 9:05 a.m.

Theodore Cadwell and Glenn Quaker brought an action in the Wayne Circuit Court against the city of Highland Park, alleging that they were retaliated against in violation of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., and their employment agreements. The matter proceeded to a jury trial, and the jury found for plaintiffs on their contract claims and their claims under the WPA, awarding each plaintiff $760,680, which included $500,000 each in damages for emotional distress, plus costs and $47,695.60 in attorney fees. Defendant appealed, and in an unpublished per curiam opinion, issued May 28, 2015 (Docket No. 318430), the Court of Appeals affirmed the jury's verdict but concluded that remittitur was warranted under MCR 2.611(E) because the award of emotional-distress damages was unsupported by the evidence. On remand, the trial court entered a remittitur judgment. After that judgment was entered, at least 10 motions were filed in the trial court seeking various types of relief, with some of the motions resulting in decisions that were appealed in the Court of Appeals with varying results. The present appeal arose from a motion filed by plaintiffs on March 22, 2017, which sought additional attorney fees and costs for the efforts their lawyer had expended to enforce and collect on the remittitur judgment. Plaintiffs supported their motion with a record of the hours their lawyer spent on the case between March 24, 2016, the day after the Supreme Court denied leave to appeal the Court of Appeals' opinion remanding for remittitur, and March 21, 2017, the day before the motion for additional attorney fees was filed. The record included a total of 148.8 hours, and plaintiffs requested a rate of $400 per hour, totaling $59,520. The record also listed filing fees of $140. Ultimately, plaintiffs sought a total of $59,660 for posttrial attorney fees. Defendant argued that postjudgment attorney fees were not recoverable under the WPA and that plaintiffs were improperly attempting to recover attorney fees related to decisions that were ultimately reversed by the Court of Appeals. The court, Sheila A. Gibson, J., stated that plaintiffs'

lawyer "has not included all of the hours that he has spent," that a rate of $200 per hour was "not an insult" but instead took into consideration that defendant was financially not in a position to pay more, and that the rate awarded "still might be a little under what somebody" with "30 plus years" of practice would normally receive. Accordingly, the trial court granted the motion and awarded plaintiffs attorney fees of $29,760, representing 148.8 hours at $200 an hour. Defendant appealed.

The Court of Appeals *held*:

1. MCL 15.364 provides that a court, in rendering a judgment in an action brought under the WPA, shall order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any combination of these remedies, and that a court may also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, if the court determines that the award is appropriate. In this case, defendant agreed that the award of attorney fees in connection with the original judgment and the remittitur judgment was appropriate under the WPA; however, defendant argued that the WPA only permits the trial court to award attorney fees in connection with work leading up to the moment that a judgment is entered and that it does not allow a court to award any attorney fees for postjudgment legal proceedings. A plaintiff who prevails on a WPA claim but then must engage in postjudgment legal proceedings in order to collect on his or her judgment is still prosecuting an action brought pursuant to the WPA. In this case, although the posttrial motions and appeals did not all directly challenge the merits of plaintiffs' claims brought under the WPA, defendant's posttrial actions were undertaken to limit the effect of the judgment and plaintiffs' actions were taken in an effort to collect on the judgment they were awarded. Thus, although ostensibly related to subjects such as the proper calculation of interest or the collection of a partially paid judgment, the postjudgment actions were brought under the WPA. Further, when considering the first sentence of MCL 15.364, the Legislature's use of the indefinite article "a" in the phrase "in rendering a judgment" denoted that there could be more than one judgment. In this case, there were multiple judgments entered, and MCL 15.364 contemplated the award of attorney fees for legal proceedings taken after the "original" judgment entered in favor of a plaintiff who succeeds on a claim brought under the WPA. The conclusion that a plaintiff may recover postjudgment attorney fees under MCL 15.364 was supported by *McLemore v Detroit Receiving Hosp & Univ Med Ctr*, 196 Mich App 391 (1992) (holding that appellate attorney fees are

recoverable under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*.) and other caselaw determining that appellate attorney fees are recoverable under similarly worded statutes.

2. When determining the reasonableness of an attorney fee sought pursuant to a fee-shifting statute, a trial court must begin its analysis by determining the reasonable hourly rate customarily charged in the locality for similar services and then must multiply that rate by the reasonable number of hours expended in the case to arrive at a baseline figure. The trial court must consider all of the following factors to determine whether an upward or downward adjustment is appropriate: (1) the experience, reputation, and ability of the lawyer or lawyers performing the services, (2) the difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly, (3) the amount in question and the results obtained, (4) the expenses incurred, (5) the nature and length of the professional relationship with the client, (6) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer, (7) the time limitations imposed by the client or by the circumstances, and (8) whether the fee is fixed or contingent. To facilitate appellate review, the trial court should briefly discuss its view of each of the factors on the record and justify the relevance and use of any additional factors. In this case, the trial court determined that $200 per hour was a reasonable hourly rate and that 148.8 hours were the reasonable number of hours expended. However, the trial court did not rely on any evidence showing that $200 per hour was the market rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question; instead, the court merely stated that plaintiffs' lawyer's time "wasn't free," that $200 per hour was "not an insult," and that $200 per hour "still might be a little under what somebody" with "30 plus years" of practice would normally receive. Accordingly, the trial court abused its discretion by determining that $200 per hour was a reasonable rate. Additionally, after determining the hourly rate and the number of hours, the court briefly addressed only part of Factor 1, noting that plaintiffs' lawyer had 30 years of experience, and the court addressed an additional consideration—the fact that defendant was in a compromised financial situation. Defendant's ability to pay was not a relevant consideration. Moreover, by failing to briefly discuss each of the reasonableness factors, the trial court necessarily abused its discretion.

Vacated and remanded.

ATTORNEY FEES — WHISTLEBLOWERS' PROTECTION ACT — POSTJUDGMENT ATTORNEY FEES.

MCL 15.364 provides that a court, in rendering a judgment in an action brought under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., shall order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any combination of these remedies; MCL 15.364 further provides that a court may also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, if the court determines that the award is appropriate; a plaintiff prevailing on an action filed under the WPA may recover postjudgment attorney fees under MCL 15.364.

*Robin H. Kyle* for plaintiffs.

*James W. McGinnis PC* (by *James W. McGinnis*) for defendant.

Before: BECKERING, P.J., and M. J. KELLY and O'BRIEN, JJ.

M. J. KELLY, J. Defendant, the city of Highland Park, appeals as of right the trial court order awarding postjudgment attorney fees to plaintiffs, Theodore Cadwell and Glenn Quaker. We conclude that a plaintiff prevailing on an action filed under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., may recover postjudgment attorney fees under MCL 15.364. However, because the trial court failed to properly evaluate whether the requested attorney fees were reasonable and appropriate, we vacate the court's order awarding postjudgment attorney fees and remand for further proceedings consistent with this opinion.

## I. BASIC FACTS

Cadwell and Quaker were formerly employed by Highland Park as its chief of police and deputy chief of

police, respectively. In October 2010, they filed a complaint against Highland Park, which was later amended to add a claim that they were retaliated against in violation of the WPA and their employment agreements. The matter proceeded to a jury trial, and the jury found for Cadwell and Quaker on their contract claims and their claims under the WPA. The jury awarded Cadwell and Quaker $760,680 each, which included $500,000 each in damages for emotional distress. On May 14, 2013, the trial court entered a judgment awarding Cadwell and Quaker each $760,680, plus costs and $47,695.60 in attorney fees.

Highland Park appealed in this Court, which affirmed the jury's verdict but concluded that the award of emotional distress damages was unsupported by the evidence, so remittitur was warranted under MCR 2.611(E). *Cadwell v Highland Park*, unpublished per curiam opinion of the Court of Appeals, issued May 28, 2015 (Docket No. 318430), p 7. On remand, Cadwell and Quaker accepted the reduced award, and the trial court entered a remittitur judgment stating that the judgment amount, all costs, and all attorney fees "shall earn and bear interest at the applicable statutory rate pursuant to MCL § 600.6013(8)[.]" Based on our review of the lower-court record, it appears that since the remittitur judgment was entered, at least 10 motions have been filed in the trial court seeking various types of relief, with some of the motions resulting in decisions that were appealed in this Court with varying results.

For example, in June 2016, the trial court granted Cadwell and Quaker's motion seeking a writ of mandamus compelling Highland Park to place the judgment on its tax rolls. The court denied reconsideration of that motion, and Highland Park appealed in this

Court, which dismissed the claim for lack of jurisdiction. *Cadwell v Highland Park*, unpublished order of the Court of Appeals, entered July 27, 2016 (Docket No. 333962).

The parties also disputed the appropriate amount of interest due on the judgment. The trial court eventually accepted Cadwell and Quaker's calculation of interest and entered an order in January 2017 stating that as of November 30, 2016, the total balance owed by Highland Park was $433,281.80 and stating that the balance was due immediately. Again, Highland Park filed a claim of appeal with this Court, which was dismissed for lack of jurisdiction. *Cadwell v Highland Park*, unpublished order of the Court of Appeals, entered February 8, 2017 (Docket No. 336758). Thereafter, Highland Park filed an application for leave to appeal the January 2017 order regarding interest on the judgment, and in a peremptory order, this Court reversed and remanded for recalculation of the amount of interest due. *Cadwell v Highland Park*, unpublished order of the Court of Appeals, entered March 20, 2017 (Docket No. 336969).

In February 2017, the trial court entered an order holding Highland Park in contempt for failing to comply with an August 2016 writ of mandamus that required Highland Park to produce certain documents. Highland Park appealed in this Court, which vacated the contempt order because it was entered without affording Highland Park minimal due process. *Cadwell v Highland Park*, unpublished order of the Court of Appeals, entered March 20, 2017 (Docket No. 337061).

The present appeal arises from a motion filed by Cadwell and Quaker on March 22, 2017, which sought additional attorney fees and costs for the efforts their

lawyer had expended to enforce and collect on the remittitur judgment. They contended that pursuant to the WPA, Highland Park was responsible for their posttrial attorney fees. Cadwell and Quaker supported their motion with a record of the hours spent by their lawyer on the case between March 24, 2016, the day after our Supreme Court denied leave to appeal this Court's opinion remanding for remittitur, and March 21, 2017, the day before the motion for additional attorney fees was filed. The record included a total of 148.8 hours. When multiplied by the requested rate of $400 per hour, Cadwell and Quaker requested additional attorney fees totaling $59,520. The record also listed filing fees of $140. Ultimately, Cadwell and Quaker sought a total of $59,660 for posttrial attorney fees.

Highland Park argued that postjudgment attorney fees were not recoverable under the WPA and that Cadwell and Quaker were improperly attempting to recover attorney fees related to decisions that were ultimately reversed by this Court. At oral argument before the trial court, Cadwell and Quaker contended that fees were appropriate for the time spent trying to recover on the judgment since March 2016. Highland Park argued that it had paid Cadwell and Quaker about $401,000 and that a payment plan would be put in place for the remainder of what was owed. It further requested that if the court awarded attorney fees, the court should only award a reasonable amount, taking into consideration Highland Park's need to zealously advocate the matter posttrial.

After clarifying that the request was for 148.8 hours of work, the trial court stated that Cadwell and Quaker's lawyer "has not included all of the hours that he has spent," that a rate of $200 per hour was

"not an insult" but instead took into consideration that Highland Park was financially not in a position to pay more, and that the rate awarded "still might be a little under what somebody" with "30 plus years" of practice would normally receive. Accordingly, the trial court granted the motion, awarding Cadwell and Quaker attorney fees of $29,760, representing 148.8 hours at $200 an hour.

## II. ATTORNEY FEES

### A. STANDARD OF REVIEW

Highland Park argues that the trial court erred by granting postjudgment attorney fees to Cadwell and Quaker. A trial court's decision to award attorney fees under the WPA is reviewed for an abuse of discretion. *O'Neill v Home IV Care, Inc*, 249 Mich App 606, 612; 643 NW2d 600 (2002). "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *Edge v Edge*, 299 Mich App 121, 127; 829 NW2d 276 (2012) (quotation marks and citation omitted). The court's factual findings are reviewed for clear error. *Id*. Questions of statutory interpretation are reviewed de novo. *Id*.

### B. ANALYSIS

As a general rule, attorney fees "are not recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award." *Haliw v Sterling Hts*, 471 Mich 700, 707; 691 NW2d 753 (2005). Here, the WPA provides that a trial court may, in its discretion, award a plaintiff who brought a claim under the WPA "reasonable attorney fees" if the court finds it "appropriate" to do so. MCL 15.364. Pursuant to MCL 15.364, the

trial court's original judgment in this case included an award for reasonable attorney fees, which Highland Park did not challenge in its first appeal. Further, the remittitur judgment entered following remand from this Court likewise contained an award of reasonable attorney fees in Cadwell and Quaker's favor. Highland Park agrees that the award of attorney fees in connection with the original judgment and the remittitur judgment was appropriate under the WPA. However, Highland Park argues that the WPA only permits the trial court to award attorney fees in connection with work leading up to the moment that a judgment is entered and that it does not allow a court to award any attorney fees for postjudgment legal proceedings. Accordingly, it contends that the trial court erred by awarding Cadwell and Quaker attorney fees for their lawyer's work on the case after the remittitur judgment was entered by the trial court.[1]

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[1] Cadwell and Quaker argue that the law-of-the-case doctrine and res judicata bar Highland Park from arguing that postjudgment attorney fees are not recoverable under the WPA. We disagree. Under the law-of-the-case doctrine, "[i]f an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *Lenawee Co v Wagley*, 301 Mich App 134, 149; 836 NW2d 193 (2013) (quotation marks and citation omitted). "The doctrine is applicable only to issues actually decided, either implicitly or explicitly, in the prior appeal." *Id*. at 149-150 (quotation marks and citation omitted). In the prior proceedings before this Court, no award of postjudgment attorney fees had yet been entered. Accordingly, our earlier opinions did not rule—even indirectly—on the question presented in this appeal. Thus, the law-of-the-case doctrine is inapplicable.

Furthermore, "[r]es judicata serves to bar any subsequent action where the first action was decided on its merits, the second action was or could have been resolved in the first action, and both actions involve the same parties or their privies." *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 376; 652 NW2d 474 (2002). Here, the issue of postjudgment attorney fees could not have been resolved in the

Although MCL 15.364 plainly allows for an award of attorney fees to a plaintiff who prevails on a claim brought under the WPA, we have not had an occasion to determine whether that same statutory provision also permits a court to award attorney fees for legal representation taken *after* the initial judgment on the WPA claim is entered, i.e., postjudgment attorney fees. When interpreting a statute, our primary goal "is to ascertain and give effect to the intent of the Legislature." *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 372-373; 652 NW2d 474 (2002). The words used in a statute must be construed "in light of their ordinary meaning and their context within the statute as a whole." *Winkler v Marist Fathers of Detroit, Inc (On Remand)*, 321 Mich App 436, 445; 909 NW2d 311 (2017) (quotation marks and citation omitted). Further, "[a] court must give effect to every word, phrase, and clause, and avoid an interpretation that renders any part of a statute nugatory or surplusage." *Id*. (quotation marks and citation omitted).

MCL 15.364 provides:

> A court, in rendering a judgment in an action brought pursuant to this act, shall order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any combination of these remedies. A court may also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, if the court determines that the award is appropriate.

