MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

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COURT OF APPEALS

FROM

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[1] To November 30, 2017.

[2] From December 1, 2017.

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[1] To November 3, 2017.

[2] From November 17, 2017.

[3] To January 5, 2018.

[4] To January 4, 2018.

[5] From December 18, 2017.

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COURT OF APPEALS CASES

EDWARDS v THE DETROIT NEWS, INC

Docket No. 334058. Submitted October 5, 2017, at Detroit. Decided October 31, 2017, at 9:00 a.m.

James Edwards filed an action in the Wayne Circuit Court against The Detroit News, Inc., and Bankole Thompson (collectively, defendants), alleging claims of defamation, defamation by implication, and invasion of privacy. Edwards created and hosted the radio show and website *The Political Cesspool*. The radio show was broadcast, in part, over a network owned by Stephen Donald Black, a former Ku Klux Klan Grand Wizard, who also operated an online forum for white nationalism, white separatism, Holocaust denial, neo-Nazism, and racism. On *The Political Cesspool*'s show and website, Edwards espoused a pro-white philosophy, characterized his listeners as pro-Confederate supporters, and on the website included photographs of himself with David Duke, a former Grand Wizard of the Klan. In March 2016, *The Detroit News* published an opinion piece by Thompson in which Thompson discussed concerns expressed by local Jewish leaders regarding the involvement of white supremacists during the 2016 presidential campaign. Specifically, Thompson asserted that the Jewish community was concerned about the support that the Donald J. Trump campaign had received from "white supremacist groups like the Ku Klux Klan and its leaders like James Edwards, David Duke and Thomas Robb, the national director of the Knights of the Ku Klux Klan in Arkansas." Edwards demanded a retraction, asserting that he had never been associated with or a leader of the Klan. In April 2016, *The Detroit News* clarified in its print and electronic editions that Edwards had no formal position with the Klan. In addition, *The Detroit News* altered the online version of the original article by omitting the word "its" before the word "leaders." The court, Kathleen Macdonald, J., granted defendants' motion for summary disposition, concluding that Edwards could not prove his claims because the term "leader" in the article was inherently ambiguous and the disputed statement in *The Detroit News* was subjective opinion rather than a statement of fact. Edwards appealed.

The Court of Appeals *held*:

1. Claims of defamation and invasion of privacy share common allegations, and the claims are therefore reviewed similarly for purposes of analyzing those claims under the First Amendment of the United States Constitution. To establish a claim of defamation, a plaintiff must prove the following: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication; a public figure must establish that the asserted defamatory statement was made with actual malice, not just negligence. The First Amendment protects communications that cannot be reasonably interpreted as stating actual facts about the plaintiff; the amendment provides maximum protection to public speech about public figures with special consideration for speech of public concern. A false statement of actual facts that is objectively provable as false is not protected by the First Amendment, but an objectively verifiable statement that is also necessarily subjective—that is, it is open to several plausible interpretations—is protected.

2. The term "leader" has multiple accepted definitions, and when referring to a formal group, the term does not necessarily imply membership in that group. Instead, a leader may be someone who guides others in action or opinion, one who takes the lead in a movement, or a person of eminent position and influence.

3. Given the language in the original opinion piece and *The Detroit News*'s subsequent clarification, Thompson clearly described Edwards as a leader of the Klan. Although Edwards did not hold an official position with the Klan, the statement was in a newspaper opinion piece and a reasonable reader would not necessarily infer from the use of the term "leader" that Edwards held office in the Klan simply because the other men mentioned in the challenged sentence had held such positions. Moreover, Edwards had involved himself in the national debate on racism and ethnicity because he clearly expressed pro-white sentiments on his radio show and website, referred in derogatory terms to nonwhite persons, had an association with former Klan Grand Wizard Black through the use of Black's radio network, and publicly embraced several individuals, including Duke, Black, and Dickson, who were publicly associated with the Klan. Accordingly, in the context of an opinion piece regarding the 2016 presidential election, defendants' use of the term "leader" was ambiguous in that it was susceptible to numerous plausible

interpretations. Defendants' use of the term was both objectively verifiable and necessarily subjective, and as a result, the sentence in the opinion article was protected speech under the First Amendment. The trial court correctly granted summary disposition in favor of defendants.

Affirmed.

1. CONSTITUTIONAL LAW — FIRST AMENDMENT — DEFAMATION — WORDS AND PHRASES — DEFINITION OF LEADER.

The term "leader" has multiple accepted definitions, and when referring to a formal group, the term does not necessarily imply membership in that group. Instead, a leader may be someone who guides others in action or opinion, one who takes the lead in a movement, or a person of eminent position and influence.

2. CONSTITUTIONAL LAW — FIRST AMENDMENT — DEFAMATION — PUBLIC FIGURES — OBJECTIVELY VERIFIABLE STATEMENTS THAT ARE SUBJECTIVE.

The First Amendment of the United States Constitution protects communications that cannot be reasonably interpreted as stating actual facts about the plaintiff; the amendment provides maximum protection to public speech about public figures with special consideration for speech of public concern; a false statement of actual facts that is objectively provable as false is not protected by the First Amendment, but an objectively verifiable statement that is also necessarily subjective—that is, it is open to several plausible interpretations—is protected.

Bristow Law, PLLC (by *Kyle James Bristow*) for plaintiff.

Honigman Miller Schwartz and Cohn LLP (by *James E. Stewart*, *Leonard M. Niehoff*, and *Andrew M. Pauwels*) for defendants.

Before: GLEICHER, P.J., and FORT HOOD and SWARTZLE, JJ.

SWARTZLE, J. The Restatement (Second) of Torts § 559 lists membership in the Ku Klux Klan as the quintessential illustration of a defamatory statement. In an opinion piece in *The Detroit News*, columnist Bankole Thompson asserted that radio talk-show host

James Edwards is a "leader" of the Ku Klux Klan. There is no record evidence to suggest that Edwards holds a formal leadership position in the Ku Klux Klan, nor is there any record evidence to suggest that he is even a member. Notwithstanding this lack of formal relationship, Edwards has espoused views consistent with those associated with the Klan and, equally as important, he has repeatedly and publicly embraced several individuals who are strongly associated with the Klan. Mindful of Aesop's lesson "*A man is known by the company he keeps*,"[1] we hold that Edwards cannot make claims of defamation or invasion of privacy and affirm summary disposition in favor of defendants.

I. BACKGROUND

A. THE CONTEXT—THE KU KLUX KLAN AND *THE POLITICAL CESSPOOL*

To better understand the underlying dispute, it is helpful to review briefly the history of the Ku Klux Klan as well as James Edwards' radio show, *The Political Cesspool*.[2]

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[1] Aesop, *The Ass & His Purchaser* in *Aesop's Fables* (Ware, Hertfordshire: Wordsworth Editions Limited, 1994), p 142.

[2] This background is gleaned from the parties' briefs and exhibits, as well as Edwards' radio show website (www.thepoliticalcesspool.org), the latter of which is quoted and cited extensively in the complaint and briefs. We also reviewed the following public records and judicial decisions: United States House of Representatives Committee on Un-American Activities, *The Present-Day Ku Klux Klan Movement*, H R Doc No 90-377 (1967); *Virginia v Black*, 538 US 343; 123 S Ct 1536; 155 L Ed 2d 535 (2003); *United States v Milbourn*, 600 F3d 808 (CA 7, 2010); *United States v Black*, 685 F2d 132 (CA 5, 1982); *State v Duke*, 362 So 2d 559 (La, 1978), overruled by *State v Johnson*, 664 So 2d 94 (La, 1995). See MRE 201 (judicial notice of adjudicative facts); *Johnson v Dep't of Natural Resources*, 310 Mich App 635, 649; 873 NW2d 842 (2015) (noting that MRE 201 allows a court to take judicial notice of public

1. A BRIEF HISTORY OF THE KU KLUX KLAN

The Ku Klux Klan has a long, sordid history. From a secret club started by six young ex-Confederate soldiers, the Klan transformed itself into a terrorist force bent on turning back Reconstruction in the years immediately following the Civil War. The Klan's reputed first leader—the Imperial Wizard—was Confederate Army General Nathan Bedford Forrest. In response to the Klan's growing power, Congress held hearings and passed a strong anti-Klan law that, among other things, authorized the President to declare martial law and suspend the writ of habeas corpus. The Ku Klux Klan faded away in the late 1800s.

The terrorist group experienced a rebirth of sorts during World War I, inspired in no small part by the silent film *The Birth of a Nation* (1915). During the decades that followed, the strength of the Ku Klux Klan ebbed and flowed, reaching its near-apex during

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records). The following newspaper articles were also consulted: Saslow, *The White Flight of Derek Black*, Washington Post (October 15, 2016); Applebome, *Duke: The Ex-Nazi Who Would Be Governor*, New York Times (Nov 10, 1991). We acknowledge that the two articles were not included in the record and that this Court cannot take judicial notice of a newspaper article for the truth of the matters asserted therein because of the general prohibition against inadmissible hearsay. *People v McKinney*, 258 Mich App 157, 161 n 4; 670 NW2d 254 (2003). We can, however, take notice of the fact that the two articles were published, and this is especially pertinent in a defamation case implicating First Amendment principles, where the inquiry focuses on, among other things, what reasonable readers would have understood at the time the communication was made and how a plaintiff's reputation in the community was impacted. Cf. *Washington Post v Robinson*, 290 US App DC 116; 935 F2d 282, 291-292 (1991). In any event, the two articles merely supplement the cited public records and judicial decisions with respect to background on David Duke and Stephen Donald "Don" Black, and they have no direct bearing on our analysis of Edwards' claims against defendants.

the Civil Rights clashes of the 1960s. Again, in response, Congress held hearings and the Klan's visibility waned.

During the 1970s, David Duke became the face of the modern-day Ku Klux Klan. Joining the Klan in the late 1960s, Duke eventually became the Grand Wizard of the Knights of the Ku Klux Klan. Duke later left the organization and started the National Association for the Advancement of White People, a white nationalist group. Duke currently hosts a radio show and is a frequent guest on *The Political Cesspool*.

Stephen Donald "Don" Black succeeded Duke as Grand Wizard of the Knights of the Ku Klux Klan. Black was later arrested and convicted of trying to overthrow a small island republic, the Commonwealth of Dominica. He later started a bulletin-board system in the 1990s called Stormfront.org. The bulletin board remains active today as an online forum for white nationalism, white separatism, Holocaust denial, neo-Nazism, and racism, among other topics.

While its messaging and tactics have changed over the years, at its core, the Ku Klux Klan has remained a loosely organized movement fueled by racism, white supremacism, anti-Semitism, and nativism.

2. THE POLITICAL CESSPOOL

Edwards is the creator and host of *The Political Cesspool* radio show and website. He started the radio show in October 2004. Based in Memphis, Tennessee, the show went on a brief hiatus in 2008, but otherwise has been on the air continuously to present day. The radio show is currently carried on the Liberty News Radio Network.

Edwards published his "Statement of Principles" on the show's website. Among other statements, Edwards proclaims the following:

- "*The Political Cesspool Radio Program* stands for the [sic] The Dispossessed Majority. We represent a philosophy that is pro-White."
- "We wish to revive the White birthrate above replacement level fertility and beyond to grow the percentage of Whites in the world relative to other races."
- "America would not be a prosperous land of opportunity if the founding stock were not Europeans. . . . You can't have a First World nation with a Third World population."
- "Secession is a right of all people and individuals. It was successful in 1776 and this show honors those who tried to make it successful from 1861 – 1865."
- "OUR MOTTO: No Retreat, No Surrender, No Apologies."
- As part of his published principles, Edwards includes an endorsement from a person asserting that there is a "genocide against European-Americans," subsequently expanded or clarified to mean "the genocide of immigration and intermarriage."

Immediately below his Statement of Principles, Edwards is pictured with Duke, sitting together at a speaking engagement in Memphis, Tennessee.

Also included on the website is a page titled "A Short History of the Political Cesspool Radio Program." As part of the radio show's history, Edwards claims that the show has filled an important gap in the public debate "because nobody else was speaking up for our People." As part of the show's political activism, he recounts how his radio show "save[d] three confederate parks" from the efforts of "a couple of black malcontents in Memphis" and other "black agitators." One of

the parks in question was named after General Nathan Bedford Forrest, and, according to Edwards, the park is "the burial site of the legendary hero." Edwards characterizes his show's listeners as "pro-Confederate supporters," and he maintains that as the host, he has "an unapologetically pro-White viewpoint" and his is "the premier voice for European Americans in the mainstream media."

With regard to his show's reach and influence, Edwards recounts his show's expansion in the section titled "Sitting on the Cusp of Greatness." Although in his eyes the show was "quite accomplished" as of October 2006, the show had not reached its potential in terms of listenership. But, in Edwards' words, "This was when Don and Derek Black offered to run the Cesspool simultaneously on their internet radio network, giving the Memphis dynamo access to another legion of loyal listeners. The marriage was a perfect fit." As noted earlier, Don Black was the one-time Grand Wizard of the Knights of the Ku Klux Klan, and his Internet radio network is the aforementioned Stormfront.org website that he created.

As for guests and interviewees of the show, Edwards claims that they span the political and ideological spectrum. In his complaint, he asserts that he has interviewed Patrick Buchanan, Lieutenant General Hal Moore, actor Gary Sinise, Dr. Alveda King (the niece of the late Reverend Dr. Martin Luther King, Jr.), legislators, and religious leaders, among others. It does appear from the record that Edwards has interviewed leaders and thinkers with diverse political and ideological viewpoints, some of whom could be considered in the mainstream.

With that said, Edwards makes clear in his show's Statement of Principles that he makes "no attempt to

give [listeners] 'both sides.' " He has a strong ideological viewpoint, he voices this viewpoint on the show, and he highlights this through several of the show's frequent guests, including Duke and Sam Dickson, Jr. (Duke's association with the Ku Klux Klan is noted earlier. As for Dickson, he has represented Ku Klux Klan members in court in the past.) Both have been on the radio show dozens of times, and Duke often writes posts for *The Political Cesspool*'s blog, including, among other things, a piece addressing the purported "Jewish extremist takeover of America."

B. BANKOLE THOMPSON'S OPINION PIECE IN *THE DETROIT NEWS*

On March 17, 2016, *The Detroit News* published an opinion piece by Bankole Thompson in its "Think" section. The piece was titled "Jewish leaders fear Trump presidency." The piece centered on concerns expressed by Detroit-area Jewish leaders regarding the involvement of white supremacists during the 2016 presidential campaign. In the piece, Thompson made the following assertion:

> Of particular note to some in the Jewish community is the unprecedented support the Trump campaign has received among white supremacist groups like the Ku Klux Klan and its leaders like James Edwards, David Duke and Thomas Robb, the national director of the Knights of the Ku Klux Klan in Arkansas.

C. A DEMAND LETTER, A RESPONSE LETTER, AND A PUBLISHED CLARIFICATION

Edwards became aware of Thompson's opinion piece shortly after publication. Edwards' lawyer, Mr. Kyle Bristow, sent defendants a letter in April 2016, demanding a retraction. Mr. Bristow asserted that Edwards "is not now, nor has he ever been, associated

with the Ku Klux Klan—much less a leader of it." He further maintained that Edwards "has no criminal history whatsoever, while the Ku Klux Klan is a criminal terrorist organization which has been responsible for beatings, bombings, murders, and other heinous crimes throughout American history." Thompson's opinion piece constituted libel per se, according to the letter.

Defendants' legal counsel responded in writing several days later. In that letter, defendants did not argue that Edwards did, in fact, have a formal leadership role with the Ku Klux Klan. Rather, defendants pointed out that the statement at issue was made in an editorial about the campaign for the presidency, that Edwards invited criticism with his on-air and written views, and that the First Amendment protects political debate. Without admitting that any reasonable reader would be confused, the letter closed by stating that *The Detroit News* would soon provide a clarification to its readers.

As promised, on April 12, 2016, *The Detroit News* published a clarification in its print and electronic editions, and as of the date of this opinion, the clarification continues to sit at the beginning of the electronic version of the piece. The clarification reads in full, "James Edwards, the Memphis-area host of the radio show 'The Political Cesspool' has no formal position with the Ku Klux Klan." Moreover, the newspaper modified the sentence in question online by omitting the word "its" before the word "leaders." The sentence now reads in full:

> Of particular note to some in the Jewish community is the unprecedented support the Trump campaign has received among white supremacist groups like the Ku Klux Klan

> and leaders like James Edwards, David Duke and Thomas Robb, the national director of the Knights of the Ku Klux Klan in Arkansas.

Notwithstanding the clarification, Edwards sued defendants, claiming that the original sentence was defamatory and that the clarification did not cure the injury or otherwise make him whole. Edwards asserted claims of defamation (libel per se), defamation by implication (libel per se), and invasion of privacy (false light). Defendants moved for summary disposition on all claims under MCR 2.116(C)(8) and (10). The trial court granted defendants' motion, holding that the term "leader" was inherently ambiguous and that the statements in the piece were subjective opinions rather than statements of fact. Edwards timely appealed as of right.

II. ANALYSIS

A. STANDARD OF REVIEW

Defendants moved in the trial court for summary disposition on all three claims under both MCR 2.116(C)(8) and (10). The trial court granted summary disposition, but it did not specify whether under Subrule (C)(8) or (10). Because the trial court considered factual matters outside the four corners of the complaint, we will review whether summary disposition was appropriate under MCR 2.116(C)(10). See MCR 2.116(G)(5).

Summary disposition is appropriate under MCR 2.116(C)(10) when, except as to damages, "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." We construe the pleadings, admissions, and other evidence submitted by the parties in the

light most favorable to Edwards as the nonmovant. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

B. DEFAMATION AND THE FIRST AMENDMENT

This Court will consider simultaneously Edwards' claims of defamation and invasion of privacy given that they share common factual allegations and in light of the protections of the First Amendment. *Battaglieri v Mackinac Ctr for Pub Policy*, 261 Mich App 296, 303-304 & n 4; 680 NW2d 915 (2004). When considering a defamation claim, the Court must make an "independent examination" of the facts to make sure that the speaker's First Amendment right of free expression is preserved. *Kevorkian v American Med Ass'n*, 237 Mich App 1, 5; 602 NW2d 233 (1999).

To make a claim of defamation, a plaintiff must prove the following:

> (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication. [*Lakin v Rund*, 318 Mich App 127, 133; 896 NW2d 76 (2016) (quotation marks and citation omitted).]

An additional requirement exists when the communication is made with reference to a public figure as opposed to a nonpublic private individual. With respect to a public figure, the defamatory statement must also have been made with actual malice, not just negligence. *Kevorkian*, 237 Mich App at 9. The parties agree that Edwards is a public figure for purposes of this lawsuit.

Not all defamatory statements, even those made with actual malice, are actionable. The First Amendment protects communications that "cannot be reasonably interpreted as stating actual facts about the plaintiff," i.e., "expressions of opinion are protected." *Ireland v Edwards*, 230 Mich App 607, 614; 584 NW2d 632 (1998). This Court has previously identified several categories of speech that fall within the constitutionally protected class of opinion speech, including: (1) statements that are both objectively verifiable but also necessarily subjective; (2) parodies, political cartoons, satires, and other statements that, while "factual on their face and provable as false, could not reasonably be interpreted as stating actual facts about the plaintiff"; (3) "statements that both do and do not state actual facts about a person"; and (4) expressions of opinion that otherwise "constitute no more than 'rhetorical hyperbole' or 'vigorous epithet,' " such as calling someone a "crook" or "traitor." *Kevorkian*, 237 Mich App at 6-8 (citation omitted). As our caselaw makes clear, the First Amendment provides "maximum protection to public speech about public figures with a special solicitude for speech of public concern." *Id*. at 9 (citation, ellipsis, and brackets omitted).

The First Amendment's "maximum protection" is not, however, an absolute bar against a public figure's defamation claim. "Statements that are not protected and therefore are actionable include false statements of fact, i.e., those that state actual facts but are objectively provable as false and direct accusations or inferences of criminal conduct." *Id*. at 8. See also *Lakin*, 318 Mich App at 138 (identifying the types of criminal accusations that fall within the category of defamation per se).

Simply being a member or an official of the Ku Klux Klan is not, by itself, a criminal act. Therefore, to have an actionable claim, Edwards must show, among other things, that Thompson's communication stated an actual, objectively verifiable factual assertion not otherwise protected under the First Amendment. In this context, if the statement can be understood both to be objectively verifiable but also to mean different things to different people—in other words, the statement is subjective and therefore open to several plausible interpretations—then the statement is not actionable.

C. WHO IS A "LEADER"?

Turning to the statement at issue—"white supremacist groups like the Ku Klux Klan and its leaders like James Edwards, David Duke and Thomas Robb, the national director of the Knights of the Ku Klux Klan in Arkansas"—defendants do not dispute that the possessive pronoun "its" refers to "the Ku Klux Klan" and not "white supremacist groups." If, in fact, "its" had referred to "white supremacist groups," then even Edwards admits he would not have a viable claim, as he has conceded on appeal that calling him a "white supremacist" would not be defamatory.

Defendants' position makes sense for two reasons. First, the word "its" is singular, and it is therefore grammatically consistent with the singular "Ku Klux Klan" and not with the plural "white supremacist groups"—otherwise, "their" would have been the more appropriate possessive pronoun. Second, when defendants published the clarification, they also edited the opinion piece by deleting the word "its," thereby making the term "leaders" stand on its own without grammatical relation to either "white supremacist groups" or "the Ku Klux Klan." It is doubtful that defendants

would have made this change had the word "its" referred to something other than "the Ku Klux Klan." For that reason, it appears clear that in his original opinion piece, Thompson described Edwards as a "leader" of the Klan, and we must determine whether this assertion is actionable under the circumstances.

As noted earlier, defendants do not argue, and there is no record evidence to suggest, that Edwards holds or has held an official leadership role with the Klan or even that he was ever a member of the organization. In Edwards' view, these uncontested facts are dispositive, as he contends that the meaning of the term "leader," when referring to a formal group, necessarily implies membership in that group. He takes support from the fact that both Duke and Robb have held official leadership roles with Klan groups in the past. Under something akin to the canon of construction that a court should interpret a general term in light of the more specific ones in a series, Edwards argues that a reader would necessarily presume that he had an official affiliation with the Ku Klux Klan because both Duke and Robb had official affiliations with the Klan.

We find this argument unconvincing for several reasons. Initially, we note that in newspaper editorials and opinion pieces a reasonable reader "expects to find the opinions and biases of the individual writers," *Garvelink v Detroit News*, 206 Mich App 604, 611; 522 NW2d 883 (1994), whereas in statutes or contracts such opinions and biases are not similarly expected. Given this, and for a myriad of other reasons, a court should not hold an opinion piece in a newspaper to the same grammatical rigor as a statute or contract.

And this leads to a second, crucial point—it is undeniable that there are multiple accepted definitions of the term "leader," and they are not nearly as

constrained as Edwards would have us believe. *The Oxford English Dictionary* (2d ed) lists, in relevant part, the following definitions of the term: "One who conducts, precedes as a guide, leads a person by the hand"; "One who leads a body of armed men; a commander, a captain"; "One who guides others in action or opinion; one who takes the lead in any business, enterprise or movement"; "[O]ne who is 'followed' by disciples or adherents; the chief of a sect or party"; "The foremost or most eminent member (of a profession); also, in wider sense, a person of eminent position and influence." For its part, the term "member" is defined, in part, as follows: "Each of the individuals belonging to or forming a society or assembly." *Id*.

Edwards is correct in the narrow sense that one meaning of "leader" includes being "[t]he foremost or most eminent member" of a group. *Id*. Thus, one plausible inference could be that Edwards, like Duke and Robb, had an official role with the Ku Klux Klan. Yet, Edwards is incorrect in a more fundamental sense because the term can be used and understood more broadly—e.g., a leader may be someone who "guides others in action or opinion," "one who takes the lead in any . . . movement," "one who is 'followed' by disciples or adherents," or "in [a] wider sense, a person of eminent position and influence." *Id*. None of these latter meanings necessarily implies official affiliation with a particular group.

Considering the multiple meanings that "leader" can have, we do not read the sentence to imply necessarily that Edwards must have held some official, designated leadership role in the Ku Klux Klan. Certainly, Edwards is correct that this could be one plausible interpretation. Yet, the sentence was part of a

newspaper opinion piece, not a statute or contract, and just because the other two cited individuals once held office in the Klan, it does not logically follow that a reasonable reader would necessarily infer that the third listed individual also held office in the Klan. Another interpretation could be that Edwards was an opinion leader, one with position and influence over those who have sympathies for the Klan or who are actual members of the Klan.

Edwards' own words and deeds lend plausibility to this latter interpretation. As recounted earlier, his radio show and website are replete with references to "pro-White" sentiments. One of his stated principles is to "grow the percentage of Whites in the world relative to other races," and he favorably cites opinions that intermarriage and immigration constitute a "genocide" against "European-Americans." Moreover, Edwards goes beyond "mere" white nationalism and ventures into even more extreme territory. For example, Edwards refers on several occasions to nonwhite persons in derogatory terms (e.g., "black malcontents"). Likewise, Duke and Dickson are frequent guests on the radio show, and both have past associations with the Ku Klux Klan. In fact, Edwards has embraced Duke to such an extent that the two are repeatedly photographed together, and Duke is a frequent writer of blog entries on the radio show's website.

Most critically, Edwards himself has embraced those listeners who are interested in extreme forms of racism, white supremacy, anti-Semitism, and nativism. Specifically, Edwards publicly celebrated the fact that, beginning in 2006, his radio show would be carried on the "internet radio network"—i.e., Stormfront.org operated by Don Black, a person long associated with the Klan and with extremist views on race and ethnicity—and

that this would give Edwards' radio show "access to another legion of loyal listeners" and was, in his estimation, a "perfect fit."

Similarly to how Dr. Jack Kevorkian sought to inject himself into the debate on assisted suicide, see *Kevorkian*, 237 Mich App at 13-14, Edwards has sought to inject himself into the national debate on racism and ethnicity. He has staked out some extreme positions, has publicly eschewed giving his listeners "both sides" of the debate, and has enthusiastically embraced several individuals, including Duke, Black, and Dickson, who are publicly associated with the Ku Klux Klan. Edwards may not believe that he is a leader of the Ku Klux Klan, but it is plausible that a reader of the statement who was also aware of Edwards' views and associates could conclude otherwise.

Edwards did not discuss or even cite this Court's controlling *Kevorkian* decision on defamation in either of his appellate briefs. Instead, he asks that we follow the Supreme Court of Montana's decision in *Roots v Montana Human Rights Network*, 275 Mont 408; 913 P2d 638 (1996). We decline the invitation to do so, given that *Roots* is not binding precedent in Michigan, see *Wells Fargo Bank, NA v Null*, 304 Mich App 508, 533; 847 NW2d 657 (2014), and the facts in that case are materially different from those here. For example, the plaintiff in *Roots* was not labeled a "leader" of the Ku Klux Klan but rather an "organizer" of the group, which calls to mind a more specific relationship with the group. *Roots*, 275 Mont at 410. Moreover, the assertion was made in a booklet, not a newspaper opinion piece, and there was a question of fact whether the plaintiff was a public figure. *Id*. at 410, 412. These and other differences make *Roots* not particularly persuasive in this case.

Our reading that defendants' statement is necessarily subjective gains further support from the only other judicial decision cited by the parties or found in our research involving the meaning of "leader" in the context of a defamation claim. In *Egiazaryan v Zalmayev*, 880 F Supp 2d 494, 499 (SD NY, 2012), the plaintiff sued the defendant for defamation based on several communications, including the assertion that the plaintiff was a "leader" of a Russian political party that had strong anti-Semitic and xenophobic strands. The federal district court noted that the assertion was an expression of opinion, not fact. *Id*. at 507-508. The court also focused on the context of the statement:

> When used in political discourse, terms of relation and association often have meanings that are "debatable, loose, and varying," rendering the relationships they describe insusceptible of proof of truth or falsity. The word "leader" has a debatable, loose and varying meaning when used to describe the relationship of a prominent politician to the political party he overtly represents. Egiazaryan is an admittedly "prominent" former banker who assumed managerial roles in the Duma while occupying an LDPR [Liberal Democratic Party of Russia] seat there for over a decade. Given the vagueness of the word "leader" in this context, and given Egiazaryan's admitted prominence and overt association with the LDPR, the assertion that he is a "leader" of the LDPR is a non-provable opinion. [*Id*. at 512 (citation omitted).]

The federal district court concluded that the assertion was a "non-provable opinion." Under the framework our Court set out in *Kevorkian*, we arrive at a similar conclusion. In the context of an opinion piece about a crucially important topic—the 2016 presidential campaign—defendants' use of the term "leader" was ambiguous and could plausibly be understood to mean different things to different readers. The term could be understood to mean that Edwards had an

official leadership position with the Ku Klux Klan, similar to that of Duke and Robb. Alternatively, the term could be understood to mean that Edwards was someone who guided "disciples or adherents" of the Ku Klux Klan "in action or opinion" or that, "in a wider sense," Edwards was "a person of eminent position and influence" to the Ku Klux Klan and its sympathizers. Or, a reader could simply assume that Thompson and *The Detroit News* were unacceptably biased in their political leanings and reject outright the assertions and arguments made in the opinion piece. Any of these interpretations, and likely others, would be plausible readings of defendants' opinion piece. Given this, defendants' use of the term "leader" was both "necessarily subjective" and "objectively verifiable," and, therefore, the statement, even if otherwise defamatory, was not actionable under Michigan law. *Kevorkian*, 237 Mich App at 5-6, 13-14.

Because we find that defendants' statement is protected opinion speech, we do not address defendants' other arguments that the statement was substantially true or that Edwards is libel-proof.

III. CONCLUSION

As a radio show host, the First Amendment protects Edwards' right of free speech. But similarly, the First Amendment also protects defendants' right of free speech. As explained here, defendants made a statement in a newspaper opinion piece that, given Edwards' expressed views and his close associates, necessarily could be interpreted in different ways by different readers—in other words, the statement is inherently imprecise and indefinite and thus open to several plausible interpretations rather than provably true or false. The statement is, therefore, protected opinion speech.

Accordingly, there is no genuine issue of material fact regarding Edwards' defamation and invasion-of-privacy claims. We affirm the trial court's grant of summary disposition in favor of defendants, and as the prevailing parties on appeal, defendants may tax costs.

GLEICHER, P.J., and FORT HOOD, J., concurred with SWARTZLE, J.

PEOPLE v LEWIS (ON REMAND)

Docket No. 325782. Submitted August 23, 2017, at Lansing. Decided November 2, 2017, at 9:00 a.m. Leave to appeal sought.

Gary P. Lewis was convicted after a jury trial in the Wayne Circuit Court of four counts of third-degree arson, MCL 750.74, and one count of second-degree arson, MCL 750.73(1). The court, Lawrence S. Talon, J., sentenced Lewis to 17 to 30 years of imprisonment for each conviction. Lewis had expressed dissatisfaction with his attorney at his preliminary examination; the court stated that it understood Lewis to have elected to proceed pro se, and it appointed Lewis's attorney as stand-by counsel. Lewis was uncooperative and was eventually removed from the courtroom. The court then relieved Lewis's stand-by counsel of his duties and continued with the preliminary examination. Lewis was bound over for trial, he was convicted as previously noted, and he appealed his convictions. In an unpublished per curiam opinion, issued July 21, 2016, the Court of Appeals, TALBOT, C.J., and MURRAY, J. (SERVITTO, J., concurring), concluded that it was bound by Michigan precedent to vacate Lewis's convictions and remand the case for a new trial because the denial of counsel at Lewis's preliminary examination amounted to a structural error requiring automatic reversal. However, the Court of Appeals believed a correct interpretation of federal law, including *Coleman v Alabama*, 399 US 1 (1970), indicated that Lewis's claim should have been subject to harmless-error review. Lewis sought leave to appeal in the Supreme Court. The Supreme Court reversed the Court of Appeals' judgment and remanded for application of the harmless-error standard to Lewis's claim that he was prejudiced by the deprivation of counsel at a critical stage of the criminal proceedings. 501 Mich 1 (2017).

On remand, the Court of Appeals *held*:

1. To determine whether the denial of counsel at a preliminary examination amounted to harmless error, courts must consider the factors discussed in *Coleman*: (1) whether a lawyer's skilled examination and cross-examination of witnesses may have exposed a weakness in the prosecution's case, (2) whether skilled interrogation of the witnesses might have elicited evi-

dence that could have been used for impeachment purposes at trial or preserved testimony favorable to the accused of a witness who did not appear at trial, (3) whether counsel might have better discovered the case against the accused allowing the preparation of a better defense for trial, and (4) whether counsel might have been influential at the preliminary hearing in making effective arguments for the accused on matters such as the necessity of an early psychiatric examination or bail. The court must also consider any other relevant factors, e.g., loss of an opportunity to negotiate a plea deal and the absence of pretrial motions. When conducting the harmless-error analysis, a court cannot presume that no harm occurred as a result of the absence of counsel at a defendant's preliminary examination just because the defendant was ultimately convicted at a fair trial. And that is true even if no evidence from the preliminary examination was used at trial and no rights or defenses were waived because of the absence of counsel during the preliminary examination.

2. In light of this analytical framework, the prosecution proved that the deprivation of counsel at Lewis's preliminary examination was harmless beyond a reasonable doubt. First, Lewis asserted that counsel could have objected to his bindover because no evidence was presented regarding the condition of the burned buildings, but the prosecution presented evidence regarding the fires at each address and, given that Lewis was convicted at trial on the basis of sufficient evidence, the possibility that counsel could have detected preclusive flaws in the probable-cause showing was moot. Second, Lewis claimed that the absence of counsel prevented him from gathering impeachment material related to the witnesses' identification of him as the perpetrator, but this argument was purely speculative. Third, Lewis claimed that the absence of counsel hampered his pretrial discovery, but he failed to identify any evidence used at trial that could have been discovered by counsel's participation in the preliminary examination. Further, Lewis was not deprived of a plea opportunity and, in fact, Lewis was offered a plea deal. Lewis also argued that he was denied the defense of misidentification when counsel could have moved for a corporeal lineup because a witness identified someone other than Lewis in a photographic lineup. But the claim that the result of a corporeal lineup would have been favorable to Lewis's defense was merely speculative. Lewis lastly argued that counsel could have questioned the police officers about the lighters found in Lewis's possession. However, the lighters were not introduced at trial, and Lewis did not argue that photographs of the lighters, which were introduced at trial, were improperly admitted.

3. Lewis was entitled to remand because Offense Variable (OV) 9, MCL 777.39 (number of victims), was scored using facts not found beyond a reasonable doubt by the jury and not admitted by Lewis, the mandatory application of the sentencing guidelines violated Lewis's Sixth Amendment rights, and the OV 9 score affected Lewis's guidelines range. On remand, the trial court must determine whether it would have imposed a materially different sentence if its sentencing discretion had not been unconstitutionally restrained.

Convictions affirmed. Case remanded for review of the sentence imposed.

CONSTITUTIONAL LAW — RIGHT TO COUNSEL — PRELIMINARY EXAMINATION — HARMLESS-ERROR REVIEW.

To determine whether the denial of counsel at a preliminary examination amounted to harmless error, courts must consider the factors discussed in *Coleman v Alabama*, 399 US 1 (1970): (1) whether a lawyer's skilled examination and cross-examination of witnesses might have exposed a weakness in the prosecution's case, (2) whether skilled interrogation of the witnesses might have elicited evidence that could have been used for impeachment purposes at trial or preserved testimony favorable to the accused of a witness who did not appear at trial, (3) whether counsel might have better discovered the case against the accused, allowing the preparation of a better defense for trial, and (4) whether counsel might have been influential at the preliminary hearing in making effective arguments for the accused on matters such as the necessity of an early psychiatric examination or bail; the court must also consider any other relevant factors, e.g., loss of an opportunity to negotiate a plea deal and the absence of pretrial motions; when conducting the harmless-error analysis, a court cannot presume that no harm occurred as a result of the absence of counsel at a defendant's preliminary examination just because the defendant was ultimately convicted at a fair trial.

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.

Gary P. Lewis, *in propria persona*, and State Appellate Defender (by *Chari K. Grove*) for defendant.

ON REMAND

Before: TALBOT, C.J., and MURRAY and SERVITTO, JJ.

PER CURIAM. Defendant was convicted by a jury of four counts of third-degree arson, MCL 750.74, and one count of second-degree arson, MCL 750.73(1). The trial court sentenced defendant, as a fourth-offense habitual offender, MCL 769.12, to 17 to 30 years' imprisonment for each conviction. On appeal, we vacated defendant's convictions and remanded for a new trial on the basis that the denial of counsel at defendant's preliminary examination amounted to a structural error requiring automatic reversal. *People v Lewis*, unpublished per curiam opinion of the Court of Appeals, issued July 21, 2016 (Docket No. 325782), pp 3, 10. However, the Michigan Supreme Court reversed our judgment and remanded for application of the harmless-error standard. *People v Lewis*, 501 Mich 1, 12; 903 NW2d 816 (2017). For the reasons stated herein, we affirm defendant's convictions, holding that any error resulting from the denial of counsel at his preliminary examination was harmless, but we remand to the trial court for a determination of whether, in light of *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), the trial court would have imposed a materially different sentence.

I. FACTS AND PROCEDURE

In our earlier opinion, we stated the relevant facts as follows:

> At the start of defendant's preliminary examination, the trial court asked defendant to state his full name on the record. In response, defendant stated, "I'm not talking. I don't have no attorney. This man disrespecting me. You all violating my rights. I'm through with it. I'm through

> with it." The trial court then stated that it had appointed lawyers for defendant on multiple occasions, that defendant had indicated his displeasure with each of the lawyers that were appointed, and that defendant had in fact grieved each of the prior counsel.
>
> In light of this, the trial court found that defendant had "elected that he would prefer not to have a lawyer to represent him and we're going to proceed." In response, defendant stated, "I never said that." The trial court then reiterated that the preliminary examination would proceed and that defendant's former trial counsel . . . would act as stand-by counsel.
>
> As the prosecution called [a witness] to testify, defendant stated, "I'm not going to participate in this legal bullshit." The court then warned defendant that he would be expelled from the courtroom if he continued his outburst. Defendant continued to interrupt the court while using profane language, so the trial court expelled defendant from the courtroom. After defendant was removed, the trial court told [defense counsel] that he was free to leave as well. The court then continued with the preliminary examination, and after hearing testimony from six witnesses, the trial court held that there was sufficient probable cause to bind defendant over for trial. [*Lewis*, unpub op at 1-2.]

As provided above, defendant was subsequently convicted of four counts of third-degree arson and one count of second-degree arson following a jury trial, and he appealed as of right. Bound by Michigan caselaw holding that the complete deprivation of counsel at a critical stage of a criminal proceeding requires automatic reversal, we concluded in our prior opinion that because defendant was denied counsel at his preliminary examination, a critical stage of the proceedings, reversal of his convictions was required. *Id*. at 3, 10. However, the two-judge majority in that opinion, citing the United States Supreme Court's decision in *Coleman v Alabama*, 399 US 1, 11; 90 S Ct 1999; 26 L Ed 2d

387 (1970), expressed the belief that the deprivation of counsel at a critical stage of a criminal proceeding should not always require reversal and that harmless-error review should apply where the deprivation does not affect the entire proceedings. *Lewis*, unpub op at 4-5.

The Supreme Court agreed, relying on *Coleman* to reverse our judgment and hold that a claim of error based on the deprivation of counsel at a preliminary examination is subject to harmless-error review. *Lewis*, 501 Mich at 12.[1] It then directed us, on remand, to consider "the substantive criteria or the procedural framework that should attend [harmless-error] review" and apply that standard to the facts at issue. *Id*.

II. HARMLESS-ERROR REVIEW

With regard to the procedural framework that should be applied for preserved[2] nonstructural constitutional errors, the prosecution must prove that the error was harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774 (appendix); 597 NW2d 130 (1999). However, determining the substantive criteria that should attend harmless-error review under these circumstances—where a defendant has been denied counsel at a preliminary examination—is more difficult. The Supreme Court admitted that it was "uncertain about just how a court is to evaluate the

[1] Specifically, our Supreme Court stated: "Although it is short on explanation for its remedy, the [*Coleman*] Court plainly held that the deprivation of counsel at a preliminary examination is subject to harmless-error review under the federal Constitution. Accordingly, we apply that decision . . . ." *Lewis*, 501 Mich at 9 (citation omitted).

[2] In our prior opinion, we concluded that, despite defendant's conduct at the preliminary examination, defendant did not forfeit his argument regarding the denial of counsel because the prosecution failed to raise the issue on appeal. *Lewis*, unpub op at 3 n 4.

effect of this error on a verdict," *Lewis*, 501 Mich at 10, but it provided "guideposts," stating:

> At each extreme, we know what is not permitted. At one end, a court may not simply presume, without more, that the deprivation of counsel at a preliminary examination must have caused the defendant harm. Although consistent with the presumption accorded to the complete denial of counsel at some other stages of a criminal proceeding, such an approach would be treating the error as structural—a result foreclosed by *Coleman*. Neither, however, may we presume the opposite. . . . *Coleman* does not permit us to presume that a defendant, who was ultimately convicted at an otherwise fair trial, suffered no harm from the absence of counsel at his preliminary examination. And that is true even if no evidence from the preliminary examination was used at trial, and even if defendant waived no rights or defenses because of the absence of counsel at the preliminary examination. [*Id*. at 10-11 (citations omitted).]

Thus, contrary to the dicta in our earlier opinion, *Lewis*, unpub op at 3-5, we cannot conclude that the error here was harmless simply because defense counsel conceded that no evidence from the preliminary examination was used at trial and that no rights or defenses were waived by defendant's lack of participation in the preliminary examination.

The United States Supreme Court's decision in *Coleman* provides further guidance. There, the Court identified four reasons why having counsel at a preliminary hearing may be essential to protecting a defendant's rights:

> First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or

> preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail. [*Coleman*, 399 US at 9.]

These factors have been used by other courts to determine whether the deprivation of counsel at a preliminary hearing amounted to harmless error. See, e.g., *State v Canaday*, 117 Ariz 572, 575-576; 574 P2d 60 (1977); *State v Brown*, 279 Conn 493, 509-510; 903 A2d 169 (2006);[3] *People v Eddington*, 77 Mich App 177, 190-191; 258 NW2d 183 (1977).

Additionally, in her concurring opinion in this case, Justice MCCORMACK opined that counsel's presence at the preliminary examination may be essential to negotiating plea deals. *Lewis*, 501 Mich at 14 (MCCORMACK, J., concurring). And defendant suggests, in his brief on remand,[4] that counsel could discover the need to file pretrial motions at a preliminary examination. Based on the foregoing, we conclude that to determine whether the denial of counsel at a preliminary examination amounts to harmless error, courts must consider the factors discussed in *Coleman*, as well as any other factors relevant to the particular case, including the lost opportunity to negotiate a plea deal and any prejudice resulting from the failure to file pretrial motions.

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[3] We recognize that caselaw from foreign jurisdictions is not precedentially binding in Michigan, but it may be considered persuasive. *People v Blanton*, 317 Mich App 107, 122 n 6; 894 NW2d 613 (2016).

[4] On remand, this Court granted defendant's motion to file a supplemental brief. *People v Lewis*, unpublished order of the Court of Appeals, entered August 28, 2017 (Docket No. 325782).

III. APPLICATION OF HARMLESS-ERROR REVIEW TO THE FACTS

Turning to the specific facts at issue and the arguments raised by defendant on remand, we hold that any error resulting from the denial of counsel at defendant's preliminary examination was harmless beyond a reasonable doubt.

Looking to the first *Coleman* factor, defendant appears to argue that counsel could have objected to his bindover on the basis that no evidence was presented regarding the "condition of the buildings" he was accused of damaging or regarding whether the house on Russell Street qualified as a dwelling. However, a review of the preliminary-examination transcript and the relevant law makes clear that no such arguments by counsel would have altered the court's decision to bind defendant over for trial. Defendant fails to explain what he means by the "condition of the buildings," but assuming that he is referring to the element necessary for conviction of both second- and third-degree arson—that a defendant burn, damage, or destroy buildings or dwellings by fire or explosives, MCL 750.73(1); MCL 750.74(1)(a)—the prosecution presented testimony at the preliminary examination regarding fires at each address. Further, defendant was convicted of third-degree arson regarding the building on Russell Street. In contrast to second-degree arson (requiring that damage be done to a dwelling), third-degree arson requires only that damage be done to buildings or structures.[5]

Moreover, this Court has held that "the presentation of sufficient evidence to convict at trial renders any

[5] Specifically, MCL 750.74 provides, in pertinent part:

> (1) Except as provided in sections 72 and 73, a person who does any of the following is guilty of third degree arson:

erroneous bindover decision harmless." *People v Bennett*, 290 Mich App 465, 481; 802 NW2d 627 (2010). Although "*Coleman* does not permit us to presume that a defendant, who was ultimately convicted at an otherwise fair trial, suffered no harm from the absence of counsel at his preliminary examination," *Lewis*, 501 Mich at 11 (opinion of the Court), it is relevant to our consideration of the first *Coleman* factor. Given that defendant was convicted at trial on the basis of sufficient evidence, the possibility that counsel could have detected preclusive flaws in the prosecution's probable-cause showing is moot. See *Coleman*, 399 US at 18 (White, J., concurring).

Defendant's arguments with regard to the second *Coleman* factor are no more persuasive. He asserts that he had no opportunity for cross-examination at the preliminary examination because the court precluded his participation and that, as a result, witnesses were never asked to provide a description of the person they saw committing the crimes, making impeachment impossible. But "[a] defendant's opportunity to cross-examine witnesses at a preliminary hearing is only a limited one." *Canaday*, 117 Ariz at 576. See also *Adams v Illinois*, 405 US 278, 281-282; 92 S Ct 916; 31 L Ed 2d 202 (1972) (recognizing limitations on the use of preliminary hearings for discovery and impeachment purposes). And although defendant was unrepresented at the preliminary examination, he was appointed new counsel at the next hearing, who it appears was given a transcript of the preliminary examination. This newly appointed counsel could have used the transcript for impeachment at trial. See

(a) Willfully or maliciously burns, damages, or destroys by fire or explosive any building or structure, or its contents, regardless of whether it is occupied, unoccupied, or vacant at the time of the fire or explosion.

Thomas v Kemp, 796 F2d 1322, 1327 (CA 11, 1986) (concluding that the absence of counsel at a preliminary hearing was harmless error where, *inter alia*, the defendant's "counsel had access to the transcript of the preliminary hearing because he used the transcript to impeach the testimony of the State's main witnesses").

Further, defendant's argument that testimony about the perpetrator's identity at the preliminary examination would have been useful at trial for impeachment purposes is purely speculative. Defendant references inconsistencies between the witnesses' descriptions at trial, but the jury heard this testimony, as well as defense counsel's closing argument calling attention to the inconsistencies, and still voted to convict. See *Ditch v Grace*, 479 F3d 249, 257 (CA 3, 2007) (concluding "that the denial of counsel ultimately did not have a substantial or injurious effect on the jury's ultimate verdict" because "[t]here was substantial evidence of guilt, and the jury was well-apprised of the weaknesses in [the witness's] identification testimony," despite the fact that trained counsel could have conducted a cross-examination of the witness at the preliminary hearing to expose weaknesses in his testimony and for use as an impeachment tool at trial).[6]

With respect to the third *Coleman* factor, defendant argues that his inability to cross-examine witnesses at the preliminary examination hampered his pretrial discovery, but he fails to identify any evidence used at trial that counsel could have discovered by virtue of participation in the preliminary examination. And neither the fourth *Coleman* factor nor the additional

[6] We note that, unlike in *Ditch*, it cannot be said that the evidence of guilt at trial was substantial. The only items of evidence linking defendant to the crimes, other than the identifications, were the lighters found in his pocket. Nonetheless, the jury found defendant guilty.

factor identified by Justice MCCORMACK affects our determination that the deprivation of counsel at defendant's preliminary examination was harmless error. Defendant does not argue that counsel could have requested an early psychiatric evaluation, and the record establishes that he was referred to the Forensic Center before the preliminary examination. Further, defendant lost no opportunity to negotiate a plea deal because he lacked counsel. At the August 8, 2014 hearing, the prosecutor stated that the plea deal offered to defendant would be available until the final conference.

Defendant's additional arguments related to the specific circumstances of his case also fail. He asserts first that he was denied the defense of misidentification because counsel could have moved for a corporeal lineup at the preliminary examination based on the fact that a witness had identified someone other than defendant in a photographic lineup. The witness was not, however, the only witness who identified defendant at the preliminary examination. Lieutenant Jamel Mayers testified that he apprehended defendant, who matched the description provided by the witness, and Lieutenant Daniel Richardson testified that he also apprehended defendant, who matched the description provided by a different witness. Moreover, defendant merely speculates that the result of a corporeal lineup would have been favorable to his defense. But as we concluded in our earlier opinion, the use of a photographic lineup instead of a corporeal lineup did not affect defendant's substantial rights. *Lewis*, unpub op at 6-7.

Defendant also argues that counsel could have questioned the officers about the lighters and moved to suppress them if they were lost, asserting that the

lighters were incapable of starting a fire. However, he fails to explain what such questioning would have revealed, and it is unclear how or why counsel would have moved to suppress lost items. Moreover, counsel appointed for defendant at the next hearing could have filed a motion to suppress the evidence before trial but chose not to do so. And regardless, no prejudice resulted from the failure to suppress the lighters because they were not introduced at trial. Instead, photographs of the lighters were introduced, and defendant does not argue that the photographs were improperly admitted.

Further, we note that, as in *Canaday*, defendant was appointed new counsel at the hearing after the preliminary examination. Neither defendant's newly appointed counsel nor his counsel at trial ever argued that defendant was prejudiced by the denial of counsel at the preliminary examination. This suggests that neither defendant nor his attorneys "immediately perceived any prejudice resulting from [defendant's] failure to be represented at his preliminary hearing." *Canaday*, 117 Ariz at 575.

Based on the foregoing, we hold that any error resulting from the denial of counsel at defendant's preliminary examination was harmless beyond a reasonable doubt. Accordingly, we affirm his convictions.

IV. SENTENCING

Because we conclude that the deprivation of counsel at the preliminary examination was harmless error, we must address the sentencing issue raised by defendant on appeal. See *Lewis*, 501 Mich at 12 (opinion of the Court) ("If the Court of Appeals concludes that the error was harmless, it must also address the sentencing issue raised in defendant's brief in that Court."). Prior Record Variable (PRV) 5, MCL 777.55 (prior

misdemeanor convictions), was scored correctly, but defendant was sentenced before our Supreme Court decided *Lockridge*, and the facts used to score Offense Variable (OV) 9, MCL 777.39 (number of victims), were not found beyond a reasonable doubt by the jury or admitted by defendant. Thus, the mandatory application of the guidelines at sentencing violated defendant's Sixth Amendment rights. And because the scoring affected the sentencing guidelines range, defendant is entitled to a remand. On remand, the trial court must determine whether it would have imposed a materially different sentence but for the unconstitutional restraint on its sentencing discretion. See *Lockridge*, 498 Mich at 395-397, 399.

V. CONCLUSION

We affirm defendant's convictions, holding that any error resulting from the denial of counsel at his preliminary examination was harmless, but we remand to the trial court for a determination of whether it would have imposed a materially different sentence. We do not retain jurisdiction.

TALBOT, C.J., and MURRAY and SERVITTO, JJ., concurred.

WIGFALL v CITY OF DETROIT

Docket No. 333448. Submitted October 3, 2017, at Detroit. Decided October 10, 2017. Approved for publication November 7, 2017, at 9:00 a.m. Leave to appeal sought.

Dwayne Wigfall filed a complaint in the Wayne Circuit Court against the city of Detroit for injuries he sustained in a motorcycle accident allegedly caused when he hit a pothole in the roadway while riding his motorcycle. Detroit moved for summary disposition under MCR 2.116(C)(7), arguing that Wigfall's claim was barred by governmental immunity because Wigfall failed to serve the requisite notice of his claim on Detroit's mayor, city clerk, or city attorney as required by MCL 691.1404(2) and MCR 2.105(G)(2). The court, Daniel A. Hathaway, J., concluded that Wigfall had substantially complied with the governing statute and court rule and, in the alternative, that Detroit was equitably estopped from claiming that Wigfall's notice failed because Detroit had given Wigfall's counsel confirmation about where to mail the claim. The court denied Detroit's motion, and Detroit appealed.

The Court of Appeals *held*:

1. According to MCL 691.1404(1), as a condition of recovery for injuries sustained by reason of any defective highway, the injured person must file within 120 days of the injury a notice of the injury and the defect. MCL 691.1404(2) requires that the notice be served personally or by certified mail on any individual who may lawfully be served with civil process against a governmental agency, notwithstanding anything to the contrary in a municipal corporation's charter. According to MCR 2.105(G)(2), individuals who may lawfully be served with civil process against a municipal corporation are the mayor, the city clerk, and the city attorney. Wigfall sent his notice of injury and the defect to the city of Detroit's Law Department, Claims Section. He claimed that an individual at the law department confirmed the mailing address for mailing a claim against the city of Detroit, and because the law department is headed by the Corporation Counsel, also known as the city attorney, Wigfall asserted that notice was properly sent. Wigfall also noted that the official website of the

claims section indicated that a completed notice-of-claim form should be mailed to the city of Detroit's Law Department, Claims Section. Having done this, Wigfall contended that he had fully complied—or at a minimum, he had substantially complied—with the notice requirement in MCL 691.1404(2). However, Wigfall's failure to address the claim to any individual who may lawfully be served with civil process directed against Detroit barred his claim against the city of Detroit. MCL 691.1404(2) is straightforward, clear, and unambiguous and must be interpreted and enforced as written. The judiciary may not construe a statute in a way that allows a party to avoid a clear statutory mandate. Substantial compliance is not sufficient. MCL 691.1404(2) expressly requires service to any individual authorized to receive civil process, and MCR 2.105(G)(2) identifies those individuals as the mayor, the city clerk, and the city attorney. Because Wigfall failed to comply with the mandate and serve any of the named individuals, Wigfall's claim was barred and Detroit was entitled to summary disposition under MCR 2.116(C)(7).

2. The doctrine of equitable estoppel arises when a party, by representations, admissions, or silence, intentionally or negligently induced another party to believe facts, and the other party justifiably relied and acted on that belief and would be prejudiced if the first party was permitted to deny the existence of the facts. The trial court erred by concluding that equitable estoppel excused Wigfall's failure to comply with the notice requirements in MCL 691.1404(2) and MCR 2.105(G)(2). The trial court erroneously ruled that Wigfall's receipt of allegedly incorrect, inapplicable, or misinterpreted legal advice from the Detroit law department or its website estopped Detroit from avoiding liability on governmental immunity grounds. For Wigfall to avoid having his claim barred by governmental immunity, he was required to fulfill the statutory and court rule notice requirements as the requirements were written. MCL 691.1404, the statute governing notice in this case, expressly states that notice must be served on any individual who may lawfully be served with civil process directed against the governmental agency—that is, under MCR 2.105(G)(2), the mayor, the city clerk, or the city attorney—notwithstanding anything to the contrary in the charter of any municipal corporation. Wigfall was not entitled to rely on information received from the law department because the law department was not authorized to amend the statutory notice requirement; instead, Wigfall was obligated to comply with MCL 691.1404. Because Wigfall failed to give proper notice and the

doctrine of equitable estoppel did not apply, Detroit was entitled to summary disposition under MCR 2.116(C)(7).

Reversed and remanded for entry of an order granting summary disposition to Detroit.

Bauer & Hunter, PLLC (by *Christopher C. Hunter* and *Richard A. Moore*) and *Mike Morse Law Firm* (by *Michael J. Morse*, *Robert Silverman*, and *Stacey L. Heinonen*) for Dwayne Wigfall.

Linda D. Fegins, Senior Assistant Corporation Counsel, for the city of Detroit.

Before: SAAD, P.J., and CAVANAGH and CAMERON, JJ.

PER CURIAM. Defendant, the city of Detroit, appeals as of right an order denying its motion for summary disposition premised on the ground that plaintiff's highway-defect action is barred by governmental immunity because plaintiff, Dwayne Wigfall, failed to comply with the statutory notice requirement. We reverse and remand for entry of an order granting defendant's motion for summary disposition.

On June 9, 2014, plaintiff was riding his motorcycle when he allegedly struck a pothole in the roadway that caused him to fall and sustain personal injuries. On December 2, 2015, plaintiff filed this lawsuit.

Defendant responded with a motion for summary disposition under MCR 2.116(C)(7), arguing that governmental immunity barred this case because plaintiff failed to serve the requisite notice "upon an individual who may lawfully be served with civil process directed against the City of Detroit, as required by MCL 691.1404(2)." Defendant acknowledged that, on September 22, 2014, it received notice of the injury and defect that was sent by certified mail to their law department claims division and that additional infor-

mation had been requested from plaintiff by letter dated December 3, 2014. But, defendant argued, MCL 691.1404(2) required that notice be served on an "individual" who may lawfully be served with civil process and, as set forth in MCR 2.105(G)(2), process on a municipal corporation may only be served on the mayor, city clerk, or city attorney. Here, plaintiff mailed his notice to "City of Detroit Law Department—CLAIMS" and not to a proper individual. Therefore, plaintiff failed to comply with the statutory notice requirement, and his lawsuit was barred by governmental immunity.

Plaintiff responded to defendant's motion, arguing that defendant's city charter states that its law department is headed by the Corporation Counsel. And, plaintiff argued, the Corporation Counsel is also known as the city attorney; therefore, notice was properly sent to defendant's law department. Further, the notice-of-claim form published on the city of Detroit law department's official website indicates that the completed notice-of-claim form should be mailed to "City of Detroit Law Department, Claims Section." Moreover, plaintiff's counsel's office telephoned the city of Detroit law department to confirm the proper mailing address for providing notice of a claim against the city of Detroit and, as set forth in an affidavit, was told by "Ms. Tyler" in the law department that the proper mailing address for such notices was "City of Detroit Law Department—Attention Claims." Plaintiff further noted that it was undisputed that defendant received the timely notice of claim with all the required information. Thus, plaintiff was in full compliance with the statutory notice provision; or, at minimum, plaintiff was at least in substantial compliance with the statutory notice provision. Plaintiff also argued that if notice was deemed lacking, equitable estoppel should

bar defendant from asserting that notice was insufficient because of defendant's actions in instructing plaintiff about how to properly provide notice of a claim and by acknowledging plaintiff's claim. Accordingly, plaintiff's lawsuit was not barred by governmental immunity.

Defendant replied to plaintiff's response to defendant's motion for summary disposition, arguing that plaintiff's notice was not directed to the mayor, city clerk, or city attorney; therefore, the notice was not in compliance, or even in substantial compliance, with the statutory notice requirement. Further, defendant was not equitably estopped from asserting that notice was insufficient because plaintiff was never advised to "send statutory notice of a highway defect claim to the claims section." In fact, defendant's ordinance warns that all claims must be "filed in accordance with the general law of the state applicable to the filing of claims against governmental agencies; otherwise no claim for money or damages may be brought against the city." Detroit Ordinances, § 2-4-23. Simply stated, defendant cannot change the legislatively prescribed notice requirements set forth in its charter or ordinance. Plaintiff was required by the statute to serve his notice on an individual who may lawfully be served with civil process directed to defendant, and he failed to do so.

At oral argument on defendant's motion, defendant further explained that the claims section on its official website merely provides for "a simplified procedure for resolving legal disputes without the necessity, time and expense of our formal judicial system." In other words, the purpose of the claims section on the website is to allow "redress without court intervention." But the claims section on the website does not, and cannot,

supplant the statutory notice requirement when a lawsuit is contemplated. Following oral argument, the trial court took the motion under advisement. Subsequently, the trial court issued an order denying defendant's motion. The court held that plaintiff substantially complied with the statutory notice provision. Alternatively, the court held that defendant was equitably estopped from asserting that notice was insufficient considering the information on defendant's website regarding the provision of notice, as well as the fact that the same information was provided by telephone to plaintiff's counsel's office by an employee of the law department. This appeal followed.

Defendant argues that governmental immunity barred this action because plaintiff failed to comply with the statutory notice requirement in MCL 691.1404(2). We agree.

We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(7) requires the trial court to accept the complaint's allegations as true, unless contradicted by the movant, and to consider the documentary evidence submitted by the parties. *Id*. at 119. We also review de novo the applicability of governmental immunity. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004).

MCL 691.1404 provides, in pertinent part:

> (1) As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the 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.

> (2) 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.

MCR 2.105(G)(2) provides that the individuals who may lawfully be served with civil process on behalf of a municipal corporation are "the mayor, the city clerk, or the city attorney of a city[.]"

Defendant argues that plaintiff did not serve "any individual" with notice of his claim as required under MCL 691.1404(2); rather, he sent notice to the claims section of defendant's law department. The city attorney for defendant is "Corporation Counsel" who, at the relevant time, was Melvin Butch Hollowell. Plaintiff did not serve his notice on Hollowell, the mayor, or the city clerk. And, contrary to plaintiff's claim, substantial compliance is insufficient. We agree with defendant.

As our Supreme Court held in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007), the "straightforward, clear, unambiguous" language of MCL 691.1404 "must be enforced as written." Further, our Supreme Court held that "no judicially created saving construction is permitted to avoid a clear statutory mandate." *McCahan v Brennan*, 492 Mich 730, 733; 822 NW2d 747 (2012). See also *Jakupovic v Hamtramck*, 489 Mich 939 (2011) (stating that the Court of Appeals erred by excusing an error in notice required under MCL 691.1404(1) instead of enforcing the notice requirement as written). Statutory notice provisions required in suits against the state are within the sole province of the Legislature and the judiciary has no authority to amend them; thus, they "must be interpreted and enforced as plainly written." *McCahan*, 492 Mich at 732-733. In other words, con-

trary to plaintiff's argument and the trial court's holding, substantial compliance with the statutory notice provision in MCL 691.1404(2) is not sufficient. Because it is undisputed that plaintiff did not serve his notice on any individual who may lawfully be served with civil process directed against defendant as required under MCL 691.1404(2), plaintiff failed to comply with the statutory notice requirement. See *McLean v Dearborn*, 302 Mich App 68, 78-79; 836 NW2d 916 (2013).

Defendant also argues that the doctrine of equitable estoppel is not applicable in this case because neither its website nor its employee advised plaintiff that the required *statutory* notice could be satisfied by sending notice of the claim to the claims section of the law department. Defendant has no power to change or alter the law in that regard. In fact, defendant argues, its claims ordinance specifically warns that state law must be followed, "otherwise no claim for money or damages may be brought against the city." Detroit Ordinances, § 2-4-23.

The application of a legal doctrine like equitable estoppel presents a question of law. *James v Alberts*, 464 Mich 12, 14-15; 626 NW2d 158 (2001). A trial court's findings of fact supporting its decision are reviewed for clear error. *AFSCME v Bank One, NA*, 267 Mich App 281, 293; 705 NW2d 355 (2005). "Estoppel arises where a party, by representations, admissions or silence, intentionally or negligently induces another party to believe facts, and the other party justifiably relies and acts on this belief, and will be prejudiced if the first party is permitted to deny the existence of the facts." *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 399; 729 NW2d 277 (2006) (quotation marks and citation omitted).

In this case, the trial court concluded that equitable estoppel applied and prevented defendant from asserting that notice was insufficient because defendant provided information on its website and over the telephone regarding the provision of notice related to claims. But this holding essentially charges defendant with the duty to provide potential litigants with legal advice related to the interpretation of a statute and court rule. We cannot agree that because plaintiff received incorrect, inapplicable, or misinterpreted legal advice, defendant should be estopped from asserting that the statutory notice requirement was not met.

It appears that plaintiff relied on information provided by defendant through its law department that was meant to relate solely to informal claims against defendant. But in any case, plaintiff was not entitled to rely on defendant's interpretation or misinterpretation of the legal requirements set forth in MCL 691.1404 as a justification or excuse for his failure to act in conformity with those requirements. To avoid having his claim barred by governmental immunity, plaintiff was required to fulfill the requirements set forth by our Legislature in MCL 691.1404. One of those requirements was to serve notice "upon any individual . . . 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." MCL 691.1404(2). MCR 2.105(G)(2) provides that the individual who may lawfully be served civil process on behalf of a municipal corporation is "the mayor, the city clerk, or the city attorney of a city[.]" Plaintiff did not serve notice on "the mayor, the city clerk, or the city attorney," allegedly because of the misinformation provided by defendant. The equitable-estoppel doctrine does not excuse that failure to comply with the statutory mandate, and the

trial court's decision to the contrary was erroneous. Accordingly, defendant's motion for summary disposition should have been granted because plaintiff's action was barred by governmental immunity.

Reversed and remanded for entry of an order granting defendant's motion for summary disposition. We do not retain jurisdiction.

SAAD, P.J., and CAVANAGH and CAMERON, JJ., concurred.

PRIME TIME INTERNATIONAL DISTRIBUTING, INC v DEPARTMENT OF TREASURY

MFJ ENTERPRISES, INC v DEPARTMENT OF TREASURY

KEWEENAW BAY INDIAN COMMUNITY v DEPARTMENT OF TREASURY

CHASE CASH & CARRY, INC v DEPARTMENT OF TREASURY

Docket Nos. 335913, 335914, 335916, 335918, 335919, 336008, and 337267. Submitted November 8, 2017, at Detroit. Decided November 16, 2017, at 9:00 a.m.

Plaintiffs in each action filed an appeal in the proper circuit court following the seizure of their respective tobacco products and the Department of Treasury's conclusion that the seizures were proper because plaintiffs had violated the Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq*. The Department filed a notice of transfer pursuant to MCL 600.6404(3) in each action so that the cases could be transferred to the Court of Claims. The Court of Claims determined in each action that the circuit court had exclusive jurisdiction, and the cases were transferred back to their respective circuit courts. The Department—and in Docket Nos. 335916, 335918, and 335919, the State Treasurer as well as the Department—appealed, arguing that the Court of Claims Act (CCA), MCL 600.6401 *et seq*., vests the Court of Claims with exclusive jurisdiction over the appeals and that the appeals did not fall within the CCA's jurisdictional exception under MCL 600.6419(5) because (1) the TPTA does not confer exclusive jurisdiction on the circuit court and (2) an appeal under the TPTA is actually an original action. The appeals were consolidated.

The Court of Appeals *held*:

1. A litigant seeking review of an administrative agency's decision has three potential avenues of relief: (1) the method of review prescribed by the statutes applicable to the particular agency; (2) the method of review prescribed by the Administrative Procedures Act, MCL 24.201 *et seq*.; or (3) an appeal under MCL 600.631. The TPTA is the applicable statute that prescribes the procedure for judicial review of the Department's decision, and MCL 205.429(4) states that if a person is aggrieved by the

decision of the Department, that person may appeal to the circuit court of the county where the seizure was made to obtain a judicial determination of the lawfulness of the seizure and forfeiture. However, under the CCA, MCL 600.6419(1)(a) provides that the Court of Claims has exclusive jurisdiction over claims against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case on the circuit court. Therefore, an inherent tension exists between the TPTA's jurisdictional provision and the CCA's jurisdictional provisions, and to resolve this tension, the exception under the CCA was applied. This CCA exception, MCL 500.6419(5), provides that the CCA does not deprive the circuit court of exclusive jurisdiction over appeals from the district court and administrative agencies as authorized by law. Accordingly, the question turned on whether MCL 205.429(4) conferred exclusive jurisdiction on the circuit court for matters involving appeals from the Department pursuant to the TPTA. The plain and clear language of MCL 205.429(4) states that appeals from the Department are to be made to the circuit court—not in addition to an appellate court, to the Court of Claims, or to any other judicial body. To interpret the statute as defendants suggested, i.e., that appeals under the TPTA must be made to the Court of Claims, would render the jurisdictional provision of the TPTA nugatory. Accordingly, MCL 600.6419(5) applied, the respective circuit courts have exclusive jurisdiction over plaintiffs' appeals pursuant to the TPTA, and the Court of Claims did not err when it reached the same result.

2. An appeal under the TPTA is not an original action. The Department argued that plaintiffs each brought an original action—as opposed to an appeal—because plaintiffs were entitled to discovery, motion practice, and a trial. The Department supported this argument with the assertion that the rules governing appellate procedure, Chapter 7 of the Michigan Court Rules, were inapplicable in these cases. However, the Department provided no authority for the proposition that an appeal is classified on the basis of which court rules apply, and definitions of the term "appeal" supported the conclusion that a plaintiff's taking of a suit and its final determination from an inferior tribunal—in this case, the Department's hearing division—to seek review in another tribunal constituted an appeal. Although the reviewing court will conduct discovery, motion practice, and trials in order to resolve the dispute, that procedure did not change the review process into an original action.

Affirmed.

1. COURTS — JURISDICTION — TOBACCO PRODUCTS TAX ACT — CIRCUIT COURT HAS EXCLUSIVE JURISDICTION FOR MATTERS INVOLVING APPEALS UNDER THE TOBACCO PRODUCTS TAX ACT.

MCL 205.429(4) of the Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq*., states that if a person is aggrieved by the decision of the Department of Treasury, that person may appeal to the circuit court of the county where the seizure was made to obtain a judicial determination of the lawfulness of the seizure and forfeiture; MCL 500.6419(5) of the Court of Claims Act, MCL 600.6401 *et seq*., provides that the Court of Claims Act does not deprive the circuit court of exclusive jurisdiction over appeals from the district court and administrative agencies as authorized by law; MCL 205.429(4) confers exclusive jurisdiction on the circuit court for matters involving appeals from the Department pursuant to the TPTA.

2. APPEAL — TOBACCO PRODUCTS TAX ACT — APPEALS UNDER THE TOBACCO PRODUCTS TAX ACT ARE NOT ORIGINAL ACTIONS.

Even though a reviewing court will conduct discovery, motion practice, and trials in order to resolve a dispute in an appeal under the Tobacco Products Tax Act, MCL 205.421 *et seq*., that procedure does not change the review process into an original action.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *Carrie L. Kornoelje*, Assistant Attorney General, for the Department of Treasury and the State Treasurer.

Fraser Trebilcock Davis & Dunlap, PC (by *Paul V. McCord*) and *Matthew C. McManus, PLLC* (by *William C. Amadeo* and *Matthew C. McManus*) for MFJ Enterprises, Inc.

Varnum LLP (by *Thomas J. Kenny* and *William L. Thompson*) for the Keweenaw Bay Indian Community.

Law Offices of Salem F. Samaan PC (by *Salem F. Samaan*) and *Varnum LLP* (by *Thomas J. Kenny* and *William L. Thompson*) for Chase Cash & Carry, Inc.

Before: BECKERING, P.J., and O'BRIEN and CAMERON, JJ.

PER CURIAM. Defendant the Department of Treasury (the Department) appeals as of right three opinions and orders issued by the Court of Claims involving plaintiffs Prime Time International Distributing, Inc., MFJ Enterprises, Inc., and Chase Cash & Carry, Inc. The Department and defendant the State Treasurer appeal as of right an opinion and order involving plaintiff Keweenaw Bay Indian Community. We affirm.

I. BACKGROUND

Spanning from 2015 to 2016, the Michigan State Police Tobacco Tax Unit seized large amounts of tobacco products from plaintiffs for violations of the Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq*. Each plaintiff timely requested a hearing before the Department pursuant to MCL 205.429(3). The Department concluded that the seizures and forfeitures were proper in each case. Plaintiffs each filed an appeal in the proper circuit court as mandated under MCL 205.429(4). The Department filed a notice of transfer pursuant to MCL 600.6404(3) in each action so that the cases could be transferred to the Court of Claims. The Court of Claims issued its first opinion on October 17, 2016, holding that the circuit court had exclusive jurisdiction over Prime Time International Distributing, Inc.'s action.[1] The remaining plaintiffs' actions were likewise transferred back to the circuit court for

[1] See *Prime Time Int'l Distrib, Inc v Dep't of Treasury*, unpublished opinion of the Court of Claims, issued October 17, 2016 (Docket No. 16-000226-MZ).

reasons consistent with the first opinion.[2] Defendants now appeal the Court of Claims' decisions, arguing that the Court of Claims Act (CCA), MCL 600.6401 *et seq*., vests the Court of Claims with exclusive jurisdiction over these appeals and that they do not fall within the CCA's jurisdictional exception under MCL 600.6419(5). Defendants claim this exception does not apply because (1) the TPTA does not confer exclusive jurisdiction on the circuit court and (2) an appeal under the TPTA is actually an original action. The appeals have been consolidated to advance the administration of the appellate process.

II. STANDARD OF REVIEW

This Court reviews de novo the question whether the trial court possessed subject-matter jurisdiction. *Bank v Mich Ed Ass'n-NEA*, 315 Mich App 496, 499; 892 NW2d 1 (2016). Additionally, "[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). Moreover, this Court "reviews de novo questions of statutory construction, with the fundamental goal of giving effect to the intent of the Legislature." *Cheboygan Sportsman Club v Cheboygan Co Prosecuting Attorney*, 307 Mich App 71, 75; 858 NW2d 751 (2014).

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[2] See *Chase Cash & Carry, Inc v Dep't of Treasury*, unpublished opinion of the Court of Claims, issued November 15, 2016 (Docket Nos. 16-000232-MT and 16-003269-CZ); *MFJ Enterprises, Inc v Dep't of Treasury*, unpublished opinion of the Court of Claims, issued November 9, 2016 (Docket No. 16-000214-MZ); *Keweenaw Bay Indian Community v Dep't of Treasury*, unpublished opinion of the Court of Claims, issued November 9, 2016 (Docket Nos. 16-000064-MZ, 16-000099-MZ, and 16-000100-MZ).

III. STATUTORY BACKGROUND

Defendants contend that the Court of Claims erred when it held that the circuit court has subject-matter jurisdiction over plaintiffs' claims. We disagree.

"The Legislature is presumed to have intended the meaning it plainly expressed. If the plain and ordinary meaning of the statutory language is clear, then judicial construction is neither necessary nor permitted. A court is required to enforce a clear and unambiguous statute as written." *Walters v Bloomfield Hills Furniture*, 228 Mich App 160, 163; 577 NW2d 206 (1998). Statutes sharing subject matter or a common purpose are *in pari materia* and "must be read together as a whole." *Bloomfield Twp v Kane*, 302 Mich App 170, 176; 839 NW2d 505 (2013) (quotation marks and citation omitted). Further, if there is "tension, or even conflict, between sections of a statute," this Court must, "if reasonably possible, construe them both so as to give meaning to each; that is, to harmonize them." *O'Connell v Dir of Elections*, 316 Mich App 91, 98; 891 NW2d 240 (2016) (quotation marks and citation omitted).