Highland Park suggests that it should prevail because the attorney fees at issue were "not in further-

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first action because no order awarding postjudgment attorney fees was entered, or could have even been entered, until after the postjudgment attorney fees were incurred. Thus, res judicata is inapplicable here.

ance of rendering a judgment under the WPA." We disagree. A plaintiff who prevails on a WPA claim but then must engage in postjudgment legal proceedings in order to collect on his or her judgment is still prosecuting an action brought pursuant to the WPA. Here, although the posttrial motions and appeals did not all directly challenge the merits of Cadwell and Quaker's claims brought under the WPA, we recognize that, generally, Highland Park's posttrial actions were undertaken to limit the effect of the judgment and Cadwell and Quaker's actions were taken in an effort to collect on the judgment they were awarded. Thus, although ostensibly related to subjects such as the proper calculation of interest or the collection of a partially paid judgment, the postjudgment actions were brought under the WPA.

Next, Highland Park argues that under the plain language of the statute, postjudgment attorney fees are not permissible because only attorney fees generated in connection with a judgment following the adjudication of a WPA claim are recoverable. In support, Highland Park focuses on the first sentence of MCL 15.364, which provides that "[a] court, *in rendering a judgment in an action brought pursuant to this act*, shall order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any combination of these remedies." (Emphasis added.) Highland Park contends that the language "in rendering a judgment" should be interpreted to mean that attorney fees can only be awarded in connection with the rendering of the judgment issued following the jury verdict. The Legislature, however, used the indefinite article "a," which denotes the possibility of more than one "judgment." See *Robinson v Detroit*, 462 Mich 439, 461-462; 613

NW2d 307 (2000). Thus, there can be more than one judgment. In this case, there were several judgments entered: the original judgment, the remittitur judgment, and each and every opinion and order entered by this Court that disposed of an appeal. See MCR 7.215(E)(1) ("When the Court of Appeals disposes of an original action or an appeal, whether taken as of right, by leave granted, or by order in lieu of leave being granted, its opinion or order is its judgment."). Therefore, contrary to Highland Park's argument, the statute does contemplate the award of attorney fees for legal proceedings taken after the "original" judgment entered in favor of a plaintiff who succeeds on a claim brought under the WPA.

Our conclusion is supported by this Court's decision in *McLemore v Detroit Receiving Hosp & Univ Med Ctr*, 196 Mich App 391; 493 NW2d 441 (1992). Although *McLemore* addressed whether appellate attorney fees were recoverable under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*., not under the WPA, *id*. at 402, this Court has held that it is appropriate to consider caselaw interpreting MCL 37.2802 under the Elliott-Larsen Civil Rights Act because the language used in MCL 37.2802 is nearly identical to the language used in MCL 15.364, *O'Neill*, 249 Mich App at 612. Similar to the attorney-fee provision in the WPA, MCL 37.2802 states that "[a] court, in rendering a judgment in an action brought pursuant to [the Elliott-Larsen Civil Rights Act], may award all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant in the action if the court determines that the award is appropriate." Interpreting that language, the *McLemore* Court reasoned:

> Plaintiff apparently seeks to recover the attorney fees incurred defending this appeal. This Court has not previ-

> ously decided whether appellate attorney fees are recoverable under MCL 37.2802. The subject of this appeal, plaintiff's action, was brought pursuant to the Civil Rights Act. The opinion of this Court is its judgment. MCR 7.215(E)(1). The act permits an award of all costs of litigation including attorney fees when a court renders "a judgment in an action brought pursuant" to the act. MCL 37.2802. Thus, the language of the statute would support such an award. [*McLemore*, 196 Mich App at 402.]

Moreover, we note that this Court has determined in numerous other cases that appellate attorney fees are recoverable under similarly worded statutes. See *Solution Source, Inc*, 252 Mich App at 375 (stating that postjudgment attorney fees are available under the Construction Lien Act, MCL 570.1101 *et seq*.); *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 311-312; 616 NW2d 175 (2000) (stating that appellate attorney fees are recoverable under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 USC 2301 *et seq*.); *Grow v W A Thomas Co*, 236 Mich App 696, 720; 601 NW2d 426 (1999) (stating that appellate attorney fees are available under the Elliott-Larsen Civil Rights Act); *Bloemsma v Auto Club Ins Ass'n (After Remand)*, 190 Mich App 686, 689-691; 476 NW2d 487 (1991) (stating that appellate attorney fees are available under the no-fault act, MCL 500.3148(1)); *Escanaba & L S R Co v Keweenaw Land Ass'n, Ltd*, 156 Mich App 804, 818-819; 402 NW2d 505 (1986) (stating that appellate attorney fees are available under the Uniform Condemnation Procedures Act, MCL 213.51 *et seq*., even though the statute only allows recovery for expenses incurred in defending against the improper acquisition of the property at issue).

In addition, because the WPA is remedial in nature, it must "be liberally construed to favor the persons the Legislature intended to benefit." *Chandler v Dowell*

*Schlumberger Inc*, 456 Mich 395, 406; 572 NW2d 210 (1998). Accordingly, it "should be interpreted broadly to advance its purpose." *Leavitt*, 241 Mich App at 310. The WPA "was intended to benefit those employees engaged in 'protected activity' as defined by the act." *Chandler*, 456 Mich at 406. In addition, this Court has noted that "the WPA was enacted to remove barriers to an employee who seeks to report violations of the law, thereby protecting the integrity of the law and the public at large." *O'Neill*, 249 Mich App at 614. Thus, the attorney-fee provision must be liberally construed to benefit employees engaged in protected activity under the WPA. Interpreting the statute to permit the recovery of postjudgment attorney fees is, therefore, consistent with the remedial purpose of the act.

Highland Park next argues that even if postjudgment attorney fees are recoverable under the WPA, the trial court's award of attorney fees was not reasonable.

When determining the reasonableness of an attorney fee sought pursuant to a fee-shifting statute,

> a trial court must begin its analysis by determining the reasonable hourly rate customarily charged in the locality for similar services. The trial court must then multiply that rate by the reasonable number of hours expended in the case to arrive at a baseline figure. [*Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 281; 884 NW2d 257 (2016) (citation omitted).][2]

[2] The *Pirgu* Court was tasked with determining how to properly calculate a reasonable attorney-fee award under MCL 500.3148(1), not with determining a reasonable attorney fee under the WPA. *Pirgu*, 499 Mich at 271. However, the legal framework set forth in *Pirgu* applies whenever a fee-shifting statute uses language stating that a lawyer is entitled to a reasonable fee. *Id*. at 279. Thus, because the WPA allows a court discretion to award a reasonable attorney fee, the framework in *Pirgu* should be used to properly calculate a reasonable attorney-fee award under MCL 15.364.

Thereafter, the trial court must consider *all* of the following "factors to determine whether an up or down adjustment is appropriate":

> (1) the experience, reputation, and ability of the lawyer or lawyers performing the services,
>
> (2) the difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly,
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> (3) the amount in question and the results obtained,
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> (4) the expenses incurred,
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> (5) the nature and length of the professional relationship with the client,
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> (6) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer,
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> (7) the time limitations imposed by the client or by the circumstances, and
>
> (8) whether the fee is fixed or contingent. [*Id*. at 281-282.]

"In order to facilitate appellate review, the trial court should briefly discuss its view of each of the factors above on the record and justify the relevance and use of any additional factors." *Id*. at 282.

In this case, the trial court apparently determined that $200 per hour was a reasonable hourly rate and that 148.8 hours were the reasonable number of hours expended.[3] However, in determining that $200 an hour was a reasonable hourly rate, the trial court did not rely on any evidence showing that $200 per hour was the "market rate" that "lawyers of similar ability and experience in the community normally charge their

[3] We note that although appellate attorney fees are recoverable under MCL 15.364, Cadwell and Quaker only sought recovery of trial-level postjudgment attorney fees.

paying clients for the type of work in question." *Smith v Khouri*, 481 Mich 519, 531; 751 NW2d 472 (2008) (opinion by TAYLOR, C.J.) (quotation marks and citation omitted). Instead, the court appears to have deemed $200 a reasonable hourly rate because Cadwell and Quaker's lawyer's time "isn't free" and because $200 per hour is "not an insult." The court then noted that $200 per hour might actually "be a little under" what someone with similar legal experience would charge. We conclude that the trial court abused its discretion by determining that $200 an hour was a reasonable rate, given that its stated reasons for reaching that sum were essentially that the lawyer had to be paid something and that the amount chosen by the court (which was 50% less than the requested hourly rate) was not insulting.

After determining the hourly rate and the number of hours, the trial court briefly addressed only part of Factor 1, noting that Cadwell and Quaker's lawyer had 30 years of experience. The court did not state whether this factor warranted an upward or downward adjustment, however. The court also addressed an additional consideration—the fact that Highland Park was in a compromised financial situation. The court appears to have essentially determined that because Highland Park could not afford to pay more, the amount of attorney fees should be less than the requested amount. Although a court can consider additional relevant factors when determining whether attorney fees are reasonable, *Pirgu*, 499 Mich at 282, Highland Park's ability to pay is not a relevant consideration. In determining whether a fee is reasonable, the focus is on the lawyer who performed the legal services, not on the opposing party's ability to pay. Moreover, by failing to briefly discuss each of the reasonableness factors set forth in *Pirgu*, the trial court necessarily abused its

discretion. See *id*. at 283. Accordingly, we vacate the court's order awarding postjudgment attorney fees and remand to the trial court for reconsideration in light of this opinion.

Vacated and remanded to the trial court for reconsideration. We do not retain jurisdiction.

BECKERING, P.J., and O'BRIEN, J., concurred with M. J. KELLY, J.

PROGRESS MICHIGAN v ATTORNEY GENERAL

Docket Nos. 340921 and 340956. Submitted May 8, 2018, at Lansing. Decided June 19, 2018, at 9:10 a.m. Leave to appeal sought.

Progress Michigan filed a complaint in the Court of Claims against Attorney General Bill Schuette, acting in his official capacity, alleging that defendant violated the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., and failed to preserve state records under the Management and Budget Act, MCL 18.1101 *et seq*. Plaintiff alleged that it learned that defendant and his staff were performing official functions using personal e-mail accounts. Consequently, plaintiff made a request pursuant to FOIA. Defendant denied the request on October 19, 2016. Pursuant to MCL 15.240(1)(a), plaintiff filed a departmental appeal of the denial with defendant on November 26, 2016, which defendant denied on December 12, 2016. On April 11, 2017, plaintiff filed the complaint in the Court of Claims. Defendant moved for summary disposition, arguing that plaintiff's complaint should be dismissed because it failed to follow the requirement in MCL 600.6431(1) of the Court of Claims Act, MCL 600.6401 *et seq*., that a claimant must sign and verify its claim. On May 26, 2017, plaintiff filed an amended complaint that contained allegations identical to those in the original complaint but was also signed and verified. Defendant again moved for summary disposition. The court, CYNTHIA D. STEPHENS, J., denied defendant's motion with respect to plaintiff's FOIA claim, holding that plaintiff had complied with the signature and verification requirements of the Court of Claims Act when it filed its amended complaint within the one-year limitations period in MCL 600.6431(1) and that the amended complaint related back to the filing of the original complaint, thereby complying with FOIA's statute of limitations. The court granted summary disposition in favor of defendant on plaintiff's claim that defendant violated the Management and Budget Act. In Docket No. 340921, defendant appealed as of right the denial of summary disposition, arguing that the Court of Claims erred by concluding that plaintiff could amend its complaint to comply with the requirements of the Court of Claims Act. In Docket No. 340956, defendant applied for leave to appeal, arguing that plaintiff failed to comply with the statute of limita-

tions under FOIA. In an unpublished order, entered December 20, 2017, the Court of Appeals granted leave to appeal and consolidated the cases.

The Court of Appeals *held*:

1. MCR 7.203(A)(1) provides, in pertinent part, that the Court of Appeals has jurisdiction of an appeal of right filed by an aggrieved party from a final judgment or final order of the circuit court, or Court of Claims, as defined in MCR 7.202(6). In turn, MCR 7.202(6)(a)(v) defines a "final judgment" or "final order" as an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116(C)(7). While MCL 600.6431 does not confer governmental immunity, it establishes conditions precedent for avoiding the governmental immunity conferred by the governmental tort liability act, MCL 691.1401 *et seq*. Therefore, contrary to plaintiff's position, defendant's assertion that plaintiff failed to comply with MCL 600.6431(1) constituted a claim that defendant was entitled to governmental immunity. As a result, the Court of Claims' denial of summary disposition constituted a denial of governmental immunity to a governmental party, and the order constituted a final order under MCR 7.202(6)(a)(v). Accordingly, that aspect of the order was appealable of right under MCR 7.203(A)(1), thereby providing the Court of Appeals with jurisdiction over the claim of appeal in Docket No. 340921.

2. MCL 15.240(1)(b) of FOIA provides that if a public body makes a final determination to deny all or a portion of a request, the requesting person may commence a civil action in the circuit court, or if the decision of a state public body is at issue, the Court of Claims, to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request. Because the Department of Attorney General is a public body, plaintiff was required to challenge the denial of the FOIA request in the Court of Claims. Court of Claims actions, in turn, have their own procedural requirements, including MCL 600.6431(1), which provides that no claim may be maintained against the state unless the claimant, within one year after the claim has accrued, files in the office of the clerk of the Court of Claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where the claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.

In this case, in which both a statute providing a cause of action against the state and the Court of Claims Act apply, and in which each statute has distinct prerequisites to bringing suit, plaintiff had to comply with the prerequisites set forth in both statutes. Because plaintiff's original complaint filed on April 11, 2017, failed to comply with the Court of Claims Act's requirement that it be signed and verified, it triggered the Court of Claims Act's bar-to-claim language in MCL 600.6431(1) that "[n]o claim may be maintained against the state" if the claim fails to comply with the Court of Claims Act's requirements. The word "maintained" in MCL 600.6431(1) has the legal meaning "to continue something" or "to assert (a position or opinion)"; accordingly, because plaintiff's claim was not verified in plaintiff's original complaint, the claim could not be asserted and thus lacked legal validity from its inception. And because plaintiff's claim was invalid from its inception, there was nothing that could be amended. Additionally, while plaintiff's amended complaint was filed within one year of the accrual of plaintiff's claims and therefore was timely under the Court of Claims Act, the amended complaint was filed more than 180 days after the denial of plaintiff's FOIA request and therefore was untimely under FOIA. Accordingly, the Court of Claims erred by holding that the court rules permitted plaintiff to amend its complaint and for that amended complaint to relate back to the date of the original complaint. Additionally, because the complaint was fatally deficient from its inception, it could not and did not toll the limitations period.

Reversed and remanded for entry of summary disposition in favor of defendant.

1. ACTIONS — COURT OF CLAIMS ACT — SIGNATURE AND VERIFICATION REQUIREMENT.

A claim brought in the Court of Claims that is neither signed nor verified pursuant to the requirements in MCL 600.6431(1) of the Court of Claims Act, MCL 600.6401 *et seq*., cannot be asserted and lacks legal validity from its inception; when a claim is invalid from its inception, there is nothing that can be amended.

2. ACTIONS — COURT OF CLAIMS ACT — ACTIONS AGAINST THE STATE — PREREQUISITES TO BRINGING SUIT.

When both a statute providing a cause of action against the state and the Court of Claims Act, MCL 600.6401 *et seq*., apply, and when each statute has distinct prerequisites to bringing suit, a plaintiff must comply with the prerequisites set forth in both statutes.

*Goodman Acker, PC* (by *Mark Brewer*) for plaintiff.

*Bill Schuette*, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *B. Eric Restuccia*, Chief Legal Counsel, and *Christina M. Grossi* and *Kyla L. Barranco*, Assistant Attorneys General, for defendant.

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

PER CURIAM. In Docket No. 340921, defendant, Attorney General (AG) Bill Schuette, acting in his official capacity, appeals as of right the Court of Claims' denial of summary disposition, arguing that the Court of Claims erred by concluding that plaintiff, Progress Michigan, could amend its complaint to comply with the requirements of the Court of Claims Act, MCL 600.6401 *et seq*. In Docket No. 340956, defendant applied for leave to appeal, arguing that plaintiff failed to comply with the statute of limitations under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. This Court granted leave to appeal and consolidated the two appeals. *Progress Mich v Attorney General*, unpublished order of the Court of Appeals, entered December 20, 2017 (Docket No. 340956). For the reasons stated in this opinion, we reverse and remand for entry of summary disposition in favor of defendant.

After reviewing public records it had received through other FOIA requests, plaintiff alleges that it learned that defendant and his staff were performing official functions using personal e-mail accounts. Consequently, on September 27, 2016, plaintiff made a request pursuant to the FOIA. The request covered all e-mails sent or received by a group of 21 AG department staff members using personal e-mail accounts in the performance of any official function from the date of November 1, 2010, onward. On October 19, 2016, defendant denied plaintiff's request. Defendant stated that he

did not possess any records meeting plaintiff's description, except for a single e-mail, which was not subject to disclosure because it was attorney work product. On November 26, 2016, plaintiff filed a departmental appeal of the denial with defendant, which defendant denied by letter dated December 12, 2016.

On April 11, 2017, plaintiff filed its original complaint in this action in the Court of Claims. Plaintiff's complaint contained two counts: (1) violation of the FOIA and (2) failure to preserve state records under the Management and Budget Act, MCL 18.1101 *et seq*. On May 16, 2017, defendant moved for summary disposition, arguing, in relevant part, that plaintiff's complaint was subject to dismissal for failure to comply with the Court of Claims Act's requirement that a claimant must sign and verify its claim, see MCL 600.6431(1), because the complaint was unsigned by plaintiff and unverified.

On May 26, 2017, plaintiff filed an amended complaint, which contained allegations identical to those in the original complaint. This time, however, the amended complaint was signed and verified. On June 13, 2017, defendant moved for summary disposition on the amended complaint. First, defendant argued that procedurally improper claims cannot be cured by virtue of an amendment of a complaint because the timing requirements of the Court of Claims Act apply to "claims," not "complaints." Thus, defendant argued that complaints can be amended but that claims cannot, because the two terms are not equivalent. Second, defendant argued that even if plaintiff could amend its complaint to comply with the requirements of the Court of Claims Act, it nevertheless was time-barred by the FOIA's statute of limitations, which provides for a 180-day limitations period, MCL 15.240(1)(b). This was so, defendant argued, because the amended complaint

was filed more than 180 days after the denial of plaintiff's FOIA request and, thus, could only be deemed valid if it related back to the filing date of the original complaint. Defendant argued, however, that because the amended complaint did not add a claim or defense, a requirement to constitute an amended complaint under the Michigan Court Rules, it was not a proper amended complaint and its filing therefore could not relate back to the date of the filing of the original complaint. Therefore, defendant argued that plaintiff's claim was time-barred by the FOIA's statute of limitations.

The Court of Claims denied defendant's motion for summary disposition with respect to plaintiff's FOIA claim. The Court of Claims rejected defendant's distinction between a "claim" and a "complaint," holding that plaintiff had complied with the signature and verification requirements of the Court of Claims Act when it filed its amended complaint within the one-year statutory period in MCL 600.6431(1). The Court of Claims also held that the amended complaint related back to the filing of the original complaint, so plaintiff had complied with the FOIA's statute of limitations. Regarding plaintiff's count pertaining to an alleged violation of the Management and Budget Act, the Court of Claims granted summary disposition in favor of defendant because it found that the act does not provide a private right of action. Plaintiff has not appealed the Court of Claims' dismissal of the Management and Budget Act count. Thus, the only count pertinent to these appeals is plaintiff's FOIA count.

### I. PLAINTIFF'S CHALLENGE TO THIS COURT'S JURISDICTION

On appeal, plaintiff contests this Court's jurisdiction over defendant's appeals. In Docket No. 340921, defen-

dant appealed as of right under MCR 7.203(A)(1) the denial of summary disposition. And in Docket No. 340956, defendant applied for leave to appeal, which this Court granted under MCR 7.203(B)(1).

"Whether this Court has jurisdiction to hear an appeal is always within the scope of this Court's review." *Chen v Wayne State Univ*, 284 Mich App 172, 191; 771 NW2d 820 (2009). "The jurisdiction of the Court of Appeals is governed by statute and court rule." *Id*. Because "[t]his Court reviews de novo the proper interpretation of statutes and court rules as questions of law," this Court reviews de novo the question whether it has jurisdiction. *Id*.

MCR 7.203(A)(1) provides that this Court "has jurisdiction of an appeal of right filed by an aggrieved party from . . . [a] final judgment or final order of the circuit court, or court of claims, as defined in MCR 7.202(6) . . . ." In turn, MCR 7.202(6)(a)(v) defines a "final judgment" or "final order" as "an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116(C)(7) . . . ."

Plaintiff argues that the Court of Claims' denial of summary disposition did not deny defendant governmental immunity because there is no governmental immunity for disclosure of public records and, even if governmental immunity did apply to disclosure of public records, the FOIA had acted as a waiver of such immunity. However, plaintiff's challenge to this Court's jurisdiction fails.

The Michigan Supreme Court stated in *Fairley v Dep't of Corrections*, 497 Mich 290, 297; 871 NW2d 129 (2015), that "while MCL 600.6431 does not 'confer governmental immunity,' it establishes conditions precedent for avoiding the governmental immunity con-

ferred by the" governmental tort liability act, MCL 691.1401 *et seq*. Thus, contrary to plaintiff's position, defendant's assertion that plaintiff failed to comply with MCL 600.6431(1) does constitute a claim that defendant was entitled to governmental immunity. As a result, the Court of Claims' denial of summary disposition constituted a denial of governmental immunity to a governmental party, and the order thus constituted a final order under MCR 7.202(6)(a)(v). Therefore, that aspect of the order is appealable of right under MCR 7.203(A)(1), thereby providing this Court with jurisdiction over the claim of appeal in Docket No. 340921. See also *Watts v Nevils*, 477 Mich 856 (2006); *Walsh v Taylor*, 263 Mich App 618, 625; 689 NW2d 506 (2004). Further, whether there is actually a governmental immunity defense to an alleged failure to disclose public records and whether the FOIA waives any such defense goes to the merits of the appeal, i.e., to whether defendant is actually entitled to governmental immunity in this case, not to the jurisdictional issue of whether the order appealed from denied him governmental immunity.

Additionally, in Docket No. 340956, plaintiff ignores the fact that this Court granted leave to appeal, undisputedly giving this Court jurisdiction over the appeal. See MCR 7.203(B)(1) (providing that this Court "may grant leave to appeal from . . . a judgment or order of the circuit court and court of claims that is not a final judgment appealable of right").

## II. AMENDED COMPLAINT

### A. STANDARDS OF REVIEW

This Court reviews issues of statutory interpretation de novo. *PNC Nat'l Bank Ass'n v Dep't of Treasury*, 285

Mich App 504, 505; 778 NW2d 282 (2009). We also review a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(7) can be granted if the plaintiff's claim is barred because of an "immunity granted by law" or because a claim is barred by the applicable "statute of limitations." MCR 2.116(C)(7); see also *Genesee Co Drain Comm'r v Genesee Co*, 309 Mich App 317, 323; 869 NW2d 635 (2015). "When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them." *Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211 (2010). "If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court." *Id*. at 429.

B. DISCUSSION

Defendant argues that plaintiff's FOIA complaint is untimely and invalid. There are two statutes at issue here, with different timing requirements, and this appeal involves the interplay between them. In order to frame the legal issues presented, we note in summary fashion the timing of the relevant events:

- October 19, 2016: Defendant denies plaintiff's FOIA request.
- December 12, 2016: Defendant denies a departmental appeal of plaintiff's FOIA request.
- April 11, 2017: Plaintiff files its original complaint in the Court of Claims.
- May 26, 2017: Plaintiff files its amended complaint in the Court of Claims.

There are two statutes that control the circumstances under which a party aggrieved by the denial of a FOIA request may challenge an agency's decision. Section 10(1) of the FOIA, MCL 15.240(1), provides, in relevant part:

> If a public body makes a final determination to deny all or a portion of a request, the requesting person may do 1 of the following at his or her option:
>
> * * *
>
> (b) Commence a civil action in the circuit court, or if the decision of a state public body is at issue, the court of claims, to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request.

Because the Department of Attorney General is a public body, in order to challenge its denial of the FOIA request through the filing of suit, plaintiff was required by Subdivision (b) to bring this action in the Court of Claims. Court of Claims actions, in turn, have their own procedural requirements, as provided for by the Court of Claims Act:

> No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths. [MCL 600.6431(1).]

It is a clearly established principle that "when the Legislature specifically qualifies the ability to bring a

claim against the state or its subdivisions on a plaintiff's meeting certain requirements," those requirements are strictly construed as written. *McCahan v Brennan*, 492 Mich 730, 746; 822 NW2d 747 (2012). While the Court of Claims Act generally provides that suits must be brought within one year of a claim's accrual, MCL 600.6431(1), in cases involving claims for personal injury or property damage, a claimant "shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action," MCL 600.6431(3). In *McCahan*, our Supreme Court construed that language, holding that "the statutory provision must be understood as a cohesive whole. Subsection (1) sets forth the general rule, for which subsection (2) sets forth additional requirements and which subsection (3) modifies for particular classes of cases that would otherwise fall under the provisions of subsection (1)." *McCahan*, 492 Mich at 742. "Accordingly, subsection (3) incorporates the consequence for noncompliance with its provisions expressly stated in subsection (1) and does not otherwise displace the specific requirements of subsection (1) other than the timing requirement for personal injury or property damage cases." *Id*. (emphasis omitted). "Therefore, the failure to file a compliant claim or notice of intent to file a claim against the state within the relevant time periods designated in either subsection (1) or (3) will trigger the statute's prohibition that '[n]o claim may be maintained against the state . . . .' " *Id*.

Although the separate requirements of MCL 15.240(1) were not at issue in *McCahan*, we view *McCahan*'s rationale as controlling. When the state consents to suit, the Legislature may "place conditions or limitations" on the state's waiver of immu-

nity. *Id*. at 736. Clearly the Legislature, through the enactment of § 10 of the FOIA, consented to suit by aggrieved parties. But equally clearly, in cases in which the adverse decision was made by a state public body, the Legislature has determined that suit can only be brought in the Court of Claims. Further, in the Court of Claims Act, the Legislature has set forth procedures that govern in all cases brought in the Court of Claims. Those procedures include the statute-of-limitations provisions of MCL 600.6431 and also include the requirement in MCL 600.6431(1) that a complaint "shall be signed and verified by the claimant before an officer authorized to administer oaths." In the context presented here, in which both a statute providing a cause of action against the state and the Court of Claims Act apply, and in which each statute has distinct prerequisites to bringing suit, "the statutory provision[s] must be understood as a cohesive whole." *McCahan*, 492 Mich at 742. Thus, in such circumstances, a plaintiff must comply with the prerequisites set forth in both statutes. Even "post-Court of Claims Act legislation waiving suit immunity . . . is limited by the terms and conditions of jurisdiction established in the Court of Claims Act." *Greenfield Constr Co, Inc v Dep't of State Highways*, 402 Mich 172, 196; 261 NW2d 718 (1978) (opinion by RYAN, J.). Preconditions to maintaining an action against the state do "not abrogate a substantive right, but rather provide[] the framework within which a claimant may assert that right." *Rusha v Dep't of Corrections*, 307 Mich App 300, 310; 859 NW2d 735 (2014).

Applying that rule to the facts here, plaintiff's complaint fails. Plaintiff filed its initial complaint on April 11, 2017, less than 180 days after defendant's

denial of its FOIA request on October 19, 2016.[1] The complaint thus was timely under each of the statutes. However, the complaint failed to comply with the Court of Claims Act because it was neither signed nor verified. The complaint thus triggered the Court of Claims Act's "bar-to-claim language" of MCL 600.6431(1) that "[n]o claim may be maintained against the state" if the claim failed to comply with the Court of Claims Act's strictures. *McCahan*, 492 Mich at 743.

The Court of Claims Act's requirement that a claim may not be maintained unless it is signed and verified is analogous to the requirements for initiating a medical malpractice claim. In *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000), our Supreme Court held that the plaintiff's failure to adhere to the statutory requirements for filing a medical malpractice claim meant that the filing was void, thereby making any attempt to amend the initial complaint futile. At issue in *Scarsella* was the requirement found in MCL 600.2912d(1), which provides that "the plaintiff in a medical malpractice action 'shall file with the complaint an affidavit of merit . . . .' " *Id*. at 548, quoting MCL 600.2912d(1) (quotation marks and citation omitted). Because the plaintiff in *Scarsella* did not file the required affidavit of merit with his initial complaint, the complaint "was insufficient to commence plaintiff's malpractice action" and therefore did not toll the limitations period. *Scarsella*, 461 Mich at 550 (quotation marks and citation omitted).

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[1] Plaintiff's counsel conceded at oral argument that the FOIA 180-day limitations period began to run from the October 19, 2016 date of defendant's initial denial of its request, not from the later date of defendant's denial of plaintiff's departmental appeal. This undoubtedly is correct because the FOIA explains that such an appeal happens after a "final determination" is made. See MCL 15.240(1)(a). Thus, the public body's decision in the departmental appeal, although later in time, is not a "final determination" under the statute.

Like the plaintiff in *Scarsella*, plaintiff here argues that it should have been allowed to amend the complaint such that the complaint then would comply with the statutory requirements. See *id*. However, we reject this argument because, as the Supreme Court noted, "it effectively repeals" the statutory requirement. *Id*. (quotation marks and citation omitted). Under plaintiff's view, plaintiffs could routinely file their complaints without having the claims verified and then "amend" the complaint at a later date after the period of limitations had passed. In the words of the *Scarsella* Court, this would "completely subvert[]" the requirements of MCL 600.6431(1). *Id*. (quotation marks and citation omitted).[2]

Plaintiff sought to correct the deficiencies in its complaint by attempting to amend the pleading pursuant to MCR 2.118 on May 26, 2017. The amended complaint was filed within one year of the accrual of plaintiff's claims and therefore was timely under the Court of Claims Act; however, the amended complaint was filed more than 180 days after the denial of plaintiff's FOIA request and therefore was untimely under the FOIA.