A. CIRCUIT COURT JURISDICTION

Circuit courts are courts of general jurisdiction that derive their power from the Michigan Constitution. *Id*. at 101. The Constitution states that "[t]he 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; . . . and jurisdiction of other cases and matters as provided by rules of the supreme court." Const 1963, art 6, § 13. The Revised Judicature Act (RJA), MCL 600.101 *et seq*., provides that "[c]ircuit courts have original jurisdiction to hear and determine all civil claims and remedies . . . ." MCL 600.605. The RJA sets

forth the circuit court's jurisdiction with regard to agency decisions as follows:

> An appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law, to the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham county, which court shall have and exercise jurisdiction with respect thereto as in nonjury cases. Such appeals shall be made in accordance with the rules of the supreme court. [MCL 600.631.]

However, the RJA provides an exception to the general jurisdiction of the circuit court "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." MCL 600.605. Accordingly, "the circuit court is presumed to have subject-matter jurisdiction over a civil action unless Michigan's Constitution or a statute expressly prohibits it from exercising jurisdiction or gives to another court exclusive jurisdiction over the subject matter of the suit." *Teran v Rittley*, 313 Mich App 197, 206; 882 NW2d 181 (2015). "[W]here this Court must examine certain statutory language to determine whether the Legislature intended to deprive the circuit court of jurisdiction," this Court has explained, "[t]he language must leave no doubt that the Legislature intended to deprive the circuit court of jurisdiction of a particular subject matter." *Detroit Auto Inter-Ins Exch v Maurizio*, 129 Mich App 166, 175; 341 NW2d 262 (1983).

B. COURT OF CLAIMS JURISDICTION

An exception to the general jurisdiction of the circuit court exists when the Court of Claims is given exclu-

sive jurisdiction. See *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 774; 664 NW2d 185 (2003). The Legislature created the Court of Claims, and thus that tribunal "has limited powers with explicit limits on the scope of its subject-matter jurisdiction." *Okrie v Michigan*, 306 Mich App 445, 448; 857 NW2d 254 (2014) (citations omitted). Accordingly, "[t]he jurisdiction of the Court of Claims is subject to Michigan statutory law," and therefore the Court of Claims "does not have extensive and inherent powers akin to those of a constitutional court of general jurisdiction." *Id*.[3] The CCA states that "[e]xcept as provided in sections 6421 and 6440, the jurisdiction of the court of claims, as conferred upon it by this chapter, is exclusive." MCL 600.6419(1). 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 relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding[4] another law that confers jurisdiction of the case in the circuit court. [MCL 600.6419(1)(a).]

However, MCL 600.6419(5) states, "This chapter does not deprive the circuit court of exclusive jurisdiction over appeals from the district court and administrative agencies as authorized by law."

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[3] In 2013, the Legislature enlarged the jurisdiction of the Court of Claims and transferred its locus from the Ingham Circuit Court to the Court of Appeals. See 2013 PA 164; *Baynesan v Wayne State Univ*, 316 Mich App 643, 646; 894 NW2d 102 (2016).

[4] " 'Notwithstanding' means 'in spite of; without being opposed or prevented by[.]' " *Gray v Chrostowski*, 298 Mich App 769, 778; 828 NW2d 435 (2012), quoting *Random House Webster's College Dictionary* (1997).

C. THE TPTA

"The TPTA 'is at its heart a revenue statute, designed to assure that tobacco taxes levied in support of Michigan schools are not evaded.' " *K & W Wholesale, LLC v Dep't of Treasury*, 318 Mich App 605, 611; 899 NW2d 432 (2017) (citation omitted). Under the TPTA, a

> tobacco product held, owned, possessed, transported, or in control of a person in violation of this act, and a vending machine, vehicle, and other tangible personal property containing a tobacco product in violation of this act and any related books and records are contraband and may be seized and confiscated by the department as provided in this section. [MCL 205.429(1).]

The TPTA also provides the procedure for requesting and conducting an administrative hearing. See MCL 205.429(3). In addition, the TPTA provides a procedure for seeking judicial review of the decision following the administrative hearing:

> If a person is aggrieved by the decision of the department, that person may appeal to the *circuit court of the county where the seizure was made* to obtain a judicial determination of the lawfulness of the seizure and forfeiture. The action shall be commenced within 20 days after notice of the department's determination is sent to the person or persons claiming an interest in the seized property. The court shall hear the action and determine the issues of fact and law involved in accordance with rules of practice and procedure as in other in rem proceedings. If a judicial determination of the lawfulness of the seizure and forfeiture cannot be made before deterioration of any of the property seized, the court shall order the destruction or sale of the property with public notice as determined by the court and require the proceeds to be deposited with the court until the lawfulness of the seizure and forfeiture is finally adjudicated. [MCL 205.429(4) (emphasis added).]

IV. ANALYSIS

Defendants contend, and we agree, that MCL 600.6419 generally vests the Court of Claims with exclusive jurisdiction over claims against the state or any of its departments. MCL 600.6419(1). Defendants further maintain that because plaintiffs' actions do not meet the CCA's exception to jurisdiction under MCL 600.6419(5), the Court of Claims has exclusive jurisdiction over these actions. We disagree.

This Court has held that "[a] litigant seeking judicial review of an administrative agency's decision has three potential avenues of relief: (1) the method of review prescribed by the statutes applicable to the particular agency; (2) the method of review prescribed by the [Administrative Procedures Act (APA), MCL 24.201 *et seq*.]; or (3) an appeal under MCL 600.631[.]" *Teddy 23, LLC v Mich Film Office*, 313 Mich App 557, 567; 884 NW2d 799 (2015) (quotation marks and citation omitted; alterations in original). The TPTA is the applicable statute that prescribes the procedure for judicial review of the Department's decision. It requires an "appeal to the circuit court of the county where the seizure was made . . . ." MCL 205.429(4). However, the Court of Claims has exclusive jurisdiction over claims "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) (emphasis added). Thus, there is an inherent tension between the TPTA's jurisdictional provision and the CCA's jurisdictional provisions. To remedy this tension, we look first to the exceptions under the CCA, MCL 600.6419(5), which provides, "This chapter does not deprive the circuit court of exclusive jurisdiction over appeals from the district court and administrative agencies as authorized by

law." If MCL 600.6419(5) applies, the Court of Claims does not have jurisdiction to hear these actions against the state. Defendants argue that MCL 205.429(4) does not confer *exclusive* jurisdiction on the circuit court, and for that reason, MCL 600.6419(5) does not apply. In support, defendants rely on the statutory analysis in *O'Connell*. This argument fails.

In *O'Connell*, we analyzed the relationship between MCL 600.4401 and MCL 600.6419 to determine which court has jurisdiction to decide writs of mandamus. *O'Connell*, 316 Mich App at 102-103. Specifically, we recognized a tension between MCL 600.4401(1), which grants concurrent jurisdiction to decide mandamus actions against a state officer to circuit courts and this Court, and MCL 600.6419(1)(a), which grants exclusive jurisdiction to the Court of Claims to decide demands for extraordinary writs against the state or the state's departments or officers, including prerogative and remedial writs. *Id*. at 103-104. The defendant argued that the CCA provided an exception under MCL 600.6419(6) that would "reserve[] for the circuit court 'exclusive' jurisdiction over mandamus actions involving state officers—notwithstanding MCL 600.6419(1)(a)." *Id*. at 104. We concluded that the exception under the CCA did not confer exclusive jurisdiction on circuit courts. Like MCL 600.6419(5) at issue in the instant case, the exception under MCL 600.6419(6) provides, "This chapter does not deprive the circuit court of exclusive jurisdiction to issue, hear, and determine prerogative and remedial writs consistent with section 13 of article VI of the state constitution of 1963."

We held in *O'Connell* that the Court of Claims had jurisdiction and that the exception under MCL 600.6419(6) did not apply because "the circuit court did

not possess exclusive jurisdiction over mandamus actions involving state officers; rather, it shared concurrent jurisdiction with this Court." *Id*. at 104. Moreover, the Michigan Constitution also grants the Michigan Supreme Court power over prerogative writs. *Id*. at 105-106. This Court interpreted MCL 600.6419(6) as barring Court of Claims jurisdiction *only* if the circuit court was granted exclusive jurisdiction over the appeal by means of another statute or the Constitution. *Id*. at 108. Because the circuit court did not have exclusive jurisdiction over prerogative and remedial writs—it conferred concurrent jurisdiction on this Court and the Michigan Supreme Court—MCL 600.6419(6) did not apply.[5] *Id*. at 106-108.

In this case, the same analysis applies. The question turns on whether MCL 205.429(4) confers exclusive jurisdiction on the circuit court for matters involving appeals from the Department pursuant to the TPTA. The Court of Claims concluded in each of its opinions and orders that the TPTA does confer exclusive jurisdiction on the circuit court to hear such appeals. We agree. The TPTA states, "If a person is aggrieved by the decision of the department, that person may appeal to the circuit court of the county where the seizure was made to obtain a judicial determination of the lawfulness of the seizure and forfeiture." MCL 205.429(4). Unlike MCL 600.4401(1) in *O'Connell*, the TPTA does not confer concurrent jurisdiction on this Court. The plain and clear language of the statute states that appeals from decisions of the Department are to be made to the circuit court—not in addition to an appellate court, to the Court of Claims, or to any other

[5] We did note in *O'Connell* that the circuit court had exclusive jurisdiction "over the remaining categories of extraordinary writs . . . ." *Id*. at 108.

judicial body.[6] To interpret the statute as defendants suggest, i.e., that appeals under the TPTA must be made to the Court of Claims, would render the jurisdictional provision of the TPTA nugatory, which is an interpretation we must avoid. *O'Connell*, 316 Mich App at 98. We conclude that MCL 600.6419(5) applies, the circuit court has exclusive jurisdiction over plaintiffs' appeals pursuant to the TPTA, and the Court of Claims did not err when it reached the same result.

The Department also argues, as it did below, that plaintiffs are not bringing an appeal at all; rather, plaintiffs have filed original actions with the Court of Claims, and therefore MCL 600.6419(5) does not apply. We disagree.

An appeal from the Department to the circuit court is governed by Chapter 2 of the Michigan Court Rules, *Keweenaw Bay Outfitters & Trading Post v Dep't of Treasury*, 252 Mich App 95, 102; 651 NW2d 138 (2002), and the Department argues that because the parties are entitled to discovery, motion practice, and a trial, this matter is not an "appeal," but rather an original action. As support, the Department asserts that the rules governing appellate procedure, Chapter 7 of the Michigan Court Rules, are not applicable here. However, the Department has provided no authority for the proposition that an appeal is classified on the basis of which court rules apply. In *Keweenaw*, we held that the appeal was governed by Chapter 2, but we continued to refer to the claim as an appeal from an agency decision. Moreover, the TPTA, the CCA, and the RJA do not define

[6] Even if the TPTA did not provide jurisdictional guidance, an appeal from an administrative agency may be made pursuant to the Administrative Procedures Act, MCL 24.201 *et seq*., or MCL 600.631, but both also mandate an appeal to the circuit court only. *Teddy 23, LLC*, 313 Mich App at 567-568.

"appeal." The Supreme Court has defined "appeal" as "the removal of a matter or cause from an inferior to a superior court for the purpose of reviewing, correcting, or reversing the judgment or sentence of the inferior tribunal," and has further stated that, "in its technical and appropriate sense," an appeal is "the taking of a suit or cause and its final determination from one court or jurisdiction after final judgment to another." *In re Mfr Freight Forwarding Co*, 294 Mich 57, 70; 292 NW 678 (1940) (quotation marks and citations omitted). *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "appeal" as "a legal proceeding by which a case is brought before a higher court for review of the decision of a lower court." The present action fits any of these definitions. In this case, each plaintiff received a "final determination" from an inferior tribunal—the Department's hearing division—and sought review in another tribunal. Further, the TPTA describes an aggrieved litigant seeking an "appeal" from an adverse determination. MCL 205.429(4). Although the reviewing court will conduct "discovery, motion practice, and trials," *Keweenaw Bay Outfitters*, 252 Mich App at 101-102, in order to resolve the dispute, the procedure does not change the review process into an original action.[7]

Affirmed.

BECKERING, P.J., and O'BRIEN and CAMERON, JJ., concurred.

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[7] The Department also claims that because the TPTA does not provide a standard of review upon which the circuit courts can review the Department's decisions, the Legislature intended an action filed with the Court of Claims as a new claim or demand. The Department provided no support for this proposition, and "[t]his Court is not required to search for authority to sustain or reject a position raised by a party without citation of authority." *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 220; 761 NW2d 293 (2008).

LONG v LIQUOR CONTROL COMMISSION

Docket No. 335723. Submitted November 8, 2017, at Grand Rapids. Decided November 16, 2017, at 9:05 a.m.

Michael Long filed an action *in propria persona* in the Charlevoix Circuit Court against the Liquor Control Commission, claiming that the commission's actions resulted in an unfair taking of the specially designated distributor (SDD) license the commission had issued to him under MCL 436.1533(4) of the Michigan Liquor Control Code, MCL 436.1101 *et seq*. In 1990, the commission issued plaintiff an SDD license, which authorized plaintiff to sell alcohol for off-premises consumption from his liquor store in Boyne City. In 2013, the commission issued Family Fare, LLC, which operates a supermarket in Boyne City, an SDD license under the MCL 436.1531(5) resort provision of the code. That provision allows the commission to issue additional SDD licenses to established merchants whose business is designed to attract and accommodate tourists and visitors to a resort area—even though the Family Fare was located less than 2,640 feet from plaintiff's store. Plaintiff asserted that an unfair taking occurred because his alcohol sales went down after the commission issued the SDD license to Family Fare and that, as a result, the value of plaintiff's SDD license was also reduced. The commission moved for summary disposition, arguing that plaintiff had failed to plead the elements of a de facto taking. Plaintiff hired an attorney, and his attorney moved to amend the complaint to assert a claim of inverse condemnation. The court, Roy C. Hayes III, J., granted the commission's motion for summary disposition. The court also denied plaintiff's motion to amend the complaint, reasoning that the amendment would be futile. Plaintiff appealed.

The Court of Appeals *held*:

1. The Fifth Amendment of the United States Constitution and Article 10 of the 1963 Michigan Constitution prohibit a governmental entity from taking private property for public use without just compensation; when a de facto taking occurs, a plaintiff may bring an inverse condemnation action to protect his or her rights. A person who asserts an uncompensated taking must first establish that a vested property right has been af-

fected. A vested property right requires a legitimate claim of entitlement that is based on more than an anticipated continuance of the present general laws; the interest is more than an expectation. A de facto taking can occur even when the property is not physically taken; a diminution in the value of the property or a partial destruction can constitute a taking. To establish a de facto taking, a plaintiff must prove that (1) the governmental action was a substantial cause of the decline in the value of the plaintiff's property and (2) the government abused its legitimate powers in affirmative actions that were directly aimed at the plaintiff's property. The increased competition and reduced market share that may affect an existing holder of an MCL 436.1533(4) SDD license when the commission issues additional SDD licenses in that market do not constitute governmental action aimed directly at the existing SDD licensee's property.

2. MCL 436.1533(4) provides that in cities, incorporated villages, or townships, the commission may issue only one SDD license for each 3,000 of population or fraction of 3,000, but the commission may waive the quota requirement if there is no existing SDD licensee within two miles of the applicant. When the commission issued the SDD license to Family Fare, an administrative rule prohibited the commission from granting an SDD license or allowing the location of a license to be transferred if there was an existing SDD license within 2,640 feet of the proposed site. However, MCL 436.1531(5) provides that in governmental units with a population of 50,000 or less, the commission may issue not more than a total of 15 additional SDD licenses per year to established merchants whose business and operation is designed to attract and accommodate tourists and visitors to the resort area; a license issued under MCL 436.1531(5) may be issued at a location within 2,640 feet of existing SDD license locations. In this case, it was uncontested that plaintiff had a general property interest in his SDD license. However, MCL 436.1533(4) and the administrative rule did not provide plaintiff with a property right to be free from increased competition in the sale of alcohol, to have a set share of the Boyne City alcohol-sales market, or to enjoy a particular level of alcohol sales or profitability. Regardless of the administrative rule's geographical-spacing requirement that limited the location of an SDD license within 2,640 feet of the location of an existing SDD license, MCL 436.1531(5) clearly grants the commission authority to issue up to 15 additional SDD licenses, and a license issued under § 1531(5) may be located within that 2,640 feet spacing limit. As a result, plaintiff did not have a vested property right to a market share that was based on the presence of only two SDD license

locations in Boyne City. In other words, the incidental benefits of governmental regulation of the liquor industry experienced by plaintiff—that is, the higher market share and profits attributable to the limited number of SDD licenses previously located in Boyne City—did not constitute property rights; MCL 436.1533(4) does not provide an assurance that a new SDD licensee would not affect plaintiff's business. Accordingly, because plaintiff did not have a property right to be free from competition, there was no basis on which to support his takings claim. Regardless, plaintiff also could not establish a de facto taking because there was no evidence that the commission's issuance of an SDD license to Family Fare was aimed directly at plaintiff's SDD license. Instead, the commission issued the license in accordance with MCL 436.1531(5), and the resulting harm to plaintiff—reduced market share, increased competition, and reduced profits—was incidental to that governmental action. Accordingly, the trial court correctly granted defendant's motion for summary disposition, and the court did not abuse its discretion by denying plaintiff's motion to amend.

Affirmed.

1. CONSTITUTIONAL LAW — TAKING PRIVATE PROPERTY — ACTIONS DIRECTLY AIMED AT PLAINTIFF'S PROPERTY — SPECIALLY DESIGNATED DISTRIBUTOR LICENSES.

The Fifth Amendment of the United States Constitution and Article 10 of the 1963 Michigan Constitution prohibit a governmental entity from taking private property for public use without just compensation; to establish a de facto taking, a plaintiff must prove that (1) the governmental action was a substantial cause of the decline in the value of the plaintiff's property and (2) the government abused its legitimate powers in affirmative actions that were directly aimed at the plaintiff's property; the increased competition and reduced market share that may affect an existing holder of a specially designated distributor (SDD) license when the Liquor Control Commission issues additional SDD licenses in that market do not constitute governmental action aimed directly at the existing SDD licensee's property (MCL 436.1531(5); MCL 436.1533(4)).

2. CONSTITUTIONAL LAW — TAKING PRIVATE PROPERTY — VESTED PROPERTY RIGHT — SPECIALLY DESIGNATED DISTRIBUTOR LICENSES.

A person who asserts an uncompensated taking under the Fifth Amendment of the United States Constitution and Article 10 of the 1963 Michigan Constitution must first establish that a vested property right has been affected; a vested property right requires

> a legitimate claim of entitlement that is based on more than an anticipated continuance of the present general laws, and the interest must be more than an expectation; the holder of a specially designated distributor license issued under MCL 436.1533(4) does not have a vested property right to be free from increased competition in the sale of alcohol, to have a set share of the alcohol-sales market in which they operate, or to enjoy a particular level of alcohol sales or profitability.

The Mastromarco Firm (by *Victor J. Mastromarco, Jr.*, and *Kevin J. Kelly*) for plaintiff.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *Adam M. Leyton*, Assistant Attorney General, for defendant.

Before: HOEKSTRA, P.J., and STEPHENS and SHAPIRO, JJ.

PER CURIAM. In this inverse-condemnation action, the trial court granted summary disposition under MCR 2.116(C)(8) to defendant, the Liquor Control Commission (the LCC), and denied plaintiff Michael Long's motion to amend his complaint. Plaintiff now appeals as of right. Because plaintiff failed to state a claim for inverse condemnation and amendment of his complaint would be futile, we affirm.

Plaintiff owns and operates a liquor store, known as Par-T-Pac, in Boyne City, Michigan. Since 1990, he has held a specially designated distributor (SDD) license, which allows him to sell alcohol[1] for off-premises consumption under the Michigan Liquor Control Code, MCL 436.1101 *et seq*. See MCL 436.1111(12);

[1] An SDD license allows a person to distribute "spirits and mixed spirit drink," MCL 436.1111(12), and "spirits" is defined, in part, as "a beverage that contains alcohol." For ease of reference in this opinion, we use the term "alcohol."

MCL 436.1533(4). In August 2013, the LCC issued an SDD license under the "resort" provision in MCL 436.1531(5) to Family Fare, LLC, which operates a supermarket in Boyne City. Under the MCL 436.1531(5) resort provision, Family Fare was able to obtain its SDD license without abiding by the quota and distance restrictions that would have otherwise applied to a new applicant for an SDD license. See MCL 436.1533(4); 2004 Annual Admin Code Supp, R 436.1133.[2] In other words, Family Fare was able to obtain an SDD license even though it is located less than 2,640 feet from plaintiff's store and even though Boyne City already had its quota of SDD liquor licenses based on the city's population. See MCL 436.1531(5); MCL 436.1533(4); 2004 Annual Admin Code Supp, R 436.1133.

On August 12, 2016, proceeding *in propria persona*, plaintiff filed a complaint in circuit court against the LCC. Plaintiff's complaint indicates that since Family Fare received its SDD license, Par-T-Pac has seen a significant reduction in sales and, as a result, the value of his own license has been significantly reduced. Plaintiff alleged that the loss of sales and the reduced value of the SDD license "essentially" amounted to an "Unfair Taking" of the liquor license and resulted in a "form of Eminent Domain" that "steals all of [plaintiff's] equity and value, and transfers it unfairly to Family Fare."

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[2] Generally, MCL 436.1533(4) limits the number of SDD liquor licenses to 1 for each 3,000 persons, or fraction of 3,000, in the population of a city, incorporated village, or township. In terms of the geographical spacing between SDD licenses, Rule 436.1133 has prohibited the LCC from granting a license or allowing the transfer of a license's location "if there [was] an existing [SDD] license located within 2,640 feet of the proposed site." The LCC has voted to repeal Rule 436.1133, but the rule was in effect when Family Fare obtained its SDD license in 2013.

In response to plaintiff's complaint, the LCC moved for summary disposition. Pertinent to this appeal, the LCC maintained that plaintiff failed to plead the elements of a de facto taking because there was no allegation that the LCC abused its legitimate powers in affirmative actions directly aimed at plaintiff's property and because the granting of a license to a private corporation to conduct a private business could not be regarded as the taking of private property by the government for public use. Before the trial court decided the LCC's motion for summary disposition, plaintiff obtained an attorney, and his attorney moved for leave to file an amended complaint. Plaintiff's proposed amended complaint contained one count of inverse condemnation, which was based on the theory that plaintiff had a property interest in his SDD license and that the LCC effectively took this property and transferred it to a private entity, namely Family Fare, for economic development. Following a hearing on the parties' motions, the trial court granted summary disposition to the LCC under MCR 2.116(C)(8), and it denied plaintiff's motion to amend his complaint, stating that the amendment would be futile. Plaintiff now appeals as of right.

On appeal, plaintiff argues that the trial court erred by granting summary disposition and by denying his motion to amend his complaint. Plaintiff contends that he has a property interest in his SDD license and, in particular, a right to the protections afforded by the quota and distance requirements governing SDD licenses, which restricted competition and assured that plaintiff's license had a particular value. According to plaintiff, by exempting Family Fare from these requirements to promote tourism under the MCL 436.1531(5) resort provision, the LCC effectively transferred the value of plaintiff's property interests to

Family Fare for the benefit of the public. In contrast, the LCC maintains that, while plaintiff may have a property interest in his SDD license, that interest does not provide him with a property right to be free from competition or to enjoy set profits. Additionally, the LCC contends that, to the extent plaintiff has a property interest in his SDD license, his claims fail because any action taken by the LCC in issuing the license to Family Fare was not aimed directly at plaintiff's property.

As explained in this opinion, we agree with the LCC that plaintiff lacked a property right in being free from increased competition and that the LCC's actions in issuing an SDD license to Family Fare were not aimed directly at plaintiff's license. In these circumstances, the trial court did not err by granting summary disposition to the LCC under MCR 2.116(C)(8), and the trial court did not abuse its discretion by denying plaintiff's motion to amend his complaint because any amendment would be futile.

I. STANDARDS OF REVIEW

We review de novo a trial court's decision to grant summary disposition. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). Constitutional issues, including claims relating to the taking of private property, are also reviewed de novo. *Id*. In this case, the trial court specified that it granted summary disposition under MCR 2.116(C)(8). A motion under this subrule "tests the legal sufficiency of the complaint based on the pleadings alone." *Gallagher v Persha*, 315 Mich App 647, 653; 891 NW2d 505 (2016). In reviewing a motion under MCR 2.116(C)(8), "[a]ll factual allegations supporting the claim and any reasonable inferences that can be drawn from the facts are accepted as

true." *Lakin v Rund*, 318 Mich App 127, 131; 896 NW2d 76 (2016). The motion is properly granted "when the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Gallagher*, 315 Mich App at 653 (quotation marks and citation omitted).

A trial court's decision on a motion to amend a complaint is reviewed for an abuse of discretion. *Trowell v Providence Hosp & Med Ctrs, Inc*, 316 Mich App 680, 690; 893 NW2d 112 (2016). Under MCR 2.116(I)(5), if summary disposition is granted pursuant to MCR 2.116(C)(8), "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." "Leave to amend the pleadings should be freely granted to the nonprevailing party upon a grant of summary disposition unless the amendment would be futile or otherwise unjustified." *Lewandowski v Nuclear Mgt Co, LLC*, 272 Mich App 120, 126-127; 724 NW2d 718 (2006).

II. ANALYSIS

"The Fifth Amendment of the United States Constitution and Article 10 of the Michigan Constitution both prohibit the taking of private property for public use without just compensation." *Dorman v Clinton Twp*, 269 Mich App 638, 645; 714 NW2d 350 (2006). "[T]o ensure the protections of this guarantee, the State of Michigan recognizes a cause of action, often referred to as an inverse or reverse condemnation suit, for a de facto taking when the state fails to utilize the appropriate legal mechanisms to condemn property for public use." *Peterman v Dep't of Natural Resources*, 446 Mich 177, 187-188; 521 NW2d 499 (1994). "A de facto taking can occur without a physical taking of the

property; a diminution in the value of the property or a partial destruction can constitute a taking." *Cummins v Robinson Twp*, 283 Mich App 677, 708; 770 NW2d 421 (2009) (quotation marks and citation omitted). "[T]he plaintiff must prove that the government's actions were a substantial cause of the decline of the value of the plaintiff's property and must establish that the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 295; 769 NW2d 234 (2009).

Notably, as a preliminary matter, "[o]ne who asserts an uncompensated taking claim must first establish that a vested property right is affected." *In re Certified Question*, 447 Mich 765, 787-788; 527 NW2d 468 (1994). See also *Adams Outdoor Advertising v East Lansing (After Remand)*, 463 Mich 17, 24; 614 NW2d 634 (2000). "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Mich Soft Drink Ass'n v Dep't of Treasury*, 206 Mich App 392, 403; 522 NW2d 643 (1994) (quotation marks and citations omitted). "A vested property right is an interest that is more than a mere expectation." *Murphy-DuBay v Dep't of Licensing & Regulatory Affairs*, 311 Mich App 539, 557; 876 NW2d 598 (2015). A vested property right requires a legitimate claim of entitlement based on something more than "an anticipated continuance of the present general laws . . . ." *In re Certified Question*, 447 Mich at 788 (quotation marks and citations omitted). See also *Murphy-DuBay*, 311 Mich App at 557.

In this case, analysis of whether plaintiff has a vested property right requires a determination of pre-

cisely what interests plaintiff claims have been taken by the LCC's actions. Plaintiff generally asserts that he has a property interest in his "liquor license," a proposition which the LCC does not dispute. See *Bundo v Walled Lake*, 395 Mich 679, 693-695; 238 NW2d 154 (1976) (holding that the licensee had a property interest in his liquor license and, in particular, a property interest "in obtaining a renewal of his liquor license"). However, plaintiff has not alleged a taking of his SDD license. To the contrary, it is undisputed that plaintiff still has his SDD license and that he still has the use of the license. He remains free to sell alcohol in Boyne City.

Considering plaintiff's allegations and arguments, in actuality, the property that plaintiff contends has been taken is not his liquor license; it is the right to be free from increased competition and to retain a set market share in the liquor industry in Boyne City given the quota and distance requirements that governed SDD licenses before Family Fare obtained its SDD license in 2013. This is reflected in plaintiff's arguments in his appellate brief, wherein he maintains that, before Family Fare received its SDD license, he "enjoyed the benefits of the State's regulation of the industry." Specifically, he asserts that his "business was protected from competition by quota and distance requirements," which prevented other private citizens or corporations from simply joining the market, and that these requirements ensured that plaintiff's "license had a particular value." Similarly, at the hearing in the trial court, plaintiff's attorney asserted that plaintiff had "a right" to a "limited amount of competition" based on quota and distance requirements that served to protect the profitability of the licensee. He contended that, by obtaining a license, the licensee received "part of the market share" with limits on "the

level of competition" and that, in this case, the "status quo" consisted of only two SDD licenses in the market. In other words, plaintiff asserted that he had a property right, protected by the provisions of the Michigan Liquor Control Code, to a share of the liquor market premised on there being only two SDD licenses in Boyne City. According to plaintiff, by allowing the introduction of a third competitor into the market, the LCC has taken plaintiff's property by decreasing his share of the market, devaluing the resale value of plaintiff's license, and reducing his alcohol sales.

Fairly read, what plaintiff actually alleges is a loss of an oligopoly resulting from the increase of competition because of the issuance of a liquor license to Family Fare. Recognizing the property that plaintiff claims has been taken, the question becomes whether plaintiff possesses a property right to be free from increased competition in the sale of alcohol in Boyne City. See *Adams Outdoor Advertising*, 463 Mich at 24 (considering, as a preliminary question, whether the claimant possessed the interest he alleged was being taken). In our judgment, the answer to this question is no.

An individual who possesses an SDD license under the Michigan Liquor Control Code has the right to sell alcohol for off-premises consumption in accordance with the law. See MCL 436.1111(12); MCL 436.1533(4). But an SDD license does not provide a property right to be free from competition in the sale of liquor, to have a set share in the market, or to enjoy a particular level of alcohol sales or profitability. These rights are simply not afforded by the Michigan Liquor Control Code. To the contrary, by its express terms, MCL 436.1531(5) makes plain that, aside from SDD licenses issued in accordance with the quota restrictions in

MCL 436.1533(4), up to 15 additional SDD licenses may be issued in communities with a population of under 50,000 people, and these licenses may be issued for locations within 2,640 feet of an existing license. MCL 436.1531(5).[3] The possibility of these 15 additional licenses wholly undercuts plaintiff's assertion that he had a vested property right to a market share based on the existence of only two SDD licenses in Boyne City. Indeed, even under the quota restrictions, the number of SDD licenses in Boyne City could increase based on population growth, see MCL 436.1533(4), and the Michigan Liquor Control Code provides no assurance that a new SDD licensee would not affect plaintiff's business. The quota requirements could also be waived if there was no existing SDD licensee within two miles of the applicant's proposed location, MCL 436.1533(4), and, again, there is no guarantee that the entry of a competitor into the market would not affect plaintiff's business. Given that the law specifically allows for the issuance of additional SDD licenses, plaintiff cannot legitimately claim that he was entitled to retain a specific market share, to exclude competition from the market, or to enjoy a set level of sales or profits. In these circumstances, he has not shown a property interest in being free from competition under the Michigan Liquor Control Code, and his takings claim premised on the LCC's issuance of an SDD "resort" license to Family Fare must fail.

In support of this conclusion, we note that—contrary to plaintiff's claim that he has a property right to a restricted liquor market—numerous other courts considering whether governmental action resulting in increased competition constitutes a "taking" have rec-

[3] The licenses may be issued to established merchants whose business is to attract and accommodate tourists and visitors in a resort area.

ognized that there is no constitutionally protected property right to be free from competition, to have a monopoly or oligopoly over an industry, or to obtain economic benefit from a license, even in industries in which governmental regulation had traditionally limited the amount of competition. See, e.g., *Illinois Transp Trade Ass'n v Chicago*, 839 F3d 594, 596 (CA 7, 2016) (" 'Property' does not include a right to be free from competition."); *Joe Sanfelippo Cabs, Inc v Milwaukee*, 839 F3d 613, 615 (CA 7, 2016) ("[A] taxi permit confers only a right to operate a taxicab . . . . It does not create a right to be an oligopolist, and thus confers no right to exclude others from operating taxis."); *Minneapolis Taxi Owners Coalition, Inc v Minneapolis*, 572 F3d 502, 508-509 (CA 8, 2009) ("The taxicab licenses themselves do not carry an inherent property interest guaranteeing the economic benefits of using the taxicab license," and "any property interest that the taxicab-license holders' [sic] may possess does not extend to the market value of the taxicab licenses derived through the closed nature of the City's taxicab market."); *Rogers Truck Line, Inc v United States*, 14 Cl Ct 108, 115 (1987) ("[P]laintiff does not have a constitutionally protected freedom from competition."); *Jaffe v United States*, 220 Ct Cl 666, 669 (1979) (order) ("[T]here is no constitutional right to be free of competition or to enjoy a monopoly. . . . Nor are alleged anticipated profits protected by the just compensation clause.") (citations omitted); *Jackson Sawmill Co, Inc v United States*, 580 F2d 302, 307 (CA 8, 1978) ("[A]ppellants possessed no constitutionally protected interest in a monopoly over traffic travelling between St. Louis and East St. Louis."); *Miadeco Corp v Miami-Dade Co*, 249 F Supp 3d 1296 (SD Fla, 2017) ("Plaintiffs' property rights derived from their [taxi] medallions do not confer on them a fully restricted market or

a monopoly on all for-hire transportation.").[4] See also *Mich Soft Drink Ass'n*, 206 Mich App at 405 ("[T]here is no property right to potential or future profits.") (quotation marks and citation omitted). These cases persuasively reason that collateral interests of ownership are not property protected by the Constitution. See *Minneapolis Taxi Owners Coalition, Inc*, 572 F3d at 509. The same is true of the SDD license issued to plaintiff. The only right afforded to plaintiff by the SDD license is the right to sell alcohol. He may have incidentally enjoyed the economic benefits of a restricted market because of the quota and distance requirements, but given the LCC's authority to issue additional SDD licenses in keeping with MCL 436.1531(5) and MCL 436.1533(4), plaintiff had no legitimate claim of entitlement to a market limited to two SDD licenses, and any incidental benefits of governmental regulation of the liquor industry did not constitute property rights. Accordingly, plaintiff cannot maintain a claim for inverse condemnation based on the allegation that the LCC took part of his market share by allowing for increased competition.

Setting aside plaintiff's erroneous assertion that he has a property right to be free from increased competition or to enjoy a set share in the Boyne City market, at most, plaintiff has some general property interest in his SDD license. See *Bundo*, 395 Mich at 693-695. But plaintiff cannot prevail on his takings claim on the basis of this interest because he has not alleged affirmative action by the LCC aimed directly at this property. See *Marilyn Froling Revocable Living Trust*, 283

[4] Although decisions of other state courts and lower federal courts are not binding on this Court, we may consider them as persuasive authority. *Travelers Prop Cas Co of America v Peaker Servs, Inc*, 306 Mich App 178, 188; 855 NW2d 523 (2014).

Mich App at 295. That is, the LCC's action was not aimed directly at plaintiff's SDD license. The LCC did not revoke plaintiff's license, refuse renewal of his license, or restrict his use of the license to sell alcohol. Instead, the governmental action consisted of simply issuing a license to Family Fare as permitted by MCL 436.1531(5). If plaintiff was harmed by the issuance of the license, any harm was incidental to the governmental action that benefited Family Fare and the alleged harm resulted because Family Fare proved to be an able competitor in the sale of alcohol for off-premises consumption. These incidental or consequential effects of governmental action do not amount to governmental action aimed directly at plaintiff's property. See *Marilyn Froling Revocable Living Trust*, 283 Mich App at 295; *Spiek v Dep't of Transp*, 456 Mich 331, 345; 572 NW2d 201 (1998); *Rogers Truck Line, Inc*, 14 Cl Ct at 114. Indeed, as previously recognized by this Court, when the government grants a license to a third party, this "granting of a license to a private citizen or a private corporation for the purpose of allowing that person or corporation to conduct a private business cannot be regarded as a taking of private property by the government for public use." *Attorney General v Ankersen*, 148 Mich App 524, 561; 385 NW2d 658 (1986).[5] See also *Marilyn Froling Revocable Living Trust*, 283 Mich App at 295. Accordingly, plaintiff cannot show that issuing an SDD license to Family Fare constituted governmental action aimed directly at plaintiff's SDD license.

In sum, plaintiff does not have a property right to be free from increased competition, and he cannot state a

[5] While *Ankersen* is not binding because it was decided before 1990, it may be considered for its persuasive value. See MCR 7.215(J)(1); *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2013).

claim for inverse condemnation by asserting that the LCC took part of his market share by allowing increased competition. Additionally, to the extent plaintiff has a property interest in his SDD license, he cannot plead a viable claim of inverse condemnation because the issuing of a license to Family Fare did not constitute governmental action aimed directly at plaintiff's liquor license. Consequently, the trial court properly granted the LCC's motion for summary disposition under MCR 2.116(C)(8). The trial court did not abuse its discretion by denying plaintiff's motion to amend his complaint because any amendment would have been futile. *Lewandowski*, 272 Mich App at 126-127.

Affirmed.

HOEKSTRA, P.J., and STEPHENS and SHAPIRO, JJ., concurred.

ANDRESON v PROGRESSIVE MARATHON INSURANCE COMPANY

Docket Nos. 334157 and 336351. Submitted November 7, 2017, at Detroit. Decided November 21, 2017, at 9:00 a.m.

Debra and David Andreson filed a complaint in the Eaton Circuit Court against Progressive Marathon Insurance Company and Progressive Michigan Insurance Company. Plaintiffs sought payment of underinsured motorist (UIM) benefits for injuries they sustained in an automobile accident and permission to negotiate a settlement with the insurer of the at-fault driver involved in the accident. The parties stipulated Progressive Marathon's dismissal from the action because Progressive *Michigan*—not Progressive *Marathon*—insured plaintiffs at the time of the accident. Progressive Michigan granted plaintiffs permission to settle, and plaintiffs obtained a $100,000 settlement from the at-fault driver's insurer, with $50,000 allocated to each plaintiff. After the settlement, plaintiffs sought payment from Progressive Michigan for the difference between the maximum amount of plaintiffs' UIM coverage ($250,000 per person, up to $500,000 per accident) and the settlement amount obtained from the at-fault driver's insurance carrier ($50,000 per person). Progressive Michigan refused to pay. Offers and counteroffers of judgment were refused, and the case proceeded to trial. Progressive Michigan moved in limine to preclude the jury from hearing about the UIM policy limits in plaintiffs' insurance coverage. The court, Janice K. Cunningham, J., granted Progressive Michigan's motion because any evidence of the limits, if relevant, would have been more prejudicial than probative under MRE 403. The court ultimately granted David a directed verdict under MCL 500.3135(2)(a)(*i*), holding that there was no factual dispute concerning the nature and extent of David's injuries and that he had suffered a serious impairment of body function and thus had satisfied the threshold-injury requirement for recovering noneconomic tort damages. The question whether Debra's injuries met the threshold was submitted to the jury; the jury found that Debra's injuries met the threshold and awarded her $1,374,112.68. Progressive Michigan objected to entry of a judgment awarding Debra the amount of the jury's award less the $50,000 she had received from the settlement with the at-fault driver's insurance carrier, but the court

determined that it was required by MCR 2.515(B) to enter a judgment consistent with the jury's verdict. Progressive Michigan moved for remittitur; the court denied the motion. Progressive Michigan appealed the order awarding Debra $1,324,112.68 (Docket No. 334157). The trial court subsequently granted plaintiffs' motion for an award of attorney fees and costs under MCR 2.405, and Progressive Michigan also appealed that order (Docket No. 336351). The appeals were consolidated.

The Court of Appeals *held*:

1. Remittitur is broadly defined as the procedural process by which a jury's verdict is reduced by subtracting some amount from the jury's total award. A jury's verdict should not be set aside when the amount awarded is supported by the evidence and within the limits of what reasonable minds might agree is just compensation for the plaintiff's personal injuries and pain and suffering. The determination whether the jury's award is supported by the evidence must be based on objective criteria relating to the actual conduct of the trial or the evidence presented. Progressive Michigan argued that the $1,374,112.68 jury award should be reduced because it exceeded the maximum amount Progressive was obligated to pay for UIM coverage according to plaintiffs' policy—a maximum of $250,000 per person, up to $500,000 per accident. Debra countered Progressive Michigan's argument that its obligation was limited to the policy maximum by arguing that Progressive Michigan waived the policy limits when it requested that the policy limits not be disclosed to the jury. However, absent an express agreement to the contrary, excluding evidence of the policy limits from the jury's knowledge does not constitute a waiver. In this case, Progressive Michigan did not expressly waive the policy limits, and there was no express agreement between the parties to waive the limits. In addition, the trial court's refusal to reduce the amount of the jury verdict amounted to a nullification of the policy limits, which effectively created insurance coverage by estoppel. Because UIM coverage is optional and not compulsory, UIM coverage is purely contractual, and the judiciary may not rewrite contracts involving UIM coverage. Instead, the judiciary must enforce contracts involving UIM coverage as the contracts are written and agreed to by the parties. An insurance company should not be required to pay for a loss for which it had charged no premium. Plaintiffs' premiums afforded them UIM coverage up to $250,000 per person, up to $500,000 per accident—the amount in the parties' contract and the amount for which plaintiffs paid premiums. The trial court erred by denying Pro-

gressive Michigan's motion for remittitur and by entering an award that exceeded the maximum liability set forth in the parties' contract. Progressive Michigan's payment to Debra, not including fees and costs, was limited to the policy maximum of $250,000, less the $50,000 she received from the at-fault driver's insurance carrier.

2. The decision to admit or exclude evidence is within a trial court's discretion and will not be disturbed absent an abuse of that discretion. A decision concerning a close evidentiary question ordinarily cannot be an abuse of discretion. Progressive opposed allowing its claims adjuster to testify at trial about the initial evaluation she had made of Debra's injuries and that she had noted in her claims log that Debra's injuries met the serious-impairment threshold. The trial court relied on MRE 701 (lay opinion testimony) and MRE 803(6) (business records hearsay exception) in deciding to allow the adjuster to testify. The adjuster was not a physician, but she routinely evaluated the injuries of people insured by Progressive Michigan by reviewing each person's medical records and history of medical treatment. The trial court permitted the adjuster to testify because MRE 701 allows a lay witness to testify in the form of opinions or inferences when the opinions or inferences are rationally based on the witness's perception and would be helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. Even if the adjuster should not have been permitted to testify, Progressive Michigan failed to show that it was more probable than not that the alleged error was outcome-determinative. In addition, Progressive Michigan argued that the adjuster's testimony should not have been admitted because whether an injury satisfied the threshold requirement was a legal conclusion about which a witness's testimony should have been inadmissible. However, caselaw indicated that otherwise-admissible testimony is not objectionable simply because it embraces an ultimate issue to be decided by the trier of fact. The trial court did not abuse its discretion by denying Progressive Michigan's motion for a new trial brought on the basis of the trial court's decision to allow the adjuster's testimony.

3. The purpose of MCR 2.405 is to encourage parties to settle disputes before trial, and an award of attorney fees under MCR 2.405(D)(1) should be the rule rather than the exception. When an adjusted verdict is more favorable to an offeror (here, plaintiffs) than the average offer the offeree (here, Progressive Michigan) rejected, the offer-of-judgment rule in MCR 2.405(D) requires the offeree to pay the offeror the offeror's actual costs incurred in

prosecuting or defending the action. In this case, the jury's verdict was more favorable to plaintiffs than the average of Progressive Michigan's offers and plaintiffs' counteroffers. MCR 2.405(D)(3) authorizes a trial court to refuse to award attorney fees when doing so would be in the interest of justice. The interest-of-justice exception to granting attorney fees must be decided on a case-by-case basis. Unusual circumstances, such as a case involving a legal issue of first impression, could constitute a situation in which the interest of justice would be served by a trial court's refusal to award attorney fees. The only issue of first impression that may have been present in this case was whether the amount of the UIM policy limits should have been admitted into evidence. That issue was decided in Progressive Michigan's favor, and the policy limit amounts were not admitted at trial. Therefore, the policy limits did not affect the jury's decision to award damages to plaintiffs. Nor did the question of the admissibility of the limits affect the settlement value of the case or the offers of judgment. The trial court properly awarded attorney fees and costs to plaintiffs.

Judgment awarding Debra $1,324,112.68 at issue in Docket No. 334157 reversed in part and case remanded for entry of a judgment in favor of Debra in the amount of $200,000. In all other respects, the orders at issue in Docket Nos. 334157 and 336351 affirmed.

Nolan, Thomsen & Villas, PC (by *Lawrence P. Nolan* and *Gary G. Villas*) for Debra and David Andreson.

Secrest Wardle (by *Drew W. Broaddus*) for Progressive Michigan Insurance Company.

Before: BECKERING, P.J., and O'BRIEN and CAMERON, JJ.

O'BRIEN, J. In Docket No. 334157, defendant[1] appeals as of right the trial court's order awarding

[1] Plaintiffs' complaint named both Progressive Michigan Insurance Company and Progressive Marathon Insurance Company as defendants. Progressive Marathon was dismissed on June 10, 2015, by stipulation of the parties because the insurance policy in effect on the date of plaintiffs' accident was issued to plaintiffs by Progressive

plaintiff Debra Andreson $1,324,112.68 following a jury trial.[2] In Docket No. 336351, defendant appeals as of right the trial court's order awarding attorney fees and taxable costs to plaintiffs. We ordered these appeals to be consolidated.[3] We reverse in part and remand for entry of a judgment in favor of Debra and against defendant in the amount of $200,000. In all other respects, we affirm.

On October 11, 2013, plaintiffs were stopped in their vehicle at a red light when their vehicle was struck from behind by a different vehicle being driven at a high rate of speed. Both plaintiffs suffered injuries as a result of the collision, and it was uncontested that plaintiffs were not at fault. Plaintiffs were insured by defendant at the time of the accident, and their insurance policy included a provision for underinsured motorist (UIM) benefits in the amount of $250,000 per individual, capped at a total of $500,000 per accident. The UIM contract provision required plaintiffs to pursue recovery from the at-fault driver and obtain payment of the maximum policy limits from the at-fault driver's insurance carrier before they could collect UIM coverage from defendant. The contract provision also required plaintiffs to obtain defendant's permission before reaching a settlement with the at-fault driver or the at-fault driver's insurance carrier.

Defendant initially declined to grant plaintiffs permission to settle with the at-fault driver's insurance

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Michigan. Progressive Marathon did not participate in this matter at trial or on appeal. Accordingly, as used in this opinion, "defendant" refers to Progressive Michigan.

[2] The trial court also entered an award in favor of plaintiff David Andreson that defendant does not challenge on appeal.

[3] *Andreson v Progressive Marathon Ins Co*, unpublished order of the Court of Appeals, entered January 18, 2017 (Docket Nos. 334157 and 336351).

carrier. On February 18, 2015, plaintiffs filed this lawsuit against defendant in an attempt to obtain that permission and to obtain UIM benefits due them from defendant. Eventually, defendant granted plaintiffs permission to settle. The parties agree that plaintiffs obtained a settlement of $100,000 from the at-fault driver's insurance carrier—the maximum limit of the driver's policy. The settlement allocated $50,000 to each plaintiff.

After the settlement, plaintiffs sought payment from defendant for the difference between the maximum amount of plaintiffs' UIM coverage and the settlement amount obtained from the at-fault driver's insurance carrier. Defendant refused to pay UIM benefits to plaintiffs, arguing that plaintiffs' injuries failed to qualify as threshold injuries. With respect to Debra, defendant alleged that her lower-back injuries arose from a preexisting condition and were not causally related to the October 11, 2013 accident. The case proceeded to trial. The central issues at trial were (1) whether plaintiffs suffered serious impairments of body function as a result of the at-fault driver's negligence and (2) whether Debra's lower-back injuries were causally related to the automobile accident. Before trial, defendant filed a motion in limine to preclude the jury from being told about the UIM limits in plaintiffs' policy. The trial court granted defendant's motion, ruling that "[a]ny evidence of the UIM policy limits, if relevant, would be more prejudicial than probative under MRE 403."

Testimony at trial indicated that Debra suffered various physical injuries as a result of the automobile accident. Her neurosurgeon, Dr. Christopher Abood, testified that he had served as Debra's treating physician since October 2008 when she first came to him complaining of lower-back pain. Dr. Abood indicated

that although Debra was experiencing pain at that time (five years before the automobile accident), the pain was manageable and was not preventing her from working or living her normal life. Dr. Abood did not see Debra for the five-year period between October 2008 and August 2013. During that time, Debra received a series of facet injections from a different doctor to whom Dr. Abood had referred her for treatment.[4] Debra returned to see Dr. Abood on August 22, 2013, indicating that she had fallen on her back in April 2013 and experienced a significant increase in pain and heaviness in both legs that severely limited her ability to walk any distance. Dr. Abood diagnosed the pain as coming from a narrowing of the spinal canal.

Dr. Abood next saw Debra on November 11, 2013, one month after the accident at issue. At that time, she was experiencing severe pain in her back and legs. Dr. Abood testified that, in his medical opinion, the increased lower-back pain was not related to her earlier fall. According to Dr. Abood, Debra's "spinal condition was severely aggravated by the automobile accident, causing severe worsening of her back and leg symptoms and pain." Dr. Abood recommended that Debra have back surgery, which he performed on December 11, 2013.

At the close of proofs, the trial court found a jury-submissible question of fact regarding whether Debra's injuries met the threshold.[5] The jury ultimately found that they did and awarded her $1,374,112.68 in damages.

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[4] Facet injections involve the injection of a local anesthetic into the joint to temporarily deaden a small nerve. This is a diagnostic procedure designed to determine if a patient would benefit from a rhizotomy, a procedure that permanently deadens the same nerve.

[5] On the last day of trial, the trial court granted a directed verdict to David pursuant to MCL 500.3135(2)(a)(*i*), finding that there was no factual dispute concerning the nature and extent of his injuries and that

After trial, plaintiffs' counsel filed a proposed judgment for $1,324,112.68 for Debra, which reflected the jury's special verdict minus $50,000 to reflect the setoff from the earlier settlement. On May 19, 2016, defendant filed an objection to the entry of judgment with respect to Debra, arguing that the judgment in her favor should be limited to $200,000 because her recovery was capped by the $250,000 UIM policy limit minus the $50,000 setoff. Following a hearing, the trial court determined that it was required to enter a judgment consistent with MCR 2.515(B), which provides that "[a]fter a special verdict is returned, the court shall enter judgment in accordance with the jury's findings." Accordingly, the trial court entered a judgment in favor of Debra for $1,324,112.68, which reflected the jury's award minus the $50,000 settlement offset.[6] Defendant moved for remittitur, arguing that the jury's verdict had to be reduced because it was more than the UIM policy limits. The trial court denied defendant's motion.

On appeal, defendant argues that the trial court abused its discretion by denying its motion for remittitur. We agree. Appellate review of a grant or denial of remittitur is limited to the determination of whether an abuse of discretion occurred. *Majewski v Nowicki*, 364 Mich 698, 700; 111 NW2d 887 (1961). A trial court abuses its discretion when it chooses an outcome outside the range of reasonable and principled out-

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he had suffered a serious impairment of body function. Defendant does not challenge that ruling on appeal.

[6] We acknowledge that there may be a question regarding whether the trial court's decision to enter an award less than the full jury award was contrary to MCR 2.515(B). However, neither party raised this issue on appeal, and in light of our ruling, it is not relevant to the disposition of this case.

comes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

"Broadly defined, remittitur is the procedural process by which a verdict of the jury is diminished by subtraction." *Pippen v Denison Div of Abex Corp*, 66 Mich App 664, 674; 239 NW2d 704 (1976) (emphasis omitted). "As long as the amount awarded is within the range of the evidence, and within the limits of what reasonable minds might deem just compensation for such imponderable items as personal injuries sustained and pain and suffering, the verdict rendered should not be set aside." *Id*. at 675 (quotation marks and citation omitted).

> In determining whether remittitur is appropriate, a trial court must decide whether the jury award was supported by the evidence. *Diamond v Witherspoon*, 265 Mich App 673, 693; 696 NW2d 770 (2005). This determination must be based on objective criteria relating to the actual conduct of the trial or the evidence presented. *Palenkas v Beaumont Hosp*, 432 Mich 527, 532; 443 NW2d 354 (1989). The power of remittitur should be exercised with restraint. *Hines v Grand Trunk W R Co*, 151 Mich App 585, 595; 391 NW2d 750 (1985). If the award for economic damages falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation, the jury award should not be disturbed. *Palenkas*, *supra* at 532-533. [*Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 462; 750 NW2d 615 (2008).]

Defendant argues that the trial court erred by denying its motion for remittitur because the verdict awarded by the jury was in excess of the UIM policy limits. Neither uninsured motorist (UM) coverage nor UIM coverage is required by Michigan law, and therefore "the terms of coverage are controlled by the language of the contract itself, not by statute." *Dawson*

v Farm Bureau Mut Ins Co of Mich, 293 Mich App 563, 568; 810 NW2d 106 (2011). As our Supreme Court has explained, "Uninsured motorist coverage is optional—it is not compulsory coverage mandated by the no-fault act," and consequently, "the rights and limitations of such coverage are purely contractual . . . ." *Rory v Continental Ins Co*, 473 Mich 457, 465-466; 703 NW2d 23 (2005). "It is not the province of the judiciary to rewrite contracts to conform to the court's liking, but instead to enforce contracts as written and agreed to by the parties." *Dawson*, 293 Mich App at 569.

Prior to trial, the trial court stated that plaintiffs were pursuing a "Breach of Contract claim against Defendant for the refusal to pay UIM protection benefits without explanation." According to the terms of the parties' contract, defendant was only liable for $250,000 for each plaintiff, up to a total of $500,000. All parties agree on appeal that plaintiffs' earlier settlement of $100,000 with the at-fault driver's insurance company entitled defendant to a $50,000 offset with respect to each plaintiff, limiting defendant's liability to $200,000 per plaintiff under plaintiffs' UIM policy provision.

In denying defendant's motion for remittitur, the trial court concluded "that the jury's verdict cannot be looked at as being clearly excessive" because "the jury was not made aware of the [UIM coverage] limits at the request of the defendant." Essentially, the trial court found that defendant waived the UIM policy limits by requesting that the policy limits not be disclosed to the jury. However, pursuant to this Court's decision in *Tellkamp v Wolverine Mut Ins Co*, 219 Mich App 231, 243; 556 NW2d 504 (1996), "[a]bsent an express agreement to the contrary," excluding evidence

of a policy's limits from the jury's knowledge "does not amount to a waiver of the limits of liability under the contract."[7] In this case, there was no express agreement between the parties to waive the UIM policy limits. Nor did defendant, through its counsel or otherwise, expressly waive the policy limits.[8] Therefore, the trial court could not enter an award for Debra that exceeded the maximum liability agreed to by the parties in their contract, see *Dawson*, 293 Mich App at 569, plus applicable interest and costs, see *Tellkamp*, 219 Mich App at 244.

Alternatively, we are persuaded by defendant's argument that the trial court's refusal to reduce the amount of the jury verdict to the maximum policy limits is tantamount to a nullification of the policy limits, effectively creating insurance coverage by estoppel contrary to *Kirschner v Process Design Assoc, Inc*, 459 Mich 587; 592 NW2d 707 (1999). In insurance cases, "[t]he application of waiver and estoppel is limited, and, usually, the doctrines will not be applied to broaden the coverage of a policy to protect the insured against risks that were not included in the policy or that were expressly excluded from the policy."

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[7] We recognize that this portion of *Tellkamp* is arguably dictum. However, even assuming that it is dictum, we adopt this portion of the *Tellkamp* panel's reasoning as our own. See *Gallagher v Keefe*, 232 Mich App 363, 374; 591 NW2d 297 (1998).

[8] Plaintiffs call our attention to several statements made during the course of trial to support their assertion that defendant waived the UIM policy limits. Some of the statements that plaintiffs highlight were made during the course of trial by a witness who worked for defendant, and others were made by defendant's counsel during opening statements. After reviewing these statements, especially in light of the trial court's ruling that the policy limits were not to be disclosed to the jury, we cannot conclude that the statements amounted to "a voluntary and intentional abandonment of a known right." *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003).

Id. at 593-594. "This is because an insurance company should not be required to pay for a loss for which it has charged no premium." *Id*. at 594. Defendant contracted with plaintiffs to insure them up to $500,000 for UIM coverage, and plaintiffs paid premiums to be covered up to that amount. In the absence of defendant's waiver of these limits, the trial court impermissibly required defendant to pay for Debra's loss in excess of the amount that it agreed to cover. Accordingly, we reverse the trial court's denial of defendant's motion for remittitur and remand for entry of a judgment in favor of Debra in the amount of $200,000.

Next, defendant argues that it is entitled to a new trial on the basis of the trial court's evidentiary rulings allowing defendant's adjuster, Marcia Vandercook, to testify about (1) the contents of her claims-log notes and (2) whether Debra suffered a serious impairment of body function. We disagree. "The grant or denial of a motion for a new trial is within the sound discretion of the trial court." *Bartlett v Sinai Hosp of Detroit*, 149 Mich App 412, 418; 385 NW2d 801 (1986). "A trial court's discretionary decisions concerning whether to admit or exclude evidence will not be disturbed absent an abuse of that discretion." *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010) (quotation marks and citation omitted). An abuse of discretion occurs when the trial court's decision to admit or exclude evidence falls outside the range of reasonable and principled outcomes. *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 604; 886 NW2d 135 (2016). "The decision upon a close evidentiary question by definition ordinarily cannot be an abuse of discretion." *People v Golochowicz*, 413 Mich 298, 322; 319 NW2d 518 (1982).

Several months before trial, plaintiffs brought a motion to strike defendant's answer and to enter a

default against defendant, in part, because defendant refused to produce Vandercook's claims-log notes. The trial court conducted an *in camera* review of the claims log and found as follows:

> [T]he adjustor's log is partially privileged and partially discoverable. Specifically, all log notes entered after February 16, 2015 are privileged, and all log notes entered on or before February 16, 2015 are subject to discovery.

The week before trial, plaintiffs' counsel served defendant with a subpoena for Vandercook to testify at trial, and defendant moved to quash the subpoena. After a hearing on defendant's motion, the trial court ruled that Vandercook could testify regarding a notation she made in her claims log in which she indicated that she thought Debra's injuries had met the serious impairment threshold. In its reasoning, the trial court relied on MRE 701 (lay opinion testimony) and the court's determination that the claims log was not hearsay because it qualified as a business record under MRE 803(6).

At trial, plaintiffs called Vandercook to testify during their case-in-chief. Vandercook testified, in pertinent part, that as part of her job with defendant she routinely evaluated the injuries of people insured by defendant and that she did so by relying on each person's medical records and history of medical treatment. She testified that neither she nor a doctor could make a determination whether serious impairment of body function had occurred because only the jury could make that determination. Outside the presence of the jury, defendant objected to Vandercook's testifying about whether Debra suffered a serious impairment, arguing that "[s]he has deferred to the jury on the issue of serious impairment" and that it was not "appropriate opinion testimony from a lay witness, because it

actually [called] for a medical expertise, which Ms. Vandercook simply [did] not have." The trial court rejected defendant's argument, reiterating its earlier ruling that the lay opinion testimony was admissible under MRE 701. Vandercook went on to testify that she wrote in her claims log that, given the acute findings in the emergency room and the fact that Debra underwent surgery, there was "enough to support [serious impairment of body function]" regarding the chest, neck, and lower-back injuries suffered by Debra. Vandercook clarified that this note in her claims log "was a preliminary assessment [that she] made based on the records [she] had at that time." On cross-examination, Vandercook testified that her statement in her claims log was based on an assumption that Debra's lower-back surgery was related to the accident. Vandercook testified that although she initially thought Debra had suffered a serious impairment of body function, she changed her mind when she obtained the medical files from Dr. Abood because those records indicated that the lower-back surgery was not related to the accident but was necessitated by a preexisting lower-back injury and degenerative condition.

On appeal, we must determine whether the trial court abused its discretion by admitting Vandercook's testimony regarding her claims log and by admitting as lay opinion testimony under MRE 701 her initial conclusion that Debra had suffered a threshold injury. Though Vandercook is not a doctor, she testified that she had significant experience in reviewing medical documentation for defendant, she had approved payment of approximately 100 automobile-accident claims, and she had approved payment of those claims after determining that the insured had suffered a serious impairment of body function. MRE 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Because Vandercook's testimony was based on her review of medical records in the ordinary course of her employment, the opinion expressed in her claims log was rationally based on her perceptions, and it was helpful to a clear understanding of her trial testimony and to the determination whether Debra suffered a serious impairment of body function. Though this is certainly a close evidentiary decision, our review of this matter is limited to whether the trial court abused its discretion, and we cannot conclude on the record before us that the trial court's decision on this close evidentiary decision fell outside the range of reasonable and principled outcomes. See *Hecht*, 499 Mich at 604; *Golochowicz*, 413 Mich at 322.

But even if the trial court should not have admitted the adjuster's testimony regarding her claims log and initial conclusions, defendant failed to show that it was more probable than not that the alleged error was outcome-determinative. See *Barnett v Hidalgo*, 478 Mich 151, 172; 732 NW2d 472 (2007); MCR 2.613(A). On cross-examination, Vandercook detailed the meaning of her note. Vandercook testified that she wrote the note under the assumption that Debra's injuries were related to the accident. She clarified that her initial assessment was made before receiving Debra's medical files from Dr. Abood and that she changed her opinion after reviewing those files. The files showed that Debra had a history of lower-back pain that was severely aggravated two months before the accident at issue. Given Vandercook's explanation, the jury was not left

with the impression that the note in her claims log reflected her final assessment of whether Debra's condition resulted from the accident and qualified as a serious impairment of body function, and defendant has failed to otherwise establish that it was more probable than not that the alleged error was outcome-determinative.

Defendant also argues that Vandercook's testimony was inadmissible because the existence of a threshold injury is a legal conclusion, and witness testimony regarding a legal conclusion is improper. However, the authority relied on by defendant for this assertion provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *Downie v Kent Prod, Inc*, 420 Mich 197, 204-205; 362 NW2d 605 (1984) (quotation marks and citation omitted). "The admissibility of such a statement should not be questioned merely because the determination of liability may turn on whether the jury believes or disbelieves that opinion." *Id*. at 206. Vandercook's claims-log entry, wherein she expressed the opinion that Debra had suffered a serious impairment of body function, was not rendered inadmissible simply because the jury may have believed Vandercook's initial evaluation of the seriousness and extent of Debra's injuries. Accordingly, we conclude that the trial court's denial of defendant's motion for a new trial, which was based on the allegedly improper admission of Vandercook's testimony, was not an abuse of discretion.

Lastly, defendant argues that the trial court abused its discretion by awarding attorney fees to plaintiffs under the offer-of-judgment rule in MCR 2.405(D)(1).

We disagree. "We review for an abuse of discretion a trial court's award of attorney fees and costs." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id*.

Before trial, the parties participated in case evaluation, which resulted in a nonunanimous award. Defendant filed an offer of judgment for $10,000 with respect to David and $50,000 with respect to Debra. Plaintiffs filed counteroffers of judgment for $150,000 with respect to David and $200,000 with respect to Debra. None of the offers of judgment was accepted. The average offer of judgment was $80,000 with respect to David and $125,000 with respect to Debra. MCR 2.405. Following a four-day jury trial in which verdicts were rendered in favor of both plaintiffs, the trial court entered an award of $179,481.65 for David and $1,324,112.68 for Debra.

On July 20, 2016, plaintiffs moved for an award of attorney fees under MCR 2.405(D)(1). Plaintiffs requested $135,650 in attorney fees and $15,465.67 in taxable costs. Defendant opposed the motion, arguing that the trial court should decline to award attorney fees pursuant to the "interest of justice" exception set forth in MCR 2.405(D)(3). MCR 2.405(D) provides, in pertinent part, as follows:

> Imposition of Costs Following Rejection of Offer. If an offer is rejected, costs are payable as follows:
>
> (1) If the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action.

* * *

> (3) The court shall determine the actual costs incurred. *The court may, in the interest of justice, refuse to award an attorney fee under this rule*. [Emphasis added.]

On December 14, 2016, the trial court entered an order granting in part and denying in part plaintiffs' motion for an award of attorney fees and costs, awarding $120,820 in attorney fees and $7,840.67 in taxable costs. The trial court specifically rejected defendant's argument that the trial court should deny plaintiffs' motion based on the interest-of-justice exception set forth in MCR 2.405(D)(3). The trial court reasoned as follows:

> After review, this Court finds that the interest of justice exception does not apply in the present case because the public policy of litigating the legal issues of first impression in this case do not override the weight of MCR 2.405 in promoting a just, speedy, and economical determination of every action. MCR 1.105. Additionally, the issues of first impression were litigated and decided prior to the Counteroffers of Judgment. The only fee requested for time expended on those issues was 3.80 hours utilized on a Motion for Reconsideration of the Court's March 14, 2016 Order Excluding Evidence of the Prior Settlement Amount and the UIM Policy Limits, by Plaintiffs' counsel, Mr. Nolan, on April 4, 2016 for a total of $2,280.00. The Motion for Reconsideration was denied by the Court in an Order dated April 5, 2016. Further, Plaintiffs' requested attorney fees only began to accrue on March 22, 2016, which was 21 days after the Counteroffers of Judgment were filed with the Court; therefore, Defendant had expressly rejected the Counteroffers of Judgment at that time pursuant to MCR 2.405(C) and all requested attorney fees, except the $2,280.00 expended on the Motion for Reconsideration, were actually necessitated by Defendant's refusal to accept the Counteroffers of Judgment. Thus, Plaintiffs are entitled to their actual fees including attorney fees less the $2,280.00 pursuant to MCR 2.405(D)(1).

"The purpose of MCR 2.405 is to encourage parties to settle matters prior to trial." *Sanders v Monical Machinery Co*, 163 Mich App 689, 693; 415 NW2d 276 (1987). In *Sanders*, this Court stated that MCR 2.405(D) "should, in our opinion, be routinely enforced and attorney fees granted." *Id*. at 692. Therefore, a grant of attorney fees under MCR 2.405(D) "should be the rule rather than the exception." *Butzer v Camelot Hall Convalescent Centre, Inc (After Remand)*, 201 Mich App 275, 278; 505 NW2d 862 (1993). "To conclude otherwise would be to expand the 'interest of justice' exception to the point where it would render the rule ineffective." *Id*. at 278-279. "What constitutes 'in the interest of justice' must be decided on a case-by-case basis." *Lamson v Martin (After Remand)*, 216 Mich App 452, 463; 549 NW2d 878 (1996).

Defendant relies on *Luidens v 63rd Dist Court*, 219 Mich App 24, 35; 555 NW2d 709 (1996), for the assertion that "a case involving a legal issue of first impression or a case involving an issue of public interest that should be litigated are examples of unusual circumstances in which it might be in the 'interest of justice' not to award attorney fees under MCR 2.405." However, defendant admits in its appellate brief in Docket No. 336351 that "[t]he central issue at trial was whether the Plaintiffs suffered 'threshold injuries' as a result of the at-fault driver's negligence." There was no issue of first impression related to the question of whether either plaintiff suffered a serious impairment of body function. Further, there was no issue of first impression as to the discoverability of the insurance adjuster's claims log, the admissibility of testimony concerning the contents of that claims log, or the admissibility of the adjuster's testimony regarding her initial conclusion that Debra had suffered a serious impairment of body

function. The only legal issue that the trial court described as an issue of first impression was the question whether, in a UIM case, the amount of the UIM policy limits should be admitted into evidence. The trial court resolved that issue in defendant's favor by ruling that the amounts in plaintiffs' UIM policy were not admissible at trial. Therefore, the issue of first impression did not affect the jury's decision that both plaintiffs had suffered a serious impairment of body function, nor did it affect the jury's decision to award plaintiffs damages.

Defendant argues that the issue of first impression regarding the admissibility of the UIM policy limits affected the settlement value of the case and therefore affected the offers of judgment. However, at the time the offers and counteroffers of judgment were made, both defendant's counsel and plaintiffs' counsel stated on the record that they believed the maximum amount each plaintiff could recover from defendant pursuant to the UIM policy was $200,000. Therefore, the admissibility of the UIM policy limits clearly did not affect the settlement value of the case for purposes of the offers and counteroffers of judgment. Accordingly, plaintiffs still qualify for an award of attorney fees under MCR 2.405(D)(1),[9] and we affirm the trial court's award of attorney fees to plaintiffs.

The trial court's judgment at issue in Docket No. 334157 is reversed in part, and the case is remanded to the trial court to enter judgment in favor of Debra and against defendant in the amount of $200,000. In all other respects, the orders at issue in Docket Nos.

[9] We note that, even after Debra's award is adjusted to reflect the UIM policy limits, she is still entitled to costs pursuant to MCR 2.405(D)(1).

334157 and 336351 are affirmed. No taxable costs pursuant to MCR 7.219 are awarded, neither party having prevailed in full.

BECKERING, P.J., and CAMERON, J., concurred with O'BRIEN, J.

KALIN v FLEMING

Docket No. 336724. Submitted November 14, 2017, at Lansing. Decided November 21, 2017, at 9:05 a.m.

Plaintiff, Jason R. Kalin, moved for custody, parenting time, and child support in the Ingham Circuit Court following his separation from defendant, Paige K. Fleming, in April 2015. Kalin and Fleming had been in a relationship, and Fleming gave birth to a child on March 11, 2012. On March 12, 2012, both Kalin and Fleming signed an affidavit of parentage. Kalin and Fleming separated in April 2015. In May 2015, Fleming would not let Kalin see the child and informed Kalin in a text message that he was not the child's father. Kalin then brought the instant action. On July 11, 2015, Fleming moved for an extension of time to set aside Kalin's affidavit of parentage on the basis of misrepresentation and misconduct. Fleming then filed an amended motion for an extension of time, adding mistake of fact as a basis for seeking an extension and asserting that Kalin's mistaken belief that he was the child's biological father was the mistake of fact warranting an extension. Kalin moved for summary disposition, arguing that Fleming did not allege facts to excuse the three-year deadline for revoking an acknowledgment of parentage. The court, R. George Economy, J., denied Kalin's motion for summary disposition and granted Fleming's motion for an extension of time to seek to revoke the acknowledgment of parentage. The court rejected Fleming's misrepresentation and misconduct arguments but agreed that Kalin's mistaken belief that he was the child's biological father constituted a mistake of fact that warranted an extension of time for Fleming to seek to revoke paternity. Kalin appealed.

The Court of Appeals *held*:

Under MCL 722.1437(1) of the Revocation of Paternity Act (RPA), MCL 722.1431 *et seq*., the child's mother, the acknowledged father, an alleged father, or a prosecuting attorney may file an action for revocation of an acknowledgment of parentage, and the revocation action must be filed within three years after the child's birth or within one year after the date that the acknowledgment of parentage was signed, whichever is later. However, MCL 722.1443 provides an exception under which a party may request an extension of time to seek revocation of an acknowledgment of parentage.

MCL 722.1443(12) provides that a court may extend the time for filing an action or motion and that a request for extension must be supported by an affidavit signed by the person requesting the extension stating facts that the person satisfied all the requirements for filing an action or motion under the RPA but did not file the action or motion within the time allowed because of one of the following: mistake of fact, newly discovered evidence that by due diligence could not have been found earlier, fraud, misrepresentation or misconduct, and duress. In this case, Fleming filed an extension motion in July 2015, which was more than three years after the child's birth in March 2012; therefore, it was necessary for Fleming to request an extension of the statutory three-year deadline. Fleming asserted Kalin's mistaken belief that he was the child's biological father as the mistake of fact in the affidavit accompanying the extension motion. However, MCL 722.1443(12) requires that the person requesting the extension show that he or she did not timely file the action *because of* one of the five listed exceptions, and Fleming did not allege that *she* was previously unaware of the child's paternity, nor did she allege that a mistaken belief contributed to her delay. Therefore, Fleming's affidavit did not describe a mistake of fact that prevented her from seeking revocation of the acknowledgment of parentage within the three-year deadline. Accordingly, the trial court erred by determining that MCL 722.1443(12) allowed an extension in this case because Fleming's affidavit did not establish an exception to the general rule that a parent must file an action to revoke parentage within three years of the child's birth.

Reversed and remanded.

Cataldo & Meeks PLLC (by *Donald J. Cataldo, II*) for Jason R. Kalin.

Ashley and Zaleski, PC (by *Robert D. Ashley*) for Paige K. Fleming.

Before: O'CONNELL, P.J., and MURPHY and K. F. KELLY, JJ.

PER CURIAM. Plaintiff, Jason Ross Kalin, appeals by delayed leave granted[1] the trial court's order denying

[1] *Kalin v Fleming*, unpublished order of the Court of Appeals, entered May 19, 2017 (Docket No. 336724).

his motion for summary disposition. The trial court also granted a motion filed by defendant, Paige Katherine Fleming, for an extension of time to file an action to revoke Kalin's paternity. We reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

Kalin and Fleming had an on-again, off-again relationship. Fleming gave birth to a child on March 11, 2012. The next day, both Kalin and Fleming signed an affidavit of parentage. The child's birth certificate also lists Kalin as the father. Fleming did not challenge Kalin's signature of the affidavit, and she later admitted that she intentionally did not tell Kalin that there was a possibility that he was not the child's father.

Kalin and Fleming separated in April 2015. In May 2015, Fleming would not let Kalin see the child because their relationship ended. In a text-message conversation, Fleming told Kalin that he was not the child's father. In June 2015, Kalin moved for custody, parenting time, and child support.

On July 11, 2015, Fleming filed a motion for an extension of time to set aside Kalin's affidavit of parentage on the basis of misrepresentation and misconduct. Fleming filed an amended motion for an extension of time, adding mistake of fact as a basis for seeking an extension. Fleming asserted that Kalin's mistaken belief that he was the child's biological father was the mistake of fact warranting an extension.

In addition to opposing Fleming's amended extension motion, Kalin moved for summary disposition under MCR 2.116(C)(7) (statute of limitations) and (8) (failure to state a claim). Kalin argued that Fleming did not allege facts to excuse the three-year deadline for revoking an acknowledgment of parentage. Fleming opposed summary disposition.

The trial court denied Kalin's motion for summary disposition and granted Fleming's motion for an extension of time to seek to revoke the acknowledgment of parentage. The trial court rejected Fleming's misrepresentation and misconduct arguments. However, the trial court agreed that Kalin signed the acknowledgment of parentage under the mistaken belief that he was the child's father, constituting a mistake of fact warranting an extension of time for Fleming to seek to revoke paternity.