The only way in which either of the complaints that plaintiff filed could be deemed valid is if the amended complaint, the only one that complied with the signature and verification requirements of the Court of Claims Act, was deemed to relate back to the filing of the original complaint, which was itself defective but timely. However, the Court of Claims Act is clear that

[2] We are cognizant that the statutory language of MCL 600.6431(1) and MCL 600.2912d(1) differ. MCL 600.6431(1) provides that a claim cannot be "maintained" unless other requirements are met, whereas MCL 600.2912d(1) provides that an affidavit of merit "shall [be] file[d] with the complaint." However, both establish mandatory prerequisites to filing suit and thus present the same issue.

"[n]o claim may be maintained" unless certain conditions are satisfied, MCL 600.6431(1), and the original complaint here undisputedly did not satisfy those requirements. "All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." MCL 8.3a. Because the word "maintained" as used in the Court of Claims Act is used in a technical, legal manner to convey a particular legal result, we are required to construe it according to that "peculiar and appropriate meaning." To "maintain" is defined, in pertinent part, as "[t]o continue (something)" or "[t]o assert (a position or opinion)[.]" *Black's Law Dictionary* (10th ed). Accordingly, because the claim was not verified in plaintiff's initial complaint, the claim could not be asserted and thus lacked legal validity from its inception. In other words, because the claim in the initial complaint could not be "maintained," it was a nullity. See *Scarsella*, 461 Mich at 550 (stating that because the complaint did not comply with statutory prerequisites to filing, it "was insufficient to commence [plaintiff's malpractice] action") (quotation marks and citation omitted).

Because plaintiff's complaint was invalid from its inception, there was nothing pending that could be amended. Therefore, any attempt by plaintiff to amend under MCR 2.118 was ineffectual. Moreover, although MCR 2.118 creates a general right to amend a complaint, the statutory provisions of the FOIA and the Court of Claims Act, as substantive law, control over any conflicting court rule. See *Stenzel v Best Buy Co, Inc*, 320 Mich App 262, 279; 906 NW2d 801 (2017). The Court of Claims therefore erred by holding that the

court rules permitted plaintiff to amend its complaint and for that amended complaint to relate back to the date of the original complaint. In addition, because the complaint was fatally deficient from its inception, it could not and did not toll the limitations period. See *Scarsella*, 461 Mich at 550.[3]

Reversed and remanded for entry of summary disposition in favor of defendant. We do not retain jurisdiction.

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

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[3] Although it could not amend its defective complaint to comply with the statutory requirements because the initial complaint was neither signed nor verified as required by the Court of Claims Act, plaintiff was free at any time within the 180-day period provided by the FOIA to file a fresh signed and verified complaint, which would have had the effect of commencing a civil action (given that the original filing was a nullity and did not initiate a proceeding). See *Scarsella*, 461 Mich at 549-550. The fact that plaintiff failed to do so in a timely manner forecloses the present suit.

NITZKIN v CRAIG

Docket No. 337744. Submitted June 13, 2018, at Detroit. Decided June 21, 2018, at 9:00 a.m.

Gary D. Nitzkin brought an action in the 47th District Court against Robert M. Craig (also known as the Law Offices of Robert M. Craig & Associates) and the Guardian Alarm Company of Michigan, alleging that they had violated the Fair Debt Collection Practices Act (FDCPA), 15 USC 1692 *et seq*., by sending a letter attempting to collect a $25.16 debt that plaintiff allegedly owed Guardian. The letter bore the letterhead of the Law Offices of Robert M. Craig & Associates and the signature of a woman named "Joan Green," and it indicated that if plaintiff did not dispute the validity of the debt in writing within 30 days, Guardian would assume the debt was valid. The letter also made reference to the "benefit of settling this dispute in an amicable manner." Following discovery, Guardian moved for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10), asserting that because it was not a "debt collector" as that term is defined by the FDCPA, it was not subject to the requirements of the FDCPA. Craig also moved for summary disposition on the ground that he was not a "debt collector," so he could not violate the FDCPA. Alternatively, he contended that even if he had violated the FDCPA, his violation was excused under the act's bona-fide-error provision. The district court, James B. Brady, J., granted Guardian's motion for summary disposition, concluding that Guardian was a creditor, not a debt collector. The court also granted Craig's motion for summary disposition, ruling that although Craig was a debt collector, any violation of the FDCPA on his part was excused because there was no genuine issue of material fact with regard to whether the bona-fide-error defense was applicable. Plaintiff appealed in the Oakland Circuit Court, Leo Bowman, J., which affirmed the district court and dismissed plaintiff's appeal. The Court of Appeals granted plaintiff's application for leave to appeal.

The Court of Appeals *held*:

1. The circuit court applied the correct standard of review to plaintiff's appeal. Although the court stated that the district court

had not abused its discretion by granting defendants' motions for summary disposition, the court had stated at the outset that it was conducting a review de novo, and the record indicated that the court had, in fact, done so. Accordingly, there was no error requiring reversal in this respect.

2. The circuit court erred by affirming the grant of summary disposition to Guardian on the basis that Guardian was not a debt collector under the FDCPA. The definition of "debt collector" in 15 USC 1692a(6) includes any creditor who, in the process of collecting his or her own debts, uses any name other than his or her own which would indicate that a third person is collecting or attempting to collect such debts unless one of the exclusions in 15 USC 1692a(6)(F) applies. Under this definition, Guardian is a "debt collector" if it is (1) a creditor, (2) collecting its own debts, (3) while using any name other than its own that indicates a third party is collecting or attempting to collect the debt, and (4) none of the exclusions in 15 USC 1692a(6)(F) applies. It was undisputed that Guardian extended credit to plaintiff and that the extension of credit created a debt, which satisfied the definition of "creditor" in 15 USC 1692a(4) as well as the first requirement of the definition of a debt collector. Further, the letter and Craig's deposition testimony made it clear that Guardian was collecting a debt owed to it while using the name of another. Finally, there was no evidence or suggestion that any of the situations set forth in 15 USC 1692a(6)(F) applied. The district court erred by relying on a statement in *Bridge v Ocwen Fed Bank, FSB*, 681 F3d 355, 359 (CA 6, 2012), for the proposition that the terms "creditor" and "debt collector" are mutually exclusive given that under the specific statutory language in 15 USC 1692a(6), Guardian was properly considered a debt collector, not a creditor, when evaluating the specific debt at issue.

3. The district court did not err by determining that Craig was a debt collector under the FDCPA. Although Craig was an employee of Guardian at the time the October 2015 letter was sent, and even though Craig testified that he did not personally attempt to collect the debt from plaintiff, Craig testified that he was partially involved in collecting debts for Guardian, and when the collection letter was sent, it was sent in the name of Craig's law office on a form that he approved in order to collect a debt owed to Guardian. This satisfies the definition of "debt collector" because Craig is someone who regularly, albeit indirectly, attempted to collect a debt owed or due to another. Craig was not excluded from the definition of "debt collector" by 15 USC 1692a(6)(A) and (B), which provide respectively that a person is

not a debt collector if that person is any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor, or any person, while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts. Subdivision (A) was inapplicable because, although Craig was employed by Guardian, he was not collecting a debt for Guardian using Guardian's name, and Subdivision (B) was inapplicable because it refers only to artificial persons.

4. The circuit court erred by affirming the district court's ruling that the bona-fide-error defense in 15 USC 1692k(c) excused any violation of the FDCPA that Craig might have committed. That provision precludes liability if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. To satisfy this provision, the debt collector must show that its violation resulted from unintentional conduct; that the violation resulted from a bona fide error, i.e., from a clerical or factual mistake; and that the debt collector maintained procedures reasonably adapted to avoid any such errors. Craig did not show that his alleged violation resulted from a bona fide error. Although there was testimony that sending the letter at issue violated Guardian's debt-collection policy, Craig did not explain how intentionally sending a letter was a clerical or factual mistake. Moreover, Craig failed to show that he or Guardian maintained procedures reasonably adapted to avoid errors that would result in this type of violation. Although he testified that there were policies against sending collection letters to collect debts less than $250, he offered no testimony about what steps were taken to ensure that those procedures would prevent this type of error. Accordingly, Craig failed to show that his alleged FDCPA violation should be excused under 15 USC 1692k(c).

5. The fact that plaintiff had no actual damages did not serve as a basis for affirming the orders granting defendants summary disposition because establishing actual damages is not required to bring suit under the FDCPA.

6. Plaintiff established that he was entitled to summary disposition under MCR 2.116(I). First, plaintiff correctly argued that the collection letter he received violated the notice provision in 15 USC 1692g(a) because the letter stated that he had to dispute the debt in writing within 30 days or the debt would be

assumed valid, and the statutory language indicates that Congress intended a consumer to be able to orally dispute a debt under 15 USC 1692g(a)(3). Second, plaintiff correctly argued that the collection letter violated 15 USC 1692g(a)(4), which provides that notice to the consumer must include a statement that if the consumer notifies the debt collector in writing within the 30-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector. When evaluating whether the FDCPA has been violated, the conduct is viewed through the eyes of the least sophisticated consumer. In this case, the letter did not state that, in order to receive verification, plaintiff was required to notify the debt collector in writing within 30 days. Although the 30-day deadline was set forth in the sentences before and after the challenged sentence, the least sophisticated consumer could arguably conclude that the 30-day deadline applied only to the rights set forth in the other sentences. Alternatively, because that was the only deadline stated in the letter, a consumer could also determine that everything it does must be done within the 30-day deadline, especially given that the 30-day deadline was twice stated in the letter. To the extent that the letter could be interpreted as permitting a consumer to request verification either with or without regard to the 30-day deadline, the collection letter violated the FDCPA. Finally, plaintiff did not establish that the letter's reference to the benefit of settling the dispute in an amicable manner violated 15 USC 1692e(5), because this vague language would not lead the least sophisticated consumer to believe that the failure to settle a $25.16 debt would cause the debt collector to file suit. Nevertheless, because plaintiff established that there was no genuine issue of material fact with regard to whether Guardian and Craig violated at least some provisions of the FDCPA, the district court was directed to enter an order granting plaintiff summary disposition on his claims against Craig and Guardian.

Circuit court order reversed; case remanded to the district court for further proceedings.

ACTIONS — STATUTES — FAIR DEBT COLLECTION PRACTICES ACT — SHOWING OF ACTUAL DAMAGES.

A person need not establish that they sustained actual damages to bring an action under the Fair Debt Collection Practices Act, 15 USC 1692 *et seq*.

*Nitzkin & Associates* (by *Gary D. Nitzkin* and *Travis Shackelford*) and *Michigan Consumer Credit Lawyers* (by *Carl Schwartz*) for Gary Nitzkin.

*Law Offices of Joel H. Kaufman* (by *Joel H. Kaufman*) for Robert M. Craig.

*Jennifer J. Henderson* for Guardian Alarm Company.

Before: BECKERING, P.J., and M. J. KELLY and O'BRIEN, JJ.

PER CURIAM. Plaintiff, Gary Nitzkin, appeals by leave granted[1] the circuit court's order affirming the district court's orders granting summary disposition in favor of defendants, Guardian Alarm Company of Michigan and Robert Craig, also known as Law Offices of Robert M. Craig & Associates. For the reasons stated in this opinion, we reverse and remand for further proceedings.

## I. BASIC FACTS

In October 2015, Nitzkin received a collection letter with the letterhead of the "Law Offices of Robert M. Craig & Associates." The letter indicated that he owed Guardian $25.16, and it stated:

> My client, Guardian Alarm Company, has turned the above account over to me for collection. Unless the validity of this debt is disputed in writing within thirty (30) days of receipt of this notice, this debt will be assumed to be valid by Guardian Alarm.
>
> If this debt is disputed, or any portion thereof, you may receive a verification of the debt or a copy of any court

[1] *Nitzkin v Craig*, unpublished order of the Court of Appeals, entered August 30, 2017 (Docket No. 337744).

> judgment against you by notifying the undersigned in writing at the above address of the disputed amount and requesting a verification of the debt.
>
> If the debt is owed to a creditor different than the original creditor, you may obtain the name and address of the original creditor by making a written request within thirty (30) days of receipt of this notification.
>
> Certainly, you can see the benefit of settling this dispute in an amicable manner. We do not feel it was your intention to allow this matter to escalate to the current situation. Let's work together to resolve this matter to everyone's satisfaction.
>
> This letter is being sent to you with the intent to collect a debt. Any information obtained will be used for that purpose.

The letter was purportedly written by "Joan Green," who was identified on the letter as a legal assistant.

Nitzkin, a debt-collection lawyer, believed that the letter was sent in violation of the Fair Debt Collection Practices Act (FDCPA), 15 USC 1692 *et seq*., and he filed a complaint against Guardian, Craig,[2] and Green[3] alleging several violations of the Act. Following discovery, Guardian moved for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10), asserting that because it was not a "debt collector" as that term is defined by the FDCPA, it was not subject to the requirements of the FDCPA. Craig also moved for summary disposition. Like Guardian, he asserted that he was not a "debt collector," so he could not violate the FDCPA. Alternatively, he contended that even if he had violated the FDCPA, his violation was excused

[2] Craig initially failed to respond to the complaint, and a default was entered against him. The district court, however, granted Craig's motion to have the default set aside. The default and the district court's decision to set it aside have not been challenged on appeal.

[3] Green has been dismissed from the case and is no longer a party.

under the Act's "bona fide error" provision. The district court granted Guardian's motion for summary disposition, concluding that Guardian was a creditor, not a debt collector. And, although it concluded that Craig was a debt collector, the court stated that any violation of the FDCPA was excused because there was no genuine issue of material fact with regard to whether the bona-fide-error defense was applicable. Nitzkin appealed in the circuit court, which affirmed the district court and dismissed Nitzkin's appeal.

## II. REVIEW BY CIRCUIT COURT

### A. STANDARD OF REVIEW

Nitzkin first argues that the circuit court applied the wrong standard of review when it evaluated his appeal. Whether a court applied the correct standard of review is a question of law, which we review de novo on appeal. See *Pierron v Pierron*, 282 Mich App 222, 243; 765 NW2d 345 (2009).

### B. ANALYSIS

The circuit court in this case stated near the end of its oral ruling that it was "satisfied" that the district court did not abuse its discretion when granting summary disposition to Guardian and Craig. Challenges to a court's decision to grant or deny summary disposition are reviewed de novo. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). The mere fact that the court recited the wrong standard is not dispositive, however. When it began its ruling, the court stated that it was conducting a de novo review. It also noted that its review of the case and the briefs led it to its conclusion that summary disposition had been properly granted

in Guardian's and Craig's favor. Thus, although the court inadvertently recited the wrong standard at the conclusion of its ruling, given that it started with the correct standard and indicated that it had, in fact, conducted a de novo review of the case, we discern no error requiring reversal.

## III. SUMMARY DISPOSITION

### A. STANDARD OF REVIEW

Nitzkin argues that the circuit court erred by affirming the district court orders granting summary disposition in favor of Craig and Guardian. He also asserts that the district court erred by not granting summary disposition in his favor under MCR 2.116(I). We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Barnard Mfg Co, Inc*, 285 Mich App at 369.

### B. ANALYSIS

#### 1. APPLICABILITY OF THE FDCPA TO GUARDIAN AND CRAIG

The FDCPA does not apply to every attempt by a creditor to collect a debt from a debtor. Instead, it applies when a "debt collector" is attempting to collect a debt from a "consumer." This is made clear in 15 USC 1692, wherein Congress explains that the purpose of the FDCPA is "to eliminate abusive *debt collection* practices *by debt collectors*, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action *to protect consumers* against debt collection abuses." (Emphasis added.) "To further these ends, the FDCPA 'establishes certain rights for consumers whose debts are placed in

the hands of professional debt collectors for collection.' " *Vincent v The Money Store*, 736 F3d 88, 96 (CA 2, 2013), quoting *DeSantis v Computer Credit, Inc*, 269 F3d 159, 161 (CA 2, 2001).[4] Thus, because the FDCPA regulates the conduct of "debt collectors" as that term is defined by the FDCPA, our first inquiry is whether Guardian and Craig are "debt collectors" under the Act.