II. STANDARD OF REVIEW

We review a trial court's factual findings regarding a revocation of paternity action for clear error. *Rogers v Wcisel*, 312 Mich App 79, 86; 877 NW2d 169 (2015). "The trial court has committed clear error when this Court is definitely and firmly convinced that it made a mistake." *Id*. (quotation marks and citation omitted). This Court reviews de novo questions of statutory interpretation. *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 187; 740 NW2d 678 (2007).

The standards for statutory interpretation are well established:

> The goal of statutory interpretation is to give effect to the Legislature's intent. If a statute's language is clear, this Court assumes that the Legislature intended its plain meaning and enforces it accordingly. In doing so, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory. While generally words and phrases used in a statute should be assigned their primary and generally understood meaning, words and phrases which have a technical or special meaning in the law should be construed according to that technical or special meaning[.] Statutory language should be construed reasonably, keeping in mind the purpose of the act,

> and to avoid absurd results. [*Rogers*, 312 Mich App at 86-87 (quotation marks and citations omitted; alteration in original).]

III. ANALYSIS

The Revocation of Paternity Act, MCL 722.1431 *et seq*., defines an "acknowledged father" as "a man who has affirmatively held himself out to be the child's father by executing an acknowledgment of parentage under the acknowledgment of parentage act, . . . MCL 722.1001 to 722.1013." MCL 722.1433(a). A signed acknowledgment of parentage "establishes paternity . . . ." MCL 722.1004.

The child's "mother, the acknowledged father, an alleged father, or a prosecuting attorney may file an action for revocation of an acknowledgment of parentage." MCL 722.1437(1). An affidavit accompanying the motion must assert one of five statutory bases for revocation:

> (a) Mistake of fact.
>
> (b) Newly discovered evidence that by due diligence could not have been found before the acknowledgment was signed.
>
> (c) Fraud.
>
> (d) Misrepresentation or misconduct.
>
> (e) Duress in signing the acknowledgment. [MCL 722.1437(4).]

A revocation action "shall be filed within 3 years after the child's birth or within 1 year after the date that the acknowledgment of parentage was signed, whichever is later." MCL 722.1437(1). The term "shall" is mandatory. *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008). Accordingly, MCL 722.1437 provides no basis under which a parent may file an action for

the revocation of paternity later than three years after the child's birth or later than one year after the signing of the acknowledgment of parentage.

However, MCL 722.1443 provides an exception under which a party may request an extension of time to seek revocation of an acknowledgment of parentage:

> (12) A court may extend the time for filing an action or motion under this act. A request for extension shall be supported by an affidavit signed by the person requesting the extension stating facts that the person satisfied all the requirements for filing an action or motion under this act but did not file the action or motion within the time allowed under this act because of 1 of the following:
>
> (a) Mistake of fact.
>
> (b) Newly discovered evidence that by due diligence could not have been found earlier.
>
> (c) Fraud.
>
> (d) Misrepresentation or misconduct.
>
> (e) Duress.

In this case, Fleming filed an extension motion in July 2015, which was more than three years after the child's birth in March 2012.[2] Therefore, it was necessary for Fleming to request an extension of the statutory three-year deadline. To merit an extension, Fleming was required to show that one of the five exceptions listed in MCL 722.1443(12) prevented her from moving for revocation of the acknowledgment of parentage within the three-year period.

Fleming argued that a mistake of fact provided the basis for extending the time for filing. A "mistake of fact" is " 'a misunderstanding, misapprehension, error,

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[2] Because Kalin and Fleming signed the affidavit of parentage the day after the child was born, the three-year deadline is the later deadline. See MCL 722.1437(1).

fault, or ignorance of a material fact, a belief that a certain fact exists when in truth and in fact it does not exist.' " *Rogers*, 312 Mich App at 95, quoting *Montgomery Ward & Co v Williams*, 330 Mich 275, 279; 47 NW2d 607 (1951). "[E]vidence that a party acted in part on an erroneous belief is sufficient under MCL 722.1437(2) to establish a mistake of fact." *Rogers*, 312 Mich App at 96.

Fleming asserted Kalin's mistaken belief that he was the child's biological father as the mistake of fact. While Kalin's mistaken belief that he was the child's father may constitute a mistake of fact, MCL 722.1443(12) requires that the person requesting the extension show that she did not timely file the action *because of* one of the five listed exceptions. Fleming did not allege that *she* was previously unaware of the child's paternity, nor did she allege that a mistaken belief contributed to her delay. Thus, Fleming's affidavit did not describe a mistake of fact that prevented her from seeking revocation of the acknowledgment of parentage within the three-year deadline. Accordingly, the trial court erred by determining that MCL 722.1443(12) allowed an extension in this case because Fleming's affidavit did not establish an exception to the general rule that a parent must file an action to revoke parentage within three years of the child's birth.

Fleming relies on cases discussing a mistake of fact supporting revocation of paternity. Her reliance is unavailing because none of these cases arose from an extension motion to bring an untimely revocation action. See *Rogers*, 312 Mich App 79; *Helton v Beaman*, 304 Mich App 97; 850 NW2d 515 (2014); *Bay Co Prosecutor*, 276 Mich App 183. Whether Fleming's affidavit described a mistake of fact that excused the

filing deadline is a separate question from whether Kalin's mistake of fact could support a timely revocation action. Because Fleming's affidavit did not establish a mistake of fact that prevented her from meeting the filing deadline, the trial court erred by granting Fleming's extension motion.[3]

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

O'CONNELL, P.J., and MURPHY and K. F. KELLY, JJ., concurred.

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[3] Fleming does not argue on appeal that misrepresentation and misconduct warranted an extension. Therefore, she has abandoned these arguments on appeal. See *Villadsen v Mason Co Rd Comm*, 268 Mich App 287, 303; 706 NW2d 897 (2005). Moreover, the events she described to support these arguments all predated the expiration of the statutory three-year filing deadline, and she did not show how they prevented her from filing a timely revocation action.

PEOPLE v SEADORF

Docket No. 335592. Submitted November 14, 2017, at Grand Rapids. Decided November 21, 2017, at 9:10 a.m.

Defendant, James D. Seadorf, was charged in the Kent Circuit Court with four criminal counts: Count 1, commercial child sexually abusive activity, MCL 750.145c(2); Count 2, using a computer to commit a crime, MCL 752.797(3)(f), punishable by imprisonment of up to 20 years; Count 3, possession of child sexually abusive material, MCL 750.145c(4); and Count 4, using a computer to commit a crime, MCL 752.797(3)(d), punishable by imprisonment of up to 7 years. Defendant had used a computer to download child pornography for personal possession and use at home. Pursuant to a plea agreement, defendant pleaded guilty to Counts 1 and 4 in exchange for the dismissal of Counts 2 and 3. Defendant admitted to downloading the child sexually abusive material, and police officers discovered the material on defendant's cell phone and computer hard drive. The court, George S. Buth, J., accepted defendant's guilty plea and sentenced defendant to 3 to 20 years' imprisonment for the MCL 750.145c(2) violation and one to seven years' imprisonment for the MCL 752.797(3)(d) violation. Defendant moved to withdraw his guilty plea, arguing that his plea to a 20-year felony under MCL 750.145c(2) should be vacated because he was not involved in the production, distribution, or promotion of child sexually abusive material but instead only downloaded the material and therefore was guilty of the four-year-maximum felony under MCL 750.145c(4). The court denied the motion, and defendant appealed.

The Court of Appeals *held*:

1. MCL 750.145c(2) provides, in pertinent part, that a person who makes or copies, or a person who attempts to make or copy, any child sexually abusive activity or child sexually abusive material for personal, distributional, or other purposes is guilty of a felony punishable by imprisonment for not more than 20 years. In 2012 PA 583, effective March 1, 2013, the Legislature amended the language of MCL 750.145c to include a definition of "make" as "to bring into existence by copying, shaping, changing, or combin-

ing material, and specifically includes, but is not limited to, intentionally creating a reproduction, copy, or print of child sexually abusive material, in whole or part." The definition further provides that "make" does not include the creation of an identical reproduction or copy of child sexually abusive material within the same digital storage device or the same piece of digital storage media. Additionally, 2012 PA 583 modified the statutory language of MCL 750.145c(2) to include the words "copies, reproduces" and "for personal, distributional, or other purposes." In this case, defendant admitted to downloading child sexually abusive material, and several such images and videos were found on defendant's phone and computer. Because defendant saved new images and videos into folders, he created new copies of the content; thus, defendant "made" content. While simply viewing an image on the Internet does not amount to "making" content because the individual has not actually copied the image yet, copying an image that is either stored on a computer hard drive or burned to a CD-ROM or other digital media storage device is considered "making" content. Therefore, the trial court did not abuse its discretion by denying defendant's motion to withdraw his guilty plea because there was a sufficient factual basis to show that defendant downloaded child sexually abusive material.

2. A defendant waives appellate review of a sentence that exceeds the guidelines by understandingly and voluntarily entering into a plea agreement to accept that specific sentence. This same logic applies to pleas that result in downward departures from the sentencing guidelines; therefore, defendant waived appellate review of the reasonableness of his sentence and was not entitled to resentencing.

Affirmed.

1. CRIMINAL LAW — CHILD SEXUALLY ABUSIVE MATERIAL — WORDS AND PHRASES — "MAKES."

MCL 750.145c(2) provides, in pertinent part, that a person who makes or copies, or a person who attempts to make or copy, any child sexually abusive activity or child sexually abusive material for personal, distributional, or other purposes is guilty of a felony punishable by imprisonment for not more than 20 years; the term "makes" includes downloading an image; while simply viewing an image on the Internet does not amount to making content because the individual has not actually copied the image yet, copying an image that is either stored on a computer hard drive or burned to a CD-ROM or other digital media storage device is considered making content.

2. APPEAL — SENTENCES — PLEA AGREEMENTS — SENTENCING DEPARTURES.

A defendant waives appellate review of a sentence that exceeds the sentencing guidelines by understandingly and voluntarily entering into a plea agreement to accept that specific sentence; this same logic applies to pleas that result in downward departures from the sentencing guidelines.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Christopher R. Becker*, Prosecuting Attorney, and *James K. Benison*, Chief Appellate Attorney, for the people.

Arthur H. Landau for defendant.

Before: SWARTZLE, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM. Defendant, James Daniel Seadorf, appeals by delayed leave his convictions for child sexually abusive activity, MCL 750.145c(2), and using a computer to commit a crime, MCL 752.797(3)(d). Defendant's convictions were entered pursuant to a plea agreement. The trial court sentenced defendant to 3 to 20 years' imprisonment for the child sexually abusive activity conviction and to one to seven years' imprisonment for the using a computer to commit a crime conviction. We affirm.

This case arises from the viewing of child sexually abusive material between the dates of August 1, 2015, and October 27, 2015. During this period, defendant, a 34-year-old male, used a computer to download child pornography for personal possession and use at home. Defendant was charged with four criminal counts: Count 1, commercial child sexually abusive activity, MCL 750.145c(2); Count 2, using a computer to commit a crime, MCL 752.797(3)(f), punishable by imprisonment of up to 20 years; Count 3, possession of child sexually abusive material, MCL 750.145c(4); and

Count 4, using a computer to commit a crime, MCL 752.797(3)(d), punishable by imprisonment of up to 7 years.

Pursuant to a plea agreement, defendant pleaded guilty to Counts 1 and 4 in exchange for the dismissal of Counts 2 and 3. Defendant admitted to downloading the child sexually abusive material. Upon searching defendant's phone, police officers located several photo albums containing child sexually abusive material. A further investigation into defendant's home computer revealed several images and videos of child sexually abusive material saved on defendant's computer hard drive. The trial court accepted defendant's guilty plea.

Defendant appeared before the trial court for sentencing and received concurrent terms of incarceration as noted above. The sentencing guidelines were determined to be 45 to 75 months for the most serious felony. But by agreement, the sentencing guidelines were modified to 30 to 50 months. Before sentencing, a discussion in chambers took place indicating that an appropriate sentence for defendant would be 36 months. Defendant asked the trial court to impose this as a minimum sentence, and the trial court responded that it was "sentencing within the guidelines, consistent with the plea agreement."

Defendant moved to withdraw his guilty plea in the Kent Circuit Court. Defendant argued that his guilty plea to a 20-year felony should be vacated because he was not involved in the production, distribution, or promotion of child sexually abusive activity. Instead, defendant stated that he only downloaded the child sexually abusive material; thus, he was guilty of the four-year-maximum felony under MCL 750.145c(4) and not the 20-year felony under MCL 750.145c(2). The trial court denied the motion.

A trial court's decision on a motion to withdraw a guilty plea made after sentencing will not be disturbed on appeal unless there is a clear abuse of discretion. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *People v Fonville*, 291 Mich App 363, 376; 804 NW2d 878 (2011). Questions of statutory interpretation are reviewed de novo. *People v Flick*, 487 Mich 1, 8-9; 790 NW2d 295 (2010).

Defendant first argues that the trial court abused its discretion by denying defendant's motion to withdraw his guilty plea because his plea was not accurate. We disagree.

A "defendant may file a motion to withdraw the plea within 6 months after sentence." MCR 6.310(C). Most importantly, "[a] defendant seeking to withdraw his or her plea after sentencing must demonstrate a defect in the plea-taking process." *People v Brown*, 492 Mich 684, 693; 822 NW2d 208 (2012). If the trial court finds such an error, "the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea." MCR 6.310(C). Once it has been accepted by the trial court, there is no absolute right to withdraw a guilty plea. *Effinger*, 212 Mich App at 69.

When a "defendant pleads guilty, the court, by questioning the defendant, must establish support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading." MCR 6.302(D)(1). "The court may not accept a plea of guilty . . . unless it is convinced that the plea is understanding, voluntary, and accurate." MCR 6.302(A).

MCL 750.145c(2) provides:

> A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material, or a person who arranges for, produces, *makes*, *copies*, reproduces, or finances, or a person who attempts or prepares or conspires to arrange for, produce, *make*, *copy*, reproduce, or finance any child sexually abusive activity or child sexually abusive material for personal, distributional, or other purposes is guilty of a felony, punishable by imprisonment for not more than 20 years, or a fine of not more than $100,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child. [Emphasis added.]

Defendant claims he was only guilty of violating MCL 750.145c(4), which states:

> A person who knowingly possesses or knowingly seeks and accesses any child sexually abusive material is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $10,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child.

Defendant believes that his guilty plea was not accurate or appropriate because he only downloaded image files for personal use; therefore, he should not be found guilty of the 20-year felony for child sexually abusive activity because there was no sufficient factual basis to support his guilty plea.

In 2012, however, the Legislature adopted 2012 PA 583, which, effective March 1, 2013, amended the language of MCL 750.145c to include a definition of "make" as:

> to bring into existence by *copying*, shaping, changing, or combining material, and specifically includes, but is not limited to, intentionally creating a reproduction, copy, or print of child sexually abusive material, in whole or part. Make does not include the creation of an identical reproduction or copy of child sexually abusive material within the same digital storage device or the same piece of digital storage media. [MCL 750.145c(1)(j) (emphasis added); see 2012 PA 583.]

Additionally, the statutory language of MCL 750.145c(2) was modified to include the words "copies, reproduces" and "for personal, distributional, or other purposes." See 2012 PA 583.

Defendant's argument that the term "makes," as used in MCL 750.145c(2) (the child sexually abusive activity statute), does not include downloading an image is incorrect. While simply viewing an image on the Internet does not amount to "making" content because the individual has not actually copied the image yet, copying an image that is either stored on a computer hard drive or burned to a CD-ROM or other digital media storage device is considered "making" content. Defendant admits to downloading child sexually abusive material, and several images and videos were found on defendant's phone and computer. Because defendant saved new images and videos into folders, he created new copies of the content; thus, defendant "made" content. Although the term "download" has multiple meanings, "[i]t is often used to refer to actively saving a copy of a file to a computer's hard drive . . . ." *Flick*, 487 Mich at 30 n 7 (CAVANAGH, J., concurring in part and dissenting in part). Per MCL 750.145c(2), "copying"

child sexually abusive material falls into the 20-year felony offense.

Defendant's second argument on appeal is that his sentence was unreasonable and violated the Sixth Amendment and *People v Lockridge*, 498 Mich 358, 365; 870 NW2d 502 (2015). Defendant has waived appellate review of this issue.

In this case, defendant pleaded guilty. "[A] defendant waives appellate review of a sentence that exceeds the guidelines by understandingly and voluntarily entering into a plea agreement to accept that specific sentence." *People v Wiley*, 472 Mich 153, 154; 693 NW2d 800 (2005). In *People v Cobbs*, 443 Mich 276, 285; 505 NW2d 208 (1993), the Court held that "a defendant who pleads guilty or nolo contendere with knowledge of the sentence, and who later seeks appellate sentence relief under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), must expect to be denied relief on the ground that the plea demonstrates the defendant's agreement that the sentence is proportionate to the offense and offender." Although defendant's guilty plea sentence did not exceed the guidelines, the same logic can be applied for pleas that result in downward departures from the sentencing guidelines.

Consequently, the trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea because there is a sufficient factual basis to show that defendant downloaded child sexually abusive material. Additionally, defendant waived appellate review of the reasonableness of his sentence; therefore, defendant is not entitled to resentencing.

We affirm.

SWARTZLE, P.J., and SAWYER and MARKEY, JJ., concurred.

RENTSCHLER v MELROSE TOWNSHIP

Docket No. 336333. Submitted November 7, 2017, at Grand Rapids. Decided November 28, 2017, at 9:00 a.m.

Petitioner, David N. Rentschler, appealed in the Michigan Tax Tribunal (the Tribunal) following Melrose Township's denial of his claim for a principal residence exemption (PRE) under MCL 211.7cc on property located in Boyne City for the 2013, 2014, and 2015 tax years. After a hearing, the Tribunal found that petitioner was the owner of the property, that the property was residential, and that petitioner had occupied the property for the majority of the relevant tax years; however, the Tribunal denied the PRE claim on the basis of a guideline provided in the Michigan Department of Treasury's Guidelines for the Michigan Principal Residence Exemption Program (PRE guidelines). The relevant guideline stated that "if an owner rents his property for more than 14 days a year, the property is not entitled to a principal residence exemption." Because petitioner had rented out the residence for more than 14 days during each year, the Tribunal concluded that petitioner was not entitled to a PRE under MCL 211.7cc for the relevant tax years. Petitioner appealed.

The Court of Appeals *held*:

1. Michigan's principal residence exemption is governed by MCL 211.7cc and MCL 211.7dd of the General Property Tax Act (GPTA), MCL 211.1a *et seq*. MCL 211.7cc(1) provides, in pertinent part, that a principal residence is exempt from the tax levied by a local school district for school operating purposes if an owner of that principal residence claims an exemption. MCL 211.7cc(2) provides, in pertinent part, that an owner of property may claim one exemption under this section by filing an affidavit stating that the property is owned and occupied as a principal residence by that owner of the property on the date that the affidavit is signed and shall state that the owner has not claimed a substantially similar exemption, deduction, or credit on property in another state. In this case, the Tribunal supported its adherence to the PRE guidelines by citing provisions within MCL 211.7dd; however, those provisions were inapplicable to this case because

the provisions dealt with multiple-unit dwellings and adjoining or contiguous property, neither of which was at issue in this case. The Tribunal concluded that petitioner satisfied the requirements in MCL 211.7cc, and nothing in the GPTA disqualified him from claiming a PRE for the relevant tax years; therefore, petitioner satisfied the legal requirements to qualify for the PRE.

2. MCL 24.207(h) provides, in pertinent part, that a rule issued by the Department of Treasury does not include a guideline or other material that in itself does not have the force and effect of law but is merely explanatory. Therefore, Michigan PRE guidelines do not have the force of a legal requirement. The PRE guideline at issue in this case—the guideline providing that an owner who rents his or her property for more than 14 days a year is not entitled to a PRE—is contrary to the GPTA. Nothing in the GPTA disqualifies a property from primary residence status simply because the residence has been rented for 15 days or more. While the guideline cited federal tax law, this comparison was unavailing because the relevant federal income tax provisions, including 26 USC 280A, did not support the PRE guideline. Accordingly, the PRE guideline provision relied on by the Tribunal was erroneous and inconsistent with the GPTA because renting one's home for more than 14 days a year does not disqualify a homeowner from the PRE.

Reversed and remanded for entry of a judgment granting petitioner's request for a PRE for the 2013, 2014, and 2015 tax years.

TAXATION — GENERAL PROPERTY TAX ACT — PRINCIPAL RESIDENCE EXEMPTION — RENTAL OF PROPERTY.

Michigan's principal residence exemption is governed by MCL 211.7cc and MCL 211.7dd of the General Property Tax Act (GPTA), MCL 211.1a *et seq*.; nothing in the GPTA disqualifies a property from primary residence status simply because the residence has been rented for more than 14 days during the taxable year.

John R. Turner for David N. Rentschler.

Before: HOEKSTRA, P.J., and STEPHENS and SHAPIRO, JJ.

SHAPIRO, J. Petitioner appeals the decision of the Michigan Tax Tribunal (the Tribunal) that he was not entitled to a principal residence exemption (PRE) under

MCL 211.7cc for the 2013, 2014, and 2015 tax years. Because the Tribunal made an error of law, we reverse.[1]

I. FACTS AND TAX TRIBUNAL PROCEEDINGS

Petitioner is the owner of property located in Boyne City, Michigan (the property). Petitioner applied for a PRE on the property. On December 12, 2015, respondent issued a notice denying petitioner's PRE claim for the 2013, 2014, and 2015 tax years for two reasons. First, it stated that "[t]he property claimed is not the owner's principal residence," and second, that the "[o]wners employment [sic] out of state. Property possibly rented during part of year." Petitioner appealed in the Michigan Tax Tribunal, contesting respondent's factual assertions and contending that he should be granted a PRE on the property. In support of his appeal, petitioner submitted an affidavit stating that the property had been his principal residence for the relevant tax years. He presented proofs that during each year, he had been registered to vote at that address and that this was the address listed on his driver's license and tax returns. Petitioner also averred that he had not claimed "a substantially similar exemption on property in another state."[2]

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[1] In the absence of fraud, this Court reviews the Michigan Tax Tribunal's decision for "misapplication of the law or adoption of a wrong principle." *EldenBrady v City of Albion*, 294 Mich App 251, 254; 816 NW2d 449 (2011) (quotation marks and citation omitted). "[F]actual findings are conclusive if supported by competent, material, and substantial evidence on the whole record." *Benedict v Dep't of Treasury*, 236 Mich App 559, 563; 601 NW2d 151 (1999) (quotation marks and citation omitted). This Court reviews matters of statutory interpretation de novo. *EldenBrady*, 294 Mich App at 254.

[2] Respondent does not contend that petitioner has requested a similar exemption as to his Ohio—or any other—property.

After a hearing, the Tribunal accepted petitioner's factual claims. It found that petitioner was the owner of the property, that the property was residential, and that petitioner had occupied the property for the majority of the 2013, 2014, and 2015 tax years. Nevertheless, the Tribunal denied the PRE because petitioner had rented out the residence for more than 14 days during each year. It relied on the Michigan Department of Treasury's Guidelines for the Michigan Principal Residence Exemption Program (PRE guidelines). The relevant PRE guideline states: "[I]f an owner rents his property for more than 14 days a year, the property is not entitled to a principal residence exemption."[3] The Tribunal noted:

> [T]he . . . guidelines do not have the force of law. However, agency interpretations are granted respectful consideration, and if persuasive, should not be overruled without cogent reasons. The Tribunal, finding no cogent reason to disregard the Department's guidelines, is persuaded that Petitioner's leasing of the subject property negates entitlement to a principal residence exemption. [Quotation marks and citation omitted.]

On the basis of this guideline, the Tribunal concluded that petitioner was not entitled to a PRE under MCL 211.7cc for the 2013, 2014, and 2015 tax years. Petitioner appeals that determination.

II. LEGAL ANALYSIS

"Michigan's principal residence exemption, also known as the 'homestead exemption,' is governed by §§ 7cc and 7dd of the General Property Tax Act, MCL 211.7cc and MCL 211.7dd." *EldenBrady v City of*

[3] Michigan Department of Treasury, *Guidelines for the Michigan Principal Residence Exemption Program* (revised September 2014), p 6, ch 4, ¶ 20.

Albion, 294 Mich App 251, 256; 816 NW2d 449 (2011). MCL 211.7cc(1) provides, in pertinent part, that "[a] principal residence is exempt from the tax levied by a local school district for school operating purposes . . . if an owner of that principal residence claims an exemption as provided in this section."

Further, MCL 211.7cc(2) provides, in pertinent part:

> [A]n owner of property may claim 1 exemption under this section by filing an affidavit . . . . The affidavit shall state that the property is owned and occupied as a principal residence by that owner of the property on the date that the affidavit is signed and shall state that the owner has not claimed a substantially similar exemption, deduction, or credit on property in another state.

On appeal, petitioner points out that the Tribunal concluded that he satisfies each of these requirements. He further argues that the General Property Tax Act (GPTA), MCL 211.1a *et seq*., itself does not contain any language that would disqualify him and that the PRE guideline is contrary to the clear and unambiguous language of the GPTA.[4] We agree with petitioner.

In support of its adherence to the PRE guidelines, the Tribunal cited the second and third sentences of MCL 211.7dd(c). The Tribunal's opinion reads, in pertinent part:

> [W]hen the second and third sentences of MCL 211.7dd(c) are read in conjunction with one another, it is clear that the Legislature intended a principal residence to include

[4] " 'This Court's primary task in construing a statute is to discern and give effect to the intent of the Legislature.' " *EldenBrady*, 294 Mich App at 254, quoting *Shinholster v Annapolis Hosp*, 471 Mich 540, 548-549; 685 NW2d 275 (2004). This Court must give effect to every word, clause, and sentence in a statute. *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). "Where the language of the statute is clear and unambiguous, the Court must follow it." *Id*.

> only that portion of the property that is owned and occupied by the owner (as a principal residence), *unless* the portion that is unoccupied, and rented or leased to another, is less than 50% of the total square footage of living space.

The Tribunal wrongly applied the cited provisions within MCL 211.7dd(c). The second sentence of MCL 211.7dd(c) deals with multiple-unit dwellings and provides, "Except as otherwise provided in this subdivision, principal residence includes only that portion of a dwelling or unit in a multiple-unit dwelling that is subject to ad valorem taxes and that is owned and occupied by an owner of the dwelling or unit." Petitioner's property is not a multiple-unit dwelling; therefore, this sentence does not apply. The third sentence of MCL 211.7dd(c) provides, "Principal residence also includes all of an owner's unoccupied property classified as residential that is adjoining or contiguous to the dwelling subject to ad valorem taxes and that is owned and occupied by the owner." This sentence is also inapplicable to the present case because there is no adjoining or contiguous property at issue.

The other statutory provision cited by the Tribunal is MCL 211.27a(11), which defines "commercial purpose" as "used in connection with any business or other undertaking intended for profit, but does not include the rental of residential real property for a period of less than 15 days in a calendar year." However, that definition, by its own terms, is limited to MCL 211.27a.[5] In addition, the use of the term in MCL 211.27a is limited to whether residential property transfers within a family trigger a reassessment of the property's equalized value. And MCL 211.27a does not

[5] MCL 211.27a(11) states that the definitions it provides define the term "[a]s used in this section."

provide that a property used for commercial purposes necessarily loses its status as a residential property.

We also note that MCL 211.7cc(3) sets forth multiple scenarios disqualifying a property from receiving a PRE exemption, none of which applies to the petitioner in this case.[6]

Given that petitioner meets all the statutory qualifications for the PRE and does not fall within any

[6] MCL 211.7cc(3) states, in pertinent part:

> [A] person is not entitled to an exemption under this section in any calendar year in which any of the following conditions occur:
>
> (a) That person has claimed a substantially similar exemption, deduction, or credit, regardless of amount, on property in another state. . . .
>
> (b) Subject to subdivision (a), that person or his or her spouse owns property in a state other than this state for which that person or his or her spouse claims an exemption, deduction, or credit substantially similar to the exemption provided under this section, unless that person and his or her spouse file separate income tax returns.
>
> (c) That person has filed a nonresident Michigan income tax return, except active duty military personnel stationed in this state with his or her principal residence in this state.
>
> (d) That person has filed an income tax return in a state other than this state as a resident, except active duty military personnel stationed in this state with his or her principal residence in this state.
>
> (e) That person has previously rescinded an exemption under this section for the same property for which an exemption is now claimed and there has not been a transfer of ownership of that property after the previous exemption was rescinded, if either of the following conditions is satisfied:
>
> (*i*) That person has claimed an exemption under this section for any other property for that tax year.
>
> (*ii*) That person has rescinded an exemption under this section on other property, which exemption remains in effect for that tax year, and there has not been a transfer of ownership of that property.

disqualification, the question is whether the PRE guideline on which the Tribunal relied properly states the law. We hold that it does not.

Michigan PRE guidelines do not have the force of a legal requirement. MCL 205.3(f) provides that the Department of Treasury "may periodically issue bulletins that index and explain current department interpretations of current state tax laws." The statute also makes a separate provision for rules issued by the Department. MCL 205.3(b).[7] Under MCL 24.207(h), a rule does not include "[a] form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory." Therefore, while a rule has the force of law, guidelines do not. *Kmart Mich Prop Servs, LLC v Dep't of Treasury*, 283 Mich App 647, 654; 770 NW2d 915 (2009).

The specific guideline on which the Tribunal relied is Chapter 4 (Qualified Principal Residence Property), ¶ 20.[8] The guideline is stated in a question-and-answer format and reads as follows:

> **20. An owner owns property in a resort/lake area. The owner occupies the home the majority of the year but rents it out during the summer and takes an apartment in town. Is the owner entitled to a**

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[7] MCL 205.3(b) provides:

> After reasonable notice and public hearing, the department may promulgate rules consistent with this act in accordance with the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, necessary to the enforcement of the provisions of tax and other revenue measures that are administered by the department.

[8] *Guidelines for the Michigan Principal Residence Exemption Program*, p 6.

> **100% principal residence exemption, a reduced exemption, or no exemption?**
>
> Michigan law does not make any provision for granting a partial exemption based on the percentage of the year that the owner occupied the home as a principal residence. Federal law allows an owner to rent their principal residence for less than 15 days during a calendar year without declaring it as a rental property on their tax return. An owner that would be required to declare rental income on their home is not entitled to a principal residence exemption on that property. Therefore, if an owner rents his property for more than 14 days a year, the property is not entitled to a principal residence exemption.

This PRE guideline is contrary to the GPTA. As discussed earlier, the controlling statutes do not disqualify a property from primary residence status simply because the residence has been rented for 15 days or more. In addition, comparison of the PRE to federal tax law is unavailing. The relevant federal income tax provisions, including 26 USC 280A, do not support the PRE guidelines.[9] Under federal income tax law, a taxpayer may not deduct expenses related to his or her primary residence. However, when the residence is rented out, the owner must report his or her rental income and may deduct the expenses related to rental. The federal statute provides for an exception to this rule when the residence is rented for fewer than 15 days during the taxable year.[10] This does not mean, however, that renting out one's residence for 15 days or

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[9] The purpose of 26 USC 280A is to "prevent a taxpayer from deducting expenses associated with the normal maintenance of his own dwelling unit." *Holmes v United States*, 85 F3d 956, 961 (CA 2, 1996).

[10] 26 USC 280A(g) reads:

> Notwithstanding any other provision of this section or section 183, if a dwelling unit is used during the taxable year by the taxpayer as a residence and such dwelling unit is actually rented for less than 15 days during the taxable year, then—

more causes the house to lose its status as a residence. Rather, federal tax law treats the property as having a dual purpose. The taxpayer is not permitted to deduct all expenses related to the property as would be available if the property were used exclusively as a rental. Instead, the expenses for the maintenance of the home are prorated so that the percentage of the expenses that may be deducted is based on the percentage of days rented in the course of the year. 26 USC 280A(e).

In addition, 26 USC 280A(d)(1) provides that a taxpayer may not claim that a dwelling unit[11] is used solely as a rental property if the taxpayer-owner uses it for personal purposes for more than 14 days or 10% of the number of days it is rented out. In other words, if a homeowner stays in the residence for more than 15 days, the residence is considered to be intended for both personal and rental use. This interpretation contrasts with Michigan's PRE guidelines, which disqualify an owner for PRE when he or she rents the residence for 14 days or more.

Other federal guidance is also available. 26 USC 121 provides for the exclusion of gain from the sale of a "principal residence." The regulations adopted pursuant to this statute, 26 CFR 1.121-1 (2017), provide a definition of "principal residence" that would clearly encompass petitioner's property. Subsection (b) of the regulations provides:

> (1) no deduction otherwise allowable under this chapter because of the rental use of such dwelling shall be allowed, and
>
> (2) the income derived from such use for the taxable year shall not be included in the gross income of such taxpayer under section 61.

[11] "The term 'dwelling unit' includes a house, apartment, condominium, mobile home, boat, or similar property, and all structures or other property appurtenant to such dwelling unit." 26 USC 280A(f)(1)(A).

> (b) *Residence*—(1) *In general*. *Whether property is used by the taxpayer as the taxpayer's residence depends upon all the facts and circumstances*. A property used by the taxpayer as the taxpayer's residence may include a houseboat, a house trailer, or the house or apartment that the taxpayer is entitled to occupy as a tenant-stockholder in a cooperative housing corporation (as those terms are defined in section 216(b)(1) and (2)). Property used by the taxpayer as the taxpayer's residence does not include personal property that is not a fixture under local law.
>
> (2) *Principal residence*. In the case of a taxpayer using more than one property as a residence, whether property is used by the taxpayer as the taxpayer's principal residence depends upon all the facts and circumstances. If a taxpayer alternates between 2 properties, using each as a residence for successive periods of time, *the property that the taxpayer uses a majority of the time during the year ordinarily will be considered the taxpayer's principal residence*. In addition to the taxpayer's use of the property, relevant factors in determining a taxpayer's principal residence, include, but are not limited to—
>
> (i) The taxpayer's place of employment;
>
> (ii) The principal place of abode of the taxpayer's family members;
>
> (iii) The address listed on the taxpayer's federal and state tax returns, driver's license, automobile registration, and voter registration card;
>
> (iv) The taxpayer's mailing address for bills and correspondence;
>
> (v) The location of the taxpayer's banks; and
>
> (vi) The location of religious organizations and recreational clubs with which the taxpayer is affiliated.[12]

For all these reasons, we conclude that the PRE guideline provision relied on by the Tribunal is erroneous and inconsistent with the GPTA. Renting one's

[12] 26 CFR 1.121-1(b) (2017) (emphasis added).

home for more than 14 days does not disqualify a homeowner from the PRE. Accordingly, accepting the Tribunal's factual findings, we conclude that petitioner has satisfied the legal requirements to qualify for the PRE. We therefore reverse the Tribunal's decision and remand for entry of a judgment granting petitioner's request for a PRE for the 2013, 2014, and 2015 tax years. We do not retain jurisdiction.

HOEKSTRA, P.J., and STEPHENS, J., concurred with SHAPIRO, J.

McROBERTS v FERGUSON

Docket No. 337665. Submitted November 15, 2017, at Lansing. Decided November 28, 2017, at 9:05 a.m.

In 2013, the Midland Circuit Court awarded plaintiff, Mary I. McRoberts, and defendant, Kyle A. Ferguson, joint legal custody of their minor child, awarded plaintiff sole physical custody of the child, and awarded defendant parenting time. The court subsequently found plaintiff in contempt of court on three separate occasions for violating the court's visitation orders, specifically by denying defendant—who was in the United States Navy and stationed outside Michigan—in-person visitation when he was in the state, denying Skype visits between defendant and the child, encouraging the child to refer to defendant by his first name and another man as the child's father, failing to enroll the child in counseling, and failing to produce the child at the airport for a prearranged pickup and causing defendant's wife to fly needlessly from California to Michigan for that pickup. In December 2016, in conjunction with the third contempt order, the court sentenced defendant to 30 days in jail and awarded defendant temporary custody of the child. In January 2017, defendant petitioned for sole legal and physical custody of the child. The court, Stephen Carras, J., found that proper cause and change of circumstances existed to revisit the custody order in light of plaintiff's repeated obstruction of defendant's parenting time and relationship with the child; the court placed the burden on defendant to establish by clear and convincing evidence that modifying the custodial environment was in the child's best interests after considering the factors set forth in MCL 722.23 of the Child Custody Act, MCL 722.21 *et seq*. The court concluded that the established custodial environment was with plaintiff, but it found that defendant was favored under six of the MCL 722.23 factors and on that basis granted defendant sole legal and physical custody of the child. Plaintiff appealed.

The Court of Appeals *held*:

1. Under MCL 722.27(1)(c), a trial court may modify or amend its previous judgments or orders for proper cause shown or because of a change of circumstances. The phrase "proper cause" means one or more appropriate grounds that have or could have a significant

effect on the child's life to the extent that the issue of custody should be revisited. A change of circumstances exists for purposes of MCL 722.27(1)(c) when the conditions surrounding custody of the child since entry of the last custody order—which have or could have a significant effect on the child's well-being—have materially changed. While minor allegations of contempt or visitation complaints are insufficient to establish proper cause or change of circumstances under MCL 722.27(1)(c), a parent's repeated violations of parenting-time orders that interfere with the other parent's relationship with the child and result in contempt orders and jail time for the violating parent constitute proper cause for purposes of the statute. In this case, plaintiff's conduct did not constitute minor allegations of contempt. Instead, plaintiff's interference with the child's and defendant's relationship—through her repeated visitation-order violations that resulted in three separate contempt orders and a 30-day jail sentence—constituted proper cause for purposes of MCL 722.27(1)(c) because it could have had a significant effect on the child's life. Accordingly, the trial court's finding that proper cause existed to revisit the custody order was not against the great weight of the evidence. There was also sufficient evidence to establish that a material change of circumstances since the original custody order was entered in 2013 had or would have an effect on the child. Specifically, defendant was in a position to provide full-time physical care for the child because he was no longer deployed at sea, he was married, he had purchased a home in Virginia where he would be located for the foreseeable future, he provided counseling for the child, and he helped her educationally. For those reasons, there was a sufficient change of circumstances for the court to consider a modification of the custody order.

2. In child custody cases, a trial court must consider all the MCL 722.23 best-interest factors and explicitly state its findings and conclusions with respect to each factor. The trial court's findings regarding MCL 722.23 Factors (a), (b), (c), (d), (e), (f), (h), (i), (j), (k), and (*l*) were not against the great weight of the evidence. In light of the facts of the case, the trial court did not abuse its discretion by awarding sole legal and physical custody of the child to defendant.

Affirmed.

PARENT AND CHILD — CHILD CUSTODY — CHANGES OF CUSTODY — CHANGE OF CIRCUMSTANCES.

Under MCL 722.27(1)(c) of the Child Custody Act, MCL 722.21 *et seq*., a trial court may modify or amend its previous judgments

> or orders for proper cause shown or because of change of circumstances; while minor allegations of contempt or visitation complaints are insufficient to establish proper cause or change of circumstances under MCL 722.27(1)(c), a parent's repeated violations of parenting-time orders that interfere with the other parent's relationship with the child and result in contempt orders and jail time for the violating parent constitute proper cause for purposes of the statute.

Balberman & Associates (by *Nick Balberman* and *Grant Munson*) for plaintiff.

Phoebe J. Moore, PC (by *Phoebe J. Moore* and *Melissa L. Williams*) for defendant.

Before: O'CONNELL, P.J., and MURPHY and K. F. KELLY, JJ.

MURPHY, J. In this custody dispute, plaintiff, Mary I. McRoberts, appeals by right the trial court's opinion and order granting the motion of defendant, Kyle A. Ferguson, for sole legal and physical custody of the parties' minor child. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The parties were never married, and their child was born in March 2011. Sometime later that year, defendant joined the United States Navy. It appears that there was little to no communication between the parties until plaintiff sought child support in April 2013. Defendant then sought to revoke paternity and requested DNA testing, which later established defendant's paternity by a high probability. In December 2013, the parties were awarded joint legal custody, and plaintiff was awarded sole physical custody. Defendant was ordered to pay monthly child support.

Since that time, defendant sought and was awarded an increasing amount of parenting time with the child. A reoccurring issue, however, was plaintiff's repeated violations of the court's visitation orders. Specifically, plaintiff denied in-person visitations and Skype visits between the child and defendant. Pursuant to a stipulated order entered in January 2016, the parties resolved various issues that had been brought to the court's attention. Specifically, it was established that the child would refer only to defendant "as father, dad, [or] daddy," whereas previously the child had been referring to plaintiff's boyfriend in that manner. Further, the court ordered that defendant would receive "make-up parenting time" with the child in California, which is where he was stationed. Shortly after the stipulated order was entered, however, defendant filed a show-cause petition, alleging that his current wife had flown "into Detroit to pick[]up the minor child but plaintiff failed to show at the airport." Following a March 2016 hearing, the trial court found plaintiff "in contempt of court for willful violation of [the] Court's visitation order" and cautioned that further violations would result in "30 days incarceration" and the child being placed in defendant's custody. The court also ordered that defendant would select a counselor in Michigan for the child and placed the burden on plaintiff to object to the selection.

In May 2016, defendant filed another show-cause petition, alleging, in part, that plaintiff "continues to support the minor child addressing Defendant as 'Kyle' and her boyfriend as 'daddy . . . .' " Defendant also alleged that plaintiff had failed to schedule an appointment for the child with the selected counselor. After a June 2016 hearing, the court found plaintiff in contempt of court. The court imposed a suspended 10-day sentence, conditioned on plaintiff's compliance with

court orders. The court also ordered that the child would be "picked up" by defendant's wife and accompanied to San Diego, California, for summer parenting time with defendant.

In fall 2016, the child returned to Michigan and plaintiff's custody to begin school. In December 2016, defendant filed a show-cause petition, alleging that certain Skype visits had not occurred since the child had returned to Michigan. Defendant also averred that plaintiff had failed to arrange counseling for the child. At the show-cause hearing, plaintiff did not dispute those allegations and admitted that 17 out of the possible 34 Skype visits had not occurred in the prior six-month period. Other concerning matters included the child's numerous absences and tardies incurred during the 2016 school year and that the child had arrived in California the previous summer with untreated cavities. The trial court found plaintiff to be in contempt of court with regard to the Skype visits and the lack of counseling. The court reasoned that "each little thing on its own is not huge; but it is the conglomeration of all of those things over time together that makes it contempt of court." The court sentenced plaintiff to 30 days in jail and awarded "temporary custody" to defendant.

In January 2017, defendant filed a supplemental petition, requesting sole legal and physical custody. A custody hearing was held on February 6, 2017. Defendant and his wife testified that the child was adjusting well to Suffolk, Virginia, which was where defendant was then stationed. They provided positive academic reports, specifically that the child's recognition of "sight words" had increased significantly. They also indicated that they had arranged for a doctor, counselor, and dentist for the child and that they were in

the process of arranging individual speech therapy because the child was speaking at a substantially younger age level. Defendant also informed the court that he would be stationed in Suffolk for the "foreseeable future" and that his military duty no longer required deployments at sea. Defendant acknowledged that the child "misses" plaintiff but also informed the court that he had paid for Skype and telephone calls between the child and plaintiff while the latter was incarcerated. The court heard testimony from plaintiff and her parents, and it took the matter under advisement. In a 14-page opinion, the court found that there was proper cause and a change of circumstances sufficient to warrant revisiting the custody order: "namely Plaintiff's deliberate and repeated obstruction of Defendant's parenting time and relationship with the child." The court then found by clear and convincing evidence that it was in the best interests of the child for defendant to have sole legal and physical custody. The court considered each best-interest factor set forth in MCL 722.23, weighing six in defendant's favor while not expressly weighing any in plaintiff's favor. Notably, with respect to Factor (j), the court stated, "One of, if not the biggest concern for this Court over the lifespan of this case has been Plaintiff's unwillingness to facilitate a close relationship between the child and Defendant." The court found that "Defendant is heavily favored under this factor." The trial court awarded plaintiff parenting time in accordance "with the Midland County Long Distance Parenting Plan." This appeal followed.

II. PROPER CAUSE OR CHANGE OF CIRCUMSTANCES

Plaintiff first argues that the trial court erred by finding proper cause and a change of circumstances

warranted revisiting the existing custody order. We disagree. A trial court's order resolving a child custody dispute "shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. "This Court reviews a trial court's determination regarding whether a party has demonstrated proper cause or a change of circumstances under the great weight of the evidence standard." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). A trial court's factual findings are against the great weight of the evidence when "the evidence clearly preponderates in the opposite direction." *Ireland v Smith*, 214 Mich App 235, 242; 542 NW2d 344 (1995), aff'd as mod on other grounds 451 Mich 457 (1996).

Section 7 of the Child Custody Act, MCL 722.21 *et seq*., allows a trial court to "modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances," as long as the modification would be in the child's best interests. MCL 722.27(1)(c). "[P]roper cause means one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Vodvarka v Grasmeyer*, 259 Mich App 499, 511; 675 NW2d 847 (2003). "[I]n order to establish a 'change of circumstances,' a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a significant effect on the child's well-being, have materially changed." *Id*. at 513 (emphasis omitted). To constitute a change of circumstances under MCL 722.27(1)(c), "the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there

must be at least some evidence that the material changes have had or will almost certainly have an effect on the child." *Vodvarka*, 259 Mich App at 513-514.

Plaintiff calls attention to our acknowledgment in *Vodvarka* that caselaw established that "minor allegations of contempt or visitation complaints," *id*. at 509-510, are insufficient to establish proper cause or a change of circumstances and contends that the trial court relied on such conduct in this case. First, we disagree with the premise that there were "minor allegations" of contempt in this case. To the contrary, plaintiff was found in contempt of court on three separate occasions, the last of which resulted in a 30-day jail sentence. Further, there were *ongoing* visitation complaints in this case, including that plaintiff had failed to produce the child at the airport for a prearranged pick-up, causing defendant's wife to fly needlessly from California to Detroit. Second, as stated, the test for proper cause examines whether there is an appropriate ground that "could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Id*. at 511. And plaintiff's interference with the child's and defendant's relationship is plainly such a ground. In addition to the parenting-time violations, plaintiff encouraged the child to call plaintiff's now ex-boyfriend "dad" and to call defendant by his first name. For those reasons, the court's finding that proper cause existed was not against the great weight of the evidence.

Further, defendant's circumstances had changed significantly since the last custody order in December 2013. Throughout most of the proceedings, defendant's military duty required him to be deployed at sea for

months at a time. At the custody hearing, however, defendant explained that he is now essentially "land based." Moreover, defendant was married in April 2014 and had purchased a home in Virginia, where he would be located for the foreseeable future. Hence, defendant was now in a position to provide full-time physical care and custody to the child. Further, there was sufficient evidence from which to conclude that "the material changes have had or will almost certainly have an effect on the child." *Id*. at 513-514. Specifically, defendant and his wife have addressed medical issues for the child, such as untreated cavities and immunizations. They have also provided a counselor for the child and have helped to greatly improve her recognition of sight words. Considering that evidence in addition to defendant's new living situation, it cannot be said that the evidence clearly preponderated against the trial court's finding that there was a sufficient change of circumstances, allowing the court to consider a modification of the custody arrangement.

III. CHANGE OF CUSTODY

Plaintiff's final argument is that the trial court erred by finding that defendant proved by clear and convincing evidence that granting him sole legal and physical custody was in the child's best interests. We disagree. We review the trial court's findings regarding the best-interest factors under the "great weight of the evidence" standard. *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994). We review the court's ultimate custody decision for an abuse of discretion. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). In the context of a child custody dispute, an abuse of discretion is found only in extreme cases wherein the trial court's decision is so palpably and

grossly violative of fact and logic that it evidences the exercise of passion or bias or a perversity of will. *Rains v Rains*, 301 Mich App 313, 324; 836 NW2d 709 (2013); *Shulick v Richards*, 273 Mich App 320, 324-325; 729 NW2d 533 (2006).

In this case, the trial court found that an established custodial environment existed with plaintiff[1] and therefore correctly concluded that defendant had the burden of proving by clear and convincing evidence that modifying the custodial environment was in the child's best interests. MCL 722.27(1)(c); *Pierron v Pierron*, 486 Mich 81, 92; 782 NW2d 480 (2010). MCL 722.23 defines the "best interests of the child" as "the sum total of the . . . factors" set forth in MCL 722.23(a)-(*l*), which are to be "considered, evaluated, and determined by the court." "In child custody cases, the family court must consider all the factors delineated in MCL 722.23 and explicitly state its findings and conclusions with respect to each of them." *Spires v Bergman*, 276 Mich App 432, 443; 741 NW2d 523 (2007). "This Court will defer to the trial court's credibility determinations, and the trial court has discretion to accord differing weight to the best-interest factors." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

Plaintiff argues that the trial court erred in how it weighed the following best-interest factors:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

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[1] Defendant does not dispute the trial court's ruling with respect to the established custodial environment.

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

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

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

(f) The moral fitness of the parties involved.

* * *

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

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

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents. A court may not consider negatively for the purposes of this factor any reasonable action taken by a parent to protect a child or that parent from sexual assault or domestic violence by the child's other parent.

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

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23.]

We have reviewed the record and conclude that the evidence did not clearly preponderate against the trial court's findings on these factors. *Ireland*, 214 Mich App at 242.

Plaintiff contends that the trial court erred by finding that neither party was favored under Factor (a) when defendant had "abandoned" the child until support proceedings were initiated. Plaintiff's argument focuses on defendant's history with the child, but Factor (a) calls for the court to examine the "existing" "ties" between the parent and child. MCL 722.23(a). Since the support obligation was imposed, defendant has received an increasing amount of parenting time with the child. At the time of the custody hearing, the child had been in his care for over a month. Defendant described his relationship with the child as "the normal father/daughter relationship [he] always wanted." Although it was undisputed that the child missed plaintiff, there was no testimony to suggest that the child did not also care for and love defendant. The trial court's finding that this was a neutral factor was not against the great weight of the evidence.

As for Factor (b), the trial court found that the "distinguishing element of this factor arises in the parties' ability to provide the child guidance and continued education." In weighing this factor in defendant's favor, the court noted the disparity between the child's school attendance under each parent's care. The court also acknowledged testimony that the child's recognition of sight words had increased significantly while in defendant's care and that defendant practiced that skill with the child daily. Plaintiff argues that the trial court's focus on school attendance was "obviously imbalanced" because the child had only resided with defendant for a short period of time. However, it was established that the child had nine absences, four of which were unexcused, and numerous tardies in the first three months of the 2016 school year while under plaintiff's care. In contrast, in over a month in defen-

dant's care, the child had only missed a few hours of school for a dentist appointment. Given the disparity, we fail to see how the trial court erred by relying on that evidence. Further, plaintiff does not acknowledge the child's increased proficiency in sight words. She fails to demonstrate that the court's finding was against the great weight of the evidence. Additionally, the same evidence sufficiently supports the trial court's finding that Factor (h) weighed in defendant's favor.

With respect to Factor (c), plaintiff fails to dispute the ample evidence relied on by the trial court in determining that defendant had a greater capacity to provide life's necessities for the child. For example, the court noted that defendant was "a Second Class Petty Officer," that defendant and his wife addressed the child's untreated cavities, and that they were in the process of arranging individual speech therapy for the child. Plaintiff asserts that defendant took the child to "specialists" and that he would arrange "expensive follow-up appointments in Michigan" to reduce his child support obligation. Plaintiff has effectively abandoned this argument by failing to identify support in the record for this assertion.[2] "This Court will not search the record for factual support for a party's claim." *McIntosh v McIntosh*, 282 Mich App 471, 485; 768 NW2d 325 (2009). Further, it is not apparent from the record that the costs associated with the specialists were unnecessary. Even assuming that defendant's child support obligation was reduced, there is still ample evidence to support the trial court's finding on this factor.

Next, plaintiff argues that there was error in weighing Factor (d) in defendant's favor given that the child

[2] Indeed, aside from citations of the trial court's opinion, plaintiff fails to provide any record citations as required by MCR 7.212(C)(6) and (7).

had lived with plaintiff, as the trial court stated, " 'for nearly all of the child's life' " and had only been in defendant's temporary custody for "two months" at the time of the hearing. The trial court acknowledged that the child had lived with plaintiff most of her life but also found that period to be marked by instability, noting numerous residences during that time and plaintiff's various debts. In contrast, defendant had purchased a home in Virginia and was current on all his bills. The court reasoned that "[t]he change in custody requested by Defendant would keep continuity with the current living arrangement, which it is clear Defendant and his wife have gone to great lengths to establish for the child in the short time they have had custody of her." We fail to see how the court erred by considering the desirability of continuing the "temporary custody" arrangement, especially when the child was excelling in school and defendant had already arranged doctors, a counselor, and individual speech therapy for the child. The evidence did not clearly preponderate against the trial court's finding that Factor (d) weighed in defendant's favor. The same can be said for Factor (e), which the trial court weighed on the basis of similar evidence.

Plaintiff also contests the trial court's finding under Factor (f) that there was no evidence presented regarding either party's moral fitness. Plaintiff again asserts that the court should have considered defendant's "abandonment" of the child. While we do not rule that the trial court was precluded from considering defendant's behavior before the support obligation was entered in 2013, we cannot say that the court erred by choosing to focus on the parties' most recent behavior. After defendant's paternity was determined, it appears that he fulfilled his child support obligation, followed court orders, and sought an ever-increasing role in the

child's life. Further, defendant disputed that he ever abandoned the child. The trial court's finding was not against the great weight of the evidence. For the same reasons, we reject plaintiff's argument that the court should have considered this matter under Factor (*l*) as "[a]ny other [relevant] factor." MCL 722.23(*l*).

Plaintiff argues that Factor (i) weighs in her favor because the child expressed a preference to live with her. The trial court interviewed the child and stated that it took her preference into consideration, but the court did not reveal the preference. Plaintiff's claim is therefore not supported by the record.[3]

Plaintiff also challenges the trial court's finding that defendant was heavily favored under Factor (j), which, again, concerns one parent facilitating and encouraging a close relationship between the child and the other parent. The trial court thoroughly recounted how plaintiff had repeatedly violated its orders "that were specifically imposed to try and foster a relationship between Defendant and his daughter, despite his being on the other side of the country." The court also noted the hostile attitude of plaintiff's parents toward defendant and his wife and that plaintiff had consistently failed "to list Defendant as a parent on all documents and forms pertaining to the child," whereas defendant had accomplished that task. Plaintiff does not address the trial court's specific findings or the mountain of evidence supporting them. Instead, she merely maintains that "[b]oth parties have obstructed the parenting time of the other party" without providing record

[3] We note that the child was only five years old at the time of the custody hearing. Moreover, even if the child expressed a preference for plaintiff, we would still conclude that the trial court did not err by finding that there was clear and convincing evidence supporting the change in custody.

citations for the position that defendant "intentionally" caused some of the missed Skype visits. See *McIntosh*, 282 Mich App at 485. Considering the numerous contempt orders issued against her on this matter, plaintiff's contention that Factor (j) should have been evaluated as a neutral factor is simply without merit.

Finally, plaintiff argues that the trial court erred by finding that Factor (k), domestic violence, did not weigh in either party's favor. Plaintiff testified that defendant once pushed her against her vehicle in the presence of the child. The trial court found this testimony lacking in credibility. We defer to the court's credibility determinations. *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011).

In sum, there were legitimate concerns with plaintiff's care of the child, including untreated cavities and numerous unexcused absences from school. Defendant has addressed those issues while also arranging for counseling and individual speech therapy for the child. Additionally, the court plainly placed great weight on Factor (j), which was within its discretion. *Berger*, 277 Mich App at 705. "It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents." MCL 722.27a(1) (governing parenting time). It can be inferred from the court's analysis that it doubted whether the child would be able to have a strong relationship with defendant if plaintiff retained sole physical custody. Indeed, plaintiff's repeated acts of contempt relative to parenting time were troubling and reflected an inability by plaintiff to facilitate and encourage a close and continuing parent-child relationship between defendant and his daughter. Conversely, there was no evidence suggesting that defendant had interfered with the relationship between plaintiff and

the child. The trial court's custody decision did not constitute an abuse of discretion.

Affirmed. Having fully prevailed on appeal, defendant is awarded taxable costs under MCR 7.219.

O'CONNELL, P.J., and K. F. KELLY, J., concurred with MURPHY, J.

KALISEK ESTATE v DURFEE

Docket No. 333943. Submitted November 14, 2017, at Lansing. Decided November 28, 2017, at 9:10 a.m.

Susan Kalisek, as personal representative of the estate of her deceased husband, Ronald L. Kalisek Sr., brought a wrongful-death action on behalf of her husband's estate in the Shiawassee Circuit Court against defendant, Bassel B. Durfee. Defendant was operating a vehicle when he struck Ronald, and Ronald died two days after the accident as a result of the injuries he sustained. Susan, on behalf of the estate, retained the law firm of appellant, Christopher P. Legghio, and entered into a contract for legal services (the fee agreement), which provided that the estate agreed to pay Legghio's law firm 25% of any amount it received, recovered, or obtained after reimbursement of amounts advanced by the firm to pay for the expenses of case preparation and litigation. The fee agreement further provided that the estate agreed to pay costs for case preparation and litigation, including court filing fees, court reporters, private investigators, medical reports, and expert witnesses. Following extensive litigation, the parties reached a settlement agreement of $110,000, which was formally approved by the trial court. The estate moved for authority to distribute the settlement proceeds, seeking, in pertinent part, the distribution of $25,000 in attorney fees and $10,000 in litigation costs to Legghio pursuant to the terms of the fee agreement. At the hearing on the motion, the court, Matthew J. Stewart, J., opined that some of the costs requested by Legghio were unreasonable and offensive. The court set the matter for an evidentiary hearing and ordered that $10,000 be placed in escrow. During the evidentiary hearing, the trial court noted that Legghio had not submitted a formal bill of costs that met the requirements of MCR 2.625(G), the court rule that generally pertains to the taxation of costs. The court rejected a large number of costs on the basis that there was no statutory provision in the Revised Judicature Act (RJA), MCL 600.101 *et seq*., or court rule allowing for or authorizing the cost, or on the basis that Legghio failed to identify and cite a supporting court rule or RJA provision. The court repeatedly indicated that it was applying the law regarding taxable costs, citing opinions addressing taxable costs recoverable

by a prevailing party. Ultimately, the court approved a $25,000 distribution to Legghio for his services in representing the estate, but the court awarded Legghio only $469 in litigation costs, which consisted of various filing fees. Legghio appealed.

The Court of Appeals *held*:

Under the wrongful-death act, MCL 600.2922, a trial court is required to conduct a hearing and approve the distribution of proceeds from any settlement. A fee or retainer agreement is a contract and is subject to the law of contracts. Therefore, the recovery of costs advanced by an attorney to a client under a fee agreement is governed by contract law. A trial court's authorization of the distribution of proceeds from a successful wrongful-death action in regard to costs incurred by the plaintiff's counsel is likewise guided by contract law. In this case, the trial court erred by relying on MCR 2.625 and the provisions of the RJA in reviewing the costs claimed by Legghio and by demanding that Legghio cite supporting court rules and RJA provisions because MCR 2.625—the court rule that pertains to taxable costs awardable to a prevailing party, as paid by the losing party—did not apply to the circumstances presented in this case. Instead, the authority for Legghio's request for litigation costs was the contract, i.e., the fee agreement, because the estate promised to reimburse Legghio for costs advanced during the litigation. Therefore, the case had to be remanded to the trial court for review of the costs requested by Legghio under the law of contracts and not the law that governs taxable costs awardable to a prevailing party.

Reversed and remanded.

COSTS — WRONGFUL-DEATH ACTIONS — FEE AGREEMENTS — CONTRACT LAW — COURT'S AUTHORIZATION OF DISTRIBUTION OF PROCEEDS.

Under the wrongful-death act, MCL 600.2922, a trial court is required to conduct a hearing and approve the distribution of proceeds from any settlement; the recovery of costs advanced by an attorney to a client under a fee agreement is governed by contract law; a trial court's authorization of the distribution of proceeds from a successful wrongful-death action in regard to costs incurred by the plaintiff's counsel is likewise guided by contract law.

Ashley & Zaleski, PC (by *Robert D. Ashley*) for the Kalisek Estate.

Legghio & Israel, PC (by *Christopher P. Legghio*) for Christopher P. Legghio.

Before: O'CONNELL, P.J., and MURPHY and K. F. KELLY, JJ.

MURPHY, J. Appellant, Christopher P. Legghio, the attorney who represented plaintiff, the estate of Ronald Louis Kalisek Sr., pursuant to a retainer agreement for purposes of pursuing this wrongful-death action, sought approval by the trial court of a $10,000 distribution to Legghio from a $110,000 settlement, as allegedly necessary to cover his costs associated with prosecuting the litigation. The trial court, generally applying the law concerning taxable costs awardable to a prevailing party, awarded Legghio only $469. We hold that the trial court's ruling reflected a misunderstanding of the law, confusing taxable costs recoverable by a prevailing party in a lawsuit with the litigation costs recoverable by an attorney from his or her client under contract law. Accordingly, we reverse and remand for further proceedings.

In May 2014, defendant, who was over 90 years of age at the time and legally blind, was operating a vehicle when he struck Ronald Kalisek as he was mowing his front yard. Mr. Kalisek died two days later as a result of the injuries he sustained in the accident. Susan Kalisek, Mr. Kalisek's widow, was named personal representative of her husband's estate. Pursuant to a contract for legal services (hereafter, the fee agreement), she retained Legghio's law firm in June 2014 to commence a wrongful-death action on behalf of the estate against defendant. The fee agreement provided, in relevant part:

> The Client agrees to . . . pay to Attorneys for services rendered a sum equal to 25% of any amount received,

> recovered or obtained on behalf of the [C]lient after reimbursement of amounts advanced by the Attorneys to pay expenses of case preparation and litigation.
>
> The Client agrees to pay costs for case preparation and litigation, such as court filing fees, court reporters, private investigators, medical reports and expert witnesses. When the Attorneys advance payment of such costs, an itemized statement shall be provided [to] the Client at the time of settlement.

Following extensive litigation, the parties reached a settlement in the wrongful-death action in the amount of $110,000, which was formally approved by the trial court. The estate then moved for authority to distribute the settlement proceeds, seeking, in pertinent part, the distribution of $25,000 in attorney fees and $10,000 in litigation costs to Legghio pursuant to the terms of the fee agreement.[1] Legghio did not attach a bill of costs or any other type of documentation to support the request for $10,000 in litigation costs. At the hearing on the motion, the trial court noted that it had been concerned about the amount of costs being requested, so it had, prior to the hearing, requested and obtained a breakdown of the costs from Legghio's office. The trial court opined that some of the costs were unreasonable and even offensive. The court stated that it was prepared to immediately order the distribution of $3,235 in costs to Legghio or, if that was not acceptable to Legghio, to set the matter for an evidentiary hearing, with $10,000 of the settlement to be placed in escrow. Legghio chose the latter option, the funds were escrowed by order, and an evidentiary hearing was scheduled.

Before the evidentiary hearing, Legghio filed a memorandum in support of his request for costs asso-

[1] Legghio indicated that actual litigation costs exceeded $15,000, but he "agree[d] to reduce his costs to $10,000."

ciated with the wrongful-death litigation, attaching a mountain of invoices, statements, and other supporting documentation. At the evidentiary hearing, Legghio presented testimony from his law firm's bookkeeper, a licensed professional investigator who served process for Legghio relative to the litigation, and another process server employed in the case. Through these witnesses or otherwise, the exhibits that Legghio had attached to his memorandum were admitted into evidence. At the conclusion of the proofs, the trial court first noted that Legghio had not submitted a formal bill of costs that met the requirements of MCR 2.625(G), which court rule generally pertains to the taxation of costs. We note that MCR 2.625(A)(1) provides that "[c]osts 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." This court rule, therefore, has no application to the issue presented to the trial court because Legghio was not seeking taxable costs awardable to a prevailing party but rather litigation costs that his client was obligated to pay under the fee agreement for purposes of reimbursement.

The trial court next made the following observation: "And I'll say on the outset, this court does not claim that Mr. Legghio's bills are not authentic—I'm not making that claim at all; I do not believe that the bills are anything but what Mr. Legghio says that they are." The trial court proceeded to address the particular costs as itemized by Legghio. The trial court rejected a large number of requested costs on the basis that there was no statutory provision in the Revised Judicature Act (RJA), MCL 600.101 *et seq*., or court rule allowing for or authorizing the cost, or on the basis that Legghio failed to identify and cite a supporting court rule or RJA provision. The trial court rejected other requested

costs on the ground that, while there might be an RJA provision generally authorizing the type of fee or cost, there was a lack of compliance with components of the statutory provision, or the requested cost fell outside the parameters of the provision. At times, the trial court broadly stated that Legghio failed to explain or support a particular cost, and it is difficult for us to discern whether the court meant that Legghio simply did not cite a statutory provision or court rule relative to the authorization of the cost, or whether the court meant that Legghio failed to provide evidentiary support showing that the cost was actually incurred or failed to explain the factual basis for the cost. During its ruling from the bench, the trial court repeatedly indicated that it was applying the law regarding taxable costs, citing opinions addressing taxable costs recoverable by a prevailing party. Ultimately, the trial court awarded Legghio only $469, which consisted of various filing fees. Orders were subsequently entered reflecting the trial court's ruling and directing the distribution of the $10,000 in escrowed funds, with $9,531 going to Mrs. Kalisek and $469 to Legghio, who now appeals.

In *Reed v Breton*, 279 Mich App 239, 241-242; 756 NW2d 89 (2008), this Court explained:

> A circuit court's decision concerning the distribution of settlement proceeds in a wrongful-death matter is reviewed for clear error. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. Interpretation of a court rule, like a matter of statutory interpretation, is a question of law that this Court reviews de novo. The rules governing the construction of statutes apply with equal force to the interpretation of court rules. [Citations, quotation marks, and brackets omitted.]

Under the wrongful-death act, MCL 600.2922, a trial court is required to conduct a hearing and approve the distribution of proceeds from any settlement. *Id*. at 242; see also MCL 700.3924. "MCR 8.121 addresses allowable attorney fees in personal-injury and wrongful-death actions." *Reed*, 279 Mich App at 242. And MCR 8.121, which also touches on litigation costs, provides, in pertinent part, as follows:

> (A) Allowable Contingent Fee Agreements. In any claim or action for personal injury or wrongful death based upon the alleged conduct of another . . . , in which an attorney enters into an agreement, expressed or implied, whereby the attorney's compensation is dependent or contingent in whole or in part upon successful prosecution or settlement or upon the amount of recovery, the receipt, retention, or sharing by such attorney, pursuant to agreement or otherwise, of compensation which is equal to or less than the fee stated in subrule (B) is deemed to be fair and reasonable. The receipt, retention, or sharing of compensation which is in excess of such a fee shall be deemed to be the charging of a "clearly excessive fee" in violation of MRPC 1.5(a) . . . .
>
> (B) Maximum Fee. The maximum allowable fee for the claims and actions referred to in subrule (A) is one-third of the amount recovered.
>
> (C) Computation.
>
> (1) *The amount referred to in subrule (B) shall be computed on the net sum recovered after deducting from the amount recovered all disbursements properly chargeable to the enforcement of the claim or prosecution of the action*. In computing the fee, the costs as taxed and any interest included in or upon the amount of a judgment shall be deemed part of the amount recovered. [Emphasis added.]

The emphasized language in MCR 8.121(C)(1) reflects that, as part of the computation of the appropriate attorney fee, any litigation costs must be deducted

from the net recovery. Under the formula set forth in MCR 8.121, and assuming that Legghio was entitled to $10,000 in costs, the $10,000 would be deducted from the $110,000 settlement, leaving $100,000, which would be subject to the valid 25% attorney-fee provision in the fee agreement, or $25,000. The trial court did approve a $25,000 distribution to Legghio for his services in representing the estate.

As indicated in MRPC 1.8, litigation costs must ultimately be borne by the client unless the client is indigent. Specifically, MRPC 1.8 provides, in relevant part:

> (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that
>
> (1) a lawyer may advance court costs and expenses of litigation, *the repayment of which shall ultimately be the responsibility of the client*; and
>
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client. [Emphasis added.]

A fee or retainer agreement is a contract and is subject to the law of contracts. *Island Lake Arbors Condo Ass'n v Meisner & Assoc, PC*, 301 Mich App 384, 392-393; 837 NW2d 439 (2013) ("We interpret the parties' retainer agreement according to its plain and ordinary meaning."). Therefore, the recovery of costs advanced by an attorney to a client under a fee agreement is governed by contract law. And a trial court's authorization of the distribution of proceeds from a successful wrongful-death suit in regard to costs incurred by the plaintiff's counsel must likewise be guided by contract law. Again, MCR 2.625 pertains to taxable costs awardable to a prevailing party, as paid by the losing party, and not to the circumstances

presented in this case. Accordingly, the trial court erred by relying on MCR 2.625 and the provisions in the RJA in reviewing the costs claimed by Legghio and by demanding that Legghio cite supporting court rules and RJA provisions. The authority for Legghio's request for litigation costs is the contract, i.e., the fee agreement, because the estate promised to reimburse Legghio for costs advanced during the litigation. Of course, standard contract defenses can serve as a basis to reject requested costs. For example, if there was a lack of evidentiary support to show that a particular cost being sought by Legghio was actually incurred, the court could legitimately decline to approve the distribution of settlement proceeds to cover the claimed cost, given that the cost would not be "properly chargeable to the enforcement of the claim or prosecution of the action." MCR 8.121(C)(1).[2]

We conclude that the proper course of action is to remand the case to the trial court for review of the costs requested by Legghio under the law of contracts and not the law that governs taxable costs awardable to a prevailing party.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. We decline to award taxable costs under MCR 7.219.

O'CONNELL, P.J., and K. F. KELLY, J., concurred with MURPHY, J.

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[2] As another example—but in the context of an attorney fee—a court would be justified in refusing to authorize the distribution of a contingency fee to an attorney that amounted to 50% of a judgment, given that such a fee would be a violation of law and public policy, as reflected in MCR 8.121(B) and MRPC 1.5. See *Rory v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005) (holding that a contractual provision is not enforceable if it violates law or public policy).

PEOPLE v MULLINS

Docket No. 334098. Submitted November 15, 2017, at Grand Rapids. Decided November 30, 2017, at 9:00 a.m. Leave to appeal sought.

Shae L. Mullins was convicted after a jury trial in the Berrien County Trial Court, Criminal Division, of contributing to the delinquency of a minor, MCL 750.145, and making a false report of felony child abuse, MCL 722.633(5). She was sentenced to seven days in the county jail and to two years of probation. Mullins and Louis Dominion had a daughter, PD, who was born in 2006. Mullins and Dominion were never married and had been involved in extensive custody litigation over PD since 2007. In 2008, Mullins took PD to a physician on three occasions, claiming that she had noticed redness and swelling in PD's vaginal area following PD's time in Dominion's care. The physician reported the visits to Child Protective Services (CPS). CPS investigated on each occasion, and each complaint was unsubstantiated. One occasion resulted in PD's being placed in foster care and a CPS petition expressly naming both Mullins and Dominion. Dominion became PD's primary caregiver in 2009, and Mullins had parenting time every other weekend. In 2013, Mullins told PD that PD would be able to spend more time with Mullins if PD told a teacher at school that Dominion hurt her private parts. PD told a teacher that Dominion hurt her private parts, and the teacher reported it to the school principal who reported the allegations to CPS. PD ultimately admitted that Mullins had told her to lie. The court, Donna B. Howard, J., concluded that the evidence presented at Mullins's preliminary examination was insufficient to bind Mullins over for trial on the charge of making a false report of felony child abuse because Mullins did not personally make the allegation. The prosecution appealed the court's decision, and the reviewing court, Angela M. Pasula, J., reversed the initial court's refusal to bind Mullins over on the false-reporting charge. Mullins was convicted of both charged offenses, and she appealed.

The Court of Appeals *held*:

1. MCL 722.633(5) prohibits a person from intentionally making a false report of child abuse under the Child Protection Law (CPL), MCL 722.621 *et seq*., when the person knows that the

report is false. Violation of MCL 722.633(5) is a crime. Mullins argued that because MCL 722.633(5) specifies that the false report must be made "under the CPL," the statute applies only to mandatory reporters. According to Mullins, the statute did not apply to her because neither she nor PD was a mandatory reporter. However, although the CPL mandates that certain persons report suspected child abuse, the law does not preclude a person who is not a mandatory reporter from reporting suspected child abuse. In fact, MCL 722.624 expressly permits persons who are not mandatory reporters to report suspected child abuse to CPS or a law enforcement agency. Because a report by a person other than a mandatory reporter is authorized by MCL 722.624, that report would be made "under the CPL." Mullins further asserted that including nonmandatory reporters in the prohibition against false reporting in MCL 722.633(5) would render superfluous the meaning of "under the CPL." But "under the CPL" clarifies that the activity criminalized by MCL 722.633(5) is making a false report to CPS or a law enforcement agency, as opposed to some other kind of report not involving child abuse or a report made to some person or entity other than CPS or law enforcement. Mullins's other argument—that other provisions of Michigan law criminalize false reports by nonmandatory reporters—was similarly ineffective. The same activity can violate more than one Michigan law. Even if Mullins's conduct violated a law other than MCL 722.633(5), it did not follow that her conduct did not also violate the CPL.

2. The Legislature is bound by the dictates of Const 1963, art 3, § 7, which mandates that the common law and statutory law remain in force until they expire or until they are changed, amended, or repealed. Therefore, statutes must be read in light of the common law unless the Legislature has otherwise indicated, and MCL 722.633(5) must be read in light of the innocent-agent doctrine because the Legislature did not express an intent to abrogate or modify the common-law innocent-agent doctrine when it enacted MCL 722.633(5). Thus, Mullins could be convicted of violating that statutory provision even though she did not personally make the false report of felony child abuse. Under the innocent-agent doctrine, a defendant who uses an innocent person to accomplish a crime on the defendant's behalf is guilty of the crime as a principal, rather than under any of the accomplice-liability theories. According to the doctrine, the innocent agent is not the individual who actually commits the offense; the innocent agent is a mere instrumentality through whom the defendant commits the offense. Mullins repeatedly used PD and school officials to make false reports of child abuse against Dominion.

PD and the school officials were innocent agents Mullins used to violate MCL 722.633(5), and she was therefore properly convicted under that statute.