As relevant to the claim against Guardian, the term "debt collector" is defined by 15 USC 1692a(6) as follows:

> The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, *the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts*. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include—
>
> * * *
>
> (F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was

[4] "While the decisions of federal circuit courts are not binding, they may be persuasive." *Glenn v TPI Petroleum, Inc*, 305 Mich App 698, 716 n 5; 854 NW2d 509 (2014).

> obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor. [Emphasis added.]

Under this definition, Guardian is a "debt collector" if (1) it is a creditor, (2) collecting its own debts, (3) while using any name other than its own that indicates a third party is collecting or attempting to collect the debt, and (4) none of the exclusions in § 1692a(6)(F) applies. See also *Henson v Santander Consumer USA, Inc*, 817 F3d 131, 136 (CA 4, 2016) (noting that the definition of "debt collector" includes "a person who collects *its own debts*, using *a name other than its own* as if it were a debt collector").

The term "creditor" is defined by 15 USC 1692a(4), which provides that a creditor is "any person who offers or extends credit creating a debt or to whom a debt is owed . . . ." In this case, it is undisputed that Guardian extended credit to Nitzkin and that the extension of credit created a debt. So the first requirement of the above definition of a debt collector is met.

With regard to the second and third requirements, the letter and Craig's deposition testimony make it clear that Guardian was collecting a debt owed to it while using the name of another. At the outset, the letter was sent to collect a debt owed to Guardian. Further, the letterhead indicated that the letter was sent from the "Law Offices of Robert M. Craig & Associates" and was signed by Joan Green, a legal assistant. Craig testified at his deposition that at all times relevant to this lawsuit, he worked as general or in-house counsel for Guardian. He explained that Guardian signed his paycheck, which was made payable to him as an individual. He also stated that the "Law Offices of Robert M. Craig & Associates" was not a separate legal entity as it was just a name he used to

do business while employed by Guardian. Although Guardian's name appeared on the letter, the letter referred to Guardian as a "client" of the Law Office or Green, which suggests a separation of identity. Further, the letter stated that Nitzkin's account with Guardian was "turned . . . over" to the Law Offices/Green, which again suggests that Guardian and the individual attempting to collect the debt were different entities. Accordingly, viewed in the light most favorable to Nitzkin, the nonmoving party, Guardian attempted to collect a debt owed to it while using the name of another. The second and third requirements are, therefore, satisfied.

Finally, the fourth requirement is that the exclusion in § 1692a(6)(F) does not apply. Here, there is no evidence or suggestion that any of the situations set forth in that provision apply.

Despite Guardian's meeting the definition of "debt collector" in 15 USC 1692a(6), the district court relied on a statement in *Bridge v Ocwen Fed Bank, FSB*, 681 F3d 355, 359 (CA 6, 2012), for the proposition that the terms "creditor" and "debt collector" are mutually exclusive. The court then concluded that because Guardian satisfied the definition of "creditor" in 15 USC 1692a(4), it could not also be a "debt collector" under 15 USC 1692a(6). However, in context, the *Bridge* Court explained that "as to a specific debt, one cannot be both a 'creditor' and a 'debt collector,' as defined in the FDCPA, because those terms are mutually exclusive." *Id*. (quotation marks and citation omitted). Here, because the more specific statutory language in § 1692a(6) applies, Guardian is properly considered a debt collector, not a creditor, when evaluating the specific debt at issue. To hold otherwise would be to render nugatory the provision in

§ 1692a(6) that expressly provides that a creditor is a debt collector under specific circumstances. See *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002) (stating that we must interpret statutory language so as to avoid rendering any portion of that statutory language surplusage or nugatory). See also *Maguire v Citicorp Retail Servs, Inc*, 147 F3d 232, 235 (CA 2, 1998) ("As a general matter, creditors are not subject to the FDCPA. However, a creditor becomes subject to the FDCPA if the creditor in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts.") (quotation marks and citation omitted).

Thus, for the foregoing reasons, the district court erred by granting summary disposition to Guardian on the basis that Guardian was not a debt collector under the FDCPA.

We also reject Craig's contention that he is not properly considered a debt collector under the FDCPA. Although Craig was an employee of Guardian at the time the October 2015 letter was sent, and even though Craig testified that he did not personally attempt to collect the $25.16 debt from Nitzkin, Craig testified that he was partially involved in collecting debts for Guardian. He explained that as part of his work at Guardian, he acquired a form collection letter from a lawyer "who [did] nothing but collections" and that he approved that letter to be used to collect debts from individuals who owed between $250 and $500 to Guardian. When shown a copy of the October 2015 letter sent to Nitzkin, he agreed that the letter appeared to match the paragraphs in the form collection letter that he had approved for use by Guardian to collect debts. Therefore, when the October 2015 collec-

tion letter was sent, it was sent by Craig's "law office" on a form that he approved in order to collect a debt owed to Guardian. This satisfies the definition of "debt collector" because Craig is someone who regularly, albeit indirectly, attempted to collect a debt owed or due to another. See 15 USC 1692a(6).

Craig argues, however, that despite meeting the general definition in 15 USC 1692a(6), he is excluded from the definition of "debt collector" by 15 USC 1692a(6)(A) and (B), which provide that a person is not a debt collector if that person is:

> (A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;
>
> (B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts[.]

However, Subdivision (A) is inapplicable because, although Craig was employed by Guardian, he was not collecting a debt for Guardian using Guardian's name. In addition, Subdivision (B) is inapplicable because, as the United States Court of Appeals for the Sixth Circuit has observed, 15 USC 1692a(6)(B) refers to artificial persons, because "[n]atural persons are not related or affiliated in those ways." *Anarion Investments LLC v Carrington Mtg Servs, LLC*, 794 F3d 568, 569 (CA 6, 2015). See also *Cruz v Int'l Collection Corp*, 673 F3d 991, 999 (CA 9, 2012) (explaining that the employee of a debt collector may be held liable for violations of the FDCPA if the employee independently meets the definition of the term "debt collector"), and *Pollice v Nat'l Tax Funding, LP*, 225 F3d 379, 404 (CA 3, 2000) (stating that "vicarious liability under the

FDCPA will be imposed for an attorney's violations of the FDCPA if both the attorney and the client are debt collectors") (quotations marks and citations omitted). Thus, contrary to Craig's argument on appeal, the district court properly determined that Craig is a debt collector.

2. BONA FIDE ERROR

Nitzkin argues that the district court erred by granting summary disposition to Craig on the basis that even if he violated the FDCPA, his violations were excused under the "bona fide error" provision in 15 USC 1692k(c). That provision precludes liability "if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 USC 1692k(c). Stated differently, the debt collector must show (1) that its violation resulted from unintentional conduct, *Jerman v Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 559 US 573, 584; 130 S Ct 1605; 176 L Ed 2d 519 (2010); (2) that the violation resulted from a "bona fide error," i.e., from a "clerical or factual mistake[]," *id*. at 587; and (3) that the debt collector maintained "procedures reasonably adapted to avoid any such [clerical or factual] error[s]," *id*. (quotation marks and citation omitted).

Here, Craig argues that any violations he committed were unintentional because he was wholly uninvolved in sending the collection letter to Nitzkin. He testified that he did not draft the letter, did not approve it, and would not have approved it if it had been shown to him before being sent to Nitzkin. He further testified that the "policy" of Guardian was to not send the collection

letter for debts under $250, so the letter in this case ought to have never been sent in the first place.

However, Craig has not shown that his alleged violation resulted from a bona fide error, i.e., a clerical or factual mistake. See *id*. at 587. Although there is testimony that sending the October 2015 letter violated Guardian's debt-collection policy, Craig has not explained how intentionally sending a letter is a clerical or factual mistake. Moreover, Craig has failed to show that he or Guardian maintained "procedures reasonably adapted to avoid" errors that would result in this type of violation. Indeed, he only testified that there were "policies" against sending collection letters to collect debts less than $250, but he offered no testimony about what steps were taken to ensure that those procedures would prevent the type of error that allegedly occurred in this case. In *Leeb v Nationwide Credit Corp*, 806 F3d 895, 900 (CA 7, 2015), the Seventh Circuit rejected a similar argument, reasoning:

> Nationwide next argues that it maintained adequate procedures because sending the January 5 letter was against its "policy." But *Jerman* instructs that "procedures" are "processes that have mechanical or other such regular orderly steps . . . ." [*Jerman*, 559 US at 587] (internal quotation marks omitted). Nationwide does not argue that its "policy" told its employee what she *should have* done, much less that the policy gave her any "mechanical" or "regular orderly" steps to follow. Following *Jerman's* instruction, we reject the argument that a thinly specified "policy," allegedly barring some action but saying nothing about what action to take, is an adequate "procedure" under § 1692k(c).

We agree with the reasoning in *Leeb* and conclude that Craig has failed to show that his alleged FDCPA

violation should be excused under § 1692k(c).[5] Consequently, the district court erred by granting summary disposition to Craig on the basis that the bona-fide-error defense excused any violation of the FDCPA that he might have committed.[6]

3. DAMAGES

Craig and Guardian both suggest that we should affirm the district court's orders granting them summary disposition because Nitzkin has no actual damages. However, a consumer filing suit under the FDCPA need not establish that he or she suffered actual damages. As explained in *Wise v Zwicker & Assoc, PC*, 780 F3d 710, 713 (CA 6, 2015), "[u]nder the FDCPA, a plaintiff does not need to prove knowledge or intent to establish liability, nor must he show actual damages, which places the risk of penalties on the debt collector that engages in activities which are not entirely lawful, rather than exposing consumers to unlawful debt-collector behavior without a possibility for relief." (Quotation marks and citation omitted.) Still, we note that

> [w]hen an alleged violation is trivial, the "actual damage[s]" sustained, § 1692k(a)(1), will likely be *de minimis* or even zero. The Act sets a cap on "additional" damages, § 1692k(a)(2), and vests courts with discretion to adjust

[5] In *Leeb*, the Seventh Circuit noted that "[d]etermining whether a debt collector's 'procedures' are 'reasonably adapted' to avoid errors is [sic] 'is a uniquely fact-bound inquiry susceptible of few broad, generally applicable rules of law.' " *Leeb*, 806 F3d at 900 n 3 (quotation marks and citation omitted). We agree. Accordingly, we only hold that, on the particular facts currently before this Court, Craig has failed to meet his burden under § 1692k(c).

[6] Given our resolution, we decline to address Nitzkin's argument that Craig waived the bona-fide-error defense by failing to properly raise it as an affirmative defense under MCR 2.111(F).

> such damages where a violation is based on a good-faith error, § 1692k(b). . . . The statute does contemplate an award of costs and "a reasonable attorney's fee as determined by the court" in the case of "any successful action to enforce the foregoing liability." § 1692k(a)(3). But courts have discretion in calculating reasonable attorney's fees under this statute, and § 1692k(a)(3) authorizes courts to award attorney's fees to the defendant if a plaintiff's suit "was brought in bad faith and for the purpose of harassment." [*Jerman*, 559 US at 597-599.]

4. MCR 2.116(I)

Finally, Nitzkin contends that the district court erred by denying his motion for summary disposition under MCR 2.116(I). Although the district court did not address this issue, it was raised before the district court and is an issue of law for which all the necessary facts are present. See *Poch v Anderson*, 229 Mich App 40, 52; 580 NW2d 456 (1998).

When evaluating whether the FDCPA has been violated, "the conduct is viewed through the eyes of the 'least sophisticated consumer.' " *Currier v First Resolution Investment Corp*, 762 F3d 529, 533 (CA 6, 2014). "This standard recognizes that the FDCPA protects the gullible and the shrewd alike while simultaneously presuming a basic level of reasonableness and understanding on the part of the debtor, thus preventing liability for bizarre or idiosyncratic interpretations of debt collection notices." *Id*.

Nitzkin contends that the collection letter he received violated the notice provision in 15 USC 1692g(a), which provides in relevant part:

> Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is

> contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—
>
> * * *
>
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector[.]

Nitzkin contends that § 1692g(a)(3) was violated because the letter stated that he had to dispute the debt "in writing within thirty (30) days of receipt of the notice" or the debt would be assumed valid. In *Clark v Absolute Collection Serv, Inc*, 741 F3d 487, 488-489 (CA 4, 2014), the United States Court of Appeals for the Fourth Circuit was asked to determine whether a debt collector violated § 1692g(a)(3) by requiring a consumer to dispute a debt in writing. The *Clark* Court noted that the federal circuit courts were split on the issue:

> The Third Circuit has held that section 1692g(a)(3) must be read to include a writing requirement, finding any other reading contrary to the purposes of the FDCPA. *See Graziano v. Harrison*, 950 F.2d 107 (3d Cir.1991). In contrast, the Second and Ninth Circuits have found that the plain text of section 1692g(a)(3) permits oral disputes, and that such a reading results in a logical, bifurcated scheme of consumer rights. *See Hooks v. Forman, Holt, Eliades & Ravin, LLC*, 717 F.3d 282 (2d Cir.2013); *Camacho v. Bridgeport Fin. Inc.*, 430 F.3d 1078 (9th Cir.2005). [*Clark*, 741 F3d at 490.]

The *Clark* Court then reasoned:

> In line with the Second and Ninth Circuits, we find that the FDCPA clearly defines communications between a debt collector and consumers. Sections 1692g(a)(4), 1692g(a)(5), and 1692g(b) explicitly require written com-

> munication, whereas section 1692g(a)(3) plainly does not. [The debt collector] asks that we disregard the statutory text to read into it words that are not there. We decline to do so. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (internal quotation marks omitted). [*Id*. at 490-491.]

We agree with the *Clark* Court that the statutory language indicates that Congress intended a consumer to be able to orally dispute a debt under § 1692g(a)(3). Accordingly, because the October 2015 collection letter expressly required Nitzkin to dispute the validity of the debt in writing, it violated § 1692g(a)(3) of the FDCPA.

Nitzkin next argues that the October 2015 collection letter violates § 1692g(a)(4) of the FDCPA, which provides that notice to the consumer must include

> a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector[.]

Nitzkin contends that this section is violated because the letter states: "If this debt is disputed, or any portion thereof, you may receive a verification of the debt or a copy of any court judgment against you by notifying the undersigned in writing at the above address of the disputed amount and requesting a verification of the debt." He argues that this is insufficient notice under § 1692g(a)(4) because it does not state that, in order to receive verification, the con-

sumer must notify the debt collector in writing *within 30 days*. Although the 30-day deadline is set forth in the sentences before and after the challenged sentence, the least sophisticated consumer could arguably conclude that the 30-day deadline applies only to the rights set forth in the other sentences. Alternatively, because that is the only deadline stated in the letter, a consumer could also determine that everything it does must be done within the 30-day deadline, especially given that the 30-day deadline is twice stated in the letter. Although one of those interpretations would, technically, lead to compliance with § 1692g(a)(5), to the extent that the letter could be interpreted as permitting a consumer to request verification either with or without regard to the 30-day deadline, the collection letter violates the FDCPA. See *Russell v Equifax ARS*, 74 F3d 30, 35 (CA 2, 1996) ("[A] collection notice is deceptive when it can be reasonably read to have two or more different meanings, one of which is inaccurate.").