3. MRE 404(b)(1) prohibits the admission of evidence of a defendant's other crimes, wrongs, or acts to prove that the defendant acted in conformity with his or her character. Other-acts evidence is admissible for other purposes, however, including for the purpose of showing a defendant's scheme, plan, or system in doing an act. A three-part test articulated by the United States Supreme Court in *Huddleston v United States*, 485 US 681, 691-692 (1988), and adopted by the Michigan Supreme Court in *People v VanderVliet*, 444 Mich 52, 74 (1993), guides trial courts in the proper exercise of their discretion when determining whether to admit other-acts evidence. First, the other-acts evidence must be offered to show something other than a defendant's character or propensity to engage in criminal conduct. Second, according to MRE 402, as enforced by MRE 104(b), the other-acts evidence must be logically relevant to an issue of fact of consequence at trial; that is, the evidence must be material and probative. Third, under MRE 403, the probative value of relevant other-acts evidence must not be substantially outweighed by the danger of unfair prejudice in light of other available means of proof and other facts appropriately considered by the court deciding on the admissibility of other-acts evidence. In this case, evidence of Mullins's uncharged conduct in 2008—her use of PD to cause a mandatory reporter to report suspected child abuse to CPS—was logically relevant to show Mullins's common plan, scheme, or system to use PD to make false allegations of child abuse aimed at Dominion in 2013. The uncharged conduct was also relevant to show Mullins's motive for causing the false report to be made given that the false report would prompt a CPS investigation and could cause CPS to remove PD from Dominion's care. The evidence of Mullins's uncharged conduct was highly probative, and although the evidence was prejudicial, its probative value was not substantially outweighed by unfair prejudice. In addition, any prejudice could have been cured by a jury instruction under MRE 105. The trial court did not abuse its discretion by admitting the other-acts evidence against Mullins at trial.

4. Under MRE 404(b)(2), absent good cause, the prosecution must provide advance notice to a defendant of the general nature of evidence it intends to introduce at trial. Mullins's argument that she received insufficient notice of the testimony regarding the CPS petition filed against her in 2008 was without merit

because it was Mullins who first introduced the matter. Dominion's testimony concerning the 2008 petition served only as a timeline regarding his custody of PD; it did not implicate the notice provisions of MRE 404(b). Rather, it was Mullins, on direct examination, who testified that she did not remember whether the 2008 petition was a response to her false allegations. On cross-examination, the prosecution asked Mullins additional questions about the 2008 petition, and the trial court overruled defense counsel's objection to the testimony's relevance based on defense counsel's having first raised the substantive allegations of the 2008 petition. Therefore, any prejudice resulting from the evidence was of Mullins's own making.

5. Prosecutors are given great latitude in making their arguments and are free to argue the evidence and all reasonable inferences from the evidence as the inferences relate to their theory of the case. A prosecutor's remarks are reviewed in context to determine whether the defendant was denied a fair and impartial trial. In this case, there was no prosecutorial misconduct. The prosecutor referred to the investigations in 2008 on several occasions and argued that Mullins had been making false reports of sexual abuse since 2008. Although the arguments were not made in the blandest of terms, they were consistent with the evidence and were used to show Mullins's common scheme and her motive. And even if there had been misconduct, the trial court instructed the jury that the attorneys' statements, arguments, and any commentary were not evidence. Because jurors are presumed to follow a court's instructions, and because instructions are presumed to cure most errors, Mullins failed to show any outcome-determinative error involving the prosecution's closing argument.

Affirmed.

1. CRIMES — CHILD PROTECTION LAW — FALSE REPORT OF CHILD ABUSE — APPLICATION TO NONMANDATORY REPORTERS.

Under MCL 722.633(5), a person who intentionally makes a false report of child abuse or neglect under the Child Protection Law, MCL 722.621 *et seq*., knowing that the report is false is guilty of a crime; the person who makes the false report of child abuse need not be a mandatory reporter under the act in order to be convicted of the crime.

2. CRIMES — CHILD PROTECTION LAW — FALSE REPORT OF CHILD ABUSE — CULPABILITY — INNOCENT-AGENT DOCTRINE.

Under MCL 722.633(5), a person who intentionally makes a false report of child abuse or neglect under the Child Protection Law,

> MCL 722.621 *et seq*., knowing that the report is false is guilty of a crime; the innocent-agent doctrine applies to the offense prohibited by MCL 722.633(5); therefore, when a defendant uses an innocent person to make a false report of child abuse, the innocent agent does not actually commit the crime—he or she is a mere instrumentality of the defendant through whom the defendant commits the crime.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Michael J. Sepic*, Prosecuting Attorney, and *Elizabeth A. Wild*, Assistant Prosecuting Attorney, for the people.

White Law PLLC (by *James White* and *John W. Fraser*) for Shae L. Mullins.

Before: SWARTZLE, P.J., and SAWYER and MARKEY, JJ.

SWARTZLE, P.J. Defendant Shae Lynn Mullins convinced her daughter (PD) to tell a school teacher that PD's father had sexually abused the girl. Defendant did so with the expectation that she would get sole or primary custody of PD. The plan quickly unraveled, and defendant was charged and ultimately convicted of contributing to the delinquency of a minor and making a false report of felony child abuse.

On appeal, defendant argues that she is not criminally liable for making a false report because she did not make the report *herself*, but instead the report was made by PD to a school teacher, who then reported the matter to the school principal, who in turn reported the matter to Child Protective Services (CPS). Because defendant used PD and the school officials as "innocent agents," we conclude that defendant can still be held criminally liable as a principal for making a false report of felony child abuse. Concluding that defendant's remaining claims of error are similarly without merit, we affirm her convictions.

I. BACKGROUND

Defendant and Louis Dominion have a daughter, PD, born in 2006. The parents have never been married, and they have been involved in extensive custody litigation over PD since 2007. Dominion became PD's primary caregiver in January 2009 with defendant having parenting time every other weekend. In November 2013, while PD was visiting defendant, defendant told PD that if PD told a teacher at school that Dominion "hurt [her] private parts" and locked her in a closet, then PD would be able to spend more time with defendant. There was also testimony suggesting that defendant offered to buy PD a new horse if she made this allegation at school.

Shortly after this discussion, PD told a teacher that Dominion "hurts [her] and has hurt [her] private parts." PD's teacher reported the statement to the school's principal, who reported the incident to CPS. PD was later interviewed about the allegations, and she admitted that defendant told her to lie.

Defendant was charged with contributing to the delinquency of a minor, MCL 750.145, and making a false report of felony child abuse, MCL 722.633(5). The district court,[1] however, refused to bind defendant over to the circuit court on the charge of making a false report of child abuse. The district court concluded that defendant could not be guilty under MCL 722.633(5) because defendant did not personally make a false report of child abuse. The district court compared the language of MCL 722.633(5) to the language of the false-crime-report statute,

[1] Berrien County has merged its district, circuit, and probate courts into one trial court of concurrent jurisdiction. We refer to "district" and "circuit" court simply to distinguish between the two courts involved in this case, according to traditional jurisdiction and procedure.

MCL 750.411a. MCL 722.633(5) states that "[a] person who intentionally makes a false report of child abuse or neglect under this act knowing that the report is false is guilty of a crime." For its part, MCL 750.411a(1) contains similar language and states that "a person who intentionally makes a false report of the commission of a crime, or intentionally causes a false report of the commission of a crime to be made, . . . knowing the report is false, is guilty of a crime." Under the principle that the expression of one thing implies the exclusion of other things, coupled with the principle that laws dealing with the same subject should be interpreted harmoniously, the district court concluded that the inclusion of the phrase "or intentionally causes a false report of the commission of a crime to be made" in MCL 750.411a, and the omission of similar language from MCL 722.633(5) must be given effect. Thus, it held that the Legislature did not intend to make punishable a person's intentionally causing a false report of child abuse to be made when that person does not personally make the report.

The prosecution appealed the district court's decision to the circuit court, and the circuit court reversed. In doing so, the circuit court noted that under the common-law theory of innocent agent, a person was liable for the commission of a crime as a principal when the person used an "innocent other" as an instrumentality to commit the offense. The circuit court commented that MCL 722.633 and MCL 750.411a were codified in different chapters of the compiled laws and that the additional language present in MCL 750.411a was the result of the Legislature's 2004 amendment to MCL 750.411a. See 2004 PA 104. Because that amendment was enacted 20 years after MCL 722.633(5) was first enacted, see 1984 PA 418, the trial court declined

to read MCL 750.411a as conclusive evidence that the Legislature intended to abrogate the common-law doctrine of innocent agent by way of MCL 722.633(5). Accordingly, the circuit court allowed the charge of making a false report of child abuse to proceed to trial.

Before trial, the prosecution noticed defendant of its intent to introduce evidence that, in 2008, defendant made three false reports that Dominion was sexually abusing PD. Defendant objected to the introduction of this evidence, and the trial court ultimately concluded that the evidence was admissible under MRE 404(b):

> [T]he Court finds that evidence of the Defendant's prior allegations or complaints of sexual abuse of [the child] by [Dominion] to CPS, the resulting CPS investigation, resulting parenting time suspension during the CPS investigation, and ultimate disposition of the investigation, are logically relevant to show Defendant's motive and intent to commit the charged offense (intention [sic] false reporting of felony child abuse, MCL §722.633(5)). Similarly, to the extent that it appears the object of the charged act (*i.e.* Defendant falsely reporting the child abuse through her daughter) remains at issue, the Court finds that those "other acts" have the requisite concurrence and combination of common features, to support the [prosecution's] purpose of showing Defendant's plan or scheme. Thus, as to these stated "other acts" involving Defendant initiating reports to CPS, the Court finds that the [prosecution has] satisfied its burden of establishing admissibility under MRE 404(b).

At trial, the jury heard evidence that on three occasions in 2008, defendant took PD to a doctor after PD returned from Dominion's care. Defendant informed the doctor that she had observed redness and swelling in PD's vaginal area, and the doctor reported the concerns to CPS. CPS initiated investigations of each complaint, all of which were unsubstantiated. The jury also heard evidence that these complaints led CPS to file a petition

in 2008 against both defendant and Dominion to place PD in foster care while CPS investigated the false allegations. Evidence of this latter petition was not noticed by either party before trial.

The jury ultimately found defendant guilty of making a false report of felony child abuse and contributing to the delinquency of a minor. For these convictions, the trial court sentenced defendant to seven days in county jail and two years' probation.

Defendant appealed her convictions as of right.

II. ANALYSIS

A. DEFENDANT WAS PROPERLY CHARGED AND CONVICTED AS A PRINCIPAL UNDER MCL 722.633(5)

We first address defendant's argument that under traditional canons of statutory construction, she should not have been charged with, let alone convicted of, making a false report of felony child abuse because she did not personally make the report and she did not speak to a mandatory reporter. "This Court reviews de novo questions of statutory interpretation." *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008). "The fundamental task of statutory construction is to discover and give effect to the intent of the Legislature." *People v Ambrose*, 317 Mich App 556, 561; 895 NW2d 198 (2016) (quotation marks and citation omitted). "The statute's words are the most reliable indicator of the Legislature's intent and should be interpreted based on their ordinary meaning and the context within which they are used in the statute." *Id*. (quotation marks and citation omitted). Judicial construction of a statute is only appropriate "if reasonable minds could differ regarding the statute's meaning." *People v Stone Transport, Inc*, 241 Mich App 49, 50-51; 613 NW2d 737 (2000).

1. MCL 722.633(5) IS NOT LIMITED TO MANDATORY REPORTERS

Defendant argues that she cannot be held criminally liable under MCL 722.633(5) because defendant and PD were not mandatory reporters, and the statute only criminalizes false reports by mandatory reporters. She buttresses this argument with a second point—because other provisions of Michigan law criminalize false reports of criminal activity by nonmandatory reporters, MCL 722.633(5) must be read to be limited solely to mandatory reporters of felony child abuse or neglect. We reject both arguments.

With respect to her first argument, MCL 722.633(5) provides in pertinent part: "A person who intentionally makes a false report of child abuse or neglect under this act knowing that the report is false is guilty of a crime . . . ." Defendant argues that the phrase "under this act" refers to mandatory reporters as defined in the Child Protection Law, MCL 722.621 *et seq*., and therefore the Legislature clearly intended to limit the scope of the statute to only those designated reporters. MCL 722.623(1) identifies the specific categories of persons who are required to report child abuse under the act, and neither a parent nor a child is included. Given this, defendant maintains that she cannot be found guilty under MCL 722.633(5).

Defendant's argument suffers from a fundamental flaw—while the Child Protection Law mandates that certain persons report suspected child abuse, the law does not preclude a person who is not a mandatory reporter from reporting suspected child abuse. In fact, the Child Protection Law explicitly contemplates these reports. Specifically, MCL 722.624 provides, "In addition to those persons required to report child abuse or neglect under [MCL 722.623], any person, including a child, who has reasonable cause to suspect child abuse

or neglect may report the matter to the department or a law enforcement agency." A person who chooses, but is not required, to make a report would still be doing so "under this act," i.e., under the authority of MCL 722.624.

Defendant suggests that such a reading would render the phrase "under this act" superfluous. But just because the reading would encompass all instances of false reporting to CPS of child abuse or neglect—those made by mandatory reporters and nonmandatory reporters alike—this does not mean that "under this act" is without content. Rather, the phrase clarifies that the activity criminalized by MCL 722.633(5) is the making of a specific report to CPS as authorized by the Child Protection Law, as opposed to some other kind of report not involving abuse or neglect of a child or made to some person or entity other than CPS or law enforcement.

As to defendant's second argument, while she contends that other provisions of Michigan law criminalize false reports by nonmandatory reporters, this contention lends no weight to her position. It is well established that the same activity can violate more than one criminal provision. See *People v Ford*, 262 Mich App 443, 447-450; 687 NW2d 119 (2004) (recognizing that the Legislature may choose to punish the same activity under multiple criminal provisions). Even if her activity might have violated another provision criminalizing false reports, it does not follow that her activity could not also have violated the Child Protection Law, MCL 722.633(5).

Accordingly, because the Child Protection Law expressly contemplates reporting of child abuse by mandatory and nonmandatory reporters, the plain meaning of the reference in MCL 722.633(5) to "[a] person

who intentionally makes a false report of child abuse or neglect under this act" covers both mandatory and nonmandatory reporters.

2. THE DOCTRINE OF INNOCENT AGENT APPLIES TO MCL 722.633(5)

Defendant next argues that she is not liable under MCL 722.633(5) because she did not personally make the false report of child abuse. The district court agreed with defendant, concluding that (a) the inclusion of language in a similar statute (MCL 750.411a) that criminalizes a false report of a crime by (i) a person who actually makes the report as well as (ii) a person who causes such a report to be made, and (b) the omission of language in MCL 722.633(5) involving those who cause a report to be made, means that the Legislature intended to hold liable only the former (i) and not the latter (ii) with respect to false reports of child abuse. While not without some logical force, we ultimately agree with the circuit court that the better understanding of MCL 722.633(5) covers both groups.

In construing a statute, the Court's analysis begins with the plain meaning of the statutory language itself. If the plain meaning of the language is clear, then the Court's analysis is at an end, and there is no need to reach for canons of construction for aid. *People v Borchard-Ruhland*, 460 Mich 278, 284; 597 NW2d 1 (1999); *Stone Transport*, 241 Mich App at 50. The Legislature, like the other branches of our government, is bound by the dictates of Michigan's Constitution of 1963, including Article 3, § 7, which mandates that common-law doctrines remain in force until they are "changed, amended or repealed" by statute. This means that statutes must be read in light of the common law except to the extent that the Legislature has abrogated or modified it. *J & L Investment Co, LLC*

v Dep't of Natural Resources, 233 Mich App 544, 549; 593 NW2d 196 (1999); see also *Dawe v Dr Reuven Bar-Levav & Assoc, PC*, 485 Mich 20, 28; 780 NW2d 272 (2010) ("The common law remains in force until modified . . . [and] [t]he Legislature is presumed to know of the existence of the common law when it acts.") (quotation marks and citations omitted; second alteration in original).

This Court does not lightly infer that our Legislature intended to abrogate or modify the common law. Rather, this Court presumes that the common law remains intact, even when the Legislature enacts a statute on the same or a similar subject. See *Butler v Grand Rapids*, 273 Mich 674, 679; 263 NW 767 (1935). When the Legislature intends to change the common law, its language must clearly indicate that intent. See *id*.

Turning to the language of MCL 722.633(5), it is clear that the Legislature intended to criminalize a person's making of a false report of felony child abuse or neglect. It is equally clear that the Legislature did not intend to change, amend, or repeal any aspect of the common law by enacting MCL 722.633(5). Thus, the statute must be read in light of the well-established common-law doctrine of the "innocent agent." Under this doctrine, when a defendant uses an innocent person to accomplish a crime on the defendant's behalf, the defendant is guilty of the crime as a principal, rather than under any of the accomplice-liability theories. See *People v Hack*, 219 Mich App 299, 303; 556 NW2d 187 (1996) (opinion by SAWYER, P.J.). Under the doctrine, the innocent agent is not the one who actually commits the offense, but is a mere "instrumentality" through whom the defendant commits the offense. *Id*.; see also *People v Fisher*, 32 Mich App

28, 33; 188 NW2d 75 (1971) (noting that in a larceny case the asportation element need not be effectuated by the perpetrator of the crime, but may be accomplished by an innocent agent).

This Court has found the following passage from Dressler, Understanding Criminal Law, 2d ed, § 30.06(B)(1), p 446, helpful to understanding the concept of innocent agent:

> If *D* coerces *X* to commit a theft by threatening *X*'s life, *X* will be acquitted of larceny on the ground of duress. Today, and according to common law principles, *D* may be convicted of larceny. *X* was *D*'s innocent instrumentality. Therefore, at common law, *D* was the principal in the first degree of the offense. Conceptually, *D*'s *guilt is not founded on accomplice-liability principles*. Instead, *D* is *directly* liable for committing the crime through the instrumentality; *D*'s guilt is not derived from another culpable person. *X*'s acquittal, therefore, presents no bar to the conviction of the only culpable party. [See *Hack*, 219 Mich App at 303 (opinion by SAWYER, P.J.).]

Considering the facts of this case in line with the innocent-agent doctrine, we find no error with charging and convicting defendant under MCL 722.633(5). As the trial evidence showed, defendant repeatedly used PD and others as agents to make false reports of child abuse against PD's father. As a result, on at least three occasions, PD was removed from her father's care, and, on at least one occasion, PD was removed from the care of both her parents and placed into foster care. With respect to the charged offense, defendant used PD to report to her teacher, who then reported the matter to the school principal, who in turn reported the matter to CPS. Neither PD, the teacher, nor the school principal intended to make a false report; instead, they were acting as the innocent agents of defendant's malicious plan. Nor was the chain of agents too attenu-

ated under the facts of this case, as PD was a minor and both the teacher and principal were mandatory reporters under MCL 722.623, meaning that they had no choice or discretion under the law but to report the allegations in accordance with the Child Protection Law.

Because we conclude that MCL 722.633(5) is not ambiguous with respect to holding liable someone who uses an innocent agent to make a false report of child abuse, we need not resort to the canons of construction used by the district court and suggested by defendant. The district court correctly noted that MCL 722.633(5) shares a similar subject with MCL 750.411a, as both criminalize the making of false reports of certain criminal activity. And the district court applied a common canon of construction that instructs that where language is included in one provision but omitted from a related provision, then the Legislature intended for that omission to be given effect by courts. See *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993). But, as explained earlier, these canons are not necessary when the plain meaning of the statutory language is clear.

Moreover, we note in passing that the phrase "intentionally causes a false report" was not added to MCL 750.411a until 2004. 2004 PA 104. The current version of MCL 722.633(5) that does not have that phrase was first added in 1984 and later amended in 1996. 1984 PA 418; 1996 PA 309. One could argue that had the Legislature intended to keep MCL 722.633(5) consistent with MCL 750.411a, it would have enacted identical amendments to both statutes in 2004. This would, however, stretch the canon of *in pari materia* too thin. There are likely many reasons—policy and nonpolicy alike—why the Legislature would choose to amend one

section of law without at the same time amending a related section, including interest, resources, politics, attention, etc. Reflecting this reality, our Supreme Court has limited the canon to instances when the related statute is an earlier enactment. See *People v Watkins*, 491 Mich 450, 482; 818 NW2d 296 (2012). When the related statute was enacted or amended after the statute at issue, the canon is generally inapplicable. See 2B Singer & Singer, Sutherland Statutory Construction (7th ed), § 51:2, pp 212-213. As the Supreme Court has observed, "It is one thing to infer legislative intent through silence in a simultaneous or subsequent enactment, but quite another to infer legislative intent through silence in an earlier enactment, which is only 'silent' by virtue of the subsequent enactment." *Watkins*, 491 Mich at 482.

Under the law, defendant was criminally liable as a principal, not an agent. We find no error in charging and convicting defendant of making a false report of felony child abuse.

B. OTHER-ACTS EVIDENCE

Defendant also raises several claims of trial error under the Michigan Rules of Evidence. "The decision whether to admit evidence is within the trial court's discretion and will not be disturbed absent an abuse of that discretion." *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). An abuse of discretion occurs "when the court chooses an outcome that falls outside the range of principled outcomes." *People v Douglas*, 496 Mich 557, 565; 852 NW2d 587 (2014) (quotation marks and citation omitted). Yet, when "the decision involves a preliminary question of law, which is whether a rule of evidence precludes admissibility, the question is reviewed de novo." *McDaniel*, 469 Mich at

412. "A preserved error in the admission of evidence does not warrant reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013) (quotation marks and citation omitted).

1. NO ABUSE OF DISCRETION IN ADMITTING OTHER-ACTS EVIDENCE

Defendant argues that the trial court abused its discretion in admitting evidence related to the 2008 CPS investigations involving allegations that Dominion sexually abused his daughter. Under MRE 404(b)(1):

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

In *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000), our Supreme Court held that a trial court does not abuse its discretion if its admission of other-acts evidence meets the three-part test articulated in *Huddleston v United States*, 485 US 681, 691-692; 108 S Ct 1496; 99 L Ed 2d 771 (1988), that was adopted in *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). Under that test:

> First, the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory. MRE 404(b). Second, the evidence must

> be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact of consequence at trial. Third, under MRE 403, a determination must be made whether the danger of undue prejudice substantially outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403. [*Sabin*, 463 Mich at 55-56 (quotation marks, citation, and brackets omitted).]

See also *People v Denson*, 500 Mich 385, 400-401, 412; 902 NW2d 306 (2017) (explaining that, to be admissible under MRE 404(b), other-acts evidence must be offered for a proper purpose as well as be logically relevant (i.e., material and probative), and the probative value must not be substantially outweighed by unfair prejudice).

The evidence from prior CPS investigations showed that on three separate instances in 2008, defendant sought medical attention for PD after observing redness and swelling in PD's vaginal area. Every instance immediately followed a weekend in which Dominion had parenting time with PD. The physician, a mandatory reporter of child abuse, contacted CPS, and then CPS and the police opened an investigation into Dominion involving possible sexual abuse.[2] Dominion's parenting time was suspended during each investigation. After each investigation was closed as unsubstantiated, Dominion's parenting time resumed. In the instant case, defendant instructed PD to tell a teacher—a mandatory reporter—that Dominion "hurt [her] privates." PD indicated that defendant told her to make the false allegation so that she could spend more time with defendant.

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[2] Defendant argues that the prosecution did not offer any evidence to show that the physician actually called CPS. This argument is without merit as defendant herself testified that the physician contacted CPS after defendant brought PD to the physician's office.

In both the charged and uncharged conduct, instead of personally lodging a complaint with CPS, defendant used PD to make or infer an allegation of abuse to a mandatory reporter, who would then be legally required to report the abuse to CPS. In each instance, CPS would initiate an investigation of Dominion, and PD would be removed from her father's direct care. Given the similar victims—PD and Dominion—as well as the similar pattern—defendant, through PD, caused a report to be made to CPS and an investigation of Dominion inevitably followed—the uncharged conduct from 2008 was logically relevant under MRE 404(b) to show defendant's common plan, scheme, or system in using PD to make a false allegation of sexual abuse against Dominion in 2013. We likewise find that the uncharged conduct was also relevant to show defendant's motive for causing the false report to be made in the instant case in that the false report could cause CPS to remove PD from Dominion's care.

Regardless of its relevance, defendant also argues that the other-acts evidence was unduly prejudicial to her defense such that it should have been excluded under MRE 403. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). As discussed above, the other-acts evidence involving the initiation of the three CPS investigations in 2008 was highly probative to show that defendant used a continuing plan or scheme to use CPS investigations to suspend Dominion's parenting time so that she would have full or primary custody of her daughter. Although this evidence was prejudicial to defendant, it was not unfairly prejudicial or otherwise so prejudicial that an instruction to the jury under MRE 105 would not cure it. See *VanderVliet*, 444 Mich at 55. Accord-

ingly, we conclude that the trial court did not abuse its discretion by admitting the other-acts evidence.

2. DEFENDANT OPENED THE DOOR TO THE 2008 CPS PETITION TESTIMONY

Defendant also argues that testimony regarding the 2008 CPS petition filed against her was inadmissible because the prosecution never noticed her of its intent to admit such evidence and because the evidence's probative value was substantially outweighed by the danger of unfair prejudice. Under MRE 404(b)(2), absent good cause, a prosecutor must provide advance notice of the general nature of evidence it intends to introduce at trial. Despite defendant's claim of insufficient notice, the record indicates that it was defendant herself who introduced the specific allegations of the 2008 CPS petition at trial. Dominion briefly testified about the 2008 CPS petition as it involved him but did not testify about the allegations in the petition. Specifically, Dominion testified in relevant part:

> *Q*. Now, did anything change in custody in terms of [your daughter]?
>
> *A*. It got to a point where the CPS . . . finally petitioned the Court to take [my daughter] away from her parents.
>
> *Q*. And after—that was after the third unsubstantiated allegation?
>
> *A*. That was past the third one. It was in October of 2008.
>
> *Q*. And did you cooperate with that?
>
> *A*. Yes, I did.
>
> *Q*. And then did you get—after that was all taken care of, did you receive time with [your daughter]?
>
> *A*. After that was taken care of, she was put into foster care. [My daughter] was put in foster care so that they could evaluate myself and the other parent.

Q. Okay. We are not going to get into that part of it. We're not going to . . . .

* * *

Q. Eventually, when that case was taken care of, did you end up getting custody, having time with [your daughter]?

A. Yes.

This testimony provides only a timeline regarding Dominion's custody of PD, and therefore did not implicate the notice provisions of MRE 404(b).

Rather, it was defendant who introduced testimony implicating MRE 404(b) when defense counsel questioned defendant about whether the petition was in response to her making false allegations to CPS, and she responded that she did not remember:

Q. . . . at that point, was there a petition filed at all?

A. Yes.

Q. And at some point in 2008, did that petition become about you?

A. Yes.

Q. That came about whether you were making false allegations or something else? Do you know what the petition was about?

A. I don't remember the specific what—what it was actually about, I just remember that it was—it was about me and if I was doing something to cause [my daughter's] injuries or they'd come—it was something about botched evidence.

On cross-examination, the prosecutor asked defendant additional questions about the 2008 CPS petition. Defense counsel objected to the relevance of the testimony. The trial court overruled the objection, stating "No, I'm going to allow it. It's related to—you brought up the petition." Defendant does not take issue on

appeal with this ruling, and we likewise find no error. Because defendant was the party who first pursued the substantive allegations involving the 2008 petition, any prejudice flowing from the evidence was of defendant's own making. We find defendant's claim to be without merit.

3. THE PROSECUTOR'S CLOSING ARGUMENT WAS NOT IMPROPER

Finally, defendant asserts that the prosecutor committed misconduct in his closing argument by asserting that defendant essentially had a propensity for making false reports of sexual abuse to CPS. "Because the challenged prosecutorial statements in this case were not preserved by contemporaneous objections and requests for curative instructions, appellate review is for outcome-determinative, plain error." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Prosecutorial misconduct issues are decided on a case-by-case basis. *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). "This Court reviews the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial." *Id*. The prosecutor's statements "are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial." *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). Generally, prosecutors are given great latitude regarding their arguments and are "free to argue the evidence and all reasonable inferences from the evidence as they relate to their theory of the case." *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009).

During closing, the prosecutor made several references to the investigations in 2008. He stated that defendant used other persons to get CPS involved and argued that defendant had been making false reports

of sexual abuse since 2008. Although the arguments were not made in the blandest of terms, they were consistent with the evidence to show defendant's common scheme, plan, or system of falsely reporting child abuse and to show defendant's motive to make the instant allegations. The prosecutor did not commit misconduct in his closing argument.

Even if there had been misconduct, the trial court instructed the jury that "[t]he lawyers' statements, arguments, and any commentary are not evidence. They are only meant to help you understand the evidence and each side's legal theories. You should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge." Jurors are presumed to follow the court's instructions, and instructions are presumed to cure most errors. *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011). Accordingly, defendant has not shown any outcome-determinative error involving the prosecutor's closing.

III. CONCLUSION

MCL 722.633(5) prohibits a person, through an innocent agent, from making a false report of felony child abuse, whether or not the person is a mandatory reporter. Defendant used her daughter and school officials to make a false report of felony child abuse against her daughter's father, and by doing so, defendant violated MCL 722.633(5), and we find no error by the trial court notwithstanding defendant's claims to the contrary. Similarly finding no error with respect to the trial court's evidentiary rulings, we affirm defendant's convictions.

SAWYER and MARKEY, JJ., concurred with SWARTZLE, P.J.

EAGER v PEASLEY

Docket No. 336460. Submitted November 15, 2017, at Lansing. Decided November 30, 2017, at 9:05 a.m.

Plaintiffs, Donald and Carol Eager, brought an action in the Alcona Circuit Court against Cecilia Peasley, individually and as trustee of the Cecilia L. Kaurich Trust, and Jeffrey and Sandra Cavanaugh, seeking injunctive relief to preclude defendants from renting their lake houses for transient, short-term use because a restrictive covenant limited use of the premises to "private occupancy," only permitted the construction of "private dwelling[s]," and did not allow for "commercial use." Defendants Jeffrey and Sandra Cavanaugh reached a settlement agreement with plaintiffs. Plaintiffs and Peasley submitted stipulated facts to the trial court for resolution, and the court, Laura A. Frawley, J., denied plaintiffs' request for injunctive relief, concluding that the language in the restrictive covenant was ambiguous with respect to whether short-term rentals were permissible, that any doubts regarding the interpretation of the restrictive covenant had to be resolved in favor of the free use of the property and against the would-be enforcers, and that Peasley, therefore, could not be found to have violated the restrictive covenant. Plaintiffs appealed.

The Court of Appeals *held*:

1. In construing restrictive covenants, the overriding goal is to ascertain the intent of the parties. If a deed restriction is unambiguous, the restriction must be enforced as written unless the restriction contravenes law or public policy, or has been waived by acquiescence to prior violations, because enforcement of such restrictions grants the people of Michigan the freedom to arrange their affairs by the formation of contracts to determine the use of land. The Michigan Supreme Court has determined that in building-restriction cases involving covenants, the term "single private dwelling house" means a building designed as a single dwelling to be used by one family. In this case, the terms "private occupancy only" and "private dwelling" in the restrictive covenant, coupled with the prohibition against "commercial use," were clear and unambiguous. Peasley's transient, short-term

rental usage violated the terms of the restrictive covenant. Peasley did not reside at the property; Peasley rented the property to a variety of groups, including tourists, hunters, and business groups; those using the property for transient, short-term use had no right to leave their belongings on the property; and rentals were available throughout the year and were advertised on at least one worldwide rental website. Accordingly, the use was not limited to one single family for "private occupancy only" and a "private dwelling"; rather, the use was far more expansive and violated the restrictive covenant.

2. "Commercial use" is defined in legal parlance as use in connection with or for furtherance of a profit-making enterprise. "Commercial activity" is defined in legal parlance as any type of business or activity which is carried on for a profit. Under these definitions, the act of renting property to another for short-term use is a commercial use, even if the activity is residential in nature. In this case, the fact that Peasley and her renters used the property as a private or residential dwelling was not dispositive; the short-term rentals still violated the restrictive covenant barring commercial use of the property. Because Peasley's commercial use of the home was in violation of the unambiguous restrictive covenant, the trial court should have granted plaintiffs' request for injunctive relief.

Reversed and remanded.

MURPHY, J., dissenting, would have held that the "private occupancy" and "private dwelling" language did not bar Peasley from using the lake house for short-term rentals and that the language in the restrictive covenant prohibiting commercial use of the dwelling did not bar short-term rentals of the dwelling in the manner exercised by Peasley because well-established principles of jurisprudence provide that courts will not lightly restrict the free use of property, restrictions must be clear and expressly provided for in controlling documents, restrictions are to be strictly construed against a would-be enforcer, and any doubts are to be resolved in favor of the free use of property. Because the restrictive covenant did not include language expressly barring rentals or mandating that a dwelling be owner-occupied, the language of the restrictive covenant was ambiguous and Peasley should not have been barred from using the lake house for short-term rentals. As for commercial use of the property, although the stipulated facts could be viewed as showing that Peasley was engaged in commerce and used her house to further a profit-making enterprise, the house itself completely retained its residential and familial character while being rented, i.e., the

house was merely being used by renters for eating, sleeping, and other residential purposes, and there were no services provided on site, such as those associated with a hotel or bed-and-breakfast establishment. While no Michigan caselaw existed that directly addressed this issue, courts from other jurisdictions have held—seemingly uniformly—that language in a restrictive covenant that precludes the commercial use of premises or prohibits using property for commercial purposes or enterprises does not bar short-term rentals of a dwelling. Accordingly, Judge MURPHY would have held that the trial court did not err by ruling in favor of Peasley.

1. COVENANTS — RESTRICTIVE COVENANTS LIMITING USE OF PREMISES TO PRIVATE OCCUPANCY — SHORT-TERM RENTAL USAGE OF PROPERTY.

In building-restriction cases involving restrictive covenants, the term "single private dwelling house" means a building designed as a single dwelling to be used by one family; transient, short-term rental usage of property violates a restrictive covenant that limits use of the premises to private occupancy, that only permits the construction of private dwellings, and that does not allow for commercial use.

2. COVENANTS — COMMERCIAL USE — RENTING PROPERTY TO ANOTHER FOR SHORT-TERM USE.

"Commercial use" is defined in legal parlance as use in connection with or for furtherance of a profit-making enterprise; the act of renting property to another for short-term use is a commercial use, even if the activity is residential in nature.

Smith & Johnson, Attorneys, PC (by *Kenneth M. Petterson*) for Donald and Carol Eager.

White and Wojda (by *Daniel W. White*) for Cecilia Peasley.

Before: O'CONNELL, P.J., and MURPHY and K. F. KELLY, JJ.

K. F. KELLY, J. Plaintiffs appeal by right an order denying their request for injunctive relief. Plaintiffs sought to preclude defendant from renting out a lake house for transient, short-term use, arguing that such

use violated a restrictive covenant.[1] The trial court found that the restrictive covenant was ambiguous and that, as a result, the law required free use of the property, including transient, short-term rentals. Finding no such ambiguity, we reverse.[2]

I. BASIC FACTS

Plaintiffs filed an amended complaint for breach of the restrictive covenant and nuisance against defendant, their neighboring property owner, who rented out a lake house for transient, short-term use. Plaintiffs alleged that the rentals violated the deed restrictions limiting defendant's use of the premises to "private occupancy" and prohibiting "commercial use" of the premises. Plaintiffs sought injunctive relief in the form of an order enjoining any further rental activity and abating the purported nuisance. No trial was conducted, nor does it appear that any hearing took place. Instead, the parties submitted the following stipulated facts to the trial court for resolution:

> 6. Plaintiffs are owners of real property located in Caledonia Township, Alcona County, Michigan described as follows:
>
> Lot 4 of Doctor's Point, a subdivision recorded in Liber 1 of Plats, Page 47, Alcona County Records, commonly known as 6351 Oak Street, Hubbard Lake, Michigan 49747 . . . .
>
> 7. Defendant Peasley, as Trustee of the Cecilia L.

[1] Defendants Jeffrey and Sandra Cavanaugh reached a settlement agreement with plaintiffs early on in the litigation. This appeal solely concerns defendant Peasley's lake house, which she owns, not as a resident, but rather in her capacity as a trustee, and we shall refer to her hereafter as "defendant" for purposes of this opinion.

[2] We have not been asked to address—nor do we comment on—long-term rentals of private dwellings for residential use and whether such use is commercial in nature. The scope of this opinion addresses only short-term, transient rentals.

Kaurich Trust, is the owner of real property located in Caledonia Township, Alcona County, Michigan described as follows:

Lot 1 and part of Lot 2 of Doctor's Point, a subdivision recorded in Liber 1 of Plats, Page 47, Alcona County Records, commonly known as 653 Oak Street, Hubbard Lake, Michigan 49747 . . . .

8. The subject cottage is a two-story structure with 150 feet of frontage on Hubbard Lake. It is approximately 2000 square feet in size and contains four bedrooms.

9. Defendant Peasley has owned the cottage since 2009 and Defendant has been renting it during the summer season each year since then.

10. Defendant advertises its rental availability on-line through a national website, www.homeaway.com, which also serves as the medium for payment.

11. All rental agreements are between Defendant Peasley and a single responsible signatory.

12. The renter must be at least 26 years old, and the rental is limited to 10 guests with no pets allowed.

13. The year 2016, which is typical of the rental history, shows 64 days booked over the four-month period of May through August. No dates have yet been booked in September.

14. Defendants have rented and continue to rent the Peasley Property on a short-term basis, for a minimum of two (2) nights to seven (7) nights for each rental, with prices ranging from $150.00 - $225.00 per night to $850.00 - $1,700.00 per week depending upon the season, Spring May 19 - May 21, 2016; Summer May 22 - September 2016.

15. The Defendant's calendar for 2016 reflects rentals for 10 different families and one business group (Leadership Retreat). The rentals average six (6) days in length.

16. There is no rental or business office maintained on site, no bed and breakfast service, and no other services provided while renters [are] on site[,] such as housekeeping or linen.

> 17. Title to Eager Property and Peasley Property originated from a common Grantor who burdened Lots 1-9 of Doctor's Point Subdivision with the same restrictive covenants which are the subject matter of this proceeding.
>
> 18. Among the covenants and restrictions placed under the chain of title of each of these parties' [sic] by warranty deed dated February 26, 1946, recoreded [sic] March 18, 1946 at Liber 78, Page 432, Alcona County Records are the following:
>
> " . . . the premises shall be used for private occupancy only; . . . that no commodity shall be sold or offered for the sale upon the premises and no commercial use made thereof; . . ."

In pertinent part, the restrictive covenant provided

> that the premises shall be used for private occupancy only; that no building to be erected on said lands shall be used for purposes otherwise than as a private dwelling and such buildings as garage, ice-house, or other structures usually appurtenant to summer resort dwellings are to be at the rear of said dwellings; that such dwellings shall face the lake unless otherwise specified; that no commodities shall be sold or offered for sale upon said premises and no commercial use made thereof . . . .

The court recited the stipulated facts and acknowledged the parties' arguments but then inexplicably denied plaintiffs' request for injunctive relief.

II. ANALYSIS

"The interpretation of restrictive covenants is a question of law that this Court reviews de novo." *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 389; 761 NW2d 353 (2008), citing *Terrien v Zwit*, 467 Mich 56, 60-61; 648 NW2d 602 (2002).

Our Supreme Court has confirmed that restrictive covenants are contracts with a particular value:

> Because of this Court's regard for parties' freedom to contract, we have consistently supported the right of property owners to create and enforce covenants affecting their own property. Such deed restrictions generally constitute a property right of distinct worth. Deed restrictions preserve not only monetary value, but aesthetic characteristics considered to be essential constituents of a family environment. If a deed restriction is unambiguous, we will enforce that deed restriction as written unless the restriction contravenes law or public policy, or has been waived by acquiescence to prior violations, because enforcement of such restrictions grants the people of Michigan the freedom freely to arrange their affairs by the formation of contracts to determine the use of land. Such contracts allow the parties to preserve desired aesthetic or other characteristics in a neighborhood, which the parties may consider valuable for raising a family, conserving monetary value, or other reasons particular to the parties. [*Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 214; 737 NW2d 670 (2007) (citations, quotation marks, and brackets omitted).]

In terms of restrictive covenants, our Supreme Court has recognized "two essential principles, which at times can appear inconsistent. The first is that owners of land have broad freedom to make legal use of their property. The second is that courts must normally enforce unwaived restrictions on which the owners of other similarly burdened property have relied." *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 343; 591 NW2d 216 (1999). These types of cases are, therefore, decided on a case-by-case basis. *Id*.

"In construing restrictive covenants, the overriding goal is to ascertain the intent of the parties. Where the restrictions are unambiguous, they must be enforced as written." *Johnson*, 281 Mich App at 389 (citations omitted). "[T]he language employed in stating the restriction is to be taken in its ordinary and generally

understood or popular sense, and is not to be subjected to technical refinement, nor the words torn from their association and their separate meanings sought in a lexicon." *Borowski v Welch*, 117 Mich App 712, 716-717; 324 NW2d 144 (1982). Our Supreme Court has cautioned against judicial overstepping when interpreting restrictive covenants:

> The dissent justifies its amending from the bench by asserting that "[t]he absence of a definition in the restrictive covenants" of the terms "commercial, industrial, or business enterprises" leaves these terms ambiguous, and thus "opens the terms to judicial interpretation." We find this to be a remarkable proposition of law, namely, that the lack of an explicit internal definition of a term somehow equates to ambiguity—an ambiguity that apparently, in this case, allows a court free rein to conclude that a contract means whatever the court wants it to mean. Under the dissent's approach, any word that is not specifically defined within a contract becomes magically ambiguous. If that were the test for determining whether a term is ambiguous, then virtually all contracts would be rife with ambiguity and, therefore, subject to what the dissent in "words mean whatever I say they mean" fashion describes as "judicial interpretation." However, fortunately for the ability of millions of Michigan citizens to structure their own personal and business affairs, this is not the test. As this Court has repeatedly stated, the fact that a contract does not define a relevant term does not render the contract ambiguous. Rather, if a term is not defined in a contract, we will interpret such term in accordance with its "commonly used meaning." [*Terrien*, 467 Mich at 75-76 (citations omitted).]

The terms "private occupancy only" and "a private dwelling" coupled with the prohibition against "commercial use" in the restrictive covenant are clear and unambiguous, and defendant is prohibited from renting the property on a transient, short-term basis.

A. THE TERMS "PRIVATE OCCUPANCY ONLY" AND "A PRIVATE DWELLING"

In *Phillips v Lawler*, 259 Mich 567, 570-571; 244 NW 165 (1932), the building restriction at issue provided that " '[n]o building nor structure shall be used, built or maintained thereon for any purpose except for a private residence and a private garage either in connection with the residence or built separately therefrom.' " Our Supreme Court concluded that a city's zoning ordinance could not impair the right of the parties to enter into such a contract. The Court concluded that "[i]n building restriction cases involving covenants, *the term 'private dwelling house' means a building designed as a single dwelling to be used by one family*." *Id*. at 571 (emphasis added), citing *Schadt v Brill*, 173 Mich 647; 139 NW 878 (1913), *Kingston v Busch*, 176 Mich 566; 142 NW 754 (1913), *De Galan v Barak*, 223 Mich 378; 193 NW 812 (1923), and *Seeley v Phi Sigma Delta House Corp*, 245 Mich 252; 222 NW 180 (1928).

In *Seeley*, our Supreme Court concluded that a building restriction permitting " 'one single private dwelling house' " prohibited erecting a building for use as a college fraternity: "We hold that a restrictive covenant running with land, limiting use thereof to 'one single private dwelling house,' means one house, for a single family, living in a private state, and prohibits a college fraternity, or chapter house, intended to provide board and rooms for part of the members and a gathering place for fraternity purposes for all members." *Seeley*, 245 Mich at 256. The Court first noted that "[t]he language employed in stating the restriction is to be taken in its ordinary and generally understood or popular sense, and is not to be subjected to technical refinement, nor the words torn from their association and their separate meanings sought in a

lexicon." *Id*. at 253. The Court's focus was on the purpose of the language: "The term as a connected whole was employed for a purpose and if such purpose is manifest, and the words to accomplish it apt, we need only make application thereof to the facts established by the evidence." *Id*. at 253-254. In *Seeley*, "[t]he restriction was imposed by an owner when he sold lots in a residential district, and the purpose was to preserve such character with its assurance of privacy and quiet enjoyment for the reciprocal benefit of all purchasers of lots." *Id*. at 254. Therefore, although the term "dwelling house" was capable of multiple meanings, it assumed "concrete meaning" when accorded with the purpose behind the restriction. *Id*. The *Seeley* Court confirmed that "[i]n building restriction cases involving covenants, the term 'private dwelling house' means a building designed as a single dwelling to be used by one family." *Id*. A college fraternity whose "relation is purely artificial, is a business proposition, and more nearly approximates the character of a club, boarding house, or apartment house, with added recreational privileges," was not a family. *Id*. at 255.

Here, the covenant provides that "the premises shall be used for private occupancy only" and that "no building to be erected on said lands shall be used for purposes otherwise than as a private dwelling . . . ." *Phillips* and *Seeley* confirm that transient use of the property as a short-term rental violates the covenant. There is no reason to treat "private occupancy" in this case any differently than "private residence" in *Phillips* or "single private dwelling house" in *Seeley*.

In *O'Connor*, 459 Mich at 337, the use and character restrictions provided: "No lot shall be used except for residential purposes. No building shall be erected, altered, placed or permitted to remain on any lot other

than for the purpose of one single dwelling not to exceed two stories in height." The *O'Connor* Court concluded that interval use—or time-sharing—violated this restriction. It reviewed *Wood v Blancke*, 304 Mich 283; 8 NW2d 67 (1943), which involved a dispute over language that restricted use to "residence purposes only" and whether such language prevented an owner from raising racing pigeons on the property. *O'Connor*, 459 Mich at 341. The *O'Connor* Court reiterated that the term "residence" involved an inquiry beyond what structures were permitted on the property:

> "Restrictive covenants in deeds are construed strictly against grantors and those claiming the right to enforce them, and all doubts are resolved in favor of the free use of property. Notwithstanding this rule of construction, covenants restricting the erection of any building except for dwelling house purposes have been held to apply to the use as well as to the character of the building; and in strictly residential neighborhoods, where there has always been compliance with the restrictive covenants in the deeds, nullification of the restrictions has been deemed a great injustice to the owners of property. It is the policy of the courts of this State to protect property owners who have not themselves violated restrictions in the enjoyment of their homes and holdings. . . .
>
> > Restrictions for residence purposes, if clearly established by proper instruments, are favored by definite public policy. The courts have long and vigorously enforced them by specific mandate. This court has expressly recognized that the right of privacy for homes is a valuable right."
>
> [*Id*. at 341-342, quoting *Wood*, 304 Mich at 287-288, in turn quoting *Johnstone v Detroit, G H & M R Co*, 245 Mich 65, 74; 222 NW 325 (1928) (citations omitted).]

The *O'Connor* Court recognized that the issue of whether interval ownership violated the restrictive

covenant was one of first impression and turned its attention to *Wood*'s imperative " 'that the usual, ordinary and incidental use of property as a place of abode does not violate the covenant restricting such use to "residential purposes only," but that an unusual and extraordinary use may constitute a violation . . . .' " *O'Connor*, 459 Mich at 345, quoting *Wood*, 304 Mich at 288-289. The Court then turned to the term "residential purpose":

> [A] residence most narrowly defined can be a place which would be one place where a person lives as their permanent home, and by that standard people could have only one residence, or the summer cottage could not be a residence, the summer home at Shanty Creek could not be a residence if the principal residence, the place where they permanently reside, their domicile is in some other location, but I think residential purposes for these uses is a little broader than that. It is a place where someone lives, and has a permanent presence, if you will, as a resident, whether they are physically there or not. Their belongings are there. They store their golf clubs, their ski equipment, the old radio, whatever they want. It is another residence for them, and it has a permanence to it, and a continuity of presence, if you will, that makes it a residence. [*O'Connor*, 459 Mich at 345 (quotation marks omitted).]

However, interval or time-sharing use did not constitute residential use:

> The people who occupy it, or who have these weekly interests in this property, they have the right to occupy it for one week each year, but they don't have any rights, any occupancy right, other than that one week. They don't have the right to come whenever they want to, for example, or to leave belongings there because the next resident, who is a one-fiftieth or one forty-eighth co-owner has a right to occupy the place, too, and the weekly owner has no right to be at the residence at any time other than during their one week that they have purchased. That is

> not a residence. That is too temporary. There is no permanence to the presence, either psychologically or physically at that location, and so I deem that the division of the home into one-week timeshare intervals as not being for residential purposes as that term is used in these building and use restrictions . . . . [*Id*. at 346 (quotation marks omitted).]

The defendants argued that the plaintiffs had waived the use restriction because they had allowed short-term rentals. The *O'Connor* Court disagreed:

> With regard to whether plaintiffs waived the use restriction by allowing short-term rentals, we agree with the circuit court that such an alternative use is different in character and does not amount to a waiver of enforcement against interval ownership. Further, defendants have not demonstrated that the occasional rentals have altered the character of the Valley View subdivision to an extent that would defeat the original purpose of the restrictions. [*Id*.]

Defendant argues that *O'Connor* "cautions against rigid definitions when interpreting covenants," but, like the Court in *Torch Lake Protection Alliance v Ackermann*, unpublished per curiam opinion of the Court of Appeals, issued November 30, 2004 (Docket No. 246879), we conclude that defendant's attempt to distinguish the short-term rentals from the interval ownership activity in *O'Connor* is unavailing because the case before us does not present a question of waiver.[3]

In *Torch Lake*, the trial court concluded that rental use of property violated deed restrictions providing that the property "shall be used for private residence

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[3] "Although unpublished opinions of this Court are not binding precedent, they may, however, be considered instructive or persuasive." *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010) (citations omitted).

purposes only" and not used for any commercial purpose. *Id*. at 1-2. The Court found these terms to be unambiguous:

> The trial court found, and we agree, that the residential use and business prohibition covenants in defendants' deed are not ambiguous, and no genuine issue of material fact was shown with respect to defendants' violation of those covenants. The trial court's reasoning is clear and cogent:
>
> > Mr. Crumb when he laid out these parcels and put these covenants in place, . . . he did attempt to make as clear as this Court believes any human can, is that the property was to have a private residential purpose; it may be that subsumed within the notion of private residential purpose would be the occasional use of one's property by another, it's certainly not uncommon people swap their homes with friends, they have friends come and visit, they have overnight guests, guests for retractive [sic] periods of time, often people take care of aging parents, family members need to be nursed during a period of illness; I suspect in the vast majority of those occasions no money ever changes hands. . . . [B]ut perhaps the best writer to ever serve on the Michigan Supreme Court was Justice Vo[e]lker. . . . Justice Vo[e]lker wrote about the inherent ambiguity of language and the ability of lawyers to make almost any argument about any set of words that man could be constrained to put together; . . . I think the point is often the more detail one provides it simply provides more opportunity to try to insert ambiguity where none was intended.
> >
> > If there was one core facet associated with these deed restrictions, it is that they restrict property to a private residential purpose. Has that purpose outlived its meaning? Is this an isolated pocket of residential property surrounded by encroaching motels or businesses? . . . This is extraordinary property, it is a precious resource and it is largely

> residential. There are some commercial establishments, marines, [sic] restaurants, motels, on various parts of the lake, but the property at issue here is private residential property, and it is not surrounded by or being encroached upon by motels or hotels or gas stations. The character of the neighborhood is not changed. The covenants have not outgrown their purpose, which is to preserve a private residential purpose.
>
> * * *
>
> But, to the extent we have clear precedent in *O'Connor v Resort Owners* with regard to what is a residence and what is not, there is no question that rentals are in excess of $50,000 during the height of the season. [*Id*. at 3-4 (alterations in original).]

Citing *Wood*, the Court acknowledged that "incidental uses to a prescribed residential use may not violate the covenant if it is casual, infrequent, or unobstructive, and causes neither appreciable damage to neighboring property nor inconvenience, annoyance, or discomfort to neighboring residents." *Id*. at 4. The Court then considered the *O'Connor* Court's consideration of what constituted a "residential purpose." *Id*. Because the defendants failed to present admissible evidence to support their claim that their rental use did not exceed an incidental use of property for "private residence purposes only," the *Torch Lake* Court held that the trial court properly concluded that the use violated the deed restrictions.

The *Torch Lake* case is on point with the case at bar, and we adopt the Court's analysis as our own. We reject defendant's tortured attempt at reading an ambiguity into the restrictive covenant that simply does not exist. Defendant's transient, short-term rental usage violates the restrictive covenant requiring "pri-

vate occupancy only" and "private dwelling." Defendant, who lives in a neighboring county, does not reside at the property. She rents the property to a variety of groups, including tourists, hunters, and business groups. Those using the property for transient, short-term rental have no right to leave their belongings on the property. Rentals are available throughout the year and are advertised on at least one worldwide rental website. This use is not limited to one single family for "private occupancy only" and a "private dwelling," but is far more expansive and clearly violates the deed restrictions.

B. THE TERM "COMMERCIAL USE"

In denying plaintiffs' request for injunctive relief, the trial court focused primarily on the term "private dwelling" and spent little time discussing whether defendant's actions amounted to "commercial use" of the property. We conclude that, even if the short-term rentals did not specifically violate the deed restrictions limiting the property to "private occupancy only" and "private dwelling," the rentals most assuredly violated the restrictive covenant barring "commercial use" of the property.

In *Terrien*, our Supreme Court noted:

> The operation of a "family day care home" for profit is a commercial or business use of one's property. We find this to be in accord with both the common and the legal meanings of the terms "commercial" and "business." "Commercial" is commonly defined as "able or likely to yield a profit." *Random House Webster's College Dictionary* (1991). "Commercial use" is defined in legal parlance as "use in connection with or for furtherance of a profit-making enterprise." Black's Law Dictionary (6th ed). "Commercial activity" is defined in legal parlance as "any

> type of business or activity which is carried on for a profit." *Id*. [*Terrien*, 467 Mich at 63-64.]

We conclude that, under the definitions set forth in *Terrien*, the act of renting property to another for short-term use is a commercial use, even if the activity is residential in nature.

We specifically adopt this Court's reasoning in *Enchanted Forest Prop Owners Ass'n v Schilling*, unpublished per curiam opinion of the Court of Appeals, issued March 11, 2010 (Docket No. 287614). The defendants in *Enchanted Forest* "occasionally rented out their property, typically for periods of one week or less, for a rental fee." *Id*. at 3. The rentals were not as frequent as those in the case at bar; the records in *Enchanted Forest* revealed "that the property was rented for 33 days in 2005, 29 days in 2006, 34 days in 2007, and 31 days between January 1 and March 31, 2008." *Id*. This Court concluded that such short-term rentals violated the restrictive covenants prohibiting commercial use of the property:

> There is no dispute that defendants contracted with an agency to advertise their property as a vacation rental and did, in fact, rent the property for a fee. Although the financial documentation submitted by defendants shows that defendants did not make a profit when renting their property, this is not dispositive of whether the commercial purpose prohibition was violated. Defendants clearly indicated that they rented out the property to transient guests. Use of the property to provide temporary housing to transient guests is a commercial purpose, as that term is commonly understood. The trial court properly granted summary disposition in favor of the EFPOA on the basis of Article XI of the deed restrictions. [*Id*. at 8.]

"Commercial use," which is clearly prohibited in the restrictive covenant, includes short-term rentals even without resorting to technical refinement of what con-

stitutes "private occupancy" or "private dwelling." That defendant and her renters may use the property as a private dwelling is not dispositive. Short-term rentals still violate the restrictive covenant barring commercial use of the property. Because defendant's commercial use of the home was in clear violation of the unambiguous restrictive covenant, the trial court should have granted plaintiffs' request for injunctive relief.

Reversed and remanded for the trial court to enter a judgment granting plaintiffs' request for injunctive relief. We do not retain jurisdiction. Plaintiffs may tax costs as the prevailing party. MCR 7.219.

O'CONNELL, P.J., concurred with K. F. KELLY, J.

MURPHY, J. (*dissenting*). Plaintiffs, Donald and Carol Eager, filed a complaint against defendants, Cecilia Peasley, individually and as trustee of the Cecilia L. Kaurich Trust, and Jeffrey and Sandra Cavanaugh, alleging that defendants, who are neighboring property owners, were renting out their lake houses for short-term use in violation of a restrictive covenant that limited the use of their premises to "private occupancy," that only permitted the construction of "private dwelling[s]," and that did not allow for the "commercial use" of their premises.[1] Plaintiffs' lawsuit claimed breach of the deed restrictions and creation of a nuisance, and they sought injunctive relief in the form of an order enjoining any further rental activity and abating the purported nuisance. The crux of the dispute concerns the proper interpretation of the re-

[1] Defendants Jeffrey and Sandra Cavanaugh entered into a settlement agreement with plaintiffs, and this appeal pertains solely to defendant Peasley, whom I shall refer to as "defendant" for the remainder of my dissent.

strictive covenant, and the parties submitted stipulated facts to the trial court for resolution. The trial court issued a written opinion and order denying plaintiffs' request for injunctive relief, concluding that the language in the deed restrictions is ambiguous with respect to whether short-term rentals are permissible, that any doubts regarding the interpretation of the restrictive covenant must be resolved in favor of the free use of the property and against the would-be enforcers, and that defendant, therefore, could not be found to have violated the deed restrictions.[2] Plaintiffs

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[2] The majority states that the trial court, after reciting the stipulated facts and acknowledging the parties' arguments, "inexplicably denied plaintiffs' request for injunctive relief." This observation is not consistent with my review of the record. In its written opinion and order, the trial court recited the stipulated facts, reviewed the parties' arguments, set forth Michigan law on restrictive covenants, discussed some opinions from other jurisdictions, state and federal, and then ruled as follows:

> The restrictive covenant at issue here does not use the term "residential purpose" but instead uses the phrase "private dwelling[,]" which is even more ambiguous than "residential purpose." The restriction [here] further describes the subdivision as having "summer resort dwellings[,]" which may reasonably be construed to mean cottages or vacation homes.
>
> In the absence of a clear definition by Michigan Courts of "private dwelling" or "commercial use[,]" the restriction must be construed in favor of the free use of the land. It would have been easy to specifically articulate the intent that "private dwelling" and "commercial use" specifically prohibited short-term rentals but such was not the case. In the absence of such clarity, and the fact that numerous courts have found "residential purpose" and "commercial enterprise" to be ambiguous, in the case at bar it is clear that pursuant to the stipulated facts there is no business or commercial enterprise being conducted on the premises itself. Further[,] the short-term rentals allow transients to use the property in the same fashion as all the other property owners, and therefore do not violate any use provisions of the restriction.

The trial court indicated that it was relying on well-established common-law principles that courts will not lightly restrict the free use of property, that a restrictive covenant is to be strictly construed against the would-be enforcer, and that all doubts as to the construc-

appeal as of right, and I would affirm the trial court's ruling. Accordingly, I respectfully dissent.

I. STANDARD OF REVIEW

In *Terrien v Zwit*, 467 Mich 56, 60-61; 648 NW2d 602 (2002), our Supreme Court observed as follows:

> Because the parties have stipulated the essential facts, our concern here is only with the law: specifically, whether covenants permitting only residential uses, and expressly prohibiting commercial, industrial, or business uses, preclude the operation of a "family day care home," and, if so, whether such a restriction is unenforceable as against "public policy." These are questions of law that are reviewed de novo . . . . [See also *Conlin v Upton*, 313 Mich App 243, 254; 881 NW2d 511 (2015) ("This Court . . . reviews de novo the proper construction of restrictive covenants involving real property.").]

We are likewise concerned solely with the construction of deed restrictions, given that the parties stipulated to the facts; therefore, our review is de novo. Additionally, this Court reviews de novo a trial court's dispositional ruling on equitable matters. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005).

II. THE LAW REGARDING RESTRICTIVE COVENANTS

In *Conlin*, 313 Mich App at 255-256, this Court recited the principles that have developed in our civil jurisprudence pertaining to deed restrictions or restrictive covenants:

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tion of a restrictive covenant must be resolved in favor of the free use of property. The trial court denied plaintiffs' request for injunctive relief, determining "that defendant [was] not in violation of the restrictive covenant."

> It is well-grounded in Michigan's common law that property owners are free to attempt to enhance the value of their property in any lawful way, by physical improvement, psychological inducement, contract, or otherwise. A covenant is a contract created with the intention of enhancing the value of property, and, as such, it is a valuable property right. However, although Michigan courts recognize that restrictions are a valuable property right, this right must be balanced against the equally well-settled principle that courts will not lightly restrict the free use of property. Courts sitting in equity do not aid one man to restrict another in the use to which he may put his property unless the right to such aid is clear. Similarly, the provisions of a covenant are to be strictly construed against the would-be enforcer and doubts resolved in favor of the free use of property. When construing a restrictive covenant, courts may only give it a fair construction; courts may not broaden or limit the restriction. To that end, courts will not infer the existence of a restriction—the restriction must be expressly provided in the controlling documents. Courts will not enlarge or extend a restriction through interpretation, even to accomplish what it may be thought the parties would have desired had a situation that later developed been foreseen by them at the time the restriction was written. [Citations, quotation marks, and ellipsis omitted.]

Restrictive covenants allow parties to preserve desired characteristics of a neighborhood that "the parties may consider valuable for raising a family, conserving monetary value, or other reasons particular to the parties." *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 214; 737 NW2d 670 (2007). It is a "well-understood proposition that a breach of a covenant, no matter how minor and no matter how *de minimis* the damages, can be the subject of enforcement." *Terrien*, 467 Mich at 65.

"If a deed restriction is unambiguous, we will enforce that deed restriction as written unless the restric-

tion contravenes law or public policy, or has been waived by acquiescence to prior violations . . . ." *Bloomfield Estates*, 479 Mich at 214. When a term in a restrictive covenant is not defined within the covenant or deed, the term is to be construed in accordance with its commonly used meaning. *Id*. at 215. Additionally, under the doctrine of *noscitur a sociis*, a term or phrase is given meaning by its setting or context. *Id*. The simple fact that a restrictive covenant in a deed does not define a relevant term does not render the covenant ambiguous; rather, as noted, the term must be interpreted in accordance with its commonly used meaning. *Terrien*, 467 Mich at 76-77.

III. DISCUSSION

A. PRIVATE OCCUPANCY AND PRIVATE DWELLING

The terms in dispute are "private occupancy," "private dwelling," and "commercial use," none of which is defined in the restrictive covenant or deed. "In building restriction cases involving covenants, the term 'private dwelling house' means *a building designed as a single dwelling to be used by one family*." *Phillips v Lawler*, 259 Mich 567, 571; 244 NW 165 (1932) (emphasis added); see also *Seeley v Phi Sigma Delta House Corp*, 245 Mich 252, 254; 222 NW 180 (1928).[3] I shall refer to this definition as the "one-family definition" relative to occupancy and use of a dwelling. As reflected in the

[3] Moreover, the word "private," which, used as an adjective, modifies "occupancy" and "dwelling," is defined as "intended for or restricted to the use of a particular person, group, or class . . . [;] belonging to or concerning an individual person, company, or interest . . . [;] restricted to the individual or arising independently of others . . . ." *Merriam-Webster's Collegiate Dictionary* (11th ed). Occupancy or use restricted to a particular person or group, such as a family, would be consistent with the Supreme Court's definition of "private dwelling house."

stipulated facts, the restrictive covenant at issue originated in 1946, after *Phillips* and *Seeley* had been issued. When the common grantor employed the terms "private occupancy" and "private dwelling," it is reasonable to conclude that the grantor's intent was for those terms to be construed and understood in a manner consistent with the status of the law at the time and our Supreme Court's determination that a "private dwelling house" means a dwelling designed to be used by one family.

Plaintiffs narrowly construe the one-family definition, arguing that it necessarily limits occupancy and use of a dwelling to "one family, not multiple parties on a transient basis." In essence, plaintiffs' position is that "one family" equates to the "same family" relative to the entire period of ownership of a dwelling, ostensibly limiting occupancy and use to the grantee or grantees under a deed of conveyance, along with any family members. Defendant broadly interprets the one-family definition, contending that occupancy or use of a dwelling by one family can encompass any given family that rents the dwelling at a point in time, if even for a short period, such as the ten different families that rented defendant's house in 2016. Defendant maintains that the "private" aspect of occupancy or of use of a dwelling is not lost when families, individuals, or suitably small groups rent a dwelling, with their occupancy and use of the dwelling being to the exclusion of all nonrenters and the public in general. According to defendant, the occupancy and use of a dwelling remains private if authorized and permitted by the owner.[4]

[4] I note that defendant also argues that the reference to "summer resort dwellings" in the restrictive covenant lends support for her position that short-term vacation rentals are permissible. At best, the

I find it impossible to discern whether the common grantor, by employing the terms "private occupancy" and "private dwelling," intended to preclude an owner from renting out premises located in the subdivision, especially in the context in which a house is leased to a family, as is mostly the case with respect to defendant's rentals. The parties present reasonable arguments in favor of their conflicting interpretations of "private occupancy" and "private dwelling." It would have been quite simple for the common grantor to have included language expressly barring rentals or mandating that a dwelling be owner-occupied, but this was not done. Taking into consideration the principles that courts will not lightly restrict the free use of property, that restrictions must be clear and expressly provided for in controlling documents, that restrictions are to be strictly construed against a would-be enforcer, and that any doubts are to be resolved in favor of the free use of property, *Conlin*, 313 Mich App at 255-256, I would hold that the "private occupancy" and "private dwelling" language does not bar defendant from using her lake house for short-term rentals.

Contrary to the majority's view, *Seeley*, 245 Mich 252, wherein the Court ruled that the restrictive covenant limiting use of the land to "one single private dwelling house" prohibited the construction of a fraternity house, is easily distinguishable. The *Seeley* Court found that the restriction meant "one house, for a single family, living in a private state," which did not encompass "a college fraternity, or chapter house, intended to provide board and rooms for part of the members and a gathering place for fraternity purposes

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language merely likens the dwellings in the subdivision to "summer resort dwellings" but really provides no insight in regard to whether rentals are permitted.

for all members." *Id*. at 256. Plaintiffs' short-term rentals, almost exclusively to families, are much more consistent with a one-house, single-family, private-state use of the property than with the operation of a fraternity house. *Seeley* ultimately provides no clear insight or definitive direction with respect to whether short-term rentals are permissible under the language at issue in the instant case. Ambiguity persists, which supports my position.

In *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335; 591 NW2d 216 (1999), our Supreme Court examined a residential-purposes subdivision restriction, holding that interval ownership or time-sharing violated the restriction. The Court noted that homes in the subdivision were also used for daily and weekly rentals, and the defendant argued, in part, that the restriction, if it indeed barred time-shares, was waived because short-term rentals had been and were being allowed. *Id*. at 338-339. After concluding that interval ownership does not constitute a residential purpose under the facts of the case, the *O'Connor* Court addressed the defendant's waiver argument and the analogy to short-term rentals:

> With regard to whether plaintiffs waived the use restriction by allowing short-term rentals, we agree with the circuit court that such an alternative use is different in character and does not amount to a waiver of enforcement against interval ownership. Further, defendants have not demonstrated that the occasional rentals have altered the character of the . . . subdivision to an extent that would defeat the original purpose of the restrictions. [*Id*. at 345-346.][5]

[5] The Supreme Court effectively rejected this Court's determination in the case that interval ownership cannot be distinguished from year-round renting. *O'Connor*, 459 Mich at 341.

In this case, the term "residential purposes" is not contained in the restrictive covenant; there is no express "residential" limitation of any kind in the covenant.[6] Assuming that the "private occupancy" limitation equates to permitting only residential uses or purposes, *O'Connor* tends to support defendant's position with respect to short-term rentals. Although couched in terms of analyzing a waiver issue, the Court nonetheless stated that short-term rentals are different in character than time-shares, strongly suggesting that such rentals would not violate a residential-purposes restriction.

In sum, I agree with the trial court's analysis and ruling regarding the terms "private occupancy" and "private dwelling."

B. COMMERCIAL USE

In my view, the prohibition against the "commercial use" of property also lacks clarity in relationship to divining whether short-term rentals to transients are permitted. The term "commercial" is defined as "occupied with or engaged in commerce or work intended for commerce." *Merriam-Webster's Collegiate Dictionary*

[6] The majority indicates its agreement with and adopts the reasoning in *Torch Lake Protection Alliance v Ackermann*, unpublished per curiam opinion of the Court of Appeals, issued November 30, 2004 (Docket No. 246879), examining the opinion at length. Like *O'Connor*, *Torch Lake* concerned a residential-purposes limitation, which language does not exist here. Moreover, the restrictions in *Torch Lake* specifically barred use of the property as a " 'tourist camp or public place of resort.' " *Torch Lake*, unpub op at 2. For these reasons, I find *Torch Lake* to be distinguishable. The majority relies on and adopts another unpublished opinion issued by this Court; however, unpublished opinions are not binding, and I find the case cited by the majority to be unpersuasive. See MCR 7.215(C)(1). I think that this Court would be better served by not using unpublished opinions in crafting its opinions, especially its published opinions.

(11th ed). And in *Terrien*, 467 Mich at 64, our Supreme Court, quoting *Black's Law Dictionary* (6th ed), defined "commercial use" as meaning, in legal parlance, " 'use in connection with or for furtherance of a profit-making enterprise.' " Although the stipulated facts might perhaps be viewed as showing that defendant is engaged in commerce and using her house to further a profit-making enterprise, the house itself completely retains its residential and familial character while being rented and there are no services provided on site, as would be the case with a hotel or bed-and-breakfast establishment. Unlike the family daycare home that was found to be a commercial or business use of the dwelling in *Terrien*, 467 Mich at 83, there are no business operations or commercial activities whatsoever taking place on defendant's premises during a rental period.[7]

I could not locate any published Michigan opinions that are directly on point in regard to the issue presented. However, courts from other jurisdictions have held, apparently uniformly so, that language in a restrictive covenant that precludes the commercial use of premises or prohibits using property for commercial purposes or enterprises does not bar short-term rentals of a dwelling. In *Mason Family Trust v Devaney*, 146 NM 199, 201; 2009-NMCA-048; 207 P3d 1176 (NM App, 2009), the New Mexico Court of Appeals held that "rental of a house or abode for a short-term use as a shelter to live in is significantly different from using the property to conduct a business or commercial enterprise on the premises." In *Silsby v Belch*, 952 A2d 218, 222-223; 2008 ME 104 (2008), the Supreme Judicial Court of Maine held:

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[7] In *Terrien*, 467 Mich at 59 n 2, the Court noted that a "family day care home" receives minor children for care and supervision. Thus, employed adult personnel are on site providing services. But here there are no on-site services or personnel.

> Adopting [the plaintiffs'] reading would result in an affirmative rule of law holding that every single- or multi-family residence that is rented for use by someone other than the owner is a commercial enterprise. Under such a rule of law, innumerable properties would invariably run afoul of local zoning ordinances prohibiting commercial uses. The use of this property is residential; the fact that this use may involve income in some fashion does not change a fundamentally residential use to a commercial enterprise. The fact remains that the original grantor could have limited the use of this property to an owner-occupied, single-family residence if she wished by placing such commonly used language in the covenant.

In *Yogman v Parrott*, 325 Or 358, 366; 937 P2d 1019 (1997), the Oregon Supreme Court ruled that because a prohibition against short-term rentals was not plainly within the provisions of the covenant, the defendants were permitted to rent their property to others despite restrictive language that did not allow commercial enterprises on the property. In *Pinehaven Planning Bd v Brooks*, 138 Idaho 826, 830; 70 P3d 664 (2003), the Idaho Supreme Court held:

> Renting the property for residential purposes, whether short or long-term, does not fit within the[] prohibitions [against commercial ventures or businesses of any type]. The only building on the [defendants'] property remains a single-family dwelling and renting this dwelling to people who use it for the purposes of eating, sleeping, and other residential purposes does not violate the prohibition on commercial and business activity as such terms are commonly understood.

In *Houston v Wilson Mesa Ranch Homeowners Ass'n, Inc*, 360 P3d 255, 260; 2015 COA 113 (Colo App, 2015), the Colorado Court of Appeals, after reviewing out-of-state opinions that concluded that covenant prohibitions against commercial use did not bar short-term rentals of residential property, either because they

were ambiguous or because they unambiguously did not preclude such use, held that it agreed with these cases and that "short-term vacation rentals . . . are not barred by the commercial use prohibition in the covenants" at issue. In *Russell v Donaldson*, 222 NC App 702, 706-707; 731 SE2d 535 (2012), the North Carolina Court of Appeals held:

> Under North Carolina case law, restrictions upon real property are not favored. Ambiguities in restrictive covenants will be resolved in favor of the unrestricted use of the land. A negative covenant, prohibiting business and commercial uses of the property, does not bar short-term residential vacation rentals.

Finally, I find instructive and persuasive the following sentiments expressed by the Alabama Court of Appeals in *Slaby v Mountain River Estates Residential Ass'n, Inc*, 100 So 3d 569, 580 (Ala Civ App, 2012), which concerned a subdivision cabin and a restrictive covenant prohibiting commercial uses of the property:

> Unlike in *Reetz* [*v Ellis*, 279 Ala 453; 186 So 2d 915 (1966)], in which the property owners planned to manage the mobile-home park on site, in this case no mercantile or similar activity occurs at the cabin. The actual renting of the cabin, and any financial transactions associated therewith, occurs off-site. The Slabys [cabin owners] do not solicit renters on-site, but do so through the Internet, where potential tenants can view the premises without actually going there. While occupying the cabin, the tenants must cook and clean for themselves and they do not receive any services from the Slabys. Although the Slabys remit a lodging tax, . . . that fact does not detract from the conclusion that no commercial activity takes place on the premises.
>
> Most importantly, unlike in *Reetz*, the income the Slabys derive from the rental of the property derives solely from the use of the property in the same manner as the other landowners in the subdivision use their properties.

> The fact that the Slabys receive rental income does not transform the character of the surrounding subdivision like the maintenance of a mobile-home park or a hotel would.

The *Slaby* court concluded that the "commercial use" prohibition did not preclude the Slabys from renting out the cabin on a short-term basis, given that the purposes for which the cabin is used by renters, "such as for eating, sleeping, and other residential purposes, do[] not amount to commercial use." *Slaby*, 100 So 3d at 582.

In the instant case, as reflected in the stipulated facts, defendant rents her property through a national website, "which also serves as the medium for payment," and "[t]here is no rental or business office maintained on site, no bed and breakfast service, and no other services provided while renters [are] on site[,] such as housekeeping or linen." Defendant's house is thus merely used by renters for eating, sleeping, and other residential purposes, just like any of the other houses in the subdivision; there are no commercial activities or business operations taking place on site. Once again, it would have been quite simple for the common grantor to have included language expressly barring rentals or mandating that a dwelling be owner-occupied, but this was not done. For the reasons expressed in the caselaw from other states, and taking into consideration the principles from our jurisprudence that courts will not lightly restrict the free use of property, that restrictions must be clear and expressly provided for in controlling documents, that restrictions are to be strictly construed against a would-be enforcer, and that any doubts are to be resolved in favor of the free use of property, *Conlin*, 313 Mich App at 255-256, I would join those jurisdictions discussed earlier and hold that language in a restrictive covenant

that prohibits making commercial use of a dwelling does not bar short-term rentals of the dwelling in the manner exercised by defendant. Therefore, I would hold that the trial court did not err by ruling in favor of defendant. Accordingly, I respectfully dissent.[8]

[8] As a final note, the majority indicates that it is not commenting on long-term rentals of private dwellings. However, I believe that the majority's underlying analysis can effectively be invoked to bar long-term rentals in the context of the language at issue in this case.