Finally, Nitzkin argues that the collection letter violates § 1692e(5) of the FDCPA, which provides:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> * * *
>
> (5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

Nitzkin asserts that the October 2015 letter threatened to file a lawsuit because it stated: "Certainly, you can see the benefit of settling this dispute in an amicable manner." Nitzkin points out that, although

the letter threatens to take legal action, Craig testified that neither he nor Guardian would file a lawsuit over a $25.16 debt. We conclude, however, that the vague language in the letter would not lead the least sophisticated consumer to believe that his failure to settle a $25.16 debt would cause the debt collector to file suit against him. Accordingly, we conclude that Nitzkin has not established that Guardian and Craig violated § 1692g(a)(5).

Nevertheless, because Nitzkin established that there is no genuine issue of material fact with regard to whether Guardian and Craig violated at least some provisions of the FDCPA, we direct the district court to enter an order granting Nitzkin summary disposition on his claims against Craig and Guardian.

## IV. CONCLUSION

For the reasons stated in this opinion, we reverse the circuit court's order affirming the grants of summary disposition to Guardian and Craig and remand to the district court for further proceedings. On remand, the district court is directed to enter an order of summary disposition in Nitzkin's favor against Craig and Guardian. The court shall independently address the issue of damages.

Reversed and remanded for further proceedings. We do not retain jurisdiction. Nitzkin may tax costs as the prevailing party. MCR 7.219(A).

BECKERING, P.J., and M. J. KELLY and O'BRIEN, JJ., concurred.

NAHSHAL v FREMONT INSURANCE COMPANY

Docket Nos. 336234 and 336919. Submitted June 7, 2018, at Detroit. Decided June 21, 2018, at 9:05 a.m.

Abdul Nahshal brought an action in the Wayne Circuit Court against Fremont Insurance Company, seeking work-loss and related personal protection insurance (PIP) benefits from defendant, his no-fault insurer, under the no-fault act, MCL 500.3101 *et seq*. Plaintiff was injured in an automobile accident, and plaintiff's wife testified at trial that she had to help plaintiff to the bathroom for approximately two weeks after the accident. She submitted paperwork to defendant that documented the assistance she provided to plaintiff. Several attempts were made to settle the matter before trial, and the case-evaluation panel recommended a settlement in plaintiff's favor. Defendant rejected the recommendation, and the dispute proceeded to trial. At trial, defendant argued that plaintiff made false statements to defendant to bolster his claim and that dismissal was warranted based on a fraud-exclusion provision in defendant's policy. Defense counsel brought up the subject of fraud with plaintiff's wife at trial, questioning whether her recordkeeping was honest. On redirect, plaintiff's counsel asked plaintiff's wife whether she was "a religious person," and plaintiff's wife said that she was. Defense counsel objected on the basis of "religion," and plaintiff's counsel countered that defense counsel was attacking her honesty. The trial court allowed her to answer. Plaintiff's wife also testified as to whether plaintiff was a religious person. Additionally, defense counsel questioned plaintiff about the amount of attendant-care services, stating that plaintiff's wife had asked for $80,000; however, defense counsel was not able to point to anything in the trial record showing that plaintiff's wife actually sought reimbursement for that amount related to helping her husband with his toiletry needs for a year. Defendant moved for a directed verdict, arguing that plaintiff admitted that his wife engaged in fraud, and the court, David J. Allen, J., denied the motion but allowed an instruction regarding fraud to be presented to the jury. The jury found defendant liable and awarded plaintiff $129,044.24 in work-loss benefits, $312 in attendant-care benefits, and $900 in replacement-services benefits. Defen-

dant moved for judgment notwithstanding the verdict (JNOV), again arguing that the policy was voided by fraud. The court denied the motion and entered a judgment that was stayed pending appeal. Plaintiff moved for taxable costs, attorney fees, penalty interest, and judgment interest, and the court rendered a verdict in plaintiff's favor. Defendant appealed as of right the judgment awarding plaintiff the PIP benefits (Docket No. 336234) and the subsequent order awarding plaintiff attorney fees, costs, and interest (Docket No. 336919).

The Court of Appeals *held*:

1. To preserve an evidentiary error for appeal, a party must object at trial on the same ground that it presents on appeal. In this case, plaintiff's counsel asked plaintiff's wife whether she was "a religious person," and defense counsel immediately objected. It was apparent from the record that defense counsel's objection was to the admission of testimony about the witness's religious beliefs or opinions for the purpose of her credibility. Accordingly, this issue was preserved.

2. MCL 600.1436 provides, in pertinent part, that no witness may be questioned in relation to his or her opinions on religion, either before or after he or she is sworn. MRE 610 provides that evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness's credibility is impaired or enhanced. In this case, plaintiff's counsel asked plaintiff's wife about whether she was a religious person to bolster her credibility as a witness. The inference intended to be drawn by jurors was that plaintiff's wife was a pious believer and that, because of this, honesty was important to her. Given the context, the colloquy fell within the statutory and evidentiary prohibitions; accordingly, the trial court abused its discretion by admitting the improper testimony.

3. In *People v Hall*, 391 Mich 175 (1974), the Supreme Court concluded that the remedy for a violation of MCL 600.1436 in a criminal case was automatic reversal. Subsequent decisions have extended this rule of automatic reversal to instances when a witness is asked about a criminal defendant's religious beliefs or opinions, *People v Bouchee*, 400 Mich 253 (1977), and when a criminal victim is asked about the victim's own religious beliefs or opinions, *People v Wells*, 82 Mich App 543 (1978). Other decisions have narrowed the rule, finding it inapplicable when the trial court takes swift and commendable action to cut off the improper questioning, *People v Burton*, 401 Mich 415 (1977), or when a third-party witness is questioned about that witness's own reli-

gious beliefs or opinions, not a criminal defendant's, *People v McLaughlin*, 258 Mich App 635 (2003). Automatic reversal is generally disfavored, and courts have only applied *Hall*'s automatic-reversal rule in criminal actions, not civil ones. Additionally, in *In re Morse Estate*, 146 Mich 463 (1906), a civil action, the Supreme Court reviewed the improper testimony for prejudice before deciding whether to reverse, which suggested that the rule of automatic reversal should not apply in civil actions when testimony about religious beliefs or opinions is offered. Neither the *Hall* Court nor any subsequent decision of the Supreme Court has expressly overruled *In re Morse Estate* or otherwise suggested that the decision is no longer good law. Finally, limiting the automatic-reversal rule to the criminal context made sense because it is inefficient, requiring additional proceedings in trial court; the passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult or even impossible; and other social costs are effectively minimized by application of traditional harmless-error and plain-error standards of appellate review. Accordingly, the automatic-reversal rule did not apply in this context, and the improper testimony was reviewed for prejudice.

4. A trial court's error is harmless if, based on review of the entire record, it is more probable than not that the error was not outcome-determinative; if the probability runs in the other direction, then the error requires reversal. In this case, a review of the record confirmed that the trial court's error in admitting the improper testimony was harmless and did not require reversal. The improper testimony was offered in response to defendant's assertion that plaintiff's wife had submitted false reports to defendant—specifically, that plaintiff's wife had claimed that she was entitled to $80,000 for her assistance in helping plaintiff to the bathroom for a year. Yet, defendant provided no documentary evidence to back up this assertion in the first place. Additionally, despite finding that plaintiff was entitled to attendant-care and replacement-services benefits, the jury only awarded plaintiff $312 and $900, respectively, for those services, which was substantially less than the requested amount. The jury's verdict indicated that it was not swayed by the improper inquiry into religious beliefs or opinions. Accordingly, although the trial court erred by admitting the improper testimony, the error was harmless and reversal was not required.

5. A directed verdict or JNOV is only appropriate when, viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law.

To void a policy under a fraud exclusion based on a willful misrepresentation of a material fact, the insurer must prove: (1) the representation was false; (2) the representation was material; (3) the insured made the representation (a) knowing that it was false or (b) recklessly, without any knowledge of its truth; and (4) the insured made the representation with the intention that the insurer act upon it. In this case, defendant argued that plaintiff admitted that his wife submitted a false claim for $80,000 based on a false report that she helped plaintiff in going to the bathroom every day for a year. It was unclear where in the record defendant's trial counsel came up with the purported $80,000 for one year of toileting assistance, and defendant similarly failed to clarify the matter on appeal. Defendant bore the burden of proving an intentional misrepresentation sufficient to invoke its policy exclusion. Because defendant did not prove the factual predicate supporting its argument, defendant was not entitled to a directed verdict or JNOV.

6. The no-fault act provides for attorney fees when an insurance carrier unreasonably withholds benefits. A judgment that an insurer owes PIP benefits that have not already been paid to the insured creates a rebuttable presumption that the refusal or delay in paying benefits was unreasonable, and the insurer bears the burden of showing that the withholding was based on a legitimate question of statutory construction, constitutional law, or factual uncertainty. In this case, after the trial, plaintiff moved for attorney fees based on defendant's refusal to pay the full amount of work-loss benefits owed. The record was clear that defendant failed to overcome the statutory presumption that it was unreasonable not to pay the full amount of work-loss benefits owed. Because defendant failed to produce any records, there was no basis for the trial court to determine whether defendant's refusal to pay the benefits was reasonable. Therefore, the trial court was warranted in awarding attorney fees to plaintiff, regardless of whether it stated the proper standard during the hearing.

Affirmed.

APPEAL — CIVIL LAWSUITS — IMPROPER TESTIMONY REGARDING A WITNESS'S RELIGIOUS BELIEFS OR OPINIONS — REVIEW FOR PREJUDICE.

MCL 600.1436 provides, in pertinent part, that no witness may be questioned in relation to his or her opinions on religion, either before or after he or she is sworn; MRE 610 provides that evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness's credibility is impaired or enhanced; in civil

lawsuits, when a trial court errs by allowing improper testimony regarding a witness's religious beliefs or opinions, any improper testimony is reviewed for prejudice on appeal.

*Mancini Schreuder Kline PC* (by *Ellen G. Schreuder* and *Drew Slager*) for plaintiff.

*Novara Tesija & Catenacci, PLLC* (by *Marc D. McDonald*, *Kaitlyn A. Cramer*, and *Brian R. Meyer*) for defendant.

Before: SWARTZLE, P.J., and SHAPIRO and BOONSTRA, JJ.

SWARTZLE, P.J. There was a time under the common law when a witness had to swear belief in a Supreme Being before testifying in court. This time passed, and the common-law rule was set aside. Today, a witness cannot be questioned about beliefs or opinions on religion, and especial care must be taken that these beliefs or opinions not be used to impair or enhance a witness's credibility.

During the jury trial in this case, plaintiff's wife was asked about her and her husband's religious opinions for the purpose of bolstering her credibility, and this was error. Whether this error requires automatic reversal or, instead, this error requires a showing of prejudice before relief can be had is the question we address here. Concluding that, in a civil action, a party must show prejudice from the improper admission of religious belief or opinion testimony before reversal can be had, yet finding defendant has not shown such prejudice here, and finding no other reversible error, we affirm.

## I. BACKGROUND

In Docket No. 336234, defendant Fremont Insurance Company appeals as of right a judgment award-

ing plaintiff Abdul Nahshal $130,256.24 for no-fault personal protection insurance (PIP) benefits. In Docket No. 336919, defendant appeals as of right the trial court's subsequent order awarding plaintiff taxable costs, attorney fees, penalty interest, and judgment interest.

Plaintiff was involved in a roll-over automobile accident from which he sustained injuries to his chest, shoulder, back, and neck. Following the accident, plaintiff also suffered from post-traumatic stress disorder. Before the accident, plaintiff worked as a server at both the Detroit Athletic Club and Greektown Casino, where he received compensation in the form of wages and tips. Plaintiff returned to work at Greektown Casino approximately five weeks after the accident, but he had to change roles from server to cashier because of his injuries. Plaintiff never returned to work at the Detroit Athletic Club.

Plaintiff sought work-loss and related benefits from defendant, his no-fault insurer, including nearly $5,000 per month for lost income and additional amounts for attendant-care and replacement-services benefits. Plaintiff's wife testified at trial that, for several weeks after the accident, it was difficult for plaintiff to do anything because of his injuries. According to plaintiff's wife, she had to help plaintiff to the bathroom for approximately two weeks after the accident. She submitted paperwork to defendant, documenting the assistance she provided to plaintiff. As relevant to this appeal, Attendant Care Service Compensation Claim Forms for October and November 2013 record that plaintiff's wife provided toileting assistance for 17 days. Plaintiff's primary-care physician corroborated plaintiff's wife's testimony that plaintiff was disabled from household duties and needed personal-attendant care.

Defendant's claims specialist testified at trial that she determined plaintiff's work-loss benefit to be $2,500 per month based on the calculation of a certified public accountant (CPA). The difference between defendant's payment and plaintiff's requested amount appears to be based on a disagreement on how plaintiff's tip income should have been calculated. The purported CPA's calculation is not in the record. As of trial, defendant had paid plaintiff a total of $40,000 in work-loss and replacement-services benefits.

Several attempts were made to settle the matter before trial, and the case-evaluation panel recommended a settlement in plaintiff's favor. Defendant rejected the recommendation, and the dispute proceeded to trial. At trial, defendant argued that plaintiff made false statements to defendant to bolster his claim and that dismissal was warranted based upon a fraud-exclusion provision in defendant's policy. The provision at issue is entitled "Concealment or Fraud" and provides:

> **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 or to any accident or loss for which coverage is sought.

Defense counsel brought up the subject of fraud with plaintiff's wife, questioning whether plaintiff's wife's recordkeeping was honest. On redirect, plaintiff's wife testified as follows:

> *Q*. Okay. Now Ms. Nahshal, are you a religious person?
>
> *A*. Yes.
>
> [*Defense Counsel*]: Your Honor, objection to religion and it's beyond the scope of my cross.

[*Plaintiff's Counsel*]: And he's attacking her honesty, Your Honor.

[*The Trial Court*]: The Court will take the answer.

*Q*. And have you been a religious person all your life?

*A*. Yes.

*Q*. Okay. And your husband, he, you married him the year he came to the United States?

*A*. Correct.

*Q*. Almost 31 years ago?

*A*. Um-hmm.

*Q*. And was he a religious person?

*A*. He was, he was a little, but when I married him he got to be better, more.

*Q*. Okay. And how did that change after this collision?

*A*. He used to go, when he used to come home from work he used to stop at the local mosque and pray whatever pray he's already, 'cause we pray five times a day.

So if one prayer already finished he'll go and pray and come home, so.

*Q*. And—

*A*. And I see him, I see him, he used to pray, but now I don't see him pray. I don't, we pray five times a day like I said, I don't see him pray.

*Q*. Is honesty important to you?

*A*. It's very, very. Everybody knows me knows I'm honest.

*Q*. And have you been honest today and—

*A*. Yes, I have.

*Q*. —in the past?

Almost three years of recordkeeping for—

*A*. Yes, I have.

*Q*. —for the insurance company?

*A*. Yes.

Defendant also brought up the subject of fraud during its cross-examination of plaintiff, specifically with respect to attendant care. Plaintiff testified on cross-examination as follows:

*Q*. Okay. All right. [Your wife] also said that she, you needed assistance going to the bathroom; correct?

*A*. For the first two or three weeks, yes.

*Q*. Okay. She submitted it for one year, did you need it for one year or you only need it for a couple of weeks?

*A*. For the shower, Yes.

*Q*. Okay, I asked—

*A*. For the bathroom, no.

*Q*. Okay. For a year you could not take a shower, is that what you're saying?

*A*. I can, but I cannot clean my back.

*Q*. What about going to the bathroom, could you get up and go to the bathroom?

*A*. Absolutely.

*Q*. Absolutely?

*A*. Yes, sir.

*Q*. Okay. Well then let me, and you could always do that; correct?

*A*. I can go to the bathroom.

*Q*. Excuse me?

*A*. I can go to the bathroom.

*Q*. Okay. All right. I want to show you documents that we've marked as Exhibit Q. And do you know what your wife's signature looks like?

*A*. Of course.

*Q*. Okay. Is that your wife's signature?

*A*. Yes.

*Q*. Okay. So if your wife submitted benefits and she's asking for $80,000 from Fremont Insurance because she says you can't go to the bathroom without her, was that untrue?

*A*. Yeah, that should be untrue.

*Q*. Okay, so that's untrue.

So what your wife submitted to Fremont Insurance Company was untrue; is that correct?

*A*. I'm saying about that, about bathroom. . . .

* * *

*Q*. Okay. The specific question is if your wife submitted claims that she had to take you to the bathroom everyday 'cause you were too physically injured, that's not true is it?

*A*. To the bathroom, using the bathroom, no.

*Q*. Okay. So what your wife submitted to Fremont Insurance Company was not true, correct?

*A*. In everything on that matter.

*Q*. Okay. But just about the bathroom is untrue?

*A*. Yes, about the bathroom.

Defense counsel was not able, however, to point to anything in the trial record showing that plaintiff's wife actually sought reimbursement for $80,000 related to helping her husband with his toiletry needs for a year. Nor could defense counsel identify a record to this effect during oral argument on appeal.

At the close of plaintiff's case-in-chief, defendant moved for a directed verdict, arguing that plaintiff admitted that his wife engaged in fraud, thereby voiding the policy. The trial court denied the motion, but allowed an instruction regarding fraud to be presented to the jury. In closing argument, plaintiff's counsel asked the jury to award $129,634.86 in work-loss benefits, $23,550 in attendant-care benefits, and $19,380 in

replacement-services benefits. The jury found defendant liable and awarded plaintiff $129,044.24 in work-loss benefits, $312 in attendant-care benefits, and $900 in replacement-services benefits.

Defendant moved for judgment notwithstanding the verdict (JNOV), again arguing that the record showed that the policy was voided by fraud and citing plaintiff's testimony regarding toileting. The trial court denied the motion, noting that the question of fraud was presented to, and rejected by, the jury. The trial court entered a judgment that was stayed pending appeal.

Plaintiff then moved for attorney fees, costs, and interest, arguing that defendant's unreasonable failure to pay work-loss benefits entitled plaintiff to payment of those fees under the no-fault act, MCL 500.3101 *et seq*. At the hearing on plaintiff's motion, the trial court noted that defendant had essentially agreed to the award of attorney fees from the time of case evaluation and that, therefore, "the issue is is [sic] attorney fees from . . . the beginning." After the parties had made their arguments, the trial court noted that it had "lived this case for the last couple of years." The trial court stated that a verdict was rendered in plaintiff's favor "but there's a little bit more to the story in that regard." The trial court then reasoned as follows:

> [T]his was an accident where the car was upside down. The gentleman was extricated, he was taken to the emergency room.
>
> There was a long litany of things that happened to him in terms of medical and his employment.
>
> It's significant to know, I think it's, the Court think [sic] it's significant, this wasn't some brand new adjuster just out of adjuster school, if you will, this person had 21 years

of experience as I'm reminded this morning. Knows the ropes if you will.

But this is a Plaintiff that was sent to three IMEs [independent medical evaluations].

The first two IMEs essentially agreed with Plaintiff that Plaintiff needed to see certain medical providers and had significant work restrictions.

If that weren't enough to get this matter moving from the adjuster's perspective then there was a third IME that wasn't given, it came out at trial wasn't given complete medical records.

Case eval was accepted by the Plaintiff.

This Court attempted to settle this matter I think on a number of occasions.

This case was facilitated and at the end of the day it went to trial, Plaintiff was successful.

Plaintiff request[ed] that the Defendant[']s failure to pay the wage loss, no fault benefits was unreasonable. At this point with the benefit of hindsight, if you will, and sitting through the trial and all of the evidence the Court can make that conclusion.

Certainly taxable costs are awardable, which I believe are in excess of $9,000.

The attorney fees Plaintiff accepted case eval, Plaintiffs bettered their position greater than 10 percent. I don't think that Defendant has argued that and in essence has conceded the attorney fees from the date of the case eval, accept reject.

The issue is is [sic] are we going back to the beginning in terms of the unreasonableness, and from what the Court has now seen the Court would concur.

And then there's the issue of no fault penalty interest which is in light of the above the Court is awarding pursuant to MCL 500.3142(3), and Judgment interest as well pursuant to 600.6013(6).

* * *

> The big picture is is [sic] that I'm granting it certainly from a case evaluation standpoint, as well as from the date of beginning.

These appeals followed.

## II. ANALYSIS

### A. USING RELIGION TO ENHANCE WITNESS CREDIBILITY

We begin our analysis with defendant's claim that it is entitled to a new trial based on the trial court's erroneous admission of testimony regarding the religious beliefs or opinions of plaintiff and his wife in violation of MCL 600.1436 and MRE 610. We conclude that the trial court erred in admitting the plaintiff's wife's testimony on the subject, but the error did not affect defendant's substantial rights under MRE 103 and, therefore, the error is not grounds for a new trial.

#### 1. TESTIMONY ABOUT RELIGIOUS BELIEFS OR OPINIONS

In old time, the common law required that a witness swear to belief in a Supreme Being before testifying, the rationale being that only a believer who risked divine punishment would feel compelled to testify truthfully. See 28 Wright & Gold, Federal Practice and Procedure: Evidence, § 6152, p 308; *People v Bouchee*, 400 Mich 253, 264 n 6; 253 NW2d 626 (1977). Unfortunately, this legal rule suffered from being both over-inclusive (if the witness was a liar, then wouldn't he lie about being a believer too?) and under-inclusive (were all atheists really all liars all the time?). The rule also suffered from a version of the liar's paradox—consider the statement, "My testimony is false" (if said by a nonbeliever, then that witness would only testify falsely, but then the statement is actually true; if said by a believer, then that witness would only testify

truthfully, but then the statement is actually false—in other words, if false, then true; if true, then false). If this were not bad enough, the rule could result in testimony highly prejudicial to a party when a juror was biased for or against a particular religious belief or opinion. A legal rule that is overinclusive, underinclusive, paradoxical, and prejudicial has little to offer and much to avoid.

Michigan long ago cast away this common-law rule. Our Constitution of 1963 states, "No person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief." Const 1963, art 1, § 18. Moreover, since 1842, it has been the statutory law of the land that a witness cannot be questioned about a person's opinions on religion. See 1842 PA 18; see also MCL 600.1436 (current version) ("No witness may be questioned in relation to his opinions on religion, either before or after he is sworn."). Our rules of evidence likewise reflect this principle: "Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced." MRE 610. While evidence of religious matters may be relevant in certain narrow contexts, see, e.g., *People v Jones*, 82 Mich App 510, 515; 267 NW2d 433 (1978) (noting that testimony about church attendance was permissible when church membership was a fact at issue), if testimony about religious beliefs or opinions is offered to impair or enhance credibility, then that testimony must be excluded.

### 2. THE ISSUE IS PRESERVED

Initially, plaintiff argues that this issue is unpreserved. To preserve an evidentiary error for appeal, a

party must object at trial on the same ground that it presents on appeal. *Klapp v United Ins Group Agency, Inc (On Remand)*, 259 Mich App 467, 475; 674 NW2d 736 (2003). Counsel must state "the specific ground of objection, if the specific ground was not apparent from the context." MRE 103(a)(1).

When plaintiff's counsel asked plaintiff's wife whether she was "a religious person," defense counsel immediately objected. While defense counsel did not specify a statute or rule of evidence, counsel noted that the objection was based on "religion," to which plaintiff's counsel responded that plaintiff's wife's "honesty" had been "attack[ed]." Based on the specific objection and response as well as the context in which these were given, it is apparent from the record that defense counsel's objection was to the admission of testimony about the witness's religious beliefs or opinions for the purpose of her credibility. Accordingly, this issue is preserved.

When an evidentiary issue is preserved, a "trial court's decision whether to admit evidence is reviewed for an abuse of discretion, but preliminary legal determinations of admissibility are reviewed de novo." *Albro v Drayer*, 303 Mich App 758, 760; 846 NW2d 70 (2014). "An abuse of discretion generally occurs only when the trial court's decision is outside the range of reasonable and principled outcomes, but a court also necessarily abuses its discretion by admitting evidence that is inadmissible as a matter of law." *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 604; 886 NW2d 135 (2016) (citations omitted).

### 3. TESTIMONY ON RELIGIOUS BELIEFS OR OPINIONS

Turning to the merits, we consider first whether the testimony actually concerned a person's religious be-

liefs or opinions. Plaintiff's wife was asked about whether she and plaintiff were "religious person[s]," how long and to what extent they were religious persons, and, during this colloquy, whether honesty was "important" to her, to which she responded: "It's very, very. Everybody knows me knows I'm honest." Whether someone is a "religious person" can, somewhat vexingly, be understood in different ways. On the one hand, being a religious person might mean, as one example, that the person regularly attends a church or mosque. Being a religious person might also mean, as another example, that the person self-identifies with a specific religious sect, such as Catholicism or Reform Judaism. None of these meanings would necessarily implicate the person's actual beliefs or opinions about religion. On the other hand, being a religious person might mean, and might be understood by others to mean, that the person ascribes to certain religious beliefs or opinions.

To determine how the phrase was intended to be understood by the jury, we again look to the context in which it was presented. Counsel asked plaintiff's wife about whether she was a religious person to bolster her credibility as a witness. Counsel admitted as much during the colloquy when, in response to the objection, counsel responded, "And [defense counsel is] attacking her honesty, Your Honor." There is little in reason or experience to the suggestion that a "religious person" is honest simply because she attends religious services or identifies with a particular sect. Stated differently, it does not follow that because a person regularly attends a religious service or belongs to a particular sect, therefore, based on the bare fact of that attendance or membership, the person must be honest. There is, however, much more to the suggestion that a "religious person" is honest precisely because that person be-

lieves in a Supreme Being who will deliver divine punishment for dishonesty—and it is precisely this type of suggestion that the law no longer permits during judicial proceedings.

It is evident from the colloquy that counsel asked plaintiff's wife whether she was a "religious person" to bolster her credibility before the jury. The inference intended to be drawn by jurors was that plaintiff's wife was a pious believer and that, because of this, honesty was "very, very" important to her. Similar statements have been held to be improper under the law. See, e.g., *People v Blair*, 82 Mich App 719, 720; 267 NW2d 164 (1978) (finding that questions on whether the criminal defendant was a "religious man" violated the statute); *People v Killingsworth*, 80 Mich App 45, 54; 263 NW2d 278 (1977) (concluding that asking a defendant about whether she attended church was sufficient to violate the law); but see *People v Calloway (On Remand)*, 180 Mich App 295, 297-298; 446 NW2d 870 (1989) (questioning a witness about whether she was a "religious person" was not sufficient alone to violate the statute when the question had nothing to do with the witness's credibility and the question was relevant to the witness's activities at the time of the murder). Given the context, we conclude that the colloquy fell within the statutory and evidentiary prohibitions and, as a result, the trial court abused its discretion by admitting the improper testimony.

4. AUTOMATIC REVERSAL OR REVIEW FOR PREJUDICE?

Defendant argues that our analysis should now be at an end—when religious belief or opinion testimony is admitted for purposes of impairing or enhancing a witness's credibility, reversal is automatic. In support, defendant relies on our Supreme Court's decision in

*People v Hall*, 391 Mich 175; 215 NW2d 166 (1974), and its progeny. Were we to apply the remedy in *Hall*, reversal would be automatic. And yet, automatic reversal is generally "disfavored" and is "inconsistent" with our courts' "modern harmless-error jurisprudence." *People v Graves*, 458 Mich 476, 481-482; 581 NW2d 229 (1998); see also MRE 103(a) (providing that an evidentiary error is harmless unless it affects a party's "substantial right").

*Hall* was a criminal appeal from an uttering-and-publishing conviction. The defendant had testified on his own behalf, and on cross-examination, the prosecutor inquired whether the defendant " 'believe[d] in the Supreme Being?' " *Hall*, 391 Mich at 180. Defense counsel did not object, and the defendant replied, " 'Yes, I do.' " *Id*. Immediately following, the prosecutor asked the defendant whether he " 'would not tell a falsehood to save [him]self,' " making clear why the prosecutor had asked the previous question. *Id*. The Supreme Court concluded that this line of questioning violated MCL 600.1436. *Id*. at 181. As to the remedy, the Supreme Court rejected a "case by case" review for prejudice, explaining that this "would emasculate our statute and the legislative intent behind it." *Id*. at 182. Instead, it opted for a rule of automatic reversal, declaring: "A defendant is entitled to a trial free of such improper questions. Once the question is asked, this is no longer possible. A new trial is mandated." *Id*. at 182-183.

Subsequent decisions have extended this rule of automatic reversal to instances when a witness is asked about a criminal defendant's religious beliefs or opinions, *Bouchee*, 400 Mich at 264, and when a criminal victim is asked about the victim's own religious beliefs or opinions, *People v Wells*, 82 Mich App

543, 545-546; 267 NW2d 448 (1978). Other decisions have narrowed the rule, finding it inapplicable when the trial court takes "swift and commendable action" to cut off the improper questioning, *People v Burton*, 401 Mich 415, 418; 258 NW2d 58 (1977), or when a third-party witness is questioned about that witness's own religious beliefs or opinions, not a criminal defendant's, *People v McLaughlin*, 258 Mich App 635, 663-664; 672 NW2d 860 (2003).

In support of defendant's claim for automatic reversal in this case, neither the statute nor the rule of evidence applies solely to criminal actions; rather, by their plain terms, both apply to civil as well as criminal matters. Moreover, it is at least arguable that the religious beliefs or opinions of a party, not just a witness, were explored during the trial here, given the wife's brief testimony about plaintiff's own religious practices. Nor did the trial court take "swift" action to cut off the line of questioning. Yet, unfortunately for defendant, this is the end of any support for its position.