SIMS v VERBRUGGE

Docket No. 337747. Submitted October 4, 2017, at Grand Rapids. Decided October 19, 2017. Approved for publication December 5, 2017, at 9:00 a.m.

In 2013, the Kent County Prosecuting Attorney initiated a support action in the Kent Circuit Court against defendant, Danny D. Verbrugge, with regard to his daughter. Defendant and the child's mother—plaintiff, Natassia T. Sims—were never married, but they signed an acknowledgment of parentage (AOP) form under MCL 722.1003 of the Acknowledgment of Parentage Act, MCL 722.1001 *et seq*., when the child was born in 2012. During the support hearing, the court, Patrick G. Hillary, J., ordered defendant to pay support, stating that plaintiff had physical custody of the child; defendant later moved for a parenting-time schedule, which the court granted. Defendant subsequently moved for joint legal custody and primary or joint physical custody after plaintiff informed him that she intended to move out of state with the child. The court denied defendant's motion, reasoning that under MCL 722.1 and MCL 722.2 of the emancipation of minors act, added by 1968 PA 293—an act that defines the rights of parents—plaintiff had sole legal custody of the child and that defendant had failed to establish under MCL 722.27(1)(c) of the Child Custody Act, MCL 722.21 *et seq*., the proper cause or change of circumstances required to modify or amend the existing custody order. Defendant appealed.

The Court of Appeals *held*:

1. MCL 722.1003(1) provides that a father is considered to be the natural father of a child born out of wedlock if the man joins with the mother of the child and acknowledges that child as his child by completing an AOP. Under MCL 722.1004, the AOP establishes paternity, and it may be the basis for court-ordered support, custody, or parenting time without further adjudication under the Paternity Act, MCL 722.711 *et seq*. The Acknowledgment of Parentage Act does not, however, grant a father who signs an AOP the same legal rights as a father whose child is born in wedlock. In that regard, MCL 722.1006 provides that

once a mother and father sign an AOP, the mother has initial custody of the child without prejudice to the determination of either parent's custodial rights, until otherwise determined by the court or otherwise agreed upon by the parties; initial custody of the child includes legal custody. The initial custody provided through execution of an AOP is not a judicial determination because such a determination would result in an established custodial environment—which would require a father to establish the MCL 722.27(1)(c) heightened standard of proper cause or change of circumstances when seeking custody—contrary to the MCL 722.1006 provision that the grant of initial custody following an AOP shall not affect the rights of either parent seeking a custody or parenting-time order.

2. While the Acknowledgment of Parentage Act establishes paternity, the Child Custody Act provides the exclusive means of pursuing child custody rights. Under MCL 722.27(1)(c), a party seeking to modify or amend an existing custody order must demonstrate proper cause or change of circumstances to justify the modification. A change of circumstances exists when, since the entry of the last custody order, the conditions surrounding custody of the child—which have or could have a significant effect on the child's well-being—have materially changed.

3. In this case, because there was an existing order regarding physical custody and parenting time, the trial court correctly required defendant to demonstrate proper cause or a change of circumstances to justify a hearing to modify or amend that order; plaintiff's statement that she may move out of state was a contingent future event, not a sufficient change of circumstances to satisfy MCL 722.27(1)(c). However, because there was no previous judgment or order concerning legal custody—plaintiff attained legal custody of the child through operation of the Acknowledgment of Parentage Act, not by judicial determination—the trial court erred by imposing the higher proper-cause-or-change-of-circumstances standard when defendant sought a change in legal custody. The heightened standard of scrutiny, which is required to modify or amend an existing judgment, placed a heavier burden on defendant because MCL 722.1006 prohibits execution of the AOP from affecting the rights of either parent in a proceeding seeking a custody order. Remand on the issue was necessary for the trial court to consider for the first time whether defendant was entitled to legal custody of the child.

Affirmed in part, reversed in part, and remanded for further proceedings.

PARENT AND CHILD — CHILD CUSTODY — ACKNOWLEDGMENT OF PARENTAGE ACT — INITIAL CUSTODY — PHYSICAL AND LEGAL CUSTODY — INITIAL CUSTODY NOT A JUDICIAL DETERMINATION.

Under MCL 722.1006 of the Acknowledgment of Parentage Act, MCL 722.1001 *et seq*., once a mother and father who are not married execute an acknowledgment of parentage form, the mother has initial custody of the child without prejudice to the determination of either parent's custodial rights until otherwise determined by the court or otherwise agreed upon by the parties; the mother's initial custody of the child includes both physical and legal custody, but the grant of custody does not affect the rights of either parent in a proceeding to seek a court order for custody or parenting time; the initial custody arises by operation of law, not through a judicial determination regarding custody that triggers the heightened MCL 722.27(1)(c) standard of scrutiny, which applies when a parent seeks to modify or amend a previous custody order.

Carpenter & Judd (by *Benjamin R. Judd*) for plaintiff.

Miller Johnson (by *Richard E. Hillary, II*) for defendant.

Before: MURRAY, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM. Defendant, Danny D. Verbrugge, appeals as of right the trial court's order denying his motion for a de novo review of his motion seeking custody of his daughter, LV. For the reasons stated below, we affirm in part, reverse in part, and remand for further proceedings.

I. FACTS AND PROCEEDINGS

LV was born to defendant and plaintiff, Natassia T. Sims, on October 15, 2012. The parties were unmarried, but on the day of LV's birth, the parties signed

an affidavit of parentage (AOP) indicating that defendant was LV's biological father. The parties subsequently ended their relationship but were able to make arrangements for defendant to visit LV without judicial involvement.

In April 2013, the Kent County Prosecuting Attorney filed a complaint for support, seeking an order requiring defendant to pay child support. The trial court eventually entered a default judgment against defendant, ordering him to pay child support and stating that plaintiff had physical custody of LV.

The parties resided a short distance from one another until May 2015, when plaintiff and LV moved an hour's drive away. Defendant later moved in the trial court to enter an order regarding parenting time, alleging that since the move, he had been unable to see LV as frequently as when the parties had lived closer to one another. The trial court entered an order providing a parenting-time schedule and, in August 2015, the parties stipulated another arrangement.

In November 2016, plaintiff notified defendant that she intended to sell her Michigan home and move to Colorado with LV. In response, defendant filed a motion seeking joint legal custody and primary or joint physical custody, alleging that this would be in LV's best interests. According to the referee, pursuant to MCL 722.1[1]

[1] MCL 722.1 provides as follows:

> As used in this act:
>
> (a) "Minor" means a person under the age of 18 years.
>
> (b) "Parents" means natural parents, if married prior or subsequent to the minor's birth; adopting parents, if the minor has been legally adopted; or the mother, if the minor is illegitimate.

and MCL 722.2,[2] plaintiff had legal custody of LV as the mother of an illegitimate child. Defendant sought de novo review of this ruling pursuant to MCR 3.215(E)(4). The trial court agreed with the referee's conclusion and denied defendant's motion, holding that plaintiff had sole legal custody of LV and that defendant had not fulfilled his statutory burden under MCL 722.27(1)(c) to seek a modification or amendment of the custody order.

II. ANALYSIS

Defendant now appeals, arguing that plaintiff did not have sole legal custody of LV because the execution of the AOP gave the parties joint legal custody. We disagree that the parties had joint legal custody by executing the AOP but hold that defendant is entitled to a hearing upon remand for a determination as to legal custody.

When this Court reviews matters concerning child custody, it reviews the trial court's findings of fact under the great weight of the evidence standard, which requires that a trial court's findings of fact "be affirmed unless the evidence clearly preponderates in the opposite direction." *Thompson v Thompson*, 261 Mich App 353, 358; 683 NW2d 250 (2004) (quotation marks and

(c) "Emancipation" means termination of the rights of the parents to the custody, control, services and earnings of a minor.

[2] MCL 722.2 provides as follows:

Unless otherwise ordered by a court order, the parents of an unemancipated minor are equally entitled to the custody, control, services and earnings of the minor, but if 1 parent provides, to the exclusion of the other parent, for the maintenance and support of the minor, that parent has the paramount right to control the services and earnings of the minor.

citation omitted). Further, this Court reviews the trial court's discretionary rulings for an abuse of discretion and questions of law for clear legal error. *Id*.

When interpreting statutes, this Court's fundamental "obligation is to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute." *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). If the statute's language is unambiguous, judicial construction is not permitted. *Shinholster v Annapolis Hosp*, 471 Mich 540, 549; 685 NW2d 275 (2004). Further, this Court "must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory." *Koontz*, 466 Mich at 312. This Court must also read the Acknowledgment of Parentage Act, MCL 722.1001 *et seq*., the Paternity Act, MCL 722.711 *et seq*., and the Child Custody Act, MCL 722.21 *et seq*., *in pari materia*, construing them together and interpreting their provisions so that they do not conflict. *Sinicropi v Mazurek*, 273 Mich App 149, 156-157; 729 NW2d 256 (2006).

The Acknowledgment of Parentage Act provides that a man can be considered the father of a child born out of wedlock[3] as follows:

> If a child is born out of wedlock, a man is considered to be the natural father of that child if the man joins with the mother of the child and acknowledges that child as his child by completing a form that is an acknowledgment of parentage. [MCL 722.1003(1).]

Once the parties complete such an act, the Acknowledgment of Parentage Act provides as follows:

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[3] A child born out of wedlock is "a child begotten and born to a woman who was not married from the conception to the date of birth of the child, or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage." MCL 722.711(a).

> An acknowledgment signed under this act establishes paternity, and the acknowledgment may be the basis for court ordered child support, custody, or parenting time without further adjudication under the paternity act, Act No. 205 of the Public Acts of 1956, being sections 722.711 to 722.730 of the Michigan Compiled Laws. The child who is the subject of the acknowledgment shall bear the same relationship to the mother and the man signing as the father as a child born or conceived during a marriage and shall have the identical status, rights, and duties of a child born in lawful wedlock effective from birth. [MCL 722.1004.]

Further, "[a]lthough MCL 722.1004 affords the *child* the full rights of a child born in wedlock, the statute does not grant a putative father who acknowledges paternity the same legal rights as a father whose child is born in wedlock." *Eldred v Ziny*, 246 Mich App 142, 149; 631 NW2d 748 (2001). Insofar as custody is concerned, MCL 722.1006 provides as follows:

> After a mother and father sign an acknowledgment of parentage, the mother has initial custody of the minor child, without prejudice to the determination of either parent's custodial rights, until otherwise determined by the court or otherwise agreed upon by the parties in writing and acknowledged by the court. This grant of initial custody to the mother shall not, by itself, affect the rights of either parent in a proceeding to seek a court order for custody or parenting time.

As described by our Supreme Court, this portion of the Acknowledgment of Parentage Act "effectively conditions the parents' ability to execute an AOP on their willingness to allow the mother to be granted 'initial custody of the minor child . . . .' " *Foster v Wolkowitz*, 486 Mich 356, 366; 785 NW2d 59 (2010), quoting MCL 722.1006. The "initial custody" enjoyed by a mother includes legal custody. See *Ziny*, 246 Mich App at 144, 146-147 (explaining that "pursuant to the Acknowledg-

ment of Parentage Act, the mother . . . had legal custody of [the child]" because the natural parents had signed an AOP).

In *Foster*, 486 Mich at 366, the Court specified that, although the mother receives initial custody of the child through the execution of an AOP, this initial custody is not a judicial determination. The Court reasoned that "[e]quating an AOP to a judicial determination would necessarily be prejudicial to the father" because, if this was the case, the child would have an established custodial environment and, as a result, the father would face a heightened standard of scrutiny when seeking custody of the child. *Id*. at 366 n 19. This would be in direct conflict with the MCL 722.1006 statement that the grant of initial custody "shall not, by itself, affect the rights of either parent in a proceeding to seek a court order for custody or parenting time." *Id*. at 366 (quotation marks and emphasis omitted).

While the Acknowledgment of Parentage Act "establishes paternity, establishes the rights of the child, and supplies a basis for court ordered child support, custody, or parenting time without further adjudication under the paternity act," the Child Custody Act provides "the exclusive means of pursuing child custody rights." *Ziny*, 246 Mich App at 148 (quotation marks and citation omitted). MCL 722.27(1) of the Child Custody Act provides, in pertinent part, that the trial court may resolve custody disputes as follows:

> If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:

> (a) Award the custody of the child to 1 or more of the parties involved or to others and provide for payment of support for the child, until the child reaches 18 years of age. Subject to section 5b of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605b, the court may also order support as provided in this section for a child after he or she reaches 18 years of age. The court may require that support payments shall be made through the friend of the court, court clerk, or state disbursement unit.
>
> (b) Provide for reasonable parenting time of the child by the parties involved, by the maternal or paternal grandparents, or by others, by general or specific terms and conditions. Parenting time of the child by the parents is governed by section 7a.
>
> (c) Subject to subsection (3), modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age and, subject to section 5b of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605b, until the child reaches 19 years and 6 months of age. The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. If a motion for change of custody is filed while a parent is active duty, the court shall not consider a parent's absence due to that active duty status in a best interest of the child determination.

To demonstrate proper cause to modify or amend a previous order, a movant must demonstrate that "one or more appropriate grounds that have or could have a

significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Vodvarka v Grasmeyer*, 259 Mich App 499, 511; 675 NW2d 847 (2003). While "[t]here is no hard or fast rule" as to what grounds could fulfill this requirement, the trial court may rely on the best-interest factors enumerated in MCL 722.23 to aid in this determination. *Id*. at 511-512. Similarly, to demonstrate a change in circumstances sufficient to justify the modification or amendment of a previous order, a movant must demonstrate that "since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Id*. at 513. Once the trial court has found by a preponderance of the evidence that proper cause or a sufficient change in circumstances exists, the trial court may then engage in a best-interest determination. *Id*. at 512. When the movant seeks to change the child's custodial environment, the best-interest determination must be based on clear and convincing evidence. MCL 722.27(1)(c).

In the present case, the parties executed an AOP on October 15, 2012—the day LV was born—that properly identified defendant as LV's father. By operation of the Acknowledgment of Parentage Act, upon execution of the AOP, plaintiff automatically received initial legal and physical custody of LV. See MCL 722.1006; *Ziny*, 246 Mich App at 146-147. Later, the trial court ordered defendant to pay child support and ruled that plaintiff had sole physical custody of LV. Although the trial court's order was silent as to legal custody, plaintiff retained initial legal custody of LV until challenged.

To the extent that defendant challenged the *physical* custody of LV, the trial court had already entered an

order regarding her physical custody, and the trial court properly required defendant to demonstrate proper cause or a change in circumstances to justify a hearing. See MCL 722.27(1)(c). However, the trial court erred by requiring defendant to demonstrate proper cause or a change in circumstances when he moved for a change in LV's legal custody. A person is only required to demonstrate proper cause or a change in circumstances when that person seeks to "modify or amend [the trial court's] previous judgments or orders." MCL 722.27(1)(c). Here, however, there was no previous judgment or order concerning legal custody, for although plaintiff enjoyed initial legal custody of LV, it was granted by operation of law, not a judicial determination. See *Foster*, 486 Mich at 366. Courts cannot treat the legal custody granted by signing an AOP the same as a judicial determination because, as stated earlier, MCL 722.1006 provides that the grant of initial custody through the execution of an AOP "shall not, by itself, affect the rights of either parent in a proceeding to seek a court order for custody or parenting time." Because the parties' AOP was not a judicial determination, no existing judgment or order regarding legal custody existed. See *Foster*, 486 Mich at 366 n 19; MCL 722.1006. Accordingly, by requiring defendant to demonstrate by a preponderance of the evidence proper cause or a change in circumstances—the standard required to modify or amend an existing judgment or order—the trial court erred, imposing a higher burden on defendant in violation of MCL 722.1006.

To the extent that the trial court reasoned that under MCL 722.1 and MCL 722.2 plaintiff had sole legal custody of LV as a result of LV being an illegitimate child, we note that this interpretation is at odds with the MCL 722.1004 mandate that a child who is the subject of an AOP is treated as a child born in

wedlock and not as illegitimate. See *Sinicropi*, 273 Mich App at 156-157 (providing that we must interpret statutes regarding the same subject matter harmoniously). Moreover, this Court is bound to follow the opinions of our Supreme Court, see *State Treasurer v Sprague*, 284 Mich App 235, 242; 772 NW2d 452 (2009), not the unpublished opinion of this Court that defendant cited. Accordingly, the Court's discussion in *Foster* concerning AOPs and initial custody determinations is controlling. The trial court erred by subjecting defendant's motion for legal custody to the standards of MCL 722.27(1)(c).

We reverse the portion of the trial court's order regarding legal custody and remand. Upon remand, the trial court should consider whether defendant is entitled to legal custody of LV. This evaluation should be treated as an initial evaluation of custody without a prior existing order.

Regarding LV's physical custody, however, a previous order existed, and the trial court did not err by requiring defendant to demonstrate proper cause or a change in circumstances to justify reconsideration of the order. On appeal, defendant argues that plaintiff's indication that she may move to Colorado and the listing of her house for sale constituted a sufficient change in circumstances to satisfy MCL 722.27(1)(c). This argument rests completely on contingent future events, not a change in circumstances that already occurred. Therefore, the trial court did not err by choosing not to hear defendant's argument as to a change in physical custody, and we affirm this portion of the trial court's ruling. See MCL 722.27(1)(c); *Vodvarka*, 259 Mich App at 511-512.[4]

[4] We further note that plaintiff has since filed a motion in the trial court seeking to change her domicile, apparently having solidified her

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

No costs to either party, neither having prevailed in full. MCR 7.219(A).

MURRAY, P.J., and SAWYER and MARKEY, JJ., concurred.

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plans to move to Colorado. Because such a move is now imminent and no longer contingent, it undoubtedly constitutes a change of circumstances under MCL 722.27(1)(c), and defendant will have the opportunity to have the trial court reevaluate physical custody in the trial court. See *Vodvarka*, 259 Mich App at 513 (stating that a change of circumstances exists when the change in circumstances could have a significant effect on the child's well-being).

AUTO-OWNERS INSURANCE COMPANY v CAMPBELL-DUROCHER GROUP PAINTING AND GENERAL CONTRACTING, LLC

CAMPBELL-DUROCHER GROUP PAINTING AND GENERAL CONTRACTING, LLC v CITY OF ADRIAN

PULLUM WINDOW CORPORATION v CAMPBELL

Docket Nos. 331384, 331389, 331802, and 331803. Submitted October 3, 2017, at Detroit. Decided October 12, 2017. Approved for publication December 5, 2017, at 9:05 a.m.

The city of Adrian contracted with Campbell-Durocher Group Painting and General Contracting, LLC, Jack Campbell, and Carrie Campbell (collectively, Campbell-Durocher) to manage a downtown restoration project for the city. Campbell-Durocher provided performance bonds for the job, naming itself as principal and Auto-Owners Insurance Company as surety. The project was not completed by December 2009, the initial deadline in the contract. And the project was still not yet substantially completed by May 2010, a date on which the parties had later agreed. In August 2010, the city ordered Campbell-Durocher off the job site and terminated its contract with the corporation. The city filed a written bond claim with Auto-Owners. Auto-Owners settled the city's bond claim for approximately $127,000, and it also settled a bond claim for approximately $62,000 with one of Campbell-Durocher's unpaid suppliers. Several related lawsuits arose from this matter in the Lenawee Circuit Court. The relevant actions on appeal involved Campbell-Durocher's complaint against the city for breach of contract and for unpaid monies for work it had performed and Auto-Owners' complaint against Campbell-Durocher for indemnification of the amounts Auto-Owners had paid on the bond claims and other costs it had incurred. Campbell-Durocher and Auto-Owners moved for summary disposition of their respective lawsuits. The court, Anna Marie Anzalone, J., denied both motions, reasoning that there remained issues of fact and law to be presented to the court. The court denied both parties' motions for reconsideration. Campbell-Durocher and Auto-Owners appealed by leave granted, and the Court of Appeals consolidated the appeals in an unpublished order entered June 2, 2016.

The Court of Appeals *held*:

1. Indemnity contracts are subject to the same rules of construction as are other types of contracts; if the language of an indemnity contract is clear, the contract's construction is a question of law for the court. An indemnity contract should be construed in a manner that covers all losses, damages, or liabilities to which the parties intended application of the contract. The indemnity contract between Campbell-Durocher and Auto-Owners unambiguously required Campbell-Durocher to indemnify Auto-Owners for all liability and expenses resulting from execution of the bonds. Campbell-Durocher did not dispute that the indemnity contract obligated it to reimburse Auto-Owners for execution of the bonds. Rather, Campbell-Durocher questioned whether Auto-Owners had properly settled the bond claims. Campbell-Durocher argued that Auto-Owners was not entitled to reimbursement because Auto-Owners had acted in bad faith by failing to conduct an investigation into the bond claims. According to Campbell-Durocher, if Auto-Owners had investigated the claims and had consulted with Campbell-Durocher, Auto-Owners would have discovered that the city was not entitled to payment on its bond claim because the city had breached the building contract. Notwithstanding the question whether the city breached the contract, the indemnity contract plainly gave Auto-Owners the discretion to adjust, settle, or compromise any claim on the bonds, and the indemnity contract plainly required Campbell-Durocher to reimburse Auto-Owners without regard to whether Auto-Owners was ultimately correct in paying the bond claims as long as Auto-Owners had acted in good faith. "Good faith" is a standard that measures the state of mind, perceptions, honest beliefs, and intentions of a party; the phrase refers to the absence of malice and the absence of an intent to defraud or to seek an unconscionable advantage. In contrast, "bad faith" refers to conduct involving something more than honest errors in judgment, such as conduct that is arbitrary, reckless, or indifferent, or conduct that intentionally disregards the interests of the person owed a duty. According to the indemnity contract, evidence that Auto-Owners paid a claim was prima facie evidence of Campbell-Durocher's liability and the extent of that liability. The prima facie evidence in this case required Campbell-Durocher to come forward with some evidence to rebut or contradict its liability. Specifically, when payment of a bond claim serves as prima facie evidence of liability, the indemnitor disputing liability has the burden of proving that the surety acted in bad faith or otherwise violated the indemnity agreement. Campbell-Durocher failed to show that a question of fact existed with regard to

whether Auto-Owners acted in bad faith. Therefore, the trial court erred when it denied Auto-Owners' motion for summary disposition.

2. Campbell-Durocher's complaint alleged that money remained due and owing to them as a result of change orders submitted. The corporation also argued that it was entitled to damages because the city breached the contract by terminating it without providing the 90-day notice required under § 2.2 of the contract. The city's sole responsive argument was that it did not violate the 90-day notice provision when it issued the termination letter to Campbell-Durocher because the contract had expired on its own terms long before Campbell-Durocher received notice of the termination. According to the city, it was not bound by the 90-day notice provision after the contract expired. Campbell-Durocher argued that the parties operated under an implied contract after the May 2010 deadline passed. An implied contract may arise when the parties continue to perform as before and their conduct demonstrates a mutual assent to a new agreement. But whether the 90-day notice provision applied would not affect whether Campbell-Durocher was entitled to payment for supplies and work performed before the city terminated the contract. Therefore, whether Campbell-Durocher was entitled to payment for the work performed under the change orders involved a question of fact, and summary disposition of the issue was not appropriate. And given that there was evidence that the parties continued to do business with each other after May 2010, determining whether the 90-day notice provision was in effect in August 2010 also involved a question of fact, and therefore summary disposition of that issue was also not appropriate. Accordingly, the trial court properly denied the city's motion for summary disposition of Campbell-Durocher's breach-of-contract claim.

Affirmed in part, reversed in part, and remanded for further proceedings.

Conlin, McKenney & Philbrick, PC (by *Bruce N. Elliott*) for Auto-Owners Insurance Company.

Jeffrey A. Dulany for Campbell-Durocher Group Painting and General Contracting, LLC, Jack Campbell, and Carrie Campbell.

Sarah K. Osburn for the city of Adrian.

Before: SHAPIRO, P.J., and HOEKSTRA and M. J. KELLY, JJ.

PER CURIAM. In these consolidated cases, Auto-Owners Insurance Company (Auto-Owners) and the city of Adrian (the City) appeal by leave granted the trial court's order denying their respective motions for summary disposition. Auto-Owners sought summary disposition regarding its claims for indemnification from appellees, Campbell-Durocher Group Painting and General Contracting, LLC (Campbell-Durocher), Jack Campbell, and Carrie Campbell.[1] The City sought summary disposition of the Campbells' claims for breach of contract. For the reasons explained in this opinion, we affirm the trial court's denial of the City's motion, reverse the trial court's denial of Auto-Owners' motion, and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

These appeals arise from a restoration project in the City that went awry. The City received a grant to fund a historical-facade-restoration project (the project) involving five downtown buildings. Campbell-Durocher was the successful bidder and was named general contractor for the project, and a building contract between the City and Campbell-Durocher was entered into on August 12, 2009. Pursuant to the requirements of MCL 129.201 *et seq*., a public works bonding act, Campbell-Durocher provided payment and performance bonds with itself as principal and Auto-Owners as surety. In relation to the bonds, an indemnity agreement was entered into by Campbell-Durocher and Auto-Owners.

[1] When appropriate, Campbell-Durocher, Jack Campbell, and Carrie Campbell will be referred to collectively as "the Campbells."

According to the building contract, the agreement was scheduled to expire on December 19, 2009. The project was not completed by that date. However, several change orders were approved by the parties that provided for completion dates well beyond December 19, 2009. Notably, before the contract expired, a change order relating to storefront windows and doors was signed that required substantial completion by May 13, 2010. Due to various issues related to the windows and doors, the project was still not completed by the date specified in the change order.

On August 24, 2010, the City ordered Campbell-Durocher off the job site. In correspondence dated August 26, 2010, the City stated, "The City of Adrian has terminated the contract with Campbell-Durocher Group as of August 24, 2010." As reasons for this decision, the City noted that Campbell-Durocher failed to complete the project on schedule, failed to pay a supplier, and failed to offer an acceptable solution to the storefront window and door issue.

As a result of the noncompletion of the project, the City filed a written bond claim with Auto-Owners. On September 21, 2011, Auto-Owners settled the City's bond claim for approximately $127,000. Auto-Owners also paid a bond claim of approximately $62,000 to ABC Supply Company, an unpaid supplier for the project.

The project resulted in the three lawsuits underlying this appeal, which were consolidated in the trial court. Other entities were named in the complaints, but they do not factor in this appeal. Relevant to this appeal, Auto-Owners sought reimbursement from the Campbells for amounts paid on the bond, totaling $189,277.64, as well as other costs incurred by Auto-Owners, including attorney fees. Also relevant to this

appeal, the Campbells alleged that the City breached the building contract by failing to pay approximately $60,000 for work performed by the Campbells and by terminating the contract in August 2010 without providing 90 days' notice as required under § 2.2 of the contract.

Several motions for summary disposition were filed by various parties, including the motions by the City and Auto-Owners that are at issue in this appeal. The City moved for summary disposition under MCR 2.116(C)(8) (failure to state claim) and (C)(10) (no genuine issue of material fact), contending that the building contract terminated on December 19, 2009, or, at the latest, on May 13, 2010. On the basis of its assertion that the contract had expired, the City argued that it did not breach the contract by terminating the Campbells in August 2010 without providing 90 days' notice. In comparison, relying on MCR 2.116(C)(9) (failure to state a valid defense) and (C)(10), Auto-Owners argued that summary disposition was proper because the unambiguous terms of the indemnification agreement entitled Auto-Owners to indemnification from the Campbells for all "bond losses."

The trial court denied the City's and Auto-Owners' motions, stating, without any elaboration, "that there are still issues of fact and law that need to be brought before this Court." The City and Auto-Owners moved for reconsideration, and the trial court denied the motions. The City filed applications for leave to appeal in this Court in each of the three lawsuits (Docket Nos. 331389, 331802, and 331803),[2] and Auto-Owners filed an application for leave to appeal in its action for

[2] The Campbells' breach-of-contract claim against the City is at issue in all three cases. In one of the cases, the Campbells filed a breach-of-

indemnification (Docket No. 331384). This Court granted the applications and consolidated the appeals.[3]

II. STANDARDS OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). While the parties cited MCR 2.116(C)(8), (C)(9), and (C)(10), they relied on evidence outside the pleadings. Consequently, we will review their motions under MCR 2.116(C)(10). MCR 2.116(G)(5); *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A genuine issue of material fact exists "when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

III. AUTO-OWNERS' APPEAL

On appeal, Auto-Owners argues that the trial court erred when it denied summary disposition on Auto-

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contract claim against the City. In the other two cases, the Campbells filed third-party complaints against the City for breach of contract.

[3] *Auto-Owners Ins Co v Campbell-Durocher Group*, unpublished order of the Court of Appeals, entered June 2, 2016 (Docket Nos. 331384 and 331802); *Campbell-Durocher Group v City of Adrian*, unpublished order of the Court of Appeals, entered June 2, 2016 (Docket No. 331389); *Pullum Window Corp v Campbell*, unpublished order of the Court of Appeals, entered June 2, 2016 (Docket No. 331803).

Owners' contractual indemnification claim. According to Auto-Owners, the express terms of the indemnity agreement required the Campbells to indemnify Auto-Owners for all losses incurred by reason of the execution of the bonds. Auto-Owners asserts that its payment of the bond claims is prima facie evidence of the Campbells' liability and that the Campbells have failed to offer any evidence that Auto-Owners paid the bond claims in bad faith.

An indemnity contract is interpreted in accordance with the rules of construction that govern any other type of contract. *Ajax Paving Indus, Inc v Vanopdenbosch Constr Co*, 289 Mich App 639, 644; 797 NW2d 704 (2010). Accordingly, "[u]nder ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court." *Meagher v Wayne State Univ*, 222 Mich App 700, 721; 565 NW2d 401 (1997).

> This Court's main goal in the interpretation of contracts is to honor the intent of the parties. The words used in the contract are the best evidence [of] the parties' intent. When contract language is clear, unambiguous, and has a definite meaning, courts do not have the ability to write a different contract for the parties, or to consider extrinsic testimony to determine the parties' intent. [*Kyocera Corp v Hemlock Semiconductor, LLC*, 313 Mich App 437, 446; 886 NW2d 445 (2015) (quotation marks and citations omitted).]

"A contract of indemnity should be construed so as to cover all losses, damages, or liabilities to which it reasonably appears to have been the intention of the parties that it should apply . . . ." *Title Guaranty & Surety Co v Roehm*, 215 Mich 586, 592; 184 NW 414 (1921) (opinion by FELLOWS, J.) (quotation marks and citation omitted).

In this case, the indemnity agreement specifically obligated the Campbells to

> indemnify [Auto-Owners] against all loss, costs, damages, expenses and attorneys fees whatever, and any and all liability therefor, sustained or incurred by [Auto-Owners] by reason of executing of said bond or bonds, or any of them, in making any investigation on account thereof, in prosecuting or defending any action brought in connection therewith, in obtaining a release therefrom, and in enforcing any of the agreements herein contained[.]

The foregoing language unambiguously required the Campbells to indemnify Auto-Owners for all liability and expenses sustained by reason of the execution of the bonds.

In contesting Auto-Owners' entitlement to reimbursement, the Campbells do not appear to dispute that the indemnity agreement, in general, obligated them to reimburse Auto-Owners for costs incurred pursuant to the bonds. Instead, the Campbells contest whether Auto-Owners properly settled the bond claims. Specifically, they argue that Auto-Owners is not entitled to reimbursement because Auto-Owners acted in bad faith by failing to conduct an investigation into the bond claims. According to the Campbells, had Auto-Owners investigated and consulted with the Campbells, it would have discovered that the City was not entitled to payment on its bond claims because the City had breached the building contract.

Relevant to the Campbells' arguments, the indemnity agreement contained several pertinent clauses involving Auto-Owners' right to pay claims and to seek reimbursement from the Campbells. Specifically, the indemnity agreement provided that Auto-Owners

> shall have the right, and is hereby authorized but not required . . . [t]o adjust, settle or compromise any claim,

> demand, suit, or judgment upon said bond or bonds, or any of them, unless the undersigned shall request [Auto-Owners] to litigate such claim or demand, or to defend such suit, or to appeal from such judgment, and shall deposit with [Auto-Owners], at the time of such request, cash or collateral satisfactory to it in kind and amount, to be used in paying any judgment or judgments rendered or that may be rendered, with interest, costs and attorneys' fees[.]

Additionally, the agreement specified that the extent of the Campbells' liability under the indemnity agreement

> shall extend to, and include, the full amount of any and all sums paid by [Auto-Owners] in settlement or compromise of any claims, demands, suits, and judgments upon said bond or bonds, or any of them, on good faith, under the belief that it was liable therefor, whether liable or not, as well as of any and all disbursements on account of costs, expenses and attorney's fees, as aforesaid, which may be made under the belief that such were necessary, whether necessary or not[.]

Further, in the event that Auto-Owners paid a claim, the agreement contained a clause specifying that "the voucher or vouchers or other evidence of such payment, settlement or compromise shall be prima facie evidence of the fact and extent of the liability of the undersigned, in any claim or suit hereunder, and in any and all matters arising between the undersigned and [Auto-Owners.]"

Read as a whole, these provisions make plain that Auto-Owners had the discretion to adjust, settle, or compromise any claim on the bonds.[4] Further, under

[4] While the Campbells could have requested that Auto-Owners litigate a claim, under the indemnity agreement, the Campbells would have had to make a request and they would have been required to deposit cash or collateral with Auto-Owners. The Campbells were

the plain terms of the agreement, the Campbells were required to reimburse Auto-Owners without regard to whether Auto-Owners was ultimately correct in paying the bond claims, provided that Auto-Owners acted in good faith. The phrase "good faith" has typically been understood "as a standard measuring the state of mind, perceptions, honest beliefs, and intentions of the parties." *Miller v Riverwood Recreation Ctr, Inc*, 215 Mich App 561, 570; 546 NW2d 684 (1996). "Good faith" refers to " 'an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage.' " *Id*. at 571, quoting *Black's Law Dictionary* (6th ed), p 693. "Bad faith" refers to an "arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty," involving something more than honest errors of judgment. *Miller*, 215 Mich App at 571 (quotation marks and citations omitted) (defining "bad faith" in the context of insurance). See also *Great American Ins Co v E L Bailey & Co, Inc*, 841 F3d 439, 446 (CA 6, 2016).

Notably, under the terms of their agreement, evidence that Auto-Owners paid a claim is prima facie evidence of the Campbells' liability and the extent of that liability. The phrase "prima facie evidence" refers to "evidence which, if not rebutted, is sufficient by itself to establish the truth of a legal conclusion asserted by a party." *American Cas Co v Costello*, 174 Mich App 1, 7; 435 NW2d 760 (1989). The admission of prima facie evidence shifts the burden of proceeding so that the opposing party must come forward with evidence to rebut or contradict that party's liability. *P R Post Corp*

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notified that the City had made a bond claim, but there is no evidence that the Campbells requested that Auto-Owners litigate the bond claim or that the Campbells deposited cash or collateral with Auto-Owners. Auto-Owners therefore had discretion under the indemnity agreement to pay the claim.

v Maryland Cas Co, 403 Mich 543, 552; 271 NW2d 521 (1978). More specifically, in the context of indemnifying a surety, when payment of a bond claim serves as prima facie evidence of liability, the indemnitor disputing liability has the burden of proving that the surety acted in bad faith or otherwise violated the indemnity agreement. See *Gray Ins Co v Terry*, 606 F Appx 188, 191 (CA 5, 2015); *Travelers Cas & Surety Co of America v Winmark Homes, Inc*, 518 F Appx 899, 903 (CA 11, 2013); *Fallon Electric Co, Inc v Cincinnati Ins Co*, 121 F3d 125, 128-129 (CA 3, 1997). Such clauses are enforceable. *Transamerica Ins Co v Bloomfield*, 401 F2d 357, 362 (CA 6, 1968).

In this case, Auto-Owners presented proof that it paid the City and ABC Supply Company, and these payments constituted prima facie evidence of the Campbells' liability and the extent of that liability under the indemnity agreement. Therefore, if the Campbells wished to contest their liability, they bore the burden of proving that Auto-Owners failed to act in good faith or otherwise violated the indemnity agreement. Given that the Campbells bore this burden, in responding to Auto-Owners' motion for summary disposition under MCR 2.116(C)(10), the Campbells could not simply "rely on mere allegations or denials in pleadings, but [had to] go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact [existed]." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The Campbells have not presented specific facts showing that a question of fact existed with regard to whether Auto-Owners acted in bad faith. At best, the Campbells have established that Auto-Owners exercised business judgment with which the Campbells disagreed.

For instance, contrary to the Campbells' assertion that Auto-Owners paid the claims without investigating or consulting with the Campbells, Auto-Owners, by correspondence dated November 24, 2010, reiterated that bond claims had been made and advised the Campbells that they were personally responsible for fully indemnifying Auto-Owners for costs and expenses related to the losses in connection with the bonded project. Auto-Owners also expressly requested that the Campbells "[p]lease contact the undersigned as to how you intend to address this matter which appears to be well in excess of $100,000," and further specified that "your immediate attention in this matter is essential." There is no evidence that the Campbells contacted Auto-Owners regarding the bond claims. Also noteworthy, Jack Campbell admitted that ABC Supply Company was owed monies on the project. In addition, the City provided documentation to Auto-Owners in support of the City's bond claim—a punch list itemizing the outstanding items yet to be completed and the related costs. Although the Campbells make the bald assertion that the bond claims were settled by Auto-Owners in bad faith and that therefore an issue of fact existed about the good faith of Auto-Owners' payments, the Campbells did not come forward with any evidence to create a genuine issue of fact in this regard. Accordingly, the trial court erred when it denied Auto-Owners' motion for summary disposition.

IV. THE CITY'S APPEAL

The Campbells' complaint alleged that the original contract required payment for its services in the amount of $224,920, but that as a result of the change orders, $391,155.27 was the amount owed. The Campbells acknowledged that they were paid $331,531.30, but alleged in their complaint that $59,623.97 was still

due. The Campbells also alleged that the City breached § 2.2 of the contract by failing to give 90 days' written notice prior to termination. According to the Campbells, because they were not given this notice, they were not allowed to complete the project and they are entitled to the damages resulting from this termination without notice.

The City's sole argument in its motion for summary disposition was that the City did not breach the contract by terminating the Campbells without notice in August 2010 because the contract had long expired, and thus the City was not bound by the 90-day notice provision. This argument is flawed for two reasons. First, fairly read, the Campbells' complaint sought payment for $59,623.97 worth of work that they allegedly completed before they were terminated in August 2010. Whether the 90-day provision applied is not dispositive of whether the Campbells were entitled to payment for supplies and work actually performed before termination.

Second, to the extent that the Campbells sought damages resulting from termination without 90 days' notice, it appears that a question of fact remained as to whether this provision was in effect in August 2010. In particular, the original contract provided for an expiration date of December 19, 2009, and a change order modified this expiration date by providing a substantial completion date of May 13, 2010. However, the Campbells maintain that there was an implied contract to extend the agreement beyond the May 2010 completion date. After an agreement has expired, an implied contract may arise when the parties continue to perform as before and their conduct demonstrates a mutual assent to a new agreement with their rights and obligations measured as provided in the expired contract. 17A Am Jur 2d, Contracts, § 576.

> A contract is implied in fact where the intention as to it is not manifested by direct or explicit words between the parties, but is to be gathered by implication or proper deduction from the conduct of the parties, language used or things done by them, or other pertinent circumstances attending the transaction. The existence of an implied contract, of necessity turning on inferences drawn from given circumstances, usually involves a question of fact, unless no essential facts are in dispute. [*Erickson v Goodell Oil Co, Inc*, 384 Mich 207, 212; 180 NW2d 798 (1970) (citation omitted).]

In this case, there is evidence that, even after May 13, 2010, the Campbells and the City continued to do business together with the Campbells continuing to act as general contractor for the project. For instance, there is correspondence to the Campbells, dated after May 2010, discussing the windows, scheduling, and items yet to be completed. Even the City's termination letter to the Campbells, terminating "the contract" as of August 24, 2010, could be read to support the proposition that the parties were still mutually operating under the terms of the written agreement, which would have included the 90-day notice provision.

Considering the foregoing, questions of fact existed with respect to whether the 90-day notice provision was in effect and whether the Campbells were entitled to additional compensation for services rendered. Accordingly, the trial court did not err when it denied the City's motion for summary disposition regarding the Campbells' breach-of-contract claim.

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

SHAPIRO, P.J., and HOEKSTRA and M. J. KELLY, JJ., concurred.

PEOPLE v STEANHOUSE (ON REMAND)

Docket No. 318329. Submitted August 16, 2017, at Lansing. Decided December 5, 2017, at 9:10 a.m. Leave to appeal sought.

Alexander J. Steanhouse was convicted by a jury in the Wayne Circuit Court of assault with intent to commit murder (AWIM), MCL 750.83, and receiving and concealing stolen property, MCL 750.535(3)(a). The court, Patricia P. Fresard, J., departed from the sentencing guidelines' recommended minimum sentence range of 171 to 285 months and sentenced Steanhouse to 30 to 60 years' imprisonment for AWIM and one to five years' imprisonment for receiving and concealing stolen property. At the time Steanhouse was sentenced, a trial court could depart upward from the minimum guidelines range for substantial and compelling reasons. However, in *People v Lockridge*, 498 Mich 358 (2015), after determining that the legislative sentencing guidelines were unconstitutional, the Supreme Court struck down that requirement and held that a departure sentence must instead be reviewed by appellate courts for reasonableness. Steanhouse appealed, and the Court of Appeals affirmed his convictions, determined that the proper framework for reviewing a departure sentence for reasonableness was to apply the principle-of-proportionality standard set forth in *People v Milbourn*, 435 Mich 630 (1990), and concluded that because the trial court had not been aware that its departure sentence would be reviewed under the *Milbourn* standard, the case had to be remanded to the trial court for a *Crosby*[1] hearing as set forth in *Lockridge*. *People v Steanhouse*, 313 Mich App 1 (2015) (*Steanhouse I*). Both Steanhouse and the prosecution moved for leave to appeal in the Supreme Court. The Supreme Court granted the prosecution's application and affirmed that the proper inquiry when reviewing a sentence for reasonableness is whether the trial court abused its discretion by violating *Milbourn*'s principle-of-proportionality standard; however, the Supreme Court reversed the Court of Appeals opinion to the extent it remanded to the trial court for further sentencing proceedings under *Crosby*. *People v Steanhouse*, 500

[1] *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

Mich 453 (2017) (*Steanhouse II*). On remand, the Supreme Court directed the Court of Appeals to consider whether the trial court's departure sentence was reasonable under the *Milbourn* standard.

The Court of Appeals *held*:

1. A trial court's decision to depart from the applicable sentencing guidelines range is reviewed for reasonableness. When reviewing a departure sentence for reasonableness, a court must review whether the trial court abused its discretion by violating the principle-of-proportionality standard set forth in *Milbourn*. Under the *Milbourn* principle-of-proportionality standard, a sentence must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. Factors that may be considered under the principle-of-proportionality standard include, but are not limited to, the seriousness of the offense, factors that were inadequately considered by the guidelines, and factors not considered by the guidelines, such as the relationship between the victim and the aggressor, the defendant's misconduct while in custody, the defendant's expressions of remorse, and the defendant's potential for rehabilitation. A departure sentence may be imposed when the trial court determines that the recommended range under the guidelines is disproportionate, in either direction, to the seriousness of the crime. A trial court abuses its discretion if it violates the principle-of-proportionality test by failing to provide adequate reasons for the extent of the departure sentence imposed. Even in cases in which reasons exist to justify a departure sentence, the trial court's articulation of the reasons for imposing a departure sentence must explain how the extent of the departure is proportionate to the seriousness of the circumstances surrounding the offense and the offender. If the trial court fails to provide adequate reasons for the extent of the departure sentence imposed, the case must be remanded to the trial court for resentencing.

2. The first inquiry in the reasonableness review is whether there were circumstances that were not adequately embodied within the variables used to score the guidelines. In this case, the stated reasons for exceeding the guidelines had to be compared with the scored offense variables (OVs) to determine whether those reasons were already encompassed within the guidelines. The trial court stated that an upward departure was appropriate based on the "horrendous, brutal assault" on a young man who appeared to have been "rendered weak or incapacitated by his drug use at that time." However, both the brutality of the assault and the fact that the victim was weak or incapacitated by drug use were not proper considerations because they were accounted

for in the sentencing guidelines and the trial court offered no explanation for why they were given inadequate weight by the guidelines. The trial court's third reason for imposing an upward departure—that a prior relationship existed between Steanhouse and the victim—was viewed as an aggravating circumstance, which was supported by the record given the degree of familiarity and trust between Steanhouse and the victim. Therefore, the trial court articulated a single valid reason for departing from the sentencing guidelines, but it was unclear whether the court would have departed at all or to the same extent solely on the basis of the prior relationship between Steanhouse and the victim. Thus, the trial court abused its discretion in applying the principle of proportionality by failing to provide adequate reasons for the extent of the departure sentence imposed. Accordingly, the case was remanded to the trial court for resentencing in accordance with the Supreme Court's directive in *Steanhouse II*.

Reversed and remanded for resentencing.

SENTENCING — DEPARTURE SENTENCES — PRINCIPLE OF PROPORTIONALITY — EXTENT OF DEPARTURE.

Under the principle-of-proportionality standard set forth in *People v Milbourn*, 435 Mich 630 (1990), a sentence must be proportionate to the seriousness of the circumstances surrounding the offense and the offender; a sentence that departs from the range recommended by the advisory sentencing guidelines may be imposed when the trial court determines that the recommended range under the guidelines is disproportionate, in either direction, to the seriousness of the crime and the trial court provides adequate reasons for the extent of the departure sentence imposed; even in cases in which reasons exist to justify a departure sentence, the trial court's articulation of the reasons for imposing a departure sentence must explain how the extent of the departure is proportionate to the seriousness of the circumstances surrounding the offense and the offender.

State Appellate Defender (by *Chari K. Grove*) for Alexander J. Steanhouse.

ON REMAND

Before: M. J. KELLY, P.J., and SERVITTO and STEPHENS, JJ.

M. J. KELLY, P.J. This case returns to this Court after remand by the Michigan Supreme Court, which ordered this Court to review Alexander Steanhouse's sentence in accordance with its decision in *People v Steanhouse*, 500 Mich 453, 461; 902 NW2d 327 (2017) (*Steanhouse II*). Because we conclude that the trial court abused its discretion in applying the principle of proportionality by failing to provide adequate reasons for the extent of the departure sentence imposed, we reverse and remand for resentencing.

I. BASIC FACTS

A jury convicted Steanhouse of assault with intent to commit murder, MCL 750.83, and receiving or concealing stolen property, MCL 750.535(3)(a). Although Steanhouse's minimum sentencing guidelines range was 171 to 285 months, the trial court departed upward and sentenced him to 30 to 60 years' imprisonment for the assault conviction and to one to five years' imprisonment for the receiving or concealing stolen property conviction.

At the time Steanhouse was sentenced, a trial court could depart upward from the minimum guidelines range only for substantial and compelling reasons. See MCL 769.34(3). However, in *People v Lockridge*, 498 Mich 358, 364-365; 870 NW2d 502 (2015), after determining that the legislative sentencing guidelines were unconstitutional, our Supreme Court struck down that requirement and held that a departure sentence must instead "be reviewed by appellate courts for reasonableness." Steanhouse appealed his convictions and sentences in this Court. We affirmed his convictions, determined that the proper framework for reviewing a departure sentence for reasonableness was to apply the principle of proportionality standard set forth in

People v Milbourn, 435 Mich 630; 461 NW2d 1 (1990), and concluded that because the trial court had not been aware that its departure sentence would be reviewed under the *Milbourn* standard, it was proper to remand the case to the trial court for a *Crosby*[1] hearing as set forth in *Lockridge*. *People v Steanhouse*, 313 Mich App 1, 42, 44-49; 880 NW2d 297 (2015) (*Steanhouse I*).

Steanhouse and the prosecutor moved for leave to appeal in our Supreme Court. The Court granted the prosecutor's application,[2] and it affirmed "that the proper inquiry when reviewing a sentence for reasonableness is whether the trial court abused its discretion by violating [*Milbourn*'s] 'principle of proportionality' . . . ." *Steanhouse II*, 500 Mich at 459-460. The Court, however, reversed this Court's opinion "to the extent [it] remanded to the trial court for further sentencing proceedings under [*Crosby*]." *Id*. at 460. On remand, this Court is directed to consider whether the trial court's departure sentence was reasonable under the *Milbourn* standard. *Id*. at 461.

II. PRINCIPLE OF PROPORTIONALITY

A. STANDARD OF REVIEW

Steanhouse argues that the trial court's sentence was unreasonable because it was not proportional under the *Milbourn* standard. We review for reasonableness a trial court's decision to depart from the applicable sentencing guidelines range. *Lockridge*, 498 Mich at 365. When reviewing a departure sentence for

[1] *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

[2] The Supreme Court also granted leave to appeal in *People v Masroor*, 313 Mich App 358; 880 NW2d 812 (2015), rev'd in part by *Steanhouse II*, 500 Mich at 460-461, and it consolidated the cases.

reasonableness, we must review "whether the trial court abused its discretion by violating the principle of proportionality set forth" in *Milbourn*. *Steanhouse II*, 500 Mich at 477. A trial court abuses its discretion if it violates the principle of proportionality test "by failing to provide adequate reasons for the extent of the departure sentence imposed . . . ." *Id*. at 476. In such cases, this Court must remand to the trial court for resentencing. *Id*.

B. ANALYSIS

Under the principle of proportionality standard, a sentence must be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Milbourn*, 435 Mich at 636. Accordingly, the sentencing court must impose a sentence that takes "into account the nature of the offense and the background of the offender." *Id*. at 651. Generally, sentences falling within the minimum sentencing guidelines range are presumptively proportionate. *People v Cotton*, 209 Mich App 82, 85; 530 NW2d 495 (1995).[3] However, a departure sentence may be imposed when the trial court determines that "the recommended range under the guidelines is disproportionate, in either direction, to the seriousness of the crime." *Milbourn*, 435 Mich at 657. Factors that may be considered under the principle of proportionality standard include, but are not limited to:

> (1) the seriousness of the offense; (2) factors that were inadequately considered by the guidelines; and (3) factors

[3] We note, however, that under "unusual circumstances," a sentence within the guidelines range may "be disproportionately severe or lenient," which would result in a sentence that violates the principle of proportionality even though it is within the guidelines range. *Milbourn*, 435 Mich at 661.

> not considered by the guidelines, such as the relationship between the victim and the aggressor, the defendant's misconduct while in custody, the defendant's expressions of remorse, and the defendant's potential for rehabilitation. [*People v Lawhorn*, 320 Mich App 194, 207; 907 NW2d 832 (2017) (citation and quotation marks omitted).]

An appellate court must evaluate whether reasons exist to depart from the sentencing guidelines and whether the *extent* of the departure can satisfy the principle of proportionality. See *Milbourn*, 435 Mich at 659-660 (recognizing that "[e]ven where some departure appears to be appropriate, the extent of the departure (rather than the fact of the departure itself) may embody a violation of the principle of proportionality"). Therefore, even in cases in which reasons exist to justify a departure sentence, the trial court's articulation of the reasons for imposing a departure sentence must explain how the extent of the departure is proportionate to the seriousness of the circumstances surrounding the offense and the offender. See *People v Smith*, 482 Mich 292, 304; 754 NW2d 284 (2008) ("When departing, the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been.").

The first inquiry in our reasonableness review is whether there were "circumstances that are not adequately embodied within the variables used to score the guidelines." *Milbourn*, 435 Mich at 659-660. As reiterated in *Steanhouse II*, 500 Mich at 474-475, quoting *Lockridge*, 498 Mich at 391, "the guidelines 'remain a highly relevant consideration in a trial court's exercise of sentencing discretion' that trial courts 'must consult' and 'take . . . into account when sentencing.' " (Quotation marks and citation omitted.) To conduct such an analysis, we must compare the

stated reasons for exceeding the guidelines with the scored offense variables (OVs) to determine whether those reasons were already encompassed within the guidelines. *Steanhouse I*, 313 Mich App at 45-46. Specifically, we must determine whether the trial court abused its discretion by imposing a departure sentence without articulating whether the guidelines adequately took into account the conduct alleged to support the particular departure imposed. See *id*.

The trial court in this case articulated a few reasons in support of its decision to impose a departure sentence. First, it articulated that an upward departure was appropriate based on the "horrendous, brutal assault" on a young man who appeared to have been "rendered weak or incapacitated by his drug use at that time." However, we conclude that both the brutality of the assault and the fact that the victim was weak or incapacitated by drug use were not proper considerations because they were accounted for in the sentencing guidelines and the trial court offered no explanation for why they were given inadequate weight by the guidelines. See *Milbourn*, 435 Mich at 659-660 (stating that trial court must consider whether the circumstances of a case are inadequately addressed by the guidelines). See also *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013) ("A trial court necessarily abuses its discretion when it makes an error of law.").

A trial court must score OV 7 at 50 points if the offender treated the victim with "excessive brutality." MCL 777.37(1)(a). For the purpose of OV 7, excessive brutality requires savagery or cruelty beyond the usual brutality of the crime. *People v Glenn*, 295 Mich App 529, 533; 814 NW2d 686 (2012), rev'd on other grounds by *People v Hardy*, 494 Mich 430 (2013).

Here, the trial court expressly stated that scoring OV 7 was not appropriate because although the facts were "horrendous," they were not "indicative of something that would be beyond the convicted offense, beyond what's necessary for assault with intent to murder." We conclude that, having determined that the facts of this case only encompassed the usual brutality of an assault with intent to murder, the trial court's later decision to use the brutality of the crime to support an upward departure was not a valid consideration.

Similarly, the trial court's decision to depart upward on the basis that Steanhouse took advantage of a victim who was incapacitated or rendered weak by drug use also could have been addressed by the sentencing guidelines. OV 10 addresses the "exploitation of a vulnerable victim." MCL 777.40(1). Five points must be scored if "[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious." MCL 777.40(1)(c).[4] The guidelines indicate that "[t]he mere existence of 1 or more factors described in [MCL 777.40(1)] does not automatically equate with victim vulnerability." MCL 777.40(2). No points were assessed or scored for OV 10. Given that the trial court determined that the incapacitation was not significant enough to warrant a score under OV 10—which is the OV that expressly addresses exploitation of a victim incapacitated by drugs—we conclude that this was not a valid reason for departing upward.

[4] The term "exploit" is defined to mean "to manipulate a victim for selfish or unethical purposes," MCL 777.40(3)(b), while "vulnerability" refers to "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation," MCL 777.40(3)(c).

The trial court's third reason for imposing an upward departure was not accounted for in the sentencing guidelines. The court reasoned:

> [T]he action taken by you towards a person who considers you a friend does substantiate the thought that you are a person without a conscience, a person who's violent and depraved and that this is an assault that is quite shocking even to people who have been in the courts for 20 and more years.

In evaluating whether the departure sentence imposed for defendant is proportional in accordance with *Milbourn*, a factor to be considered, which is not adequately reflected in the guidelines, involves the "prior relationship" between defendant and the victim. *Milbourn*, 435 Mich at 660. In *Milbourn*, the Court explained that a prior relationship between the offender and the victim can be either a "very mitigating circumstance or a very aggravating circumstance, depending upon the history of interaction between the parties." *Id*. at 660-661. In this case, the trial court viewed it as an aggravating circumstance. That finding is supported by the record, which shows that Steanhouse and the victim were frequently together at the victim's home, demonstrating that there was a degree of familiarity and trust between them. Steanhouse breached that trust by stealing items from the victim's home, soliciting a "reward" for their return, and then ultimately striking the victim with a wrench and slitting his throat.

In sum, two of the stated reasons for imposing a departure sentence were improper. The trial court only articulated a single valid reason for departing from the sentencing guidelines, and on this record it is unclear whether the court would have departed solely on the basis of the prior relationship between Steanhouse and

his victim. Similarly, it is difficult to ascertain the trial court's reasoning or rationale for the extent of the departure imposed and to ascertain where on the "continuum from the least to the most serious situations" this case falls. *Milbourn*, 435 Mich at 654. As discussed in *Milbourn*, it is necessary for a trial court to articulate its reasons for imposing a departure sentence in order to permit appellate review of whether the court abided by the principle of proportionality. *Id*. at 659-660. Accordingly, we conclude that the trial court "abused its discretion in applying the principle of proportionality by failing to provide adequate reasons for the extent of the departure sentence imposed," so—in accordance with our Supreme Court's directive in *Steanhouse II*—we remand to the trial court for resentencing. *Steanhouse II*, 500 Mich at 476.

Reversed and remanded for resentencing. We do not retain jurisdiction.

SERVITTO and STEPHENS, JJ., concurred with M. J. KELLY, P.J.

VILLAGE OF EDMORE v CRYSTAL AUTOMATION SYSTEMS, INC

Docket No. 334135. Submitted October 4, 2017, at Grand Rapids. Decided October 19, 2017. Approved for publication December 7, 2017, at 9:00 a.m.

The village of Edmore filed an action in the Montcalm Circuit Court against Crystal Automation Systems, Inc., seeking an order requiring defendant to remove its antennas and equipment from the water tower owned by plaintiff and leased by defendant and requesting that the lease be terminated. In 2003, the parties entered into a lease agreement that allowed defendant to place its antennas and equipment near and on plaintiff's water tower in exchange for a monthly fee. In 2015, the company that plaintiff hired to maintain and repaint the water tower required that defendant's property be removed before it began working on the project; defendant objected to plaintiff's removal request. In March 2016, after the parties failed to reach an agreement on the removal, plaintiff demanded that defendant remove the equipment. On March 22, 2016, plaintiff filed a complaint alleging breach of contract. In tandem with the complaint, plaintiff moved for a preliminary injunction to compel defendant to remove its equipment. Rather than hear the preliminary-injunction motion, the court, Ronald J. Schafer, J., ordered plaintiff to file a motion for partial summary disposition and for defendant to file a response by certain dates; both parties complied with the order. On April 14, 2016, defendant filed its answer to plaintiff's complaint, as well as its affirmative defenses. On that same day, plaintiff moved for entry of default against defendant, arguing that defendant had failed to file its answer within 21 days of being served as required by MCR 2.108(A)(1). The clerk entered the default, and plaintiff served defendant by mail. The next day, the court granted plaintiff's motion for summary disposition under MCR 2.116(C)(9) and (10) and ordered defendant to remove its equipment from and around the water tower at its own expense, reasoning that defendant was precluded from responding to plaintiff's motion after entry of the default—even though it had filed a response to plaintiff's motion and was at the hearing to defend its position. Defendant moved to set aside the default, and plaintiff moved for entry of a default judgment. The court

denied defendant's motion and entered a default judgment in favor of plaintiff. The court considered the good-cause factors set forth in *Shawl v Spence Bros, Inc*, 280 Mich App 213 (2008), and concluded that defendant had failed to demonstrate good cause to set aside the default and that defendant also had no meritorious defense that would have mitigated against entering the default. In addition, the court found that defendant had materially breached the lease and that the lease was therefore terminated. Finally, the court assessed against defendant attorney fees, reasonable costs, and any damages incurred by plaintiff when removing the equipment. Defendant appealed.

The Court of Appeals *held*:

1. Under MCR 2.603(A)(1), if a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by the Michigan Court Rules, and that fact is made to appear by affidavit or otherwise, the clerk must enter the default of that party. Accordingly, a default may not be entered if the party has otherwise defended the action by taking some defensive action in the case. MCR 2.603(D)(1) provides that a motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. Therefore, a defaulting party must demonstrate both good cause and a meritorious defense before a court may set aside the default. Generally, appellate courts will not set aside a default that has been properly entered. In determining whether a party has established good cause to justify setting aside a default judgment, the trial court should consider the following factors: (1) whether the party completely failed to respond or simply missed the deadline to file; (2) if the party simply missed the deadline to file, how long after the deadline the filing occurred; (3) the duration between entry of the default judgment and the filing of the motion to set aside the judgment; (4) whether there was defective process or notice; (5) the circumstances behind the failure to file or file timely; (6) whether the failure was knowing or intentional; (7) the size of the judgment and the amount of costs due under MCR 2.603(D)(4); (8) whether the default judgment results in an ongoing liability (as with paternity or child support); and (9) if an insurer is involved, whether internal policies of the company were involved. In determining whether a defendant has a meritorious defense, the trial court should consider whether the affidavit of meritorious defense contains evidence that (1) the plaintiff cannot prove or the defendant can disprove an element of the claim or a

statutory requirement; (2) a ground for summary disposition exists under MCR 2.116(C)(2), (3), (5), (6), (7), or (8); or (3) the plaintiff's claim rests on evidence that is inadmissible.

2. A court must enforce a contract as written when its terms are unambiguous because the court may not substitute its judgment for the intent of the parties and remake the contract into something the parties never intended; specific terms in a contract normally control over general terms. In this case, the lease granted defendant space on and near plaintiff's water tower and granted defendant the right to terminate the lease, in specific circumstances, with 30 days' notice; the lease did not grant plaintiff the right to terminate the lease or the right to order defendant to remove its equipment from the leased premises. Although the lease provided that defendant could not interfere with plaintiff's operation, repair, or maintenance of the water tower and provided plaintiff the right to take any action it deemed necessary in its sole discretion to repair, maintain, alter, or improve the water tower, the lease specifically provided that if plaintiff painted the water tower, defendant had to take reasonable measures at its cost to protect its equipment from harm; the lease did not grant plaintiff the right to request or order defendant to vacate the premises when the tower was being painted.

3. In this case, good cause existed to set aside the default entered against defendant. Although defendant did not file its answer and affirmative defenses until two days after the MCR 2.108(A)(1) 21-day period passed, defendant had vigorously defended the suit by opposing plaintiff's motion for injunctive relief with supporting affidavits, appeared with counsel at the hearing on that motion, argued against the forced removal of its equipment as contrary to the terms of the lease, opposed plaintiff's motion for partial summary disposition, and appeared with counsel at the summary disposition hearing; each pleading contained defenses to plaintiff's claims and requests for relief. Contrary to the trial court's conclusion regarding the *Shawl* good-cause factors, Factors (1) through (3) and (6) through (8) weighed in favor of a finding of good cause. Accordingly, the trial court erred by finding that good cause did not exist to set aside the default. The trial court also erred by finding that defendant had failed to establish a meritorious defense. Reading the contract provisions together, the parties never agreed that plaintiff could order defendant to completely remove its equipment and terminate the lease when plaintiff had the tower painted. Moreover, the contract only granted defendant, not plaintiff, the right to terminate the lease in specific circumstances. Defendant there-

fore had a meritorious defense because the lease did not grant plaintiff the right to order defendant to remove its equipment or the right to terminate the lease if defendant refused to do so; rather, it outlined defendant's responsibilities when the tower was painted. Accordingly, because good cause existed and defendant had a meritorious defense, the trial court abused its discretion by denying defendant's motion to set aside the default.

4. Summary disposition under MCR 2.116(C)(9) is appropriate when the defenses asserted by the defendant are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery, and summary disposition under MCR 2.116(C)(10) is appropriate when there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. Contrary to the trial court's conclusion, defendant had a valid defense to plaintiff's complaint because the contract did not grant plaintiff the power to order defendant to remove its equipment in the event of tower maintenance or painting and it did not grant plaintiff the power to terminate the contract if defendant failed to comply with that demand. By ordering defendant to remove its equipment and terminating the lease, the trial court created a remedy that did not exist under the lease and interfered with defendant's right to uninterrupted use of the water tower for its business. Accordingly, the trial court erred by granting summary disposition in favor of plaintiff.

Reversed and remanded for further proceedings.

Miller Canfield Paddock & Stone, PLC (by *Floyd E. Gates, Jr.*, and *Paul D. Hudson*) and *Bodman PLC* (by *Thomas J. Rheaume, Jr.*) for plaintiff.

Clark Hill PLC (by *David W. Centner*) for defendant.

Before: MURRAY, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM. Defendant, Crystal Automation Systems, Inc., a provider of phone and internet services to residents living in and around plaintiff, the village of Edmore, a Michigan municipal corporation in Montcalm County, appeals as of right the trial court's Order for Entry of Default Judgment, Order Granting Plain-

tiff's Motion for Partial Summary Disposition, and Order Denying Defendant's Motion to Vacate and/or Set Aside Default and Granting Plaintiff's Motion for Entry of Default Judgment. Defendant contends that the trial court committed error requiring reversal when it entered a default judgment against defendant, refused to set aside an improperly entered default, and granted plaintiff partial summary disposition on the basis of an incorrectly construed and interpreted lease agreement (the Lease) between the parties. We agree and reverse each of the trial court's orders and remand for further proceedings.

I. FACTS AND PROCEEDINGS

Since April 2003, defendant has rented space on and near plaintiff's water tower for its antennas and equipment. During 2015, plaintiff contracted with Utility Service Co., Inc. (USC) to repaint and maintain its water tower. USC told plaintiff that before USC commenced the work, all tenants of the water tower had to remove their equipment. For that reason, plaintiff ordered defendant to remove all of its equipment from on and around the water tower and threatened defendant that if it did not do so, plaintiff would remove the equipment and charge defendant for doing so. Defendant objected to plaintiff's demand on the ground that the Lease did not permit plaintiff to order defendant to vacate the premises. Defendant also advised plaintiff that if plaintiff removed the equipment, local residents' phone, 911, and Internet services would be interrupted in violation of the law. Shortly after receiving defendant's objection, plaintiff informed defendant that it would delay the project until spring 2016.

During the interim period, defendant attempted to work out an alternative arrangement with plaintiff that would allow defendant to provide its customers with uninterrupted services while plaintiff repainted the water tower. Plaintiff's manager represented to defendant that it could erect a new tower on a different piece of property owned by plaintiff, but plaintiff ultimately decided it did not want to provide that option to defendant. Defendant also offered to move its equipment to allow USC to work around it, but plaintiff refused that offer. Then, on March 3, 2016, plaintiff's counsel ordered defendant to remove its equipment from on and around the water tower by May 1, 2016. Plaintiff sued defendant on March 18, 2016, alleging breach of contract and seeking injunctive relief to force defendant to remove its equipment and to terminate the Lease.

The Lease signed by the parties granted defendant an initial five-year term with three additional automatically renewable five-year terms unless defendant notified plaintiff before the end of the initial term of its intent not to extend the Lease. The Lease also granted defendant the right to terminate the agreement upon 30 days' notice in specified circumstances, but the Lease did not give plaintiff the right to terminate the contract. The Lease also contained the following provisions:

> 7. Maintenance:
>
> * * *
>
> D. In the event the Landlord or any other Tenant undertakes painting, construction or other alterations on the premises, Tenant shall take reasonable measures as [sic] Tenant's cost to cover Tenant's equipment, personal property or antenna facilities and protect such from paint

and debris fallout which may occur during painting, construction or alteration process.

* * *

10. Interference: Tenant's installation, operation, and maintenance of its transmission facilities shall not damage or interfere in any way with the Landlord's water tower operations or related repair and maintenance activities or with such activities of other Tenants of the water tower. Landlord, at all times during this Lease, reserves the right to take any action it deems necessary, in its sole discretion, to repair, to maintain, alter or improve the premises in connection with the tower operations as may be necessary, including leasing parts of the water tower and surrounding ground space to others.

* * *

12. Indemnity:

* * *

B. Tenant's Indemnification: Any and all liability, obligation, damages, penalties, claims, liens, costs, charges, losses and expenses (including, without limitation, reasonable fees and expenses of attorney's [sic], expert witnesses and consultants), which may be imposed upon, incurred by or be asserted against the Landlord, its agents or employees, by reason of any act or omission of Tenant, its personnel, employees, agents, contractors or subcontractors, resulting in personal injury, bodily, [sic] injury, sickness, disease or death to any person or damage to, loss of or destruction of tangible or intangible property, copyright, patent, service mark or any other right of way [sic] person, firm, or corporation, which may arise out of or be in any way connected with the construction, installation, operation, maintenance, use or condition of the premises or Tenant's antenna facilities or the Tenant's failure to comply with any federal, state or local stature [sic], ordinance or regulation.

On March 22, 2016, plaintiff served its complaint on defendant along with an ex parte motion for a preliminary injunction, which sought an order that defendant vacate the water tower. Without delay, on March 23, 2016, defendant opposed plaintiff's motion by arguing that the Lease did not grant plaintiff the right to evict defendant from the water tower. Plaintiff filed a reply in which it requested that the trial court order defendant to remove its equipment by May 1, 2016, or allow plaintiff to do so at defendant's expense, and enter judgment against defendant.

The parties appeared the next day for a hearing, and a conference was held off the record where it was agreed that, rather than having the trial court hear and decide the motion for injunctive relief, plaintiff would file a motion for partial summary disposition, defendant would respond, and the trial court would hear the motion, all on an expedited basis so that the hearing on the motion could happen on April 15, 2016. The trial court later entered an order requiring plaintiff to file its motion by April 1 and defendant to respond by April 12. The order also stated that the parties could file their pleadings by e-mail with the original sent by first-class mail.

Consistently with the order, on April 1, 2016, plaintiff moved for partial summary disposition under MCR 2.116(C)(9) and (10). Plaintiff argued that because the Lease unambiguously required defendant to vacate the premises if in plaintiff's sole discretion it ordered defendant to do so for maintenance and repair of the water tower, defendant's refusal to vacate upon demand breached the Lease. In its timely response, defendant denied that plaintiff was entitled to force defendant to vacate its leasehold and argued that plaintiff's conduct violated defendant's right to quiet

enjoyment of the premises and effectively nullified the purpose of the Lease.

Late on the afternoon of April 14, 2016, defendant also filed its answer, affirmative defenses, and jury demand by e-mail and the original by first-class mail. That same afternoon, however, plaintiff filed a request for entry of default against defendant for failure to timely file its answer. The clerk entered the default, and plaintiff served defendant the default by mail.

The very next day, at the hearing on plaintiff's motion for partial summary disposition, plaintiff's counsel announced that a default had been entered against defendant and that plaintiff's motion was essentially unopposed because, under MCR 2.603(A)(3), defendant was precluded from responding to plaintiff's motion after the entry of the default. Defendant argued that it had opposed plaintiff's motion and requested that the trial court set aside the default. The trial court told defendant that it would prefer having defendant file a motion to set aside the default, having the parties brief the issue, and having the motion heard on an expedited basis. The trial court then adopted the arguments made by plaintiff in its briefs and granted plaintiff summary disposition under MCR 2.116(C)(9) and (10).

On April 22, 2016, defendant moved to vacate or set aside the default, arguing, in part, that the default was improperly entered because defendant had defended the action vigorously from the start. Defendant asserted that plaintiff would suffer no prejudice if the default were set aside and explained that good cause existed to set aside the default because defendant had a meritorious defense. According to defendant, the numerous factors articulated in *Shawl v Spence Bros, Inc*, 280 Mich App 213, 238-239; 760 NW2d 674 (2008), all

weighed in favor of finding good cause to set aside the default. Defendant further argued that under the terms of the Lease, it was not liable to plaintiff. Defendant filed an affidavit of meritorious defense in which defendant's president denied that the Lease gave plaintiff the right to evict defendant from the water tower and denied that plaintiff could terminate the Lease but stated that defendant had nevertheless removed all of its equipment as previously ordered by the court.

On April 26, 2016, before responding to defendant's motion to set aside the default entered by the clerk, plaintiff moved for entry of a default judgment. Plaintiff argued that a default judgment should be entered because (1) defendant was properly defaulted and (2) defendant had materially breached the Lease by refusing to vacate the water tower, which entitled plaintiff to terminate the Lease. Plaintiff contended that it was entitled to recover damages and attorney fees from defendant under the Lease.

Plaintiff subsequently opposed defendant's motion to set aside the default, arguing that defendant's failure to timely file its answer justified the clerk's entry of the default. Plaintiff contended that defendant did not "otherwise defend" the lawsuit because defendant had not filed its own motion. Good cause to set aside the default also did not exist because, according to plaintiff, no substantial defect or irregularity occurred, no excuse existed for defendant's tardy filing, and the totality of the circumstances favored entering the default against defendant. Plaintiff also argued that defendant had no valid defense because the trial court had already granted plaintiff partial summary disposition.

In opposition to plaintiff's motion for default judgment, defendant argued that ¶ 12(B) of the Lease did not apply to the claims asserted because the paragraph

specified defendant's obligation to indemnify plaintiff for claims made by third persons but did not permit plaintiff to recover attorney fees in a dispute with defendant over the terms of the Lease. Defendant also argued that plaintiff had no right to terminate the Lease.

Three days later, the trial court heard defendant's motion to set aside the default and plaintiff's motion for default judgment. The trial court considered the factors set forth in *Shawl* and found that all the factors weighed against a finding of good cause. The trial court also held that defendant had no meritorious defense and, therefore, denied defendant's motion to set aside the default.

The trial court then adopted plaintiff's brief as its rationale for entry of a default judgment. Without explanation, the trial court found that defendant had materially breached the Lease and, therefore, ruled that the Lease was terminated. The trial court also found that, under ¶ 12(B), the parties contemplated reasonable costs and attorney fees and that costs and attorney fees would be assessed against defendant. The trial court later entered an order denying defendant's motion to set aside the default and granting plaintiff's motion for default judgment, which terminated the Lease effective May 1, 2016, and ordered defendant to pay plaintiff's reasonable attorney fees and the damages plaintiff had incurred in removing defendant's equipment from the water tower.

II. ANALYSIS

A. DEFAULT

We first turn to defendant's argument that the trial court erred by not setting aside the default because the

default was improperly entered. We agree with defendant that it "otherwise defended" under MCR 2.603(A)(1) by defending against plaintiff's motions for injunctive relief and partial summary disposition and that, as a result, the trial court abused its discretion by not setting aside the default and default judgment.

Generally, this Court will not set aside a default that has been *properly* entered. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999). In part, this is because the abuse-of-discretion standard applies to review of the trial court's decision, *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 389; 808 NW2d 511 (2011).[1]

The trial court abused its discretion by not finding that good cause existed to set aside the default and default judgment given that the default was not properly entered. Pursuant to MCR 2.603(D)(1), "[a] motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." In that regard, a default will not be set aside unless the defaulting party demonstrates both "good cause" and a "meritorious defense." *Barclay v Crown Bldg & Dev, Inc*, 241 Mich App 639, 653; 617 NW2d 373 (2000).