First, to restate, automatic reversal is generally "disfavored." *Graves*, 458 Mich at 481. The rule is used sparingly, almost always in the context of a structural error of constitutional dimension, see, e.g., *Neder v United States*, 527 US 1, 8; 119 S Ct 1827; 144 L Ed 2d 35 (1999) (identifying "a very limited class" of constitutional errors that are deemed "structural" and "thus subject to automatic reversal") (citation and quotation marks omitted), and similarly almost always in the context of a criminal action, see, e.g., *id*. at 8-9 (explaining that "these errors deprive defendants of basic protections without which a *criminal* trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no *criminal* punishment

may be regarded as fundamentally fair") (emphasis added; citation and quotation marks omitted); but see *Pellegrino v Ampco Sys Parking*, 486 Mich 330, 351 n 14; 785 NW2d 45 (2010) (noting "that *Batson* errors are, in fact, 'structural' and require 'automatic' reversal" and applying the rule in a civil action). It is true that *Hall*'s automatic-reversal rule is one of the rare instances when such a rule is applied in a nonconstitutional context. See *Hall*, 391 Mich at 181-183 (quoting the constitutional provision regarding a witness's competency based on " 'his opinions on matters of religious belief' " but concluding that it was violation of the *statute* that justified automatic reversal) (citation omitted). With that said, *Hall*'s automatic-reversal rule has been the law since 1974, and since then, courts have only applied it in criminal actions, not civil ones. This narrow application and the reasonable inference to be drawn should not be ignored.[1]

Second, supporting a narrow application, there is early caselaw suggesting that the rule of automatic reversal should not apply in civil actions when testimony about religious beliefs or opinions is offered. In *In re Morse Estate*, 146 Mich 463; 109 NW 858 (1906), the Supreme Court considered a previous version of the statute, 1897 CL 10207. Similar to MCL 600.1436, 1897 CL 10207 provided that "no person shall be deemed incompetent as a witness in any court, matter, or proceeding on account of his opinions on the subject of religion, nor shall any witness be questioned in

[1] In distinguishing criminal actions from civil ones, we admittedly paint with a broad brush. We recognize that there is a limited set of civil actions that have criminal-like aspects, such as parental-termination actions. The present action does not fall within that limited set, and, accordingly, we take no position on whether actions in that set should be subject to *Hall*'s automatic-reversal rule for violation of MCL 600.1436 or MRE 610.

relation to his opinions thereon, either before or after he shall be sworn." *In re Morse Estate*, 146 Mich at 469. *In re Morse Estate* involved a civil lawsuit in which several witnesses were questioned about their own religious beliefs or the religious beliefs of other witnesses. *Id*. at 469-470. Counsel objected to some of the questions, but the trial court overruled and allowed the testimony. *Id*. On appeal, the Supreme Court declined to reverse the jury verdict, despite the violation of 1897 CL 10207. The Supreme Court explained that, even for those inquiries to which objections were made, the inquiries did not create any prejudice. *Id*.

Neither the *Hall* Court nor any subsequent decision of the Supreme Court has expressly overruled *In re Morse Estate* or otherwise suggested that the decision is no longer good law. This Court is "bound to follow decisions by [the Supreme Court] except where those decisions have *clearly* been overruled or superseded." *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191; 880 NW2d 765 (2016). Although it is not clear whether the issue here—automatic reversal versus prejudice review—was squarely presented in *In re Morse Estate*, it is consequential that the Supreme Court reviewed the improper testimony for prejudice before deciding whether to reverse.

Third and finally, limiting *Hall*'s automatic-reversal rule to the criminal context makes sense. As explained in *Graves*, there are good reasons that automatic reversal is disfavored for the mine-run of cases. It is inefficient, requiring additional proceedings in the trial court, which a prejudice analysis might otherwise show is not necessary. Moreover, the "passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." *Graves*, 458 Mich at 481 n 4 (quotation marks, citation, and brack-

ets omitted). These and other "social costs" are effectively minimized by application of traditional harmless-error and plain-error standards of appellate review. Other jurisdictions have arrived at a similar conclusion. See, e.g., *Medes v Geico Corp*, 97 Conn App 630, 633-634 & n 2; 905 A2d 1249 (2006) (reviewing for prejudice the improper testimony of a person's religious beliefs or opinions); *Steele v Inn of Vicksburg, Inc*, 697 So 2d 373, 377-378 (Miss, 1997) (same); *Kolaric v Kaufman*, 261 Cal App 2d 20, 27-28; 67 Cal Rptr 729 (1968) (same).

Therefore, because *Hall*'s automatic-reversal rule has been applied only in the criminal context, and because there is support in precedent and logic to reject the rule in the civil context, we will eschew *Hall*'s rule and review the improper religious belief or opinion testimony for prejudice.

5. THE ERROR DOES NOT REQUIRE REVERSAL

Because the issue was preserved, we review the admission of the improper testimony to determine whether such admission was harmless error or reversible error under MRE 103(a). A trial court's error is harmless if, based on review of the entire record, it is more probable than not that the error was not outcome-determinative; if the probability runs in the other direction, then it is reversible error. *Barnett v Hidalgo*, 478 Mich 151, 172; 732 NW2d 472 (2007); see also MCR 2.613(A); *Mitchell v Kalamazoo Anesthesiology, PC*, 321 Mich App 144, 157-158; 908 NW2d 319 (2017).

Our review of the record confirms that it was more probable than not that the admission of the improper testimony was not outcome-determinative. Plaintiff's wife's credibility was attacked with respect to the extent of attendant care claimed by plaintiff. Yet,

several witnesses, including plaintiff and his treating physician, testified about plaintiff's need for services after the accident. Moreover, the improper testimony was offered in response to defendant's assertion that plaintiff's wife had submitted false reports to defendant—specifically, that plaintiff's wife had claimed that she was entitled to $80,000 for her assistance in helping plaintiff to the bathroom for a year. Yet, defendant provided no documentary evidence to back up this assertion in the first place. The relevant documentation submitted to defendant did not mention an $80,000 claim—the documentation instead showed that plaintiff's wife claimed that she helped defendant with toileting for 17 days, consistent with her trial testimony that she helped plaintiff to the bathroom for a couple of weeks. Finally, despite finding that plaintiff was entitled to attendant-care and replacement-services benefits, the jury only awarded plaintiff $312 and $900, respectively, for those services, which was substantially less than the requested amount. Thus, the jury's verdict indicates that it was not swayed by the improper inquiry into religious beliefs or opinions. Accordingly, although the trial court erred by admitting the improper testimony, the error was harmless and reversal is not required.

### B. DIRECTED VERDICT OR JNOV

Defendant next argues that the trial court erred by denying its motions for directed verdict or JNOV. Defendant argues that documentation submitted in support of plaintiff's claim was demonstrably false, thereby triggering the fraud exclusion contained in the insurance policy. We review "de novo a trial court's decision with regard to both a motion for a directed verdict and a motion for JNOV." *Taylor v Kent Radiology, PC*, 286

Mich App 490, 499; 780 NW2d 900 (2009). Both motions are "essentially challenges to the sufficiency of the evidence in support of a jury verdict in a civil case." *Id*. A directed verdict or JNOV is only appropriate when, viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law. *Id*. at 499-500. "If reasonable persons, after reviewing the evidence in the light most favorable to the nonmoving party, could honestly reach different conclusions about whether the nonmoving party established his or her claim, then the question is for the jury." *Id*. at 500.

In *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 423-425; 864 NW2d 609 (2014), this Court held that to void a policy under a fraud exclusion based on a willful misrepresentation of a material fact, the insurer must prove: (1) the representation was false; (2) the representation was material; (3) the insured made the representation (a) knowing that it was false or (b) recklessly, without any knowledge of its truth; and (4) the insured made the representation with the intention that the insurer act upon it. When there is a question of fact on at least one of the elements, and the insured is not otherwise entitled to summary disposition, the matter is one for the jury. *Shelton v Auto-Owners Ins Co*, 318 Mich App 648, 656; 899 NW2d 744 (2017).

Defendant argues that plaintiff admitted that his wife submitted a false claim for $80,000 based on a false report that she helped plaintiff in going to the bathroom every day for a year. Yet, as noted earlier, nowhere in the records provided to the trial court does plaintiff's wife seek $80,000 for assistance with plaintiff's toileting for a year; rather, the documentation she sent to defendant indicates that she helped plaintiff

with toileting for 17 days following plaintiff's accident. This documentation is consistent with her testimony that she helped plaintiff to the bathroom for a couple weeks following plaintiff's accident. It is unclear where in the record defendant's trial counsel came up with the purported $80,000 for one year of toileting assistance, and defendant has similarly failed to clarify the matter on appeal. Defendant bore the burden of proving an intentional misrepresentation sufficient to invoke its policy exclusion. Because defendant has not proved the factual predicate supporting its argument, defendant was not entitled to a directed verdict or JNOV.

### C. ATTORNEY FEES

Finally, defendant argues that the trial court applied the wrong legal standard and committed plain factual error in awarding attorney fees to plaintiff. "The no-fault act provides for attorney fees when an insurance carrier unreasonably withholds benefits." *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008); see also MCL 500.3142. A judgment that an insurer owes PIP benefits that have not already been paid to the insured creates a rebuttable presumption that the refusal or delay in paying benefits was unreasonable. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 317; 602 NW2d 633 (1999). Thus, the insurer bears the burden of showing that the withholding was "based on a legitimate question of statutory construction, constitutional law, or factual uncertainty." *Id*. "The trial court's finding of unreasonable refusal or delay will not be reversed unless it is clearly erroneous." *McKelvie v Auto Club Ins Ass'n*, 203 Mich App 331, 335; 512 NW2d 74 (1994).

After the trial, plaintiff moved for attorney fees based on defendant's refusal to pay the full amount of work-loss benefits owed. In ruling on plaintiff's motion, the trial court stated that its conclusion was based on the "benefit of hindsight" and the evidence presented at trial. Yet, the relevant inquiry "is not whether the insurer ultimately is held responsible for a given expense, but whether its initial refusal to pay the expense was unreasonable." *McCarthy v Auto Club Ins Ass'n*, 208 Mich App 97, 105; 527 NW2d 524 (1994). The trial court's reference to the "benefit of hindsight" suggests that it may have made its decision on attorney fees based on the jury's ultimate finding of liability, though admittedly the phrase and context are ambiguous on this point.

We need not resolve the ambiguity here because any error was harmless. The record makes clear that defendant failed to overcome the statutory presumption that it was unreasonable not to pay the full amount of work-loss benefits owed. Defendant's claims specialist testified that she based her decision to authorize a lower reimbursement on certain CPA calculations, but defendant failed to produce any evidence corroborating this assertion. By failing to produce any records, there was no basis for the trial court, or this Court on appeal, to determine whether defendant's reliance on the purported CPA calculations was reasonable. Thus, the trial court was warranted in awarding attorney fees to plaintiff, regardless of whether it stated the proper standard during the hearing.

## III. CONCLUSION

The law no longer requires or even permits the questioning of a witness about religious beliefs or opinions, especially when such questioning is intended

to impair or enhance a witness's credibility. The trial court erred by permitting plaintiff's counsel to question plaintiff's wife about her and her husband's religious beliefs and opinions. As to the remedy, while there is a time to follow *Hall*'s automatic-reversal rule for such errors, there is a time to follow a different path. As explained earlier, we conclude that the automatic-reversal rule does not apply in civil lawsuits and that any improper religious belief or opinion testimony should be reviewed for prejudice on appeal.

Because the issue was preserved, we review the improper testimony under this jurisdiction's harmless-error standard. Finding no reversible error, either with the improper testimony or the other claims raised by defendant, we affirm both the judgment and the award of attorney fees. As the prevailing party, plaintiff may tax costs under MCR 7.219.

SHAPIRO and BOONSTRA, JJ., concurred with SWARTZLE, P.J.

# Special Orders

# SPECIAL ORDERS

In this section are orders of the Court of general interest to the bench and bar of the state.

*Order Entered July 12, 2018:*

TIM EDWARD BRUGGER II v MIDLAND COUNTY BOARD OF ROAD COMMISSIONERS, Docket No. 337394. The motion for reconsideration is denied for the reasons set forth below.

Defendant argues that we should follow the decision in *Harston v Eaton County*, 324 Mich App 549; 922 NW2d 391 (2018) (Docket No. 338981), which held that *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449; 890 NW2d 680 (2016), was retroactive. However *Harston* was decided after our published decision in this case. As the first published Court of Appeals case to decide the issue of *Streng*'s retroactivity, our decision controls. The *Harston* panel failed to adhere to MCR 7.215(J)(1) which provides:

> *Precedential Effect of Published Decisions. 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 l, 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. [Emphasis added.]

Because *Harston* was decided after this case, we need not consider it. However, we do so in hopes of providing clarification to the bench and bar. *Harston* concluded that *all* judicial rulings involving the reinterpretation of a statute are to be applied retroactively. *Harston* based this conclusion on its reading of *W A Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159; 909 NW2d 38 (2017), oral argument gtd on the application 501 Mich 1079 (2018).[1]

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[1] *W A Foote Mem Hosp* was not mentioned in the briefing in this case even though it was decided before defendant's brief was filed. Further, prior to argument, defendant did not file a supplemental brief to advise us that it believed that *W A Foote Mem Hosp* was relevant, let alone controlling, precedent by which this case must be decided. We also take judicial notice of the fact that *W A Foote Mem Hosp* was similarly not cited in the initial briefing to the *Harston* panel. It was briefed in *Harston* only when the panel *sua sponte* directed the parties to file supplemental briefs addressing it. Thus, it would appear that defendants did not, until invited to by the *Harston* panel, conclude that *W A Foote Mem Hosp* was worth briefing, let alone dispositive of the case before us.

The holding in *W A Foote Mem Hosp*, 321 Mich App at 196, was that the decision in *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017), is to be given retroactive application. Our opinion does not contradict that holding. The *Harston* panel cited *W A Foote Mem Hosp*, for the principle, previously articulated in *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503; 821 NW2d 117 (2012), that "a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation." *Harston*, 324 Mich App at 556; slip op at 4, quoting *Spectrum Health Hosps*, 492 Mich at 536 (quotation marks omitted). In *W A Foote Mem Hosp*, we were considering whether or not *Covenant*, *a decision of a court of supreme jurisdiction overruling a former decision*, should be given retroactive application. Similarly, in *Spectrum Health Hosps*, the Supreme Court was considering its own previous decision, i.e., a decision of the court of supreme jurisdiction. We are unaware of any case, and none was cited in *Harston*, that holds that this rule applies to decisions of this Court or any other intermediate Court of Appeal. *Streng* was a decision of this Court, not of the Supreme Court. Given the clear demarcation of this principle of retroactivity to decisions of the Supreme Court, it is difficult to understand why the *Harston* Court concluded that *W A Foote Mem Hosp* "controls this case in all respects." *Harston*, 324 Mich App at 558; slip op at 5. Neither the holding of *W A Foote Mem Hosp*, i.e., that the Supreme Court's decision in *Covenant* was retroactive, nor its analysis, i.e., that decisions of "the court of supreme jurisdiction" should be given retroactive application are controlling here.

The "first-out" rule set forth in MCR 7.215(J)(1) was adopted due to the confusion created by conflicting decisions by different panels of this Court. Unfortunately, the *Harston* decision has resulted in exactly the type of confusion the rule was intended to avoid. That confusion is unwarranted. Our published opinion in this case was the first Court of Appeals decision addressing the retroactivity of *Streng* and so is precedentially binding pursuant to MCR 7.215(J)(1). *Harston* was the second case addressing the issue and is not precedentially binding.

The clerk is directed to provide a copy of this order to the Supreme Court Reporter of Decisions for publication in the Michigan Appeals Reports.

O'BRIEN, J., would grant the motion for reconsideration.