In *Shawl*, 280 Mich App at 238-239, this Court directed:

> In determining whether a party has shown good cause, the trial court should consider the following factors:

[1] In making its argument, plaintiff cites the prior, more deferential, abuse-of-discretion standard that no longer applies. See *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

> (1) whether the party completely failed to respond or simply missed the deadline to file;
>
> (2) if the party simply missed the deadline to file, how long after the deadline the filing occurred;
>
> (3) the duration between entry of the default judgment and the filing of the motion to set aside the judgment;
>
> (4) whether there was defective process or notice;
>
> (5) the circumstances behind the failure to file or file timely;
>
> (6) whether the failure was knowing or intentional;
>
> (7) the size of the judgment and the amount of costs due under MCR 2.603(D)(4);
>
> (8) whether the default judgment results in an ongoing liability (as with paternity or child support); and
>
> (9) if an insurer is involved, whether internal policies of the company were followed.
>
> * * *
>
> Neither of these lists is intended to be exhaustive or exclusive. Additionally, as with the factors provided in other contexts, the trial court should consider only relevant factors, and it is within the trial court's discretion to determine how much weight any single factor should receive.

We first conclude that although defendant "simply missed the deadline" to file its answer and affirmative defenses by two days, the default was nevertheless improperly entered because defendants "otherwise defended" this case from the start. Under MCR 2.603(A)(1), "[i]f a party against whom a judgment for affirmative relief is sought has failed to plead *or otherwise defend* as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk must enter the default of that party." (Emphasis added.) This Court has made clear that the highlighted portion of

MCR 2.603(A)(1) means that a party must not be defaulted if the party has otherwise defended the action by taking some defensive action in the case. In *Marposs Corp v Autocam Corp*, 183 Mich App 166, 168; 454 NW2d 194 (1990), the defendant filed motions for summary disposition and a change of venue. The trial court denied both motions. *Id*. The defendant sought leave to appeal the trial court's denial of its motion for a change of venue but not the denial of its motion for summary disposition. *Id*. The defendant did not file an answer and a default was entered. *Id*. Although the defendant had failed to file a responsive pleading under MCR 2.108(A)(1), this Court held that the trial court erred by concluding that the defendant had defaulted because the defendant had otherwise defended itself under MCR 2.603(A)(1). *Id*. at 170.

Here, from the start of this case, defendant defended itself by vigorously opposing plaintiff's motions for injunctive relief and partial summary disposition. Specifically, defendant (1) filed a brief opposing plaintiff's motion for injunctive relief with supporting affidavits, (2) appeared with counsel at the hearing on plaintiff's motion, (3) argued against the forced removal of its equipment because the Lease did not authorize plaintiff to demand that action from defendant, (4) defended against plaintiff's motion for summary disposition, and (5) appeared with counsel at the hearing on plaintiff's motion for summary disposition. There can be no doubt that defendant "otherwise defended" this lawsuit because each pleading it filed in this short time span contained defenses to plaintiff's claims and requests for relief. Compare *id*. at 168-170 with *Huntington Nat'l Bank*, 292 Mich App at 388. Consequently, good cause existed to set aside the default and default judgment because the default was improperly entered, and the trial court abused its discretion by ruling otherwise.

Though the foregoing conclusion is enough to move on to the meritorious-defense issue, we still point out that the record establishes that the *Shawl* factors warranted a finding of good cause. Factors (1) through (3) weighed in favor of finding good cause. Although defendant missed the April 12, 2016 deadline for filing its answer, defendant filed its answer and affirmative defenses by e-mail and mailed the originals to the trial court two days late. Further, the court clerk entered the mailed copy as filed on April 18, 2016, just six days after the deadline. Defendant did not completely fail to defend the action, nor did defendant fail to file an answer. Moreover, defendant vigorously defended against plaintiff's claims from the commencement of the case. Therefore, the trial court incorrectly found that defendant completely failed to answer or take any action and wrongly ruled that Factors (1) and (2) weighed against finding good cause, when clearly both factors weighed in defendant's favor.

Respecting Factor (3), on April 15, 2016, when defendant learned that a default had been entered late afternoon on April 14, 2016, defense counsel moved in open court to have the default set aside. The trial court refused to take immediate action and instead required defendant to file a motion to set aside the default. Defendant promptly filed its motion to set aside the default on April 22, 2016, only eight days after entry of the default. The trial court should have found that the short duration between entry of the default and defendant's action favored finding good cause for setting aside the default because, contrary to the trial court's conclusion, defendant actually took prompt action to get the default set aside.

Factor (5) weighed against finding good cause because defendant had missed the deadline to file its answer. Defense counsel failed to properly calendar the

deadline and filed the answer late. Such negligence was not excusable. Nevertheless, the record reflects that defense counsel's failure to timely file defendant's answer was not intentional. Therefore, Factor (6) weighed in favor of finding good cause. The trial court incorrectly concluded that Factor (6) absolutely weighed against finding good cause.

Factor (7) also weighed in favor of finding good cause. The trial court focused only on the monetary amount of a potential judgment and held that the minimal amount of damages at stake required finding that Factor (7) weighed against good cause. The trial court, however, completely disregarded the fact that the judgment sought by plaintiff included the eviction of defendant and termination of the Lease. The severity of the potential judgment's impact on defendant should have been considered. When that impact is considered, Factor (7) weighs in favor of finding good cause. The trial court's analysis of Factor (7) was critically flawed.

Factor (8) also weighed in favor of finding good cause because nothing in the record establishes that there was a risk of ongoing liability in this case. There was no potential for ongoing liability like that of a paternity or child support case. The trial court, therefore, erroneously ruled this factor weighed against finding good cause.

Again, for all these reasons, we conclude that the trial court erred by holding that good cause did not exist to set aside the default.

In addition to good cause, defendant was required to establish a meritorious defense to warrant setting aside the default. MCR 2.603(D)(1). Under *Shawl*, 280 Mich App at 238, the trial court was required to

consider whether the affidavit of meritorious defense contained evidence that:

> (1) the plaintiff cannot prove or defendant can disprove an element of the claim or a statutory requirement;
>
> (2) a ground for summary disposition exists under MCR 2.116(C)(2), (3), (5), (6), (7) or (8); or
>
> (3) the plaintiff's claim rests on evidence that is inadmissible.

The trial court held that defendant failed to establish a meritorious defense on the basis that defendant had no defense under the Lease to plaintiff's claims. Because the trial court incorrectly construed and interpreted the Lease terms, it also incorrectly held that defendant had no defense and refused to set aside the default. As explained below, the Lease provided a defense to defendant because the Lease did not grant plaintiff the right to order defendant to remove its equipment or the right to terminate the Lease if defendant refused. The trial court's original error (explained more below) in granting plaintiff's motion for partial summary disposition led to its erroneous conclusion that defendant lacked any defense. Accordingly, the trial court's ruling resulted in an outcome that fell outside the range of principled outcomes. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

Therefore, we hold that the trial court abused its discretion by refusing to set aside the default because defendant established good cause for setting aside the default and defendant had a meritorious defense to plaintiff's claims.

B. SUMMARY DISPOSITION

We next turn our attention to defendant's argument that the trial court erred by granting plaintiff sum-

mary disposition under MCR 2.116(C)(9) and (10). Summary disposition under MCR 2.116(C)(9) may be granted only if the defendant failed to plead a valid defense to a claim. *Dimondale v Grable*, 240 Mich App 553, 564; 618 NW2d 23 (2000). As explained in *Dimondale*,

> [a] motion under MCR 2.116(C)(9) tests the sufficiency of a defendant's pleadings by accepting all well-pleaded allegations as true. If the defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery, then summary disposition under this rule is proper. [*Id*. (quotation marks and citations omitted).]

The trial court "may look only to the parties' pleadings in deciding a motion under MCR 2.116(C)(9)." *Id*. at 565, citing MCR 2.116(G)(5). Under MCR 2.110(A), "pleadings" "include only a complaint, a cross-claim, a counterclaim, a third-party complaint, an answer to any of these, and a reply to an answer. A motion for summary disposition is not a responsive pleading under MCR 2.110(A)." *Dimondale*, 240 Mich App at 565.

A motion brought under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim and is reviewed by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008) (quotation marks omitted). Summary disposition is proper if there is "no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. A genuine issue of material fact exists when "reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8

(2008). This Court considers only the evidence that was properly presented to the trial court in deciding the motion. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

As a general rule, summary disposition is premature if granted before discovery is complete on a disputed issue. *Dimondale*, 240 Mich App at 566. "However, summary disposition may be proper before discovery is complete where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion." *Id*. (quotation marks and citations omitted).

The resolution of this appeal involves the construction and interpretation of the terms of the Lease. "The primary goal in interpreting contracts is to determine and enforce the parties' intent." *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). "To do so, this Court reads the agreement as a whole and attempts to apply the plain language of the contract itself." *Id*. The language of a contract is to be given its ordinary, plain meaning; technical, constrained constructions should be avoided. *Bianchi v Auto Club of Mich*, 437 Mich 65, 71 n 1; 467 NW2d 17 (1991). The construction of the terms of a contract is generally a question of law for the court; however, where a contract's meaning is ambiguous, the question of interpretation should be submitted to the fact-finder. *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997). A contract is ambiguous when its words can reasonably be understood in different ways. *Id*. Inartfully worded or clumsily arranged contract terms do not render a contract ambiguous if it fairly admits of one interpretation. *Mich Twp Participating Plan v Pavolich*, 232 Mich App 378, 382; 591 NW2d 325 (1998).

If the language of the Lease was unambiguous, the trial court was required to enforce it as written, *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008), because a court may not substitute its judgment for the intent of the parties and remake the contract into something the parties never intended, *Grosse Pointe Park v Mich Muni Liability & Prop Pool*, 473 Mich 188, 199-200; 702 NW2d 106 (2005). Parties are free to contract as they see fit, and courts must enforce contracts as written unless they are in violation of law or public policy. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003).

Contracts must be construed as a whole, giving effect to all provisions. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005). Courts must avoid interpretations that would render any part of a contract surplusage or nugatory and must also, if possible, seek an interpretation that harmonizes potentially conflicting terms. *Wells Fargo Bank, NA v Cherryland Mall Ltd Partnership*, 295 Mich App 99, 111; 812 NW2d 799 (2011), remanded for reconsideration on other grounds 493 Mich 859 (2012). Further, where a contract contains specific and general terms, the specific terms normally control over the general terms. *Royal Prop Group, LLC*, 267 Mich App at 719.

Here, ¶ 2 of the Lease granted defendant space on plaintiff's water tower and near the water tower's base for an initial five-year lease term with three additional automatically renewable five-year terms unless defendant notified plaintiff before the end of the initial term of its intent not to extend the Lease. Paragraph 19 of the Lease granted defendant the right to terminate the agreement upon 30 days' notice in specified circumstances. The Lease did not grant plaintiff the right to

terminate the agreement, nor did it expressly state that plaintiff could order defendant to remove its equipment from the leased premises.

Paragraph 7(D) of the Lease specifically addressed what was required of defendant if plaintiff decided to paint the water tower. Specifically, that paragraph provides that when plaintiff undertook to paint the water tower, defendant had to take "reasonable measures" at its cost to protect its equipment from harm. It does not state that plaintiff could request or order defendant to vacate the premises. However, language in ¶ 10 intersects with that in ¶ 7(D). Pursuant to ¶ 10, defendant could not interfere with plaintiff's operation, repair, or maintenance of the water tower and provided plaintiff the right to take any action it deemed necessary in its sole discretion to repair, maintain, alter, or improve the water tower.

However, ¶¶ 2, 7(D), 10, and 19 must be read together. And, when properly read together, we hold that there was no contractual language in which the parties agreed that plaintiff could order defendant to completely remove its equipment and terminate the Lease when plaintiff deemed painting or maintenance necessary. Rather, a specific procedure was set forth by the parties within ¶ 7(D) in the event plaintiff needed to paint the water tower. Plaintiff unilaterally determined that that procedure would not suffice and ordered defendant to remove its property. When defendant opposed this remedy, the trial court ordered the material removed and terminated the Lease.

However, construing and interpreting the Lease to provide plaintiff the unfettered right to order defendant to remove all of its equipment and cease its use of the water tower is inconsistent with ¶ 19, which gives defendant, not plaintiff, the ability to end the Lease

early. The trial court's interpretation is also inconsistent with the very purpose of the Lease—defendant's right to uninterrupted use of the water tower for defendant's business in return for its payment of the rent. The trial court's decision deprived defendant of its benefit of the bargain and created a remedy that did not exist under the Lease. See *United Coin Meter Co of Mich v Lasala*, 98 Mich App 238, 242; 296 NW2d 221 (1980).

The trial court's orders are reversed, and this matter is remanded for further proceedings consistent with this opinion.

This Court does not retain jurisdiction.

Defendant may tax costs, having prevailed in full. MCR 7.219(A).

MURRAY, P.J., and SAWYER and MARKEY, JJ., concurred.

LUDWIG v LUDWIG

Docket Nos. 336938 and 336978. Submitted December 6, 2017, at Detroit. Decided December 12, 2017, at 9:00 a.m. Reversed and remanded 501 Mich 1075.

Plaintiff, Susan Ludwig, filed a complaint for divorce from defendant, Craig Ludwig, in the Oakland Circuit Court, Family Division. Plaintiff requested that the trial court order defendant to undergo a psychological evaluation, and the court ordered both parties to submit to a psychological evaluation. Defendant's assessment was largely negative, and in February 2009, the court ordered defendant to vacate the marital home, allowing supervised parenting time until further order of the court. In May 2009, the parties signed a consent judgment of divorce that granted plaintiff sole legal and physical custody of the parties' two minor children and granted defendant supervised parenting time. Plaintiff obtained personal protection orders (PPOs) against defendant in 2009 and 2010. In 2012, defendant was found in violation of the 2010 PPO, and his parenting time was suspended until further order of the court. In 2013, defendant requested unsupervised parenting time, claiming that he had been regularly attending therapy. Several psychologists evaluated defendant, who was diagnosed with persecutory type delusion disorder. The court ordered that defendant participate in therapy with John Cotter, a treating psychologist, and treatment began in September 2015. In January 2016, Cotter recommended that the trial court begin the reunification process between defendant and the children. On September 15, 2016, the court held a hearing to determine whether the reunification process should begin, and Cotter testified as a fact witness. Plaintiff argued that the reunification process should not begin until the trial court conducted a full evidentiary hearing. On January 19, 2017, the court, Mary Ellen Brennan, J., ordered that the children participate with a therapist for a minimum of four sessions, after which a reunification videoconference would be conducted between the children, defendant, and two therapists. The court further ordered that, following the videoconference, the therapists had discretion over the frequency, duration, and method of continued contact and that, after six months, the Friend of the Court would

review the matter to determine whether a motion to change parenting time should be entertained. The court explicitly stated that it was not changing parenting time, concluding that the therapeutic contact it ordered did not constitute a change in parenting time. Plaintiff filed a claim of appeal and sought leave to appeal. The Court of Appeals granted the application in Docket No. 336938 and consolidated that appeal with the appeal in Docket No. 336978. On appeal, plaintiff argued that the trial court committed clear legal error by ordering the minor children and defendant to engage in family therapy without first holding an evidentiary hearing.

The Court of Appeals *held*:

1. The Child Custody Act, MCL 722.21 *et seq*., provides the trial court with broad power to enter orders in custody and parenting-time disputes. Under MCL 722.27(1)(e), if a child custody dispute has been submitted to the circuit court, the court may take any other action considered to be necessary in a particular child custody dispute. Under MCL 722.28, all orders and judgments of the circuit court in child custody disputes shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.

2. Parenting time is defined as the time a child spends with each parent. In this case, the videoconference that the court ordered between defendants, the children, and two therapists did not constitute parenting time under the Child Custody Act. The trial court ordered the therapists, rather than defendant, to direct and control the videoconference reunification, the trial court gave the therapists discretion to determine whether further video interaction would occur, and the trial court gave the therapists discretion to control the frequency, duration, and method of any further interactions. Moreover, the trial court repeatedly and explicitly stated that the order did not modify the prior parenting-time order that had suspended defendant's parenting time. The trial court's decision did not amount to clear legal error because the order did not affect parenting time and was a proper exercise of the trial court's broad power over the parenting dispute. Because the order did not modify parenting time, a full evidentiary hearing was not required.

3. Due process requires notice and an opportunity to be heard in a meaningful time and manner. While plaintiff argued that she was denied her due-process rights when the trial court refused to allow her to present her own evidence at the hearing, the record revealed that plaintiff had notice of the hearing and was provided

with an opportunity to be heard. The trial court held a three-day hearing accepting the testimony of Cotter, and much of that hearing consisted of plaintiff's cross-examination of Cotter. The trial court did not abuse its discretion or violate principles of due process by entering the order after taking testimony from Cotter.

Affirmed.

Judith A. Curtis for plaintiff.

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

PER CURIAM. In this consolidated appeal involving a custody dispute, plaintiff appeals by leave granted[1] the trial court's order to begin family therapy and reunification between defendant and the parties' two minor children. We affirm.

I. BACKGROUND

Plaintiff and defendant were married in 1994 and had three children[2] during the course of their mar-

[1] *Ludwig v Ludwig*, unpublished order of the Court of Appeals, entered April 13, 2017 (Docket No. 336938). We acknowledge that plaintiff filed an appeal as of right regarding the identical issue presented herein in Docket No. 336978. This Court previously directed the parties to address whether this Court had jurisdiction to hear the appeal as of right pursuant to MCR 7.202(6)(a)(*iii*) in their briefs on appeal. *Ludwig v Ludwig*, unpublished order of the Court of Appeals, entered April 6, 2017 (Docket No. 336978) (O'CONNELL, J., would have denied the motion for reconsideration). However, because this Court later granted plaintiff's application for leave to appeal the same order, we need not consider whether we now have jurisdiction as of right. See MCR 7.203(B)(1) ("The court may grant leave to appeal from: (1) a judgment or order of the circuit court and court of claims that is not a final judgment appealable of right[.]"); see also *In re Investigative Subpoena re Morton Homicide*, 258 Mich App 507, 508 n 2; 671 NW2d 570 (2003).

[2] The oldest child was not subject to the trial court's order because she was over 18 years old and was no longer within the trial court's jurisdiction.

riage. On July 21, 2008, plaintiff filed a complaint for divorce, and shortly after, she requested that the trial court order defendant to undergo a psychological evaluation. The trial court then ordered both parties to submit to a psychological evaluation with a psychologist. The assessment of defendant was largely negative.[3] On February 19, 2009, the trial court ordered defendant to vacate the marital home, allowing supervised parenting time until further order of the court.

On May 6, 2009, the parties signed a consent judgment of divorce that granted plaintiff sole legal and physical custody of the two minor children. Defendant was granted supervised parenting time, but at some point in 2009, plaintiff obtained a personal protection order (PPO) against defendant. She obtained a second PPO in 2010. Around that time, defendant joined the Army and was eventually deployed overseas. He returned in December 2011 and began living in Texas. Upon his return, he attempted to arrange supervised parenting time with the minor children, but claimed that plaintiff prevented contact with the children. In 2012, defendant was found in violation of the 2010 PPO by visiting one of the children at her school, and defendant's parenting time was suspended until further order of the court.

In 2013, defendant requested unsupervised parenting time, claiming that he had been attending regular therapy with two different counselors in Texas. Plaintiff argued that any parenting time with defendant would not be in the best interests of the children, considering defendant's history of psychological problems. She insisted that defendant submit to another independent psychological evaluation. After a hearing

[3] The results of plaintiff's psychological evaluation are not in the record.

on defendant's motion, the trial court ordered defendant to submit to a second evaluation with a Michigan-based psychologist agreed on by the parties. On November 26, 2014, which was 18 months after the trial court entered its order, Dr. Jackson E. Turner evaluated defendant in Michigan without plaintiff's approval. It appears from the record that defendant moved from Texas back to Michigan at some point during this time. Turner concluded that defendant was capable and ready to interact positively with the children and recommended that the process of reunification begin with gradual steps leading to one-on-one parenting time. Plaintiff argued that the evaluation from Turner should not be considered because the trial court's order required that the parties agree on a psychologist. The trial court expressed its concern that the minor children were not involved with Turner's evaluation, and it ordered another psychological evaluation to be performed by Dr. James N. Bow, requiring that Bow work with all members of the family in order to get a more expansive view of the situation.

Bow diagnosed defendant with persecutory type delusion disorder, concluding that defendant's prognosis was poor and that defendant would likely never be entirely free of the condition. He recommended that defendant engage in therapy, focusing on a number of specified concerns. Accordingly, the trial court ordered defendant to participate in therapy with Dr. John Cotter, a treating psychologist. On September 23, 2015, Cotter began treating defendant with a focus on the concerns identified by Bow.

On December 23, 2015, the trial court granted plaintiff's motion to move to California with the children. By January 29, 2016, defendant had completed 12 sessions with Cotter. Thereafter, Cotter recom-

mended that the trial court begin the reunification process between defendant and the children. After a hearing on defendant's motion to adopt Cotter's recommendation, the trial court ordered defendant to undergo a reevaluation with Bow, but Bow refused to reevaluate defendant, claiming it would amount to a conflict of interest. Defendant then asked the trial court to modify its previous order and allow Cotter to conduct the reevaluation, but plaintiff argued that a different psychologist should perform the reevaluation. The trial court heard arguments on May 4, 2016, and it ordered Cotter to review all the psychological evaluations, to have Cotter and defendant discuss what the children had said about defendant, to address the other issues with defendant, and then to inform the trial court regarding defendant's progress with his mental health. From March 23, 2016 to September 15, 2016, defendant visited Cotter 20 more times.

The trial court held a hearing on September 15, 2016, and Cotter testified as a fact witness. According to the trial court, the purpose of the hearing was to evaluate whether Bow's recommendations for treatment had been followed, whether defendant was making progress, and whether it would be appropriate at that time to initiate the reunification process. After three days of direct and cross-examination of Cotter, the trial court had the parties submit closing arguments via briefing regarding whether defendant had sufficiently improved to begin the first step of Cotter's plan for reunification. Plaintiff argued that the reunification process should not begin until the trial court conducted a full evidentiary hearing.

The trial court entered an opinion and order on January 19, 2017, holding that defendant had "satisfactorily complied with substantial hoops, ordered at

both [p]laintiff's request and the court's own caution, to demonstrate a reunification process should begin." The trial court ordered the following: (1) the minor children shall participate with a therapist in California for a minimum of four sessions within 45 days, (2) after the children's therapy, and within 60 days, a reunification videoconference must be conducted between defendant, the children, the therapist in California, and Cotter, (3) after the first reunification conference, the frequency, duration, and method of continued contact will be at the therapists' discretion, and (4) after six months, the Friend of the Court will review the matter in order to determine if, at that time, a motion to change parenting time should be entertained. The trial court made clear that it was not changing parenting time, concluding "that therapeutic contact does not constitute a 'change' in parenting time as [d]efendant will not be having any 'parenting time,' supervised or otherwise, at this juncture and through this medium."

Plaintiff argues on appeal that the trial court committed clear legal error by ordering the minor children and defendant to engage in family therapy with therapists, all by way of videoconference, as part of the reunification process without first holding an evidentiary hearing. Because the order in question did not modify parenting time, we disagree.

II. STANDARDS OF REVIEW

This Court applies " 'three standards of review in custody cases.' " *Vodvarka v Grasmeyer*, 259 Mich App 499, 507; 675 NW2d 847 (2003), quoting *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). "Findings of fact . . . are reviewed under the 'great weight of the evidence' standard." *Dailey v Kloenhamer*, 291 Mich App 660, 664; 811 NW2d 501 (2011) (citation

omitted). In other words, "a reviewing court should not substitute its judgment on questions of fact unless they clearly preponderate in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994) (quotation marks omitted). Meanwhile, "[d]iscretionary rulings . . . are reviewed for an abuse of discretion." *Dailey*, 291 Mich App at 664. "In child custody cases, an abuse of discretion occurs if the result [is] so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Maier v Maier*, 311 Mich App 218, 221; 874 NW2d 725 (2015) (quotation marks and citation omitted; alteration in original). "Lastly, the custody act provides that questions of law are reviewed for 'clear legal error.' " *Fletcher*, 447 Mich at 881, quoting MCL 722.28. A trial court commits clear legal error when it "incorrectly chooses, interprets, or applies the law . . . ." *Id*. In sum, "in child-custody disputes, 'all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.' " *Dailey*, 291 Mich App at 664, quoting MCL 722.28.

III. ANALYSIS

Pursuant to MCL 722.27a(1), "[p]arenting time shall be granted in accordance with the best interests of the child." With regard to the best interests of children, MCL 722.27a(1) requires that this Court presume that it would be "in the best interests of a child for the child to have a strong relationship with both of his or her

parents." The right to parenting time, however, is not absolute. See *Rozek v Rozek*, 203 Mich App 193, 194; 511 NW2d 693 (1993).

The primary issue presented in this case is whether the trial court's order modified a parenting-time order. If it did, then the trial court made a clear error of law by entering the order without first holding an evidentiary hearing regarding the contested best interests of the children. See *Shade v Wright*, 291 Mich App 17, 31-32; 805 NW2d 1 (2010). We hold that the trial court order was not an order modifying parenting time, and therefore a full evidentiary hearing was not required. It is important to note that the Child Custody Act, MCL 722.21 *et seq*., provides the trial court with broad power to enter orders in custody and parenting-time disputes. *Blaskowski v Blaskowski*, 115 Mich App 1, 7-8; 320 NW2d 268 (1982) ("The trial court is granted extremely broad powers in custody cases."). Indeed, "[i]f a child custody dispute has been submitted to the circuit court . . . the court may . . . [t]ake any other action considered to be necessary in a particular child custody dispute." MCL 722.27(1)(e). We conclude that the trial court order did not affect parenting time.

We have defined parenting time as "the time a child spends with each parent." *Lieberman v Orr*, 319 Mich App 68, 80; 900 NW2d 130 (2017). Although this is a broad definition, we cannot conclude that the contact ordered between defendant and the children constitutes "parenting time." More precisely, a court-ordered videoconference between defendant, the children, a California therapist, and a Michigan therapist (Cotter) does not constitute the "parenting time" envisioned under the Child Custody Act. This is particularly true because the trial court ordered the therapists, rather than defendant, to direct and control the video confer-

ence sessions. According to the court order, the therapists will determine whether there should be further video interaction between defendant and the children beyond the initial videoconference, and the therapists will control the frequency, duration, and method of each continued contact. In fact, either therapist can end further contact after a single session. The videoconferences will last no longer than six months, when the Friend of the Court will make a recommendation to the trial court whether a hearing to change parenting time is warranted. Overall, the trial court's decision did not amount to clear legal error because the order does not affect parenting time and was a proper exercise of the trial court's broad power over the parenting dispute.

The trial court's intent to not alter parenting time is clear from the order. The trial court repeatedly and explicitly stated that the order does not modify the last parenting-time order, which has suspended defendant's parenting time since 2012. The trial court also held that it would only consider a modification of parenting time after the children and defendant had been involved in family therapy for up to six months. The trial court would then entertain a motion for a change of parenting time only *after* the Friend of the Court reviewed the matter and submitted a positive recommendation. Only then would the trial court hold an evidentiary hearing to determine whether a change of parenting time is merited. The order was clear to not change parenting time, and we cannot conclude that the trial court committed clear legal error when it entered its order without holding an evidentiary hearing on the contested best interests of the children.

Because the order did not modify parenting time, the various procedural requirements necessitated un-

der the Child Custody Act when parenting time is modified are inapplicable in the present case. Instead, the trial court entered the order pursuant to its broad statutory power in custody cases. MCL 722.27(1)(e). Because plaintiff's entire argument on appeal relies on the fact that the order modified parenting time, her appeal is without merit.

Additionally, contrary to plaintiff's argument on appeal, the trial court did abide by the most general requirements of due process. "Due process is a flexible concept, the essence of which requires fundamental fairness." *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009). "At a minimum, due process requires notice and an opportunity to be heard in a meaningful time and manner." *Spranger v City of Warren*, 308 Mich App 477, 483; 865 NW2d 52 (2014). While plaintiff argues that she was denied her due-process rights when the trial court refused to allow her to present her own evidence, the record reveals that plaintiff had notice of the hearing and was provided with an opportunity to be heard. See *id*. Indeed, the trial court held a three-day hearing accepting the testimony of Cotter. Much of that hearing consisted of plaintiff's cross-examination of the witness. Although plaintiff's purported evidence was repeatedly ruled inadmissible, plaintiff was still permitted to cross-examine Cotter on the content of that evidence by asking how Cotter dealt with the allegations during therapy. Further, the trial court made clear on the record that it had a copy of, and had considered, the prior psychological evaluation performed in the case. Therefore, because the order appealed was not an order modifying parenting time, the strict procedural requirements of MCL 722.27(1)(c) were not required and the trial court did not abuse its discretion or violate principles of due process by entering the order

after taking testimony from Cotter. See *Al-Maliki*, 286 Mich App at 485. Indeed, there is no basis to hold that the trial court's decision to have defendant and the children engage in family therapy was "so palpably and grossly violative of fact and logic that it evidence[d] not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Maier*, 311 Mich App at 221 (quotation marks and citation omitted).

The trial court stated in its order that it would not consider a change to parenting time for at least six months, and then only upon a recommendation from the Friend of the Court. If the trial court considers a change to parenting time at that point, it will be required to hold an evidentiary hearing to address plaintiff's concerns and accept additional evidence regarding the best interests of the children. Until then, however, the trial court did not err by entering the order appealed pursuant to its broad statutory power to do so. MCL 722.27(1)(e).

Affirmed.

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

BATTS v TITAN INSURANCE COMPANY

Docket No. 335656. Submitted December 5, 2017, at Detroit. Decided December 12, 2017, at 9:05 a.m.

William J. Batts, a military veteran, filed a complaint in the Wayne Circuit Court against Titan Insurance Company, seeking payment of personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*. Plaintiff was riding a motor scooter and was injured when he struck a vehicle that failed to stop at an intersection stop sign. The vehicle could not be identified. Plaintiff received medical treatment through the Veterans Health Administration of the United States Department of Veterans Affairs (the VA) and from non-VA medical providers for his injuries. Because plaintiff did not have a no-fault policy, plaintiff filed a claim for no-fault PIP benefits through the assigned claims plan, which assigned the claim to defendant. Defendant refused to pay any of the requested PIP benefits, arguing that plaintiff was entitled to healthcare benefits through the VA and that the VA was the primary insurer responsible for plaintiff's medical care and expenses. Defendant moved for summary disposition, arguing that (1) under the coordination of benefits provision, MCL 500.3109a, defendant was not liable for the cost of any medical treatment plaintiff received outside the VA system, (2) under MCL 500.3172(2), defendant was not liable for any of plaintiff's medical expenses because benefits through the assigned claims plan are coordinated under MCL 500.3172(2) and plaintiff had healthcare coverage through the VA, and (3) under MCL 500.3109(1), defendant was entitled to a setoff against federal benefits to which plaintiff was entitled. Plaintiff also moved for summary disposition. The court, John H. Gillis, Jr., J., denied defendant's motion for summary disposition, holding that because the VA did not offer the services that plaintiff needed, defendant was liable for those expenses incurred outside the VA. Defendant sought leave to appeal, which the Court of Appeals denied. The parties agreed to a contingent award of damages pending appeal, and the trial court entered a stipulated judgment. Defendant appealed as of right.

The Court of Appeals *held*:

1. MCL 500.3109a provides, in pertinent part, that an insurer providing PIP benefits may offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health and accident coverage on the insured. This provision encompasses no-fault policies that are purchased by the insured that coordinate the insured's no-fault and health insurance coverage in exchange for a reduced premium. In this case, however, plaintiff did not purchase a no-fault policy or a coordinated no-fault policy; therefore, MCL 500.3109a was not applicable. Accordingly, to the extent the trial court held that plaintiff's claim for PIP benefits was subject to MCL 500.3109a—but that plaintiff was still entitled to recovery because the medical services he required were not available from the VA—the trial court's decision was erroneous.

2. A federal law preempts state law to the extent that the state law directly conflicts with federal law or with the purposes and objectives of Congress. Under 38 USC 1729, the United States may recover the cost of providing medical care to a veteran through the VA system for nonservice-related injuries, such as injuries sustained in a motor vehicle accident. MCL 500.3172(2) provides, in pertinent part, that PIP benefits payable through the assigned claims plan shall be reduced to the extent that benefits covering the same loss are available from other sources, regardless of the nature or number of benefit sources available and regardless of the nature or form of the benefits, to the person claiming PIP benefits through the assigned claims plan. To the extent that MCL 500.3172(2), or any other no-fault provision, is in conflict with the federal statute mandating reimbursement for medical care and services provided to a veteran for nonservice-related injuries—like those resulting from a motor-vehicle accident—such state laws are preempted by 38 USC 1729. Because the VA system does not provide free medical services to veterans for nonservice-related injuries, entitlement to seek medical services from the VA could not be deemed a "benefit source" that relieved defendant of its obligation to pay PIP benefits to plaintiff. Accordingly, defendant's argument regarding MCL 500.3172(2) was without merit.

3. MCL 500.3109(1) provides that benefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the PIP benefits otherwise payable for the injury. The history of MCL 500.3109(1) indicates that the Legislature's intent was to require a setoff of those government benefits that duplicated the no-fault benefits payable because of the accident and thereby reduce or contain the cost of

basic insurance. In this case, however, plaintiff was not active in a military service at the time of the motor vehicle accident, and 38 USC 1729 negated any argument that the VA was liable, and primarily responsible, to provide medical benefits to plaintiff for his nonservice-related motor vehicle accident injuries. Accordingly, there was no duplication of governmental benefits related to plaintiff's medical care, and defendant was not entitled to a setoff for the medical services provided to plaintiff by the VA for his accident-related injuries. The healthcare benefits plaintiff received from the VA were outside the scope of MCL 500.3109(1). Moreover, because defendant was the primary insurer responsible for plaintiff's medical expenses for injuries sustained in the motor vehicle accident, plaintiff was not required to solely seek medical care and services through the VA system.

Affirmed, but remanded for entry of an order granting summary disposition in plaintiff's favor.

INSURANCE — NO-FAULT INSURANCE — ASSIGNED CLAIMS PLAN — PREEMPTION — REIMBURSEMENT FOR MEDICAL CARE AND SERVICES PROVIDED TO A VETERAN FOR NONSERVICE-RELATED INJURIES.

Under 38 USC 1729, the United States may recover the cost of providing medical care to a veteran through the Veterans Health Administration system for nonservice-related injuries; MCL 500.3172(2) provides, in pertinent part, that personal protection insurance (PIP) benefits payable through the assigned claims plan shall be reduced to the extent that benefits covering the same loss are available from other sources, regardless of the nature or number of benefit sources available and regardless of the nature or form of the benefits, to the person claiming PIP benefits through the assigned claims plan; to the extent that MCL 500.3172(2), or any other provision of the no-fault act, MCL 500.3101 *et seq*., is in conflict with the federal statute mandating reimbursement for medical care and services provided to a veteran for nonservice-related injuries, such state laws are preempted by 38 USC 1729.

Sohou Law (by *Guy Sohou*) for William J. Batts.

Law Offices of Ronald M. Sangster, PLLC (by *Ronald M. Sangster*) for Titan Insurance Company.

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

CAVANAGH, J. Defendant appeals as of right a stipulated judgment entered following the trial court's order denying defendant's motion for summary disposition in this no-fault insurance dispute. We affirm and remand for entry of an order granting summary disposition in plaintiff's favor.

Plaintiff, a military veteran, was riding a motor scooter and was injured when he struck a vehicle that failed to stop at an intersection stop sign. The vehicle could not be identified. Plaintiff received various medical treatments through the Veterans Health Administration of the United States Department of Veterans Affairs (the VA) for his injuries, but he also received medical care from non-VA medical providers, including Serenity Personal Care, an assisted-living facility. Plaintiff did not have a policy of no-fault insurance available to him in his household. Therefore, plaintiff filed a claim for no-fault personal protection insurance (PIP) benefits through the assigned claims plan, which assigned the claim to defendant. Defendant refused to pay any of the requested PIP benefits on the ground that plaintiff was entitled to healthcare benefits through the VA, and thus, the VA was the primary insurer responsible for plaintiff's medical care and expenses.

Plaintiff then filed his complaint seeking payment of PIP benefits from defendant. Plaintiff alleged that defendant had refused to pay any PIP benefits, including medical, attendant care, replacement service, and transportation benefits.

Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that as a military veteran plaintiff had health "insurance" coverage through the VA that, like a health maintenance organization (HMO), required plaintiff to receive medical treatment

within the VA system. Consequently, under the coordination of benefits provision of MCL 500.3109a, defendant argued that it was not liable for the cost of any medical treatment received by plaintiff outside the VA system. Similarly, because benefits through the assigned claims carrier are coordinated under MCL 500.3172(2) and plaintiff had healthcare coverage through the VA, defendant argued that it was not liable for any of plaintiff's medical expenses. Further, under the setoff provision of MCL 500.3109(1), defendant alleged that it was entitled to a setoff against federal benefits to which plaintiff was entitled. And, in this case, the VA health system could provide the same treatments and services plaintiff received from non-VA providers after his motor vehicle accident; thus, defendant asserted that it was not liable for those expenses. That is, although plaintiff's case manager, Monica Gay, testified that a VA social worker contacted her to locate 24-hour care for plaintiff following a surgical procedure, Gay did not seek that care from a VA facility before having him placed at Serenity Personal Care. Further, a social worker at the VA, Pamela Mackey, testified that although the VA does not provide 24-hour care, a veteran can apply to a VA-run medical foster-care program that requires a veteran to privately pay to receive care by individuals who are reviewed by VA staff. Therefore, defendant argued, plaintiff's complaint seeking PIP benefits should be summarily dismissed.

Plaintiff responded to defendant's motion for summary disposition and requested summary disposition in his favor under MCR 2.116(I)(2). First, plaintiff argued, the VA is not a health insurance company; it is a medical provider of last resort for veterans unless they have a service-connected injury. Federal law—specifically 38 USC 1729—establishes that the VA is

not an "insurer" because it grants the federal government the right to be reimbursed for the cost of medical care provided to veterans for nonservice-related injuries. More specifically, 38 USC 1729(f) states that when a veteran receives medical care for nonservice-connected injuries incurred in a motor vehicle accident, no law of any state and no contract provision shall prevent recovery by the Unites States for the care or services furnished to the veteran. See also *United States v State Farm Ins Co*, 599 F Supp 441 (ED Mich, 1984). Accordingly, plaintiff argued that this federal law preempts the state law provisions on which defendant relies and that defendant's argument is without merit.

Second, plaintiff argued, the no-fault provisions and cases defendant relies upon in support of its legal position are inapposite. In this case, plaintiff did not choose to purchase a coordinated automobile insurance policy that offered reduced healthcare benefits. Moreover, again, the VA is not a health insurance company. That is why the VA actually sought payment from defendant through its numerous billings for medical services provided to plaintiff as a consequence of the motor vehicle accident. Further, defendant was sent a letter from a staff attorney at the VA General Counsel Office that set forth the legal authority, including 38 USC 1729, supporting its efforts to seek reimbursement for medical services provided to plaintiff as a result of the motor vehicle accident. In summary, plaintiff argued, he was wrongfully denied PIP benefits and was entitled to summary disposition in his favor.

Following oral argument, the trial court denied defendant's motion for summary disposition. The trial court held that because the VA did not offer the services that plaintiff needed, defendant was liable for

those expenses incurred outside the VA. Subsequently, the trial court granted defendant's motion to stay proceedings pending this Court's decision on defendant's application for leave to appeal. After this Court issued an order denying defendant's application, the parties agreed to a contingent award of damages pending appeal and the trial court entered a stipulated judgment that closed the case. This appeal of right followed.

Defendant argues that plaintiff had health insurance coverage through the VA and was required under provisions of the no-fault act to seek and receive all medical treatment within the VA system. Therefore, defendant argues that it was not liable for any outstanding PIP benefits and that the trial court erred by denying its motion for summary disposition. We disagree.

We review de novo a trial court's decision to grant a motion for summary disposition. *Lakeview Commons Ltd Partnership v Empower Yourself, LLC*, 290 Mich App 503, 506; 802 NW2d 712 (2010). A motion brought under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim and should be granted if, after consideration of the evidence submitted by the parties in the light most favorable to the nonmoving party, no genuine issue regarding any material fact exists. *Id*.

We also review de novo questions of statutory interpretation. *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010). It is well established that the goal of statutory interpretation is to give effect to the intent of the Legislature. *Atchison v Atchison*, 256 Mich App 531, 535; 664 NW2d 249 (2003). "If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further

judicial construction is permitted." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013).

Under the assigned claims statutory scheme, including MCL 500.3172(3)(b) and MCL 500.3175(1), defendant was required to make prompt payment for plaintiff's losses suffered as a consequence of the motor vehicle accident in accordance with the no-fault act, MCL 500.3101 *et seq*. Defendant has asserted three untenable excuses for failing to do so. First, defendant claims that under the coordination of benefits provision of MCL 500.3109a, it was not liable for medical expenses incurred by plaintiff inside or outside the VA system. MCL 500.3109a provides, in pertinent part:

> An insurer providing personal protection insurance benefits under this chapter may offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health and accident coverage on the insured.

This provision plainly refers to "coordinated" no-fault policies, i.e., no-fault policies that are purchased by the insured that coordinate the insured's no-fault and health insurance coverage in exchange for a reduced premium. *St John Macomb-Oakland Hosp v State Farm Mut Auto Ins Co*, 318 Mich App 256, 263; 896 NW2d 85 (2016). "In that circumstance, the no-fault insurer is not liable for medical expenses that the health insurer is required to pay for or provide." *Id*., citing *Tousignant v Allstate Ins Co*, 444 Mich 301, 303; 506 NW2d 844 (1993). Consequently, the no-fault insurer is only liable for medical expenses incurred for care or services not available from the insured's health insurer—the primary insurer. *Tousignant*, 444 Mich at 307; *Sprague v Farmers Ins Exch*, 251 Mich App 260, 270; 650 NW2d 374 (2002).

In this case, however, plaintiff did not purchase either a no-fault policy or a *coordinated* no-fault insurance policy; therefore, MCL 500.3109a is not applicable. Accordingly, defendant's argument premised on the holdings in *Tousignant* and *Owens v Auto Club Ins Ass'n*, 444 Mich 314; 506 NW2d 850 (1993), is without merit. Both of those decisions involved no-fault policies that coordinated benefits as allowed by MCL 500.3109a. The former concerned health coverage through an HMO. *Tousignant*, 444 Mich at 310. The latter concerned health coverage though the United States Coast Guard and the VA—for an *active* member/employee of the Coast Guard, not a veteran. *Owens*, 444 Mich at 318-319, 321-322. And in each case, the insured's voluntary decision to purchase a coordinated no-fault policy was critical to the Court's holding. Thus, here, to the extent the trial court held that plaintiff's claim for PIP benefits was subject to MCL 500.3109a—but that plaintiff was still entitled to recovery because the medical services he required were not available from the VA—the trial court's decision was erroneous. MCL 500.3109a is inapplicable.

The second reason provided by defendant for failing to promptly pay plaintiff's PIP claim is that, under MCL 500.3172(2), benefits through the assigned claims plan are coordinated with a claimant's benefits received from other sources, including healthcare benefits through the VA. MCL 500.3172(2) provides:

> Except as otherwise provided in this subsection, personal protection insurance benefits, including benefits arising from accidents occurring before March 29, 1985, payable through the assigned claims plan *shall be reduced to the extent that benefits covering the same loss are available from other sources*, regardless of the nature or number of benefit sources available and regardless of the nature or form of the benefits, to a person claiming

> personal protection insurance benefits through the assigned claims plan. This subsection only applies if the personal protection insurance benefits are payable through the assigned claims plan because no personal protection insurance is applicable to the injury, no personal protection insurance applicable to the injury can be identified, or the only identifiable personal protection insurance applicable to the injury is, because of financial inability of 1 or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed. As used in this subsection, "sources" and "benefit sources" do not include the program for medical assistance for the medically indigent under the social welfare act, 1939 PA 280, MCL 400.1 to 400.119b, or insurance under the health insurance for the aged act, title XVIII of the social security act, 42 USC 1395 to 1395kkk-1. [Emphasis added.]

Defendant claims that plaintiff's eligibility to receive healthcare services through the VA constituted a "benefit source," which therefore relieved defendant of its obligation to pay for any medical care or services required by plaintiff for his motor vehicle accident injuries. We do not agree.

As plaintiff argued in the trial court, the VA has the same right to recover payment for medical care and services provided to plaintiff as any private hospital or medical facility. That is so because of a federal statute, 38 USC 1729, which states:

> (a)(1) Subject to the provisions of this section, in any case in which a veteran is furnished care or services under this chapter for a non-service-connected disability described in paragraph (2) of this subsection, the United States has the right to recover or collect reasonable charges for such care or services (as determined by the Secretary) from a third party to the extent that the veteran (or the provider of the care or services) would be eligible to receive payment for such care or services from

> such third party if the care or services had not been furnished by a department or agency of the United States.
>
> (2) Paragraph (1) of this subsection applies to a non-service-connected disability—
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> * * *
>
> (B) that is incurred as the result of a motor vehicle accident to which applies a State law that requires the owners or operators of motor vehicles registered in that State to have in force automobile accident reparations insurance;
>
> * * *
>
> (b)(1) As to the right provided in subsection (a) of this section, the United States shall be subrogated to any right or claim that the veteran . . . may have against a third party.
>
> * * *
>
> (f) No law of any State or of any political subdivision of a State, and no provision of any contract or other agreement, shall operate to prevent recovery or collection by the United States under this section . . . .

These provisions clearly allow the United States to recover the cost of providing medical care to a veteran through the VA system for injuries sustained in a motor vehicle accident.

The Supremacy Clause of the United States Constitution, US Const, art VI, cl 2, gives Congress the authority to preempt state laws that interfere with, or are contrary to, federal law. See *Ter Beek v City of Wyoming*, 495 Mich 1, 10; 846 NW2d 531 (2014). "Under conflict preemption, a federal law preempts state law to the extent that the state law directly conflicts with federal law or with the purposes and

objectives of Congress." *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132, 140; 796 NW2d 94 (2010). Thus, to the extent that MCL 500.3172(2), or any other no-fault provision, is in conflict with the federal statute mandating reimbursement for medical care and services provided to a veteran for nonservice-related injuries—like those resulting from a motor vehicle accident—such state laws are preempted by 38 USC 1729. And because the VA system, like private hospitals and medical facilities, does not provide free medical services to veterans for nonservice-related injuries, entitlement to seek medical services from the VA cannot be deemed a "benefit source" that relieved defendant of its obligation to pay PIP benefits to plaintiff. Accordingly, defendant's argument regarding MCL 500.3172(2) is without merit.

The third reason provided by defendant for failing to promptly pay plaintiff's PIP claim is that, under MCL 500.3109(1), defendant was entitled to a setoff against federal benefits to which plaintiff was entitled, including healthcare benefits through the VA. MCL 500.3109(1) states:

> Benefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the personal protection insurance benefits otherwise payable for the injury under this chapter.

As our Supreme Court explained, "The history of § 3109(1) indicates that the Legislature's intent was to require a set-off of those government benefits that duplicated the no-fault benefits payable because of the accident and thereby reduce or contain the cost of basic insurance." *O'Donnell v State Farm Mut Auto Ins Co*, 404 Mich 524, 544; 273 NW2d 829 (1979). But plaintiff was not active in a military service when he was in the

motor vehicle accident.[1] As discussed earlier, 38 USC 1729 negates any argument that the VA was liable, and primarily responsible, to provide medical benefits to plaintiff for his nonservice-related motor vehicle accident injuries. In other words, there was no duplication of governmental benefits related to plaintiff's medical care. The United States is entitled to reimbursement for all medical services provided to plaintiff for his accident-related injuries; therefore, defendant is not entitled to a setoff for the medical services provided to plaintiff by the VA for his accident-related injuries. The healthcare benefits plaintiff received from the VA were outside the scope of MCL 500.3109(1). Moreover, because defendant was the primary insurer responsible for plaintiff's medical expenses for injuries sustained in the automobile accident, plaintiff was not required to seek medical care and services solely through the VA system.

In summary, defendant, as the assigned claims insurer, was required under the no-fault act to promptly pay plaintiff's PIP benefits, and defendant's reasons for refusing to pay any benefits at all were unreasonable. Therefore, defendant's motion for summary disposition premised on those same reasons was properly denied, albeit for the wrong reason. And plaintiff's request for summary disposition in his favor under MCR 2.116(I)(2) should have been granted. Accordingly, we affirm the trial court's decision but remand for entry of an order granting summary disposition in plaintiff's favor. Because the parties' stipulated award of damages is "inclusive of no-fault penalty interest, no-fault attorney

[1] Cf. *Morgan v Citizens Ins Co of America*, 432 Mich 640, 643-644; 442 NW2d 626 (1989), a case in which the plaintiff was injured in a motor vehicle accident while active in a military service.

fees, and taxable costs," we need not remand for further proceedings in that regard.

Affirmed, but remanded for entry of an order granting summary disposition in plaintiff's favor. We do not retain jurisdiction. Plaintiff is entitled to costs as the prevailing party. MCR 7.219(A).

JANSEN, P.J., and CAMERON, J., concurred with CAVANAGH, J.

COX v HARTMAN

Docket Nos. 333849 and 333994. Submitted December 6, 2017, at Detroit. Decided December 12, 2017, at 9:10 a.m. Leave to appeal denied 503 Mich ___.

Plaintiff, Leana M. Cox, individually and as next friend of Angelina A. Cox, a minor, brought a medical malpractice action in the St. Clair Circuit Court against Eric J. Hartman, M.D.; Blue Water Obstetrics and Gynecology Professional Corporation (Blue Water); Tracey McGregor, a registered nurse; and Port Huron Hospital, alleging negligence on the part of Hartman and McGregor and vicarious liability on the part of Blue Water and Port Huron Hospital related to the birth of plaintiff's daughter, Angelina. After discovery, McGregor and Port Huron Hospital moved for summary disposition with regard to the nursing malpractice claim, arguing that plaintiff's proposed expert, Claudia A. Beckmann, was not qualified to offer standard-of-care testimony against McGregor pursuant to MCL 600.2169(1) because Beckmann practiced and taught as a nurse practitioner, rather than as a registered nurse, during the year immediately preceding the alleged malpractice. The court, Daniel J. Kelly, J., ultimately granted summary disposition in favor of McGregor and Port Huron Hospital on the nursing malpractice claim. Plaintiff appealed that decision in Docket No. 333849. After the court granted summary disposition in favor of McGregor and Port Huron Hospital, plaintiff moved for leave to name a new nursing expert and to amend the affidavit of merit regarding the nursing malpractice claim. The court denied the motion. Plaintiff appealed that decision in Docket No. 333994. The Court of Appeals consolidated the appeals. Hartman and Blue Water were not involved in the appeals.

The Court of Appeals *held*:

1. MCL 600.2169(1) provides, in relevant part, that in an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and, during the year immediately preceding the date of the occurrence that is the basis for the claim or action,

devoted a majority of his or her professional time to either or both of the following: the active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty; the instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty. In this case, plaintiff's proposed expert witness on the standard of care, Beckmann, had to have devoted a majority of her professional time in the year immediately preceding April 26, 2010, the date of the alleged malpractice, to the active clinical practice of, or the instruction of students in, the same health profession in which McGregor was licensed, i.e., that of a registered nurse. Therefore, the precise issue presented in this case was whether a nurse practitioner who spends the majority of her time practicing or teaching pursuant to her specialty certification as a nurse practitioner is engaged in the same health profession as a registered nurse who practices pursuant to her license as a registered nurse.

2. MCL 333.16105(2) defines "health profession" as a vocation, calling, occupation, or employment performed by an individual acting pursuant to a license or registration, and MCL 333.16108(2) provides that registration includes specialty certification of a licensee and a health profession specialty field license; therefore, the statutory definition of "health profession" indicates that a health profession may be determined by reference to a license or a registration, and a registration includes a specialty certification. MCL 333.17201(e) provides, in pertinent part, that a registered nurse is an individual who is licensed to engage in the practice of nursing. MCL 333.2701(c) provides, in pertinent part, that a certified nurse practitioner is an individual who is licensed as a registered nurse and who has been granted a specialty certification as a nurse practitioner by the Michigan board of nursing. Therefore, the health profession of a registered nurse and the health profession of a nurse practitioner are different, as reflected in the fact that the former health profession is practiced pursuant to a license while the latter health profession is practiced pursuant to a registration or specialty certification. In this case, at the time of the alleged malpractice, McGregor was practicing in the health profession of a registered nurse pursuant to her license as a registered nurse. In the year immediately

preceding the alleged malpractice, Beckmann devoted the majority of her professional time to instructing or practicing in the health profession of a nurse practitioner pursuant to her registration or specialty certification as a nurse practitioner. Because Beckmann did not spend the majority of her professional time in the year preceding the alleged malpractice practicing or teaching the health profession of a registered nurse, she did not satisfy the statutory criteria to testify concerning the standard of care applicable to McGregor. Accordingly, the trial court properly excluded Beckmann's testimony. Because plaintiff presented no other expert witness concerning the standard of care, plaintiff failed to establish a genuine issue of material fact regarding the applicable standard of care and the breach of that standard; therefore, the trial court properly granted summary disposition to McGregor and Port Huron Hospital.

3. The trial court did not violate MCR 7.215(C)(1) by citing and relying on an unpublished opinion for a proposition of law for which there was published authority because the two published Court of Appeals cases on which plaintiff relied did not directly address the issue in this case—whether a nurse practitioner is engaged in the same health profession as a registered nurse. There was no published authority in Michigan addressing this precise issue, and plaintiff's citation of a Georgia Court of Appeals case holding that a nurse midwife was a member of the same profession as a registered nurse was unavailing because the present case turned on the interpretation of Michigan statutes rather than the Georgia statutes at issue in the Georgia case.

4. A trial court's decision whether to allow a party to add an expert witness is reviewed for an abuse of discretion, which occurs when the trial court's decision falls outside the range of principled outcomes. In this case, plaintiff did not move to add a new expert until June 10, 2016, which was four days after the trial court entered the order granting summary disposition to McGregor and Port Huron Hospital. Plaintiff could have sought to add a new expert witness much earlier because plaintiff was on notice in November 2015 that there was at least a question concerning Beckmann's qualification to testify when McGregor and Port Huron Hospital moved for summary disposition on the basis of Beckmann's lack of qualification. The trial court did not err by concluding that plaintiff's motion to add an expert witness was untimely. Additionally, given the lateness of plaintiff's motion, the trial court reasonably concluded that McGregor and Port Huron Hospital would be prejudiced in preparing for trial had

plaintiff's motion been granted. Overall, the trial court's denial of plaintiff's motion to add a new expert witness fell within the range of principled outcomes.

5. Plaintiff's arguments regarding MCR 2.604(A) (arguing that MCR 2.604(A) granted the trial court authority to revise the order granting summary disposition because a final judgment had not yet been entered) and MCR 2.112(L)(2)(b) (arguing that she should be permitted to file an amended affidavit of merit signed by a new expert witness) were without merit. The trial court did not state that it lacked authority to revise the order granting summary disposition to McGregor and Port Huron Hospital; instead, the court ruled that plaintiff's motion to add a new expert witness was untimely, and MCR 2.604(A) does not require a trial court to consider an untimely motion. Additionally, amendment of the affidavit of merit would not affect the rationale or basis on which summary disposition was granted because summary disposition was not granted on the basis of any deficiencies in the affidavit of merit; instead, summary disposition was granted because plaintiff failed to present a standard-of-care expert who was qualified to testify at trial.

Affirmed.

ACTIONS — MEDICAL MALPRACTICE — EXPERT WITNESS TESTIMONY — HEALTH PROFESSION — REGISTERED NURSE — NURSE PRACTITIONER.

MCL 333.16105(2) defines "health profession" as a vocation, calling, occupation, or employment performed by an individual acting pursuant to a license or registration; MCL 333.17201(e) provides, in pertinent part, that a registered nurse is an individual who is licensed to engage in the practice of nursing; MCL 333.2701(c) provides, in pertinent part, that a certified nurse practitioner is an individual who is licensed as a registered nurse and who has been granted a specialty certification as a nurse practitioner by the Michigan board of nursing; for purposes of MCL 600.2169(1) (testifying as an expert witness on the appropriate standard of care in an action alleging medical malpractice), the health profession of a registered nurse and the health profession of a nurse practitioner are different, as reflected in the fact that the former health profession is practiced pursuant to a license while the latter health profession is practiced pursuant to a registration or specialty certification, and therefore a nurse practitioner who spends the majority of his or her time practicing or teaching pursuant to his or her specialty certification as a nurse practitioner is not engaged in the same health profession as a registered nurse who practices pursuant to his or her license as a registered nurse.

Hafeli Staran & Christ, PC (by *Mark W. Hafeli*) for Leana M. Cox.

Giarmarco, Mullins & Horton, PC (by *Donald K. Warwick* and *Christopher J. Ryan*) for Tracey McGregor and Port Huron Hospital.

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

PER CURIAM. These consolidated appeals arise from the same medical malpractice case. In Docket No. 333849, Leana M. Cox (plaintiff), formerly known as Leana M. Taravella, individually and as next friend of Angelina A. Cox (Angelina), a minor, appeals by leave granted[1] a June 6, 2016 opinion and order granting summary disposition in favor of defendants Tracey McGregor, R.N., and Port Huron Hospital pursuant to MCR 2.116(C)(10). In Docket No. 333994, plaintiff appeals by leave granted[2] a July 6, 2016 order denying plaintiff's motion for leave to name a new nursing expert and to file an amended affidavit of merit. The appeals were consolidated. *Cox v Hartman*, unpublished order of the Court of Appeals, entered January 20, 2017 (Docket No. 333849); *Cox v Hartman*, unpublished order of the Court of Appeals, entered January 20, 2017 (Docket No. 333994). We affirm in both appeals.

This case arises out of alleged malpractice on the part of defendant Eric J. Hartman, M.D., and McGregor, a registered nurse, related to the birth of plaintiff's daughter, Angelina, on April 26, 2010, at Port Huron Hospital. Hartman delivered Angelina,

[1] See *Cox v Hartman*, unpublished order of the Court of Appeals, entered January 20, 2017 (Docket No. 333849).

[2] See *Cox v Hartman*, unpublished order of the Court of Appeals, entered January 20, 2017 (Docket No. 333994).

and McGregor assisted in the delivery. Hartman was an owner and employee of defendant Blue Water Obstetrics and Gynecology Professional Corporation, doing business as Blue Water OB GYN, PC (Blue Water). McGregor was an employee of Port Huron Hospital. Plaintiff filed this medical malpractice action alleging negligence on the part of Hartman and vicarious liability of Blue Water for Hartman's negligence. Plaintiff also asserted a claim of professional negligence against McGregor. Plaintiff further alleged that Port Huron Hospital was vicariously liable for the negligence of McGregor.[3]

After discovery, McGregor and Port Huron Hospital (hereinafter referred to collectively as defendants, given that Hartman and Blue Water are not involved in these appeals) moved for summary disposition pursuant to MCR 2.116(C)(10). As relevant to these appeals, defendants argued that plaintiff's proposed nursing expert, Claudia A. Beckmann, was not qualified to offer standard-of-care testimony against McGregor pursuant to MCL 600.2169(1) and that defendants were thus entitled to summary disposition with respect to plaintiff's nursing malpractice claim. Defendants argued that, during the year immediately preceding the alleged malpractice, Beckmann did not devote the majority of her professional time to the active clinical practice or teaching of labor and delivery nursing, or even nursing more generally. Instead, Beckmann devoted the majority of her professional time to instructing students in a nurse practitioner graduate program at Rutgers University. In response to defendants' motion, plaintiff contended that Beckmann was qualified to testify as an expert witness on

[3] Plaintiff asserted additional claims that are not relevant to these appeals.

the standard of care for a registered nurse. Plaintiff argued that Beckmann devoted the majority of her professional time in the year preceding the alleged malpractice to instructing students in the nursing profession. In particular, plaintiff suggested that, by teaching nurse practitioner students, Beckmann was providing instruction in the same profession in which McGregor was licensed. The trial court ultimately agreed with defendants' argument and granted summary disposition to defendants on the nursing malpractice claim. Plaintiff then moved for leave to name a new nursing expert and to amend the affidavit of merit regarding the nursing malpractice claim; the trial court denied plaintiff's motion. These appeals followed.

Plaintiff argues on appeal that the trial court erred by determining that Beckmann was unqualified to testify as an expert witness concerning the standard of care applicable to McGregor and that the court erred by granting summary disposition to defendants. We disagree.

A trial court's ruling regarding the qualification of a proposed expert witness to testify is reviewed for an abuse of discretion. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *Id*. This Court reviews de novo issues of statutory interpretation. *Sturgis Bank & Trust Co v Hillsdale Community Health Ctr*, 268 Mich App 484, 489; 708 NW2d 453 (2005).

> The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. The first step is to examine the plain language of the statute itself. The Legislature is presumed to have intended the meaning it plainly expressed. If the statutory language is clear and unambiguous, appellate courts pre-

> sume that the Legislature intended the meaning plainly expressed, and further judicial construction is not permitted. [*McElhaney ex rel McElhaney v Harper-Hutzel Hosp*, 269 Mich App 488, 493; 711 NW2d 795 (2006) (citations omitted).]

"When a statute specifically defines a given term, that definition alone controls." *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007). Court rules are interpreted in the same manner as statutes. *In re KH*, 469 Mich 621, 628; 677 NW2d 800 (2004). If the language of a court rule is unambiguous, it must be enforced as written. *Id*.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012).

> In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. [*Bank of America, NA v Fidelity Nat'l Title Ins Co*, 316 Mich App 480, 488; 892 NW2d 467 (2016) (quotation marks and citations omitted).]

"The plaintiff in a medical malpractice action bears the burden of proving: (1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury. Failure to prove any one of these elements is fatal." *Cox ex rel Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 10; 651 NW2d 356 (2002)

(quotation marks and citation omitted). Although nurses do not engage in the practice of medicine, the Legislature has made malpractice actions available against any licensed healthcare professional, including nurses. *Id*. at 19-20, citing MCL 600.5838a; see also *Sturgis*, 268 Mich App at 490. In general, expert testimony is necessary in a malpractice action to establish the applicable standard of care and the defendant's breach of that standard. *Elher v Misra*, 499 Mich 11, 21; 878 NW2d 790 (2016);[4] see also *Gay v Select Specialty Hosp*, 295 Mich App 284, 292; 813 NW2d 354 (2012) (noting that a plaintiff alleging nursing malpractice was required to present evidence concerning the applicable standard of care and that the plaintiff "could do so only through an expert's testimony"). "The proponent of the evidence has the burden of establishing its relevance and admissibility." *Elher*, 499 Mich at 22; see also *Gay*, 295 Mich App at 293 (explaining that "the party proposing to call an expert bears the burden to show that his or her expert meets [the requisite statutory] qualifications").

MCL 600.2169(1) provides, in relevant part:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> * * *

[4] An exception to the requirement of expert testimony "exists when the professional's breach of the standard of care is so obvious that it is within the common knowledge and experience of an ordinary layperson." *Elher*, 499 Mich at 21-22. Plaintiff does not argue that this exception applies, nor do we discern any basis to conclude that plaintiff's allegations of nursing malpractice fall within the common knowledge and experience of an ordinary layperson.

> (b) Subject to subdivision (c) [which is not relevant here], during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> (*i*) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.
>
> (*ii*) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

A majority means more than 50%. *Kiefer v Markley*, 283 Mich App 555, 559; 769 NW2d 271 (2009). MCL 600.2169(1)(b) "makes no qualification of its applicability and, therefore, must be considered to apply generally to all malpractice actions, including those initiated against nonphysicians." *McElhaney*, 269 Mich App at 494. Therefore, plaintiff's proposed expert witness on the standard of care, Beckmann, must have devoted a majority of her professional time in the year immediately preceding April 26, 2010, the date of the alleged malpractice, to the active clinical practice of, or the instruction of students in, the same health profession in which McGregor was licensed, i.e., that of a registered nurse.

Beckmann's deposition testimony establishes that she devoted a majority of her professional time in the year immediately preceding April 26, 2010, to the practice of, or the instruction of students in, the health profession of a nurse practitioner, which, as explained

later in this opinion, is different from the health profession of a registered nurse. According to Beckmann's curriculum vitae, she has, among other degrees, a post-master's certificate as a women's health nurse practitioner. Beckmann testified that, during the relevant period,[5] she was the coordinator of the women's health nurse practitioner graduate program in the college of nursing at Rutgers University; in this position, she instructed nurse practitioner students. The nurse practitioner courses that she taught lasted the entire semester. Beckmann lectured nurse practitioner students in an academic setting and provided clinical training to nurse practitioner students. Beckmann also gave labor and delivery lectures in an undergraduate maternity nursing program, but this lecturing comprised a smaller percentage of her professional time than the time devoted to instructing nurse practitioner students; she spent only about six hours each semester lecturing undergraduate nursing students. Beckmann spent a couple days each semester filling in clinically for faculty members who were teaching a course. The percentage of her professional time lecturing on labor and delivery to undergraduate nursing students and performing hands-on clinical work was less than 50%. It is clear from Beckmann's deposition testimony that, in the year immediately preceding April 26, 2010, she devoted a majority of her professional time to the practice of, or the instruction of students in, the health profession of a nurse practitioner.[6]

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[5] In his initial questioning of Beckmann, defense counsel mistakenly asked about the period of April 2008 to April 2009 rather than the period of April 2009 to April 2010, but defense counsel noted his mistake later in the deposition, and Beckmann then confirmed that all of her answers to the questions concerning how she spent her professional time during the period of April 2008 to April 2009 would be identical for the period of April 2009 to April 2010.

[6] In an affidavit appended to plaintiff's response to defendants' motion for summary disposition, Beckmann asserted in conclusory terms that

It is therefore necessary to determine whether a nurse practitioner has the same health profession as a registered nurse. Our Supreme Court has looked to the definition of "health profession" contained in MCL 333.16105(2), a provision of the Public Health Code (PHC), MCL 333.1101 *et seq*., when interpreting MCL 600.2169(1)(b). See *Bates v Gilbert*, 479 Mich 451, 459; 736 NW2d 566 (2007). MCL 333.16105(2) defines a "health profession" as "a vocation, calling, occupation, or employment performed by an individual acting pursuant to a license *or registration* issued under this article." (Emphasis added.) The PHC defines a "registration" as "an authorization only for the use of a designated title which use would otherwise be prohibited under this article. *Registration includes specialty certification of a licensee* and a health profession specialty field license." MCL 333.16108(2) (emphasis added). Thus, the statutory definition of "health profession" indicates that a health profession may be determined by reference to a license *or* a registration, and a registration includes a specialty certification.

The PHC defines a "registered professional nurse" or "r.n." as "an individual who is licensed under this part to engage in the practice of nursing which scope of practice includes the teaching, direction, and supervision of less skilled personnel in the performance of

she devoted more than 50% of her time in the year preceding April 26, 2010, to the instruction of students in the health profession of nursing. "However, a witness is bound by his or her deposition testimony, and that testimony cannot be contradicted by affidavit in an attempt to defeat a motion for summary disposition." *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 396; 729 NW2d 277 (2006). As discussed, Beckmann's deposition testimony established that she spent a majority of her professional time during the relevant period practicing or instructing as a nurse practitioner, and as explained later, the health profession of a registered nurse is different from the health profession of a nurse practitioner. Therefore, despite the conclusory assertions in Beckmann's affidavit, this Court is required to accept as binding Beckmann's deposition testimony. *Id*.

delegated nursing activities." MCL 333.17201(e). The "practice of nursing" is defined as

> the systematic application of substantial specialized knowledge and skill, derived from the biological, physical, and behavioral sciences, to the care, treatment, counsel, and health teaching of individuals who are experiencing changes in the normal health processes or who require assistance in the maintenance of health and the prevention or management of illness, injury, or disability. [MCL 333.17201(c).]

A "certified nurse practitioner" is "an individual who is licensed as a registered professional nurse under part 172 who has been granted a specialty certification as a nurse practitioner by the Michigan board of nursing under section 17210." MCL 333.2701(c). See also *Cox*, 467 Mich at 9 n 10 (noting that a "nurse practitioner" "is a specialized term used in nursing that refers to a registered nurse who receives advanced training and is qualified to undertake some of the duties and responsibilities formerly assumed only by a physician"). MCL 333.17210(1) provides:

> (1) The Michigan board of nursing may grant a specialty certification to a registered professional nurse who has advanced training beyond that required for initial licensure, who has demonstrated competency through examination or other evaluative processes, and who practices in 1 of the following health profession specialty fields:
>
> (a) Nurse midwifery.
>
> (b) Nurse anesthetist.
>
> (c) *Nurse practitioner*.
>
> (d) Subject to subsection (2) [not relevant here], clinical nurse specialist. [Emphasis added.]

At the time of the alleged malpractice, McGregor was practicing the health profession of nursing pursuant to her license as a registered nurse. In the year

immediately preceding the alleged malpractice, Beckmann devoted the majority of her professional time to instructing or practicing in the health profession of a nurse practitioner pursuant to her registration or specialty certification as a nurse practitioner. The health profession of a nurse and the health profession of a nurse practitioner are different, as reflected in the fact that the former is practiced pursuant to a license while the latter is practiced pursuant to a registration or specialty certification. Because Beckmann did not spend the majority of her professional time in the year preceding the alleged malpractice practicing or teaching the health profession of a nurse, as opposed to the health profession of a nurse practitioner, she did not satisfy the statutory criteria to testify concerning the standard of care applicable to McGregor, a registered nurse. Beckmann's testimony was therefore properly excluded.

We find support for this reasoning in *Woodard*. In *Hamilton v Kulgowski*, which was a companion case to *Woodard*, the defendant physician was board-certified in general internal medicine and specialized in general internal medicine. *Woodard*, 476 Mich at 556. The plaintiff's proposed expert witness was board-certified in general internal medicine but devoted a majority of his professional time to the treatment of infectious diseases, which is a subspecialty of internal medicine. *Id*. The trial court granted a directed verdict in favor of the defendant physician, reasoning that the plaintiff's proposed expert witness was not qualified given that he specialized in infectious diseases and did not devote a majority of his professional time to practicing or teaching general internal medicine. *Id*. Our Supreme Court held that the trial court had properly granted a directed verdict to the defendant physician. *Id*. at 579. Our Supreme Court explained:

> The defendant physician specializes in general internal medicine and was practicing general internal medicine at the time of the alleged malpractice. During the year immediately preceding the alleged malpractice, plaintiff's proposed expert witness did not devote a majority of his time to practicing or teaching general internal medicine. Instead, he devoted a majority of his professional time to treating infectious diseases. As he himself acknowledged, he is "not sure what the average internist sees day in and day out." Therefore, plaintiff's proposed expert witness does not satisfy the same practice/instruction requirement of § 2169(1)(b).
>
> For this reason, the trial court did not abuse its discretion in concluding that plaintiff's proposed expert witness is not qualified to testify regarding the appropriate standard of practice or care under § 2169(1). Because plaintiff failed to present an expert qualified under § 2169(1) to testify with regard to the appropriate standard of practice or care, the trial court properly granted a directed verdict in favor of defendant. [*Id*. at 577-578.]

We find this reasoning in *Woodard* applicable in the analogous context of nursing and supportive of our analysis. Given that Beckmann did not spend a majority of her professional time in the relevant period practicing or teaching the health profession of nursing, she was not qualified to testify regarding the appropriate standard of care under MCL 600.2169(1)(b).

"On a motion for summary disposition, the existence of a disputed fact may only be established by admissible evidence." *McElhaney*, 269 Mich App at 497. Beckmann's testimony was not admissible to establish the standard of care applicable to McGregor, plaintiff presented no other expert witnesses concerning the standard of care applicable to McGregor, and plaintiff thus failed to establish a genuine issue of material fact regarding the applicable standard of care and the breach of that standard. Accordingly, the trial court

properly granted summary disposition to defendants. See *id*. at 497-498 (holding that when the testimony of the plaintiff's proposed expert witness was not admissible under MCL 600.2169(1)(b) to establish the standard of care, the defendant was entitled to summary disposition because the plaintiff failed to establish a genuine issue of material fact regarding the standard of care and the breach of that standard).

Plaintiff argues that, in its opinion and order granting summary disposition to defendants, the trial court violated MCR 7.215(C)(1) by citing and relying on an unpublished opinion for a proposition of law for which there was published authority, i.e., *Sturgis* and *McElhaney*. We disagree. MCR 7.215(C)(1) provides:

> An unpublished opinion is not precedentially binding under the rule of stare decisis. Unpublished opinions should not be cited for propositions of law for which there is published authority. If a party cites an unpublished opinion, the party shall explain the reason for citing it and how it is relevant to the issues presented. A party who cites an unpublished opinion must provide a copy of the opinion to the court and to opposing parties with the brief or other paper in which the citation appears.

Although MCR 7.215(C)(1) provides that unpublished opinions are not binding under the rule of stare decisis, a court may nonetheless consider such opinions for their instructive or persuasive value. *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010). MCR 7.215(C)(1) requires a party to explain the reason for citing an unpublished opinion and how it is relevant to the issues presented, but the court rule does not impose this requirement on a trial court. In any event, the trial court more than adequately explained why it was citing an unpublished opinion. The trial court stated, "Although unpublished, because of the nearly identical factual situation; the

straightforward, logical analysis that takes every word of MCL 600.2169(1)(b) into account; and the reliance on a rational interpretation of binding precedent, this Court finds the analysis, reasoning, and holding in [the unpublished opinion cited by the trial court] to be extremely persuasive."

Moreover, contrary to plaintiff's argument, there is no published authority addressing the precise issue presented in this case. Plaintiff's reliance on *Sturgis* and *McElhaney* is misplaced.

In *Sturgis*, 268 Mich App at 486-487, the plaintiff sued the defendant-hospital for the alleged negligence of its nursing staff. Pursuant to MCL 600.2912d(1), the plaintiff attached to its complaint affidavits of merit from a registered nurse and a nurse practitioner. *Id*. at 487. The defendant agreed that the nurse and the nurse practitioner who signed the affidavits of merit were employed in the same health profession as the nurses who allegedly committed the malpractice but argued that the proposed experts were not qualified to aver with respect to the proximate cause of the injury. *Id*. This Court held that the affidavits were sufficient. *Id*. at 489. This Court stated that MCL 600.2169(1) "only requires that the affiants, the nurse and the nurse practitioner, practice or teach in the same health profession as those who committed the alleged malpractice, i.e., defendant's nurses. Either the nurse's affidavit or the nurse practitioner's affidavit sufficed." *Id*. at 492. This Court found support for its decision in *Grossman v Brown*, 470 Mich 593; 685 NW2d 198 (2004), in which "our Supreme Court noted the need for a plaintiff in a medical malpractice action to obtain a medical expert at two different stages of the litigation, i.e., at the time the complaint is filed and at the time of trial, [and] recognized the differing features of

[MCL 600.2912d(1) (governing affidavits of merit)] and [MCL 600.2169 (governing testimony at trial)]." *Sturgis*, 268 Mich App at 493-494. At the affidavit-of-merit stage, the plaintiff's attorney need only hold a *reasonable belief* that the expert signing the affidavit of merit satisfies the requirements for an expert witness under MCL 600.2169. See *Sturgis*, 268 Mich App at 490-491, citing MCL 600.2912d(1). The *Sturgis* Court quoted the following language from *Grossman*:

> "The Legislature's rationale for this disparity is, without doubt, traceable to the fact that until a civil action is underway, no discovery is available. See MCR 2.302(A)(1). Thus, the Legislature apparently chose to recognize that at the first stage, in which the lawsuit is about to be filed, the plaintiff's attorney only has available publicly accessible resources to determine the defendant's board certifications and specialization. At this stage, the plaintiff's attorney need only have a *reasonable belief* that the expert satisfies the requirements of MCL 600.2169. See MCL 600.2912d(1). However, by the time the plaintiff's expert witness testifies at trial, the plaintiff's attorney has had the benefit of discovery to better ascertain the qualifications of the defendant's physician, and, thus, the plaintiff's attorney's reasonable belief regarding the requirements of MCL 600.2169 does not control whether the expert may testify." [*Sturgis*, 268 Mich App at 494, quoting *Grossman*, 470 Mich at 599.]

The *Sturgis* Court also quoted language from *Grossman* noting that what satisfies the statutory standard at the affidavit-of-merit stage might not satisfy the requirements for admission of expert testimony at trial. *Sturgis*, 268 Mich App at 494, citing *Grossman*, 470 Mich at 600. See also *Jones v Botsford Continuing Care Corp*, 310 Mich App 192, 199-201; 871 NW2d 15 (2015) (discussing the differing statutory standards governing, respectively, the admission of an expert's

standard-of-care testimony at trial and the adequacy of an expert's affidavit of merit).

Sturgis is therefore distinguishable from the present case in numerous respects. The dispute in *Sturgis* concerned whether the proposed experts were qualified *at the affidavit-of-merit stage* to aver *with respect to proximate cause*, whereas the present case concerns the admissibility of the proposed expert's testimony *at trial* concerning the *standard of care*. As explained earlier, the standard at the affidavit-of-merit stage is more lenient than the standard for admissibility of expert testimony at trial. Further, the defendant in *Sturgis* conceded that the nurse and the nurse practitioner who signed the affidavits of merit were employed in the same health profession as the nurses who allegedly committed the malpractice, and this Court had no occasion to examine the validity of that concession. Most importantly, plaintiff fails to recognize that it is not the mere fact that Beckmann is a nurse practitioner that precludes her testimony in this case; it is the fact that she did not devote a majority of her professional time to the practice or instruction of the health profession of nursing that renders her unqualified. Given that a nurse practitioner is licensed as a registered nurse but possesses an additional specialty certification as a nurse practitioner, it is possible that a nurse practitioner could qualify to testify regarding the standard of care against a registered nurse *if* the nurse practitioner devoted a majority of her professional time to instructing or practicing in the health profession of nursing during the relevant period. Therefore, plaintiff's argument that *Sturgis* controls this case is unavailing.

Plaintiff's reliance on *McElhaney* is likewise misplaced. In *McElhaney*, 269 Mich App at 496, this Court

held that the plaintiff's proposed expert witnesses, who were obstetricians and gynecologists, were not qualified under MCL 600.2169(1)(b) to testify regarding the standard of care applicable to a nurse midwife. This Court concluded that "because nurse midwives are separately licensed professionals who practice nursing with specialty certification in the practice of nurse midwifery, obstetricians/gynecologists may not testify about their standard of practice or care." *Id*. at 497. We find nothing in *McElhaney* that addresses the precise issue presented here, i.e., whether a nurse practitioner who spends the majority of her time practicing or teaching pursuant to her specialty certification as a nurse practitioner is engaged in the same health profession as a registered nurse who practices pursuant to her license as a registered nurse.

Further, plaintiff's citation of a Georgia case, *Dempsey v Gwinnett Hosp Sys, Inc*, 330 Ga App 469; 765 SE2d 525 (2014), is unavailing. This Court is not bound by the decisions of the courts of other states, although such decisions may be considered as persuasive. *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 559 n 38; 705 NW2d 365 (2005). In *Dempsey*, a Georgia appellate court determined that a nurse midwife was qualified under Georgia statutes to testify as an expert against registered nurses because the nurse midwife was a member of the same profession as the registered nurses. *Dempsey*, 330 Ga App at 469-474. Because the present case turns on the interpretation of Michigan statutes rather than the Georgia statutes at issue in *Dempsey*, we do not find *Dempsey* to be persuasive.

We also note that in *Jones*, 310 Mich App at 203-204, this Court stated that the plaintiff's counsel could have reasonably believed at the affidavit-of-merit stage that

a registered nurse was qualified to offer standard-of-care testimony against a licensed practical nurse, which this Court noted is a health profession subfield of the practice of nursing. This Court declined to decide, however, whether a registered nurse could ultimately offer standard-of-care testimony against a licensed practical nurse at trial. *Id*. at 203. Moreover, this Court emphasized that neither a registered nurse nor a licensed practical nurse has any specialty training. *Id*. at 205. This Court explained, "Unlike a nurse midwife or a nurse practitioner, neither [a registered nurse] nor [a licensed practical nurse] is within a 'health profession specialty field.' MCL 333.16105(3)." *Id*. at 205 n 5. Hence, the reasoning in *Jones* is not inconsistent with our analysis.

Plaintiff next argues that the trial court abused its discretion by denying plaintiff's motion to add an expert witness. We disagree.

This Court reviews for an abuse of discretion a trial court's decision whether to allow a party to add an expert witness. *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1992). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *Woodard*, 476 Mich at 557.

Plaintiff contends that the trial court erred by concluding that plaintiff's motion to add an expert witness was untimely. We disagree. Plaintiff did not move to add a new expert until June 10, 2016, which was four days after the trial court had entered its June 6, 2016 order granting summary disposition in favor of defendants. In an analogous context, this Court has held that a motion to amend a complaint was untimely when the motion was filed after summary disposition had already been granted to the defendant. See *Wormsbacher v Phillip R Seaver Title Co, Inc*, 284 Mich

App 1, 9-10; 772 NW2d 827 (2009), citing *Amburgey v Sauder*, 238 Mich App 228, 247-248; 605 NW2d 84 (1999). In this case, plaintiff could have sought to add a new expert witness much earlier because plaintiff was on notice that there was at least a question concerning Beckmann's qualification to testify. At Beckmann's deposition in August 2015, it became clear that Beckmann devoted a majority of her professional time in the year preceding the alleged malpractice to instructing or practicing as a nurse practitioner rather than a registered nurse. In November 2015, defendants moved for summary disposition on the basis of Beckmann's lack of qualification to testify; by this point, plaintiff was plainly on notice that Beckmann's qualification as an expert witness was in question. Although the trial court initially ruled in plaintiff's favor on the summary disposition issue on February 2, 2016, the trial court granted reconsideration of its decision on March 31, 2016, allowing the parties to file supplemental briefs on the issue. Hence, plaintiff's suggestion that she could not have known that she needed to obtain an expert other than Beckmann until the trial court actually granted summary disposition on June 6, 2016, lacks merit. In opposing defendant's motion for summary disposition, plaintiff chose to rely entirely on Beckmann as an expert rather than seek to add another expert at that time; this was plaintiff's choice. The trial court then granted summary disposition to defendants because Beckmann was unqualified and plaintiff had presented no other expert to testify concerning the standard of care. The trial court did not err by concluding that plaintiff's motion was untimely.

Plaintiff argues that MCR 2.604(A) granted the trial court authority to revise the order granting summary disposition because a final judgment had not yet been

entered (given that plaintiff still had claims pending against Hartman and Blue Water). MCR 2.604(A) states, in pertinent part:

> Except as provided in subrule (B) [not applicable here], an order or other form of decision adjudicating fewer than all the claims, or the rights and liabilities of fewer than all the parties, does not terminate the action as to any of the claims or parties, and the order is subject to revision before entry of final judgment adjudicating all the claims and the rights and liabilities of all the parties.

Plaintiff's argument lacks merit. The trial court did not state that it lacked authority to revise the order granting summary disposition to defendants. Instead, the trial court ruled that plaintiff's motion to add a new expert witness was untimely. To the extent that plaintiff fails to address the basis of the trial court's decision, plaintiff has abandoned her argument on this issue. See *AK Steel Holding Corp v Dep't of Treasury*, 314 Mich App 453, 474 n 10; 887 NW2d 209 (2016). MCR 2.604(A) does not require a trial court to consider an untimely motion. Also, plaintiff's motion sought to add a new expert witness, not to revise an order (although plaintiff presumably would have sought to set aside the order granting summary disposition if her motion to add a new expert witness had been granted). Plaintiff's reliance on MCR 2.604(A) is thus misplaced.

In any event, the trial court's decision was not premised solely on the untimeliness of the motion. After concluding that the motion was untimely, the trial court went on to state that even if the motion was properly before the court, the court would deny the motion given the prejudice to defendants. The trial court's decision fell within the range of principled outcomes. MCR 2.401(I)(1) provides that parties must file and serve witness lists no later than the time

directed by the trial court. "The court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown." MCR 2.401(I)(2). The trial court's scheduling order required plaintiff to file and serve her witness lists by March 6, 2015. Hence, plaintiff's June 10, 2016 motion to add a new expert witness was filed more than one year and three months after the due date for filing and serving witness lists. It was thus plaintiff's burden to demonstrate good cause for the late addition of a new expert witness. The denial of a late motion to add a witness "is proper where the movant fails to provide an adequate explanation and show that diligent efforts were made to secure the presence of the witness." *Tisbury*, 194 Mich App at 20. A court should consider whether prejudice would result from granting a motion to add an expert witness. *Id*. at 21; *Levinson v Sklar*, 181 Mich App 693, 698-699; 449 NW2d 682 (1989).

As the trial court noted, plaintiff did not act diligently in pursuing this case. At one point in the case, the trial court had to enter an order requiring plaintiff's counsel to specify in writing whether plaintiff would use various listed experts, including Beckmann, and compelling plaintiff's counsel to cooperate in scheduling the depositions of expert witnesses. Plaintiff notes that she did not file a written response opposing defendants' motion to compel, that Beckmann's deposition was scheduled by the parties before the court entered its order on the motion to compel, and that the order granting the motion to compel resulted from an agreement of the parties, but it appears this agreement was reached only after the parties' attorneys came to court for the hearing on the motion to compel.

Further, as discussed earlier, plaintiff's motion to add an expert witness was not filed until after the trial court had already granted summary disposition to defendants, even though plaintiff's counsel was on notice much earlier that Beckmann's qualification as an expert witness was at the very least in dispute. Even on the date of the hearing on plaintiff's motion to add a new expert witness, plaintiff's counsel still had not retained a new expert witness and had not provided any notice of the identity of any new expert witness to defendants, despite the fact that trial was scheduled to occur on September 7, 2016, which was less than three months away at the time of the motion hearing. The case had been pending for one year and 10 months by the time plaintiff filed the motion to add a new expert witness. Given the lateness of plaintiff's motion, the trial court reasonably concluded that defendants would be prejudiced in preparing for trial if the motion was granted. Overall, the trial court's denial of plaintiff's motion to add a new expert witness fell within the range of principled outcomes.

Plaintiff also contends that she should be permitted to file an "amended" affidavit of merit signed by a new expert witness pursuant to MCR 2.112(L)(2)(b), which provides:

> [A]ll challenges to an affidavit of merit or affidavit of meritorious defense, including challenges to the qualifications of the signer, must be made by motion, filed pursuant to MCR 2.119, within 63 days of service of the affidavit on the opposing party. An affidavit of merit or meritorious defense may be amended in accordance with the terms and conditions set forth in MCR 2.118 and MCL 600.2301.

Plaintiff fails to explain how an affidavit of merit signed by a new expert witness, i.e., a different affiant than Beckmann, who had signed the prior affidavit of

merit, would constitute an "amended" affidavit of merit under MCR 2.112(L)(2)(b). See *Jones*, 310 Mich App at 224 (DONOFRIO, P.J., concurring in part and dissenting in part) (questioning "whether plaintiff's current desire to *substitute* the prior affidavits of merit with entirely new ones signed by different affiants qualifies as *amending* the prior affidavits"). In any event, summary disposition was not granted to defendants on the basis of any deficiencies in the affidavit of merit; instead, summary disposition was granted because plaintiff failed to present a standard-of-care expert who was qualified to testify at trial. Therefore, amendment of the affidavit of merit would not affect or undermine the rationale or basis on which summary disposition was granted to defendants, nor would it alter the fact that, for the reasons explained earlier, the trial court's denial of plaintiff's motion to add a new expert witness to testify at trial fell within the range of principled outcomes.

Affirmed.

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

HUNT v DRIELICK

HUBER v DRIELICK

LUCZAK v DRIELICK

Docket Nos. 333630, 333631, and 333632. Submitted November 7, 2017, at Lansing. Decided December 14, 2017, at 9:00 a.m. Leave to appeal sought.

This case has a lengthy procedural history involving multiple appeals. The case arose after a multivehicle accident involving a semi-tractor belonging to Roger Drielick Trucking, a commercial trucking company owned by Roger Drielick. Eugene Hunt was killed in the accident, and Noreen Luczak and Brandon Huber were seriously injured. In separate actions in the Bay Circuit Court, Marie Hunt, as personal representative of Eugene Hunt's estate; Thomas and Noreen Luczak; and Huber (collectively, garnishor-plaintiffs) sued Drielick Trucking; Roger Drielick; Corey Drielick; and Sargent Trucking, Inc., and Great Lakes Carriers Corporation (GLC), two companies that used semi-tractors provided by Drielick Trucking. The court, William J. Caprathe, J., consolidated the actions. Before the accident, Roger had orally terminated Drielick Trucking's lease agreement with Sargent and began doing business with GLC. At the time of the accident, Corey was driving a Drielick Trucking semi-tractor without a trailer to GLC at the request of GLC's operators, Bill and Jamie Bateson, to pick up and deliver some goods stored on GLC's property. Drielick Trucking's insurance carrier, Empire Fire and Marine Insurance Company, denied coverage for the accident and refused to defend Drielick Trucking and the Drielicks against the garnishor-plaintiffs' lawsuits. Empire argued that the business-use exclusion in its nontrucking-use insurance policy (also called a bobtail policy) precluded payment of the damages because the semi-tractor was being used for a business purpose at the time of the accident. The policy's business-use exclusion precluded coverage for damages under two circumstances: (1) when a covered vehicle was being used to carry property in any business, or (2) when a covered vehicle was being used in the business of anyone to whom the vehicle was leased or rented. Garnishor-plaintiffs entered into consent judgments with Roger and Corey and Drielick Trucking. Roger assigned his rights under the insurance policy with Empire

to garnishor-plaintiffs, Sargent, and GLC. Sargent and GLC settled with garnishor-plaintiffs and, in exchange for a portion of garnishor-plaintiffs' recovery, assisted them with their efforts to collect from Empire. Sargent and GLC filed writs of garnishment against Empire, and Empire moved to quash. The court denied Empire's motion and entered an order to execute the consent judgments, holding that the business-use exclusion did not preclude coverage and that the named-driver exclusion was invalid under MCL 500.3009(2). Empire appealed. The Court of Appeals, HOEKSTRA, P.J., and COOPER and K. F. KELLY, JJ., affirmed in part, reversed in part, and remanded in an unpublished per curiam opinion, issued October 5, 2004 (Docket Nos. 246366, 246367, and 246368). The panel agreed with the trial court's ruling regarding the named-driver exclusion but held that further factual determinations were necessary regarding the business-use exclusion. According to the Court, there was a question of fact about whether the semi-tractor was being used for a business purpose when it was traveling without a trailer at the time of the accident. The panel also noted that it was not clear whether the accident was a covered event because there was no written lease with GLC. On remand, the trial court concluded that even if there had been a lease between Drielick Trucking and GLC, the business-use exclusion did not preclude coverage. Empire again appealed. The Court of Appeals, RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ., reversed, holding that the first clause of the business-use exclusion applied despite the fact that the semi-tractor was not actually carrying property at the time of the accident. 298 Mich App 548 (2012). The Court of Appeals, having found that coverage was precluded by the first clause, did not examine whether the second clause applied. Garnishor-plaintiffs sought leave to appeal, which the Supreme Court granted. 495 Mich 857 (2013). In a unanimous opinion by Justice CAVANAGH, the Supreme Court reversed the Court of Appeals judgment, concluding that the first clause of the business-use exclusion did not preclude coverage because it was undisputed that the semi-tractor was not carrying attached property. 496 Mich 366 (2014). But because the Supreme Court determined that the first clause did not preclude coverage, the Court had to examine the second clause, which would preclude coverage if the semi-tractor involved in the accident was being used under lease to GLC or to Great Lakes Logistics & Services (GLLS), a trucking brokerage company also operated by the Batesons. The Supreme Court concluded that whether a lease existed between Drielick Trucking and GLC or GLLS required further fact-finding by the trial court. On remand from the Supreme Court, the trial court, Harry P. Gill, J., held that there was no lease agreement

between Drielick Trucking and GLC or GLLS as contemplated by the leasing clause of the business-use exclusion and that Corey was not acting in furtherance of any leasing agreement at the time of the accident. Therefore, the insurance policy's business-use exclusion did not preclude Empire's liability. Garnishor-plaintiffs moved for entry of judgment against Empire for the amounts owed under the consent judgments including prejudgment and postjudgment interest. Empire argued that its policy contained no provision for the payment of prejudgment interest in excess of the policy limits. Empire further argued that its policy provided that postjudgment interest would only be paid in suits defended by Empire. The trial court held that Empire breached its duty to defend and that the breach negated the condition that would have precluded it from paying postjudgment interest. The trial court entered final orders of judgment inclusive of statutory interest from the date the underlying complaints were filed until the date the final orders of judgment entered. Empire appealed.

The Court of Appeals *held*:

1. An insurance policy is similar to any other contractual agreement; therefore, a court's role is to determine what the agreement was and to effectuate the intent of the parties. This is accomplished by first determining whether the policy provides coverage to the insured and second by ascertaining whether that coverage is negated by exclusion. Exclusionary clauses are strictly construed in favor of the insured, but an insurance company may not be held liable for a risk it did not assume. There was no dispute that a written lease did not exist between Drielick Trucking and GLC, but the plain language of the leasing clause of the business-use exclusion did not require a written lease. The leasing clause of the business-use exclusion made clear that there was no coverage when an accident occurred while the vehicle was being used in the business of anyone who had been given possession and use of the vehicle for a specified period in return for the payment of rent. Contrary to Empire's argument that an exclusive and ongoing oral lease existed between Drielick Trucking and GLC, there was no evidence that the parties mutually agreed that Drielick Trucking would give possession and use of the semi-tractor to GLC for a specified period in return for the payment of rent. Rather there was evidence that no agreement of that type existed. At most, the evidence supported a finding that a lease would be formed at the time that Drielick Trucking arrived at the GLC yard to accept an assignment. A lease, as

contemplated by the insurance policy, did not exist at the time of the accident, and the leasing clause of the business-use exclusion did not preclude coverage.

2. The consent judgments in this case required payment of statutory interest. Under MCL 600.6013, interest on a judgment is calculated on the entire amount of the money judgment, including attorney fees and other costs. MCL 600.6013 is a remedial statute, intended to compensate prevailing parties for expenses incurred in bringing suits for money damages and for any delay in receiving those damages, and the statute should be liberally construed in favor of the plaintiff. Although Empire's policy stated that it was not required to pay out an amount that exceeded its policy limits, the law in Michigan is clear: an insurer whose policy includes an interest clause that does not address prejudgment interest must pay prejudgment interest on a money award based on the insurer's policy limits, even if the combined amount of the interest and the policy limit exceeds the policy limit. Prejudgment interest accrues from the date a complaint is filed until the date judgment enters. Although Empire was properly ordered to pay prejudgment interest, the interest was improperly calculated from the dates the underlying complaints were filed until entry of the final judgment on the writs of garnishment, some six years after the consent judgments were entered. The prejudgment period ended on the day the consent judgments entered, and at that time, the postjudgment period began.

3. The payment of postjudgment interest by an insurance company promotes the speedy resolution of insurance claims. The purpose of postjudgment interest is to protect the insured when the insurer assumes the defense of a matter and, as a result, controls the time any judgment entered against the insurer is paid. An insurer is permitted to contractually limit the risk it assumes and should be liable only for the interest that accrues on the amount of risk assumed. The express language of Empire's insurance policy limited Empire's obligation to pay postjudgment interest to the cases it defends. An insurer's duty to defend its insured is a contractual duty owed to the insured and not to a judgment creditor. Breach of Empire's duty to defend Drielick Trucking and the Drielicks was not raised or litigated in this case, although the garnishor-plaintiffs could have brought a direct action against Empire on the issue because they had been assigned Drielick Trucking's rights under the insurance policy. But the garnishor-plaintiffs did not raise the issue, and Empire is

not obligated to pay postjudgment interest because it did not defend against the underlying suits.

Affirmed in part, vacated in part, and remanded.

Garan Lucow Miller, PC (by *Nicolette S. Zachary*) and *Ward Anderson Porritt & Bryant PLC* (by *David S. Anderson*) for Empire Fire and Marine Insurance Co.

O'Neill, Wallace and Doyle, PC (by *David Carbajal* and *Robert Andrew Jordan*) for Great Lakes Carriers Corp.

Hickey, Cianciolo, Finn & Atkins, PC (by *Steven M. Hickey* and *Andrew L. Finn*) for Sargent Trucking, Inc.

Trogan & Trogan, PC (by *Bruce F. Trogan*) for Marie Hunt.

Peter J. Riebschleger for Thomas Luczak and Noreen Luczak.

Law Office of Joseph S. Harrison (by *Joseph S. Harrison*) for Brandon James Huber.

Before: M. J. KELLY, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

BOONSTRA, J. In these consolidated cases, garnishee-defendant Empire Fire and Marine Insurance Company appeals by right the June 2, 2016 final judgments entered by the trial court in favor of garnishor-plaintiffs Marie Hunt (as personal representative of the estate of Eugene Wayne Hunt), Brandon James Huber, and Thomas and Noreen Luczak (collectively, plaintiffs or garnishor-plaintiffs).[1] The final judgments

[1] It appears that, as part of a settlement agreement, defendants Great Lakes Carriers Corporation (GLC) and Sargent Trucking, Inc., assisted garnishor-plaintiffs with their collection efforts by filing writs of gar-

held Empire liable for the amounts awarded in consent judgments that had been entered into in three underlying cases against defendants Roger Drielick, doing business as Roger Drielick Trucking,[2] and Corey Drielick plus prejudgment and postjudgment interest. The trial court had entered a separate but similar judgment in each underlying case; the judgments differed only with respect to the amount awarded to each plaintiff. Empire challenges the trial court's September 28, 2015 written opinion, issued in all three cases, holding that insurance coverage for a multivehicle accident was not precluded under the leasing clause of a business-use exclusion in an "Insurance for Non-Trucking Use" policy issued by Empire to Drielick Trucking. Empire also challenges the trial court's decision to award garnishor-plaintiffs statutory interest, which made the total award exceed Empire's policy limits. We affirm in part, vacate in part, and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

A. BUSINESS-USE EXCLUSION

This case has a lengthy procedural history involving multiple prior appeals. Relevant to this appeal, our

nishment with garnishor-plaintiffs' consent. GLC and Sargent were not designated as garnishor-plaintiffs in our Supreme Court or the trial court.

[2] The Corporate Division of Michigan's Department of Licensing and Regulatory Affairs (LARA) lists an entry for "Drielick Trucking, LLC" and identifies its owner and resident agent as Roger A. Drielick. It does not appear that the LLC was named in the actions below. No party has raised as an issue the existence of the LLC or its connection, if any, to the actions. See LARA, *Corporations Online Filing System* <https://cofs.lara.state.mi.us/CorpWeb/CorpSearch/CorpSummary.aspx?ID=801087433> (accessed October 30, 2017) [https://perma.cc/NU5F-T2RD].

Supreme Court remanded the case to the trial court "for further fact-finding to determine whether Drielick Trucking and [GLC] entered into a leasing agreement for the use of Drielick Trucking's semi-tractors as contemplated under the policy's clause related to a leased covered vehicle." *Hunt v Drielick*, 496 Mich 366, 369; 852 NW2d 562 (2014).

The trial court had previously concluded that the business-use exclusion did not preclude coverage, even if there was a lease between Drielick Trucking and GLC. *Id*. at 371. This Court disagreed, holding that the first clause of the business-use exclusion, which precluded coverage if injury or damage occurred "*while* a covered auto *is used to carry property* in any business," applied despite the fact that the truck was not actually carrying property at the moment of the accident. *Hunt v Drielick*, 298 Mich App 548, 557; 828 NW2d 441 (2012), rev'd 496 Mich 366 (2014).[3] Our Supreme Court granted garnishor-plaintiffs' applications for leave to appeal. *Hunt v Drielick*, 495 Mich 857 (2013).

In its 2014 decision, our Supreme Court set forth the following relevant facts:

> Roger Drielick owns Drielick Trucking, a commercial trucking company. It seems that throughout most of the year in 1995, Drielick Trucking leased its semi-tractors to Sargent Trucking (Sargent). Around October 1995, Roger orally terminated the lease agreement with Sargent and began doing business with Bill Bateson, one of the operators of GLC, the other being his wife at the time, Jamie Bateson.

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[3] This Court stated that it did not need to address whether the second clause of the business-use exclusion, relating to a lease or rental agreement, applied in light of the Court's conclusion that the first clause of the business-use exclusion applied. *Hunt*, 298 Mich App at 557. The trial court had concluded that neither prong of the policy's business-use exclusion was applicable. *Id*. at 553.

On January 12, 1996, Bill Bateson dispatched Corey Drielick, a truck driver employed by Drielick Trucking, to pick up and deliver a trailer of goods stored on GLC's property. While driving the semi-tractor without an attached trailer, Corey picked up his girlfriend and proceeded to GLC's truck yard.[4] When he was less than two miles away from the yard, Corey was involved in a multivehicle accident. Eugene Hunt died, and Noreen Luczak and Brandon Huber were seriously injured.

Marie Hunt (on behalf of her deceased husband), Thomas and Noreen Luczak, and Huber filed suits against Corey and Roger Drielick, Drielick Trucking, Sargent, and GLC. Empire, which insured Drielick Trucking's semi-tractors under a non-trucking-use, or bobtail, policy, denied coverage and refused to defend under the policy's business-use and named-driver exclusions. Plaintiffs settled with Sargent and GLC. Plaintiffs later entered into consent judgments with the Drielicks and Drielick Trucking.[5] The parties also entered into an "Assignment, Trust, and Indemnification Agreement," wherein they agreed that Roger Drielick would assign the rights under the insurance policy with Empire to plaintiffs, Sargent, and GLC. Sargent and GLC agreed to help plaintiffs' collection efforts from Empire in exchange for a portion of any proceeds received from Empire.

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[4] The Supreme Court noted that this case involved a semi-tractor driven "bobtail," which means "without an attached trailer," and that a bobtail insurance policy typically provides coverage " 'only when the tractor is being used without a trailer or with an empty trailer, and is not being operated in the business of an authorized carrier.' " *Hunt*, 496 Mich at 373-374, quoting *Prestige Cas Co v Mich Mut Ins Co*, 99 F3d 1340, 1343 (CA 6, 1996) (quotation marks omitted).

[5] The March 14, 2000 consent judgments obligated Roger Drielick, doing business as Drielick Trucking Company, and Corey Drielick in the total amount of $780,000, payable as follows: $550,000 to Hunt, $50,000 to Huber, and $180,000 to Luczak. The consent judgments also provided for "statutory interest from the date of the filing of the Complaint" and for postjudgment interest in the event the judgment was not satisfied by January 1, 2001.

> Sargent and GLC filed writs of garnishment against Empire. In response, Empire filed a motion to quash, arguing again that the policy exclusions apply, among other things. The trial court denied Empire's motion and entered an order to execute the consent judgments, reasoning that the business-use exclusion does not apply and the named-driver exclusion is invalid under MCL 500.3009(2). The Court of Appeals affirmed the trial court's ruling regarding the named-driver exclusion but reversed the trial court's ruling regarding the business-use exclusion, holding that further factual determinations were necessary because the fact that the semi-tractor "was traveling bobtail at the time of the accident, creat[ed] a question of fact whether the truck was being used for a business purpose at that time." *Hunt v Drielick*, unpublished opinion per curiam of the Court of Appeals, issued October 5, 2004 (Docket Nos. 246366, 246367, and 246368), p 5. The Court mentioned that the policy exclusions are clear but "whether this accident was a covered event is not," explaining that Roger Drielick orally revoked his lease with Sargent, and, contrary to federal regulations, there was no written lease with GLC. [*Hunt*, 496 Mich at 369-371.]

In reversing this Court's decision, the Supreme Court concluded that the first clause of the business-use exclusion precludes coverage only if the covered vehicle is carrying attached property and that, because it was undisputed that the semi-tractor was not carrying attached property at the time of the accident, the first clause did not preclude coverage in this case. *Hunt*, 496 Mich at 376, 379. The Supreme Court further stated:

> Because we hold that the first clause of the business-use exclusion does not preclude coverage, it is necessary to determine whether the second clause does. After considering the record in light of the trial court's prior factual findings, we conclude that this case requires that the trial court make further findings of fact.

It is clear that Drielick Trucking and the Batesons did not enter a written lease regarding the use of Drielick Trucking's semi-tractors, contrary to federal regulations. Because Drielick Trucking's and the Batesons' business relationship was in direct contravention of applicable federal regulations, our order granting leave to appeal focused primarily on the potential lease agreement and whether the Court of Appeals should have, instead, resolved this case under the policy's leasing clause.

Apparently considering that clause, the trial court previously explained that the parties had agreed that there are no material issues of fact in dispute; however, that does not appear to be the case. Bill and Jamie Bateson operated Great Lakes Logistics & Services (GLLS), in addition to the carrier company, GLC. GLLS was a brokerage company that connected semi-tractor owners, such as Roger Drielick, with carriers that are federally authorized to transport goods interstate, such as GLC. The parties dispute whether Bill Bateson dispatched Corey under GLC's authority or merely brokered the deal under GLLS's authority. Furthermore, the trial court considered the parties' "verbal agreement and course of conduct," concluding that the payment terms and the fact that Corey was not bound by a strict pick-up deadline meant that the business relationship was not triggered until Corey actually picked up for delivery the trailer of goods. Yet it remains uncertain whether the parties entered into a *leasing* agreement *as contemplated by the terms of the insurance policy*. Barring GLLS's alleged involvement, an oral arrangement or course of conduct might have existed between GLC and Drielick Trucking, but whether that agreement constituted a lease for the purposes of the policy is a threshold factual determination that has not yet been fully considered.

Accordingly, we direct the trial court on remand to consider the parties' agreement to decide whether there was, in fact, a leasing agreement between Drielick Trucking and GLC as contemplated by the business-use exclusion's leasing clause. If so, the precise terms of that agreement must be determined, and the trial court should

> reconsider whether Corey was acting in furtherance of a particular term of the leasing agreement at the time of the accident. [*Id*. at 379-381.]

On remand from the Supreme Court, the trial court held that there was no lease agreement as contemplated by the leasing clause of the business-use exclusion and that Corey Drielick was not acting in furtherance of a particular term of any leasing agreement at the time of the accident. Therefore, the court again concluded that the leasing clause of the business-use exclusion did not preclude coverage under the insurance policy between Drielick Trucking and Empire.

B. JUDGMENT INTEREST

Thereafter, garnishor-plaintiffs moved for entry of judgment against Empire, seeking a judgment that Empire was liable for payment of the amounts owing under the consent judgments, including statutory interest. Empire argued that its responsibility for payment of the liabilities under the consent judgments was limited to the $750,000 policy limit because the policy contained no provision for the payment of prejudgment interest in excess of the policy limit, and because the policy's "Supplementary Payments" provision contained an interest clause that provides that postjudgment interest will be paid only in suits in which Empire assumes the defense. In other words, Empire argued that it was not obligated to pay postjudgment interest because it did not defend the underlying suits. The trial court found that Empire had breached its duty to defend under the policy and that the breach had negated the provision in the policy that limited the payment of postjudgment interest to those suits in which Empire had assumed the defense. The trial court entered final orders of judgment inclusive of

statutory judgment interest from the date the underlying complaints were filed through June 2, 2016, obligating Empire to pay garnishor-plaintiffs $1,342,722.78 for the Hunt consent judgment, $113,912.97 for the Huber consent judgment, and $439,831.90 for the Luczak consent judgment.

This appeal followed.

II. STANDARD OF REVIEW

We review de novo the interpretation of an insurance contract. *Morley v Auto Club of Mich*, 458 Mich 459, 465; 581 NW2d 237 (1998). We review for clear error the trial court's findings of fact. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). We review de novo questions regarding the interpretation and application of a statute. *Vitale v Auto Club Ins Ass'n*, 233 Mich App 539, 542; 593 NW2d 187 (1999).

III. THE LEASING CLAUSE OF THE BUSINESS-USE EXCLUSION

The narrow issue presented is whether the second clause (the leasing clause) of the business-use exclusion in Empire's insurance policy applies to preclude coverage for the accident in this case. As framed by the Supreme Court, the question is whether Drielick Trucking and GLC "entered into a *leasing* agreement *as contemplated by the terms of the insurance policy*." *Hunt*, 496 Mich at 380. We conclude that the trial court correctly determined that the leasing clause did not preclude coverage.

> An insurance policy is similar to any other contractual agreement, and, thus, the court's role is to "determine what the agreement was and effectuate the intent of the parties." *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). "[W]e employ a two-part analysis" to determine the parties' intent. *Heniser v Frankenmuth Mut*

> *Ins Co*, 449 Mich 155, 172; 534 NW2d 502 (1995). First, it must be determined whether "the policy provides coverage to the insured," and, second, the court must "ascertain whether that coverage is negated by an exclusion." *Id*. (citation and quotation marks omitted). While "[i]t is the insured's burden to establish that his claim falls within the terms of the policy," *id*., "[t]he insurer should bear the burden of proving an absence of coverage," *Fresard v Mich Millers Mut Ins Co*, 414 Mich 686, 694; 327 NW2d 286 (1982) (opinion by FITZGERALD, C.J.). See, also, *Ramon v Farm Bureau Ins Co*, 184 Mich App 54, 61; 457 NW2d 90 (1990). Additionally, "[e]xclusionary clauses in insurance policies are strictly construed in favor of the insured." *Churchman*, 440 Mich at 567. See, also, *Group Ins Co of Mich v Czopek*, 440 Mich 590, 597; 489 NW2d 444 (1992) (stating that "the exclusions to the general liability in a policy of insurance are to be strictly construed against the insurer"). However, "[i]t is impossible to hold an insurance company liable for a risk it did not assume," *Churchman*, 440 Mich at 567, and, thus, "[c]lear and specific exclusions must be enforced," *Czopek*, 440 Mich at 597. [*Hunt*, 496 Mich at 372-373 (alterations in original).]

In addition, clear and unambiguous policy language must be enforced according to its plain meaning. *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 469; 556 NW2d 517 (1996).

The leasing clause provides that the policy does not apply "while a covered 'auto' is used in the business of anyone to whom the 'auto' is leased or rented." There is no dispute that Drielick Trucking and GLC did not enter into a written lease regarding the use of Drielick Trucking's semi-tractors. However, the plain language of the leasing clause of the business-use exclusion does not require a written lease.[6]

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[6] Empire cites in its brief a number of cases discussing how courts of other states have found the absence of a written lease, which is required by 49 CFR 376.11 and 49 CFR 376.12, to be irrelevant in determining

In the context of the first clause of the business-use exclusion, the Supreme Court stated in *Hunt*, 496 Mich at 375:

> Considering the commonly used meaning of the undefined terms of the clause to ascertain the contracting parties' intent, *Czopek*, 440 Mich at 596, the word "while" means "[a]s long as; during the time that," *The American Heritage Dictionary of the English Language* (1981). Further, "use" is defined as " 'to employ for some purpose; put into service[.]' " *Hunt*, 298 Mich App at 556, quoting *Random House Webster's College Dictionary* (2001). See, also, *The American Heritage Dictionary of the English Language* (1981) (defining "employ" as "[t]o engage in the services of; to put to work"). [Alterations in original.]

"Lease" is defined as "a contract conveying land, renting property, etc., to another for a specified period." *Random House Webster's College Dictionary* (2001). "Rent" means "to grant the possession and use of (property, machinery, etc.) in return for payment of rent." *Id*. As our Supreme Court noted, the parties do not dispute that the semi-tractor being operated without an attached trailer was a "covered 'auto' " under the policy. See *Hunt*, 496 Mich at 374 n 6. Applying these definitions, the leasing clause makes clear that there is no coverage when an accident occurs during the time that the auto is being used in the business of anyone who has been given possession and use of the auto for a specified period in return for the payment of rent.

Empire argues, as it did in the trial court, that an exclusive, ongoing oral lease existed between Drielick Trucking and GLC. The trial court found that a lease as contemplated by the business-use exclusion did not

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carrier liability for *leased* equipment, because a lease will be *implied* in the absence of a written lease. None of these cases, however, addresses the issue presented in this case, i.e., whether a lease was formed.

exist between Drielick Trucking and GLC at the time of the accident. The evidence supports the trial court's finding that the parties did not mutually agree that Drielick Trucking would give possession and use of the semi-tractor to GLC for a specified period in return for the payment of rent. According to Roger Drielick, GLC was "supposed" to prepare a written lease agreement, but never did. Both Bill Bateson and Jamie Bateson (of GLC) denied that the semi-tractor was the subject of any type of lease with GLC. Corey Drielick used the semi-tractor for personal errands, including transporting another person, during the period that Drielick Trucking transported for GLC. Corey kept the semi-tractor at his home and, when dispatched, would drive to the GLC yard, at which time he would couple the semi-tractor with a trailer and obtain the necessary paperwork from GLC to carry out the delivery. There is no indication that Corey had to be at GLC's yard at a specific time or that he was not free to go where he wanted with the semi-tractor or that he could not decline an assignment. Drielick Trucking did not receive payment until arriving at GLC's yard and coupling the semi-tractor with the trailer. The broker, GLLS, paid Drielick Trucking for deliveries made using the semi-tractor.[7] Bill Bateson did not provide Drielick Trucking with the lettering for the semi-tractor involved in the accident, and Bateson testified that he had no knowledge that GLC lettering had been placed on the semi-tractor. Drielick Trucking did not receive a Michigan Apportioned Registration Cab Card with GLC's name on it, Corey denied that any documents provided by GLC were inside the semi-tractor, and the accident report did not reveal that police

[7] One check in the amount of $500 was issued by GLC to Drielick Trucking on November 20, 1995. According to Jamie Bateson, the check was mistakenly drawn on the GLC account by the bookkeeper.

officers were provided with any documentation at the scene indicating that the semi-tractor was under lease to GLC at the time of the accident. In light of this evidence, Empire failed to establish that Drielick Trucking and GLC had a contract and "a relationship, where use, control and possession had been transferred to GLC for a period, including the time of the accident," in return for the payment of rent. At most, the evidence supported a finding that a lease would be formed as of the time that Drielick Trucking arrived at the GLC yard to accept an assignment. Accordingly, we conclude that a lease, as contemplated by the insurance policy, did not exist at the time of the accident and that the leasing clause of the business-use exclusion does not apply.

IV. JUDGMENT INTEREST

MCL 600.6013 provides, in relevant part:

> (1) Interest is allowed on a money judgment recovered in a civil action, as provided in this section. . . .
>
> * * *
>
> (8) Except as otherwise provided in subsections (5) and (7) and subject to subsection (13), for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section. Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs.

MCL 600.6013 is remedial and primarily intended to compensate prevailing parties for expenses incurred in

bringing suits for money damages and for any delay in receiving those damages. *Heyler v Dixon*, 160 Mich App 130, 152; 408 NW2d 121 (1987). Because it is remedial, the statute should be liberally construed in favor of the plaintiff. See *Denham v Bedford*, 407 Mich 517, 528; 287 NW2d 168 (1980).

Each of the consent judgments in this case provides for an amount of damages plus statutory interest from the date the complaint was filed, in addition to costs and attorney fees. If the judgment was not satisfied by January 1, 2001, interest would continue to accrue until the judgment was satisfied. Empire objected to garnishor-plaintiffs' request for both prejudgment and postjudgment interest, relying on the following policy language to support its argument that it is not responsible under MCL 600.6013 for payment of prejudgment interest in excess of the policy limits and that postjudgment interest is limited to suits it defends:

> 2. COVERAGE EXTENSIONS
>
> a. Supplementary Payments. In addition to the Limit of Insurance, we will pay for the "insured":
>
> * * *
>
> (6) All interest on the full amount of any judgment that accrues after entry of the judgment in any "suit" we defend; but our duty to pay interest ends when we have paid, offered to pay or deposited in court the part of the judgment that is within our Limit of Insurance.

A. PREJUDGMENT INTEREST

Empire argues that MCL 600.6013 does not mandate that a defendant's liability insurer pay prejudgment interest on a judgment entered against an insured in excess of the insurance policy limits when the plain, unambiguous terms of the policy state that the insurer

is not obligated to do so. We agree that MCL 600.6013 does not speak to an insurer's liability for prejudgment interest; however, we disagree with Empire's assertion that it is not obligated to pay prejudgment interest under the terms of the policy at issue in this case.

An insurer is permitted to contractually limit the risk it assumes. See, e.g., *Cottrill v Mich Hosp Serv*, 359 Mich 472, 477; 102 NW2d 179 (1960) (holding that an insurer may limit the risk it assumes and fix its premiums accordingly); *Cosby v Pool*, 36 Mich App 571, 578; 194 NW2d 142 (1971) (holding that an "insurer should be liable only for the interest that accrues on the amount of risk it has assumed"). In *Matich v Modern Research Corp*, 430 Mich 1, 23; 420 NW2d 67 (1988), our Supreme Court held:

> [T]he law of Michigan with respect to an insurer's liability for *pre*judgment interest is well settled, at least to this extent: An insurer whose policy includes the standard interest clause is required to pay prejudgment interest from the date of filing of a complaint until the entry of judgment, calculated on the basis of its policy limits, not on the entire judgment, and interest on the policy limits must be paid even though the combined amount exceeds the policy limits.

The "standard interest clause" at issue in *Matich* stated that the insurer shall pay "all interest on the entire amount of any judgment therein which accrues after entry of the judgment and before . . . [the insurer] has . . . tendered or deposited in court that part of the judgment which does not exceed the limit of [the insurer's] liability thereon." *Id*. at 18 (quotation marks omitted; alterations in original). It was silent with regard to prejudgment interest.

The interest clause in the instant insurance policy is similarly devoid of language related to prejudgment

interest, and as a result, it does not contractually limit Empire's risk in that regard. Pursuant to *Matich*, Empire is therefore responsible for prejudgment interest calculated based on the policy limit, even if the judgment amounts plus prejudgment interest exceed the policy limits. *Matich*, 430 Mich at 23; see also *Cochran v Myers*, 169 Mich App 199, 204; 425 NW2d 765 (1988).

We do agree that the trial court erred when calculating the amounts of prejudgment interest owed. The trial court awarded prejudgment interest from the dates the underlying complaints were filed until the final judgments on the writs of garnishment were entered on June 2, 2016. Empire argues that prejudgment interest can only be measured from the date of the original complaints through March 14, 2000, the date of the consent judgments. We agree. The settling parties memorialized their agreements in consent judgments. When those judgments were entered, the prejudgment-interest period ended and the postjudgment-interest period began. *Matich*, 430 Mich at 20. See also *Madison v Detroit*, 182 Mich App 696, 700-701; 452 NW2d 883 (1990). Therefore, prejudgment interest accrued until the consent judgments were entered; interest that accrued after entry of the consent judgments is postjudgment interest. Empire is obligated to pay prejudgment interest on the policy limits from the dates the complaints in the underlying actions were filed until the date the consent judgments were entered.

B. POSTJUDGMENT INTEREST

Empire argues that the trial court erred by finding that it was subject to liability under MCL 600.6013 for payment of postjudgment interest because the express

language of the "Supplementary Payments" provision of the policy limited its obligation to pay postjudgment interest to suits it defends.[8] We agree. The trial court reasoned that if Empire had provided a defense for its insured, as it was obligated to do, it would have been required to pay postjudgment interest. Garnishor-plaintiffs did not, however, raise a claim that Empire had breached a duty under the policy to defend its insured, and such a claim was not litigated in the trial court.[9]

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[8] Empire distinguishes this case from *Matich*, in which the Court held that the language of the standard interest clause was clear and that the insurers, by the terms of their insurance policies, had assumed the obligation to pay postjudgment interest on the entire amount of the judgment, including the amount in excess of the policy limits. *Matich*, 430 Mich at 24, 26. Empire argues that the policy in the present case differs from the policy in *Matich* because Empire's policy expressly limits liability for postjudgment interest in excess of policy limits to suits that Empire defends.

[9] An insurer's duty to defend is a contractual duty that is owed to its insured, not to a judgment creditor. See *Lisiewski v Countrywide Ins Co*, 75 Mich App 631, 636; 255 NW2d 714 (1977). The record reflects, however, that the insured in this case, Drielick Trucking, assigned to garnishor-plaintiffs any and all claims for insurance coverage under the Empire policy. Consequently, garnishor-plaintiffs could have brought a direct action against Empire challenging its refusal to defend its insured. See *Ward v DAIIE*, 115 Mich App 30, 36-37; 320 NW2d 280 (1982) ("A judgment creditor, armed with a valid assignment of an insured's cause of action for alleged unlawful refusal to defend or settle a claim, may institute a direct action against the insurer."); see also *Davis v Great American Ins Co*, 136 Mich App 764, 768-769; 357 NW2d 761 (1984) (holding that the availability of a garnishment action does not preclude "a breach of contract action by a judgment creditor as assignee against an insurer as a remedy *in addition to* garnishment"). (Emphasis added.) Nonetheless, garnishor-plaintiffs did not bring a claim challenging Empire's refusal to defend. The postjudgment garnishment proceedings did not encompass a claim that Empire had breached its contract with its insured by refusing to defend. In *Ward*, 115 Mich App at 39, this Court noted that the judgment creditor's prior garnishment action against the judgment debtor's insurer "related to an attempted satisfaction of a default judgment," whereas the judgment

Our obligation is to give effect to the clear language of the insurance contract and not to invent or create an ambiguity and then resolve it to expand coverage. There is no ambiguity in Empire's interest clause. It clearly provides that postjudgment interest will be paid only in suits in which Empire assumes the defense. The purpose of such clauses is "to protect the insured when the insurer assumes the defense of a matter and therefore controls the timing of payment of any judgment which is entered against the insured." *McCandless v United Southern Assurance Co*, 191 Ariz 167, 176; 953 P2d 911 (Ariz App, 1997).[10] If the insurer delays payment on the judgment—for example, by taking an appeal—it must pay for this delay by assuming responsibility for interest on the entire amount of the judgment, even if the combined total exceeds the policy limit. Under the plain language of the insurance policy at issue in this case, however, Empire is not obligated to pay postjudgment interest because Empire did not defend against the underlying suits.

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creditor's subsequent action "concern[ed] an alleged breach of contract of an insurance policy." The *Ward* Court explained that "[t]he [subsequent] action [did] not raise an issue which was litigated between plaintiff and defendant in the garnishment action." *Id*. A comparison of the two matters displayed that they were different: "the first was a post-judgment proceeding, and the [subsequent] litigation [was] an action by the insured, through an assignee, seeking enforcement of an insurance policy after an alleged breach of contract." *Id*. Because the issue of Empire's refusal to defend was not raised or litigated in this case, the trial court erred by ruling that Empire had breached the insurance contract when it failed to defend its insured and by consequently awarding postjudgment interest notwithstanding the policy language. We express no opinion regarding whether garnishor-plaintiffs may yet have a viable direct (by assignment) cause of action against Empire for its alleged breach.

[10] Cases from other jurisdictions are, of course, not binding on this Court, but they may be persuasive. *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006).

V. CONCLUSION

We hold that the leasing clause of the business-use exclusion does not apply to deny coverage in this case because a lease, as contemplated by the insurance policy, did not exist at the time of the accident. Accordingly, we affirm the trial court's holding that insurance coverage for the accident was not precluded under the leasing clause of the business-use exclusion. We also hold that Empire is obligated to pay prejudgment interest on the policy limits from the date the complaints in the underlying actions were filed until the date the consent judgments were entered, but that Empire is not obligated to pay postjudgment interest because Empire did not defend the underlying suits.

Accordingly, we vacate that part of the trial court's final judgment that awarded prejudgment statutory interest through the date that judgment on the writs of garnishment entered and remand for calculation of prejudgment interest in accordance with this opinion. We otherwise affirm.

Affirmed in part, vacated in part, and remanded. We do not retain jurisdiction.

M. J. KELLY, P.J., and RONAYNE KRAUSE, J., concurred with BOONSTRA, J.

PEOPLE v THORNE

Docket No. 335262. Submitted December 6, 2017, at Grand Rapids. Decided December 14, 2017, at 9:05 a.m. Leave to appeal denied 503 Mich 873.

Kerri L. Thorne was convicted in the Emmet Circuit Court of larceny in a building, MCL 750.360, after she took a "ticket-in, ticket-out" slip (TITO) from a slot machine next to the one she had been using at the Odawa Casino. A slot machine prints a TITO when the player is done playing at that machine; the TITO represents the remaining credit on the player's account, which the player may either turn in for cash or use to play at another machine. Defendant took the TITO from the victim's slot machine after the victim left her own machine without first retrieving the TITO. When the victim returned to the slot machine after realizing that she had left her TITO, defendant told the victim that defendant had not seen the TITO. Defendant initially denied responsibility when speaking with the police but later admitted that she had taken the TITO after she was informed that there was video footage of the act. At trial, defendant admitted that she had taken the TITO but asserted that she had believed it had been abandoned given her experiences at casinos, prior discussions with casino staff, and an earlier instance in which staff had prevented her from retrieving her own TITO after she had momentarily left her slot machine. Defendant testified on her own behalf, but the court, Charles W. Johnson, J., limited the testimony on relevancy grounds when she attempted to discuss the casino's policy regarding a "bowl of tickets." Defendant was convicted following a jury trial, and she appealed.

The Court of Appeals *held*:

1. The elements of larceny in a building are (1) a trespassory taking (2) within the confines of a building and (3) the carrying away (4) of the personal property (5) of another (6) with the intent to steal that property. The property "of another" requirement refers to any property in which another individual holds the right to possess as against the defendant at the time of the taking. Because the possession of property can be either actual or constructive, an owner does not lose possession of property by momentarily walking away from the property; the relevant in-

quiry for purposes of possession is whether the owner retained the power and intention to exercise dominion or control over the property. As between the owner of lost property and the individual who finds the item, the owner of the property has the right to possession of the item. In addition, the finder of lost or misplaced property can be guilty of larceny when he or she takes found property with the intent to steal. Conversely, no larceny can occur if the defendant had the right to possess the property as against the complainant at the time of the taking. To determine whether "another" had such rightful possession, courts must examine the respective rights of all relevant individuals to the property and consult the statutes, contracts, caselaw, and other sources that give rise to the individual's rights and define the relationship between those rights. In this case, the victim had actual possession of the TITO when she was sitting at and using the slot machine. She had constructive possession of the TITO after she walked away from the machine because she returned to the slot machine within four minutes to look for the TITO. Even if the victim had lost the TITO, she had the right to possession of the item as its owner, not defendant. Under these circumstances, regardless of whether the victim lost the TITO or had constructive possession of it, the TITO was the property "of another" for purposes of MCL 750.360, not an abandoned item as asserted by defendant.

2. An owner or holder of property abandons the property when he or she voluntarily relinquishes the property with the intention of terminating his or her ownership, possession, and control, and without vesting ownership in any other person. Abandoned property cannot be the subject of larceny because abandoned property belongs to no one and the first person to take possession acquires ownership. Moreover, because larceny is a specific-intent crime, a person who claims a right to property—even if that claim is mistaken or unfounded—has not committed larceny if the person honestly believed he or she had a claim to the property. In other words, if the person truly believed that property was abandoned or unwanted, the honest belief, even if mistaken, can constitute a defense to a specific-intent crime like larceny. Defendant was not denied the effective assistance of counsel when her attorney failed to request an instruction regarding abandoned property. Specifically, defendant did not overcome the presumption that trial counsel's failure to request the instruction was a matter of trial strategy. In addition, plaintiff was able to present a substantial defense without the instruction through her own testimony and counsel's closing argument; the jury instruction given for larceny in a building, M Crim JI 23.4, did not

prevent the jury from returning a not-guilty verdict if they believed defendant's testimony; and there was strong evidence of defendant's guilt, further negating defendant's assertion that she honestly believed the TITO had been abandoned. Accordingly, plaintiff was not denied the effective assistance of counsel because she was unable to establish that she was prejudiced by trial counsel's failure to request an instruction regarding abandoned property.

3. A defendant's right to testify in a criminal prosecution is protected by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. An evidentiary ruling necessarily affects that constitutional right if the ruling has a chilling effect on the exercise of the right to testify. The right to testify is not absolute, and a defendant remains subject to established procedural and evidentiary rules that are designed to assure both fairness and reliability in determining guilt and innocence. In this case, defendant was allowed to take the stand and testify. Because defendant was able to present her abandoned-property defense and there was strong evidence of defendant's guilt, any potential error in the exclusion of her testimony regarding a "bowl of tickets" at the casino was harmless.

Affirmed.

LARCENY — ELEMENTS — PROPERTY OF ANOTHER — POSSESSION OF PROPERTY — ACTUAL OR CONSTRUCTIVE.

The elements of larceny in a building are (1) a trespassory taking (2) within the confines of a building and (3) the carrying away (4) of the personal property (5) of another (6) with the intent to steal that property; the property "of another" requirement refers to any property in which another individual holds the right to possess as against the defendant at the time of the taking; because the possession of property can be either actual or constructive, an owner does not lose possession of property by momentarily walking away from the property; the relevant inquiry is whether the owner retained the power and intention to exercise dominion or control over the property.

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

Zachary R. Landau for defendant.

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

PER CURIAM. Following a jury trial, defendant, Kerri L. Thorne, appeals as of right her conviction of larceny in a building, MCL 750.360. For the reasons explained in this opinion, we affirm.

On April 12, 2016, defendant and the victim were playing slot machines next to each other at the Odawa Casino in Petoskey, Michigan. When the victim left her slot machine to use the restroom, defendant took the victim's TITO[1] out of the slot machine that the victim had been playing. While the victim was on her way to the restroom, she realized that she had not retrieved her TITO. The victim returned to the slot machine and asked defendant if she had seen the TITO, and defendant responded that she had not.

The victim reported the missing TITO to a security guard. Video footage from the casino showed defendant taking the TITO, and a police officer was called to investigate the incident. When speaking to the police, defendant initially denied that she had taken the TITO, but she later admitted doing so after the officer informed defendant of the surveillance footage.

At trial, defendant did not dispute having taken the TITO; rather, she testified that she believed that the TITO had been abandoned. According to defendant, her belief was rooted in her prior experiences in casinos, her prior discussions with casino staff, and an earlier instance in which staff had prevented her from

[1] TITO means "ticket-in, ticket-out." A TITO slot machine produces a piece of paper with the player's present credit value upon conclusion of play. For ease of reference in this opinion, we refer to this piece of paper as a TITO. A player may either exchange the TITO for cash or use it in another machine to play more games.

retrieving her own TITO after she had momentarily left her slot machine. A jury convicted defendant of larceny in a building. Defendant now appeals as of right.

I. PROPERTY "OF ANOTHER"

Defendant first argues that she did not commit a larceny because the TITO was not the property "of another." Specifically, defendant maintains that the victim did not have the right to possess the TITO as against defendant because the victim abandoned or, at a minimum, "lost" the TITO. Because the TITO was lost or abandoned, defendant maintains that she—"or anyone else that sat down at that slot machine and played"—had the right to possess the TITO.

Questions of statutory interpretation and issues relating to the sufficiency of the evidence are reviewed de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). Defendant was convicted of larceny in a building under MCL 750.360. Because the statute does not define the term "larceny," it is afforded its common-law meaning. *People v March*, 499 Mich 389, 399; 886 NW2d 396 (2016). Based on the common-law understanding of larceny, the elements of larceny in a building are as follows: (1) a trespassory taking (2) within the confines of a building and (3) the carrying away (4) of the personal property (5) of another (6) with intent to steal that property. *Id*. at 401-402. Defendant's argument implicates the "of another" element.

For purposes of the "of another" requirement, "possession, and not title ownership is the determinative requirement in larceny crimes." *Id*. at 409. Specifically, property "of another" "is any property in which 'another' individual holds the right to possess as against the defendant at the time of the taking." *Id*. at 414.

Conversely, "if the defendant had the right to possess the property as against the complainant at the time of the taking, no larceny could occur." *Id*. at 403.

> To determine whether "another" had . . . rightful possession, courts must examine the respective rights to the property. This examination requires courts to determine both the rights of all relevant individuals to the property and whether any of those individuals held a right to possess the property as against the defendant. To undertake this examination, courts should consult pertinent statutes, ordinances, contracts, caselaw, and the like that give rise to the individuals' rights and define the relationship between those rights . . . . [*Id*. at 414.]

In this case, the victim using the slot machine had actual possession of the TITO until she walked away from the machine. According to the victim's testimony, as she walked to the bathroom, she realized that she had left her ticket behind and, when the victim saw her daughter-in-law, the victim told her that she had "lost" the ticket. But within 4 minutes, the victim returned to the slot machine with her daughter-in-law to look for the ticket. The mere fact that the victim momentarily walked away from the machine does not establish that the victim gave up possession of the TITO. That is, possession can be either actual or constructive, and it can be concluded from the evidence that the victim retained the power and intention to exercise dominion or control over the TITO. *Id*. at 415. Moreover, insofar as defendant emphasizes the victim's characterization of the TITO as "lost," as between the owner of lost property and the individual who finds the item, the owner of the property has the right to possession of the item. See MCL 434.22(1); MCL 434.24; *Wood v Pierson*, 45 Mich 313, 317; 7 NW 888 (1881). Indeed, the finder of lost or misplaced property can be guilty of larceny when he or she takes found property with the intent to

steal. See *People v Harmon*, 217 Mich 11, 13, 18; 185 NW 679 (1921); see also 50 Am Jur 2d, Larceny, § 52, p 73. In short, while defendant claims that the TITO was abandoned, the evidence supports the conclusion that the victim momentarily walked away from the TITO without relinquishing constructive possession or that she, at most, lost the TITO; and this evidence that defendant took lost or mislaid property was sufficient to support the conclusion that, when defendant took the TITO, the TITO was the property "of another" within the meaning of MCL 750.360.[2]

II. JURY INSTRUCTIONS ON ABANDONED PROPERTY

Defendant next argues that the trial court erred by failing to give a specific instruction on abandoned property or that, alternatively, her trial counsel's failure to request an abandoned property instruction amounted to ineffective assistance of counsel. We first note that defendant waived review of the jury instructions because her counsel clearly expressed satisfaction with the trial court's instructions. See *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011). However, we will consider the jury instructions in the context of addressing defendant's claim that defense counsel was ineffective for not requesting instructions on abandoned property. See *People v Eisen*, 296 Mich App 326, 329-330; 820 NW2d 229 (2012).

Defendant preserved her claim of ineffective assistance of counsel by raising it in a motion for a new

[2] On appeal, defendant also argues that the TITO may have been owned or possessed by the casino once the victim walked away from the slot machine. We fail to see how this argument aids defendant because property belonging to, or in the possession of, the casino would still be property "of another." See generally *People v Hatch*, 156 Mich App 265, 267; 401 NW2d 344 (1986).

trial. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id*. This Court reviews for clear error the trial court's factual findings and reviews de novo questions of law. *People v Lane*, 308 Mich App 38, 67-68; 862 NW2d 446 (2014). When, as in this case, an evidentiary hearing has not been held, our review is limited to mistakes apparent from the record. *Id*. at 68.

To establish ineffective assistance of counsel, defendant "must establish (1) the performance of [her] counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). "Trial counsel is responsible for preparing, investigating, and presenting all substantial defenses." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). "Failing to request a particular jury instruction can be a matter of trial strategy." *People v Dunigan*, 299 Mich App 579, 584; 831 NW2d 243 (2013).

"A criminal defendant is entitled to have a properly instructed jury consider the evidence against [her]." *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). "The jury instructions must include all elements of the crime charged, and must not exclude from jury consideration material issues, defenses or theories

if there is evidence to support them." *People v Armstrong*, 305 Mich App 230, 240; 851 NW2d 856 (2014) (quotation marks and citation omitted). "When a defendant requests a jury instruction on a theory or defense that is supported by the evidence, the trial court must give the instruction." *Riddle*, 467 Mich at 124.

In this case, defendant contends that counsel should have requested an instruction on abandoned property. The "abandonment" of property refers to "the voluntary relinquishment thereof by its owner or holder, with the intention of terminating his or her ownership, possession, and control, and without vesting ownership in any other person." 1 CJS, Abandonment, § 1, p 2.[3] See also *Roebuck v Mecosta Co Rd Comm*, 59 Mich App 128, 132; 229 NW2d 343 (1975). "Abandoned property belongs to no one," and "[t]he first person to take possession acquires ownership." 3 Wharton's Criminal Law (15th ed), § 377, p 447. "Therefore, abandoned property cannot be the subject of larceny." *Id*. See also Am Jur 2d, § 52. Moreover, because larceny is a specific-intent crime, an individual who claims a right to property, even if that claim is mistaken or unfounded, has not committed larceny, provided that the individual honestly believed he or she had a claim to the property. See *People v Holcomb*, 395 Mich 326, 333; 235 NW2d 343 (1975); *People v Hillhouse*, 80 Mich 580, 586; 45 NW 484 (1890); M Crim JI 7.5. For this reason, if an individual "truly believed" property to be "abandoned or unwanted," this honest belief, even if mistaken, can constitute a defense to a specific-intent crime. *Morissette v United States*, 342 US 246, 271, 276; 72 S Ct 240; 96 L Ed 288 (1952). See also *Hawkins*

[3] Formatting altered.

v United States, 103 A3d 199, 201 (DC, 2014); *Commonwealth v Liebenow*, 470 Mass 151, 156-158; 20 NE3d 242 (2014).

At trial, defendant testified that she thought the TITO was "abandoned" when the victim walked away from the slot machine, and she specified that she held this belief because of her past experiences in the casino. Arguably, given this testimony, defense counsel could have sought an instruction regarding abandoned property. However, counsel's actions are presumed to be sound trial strategy, and defendant has not overcome the presumption that counsel's decisions regarding the jury instructions were a matter of trial strategy, particularly when, as discussed later in this opinion, the instructions on the elements of larceny under M Crim JI 23.4 were sufficient to protect defendant's rights. See *People v Meissner*, 294 Mich App 438, 458, 460; 812 NW2d 37 (2011).

Moreover, even assuming counsel could, or should, have requested a specific instruction on abandonment, we are not persuaded that defendant is entitled to relief on appeal. Counsel's failure to request an instruction on abandonment did not prevent defendant from presenting a substantial defense. To the contrary, even absent a specific jury instruction, defendant testified to her belief that the property was abandoned and, in closing arguments, defense counsel argued that defendant did not intend to take property belonging to anyone else because, at the time she took the TITO, she did not think it belonged to the victim. Further, the jury instructions given did not prevent the jury from returning a not-guilty verdict if they believed defendant's version of events.[4] The instructions given on the

[4] Defendant relies heavily on *Morissette*, wherein the Court determined that the defendant's honest belief that property was abandoned

elements of larceny in a building, which were consistent with M Crim JI 23.4, required the jury to find that defendant took "someone else's property" and that "at the time the property was taken, the Defendant intended to permanently deprive the owner of the property." Had the jury believed that the TITO was abandoned or had the jury determined that defendant honestly believed that the TITO was abandoned, they would not have concluded that she took "someone else's property" or that when she did so she "intended to permanently deprive the owner of the property."

Additionally, despite defendant's claim that she believed that the TITO was abandoned, we note that there was strong evidence that this was not her honest belief. Unlike the "spent casings left in the hinterland to rust away" like unwanted junk in *Morissette*, 342 US at 276, the TITO had a value of $40, it was being used by the victim in the moments before the taking, defendant saw the victim walk away from the slot machine, and defendant took the TITO within 30 seconds after the victim walked away. On these facts, it strains credulity to suggest that defendant honestly believed that the victim intended to relinquish all rights to the TITO. This is particularly true given evidence that the victim returned and asked defendant about the TITO within 4 minutes of walking away, but defendant denied seeing the ticket. Likewise, when defendant was first confronted by authorities about taking the

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negated the specific intent required to convert property, and the Court reversed the defendant's conviction on the basis of improper jury instructions on intent. *Morissette*, 342 US at 271, 276. However, *Morissette* is easily distinguished because in that case the trial court affirmatively instructed the jury that "it is no defense to claim that [the property] was abandoned . . . ." *Id*. at 249. While the present case lacked a specific instruction on abandoned property, the general instructions on larceny in a building allowed the jury to consider defendant's claim that she believed the TITO had been abandoned.

TITO, rather than claim that she simply picked up abandoned property, she said that she did not take the TITO. These lies to the victim and the authorities are indicative of a consciousness of guilt. See *People v Unger*, 278 Mich App 210, 227; 749 NW2d 272 (2008). Overall, even assuming that counsel should have requested a specific instruction on abandonment, given the instructions under M Crim JI 23.4 and the strong evidence of defendant's guilt, defendant has not established that she was prejudiced by counsel's failure to request an abandoned-property instruction, and she is not entitled to relief on appeal.

III. CONSTITUTIONAL RIGHT TO TESTIFY

Finally, defendant claims that she was deprived of her constitutional right to testify when the trial court sustained a relevancy objection during her testimony. In particular, during defendant's testimony, defense counsel asked her whether she was familiar with the casino's practices regarding a "bowl of tickets." The prosecutor objected on relevancy grounds, and the trial court sustained the objection. Defendant now claims that this ruling deprived her of the right to testify in her own defense and to offer exculpatory evidence that would have revealed that TITOs are commonly abandoned at the casino.

"A defendant's right to testify in [her] own defense stems from the Fifth, Sixth, and Fourteenth amendments of the United States Constitution." *People v Boyd*, 470 Mich 363, 373; 682 NW2d 459 (2004). "Any ruling, even if on a mere evidentiary issue, necessarily affects a defendant's constitutional rights if it has a chilling effect on the exercise of the right to testify." *Id*. at 374. However, the right is not absolute, and a defendant remains subject to the " 'established rules of

procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.' " *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973).

At the outset, we note that this is not a case in which the trial court prevented defendant from taking the stand. Cf. *People v Solomon (Amended Opinion)*, 220 Mich App 527, 535; 560 NW2d 651 (1996). Instead, this is a case in which the trial court sustained an objection to a specific line of questioning relating to a "bowl of tickets" at the casino. Defendant did not make an offer of proof at trial, MRE 103(a)(2), and therefore it is unclear what testimony defendant intended to offer about a "bowl of tickets" at the casino or how this bowl related to the taking of the victim's TITO, which was left in a slot machine. If we were to accept defendant's assertion on appeal that the bowl of TITOs was evidence that TITOs are commonly abandoned in the casino, this evidence might have some relevance to defendant's intent and whether she honestly believed that the victim abandoned her TITO by momentarily walking away from the machine. See MRE 401.

However, even assuming that this testimony was relevant, the exclusion of this testimony did not prevent defendant from testifying on her own behalf, and any error in excluding this testimony was harmless. See *Solomon*, 220 Mich App at 535. That is, the exclusion of evidence relating to a "bowl of tickets" did not prevent defendant from asserting that she believed the victim's TITO had been abandoned or from asserting that she held this belief based on casino customs. Cf. *Alicea v Gagnon*, 675 F2d 913, 925 (CA 7, 1982). For instance, defendant testified that she had "no idea" she was stealing because she had talked with "security

supervisors, slot attendants, about slips that have been left over, whether it be fifteen cents or $15.00, and they considered it abandoned, and that was my line of thinking." More specifically, defendant testified that two weeks before this incident, she had been playing a slot machine, she left the machine for a few moments, and when she returned to the machine, casino staff denied her receipt of her winnings because she had abandoned her machine. In short, the exclusion of evidence relating to a bowl of TITOs did not prevent defendant from testifying on her own behalf to her understanding of the casino's practice of deeming TITOs "abandoned" if a machine was left unattended. Moreover, as discussed earlier, given the $40 value of the ticket, the fact that defendant took the TITO within 30 seconds of watching the victim walk away, and the lies defendant told when first asked about the TITO, there was strong evidence that she did not honestly believe that the victim's TITO was abandoned. Overall, because defendant was able to present her abandonment-of-property defense, any potential error in the exclusion of her testimony relating to a "bowl of tickets" was harmless, particularly in light of the strong evidence of defendant's guilt. See *id*. at 925-926; *Solomon*, 220 Mich App at 535.

Affirmed.

MARKEY, P.J., and HOEKSTRA and RONAYNE KRAUSE, JJ., concurred.

McMILLAN v DOUGLAS

Docket No. 335166. Submitted December 5, 2017, at Grand Rapids. Decided December 14, 2017, at 9:10 a.m.

Plaintiff, Robert McMillan, brought an action in the 10th District Court against defendant, Susan Douglas, claiming that he was entitled to the return of all rent paid to defendant, his landlord, because defendant did not have a valid rental permit as required by the Battle Creek Code of Ordinances, § 842.06(c). Plaintiff rented property from defendant between August 2011 and October 2014 at a rate of $595 per month for a total of 39 months, and during that time, defendant did not have a valid rental permit. Plaintiff received an order to vacate the premises on October 23, 2014, because there was no current, valid rental permit, and plaintiff vacated the property on October 31, 2014. Plaintiff brought suit, alleging that § 842.06(c) created a private cause of action allowing plaintiff to recoup rental payments he had made to defendant. The parties stipulated to the facts involved, and the court, James D. Norlander, J., held that the ordinance did not grant a private cause of action to tenants to recover rent. Plaintiff appealed in the Calhoun Circuit Court, and the court, Sarah S. Lincoln, J., affirmed the district court's holding. Plaintiff appealed.

The Court of Appeals *held*:

Absent an express indication to the contrary, an ordinance imposing a public duty on a property owner does not give rise to a private cause of action. When a provision creates a new right or imposes a new duty unknown to the common law and provides a comprehensive administrative or other enforcement mechanism or otherwise entrusts the responsibility for upholding the law to a public officer, a private right of action will not be inferred. In this case, the ordinance at issue, Battle Creek Code of Ordinances, § 842.06(c), provides that when there is no current, valid rental permit for a dwelling, no rent shall be accepted, retained, or recoverable by the owner or lessor of the premises for the period. Section 842.06(c) gives no express indication that a private cause of action exists for a tenant; instead, the provision only provides for a limitation on the rights and conduct of an

owner or lessor. Additionally, a private cause of action could not be inferred when reading the ordinance as a whole and in the context of Chapter 842, the chapter of the Battle Creek Code of Ordinances that regulates rental housing. First, the permit requirement was a public duty, and therefore it did not give rise to a private cause of action for a tenant. Second, the permit requirement was not a common-law obligation; read as a whole, Chapter 842 provides that the city of Battle Creek is entrusted to administer and enforce this obligation, which meant that a private cause of action could not be inferred. Because the landlord's requirement to obtain a permit was a public duty and any authority to seek redress for the landlord's failure to obtain a permit rested with the city, plaintiff did not have a private cause of action against defendant to recoup rental payments he had made to defendant.

Affirmed.

ACTIONS — ORDINANCES — REAL PROPERTY — PRIVATE RIGHT OF ACTION.

Absent an express indication to the contrary, an ordinance imposing a public duty on a property owner does not give rise to a private cause of action; when a provision creates a new right or imposes a new duty unknown to the common law and provides a comprehensive administrative or other enforcement mechanism or otherwise entrusts the responsibility for upholding the law to a public officer, a private right of action will not be inferred.

Mumford, Schubel, Macfarlane & Barnett, PLLC (by *Jason S. H. ter Avest*) for plaintiff.

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

PER CURIAM. Plaintiff, Robert McMillan, appeals by leave granted[1] the circuit court order affirming the decision of the district court to deny plaintiff's request to recoup rent paid to his landlord, defendant Susan Douglas, for the months when defendant rented the property to plaintiff without a rental permit. Because

[1] *McMillan v Douglas*, unpublished order of the Court of Appeals, entered February 16, 2017 (Docket No. 335166).

the Battle Creek Code of Ordinances, § 842.06(c), does not provide plaintiff a private cause of action to enforce rental ordinances against defendant, we affirm.

Between August 2011 and October 2014, plaintiff rented residential property in Battle Creek from defendant at a rate of $595 per month for a total of 39 months. During that time, defendant did not have a valid rental permit for the property as required by the Battle Creek Code of Ordinances. On October 23, 2014, plaintiff received an order to vacate the premises because there was no current, valid rental permit. Plaintiff vacated the property on October 31, 2014, and subsequently filed suit against defendant.

Relevant to the present appeal, in the district court, plaintiff claimed that he was entitled to the return of all rent paid to defendant during his tenancy because, under § 842.06(c), defendant could not accept, retain, or recover rent without a current, valid rental permit. According to plaintiff, § 842.06(c) created a private cause of action allowing plaintiff to recoup rental payments made to defendant. The parties stipulated to the facts involved, and the district court ruled in defendant's favor with regard to plaintiff's claim to recoup rent under § 842.06(c), concluding that the ordinance did not grant a private cause of action to tenants to recover rent. Plaintiff appealed the district court's ruling in the circuit court, and the circuit court affirmed. Plaintiff now appeals by leave granted.

On appeal, the issue before us is whether § 842.06(c) creates a private cause of action that allows a tenant to demand the return of rent that was paid to a landlord during a period in which the landlord did not have a valid rental permit. Plaintiff emphasizes that, under § 842.06(c), defendant cannot accept, retain, or recover rent without a valid rental permit. To enforce this

prohibition, plaintiff contends that it must be inferred that there is a private right of action allowing plaintiff to demand the return of rent. We disagree.

We review de novo a decision to grant summary disposition under MCR 2.116(A). *Flint Mayor v Genesee Co Clerk*, 258 Mich App 215, 218; 671 NW2d 116 (2003). The interpretation and application of an ordinance also presents a question of law, which we review de novo. *Great Lakes Society v Georgetown Charter Twp*, 281 Mich App 396, 407; 761 NW2d 371 (2008). The rules of statutory construction apply to the interpretation of an ordinance. *Goldstone v Bloomfield Twp Pub Library*, 479 Mich 554, 568 n 15; 737 NW2d 476 (2007). "Thus, this Court's goal in the interpretation of an ordinance is to discern and give effect to the intent of the legislative body." *Morse v Colitti*, 317 Mich App 526, 548; 896 NW2d 15 (2016). An ordinance must be construed as a whole, *Winchester v W A Foote Mem Hosp*, 153 Mich App 489, 501; 396 NW2d 456 (1986), affording words their plain and ordinary meanings, *Great Lakes Society*, 281 Mich App at 408. "If the language used by the legislative body is clear and unambiguous, the ordinance must be enforced as written." *Morse*, 317 Mich App at 548.

Absent an express indication to the contrary, an ordinance imposing a public duty on a property owner does not give rise to a private cause of action. See *Levendoski v Geisenhaver*, 375 Mich 225, 228; 134 NW2d 228 (1965); *Grooms v Union Guardian Trust Co*, 309 Mich 437, 440; 15 NW2d 698 (1944). Moreover, when a provision "creates a new right or imposes a new duty unknown to the common law and provides a comprehensive administrative or other enforcement mechanism or otherwise entrusts the responsibility for upholding the law to a public officer, a private right of

action will not be inferred." *Claire-Ann Co v Christenson & Christenson, Inc*, 223 Mich App 25, 31; 566 NW2d 4 (1997).

In this case, Chapter 842 of the Battle Creek Code of Ordinances regulates rental housing. The stated purpose of regulating, permitting, and inspecting rental property as set forth in Chapter 842 is to:

> (a) Protect the health, safety, and welfare of persons affected by or subject to the provisions of this chapter.
>
> (b) Ensure that rental unit owners, legal agents, and tenants are informed of and adhere to all applicable code provisions governing the use and maintenance of rental units.
>
> (c) Establish standards for obtaining rental permits, inspection of rental units, and the issuance of certificates of compliance for rental units. [Section 842.02.]

Notably, under § 842.04(a), "no dwelling shall be rented by any person unless there is first issued a rental permit . . . ." The burden is on the owner of the property to "obtain a current, valid, rental permit." Section 842.04(b). Rental of a property without a permit results in several consequences for landlords and tenants. Specifically, § 842.06 provides:

> In addition to all other remedies provided for in this chapter or by any other local ordinance, state statute, or federal law, the following shall apply when there is no rental permit as required:
>
> (a) Order to vacate. Failure to have a current, valid, rental permit subjects the rental dwelling to being ordered vacated as provided in Section 842.12, until a valid rental permit is issued.
>
> (b) Failure to vacate. In addition to any other remedy available to the City under law, including City ordinances, an owner, tenant, or other occupant who fails to vacate a

> dwelling after having been given notice of an order to vacate under this chapter is subject to the penalties set forth at Section 842.99.
>
> (c) Abatement of rent. Where there is no current, valid, rental permit for a dwelling, no rent shall be accepted, retained or recoverable by the owner or lessor of the premises for the period.

Plaintiff claims that he has a private cause of action for the recoupment of rent because § 842.06(c) precludes an owner from accepting, retaining, or recovering rent in the absence of a current, valid rental permit. However, this section gives no express indication that a private cause of action exists for a tenant. Indeed, the word "tenant" does not appear at all in § 842.06(c). Instead, the provision only provides for a limitation on the rights and conduct of an "owner or lessor." "Given that the ordinance purports only to limit the rights of owners and lessors, doubt is immediately cast on plaintiff's contention that the ordinance creates a cause of action in [his] favor." *Ballman v Borges*, 226 Mich App 166, 169; 572 NW2d 47 (1997).[2]

Any claim that a private cause of action exists or should be inferred is further undercut by consideration of the ordinance as a whole and in context. First, considering Chapter 842 as a whole, the rental permit requirements impose a public duty on landlords, not an obligation owed by a landlord to a tenant. See *Levendoski*, 375 Mich at 228; *Szkodzinski v Griffin*,

[2] Under *Ballman*, an ordinance preventing a landlord from recovering rent, such as § 842.06(c), could be used as a "shield" by a tenant when being sued for unpaid rent, but it is not a "sword" creating a private cause of action. *Ballman*, 226 Mich App at 169. While controlling with respect to provisions preventing a landlord from recovering rent, *Ballman* is not entirely on point with the current case because, unlike the ordinance in *Ballman*, § 842.06(c) also prevents a landlord from accepting or retaining rent.

171 Mich App 711, 713; 431 NW2d 51 (1988). More specifically, under § 842.04(b), it is certainly the owner's or lessor's obligation to obtain a rental permit. However, this permit requirement provides a public benefit that facilitates the inspection and policing of rental properties, not only for the welfare of occupants of the properties, but also to confirm that the properties are not a nuisance, § 842.08(c)(2), and to ensure that there are no conditions on the properties posing a hazard to the general public, § 842.12. In short, the permit requirement benefits the public as a whole. And because the permit requirement is a public duty, it does not give rise to a private cause of action for a tenant. See *Levendoski*, 375 Mich at 228.

Second, the rental permit requirement is not a common-law obligation; and, read as a whole, Chapter 842 provides for the administration and enforcement of this obligation by the city, meaning that a private cause of action cannot be inferred. See *Claire-Ann Co*, 223 Mich App at 31. As noted, under § 842.04(b), it is certainly the owner's or lessor's obligation to obtain a rental permit, and Chapter 842 provides for various penalties and sanctions if a landlord fails to obtain the necessary permit. However, Chapter 842 makes plain that it is not only the landlord who faces prohibitions and repercussions as a result of rental property regulations. Rather, one of the stated purposes of Chapter 842 is to "[e]nsure that rental unit owners, legal agents, *and tenants* are informed of and adhere to all applicable code provisions governing the use and maintenance of rental units." Section 842.02(b) (emphasis added). As a corollary to a landlord's obligation to obtain a rental permit, a tenant is prohibited from renting an unpermitted rental dwelling. See § 842.04(a) ("[N]o dwelling shall be rented by any person unless there is first issued a rental per-

mit . . . ."). Further, both the landlord and the tenant are subject to repercussions under § 842.06, including orders to vacate the property as well as a possible civil infraction or misdemeanor conviction for failing to vacate.[3] See § 842.06(a) and (b); § 842.99. In other words, Chapter 842 plainly contemplates action against the landlord as well as the tenant, and such enforcement action is clearly entrusted to the city.

Given that a tenant is subject to action by the city for the enforcement of Chapter 842, we find unpersuasive plaintiff's assertion that—without any express indication—it should be assumed that a tenant has a private cause of action under § 842.06(c). That is, read as a whole, Chapter 842 makes plain that tenants are not the enforcers of Chapter 842; rather, they are subject to Chapter 842, which is enforced by the city.[4] Indeed, recognizing that a tenant is prohibited from renting property that lacks a rental permit, it would be absurd to conclude that § 842.06(c) was intended to

[3] Under § 842.06(a) and § 842.12, an order to vacate requires everyone, including the tenant, to vacate the premises unless "there are no conditions in the property posing a hazard to life, limb, property or safety of the occupants or the general public, and, the owner makes application [for a rental permit] . . . ." See also § 1462.24. Pursuant to § 842.06(b), anyone who fails to vacate the property—including the owner or tenant—is subject to penalties under § 842.99. Under § 842.99(a), failure to vacate after receiving notice is a municipal civil infraction, and if the order to vacate involves "an imminent danger to life, limb or property," the person who fails to vacate after receiving notice is guilty of a misdemeanor, § 842.99(b). Additionally, with regard to a landlord, under § 842.99(e), "[f]ailure to obtain a rental permit . . . is a misdemeanor punishable by a fine of up to five hundred dollars ($500.00) and/or ninety days in jail." "Each day that a person fails to obtain a rental permit is a separate violation." *Id*.

[4] Insofar as the term "tenant" does not appear in § 842.06(c) in particular, the omission of this term does not impliedly create a cause of action for tenants; rather, it makes plain that the actions available to the city under § 842.06(c) relate only to owners and lessors, not tenants or others. See *Ballman*, 226 Mich App at 169.

create a private cause of action that would allow a tenant to recoup rent paid for a period in which the tenant lived in the property in violation of § 842.04(a).[5] Instead, reading Chapter 842 as a whole, we conclude that § 842.06(c) is subject to enforcement by the city.[6] Consequently, in the absence of an express indication that a tenant has a private cause of action against a landlord, we will not infer such a cause of action from § 842.06(c).

In sum, while a landlord is required to obtain a permit, this is a public duty, and any authority to seek redress for a landlord's failure to obtain a permit rests with the city.[7] Consequently, plaintiff does not have a

[5] A tenant is not without recourse against a landlord when there has been a violation of a duty. By statute and under the common law, there are duties a landlord owes a tenant in terms of habitability, including those duties set forth in MCL 554.139, and a tenant may file suit to seek redress for a violation of these duties, see, e.g., *Hadden v McDermitt Apartments, LLC*, 287 Mich App 124, 128; 782 NW2d 800 (2010). However, we do not read § 842.06(c) as creating a cause of action for recoupment of rent, regardless of the condition of the property, simply because a landlord lacked a rental permit. If the city commissioners intended to create such a windfall for tenants, they easily could have expressed such intent.

[6] It is true that § 842.06(c) does not mention enforcement by "the City," but express reference to the city was unnecessary when, as we have discussed, Chapter 842 as a whole contemplates enforcement by the city against landlords and tenants. See generally § 842.06; § 842.12; § 842.99.

[7] Plaintiff complains that the city's enforcement provisions are not entirely clear because Chapter 842 does not include a mandatory restitution provision requiring the city to return any rent recouped to the tenant. We agree that Chapter 842, and § 842.06(c) in particular, is not a model of clarity. For example, it is unclear what the city should do with the funds recouped (i.e., whether the city may keep the funds or must return them to a tenant), whether § 842.06(c) applies to the entire period for which a permit is lacking or only "the period" after a notice to vacate is given under § 842.06, and whether the recouped rent is part of, or in addition to, the hefty fines applicable under § 842.99(e) for failing to obtain a permit. However, these issues are not before us, and we offer

private cause of action against defendant, and the trial court properly granted summary disposition under MCR 2.116(A).

Affirmed.

MARKEY, P.J., and HOEKSTRA and RONAYNE KRAUSE, JJ., concurred.

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no opinions on the procedures available to the city under § 842.06(c). On appeal, plaintiff also asks us to determine whether the city has the authority to enact a private right of action for tenants against landlords for the recoupment of rent when the landlord failed to obtain a rental permit. Having determined that the city did not attempt to create such an ordinance, we need not determine whether the city had the authority to do so. Cf. *Bivens v Grand Rapids*, 443 Mich 391, 396; 505 NW2d 239 (1993).

KELSEY v LINT

Docket No. 336852. Submitted December 5, 2017, at Grand Rapids. Decided December 14, 2017, at 9:15 a.m.

Carolyn S. Kelsey and David B. Kelsey brought an action against Nita Lint in the Montcalm Circuit Court, seeking damages for the injuries Carolyn suffered when defendant's dog bit Carolyn in the leg. Carolyn attended a garage sale at defendant's house in August 2013. When Carolyn returned to defendant's house the following day to inquire about an item that had been for sale, defendant's dog bit Carolyn on the leg soon after Carolyn got out of her car. Defendant moved for summary disposition of plaintiffs' statutory and common-law dog-bite claims, arguing that plaintiffs could not prevail on those claims because Carolyn had been trespassing on defendant's property when she was bitten. Plaintiffs opposed the motion, asserting that Carolyn had an implied license to enter defendant's property and approach the house on the day she was bitten. Plaintiffs also requested sanctions under MCR 2.114(E), asserting that defendant or her attorney had signed documents that were not well grounded in fact given that defendant admitted in a prior recording that her dog had previously bitten someone yet stated otherwise in court documents in this case. The court, Suzanne Hoseth Kreeger, J., granted defendant's motion, reasoning that plaintiffs could not prevail on their claims because Carolyn had been trespassing on defendant's property when she was bitten by the dog. The court also denied plaintiffs' request for sanctions. Plaintiffs appealed.

The Court of Appeals *held*:

1. Under MCL 287.351(1), if a dog bites a person without provocation while the person is on public property, or lawfully on private property, including the property of the owner of the dog, the owner of the dog is liable for any damages suffered by the person bitten, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness. Accordingly, a dog-bite plaintiff must be on public property or lawfully on private property to succeed on a claim under the statute. MCL 287.351(2) provides, in part, that a person is lawfully on a dog owner's property if the person is on the owner's property as an invitee or

licensee of the person lawfully in possession of the property. For that reason, invitees and licensees are lawfully on the property, but a trespasser cannot maintain a statutory dog-bite claim. A trespasser is a person who enters another person's land without the landowner's consent. In contrast, a licensee is a person who is privileged to enter the land of another by the possessor's consent, and that consent may be express or implied. In that regard, permission may be implied when the owner acquiesces in the known, customary use of property by the public, which includes an implied license that permits ordinary persons to approach a home in Michigan and knock on the front door. The scope of the implied license is defined by what anyone may do on the basis of custom and the background social norms that invite a visitor to the front door. Posting a notice may prevent the public's implied license from being created in light of the context in which the member of the public would have encountered the signs and the message that those signs would have conveyed to an objective member of the public under the circumstances. Because defendant had an open, ungated driveway devoid of signs prohibiting entry, it could be inferred that Carolyn had an implied license to enter defendant's property and to approach the front door. The "no soliciting" sign posted on the door leading to a portion of defendant's garage did not revoke the implied license because it could not be seen until a person approached the door, and, in any event, Carolyn was allegedly bitten as soon as she got out of her car and before she approached the door. Carolyn's loss of invitee status when the garage sale ended did not eliminate the implied license she had as a member of the public to enter defendant's property and knock on the door; in other words, Carolyn did not become a trespasser simply because her invitee status during the garage sale had ended. Accordingly, because reasonable minds could have concluded that Carolyn was a licensee, the trial court erred by granting defendant's motion for summary disposition and dismissing plaintiffs' statutory dog-bite claim. On the other hand, plaintiffs were not entitled to summary disposition under MCR 2.116(I)(2) because the issue of Carolyn's status on defendant's property was for the jury to decide.

2. A common-law dog-bite claim arises when there is ineffective control of an animal in a situation in which it would reasonably be expected that injury could occur and injury does proximately result from the negligence. To make a prima facie showing of negligence, a plaintiff need only establish that the defendant failed to exercise ordinary care under the circumstances to control or restrain the animal. A landowner owes no duty to a trespasser except to refrain from injuring him or her by

willful and wanton misconduct. In this case, the trial court erred by concluding that Carolyn was a trespasser and, on that basis, applying the willful-and-wanton-misconduct test to dismiss plaintiffs' common-law dog-bite claim.

3. Under MCR 2.114(D), an attorney has an affirmative duty to conduct a reasonable inquiry into both the factual and legal basis of a document before it is signed. The reasonableness of the inquiry is determined by an objective standard and depends on the particular facts and circumstances of the case. A person is subject to mandatory sanctions under MCR 2.114(E) if a court determines that he or she violated MCR 2.114(D) by filing a signed document that is not well grounded in fact and law. In this case, defendant denied in multiple filings that her dog had previously bitten anyone or that her dog was aggressive. Defendant's attorney signed those documents even though the attorney knew that defendant may have admitted during a 2014 recorded statement that her dog had previously bitten another person. The trial court's order denying plaintiffs' motion for sanctions was vacated because the trial court failed to consider and made no findings regarding whether counsel conducted a reasonable inquiry into the facts supporting the motion for summary disposition and other documents before signing those documents.

Reversed in part, vacated in part, and remanded for further proceedings.

1. PROPERTY — LICENSEES — IMPLIED LICENSE TO APPROACH AND KNOCK.

A licensee is a person who is privileged to enter the land of another by the possessor's consent, and that consent may be express or implied; permission may be implied when the owner acquiesces in the known, customary use of property by the public, which includes an implied license that permits ordinary persons to approach a home in Michigan and knock on the front door; the scope of the implied license is defined by what anyone may do on the basis of custom and the background social norms that invite a visitor to the front door.

2. PROPERTY — LICENSEES — IMPLIED LICENSE TO APPROACH AND KNOCK — POSTED NOTICE PREVENTING IMPLIED LICENSE.

The public has an implied license that permits ordinary persons to approach a home in Michigan and knock on the front door; posting a notice may prevent the public's implied license from being created in light of the context in which a member of the

> public would encounter the signs and the message that those signs would convey to an objective member of the public under the circumstances.

Steven A. Hicks for plaintiffs.

Bosch Killman VanderWal, PC (by *Kurt R. Killman*) for defendant.

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

PER CURIAM. In this dog-bite case, plaintiffs,[1] Carolyn Kelsey and David Kelsey, appeal as of right the trial court's order granting summary disposition to defendant, Nita Lint, and denying plaintiffs' motion for sanctions under MCR 2.114(E). Because the trial court erred by concluding that Kelsey was a trespasser as a matter of law and dismissing plaintiffs' dog-bite claims on this basis, we reverse the trial court's grant of summary disposition to Lint and remand for further proceedings. In addition, because the trial court failed to determine whether Lint's attorney conducted a reasonable inquiry into the facts that formed the basis for the documents he signed under MCR 2.114(D), we vacate the trial court's denial of plaintiffs' request for sanctions and remand for specific findings on this issue.

On August 31, 2013, Kelsey was bitten by Lint's dog while on Lint's property. Kelsey had attended a garage sale at Lint's house on August 30, 2013. She returned to Lint's property about 5:00 p.m. on August 31, 2013, after the sale had ended, to inquire about an item that had been for sale the previous day. When Kelsey exited

[1] Plaintiffs Carolyn Kelsey and David Kelsey will be referred to collectively as "plaintiffs" in this opinion. References to "Kelsey" are to plaintiff Carolyn Kelsey in particular.

her vehicle, Lint's dog ran at Kelsey from the back of the house and bit Kelsey's leg. Following this incident, plaintiffs filed the current lawsuit alleging (1) a statutory dog-bite claim under MCL 287.351, (2) a common-law dog-bite claim premised on the assertion that Lint knew of the dog's violent propensities and acted negligently by failing to properly control the dog, and (3) a claim for loss of consortium.

Lint moved for summary disposition under MCR 2.116(C)(8) and (10), asserting that plaintiffs' dog-bite claims must fail because, when Kelsey returned to the property after the yard sale ended, she was a trespasser on Lint's property. Lint contended that, as a trespasser, Kelsey was not lawfully on the property for purposes of MCL 287.351. Likewise, for purposes of Kelsey's common-law dog-bite claim, Lint maintained that her only obligation to a trespasser was to refrain from willful and wanton misconduct and that her ownership of a dog with no history of biting did not constitute willful or wanton misconduct.

Plaintiffs opposed Lint's motion for summary disposition, arguing that Kelsey was a licensee because, like the general public, Kelsey had an implied license to enter Lint's property and approach the house to knock on the front door. In opposing Lint's motion for summary disposition, plaintiffs also sought sanctions under MCR 2.114(E). Plaintiffs presented a recorded statement in which Lint admitted that her dog had previously bitten a mailman. On the basis of this statement, plaintiffs asserted that they were entitled to sanctions under MCR 2.114(E) because Lint or Lint's attorney signed documents that were not well grounded in fact insofar as the documents indicated that Lint had no knowledge of her dog biting anyone before Kelsey.

Following a hearing, the trial court granted summary disposition to Lint. The trial court reasoned that Kelsey was an invitee when she attended Lint's garage sale, but the trial court concluded as a matter of law that Kelsey was a trespasser when she returned to Lint's property after the sale. In light of the trial court's conclusion that Kelsey was a trespasser, the trial court dismissed plaintiffs' statutory and common-law dog-bite claims. The trial court also denied plaintiffs' request for sanctions under MCR 2.114(E). Plaintiffs filed a motion for reconsideration, which the trial court denied. Plaintiffs now appeal as of right.

I. KELSEY'S STATUS ON LINT'S PROPERTY

On appeal, plaintiffs first argue that the trial court erred by dismissing their statutory and common-law dog-bite claims on the basis that Kelsey was trespassing. Specifically, plaintiffs contend that everyone, including Kelsey, has an implied license to enter property and knock on the front door. According to plaintiffs, in the absence of a fence or "no trespassing" signs, Lint acquiesced in the general public's customary use of property. While there was a "no soliciting" sign on Lint's door, plaintiffs maintain that this does not render Kelsey a trespasser because she was not soliciting and, in any event, the dog attacked Kelsey before she had an opportunity to observe the sign. With regard to the garage sale, plaintiffs argue that the sale did not alter the general implied license that exists to enter property. Plaintiffs contend that, if anything, Lint's practices showed that she had acquiesced in allowing people to return to her property after a garage sale to take a second look at items. In these circumstances, plaintiffs assert that the trial court erred by concluding as a matter of law that Kelsey was a trespasser.

"This Court reviews a trial court's decision on a motion for summary disposition de novo." *Barnes v Farmers Ins Exch*, 308 Mich App 1, 5; 862 NW2d 681 (2014). Lint moved for summary disposition under MCR 2.116(C)(8) and (10). However, the parties and the trial court relied on evidence outside the pleadings, meaning that Lint's motion is properly reviewed under MCR 2.116(C)(10). *Sisk-Rathburn v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 425, 427; 760 NW2d 878 (2008). "When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all the evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact." *Id*. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Plaintiffs brought both a statutory dog-bite claim and a common-law, negligence-based dog-bite claim. We begin with plaintiffs' statutory claim. The dog-bite statute is MCL 287.351(1), which states:

> If a dog bites a person, without provocation while the person is on public property, or lawfully on private property, including the property of the owner of the dog, the owner of the dog shall be liable for any damages suffered by the person bitten, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness.

The statute imposes " 'almost absolute liability' " on the dog owner, except when the dog bites after being provoked. *Koivisto v Davis*, 277 Mich App 492, 496; 745 NW2d 824 (2008) (citation omitted). However, to suc-

ceed on a claim under MCL 287.351(1), the plaintiff must be on public property or "lawfully on private property." See *Cox v Hayes*, 34 Mich App 527, 531; 192 NW2d 68 (1971).

> A person is lawfully on the private property of the owner of the dog within the meaning of this act if the person is on the owner's property in the performance of any duty imposed upon him or her by the laws of this state or by the laws or postal regulations of the United States, or *if the person is on the owner's property as an invitee or licensee of the person lawfully in possession of the property* unless said person has gained lawful entry upon the premises for the purpose of an unlawful or criminal act. [MCL 287.351(2) (emphasis added).]

Licensees and invitees—in addition to trespassers—are common-law categories for persons who enter upon the land of another. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). Under MCL 287.351(2), invitees and licensees are "lawfully" on the property, but a trespasser cannot maintain a statutory dog-bite claim. See *Alvin v Simpson*, 195 Mich App 418, 421; 491 NW2d 604 (1992).

In this case, the parties focus their arguments on whether Kelsey was a licensee or a trespasser when she returned to Lint's property. "A 'trespasser' is a person who enters upon another's land, without the landowner's consent." *Stitt*, 462 Mich at 596. In comparison, "[a] 'licensee' is a person who is privileged to enter the land of another by virtue of the possessor's consent." *Id*. Consent to enter may be either express or implied. *Pippin v Atallah*, 245 Mich App 136, 142; 626 NW2d 911 (2001). "Permission may be implied where the owner acquiesces in the known, customary use of property by the public." *Alvin*, 195 Mich App at 420.

Plaintiffs maintain that Kelsey had an implied license to enter Lint's property. In considering whether Kelsey had implied consent to enter Lint's property, we begin with the proposition that in the United States, and in Michigan in particular, given the established habits in this country, there is an implied license that permits ordinary persons to enter property, approach a home, and knock. See *Florida v Jardines*, 569 US 1, 8; 133 S Ct 1409; 185 L Ed 2d 495 (2013); *Kentucky v King*, 563 US 452, 469; 131 S Ct 1849; 179 L Ed 2d 865 (2011); *People v Frederick*, 500 Mich 228, 234-235; 895 NW2d 541 (2017). More fully, the United States Supreme Court has explained this implied license as follows:

> "A license may be implied from the habits of the country," notwithstanding the "strict rule of the English common law as to entry upon a close." *McKee v Gratz*, 260 US 127, 136 [43 S Ct 16; 67 L Ed 167] (1922) (Holmes, J.). We have accordingly recognized that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." *Breard v Alexandria*, 341 US 622, 626 [71 S Ct 920; 95 L Ed 1233] (1951). This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is "no more than any private citizen might do." [*Jardines*, 569 US at 8.]

Relying on the Court's decision in *Jardines*, the Michigan Supreme Court has similarly recognized "an implied license to approach a house and knock." *Frederick*, 500 Mich at 238. The scope of this implied license

is "defined by what *anyone* may do" based on "custom" and the " 'background social norms that invite a visitor to the front door.' " *Id*. at 238-239 (citation omitted).[2] Quite simply, as a general proposition, the established customs in Michigan grant anyone, including Kelsey, an implied license to approach a house and knock on the front door.[3]

Turning to the more specific facts of this case, reasonable minds could conclude that Lint acquiesced

[2] Lint attempts to distinguish *Jardines* and *Frederick* by emphasizing that they are police "knock and talk" cases. However, while decided in the context of the Fourth Amendment, these cases "employed a property-rights framework" to determine what actions the police could lawfully take. See *Frederick*, 500 Mich at 235. In other words, the ability to approach a house and knock on a door is not unique to the police; rather, it is the well-established principle that *anyone* may approach a house and knock on the door that leads to the conclusion that the police also have an implied license to engage in that activity. *Id*. at 238-239.

[3] In contrast to this basic proposition, Lint relies on three cases: *Ramonas v Grand Rapids R Co*, 194 Mich 69; 160 NW 382 (1916); *Alvin*, 95 Mich App 136; and *Tieman v Grinsteiner*, unpublished per curiam opinion of the Court of Appeals, issued October 27, 2011 (Docket No. 300265). Contrary to Lint's arguments, these cases do not compel the conclusion that Kelsey was a trespasser. First, *Ramonas* is easily distinguished because it involves a situation in which the plaintiff rode a train at an amusement park when the train was not being operated for public use. *Ramonas*, 194 Mich at 73. While it is customary for the general public to approach a residential front door (and thus there is an implied license to do so), there is no implied license for the public to ride a train at an amusement park when the train is not open for business. Similarly, *Alvin* involved a situation in which the plaintiff acted outside accepted customs. In *Alvin*, 195 Mich App at 419, the plaintiff—a child trying to retrieve a ball—climbed over a fence into an enclosed backyard, and the plaintiff admitted that he was trespassing when he did so. Again, while it is customary to approach front doors and knock, it is not customary to climb over fences and enter someone's backyard. Finally, *Tieman* is nonbinding, MCR 7.215(C)(1), and unpersuasive because this Court did not consider authority supporting the proposition that the public has an implied license to enter property, approach the front door, and knock. See *Jardines*, 569 US at 8; *Frederick*, 500 Mich at 234-235, 238-239.

in the known, customary use of residential property by the public that involves approaching houses and knocking on the front door to make contact with the occupants. For instance, Lint's property did not have a fence that prevented entry. The record also indicates that when approaching Lint's house from the street, there were no signs prohibiting entry or stating "no trespassing." Instead, an individual approaching Lint's home found an open, ungated driveway devoid of signs prohibiting entry. Cf. *People v Taormina*, 130 Mich App 73, 80; 343 NW2d 236 (1983); *Smith v VonCannon*, 283 NC 656, 662; 197 SE2d 524 (1973). From these circumstances, it could be inferred that Kelsey had an implied license, consistent with the accepted habits in Michigan, to enter the property and to approach Lint's front door.

In contrast to this conclusion, in terms of evidence suggesting that Kelsey should not have been on the property, it appears that there was a small "no soliciting" sign posted on a door leading to a portion of Lint's garage where she had previously operated a beauty parlor. Posting a notice may serve to prevent the creation of an implied license. See 2 Restatement Torts, 2d, § 330, comment *e*, pp 173-174. However, whether signs posted on property revoke the public's implied license to approach the house and knock depends on the context in which a member of the public would have encountered the signs and the message that those signs would have conveyed to an objective member of the public under the circumstances. *United States v Carloss*, 818 F3d 988, 994 (CA 10, 2016) (quotation marks omitted). See also Restatement, § 330, comment *e*, p 173 ("[T]he decisive factor is the interpretation which a reasonable man would put upon the possessor's acts."). Viewing the evidence in this case in a light most favorable to Kelsey, it could be

concluded that the location of the "no soliciting" sign was such that someone would have to drive down Lint's driveway to her house and approach the door before realizing that soliciting was not allowed. Further, "no soliciting" is not synonymous with "no trespassing" or "do not enter" and therefore reasonable minds could conclude that a small "no soliciting" sign on a door to the garage would not prevent Kelsey from driving up Lint's driveway and exiting her vehicle. Cf. *Pippin*, 245 Mich App at 142 (stating that a sign "forbidding people to park their vehicles in a particular place does not necessarily convey the message that they may not walk or ride through that same place").[4] According to Kelsey's description of events, she was attacked by Lint's dog within seconds of exiting her vehicle and did not have a chance to approach Lint's door on which the sign was posted. In these circumstances, even if Kelsey's proposed inquiry could be considered "soliciting," given Kelsey's assertion that she was bitten as soon as she exited her vehicle, before she approached Lint's door or had a chance to speak with Lint, reasonable minds could conclude that she was still within the scope of the public's implied license when she exited her vehicle and was attacked by Lint's dog.

The only other fact presented by the parties as bearing on Kelsey's status is the garage sale held by Lint on the weekend of Kelsey's visit. Lint argues, and the trial court concluded, that because the sale had

[4] See also *State v Crowley*, 232 So 3d 473, 476 (Fla App, 2017) (" 'No Soliciting' signs can be found in places where visitors are plainly welcome and expected, including supermarkets, malls, neighborhoods, hospitals, and stadiums."); *Furman v Call*, 234 Va 437, 441; 362 SE2d 709 (1987) ("The only signs read: 'Private Property, No Soliciting.' Clearly, the purpose of the signs is to prohibit soliciting, not the entry of motor vehicles operated by members of the public.").

ended, Kelsey was a trespasser when she returned. However, this reasoning ignores the public's implied license to enter the property and approach the door. That is, as noted by the trial court, when inviting the general public to her property for a sale, it could be concluded that Lint welcomed those individuals as invitees and, when the sale ended, it could be concluded that Kelsey lost her invitee status.[5] But the end of a garage sale—and the loss of invitee status—did not eliminate the implied license that normally exists. In other words, while heightened invitee status may have existed during the sale, the end of the sale returned things to their normal state, which typically includes an implied license for anyone to enter the property and knock on the door.[6] See *Jardines*, 569 US at 8; *Frederick*, 500 Mich at 234-235, 238-239.

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[5] "An 'invitee' is a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitee's] reception." *Stitt*, 462 Mich at 596-597 (quotation marks and citation omitted; alteration in *Stitt*). While Kelsey may have been an invitee on Friday when attending Lint's garage sale, Kelsey does not contend on appeal that she was an invitee on Saturday when she returned after the sale.

[6] Additionally, on the more specific facts of this case, the trial court's conclusion that the end of the garage sale rendered Lint a trespasser ignores evidence that Lint had acquiesced to a practice by which Kelsey, and others, returned to Lint's property after a garage sale for a second look at items that had been available during the garage sale. Kelsey testified that on a previous occasion she had returned to Lint's property for a second look at an item after a sale. And Lint confirmed that it was not uncommon for people to return to her property in the day or two following a garage sale. She stated that she preferred for people to call first but conceded that they did not always do so. Faced with this practice, Lint made no effort—such as posting signs—to prevent people from returning. Therefore, notwithstanding her "no soliciting" sign and the end of the garage sale, it reasonably could be concluded that Lint had acquiesced in a practice of allowing people to return to her property following a garage sale to take a second look at items.

Overall, viewing the evidence in a light most favorable to Kelsey, while Kelsey did not have Lint's express permission to return to the property, it could be inferred that Kelsey had an implied license to enter the property and to approach Lint's house. Generally, when considering an entrant's status on the land, "if there is evidence from which one could infer a particular person's status on land, then the question is one for the jury." *Pippin*, 245 Mich App at 141. Consequently, because reasonable minds could conclude that Kelsey was a licensee, the trial court erred by determining that she was a trespasser as a matter of law and by concluding that Kelsey was not lawfully on the property within the meaning of MCL 287.351. Therefore, we reverse the trial court's grant of summary disposition to Lint on plaintiffs' statutory dog-bite claim under MCL 287.351.[7]

With regard to plaintiffs' common-law dog-bite claim, their common-law theory is premised on negligence.

> "[A] negligence cause of action arises when there is ineffective control of an animal in a situation where it would reasonably be expected that injury could occur, and injury does proximately result from the negligence. The amount of control required is that which would be exercised by a reasonable person based upon the total situation at the time, including the past behavior of the animal and the injuries that could have been reasonably foreseen." [*Trager v Thor*, 445 Mich 95, 106; 516 NW2d 69 (1994) (citation omitted).]

"To make a prima facie showing of negligence, a plaintiff need only establish that the defendant failed

[7] Having concluded that Kelsey's status is an issue for the jury, *Pippin*, 245 Mich App at 141, we reject plaintiffs' assertion that they were entitled to summary disposition under MCR 2.116(I)(2).

to exercise ordinary care under the circumstances to control or restrain the animal." *Hiner v Mojica*, 271 Mich App 604, 613; 722 NW2d 914 (2006).

In this case, the trial court determined that Kelsey was a trespasser, such that Lint's duty to Kelsey with regard to the dog only required her to refrain from willful and wanton misconduct. See *Stitt*, 462 Mich at 596 ("The landowner owes no duty to the trespasser except to refrain from injuring him by 'wilful and wanton' misconduct."). On the basis of this conclusion, the trial court also reasoned that Kelsey could not show a breach of this duty because keeping a dog on one's property did not constitute a willful and wanton act. However, as discussed, the trial court erred by concluding as a matter of law that Kelsey was trespassing when she was bitten by Lint's dog. Accordingly, the trial court erred by applying the willful-and-wanton standard of care and by dismissing plaintiffs' common-law claim on this basis. Therefore, we also reverse the trial court's grant of summary disposition to Lint on plaintiffs' common-law dog-bite claim.

II. SANCTIONS UNDER MCR 2.114(E)

In the trial court, plaintiffs requested sanctions under MCR 2.114(E), asserting that Lint or her attorney signed documents—including pleadings, Lint's summary disposition motion, and requests for admissions—that were not well grounded in fact. Plaintiffs also sought an evidentiary hearing on this issue to determine whether Lint's conduct, and that of her attorney, was reasonable in light of Lint's recorded statement in which she admitted that her dog had previously bitten a mailman. On appeal, plaintiffs argue that the trial court erred by denying their

request for sanctions and by failing to hold an evidentiary hearing on this issue.

This Court reviews for clear error a trial court's decision regarding whether to impose sanctions under MCR 2.114. *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008). "A decision is clearly erroneous when, although there may be evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *Id*.

Under MCR 2.114(D), the effect of signing a document is as follows:

> The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
>
> (1) he or she has read the document;
>
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
>
> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Under this rule, "an attorney is under an affirmative duty to conduct a reasonable inquiry into both the factual and legal basis of a document before it is signed." *Guerrero*, 280 Mich App at 677. "The reasonableness of the inquiry is determined by an objective standard and depends on the particular facts and circumstances of the case." *LaRose Market, Inc v Sylvan Ctr, Inc*, 209 Mich App 201, 210; 530 NW2d 505 (1995). "The filing of a signed document that is not well grounded in fact and law subjects the filer to sanctions pursuant to MCR 2.114(E)." *Guerrero*, 280 Mich App at 678. Specifically, MCR 2.114(E) provides:

> Sanctions for Violation.
>
> If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

"[I]f a violation of MCR 2.114(D) has occurred, the sanctions provided for by MCR 2.114(E) are mandatory." *Guerrero*, 280 Mich App at 678.

In this case, in documents signed by Lint's attorney, including her motion for summary disposition and requests for admissions, Lint repeatedly denied knowing that her dog had bitten anyone other than Kelsey or that the dog was aggressive. However, in February 2014, Lint gave a recorded statement while speaking with a representative from her insurance agency. In this statement, she admitted that her dog had previously bitten a mailman, that the dog was "protective" of her, and that the dog had "shown aggression" toward people.[8] This recording was referred to during Lint's deposition in June 2016, at which time Lint acknowledged that she had given a recorded statement, and Lint's attorney said that he would "look into whether or not there was actually a recorded statement taken or not." Yet according to statements by Lint's counsel in the trial court, he did not obtain the recording until two or three weeks before the summary disposition hearing, which was held in November 2016. Apparently without obtaining this recording or listening to its contents, Lint's counsel moved for summary dispo-

[8] Veterinarian records for Lint's dog also indicate that the dog was "very aggressive with people coming to the home."

sition and signed other documents, asserting that there was no indication that Lint's dog was dangerous and that Lint had not kept a dog that was known to bite people. There is no indication that defense counsel attempted to correct these representations after obtaining Lint's recorded statement.

While Lint gave obviously inconsistent statements, the question for purposes of MCR 2.114(E) is whether, as the person signing the motion for summary disposition and other documents under MCR 2.114(D), Lint's attorney made a reasonable inquiry into both the factual and legal basis of the documents before they were signed.[9] *Guerrero*, 280 Mich App at 677. Whether counsel conducted a reasonable inquiry should be determined by the trial court and reviewed by this Court for clear error. *Id*. However, in this case, the trial court failed to consider this question and made no findings regarding whether Lint's attorney made a reasonable inquiry. Instead, the trial court remarked that, in general, Lint's attorney was a "gentlemen" and that his "integrity" was not in question. But, an attorney's general character is not at issue under MCR 2.114(D) and (E). Rather, the question is whether, based on the facts and circumstances of this particular case, see *LaRose Market, Inc*, 209 Mich App at 210, Lint's attorney made a reasonable inquiry into the facts supporting the motion for summary

[9] On appeal, Lint does not deny that her dog bit a mailman. Instead, she contends that sanctions are not appropriate because she has a "bad memory." No finding has been made that Lint has a "bad memory." In any event, considering her attorney's conduct before signing documents under MCR 2.114(D), the fact that Lint has a "bad memory" could be seen to suggest that counsel's inquiry was inadequate. In other words, in light of Lint's "bad memory," a reasonable inquiry might include obtaining and listening to a statement made by Lint relatively close in time to the dog-bite incident.

disposition and other documents before signing those documents. On the facts of this case, given that the issue was raised below and that the trial court failed to decide whether defense counsel conducted a reasonable inquiry within the meaning of MCR 2.114(D), we vacate the trial court's denial of plaintiffs' motion for sanctions and remand to the trial court to make specific findings regarding this issue. See *In re Forfeiture of Cash & Gambling Paraphernalia*, 203 Mich App 69, 72-73; 512 NW2d 49 (1993). If defense counsel violated MCR 2.114(D), sanctions under MCR 2.114(E) are mandatory. *Guerrero*, 280 Mich App at 678.

Reversed in part, vacated in part, and remanded for further proceedings. We do not retain jurisdiction. Having prevailed in full, plaintiffs may tax costs pursuant to MCR 7.219.

MARKEY, P.J., and HOEKSTRA and RONAYNE KRAUSE, JJ., concurred.

In re KOCH ESTATE

Docket No. 332583. Submitted July 12, 2017, at Lansing. Decided December 19, 2017, at 9:00 a.m. Leave to appeal denied 503 Mich 858.

Michael Koch, who had been employed by Platinum Mechanical, Inc., was killed in an explosion at the village of Dexter's wastewater treatment plant where he was working. Koch's estate filed a complaint in the Washtenaw Circuit Court against defendants A. Z. Shmina, Inc.; Orchard, Hiltz & McCliment, Inc. (OHM); and Regal Rigging & Demolition, LLC. In 2012, OHM contracted with Dexter to provide administrative and engineering services during the improvement of Dexter's digester and sludge storage tanks at Dexter's wastewater treatment plant. Shmina was the contractor on the project, OHM was the engineer, and Regal provided demolition services through a subcontract with Platinum. After the estate initiated its action against Shmina, OHM, and Regal, OHM filed a third-party complaint against Platinum, the subcontractor hired by Shmina to provide labor and materials for the demolition and installation of the digester lids. OHM alleged that Shmina and Platinum breached their contracts with OHM by refusing to indemnify and defend OHM in the estate's action and by failing to purchase project insurance that would have protected OHM from claims arising from the explosion. OHM moved for summary disposition against Shmina and Platinum under MCR 2.116(C)(10). The court, Carol A. Kuhnke, J., denied OHM's motion for summary disposition, concluding that MCL 691.991 prohibited OHM from seeking indemnification for its own negligence. Shmina and Platinum then moved for summary disposition under MCR 2.116(C)(10), alleging that MCL 691.991 voided or precluded the indemnification agreements at issue. The court granted Shmina's and Platinum's motions for summary disposition. The parties settled their claims with the estate and filed a stipulated order to dismiss the case. OHM then appealed the orders denying its motion for summary disposition and granting summary disposition in favor of Shmina and Platinum.

The Court of Appeals *held*:

1. A statute is presumed to operate prospectively unless the Legislature clearly expresses that the statute is intended to

operate retroactively. A statute must be prospectively applied when the statute imposes liability for failing to comply with its provisions. That is, a party may not be subject to penalties for not complying with statutory provisions that were not in effect at the time the event occurred that would have triggered application of the statute. An amendment of MCL 691.991, the indemnity-invalidating act, became effective on March 1, 2013, after the relevant contracts in this case were formed in 2012. The amendment added a provision, MCL 691.991(2), that would have invalidated the indemnity provided to OHM by Shmina's and Platinum's contracts with Dexter. According to the trial court, the new provision applied retroactively in this case and prohibited OHM from seeking indemnification for its own negligence. But the trial court erred by applying the new provision retroactively to the indemnity provisions contained in Dexter's contract with Shmina and Platinum and extended to OHM through OHM's contract with Dexter because the Legislature included no express language regarding retroactivity and the new provision concerned contract formation such that it could not be applied retroactively to contracts entered into and executed before the effective date of the amendatory act. Because MCL 691.991(2) was limited to prospective application, the trial court improperly granted Shmina's and Platinum's motions for summary disposition on the basis that MCL 691.991 made void and unenforceable the indemnification provisions in the contracts between and among the parties. The trial court's decision had to be reversed, and OHM's indemnity claims had to be reinstated.

2. In the alternative, Shmina argued that the contracts were ambiguous and had to be construed against OHM as the drafter of the contracts and that, therefore, the broader indemnification provision of the supplementary contractual conditions could not be enforced by OHM. The general and supplementary contractual provisions conflicted because it was not possible for Shmina or Platinum to both indemnify OHM for (1) all damages, regardless of who caused them, as required by the supplementary conditions, and (2) some of the damages, only if Shmina or Platinum or its subcontractors caused them, as required under the general contractual conditions. Therefore, the trial court did not err by holding that these provisions in Shmina's and Platinum's contracts were ambiguous. Because of the contractual ambiguity, it was appropriate for the trial court to decline to grant summary disposition in favor of OHM. However, it would have been inappropriate, absent consideration of relevant extrinsic evidence and other means and rules of contract interpretation, for the trial court to have relied on the contractual ambiguity as a basis for

granting summary disposition in favor of Shmina or Platinum, and the trial court did not in fact do so. Generally, the meaning of an ambiguous contract is a question of fact that must be decided by the jury. And the rule requiring that contracts be construed against the drafter only applies if conventional means of contract interpretation have been exhausted; therefore, it was not appropriate to apply the rule at this juncture. Given that the ambiguity created a genuine issue of material fact, the trial's court grant of summary disposition in favor of Shmina and Platinum had to be vacated.

3. A stipulation is an agreement made by the parties to a legal action in a matter related to the case. A stipulation is construed like a contract and, if unambiguous, will be enforced as written. OHM asserted that the trial court failed to resolve its cross-claims against Shmina and Platinum, alleging that they breached their contracts by failing to purchase sufficient project liability insurance. OHM waived this issue when it signed a stipulation that dismissed the case, resolved the last pending claim in the case, and closed it. By signing the stipulation, OHM agreed that there were no additional claims that the trial court should address, and consequently, OHM was prohibited from appealing an alleged error it helped create.

Trial court's denial of OHM's motion for summary disposition affirmed. Trial court's grant of Shmina's and Platinum's motions for summary disposition vacated. Remanded for reinstatement of OHM's claims for indemnification and for further proceedings.

Thomas, DeGrood & Witenoff, PC (by *Michelle A. Thomas*) for Orchard, Hiltz & McCliment, Inc.

Moffett, Vitu, Lascoe & Packus PC (by *Robert E. Packus, Jr.*) for Platinum Mechanical, Inc.

Siemion Huckabay, PC (by *Raymond W. Morganti*) for A. Z. Shmina, Inc.

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

BOONSTRA, J. Defendant Orchard, Hiltz & McCliment, Inc. (OHM) appeals by right the trial court's order dismissing this case, which plaintiff, the estate of

Michael Koch, filed after Michael was killed in an explosion at the village of Dexter's (Dexter) wastewater treatment plant. OHM was Dexter's engineer for an improvement project involving the wastewater treatment plant. OHM filed a cross-complaint seeking indemnity from defendant-contractor A. Z. Shmina, Inc., and a third-party complaint seeking indemnity from subcontractor Platinum Mechanical, Inc. The parties stipulated to dismissal of the case after the trial court denied OHM's motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) and granted Shmina's and Platinum's motions for summary disposition under MCR 2.116(C)(10). We affirm the trial court's denial of summary disposition in favor of OHM. We vacate the trial court's grant of summary disposition in favor of Shmina and Platinum, and we remand to the trial court for further proceedings consistent with this opinion.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

OHM initially contracted with Dexter in September 2011 to design upgrades to the sludge-handling process at Dexter's wastewater treatment plant. The services included replacing digester tank lids that had exceeded their design life. On June 12, 2012, OHM again contracted with Dexter for services including "contract administration, construction engineering, construction observation, and construction staking." OHM's contract incorporated a provision relieving it of responsibility for job-site safety.

Dexter hired Shmina in October 2012 as the contractor to improve the digester and sludge storage tanks. Dexter's contract with Shmina included general and supplementary terms containing indemnification provisions. Later in October 2012, Shmina subcontracted

with Platinum, which agreed to provide labor and materials for digester lid demolition and installation. Platinum's contract incorporated the general, special, and supplementary terms of Shmina's contract with Dexter. In April 2013, Platinum awarded a subcontract to Regal Rigging & Demolition, calling for Regal to demolish, remove, and haul away two digester tank lids.

According to Jeremy Cook, Platinum's job foreman, there were weekly progress meetings in OHM's job trailer. Cook stated that Chris Nastally of OHM discussed "anything that had to do with that job" at the meetings, including job safety. Meeting minutes indicated that a progress meeting was held on April 11, 2013, and that Nastally, Sherri Wright, and Rhett Gronevelt of OHM; Cook and Kenneth Coon of Platinum; John Franklin of Shmina; and Jeff LaFave of Regal were in attendance. The minutes indicated that Regal planned to start demolishing the digester lids on April 12 and that the primary lid would be removed first. The minutes also indicated that the only "hot" work would be to cut holes in the lids and pull them out. Coon testified that at the meeting, Regal was instructed that it could only cut holes in the primary digester for rigging purposes and "[t]here was to be no other cutting on that job site whatsoever." Coon stated that anyone on the job site should have known that there should be no cutting torches on the secondary digester.

On April 22, 2013, the secondary digester exploded, resulting in Koch's death. Wright, an environmental engineer, testified that she was on the site the week before the explosion because Nastally was on vacation. Wright testified that on the morning of the explosion, she walked the site with Nastally, talked about the

areas that had been worked on, and told Nastally that the secondary digester still contained sludge.

Franklin, Shmina's project supervisor and site safety officer, testified that the primary digester had been cleaned and purged. Franklin also testified that OHM, Platinum, and Nastally would have known that only one digester could be worked on at a time. According to Franklin, David McBride of Regal began cutting the side beams on the secondary digester tank at around 10:00 a.m. or 10:30 a.m., and Franklin was concerned about the methane in the digester.

Cook testified that Franklin approached him at around 10:00 a.m. and told him that "the guys from Regal [were] doing some hot work and he was worried that they were blowing sparks on the roof . . . ." Cook stated that he approached McBride, told him that he was not supposed to be working on the secondary digester, and specifically mentioned that there could be methane gas.

Cook testified that he did not see McBride cutting again that day. However, Franklin testified that he saw McBride again cutting at around 1:00 p.m. or 1:30 p.m. on the roof line. According to Franklin, he went onto the roof and told McBride to stop working and that it was dangerous to work there. Franklin stated that McBride shut off his cutting torch and walked over to the primary digester, at which point Franklin left to have a conversation with Cook. McBride testified that "somebody" told him to cut the bolts with a torch and that if someone had told him to stop cutting or to cut in a different location, he would have moved.

Nastally testified that he was on the roof for about four minutes before the explosion. Nastally stated that if he was looking at someone who was cutting, he would have known they were cutting, but he was not

paying attention to whether there were sparks. When asked whether he knew that the tanks contained methane gas when they had sludge in them, Nastally testified, "I guess I never thought about it." Nastally also testified that it was not his responsibility to know whether there was methane gas or to make sure the digesters did not explode. Nastally testified that he took a couple of pictures and then responded to an e-mail on his phone, which he was looking down at when the explosion occurred.

McBride testified that in one of the photographs Nastally had taken, he can be seen cutting the center bolts of the digester, that he had cut about one-half of the bolts, and that it took him about five minutes to cut each bolt. McBride testified that when he is cutting, he creates sparks, smoke, a loud noise, and a burnt metal smell. Wright testified that if she had been standing where Nastally had been standing when he took the photograph, she would have been concerned for the safety of everyone in the area, and that anyone on-site should have informed Franklin about McBride's activities.

The estate sued Shmina and OHM,[1] alleging in pertinent part that Dexter had warned Shmina and OHM not to work on any digester until it was emptied and cleaned to eliminate methane hazards, that the secondary digester had not been emptied, that Shmina and OHM knew the secondary digester still contained sludge, and that McBride was photographed cutting bolts on the secondary digester within minutes of the explosion. The estate alleged that McBride's cutting

[1] The estate did not name Platinum as a defendant because the Worker's Disability Compensation Act, MCL 418.101 *et seq*., was the estate's only remedy against Platinum, which was Koch's employer.

torch ignited methane in the secondary digester, which launched the lid into the air and caused Koch's death.

OHM filed a cross-claim against Shmina, alleging in pertinent part that Shmina had breached its contract with OHM by refusing to indemnify and defend OHM against the Estate's complaint and by failing to purchase project insurance that would have protected OHM from claims against it. OHM also filed a third-party complaint against Platinum, in which OHM made the same allegations.

OHM moved for summary disposition under MCR 2.116(C)(10) against Platinum and Shmina, alleging that OHM was an intended third-party beneficiary of Platinum's and Shmina's contracts with Dexter and that Platinum and Shmina were required to indemnify, defend, and hold harmless OHM. In response, Platinum asserted that the contract's general and supplementary provisions conflicted, creating an ambiguous agreement that the trial court should construe against OHM. Shmina responded that OHM could not reasonably observe practices that its engineers knew to be dangerous and do nothing. OHM replied that the parties' contracts required them to defend and indemnify OHM regardless of the cause of the accident and that the contracts' general and supplementary provisions did not conflict.

At an April 22, 2015 motion hearing, the trial court asked counsel if they were familiar with MCL 691.991, also known as the indemnity-invalidating act (the act), which no party had cited. The trial court then read MCL 691.991. OHM argued that it was not a public entity under the statute. The trial court ultimately denied OHM's motion for summary disposition, ruling that MCL 691.991 was clear and prohibited OHM from seeking indemnification for its own negligence. The trial

court subsequently denied OHM's motion for reconsideration and reaffirmed its determination that MCL 691.991 applied retroactively.[2] The court also stated, as an alternative basis for its denial of OHM's motion for summary disposition, that the internally inconsistent nature of the indemnification clauses at issue created an ambiguity, and it accepted Shmina's position that an express indemnity contract should be construed strictly against the drafter and the indemnitee.

Platinum and Shmina subsequently filed motions for summary disposition under MCR 2.116(C)(10), alleging that the indemnification agreements were void or precluded by MCL 691.991. Shmina argued that any indemnification would indemnify OHM for its own negligence. In response, OHM argued that it was not responsible for supervising or controlling construction, that the statute did not apply to contracts between private entities, and that the statute allowed indemnification as long as no party was held liable for more than its proportionate share of fault.

The trial court summarized the question as whether MCL 691.991 eliminated or limited indemnity provisions in public contracts. The trial court granted summary disposition in favor of Platinum and Shmina on the basis that MCL 691.991 precluded indemnity and the parties' contractual provisions were therefore void and could not be severed because the contracts provided more indemnification than the statute allowed. The parties then settled their claims with the estate and filed a stipulated order to dismiss the case.

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[2] Although MCL 691.991 was not yet effective on the dates the parties contracted, the alleged negligence giving rise to the accidental explosion occurred after the effective date of the statute. See 2012 PA 468, effective March 1, 2013; *Brda v Chrysler Corp*, 50 Mich App 332; 213 NW2d 295 (1973).

After oral argument, this Court, on its own motion, ordered the parties to file supplemental briefs on the issue of the retroactive application of MCL 691.991(2).[3] Because resolution of that issue disposes of the case before us, we address that issue first.

II. RETROACTIVITY OF MCL 691.991(2)

We hold that MCL 691.991(2) is subject to prospective application only and that the trial court therefore erred by granting summary disposition in favor of Platinum and Shmina regarding their obligation to indemnify OHM. This Court reviews de novo issues of statutory interpretation, *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 172; 848 NW2d 95 (2014), and reviews de novo a court's decision on a motion for summary disposition, *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A party is entitled to summary disposition under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party. *Maiden*, 461 Mich at 120; MCR 2.116(G)(5). A genuine issue of material fact exists if, when viewing the record in the light most favorable to the nonmoving party, reasonable minds could differ on the issue. *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 116; 839 NW2d 223 (2013).

When interpreting a statute, this Court's goal is to give effect to the intent of the Legislature. *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795

[3] *Koch Estate v A Z Shmina, Inc*, unpublished order of the Court of Appeals, entered July 14, 2017 (Docket No. 332583).

NW2d 101 (2009). The language of the statute itself is the most reliable indicator of the Legislature's intent. *Id*. If the statutory language is unambiguous, this Court must enforce the statute as written. *Id*. We read and understand statutory language in its grammatical context unless the language indicates a different intention. *Id*.

"An indemnity contract creates a direct, primary liability between the indemnitor and the indemnitee that is original and independent of any other obligation." *Miller-Davis*, 495 Mich at 173. Parties have broad discretion to negotiate such contracts. *Id*. However, MCL 691.991(2) provides that in any contract for the maintenance or demolition of infrastructure, a public entity shall not require a contractor to indemnify the public entity for any amount greater than the contractor's degree of fault:

> When entering into a contract with a Michigan-licensed . . . professional engineer . . . for the design of a building, . . . or other infrastructure, . . . or a contract with a contractor for the construction, alteration, repair, or maintenance of any such improvement, including moving, demolition, and excavating connected therewith, a public entity shall not require the . . . professional engineer . . . or the contractor to defend the public entity or any other party from claims, or to assume any liability or indemnify the public entity or any other party for any amount greater than the degree of fault of the . . . professional engineer . . . or the contractor and that of his or her respective subconsultants or subcontractors. A contract provision executed in violation of this section is against public policy and is void and unenforceable.

We agree that application of MCL 691.991(2) would compel the result reached by the trial court. But in this case, the parties entered into and executed their re-

spective contracts in 2011 and 2012.[4] MCL 691.991(2) became effective on March 1, 2013, and the digester exploded on April 22, 2013. Accordingly, the contracts pertinent to this dispute were entered into before the effective date of the statute.

The question therefore becomes whether MCL 691.991(2) may be applied retroactively. Statutes are presumed to operate prospectively unless "the contrary intent [of the Legislature] is clearly manifested." See *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001). "This is especially true if retroactive application of a statute would impair vested rights, create a new obligation and impose a new duty, or attach a disability with respect to past transactions." *Id*. See also *id*. at 588 (holding that a statute concerning sales commission payments could not be applied retroactively because retroactive application would substantially alter the nature of agreements that were entered into before the act's effective date).

This Court has held that a pre-2013 version of the indemnity-invalidating act should be given retroactive effect, at least when the negligent act occurred after the effective date of the act. See *Brda v Chrysler Corp*, 50 Mich App 332, 335-336; 213 NW2d 295 (1973); cf. *Blazic v Ford Motor Co*, 15 Mich App 377; 166 NW2d 636 (1968) (holding that the act did not apply when the negligent act occurred before the effective date). Indeed, it was *Brda* on which the trial court relied in this case when it concluded that MCL 691.991(2) was retroactively applicable. However, the act, before its 2013 amendment, did not contain any of the language now found in MCL 691.991(2). Rather, the entirety of the pre-2013 act read:

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[4] Platinum subcontracted with Regal on April 17, 2013, but that contract is not pertinent to the issues before us.

> A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable. [MCL 691.991, as enacted by 1966 PA 165 (before amendment by 2012 PA 468, effective March 1, 2013).]

This language closely mirrors the postamendment language of MCL 691.991(1):

> In a contract for the design, construction, alteration, repair, or maintenance of a building, a structure, an appurtenance, an appliance, a highway, road, bridge, water line, sewer line, or other infrastructure, or any other improvement to real property, including moving, demolition, and excavating connected therewith, a provision purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable.

Both the pre-2013 act and MCL 691.991(1) of the current act prohibit a general contractor from requiring its subcontractors to indemnify it for its sole negligence. See *Miller-Davis*, 495 Mich at 173; *Robertson v Swindell-Dressler Co*, 82 Mich App 382, 389; 267 NW2d 131 (1978). By contrast, MCL 691.991(2), which took effect in 2013, concerns the issue at hand—the extent to which a public entity may require a general contractor or subcontractor to indemnify it. And MCL 691.991(2) uses substantially different language than

the preamendment statute and the current MCL 691.991(1). MCL 691.991(1) refers to sole-negligence indemnification clauses in contracts in an essentially timeless manner—if a contract exists with a sole-negligence indemnification provision, that provision is void and unenforceable. By contrast, MCL 691.991(2) speaks to contract *formation* in three places: it provides that "[w]hen entering into a contract," a public entity "shall not require" a general contractor to indemnify it beyond the general contractor's or its subcontractors' degree of fault. And "[a] contract provision *executed* in violation of this section is against public policy and is void and unenforceable."[5] (Emphasis added.)

The Legislature's use of different terms suggests different meanings. *United States Fidelity*, 484 Mich at 14. Further, our Supreme Court has discussed "two signals" that indicate the Legislature's intent that a statute be applied prospectively: the first is that the "Legislature included no express language regarding retroactivity," and the second is that the statute imposes liability for failing to comply with its provisions. *Frank W Lynch*, 463 Mich at 583-584. The Legislature knows how to make clear, through express language, its intention that a statute operate retroactively. *Id*. at 584. And it is impossible for a party to comply with a statute's provisions before that statute's existence. *Id*.

Both of those signals are present here. MCL 691.991(2) contains no express language concerning

[5] A contract is generally executed (i.e., brought into its final, legally enforceable form) by signing and delivering it. See *Black's Law Dictionary* (10th ed), p 393 (defining "executed contract"), p 689 (defining "execute"). The contracts at issue provided that they were effective on the date the last party signed and delivered them, if another date was not specified. Except for Platinum's contract with Regal, which was initiated in 2013, all relevant signature dates and specified effective dates for the contracts and amendments at issue were in 2012.

retroactivity. In fact, the 2013 amendment specified that "this amendatory act takes effect March 1, 2013." 2012 PA 468. And MCL 691.991(2) states that "[a] contract provision *executed in violation of this section* is against public policy and is void and unenforceable." (Emphasis added.) Before March 1, 2013, MCL 691.991(2) did not exist, and contracts could not be executed in violation of it. See *Frank W Lynch*, 463 Mich at 584 (in which the Supreme Court, referring to the sales representatives' commissions act (SRCA), MCL 600.2961, stated: "Further indicating that the Legislature intended prospective application of the SRCA is the fact that subsection 5 of the SRCA provides for liability if the principal 'fails to comply with this section.' Because the SRCA did not exist at the time that the instant dispute arose, it would have been impossible for defendants to 'comply' with its provisions. Accordingly, this language supports a conclusion that the Legislature intended that the SRCA operate prospectively only.").

We conclude that the language of the amendatory act does not clearly manifest the Legislature's intent that MCL 691.991(2) be applied retroactively to contracts entered into and executed before the amendment's effective date. See *id*. at 583. The trial court therefore erred by applying MCL 691.991(2) to the claims before it. Accordingly, we vacate the trial court's grant of summary disposition in favor of Shmina and Platinum. The trial court erred when it held that MCL 691.991(2) rendered void and unenforceable the indemnification provisions at issue, and we remand for reinstatement of OHM's indemnity claims.

III. CONTRACTUAL AMBIGUITY

Shmina argues that the trial court's determination that the contracts were ambiguous provides an alter-

native basis for granting summary disposition in its favor. More specifically, Shmina contends that the contractual ambiguity must be construed against OHM as the drafter of the contracts and that, therefore, this Court should hold that the broader indemnification provision of the supplementary conditions may not be enforced by OHM. OHM argues that the contractual provisions are not ambiguous because they are complementary.

We agree with the trial court that the contractual indemnification provisions are ambiguous, and for that reason, we affirm the trial court's denial of summary disposition in favor of OHM. However, the trial court did not rely on the contractual ambiguity as a basis for granting summary disposition in favor of Shmina or Platinum, and we decline to do so in the first instance. Rather, we conclude that the ambiguity presents a genuine issue of material fact, requiring a remand to the trial court.

This Court reviews de novo the proper interpretation of a contract, *Miller-Davis*, 495 Mich at 172, and the legal effect of a contractual clause, *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 369; 666 NW2d 251 (2003). If a contract's language is unambiguous, "we construe and enforce the contract as written." *Quality Prods*, 469 Mich at 375. A contract is ambiguous when its provisions irreconcilably conflict. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003). A court may not ignore provisions of a contract in order to avoid finding an ambiguity. *Id*. Generally, "the meaning of an ambiguous contract is a question of fact that must be decided by the jury." *Id*. at 469.

Dexter's contract with Shmina expressly incorporated general conditions, supplementary conditions,

insurance requirements, specifications, and drawings. Platinum's contract with Dexter included Platinum's contractual provisions as well as an incorporation of Shmina's contract with Dexter. When a contract incorporates a writing by reference, it becomes part of the contract, and courts must construe the two documents as a whole. *Whittlesey v Herbrand Co*, 217 Mich 625, 627; 187 NW 279 (1922).

The general conditions in Article 6, ¶ 6.20(A) of the Standard General Conditions of the Construction Contract between Dexter and Shmina provided, in pertinent part, as follows:

> To the fullest extent permitted by Laws and Regulations, Contractor shall indemnify and hold harmless Owner and Engineer . . . *against all claims, costs, losses, and damages* . . . arising out of or relating to the performance of the Work . . . *but only to the extent caused by any negligent act or omission of Contractor, any Subcontractor*, . . . or any individual or entity directly or indirectly employed by any of them . . . . [Emphasis added.]

Paragraph 6.20(C)(2) also provided that "[t]he indemnification obligations of Contractor under Paragraph 6.20.A shall not extend to the liability of Engineer . . . arising out of . . . giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage."

The Supplementary General Conditions "amend[ed] or supplement[ed] the Standard General Conditions of the Construction Contract . . . as indicated below. *All provisions which are not so amended or supplemented remain in full force and effect*." The supplementary conditions deleted ¶¶ 5.04 to 5.10[6] from the General Conditions and added to Article 5 language that "[t]he

[6] The Standard General Conditions of the Construction Contract was divided into 17 articles. The articles were further divided into numbered

Insurance Specifications, Section 00 80 00, of this Contract, following the Supplementary Conditions, shall be added to Article 5 of the General Conditions, regarding insurance requirements." The insurance specifications in § 00 80 00, provided as part of the supplementary conditions, required Shmina to indemnify OHM as follows:

> The CONTRACTOR agrees to indemnify, defend, and hold harmless the OWNER and ENGINEER, their consultants, agents, and employees, from and *against all loss or expense* (including costs and attorney's fees) by reason of liability imposed by law upon the OWNER and ENGINEER, their consultants, agents, and employees for . . . damages because of bodily injury, including death at any time resulting therefrom, arising out of or in consequence of the performance of this work, *whether such injuries to persons or damage to property is due, or claimed to be due, to the negligence of the CONTRACTOR, his subcontractors, the OWNER, the ENGINEER, and their consultants, agents, and employees*, except only such injury or damage as shall have been occasioned by the sole negligence of the OWNER, the ENGINEER, and their agents and/or consultants. [Emphasis added; formatting omitted.]

Because the supplementary conditions did not modify ¶ 6.20, that provision remained in full force and effect.

These provisions irreconcilably conflict because it is not possible for Shmina or Platinum to both indemnify OHM for (1) *all* damages, *regardless* of who caused them, under § 00 80 00, and (2) *some* of the damages, *only if* Shmina or Platinum or its subcontractors caused them, under ¶ 6.20. Therefore, the trial court did not err by holding that these provisions in Shmina's and Platinum's contracts were ambiguous.

"paragraphs." We understand the reference in the Supplementary General Conditions to "Articles 5.04 – 5.10" to refer to ¶¶ 5.04 to 5.10.

But the trial court did not grant summary disposition in favor of Shmina or Platinum on this basis. The trial court only relied on the contractual ambiguity as an alternative basis for denying OHM's motion for summary disposition. And we conclude that, because of the contractual ambiguity, it was appropriate for the trial court to decline to grant summary disposition in favor of OHM.

However, it would have been inappropriate, absent consideration of relevant extrinsic evidence and other means and rules of contract interpretation, for the trial court to have relied on the contractual ambiguity as a basis for granting summary disposition in favor of Shmina or Platinum, and the trial court did not in fact do so. Generally, "the meaning of an ambiguous contract is a question of fact that must be decided by the jury." *Klapp*, 468 Mich at 469. The relevance, if any, of the rule of *contra proferentem* that Shmina asks us to employ is generally for the jury, not the trial court (or this Court), to consider, and then only in certain circumstances. According to *Klapp*:

> In interpreting a contract whose language is ambiguous, *the jury* should also consider that ambiguities are to be construed against the drafter of the contract. This is known as the rule of *contra proferentem*. However, this rule is only to be applied if all conventional means of contract interpretation, including the consideration of relevant extrinsic evidence, have left the jury unable to determine what the parties intended their contract to mean. . . . In other words, if a contract is ambiguous regarding whether a term means "a" or "b," but relevant extrinsic evidence leads the jury to conclude that the parties intended the term to mean "b," then the term should be interpreted to mean "b," even though construing the document in the nondrafter's favor pursuant to an application of the rule of *contra proferentem* would produce an interpretation of the term as "a."

> However, if the language of a contract is ambiguous, and the jury remains unable to determine what the parties intended after considering all relevant extrinsic evidence, the jury should only then find in favor of the nondrafter of the contract pursuant to the rule of *contra proferentem*. [*Id*. at 470-472 (citations omitted) (emphasis added).]

Particularly given that the trial court did not grant summary disposition in favor of Shmina or Platinum on this basis, and did not articulate any consideration of relevant extrinsic evidence or other means and rules of contract interpretation, we decline to introduce and apply the *contra proferentem* canon of construction at this juncture of the proceedings.

IV. UNRESOLVED CLAIMS

Finally, OHM argues that the trial court improperly failed to resolve its cross-claims that Shmina and Platinum breached their contracts by failing to purchase sufficient project liability insurance. We conclude that OHM has waived this issue by stipulating to dismissal of the case.

"A stipulation is an agreement, admission, or concession made by the parties in a legal action with regard to a matter related to the case." *People v Metamora Water Serv, Inc*, 276 Mich App 376, 385; 741 NW2d 61 (2007). A stipulation is construed in the same manner as a contract. *Bd of Co Rd Comm'rs for Eaton Co v Schultz*, 205 Mich App 371, 379; 521 NW2d 847 (1994). When a stipulation is unambiguous, a court will enforce it as written. See *id*. at 380. "[A] waiver is a voluntary and intentional abandonment of a known right." *Quality Prods*, 469 Mich at 374. A party may not

appeal an error that the party created. *Clohset v No Name Corp (On Remand)*, 302 Mich App 550, 555; 840 NW2d 375 (2013).

In this case, the parties filed a stipulated order dismissing the case. The order stated that it "resolve[d] the last pending claim and close[d] the case." By signing this stipulation, OHM agreed that there were no additional claims that the trial court should address. We will not allow OHM to appeal an error that OHM itself helped create, and we therefore conclude that OHM has waived this issue by stipulating to dismissal of the case.

Affirmed with respect to the trial court's denial of OHM's motion for summary disposition. Vacated with respect to the trial court's grant of summary disposition in favor of Shmina and Platinum. Remanded for reinstatement of OHM's claims for indemnification and further proceedings consistent with this opinion. Because the principal issue in this case came before this Court after the trial court sua sponte raised the application of MCL 691.991(2), because this Court ordered supplemental briefing on the issue on its own motion, and because the issue is of public importance, each party shall bear its own costs. MCR 7.219(A). We do not retain jurisdiction.

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

PEOPLE v McBURROWS

Docket No. 338552. Submitted December 7, 2017, at Detroit. Decided December 19, 2017, at 9:05 a.m. Leave to appeal sought.

Romon B. McBurrows was charged in the Monroe Circuit Court with delivery of a controlled substance causing death, MCL 750.317a, in connection with the drug-overdose death of Nicholas Abraham (the decedent). The decedent drove William Ingall from Monroe County to Wayne County to purchase heroin from defendant. The decedent waited in his truck while Ingall used the decedent's money to purchase the heroin. The decedent and Ingall sampled the heroin in Wayne County, after which the decedent used some of the remaining heroin with his wife in Monroe County. The decedent's wife, who passed out after using the heroin, found the decedent unresponsive the following morning after she regained consciousness. It was later determined that the decedent had died from an overdose of fentanyl, a substance that is used by drug dealers as a cutting agent to make heroin more potent. Defendant moved to dismiss the charge, arguing that the trial court lacked jurisdiction over the case because the only act he had committed—the delivery of heroin containing fentanyl—occurred in Wayne County, not Monroe County. Analyzing defendant's challenge as one to the venue of the case—not to the court's jurisdiction—the court, Daniel S. White, J., denied the motion, concluding that defendant could be tried in either Wayne County or Monroe County because elements of the charged offense occurred in both counties and the drug transaction had inflicted a mortal wound, resulting in a death in Monroe County. Defendant appealed by leave granted.

The Court of Appeals *held*:

1. Defendant's argument that the charge against him should have been dismissed was a challenge to the venue of the case—not a jurisdictional challenge—because venue refers to the location or forum in which a trial should be held.

2. MCL 750.317a provides that a person who delivers a Schedule 1 or 2 controlled substance, other than marijuana, to another person in violation of MCL 333.7401 that is consumed by that person or any other person and that causes the death of

that person or other person is guilty of a felony; fentanyl is classified as a Schedule 2 controlled substance under MCL 333.7214(b). In light of its plain language, MCL 750.317a clearly provides a penalty enhancement when a defendant's criminal act—the delivery of a controlled substance in violation of MCL 333.7401—has the result or effect of causing a death to any other individual. Therefore, to establish a violation of MCL 750.317a, the prosecution must prove (1) the defendant's act of delivering a controlled substance in violation of MCL 333.7401 and (2) the effect that a person died as a result of consuming the controlled substance. MCL 750.317a is a general intent crime, and the defendant's criminal act is complete when the controlled substance is delivered. The statute punishes an individual's role in placing the controlled substance in the stream of commerce, even when the individual is not directly linked to the resultant death.

3. With regard to venue, except as the Legislature has otherwise provided, defendants should generally be tried by a jury of the county where the offense was committed. MCL 762.5 and MCL 762.8 provide two exceptions to the general venue rule. Under MCL 762.8, whenever a felony consists or is the culmination of two or more acts done in the perpetration of that felony, the felony may be prosecuted in any county where any of those acts were committed or in any county that the defendant intended the felony or acts done in perpetration of the felony to have an effect. In other words, when a felony consists of two or more acts, venue for prosecution of the felony is proper in any county in which any one of the acts was committed. However, MCL 762.8 does not allow venue for prosecution in places where the effects of the criminal act are felt; it is the act that constitutes the felony, not the effects of the act, that gives rise to venue. Under MCL 762.5, if any mortal wound is given or other violence or injury is inflicted or any poison is administered in one county by means of which death shall occur in another county, the offense may be prosecuted in either county; the mortal wound, injury, or poison must be inflicted on or administered to the victim directly by the defendant for venue to be proper under MCL 762.5 when the death subsequently occurs in a different county. For purposes of the statute, the term "wound" means an injury to the body—as from violence, accident, or surgery—that typically involves lacerations or breaking of a membrane and usually damage to underlying tissues; the term "injury" means hurt, damage, or loss sustained; the term "poison" refers to any substance, either taken internally or applied externally, that is injurious to health or dangerous to life; and the term "poisoning"

means to injure or kill with poison. Venue is not automatically established under MCL 762.5 for the prosecution of an MCL 333.7401 charge even when the controlled substance could be considered a poison in a particular case; rather, the focus is on where the act of administering the poison occurred when determining venue.

4. In this case, it was undisputed that the alleged drug transaction occurred in Wayne County, and the alleged criminal act—delivery of a controlled substance in violation of MCL 333.7401—was completed when that transaction occurred. Venue was therefore proper in Wayne County because the alleged criminal offense, delivery of the heroin containing fentanyl, occurred in that county. Neither MCL 762.5 nor MCL 762.8 provided grounds for venue to be in Monroe County. Venue was not proper in Monroe County under MCL 762.8 because the alleged criminal act—with the exception of the sentencing enhancement for the decedent's death—was completed at the point of sale in Wayne County and there was no further act that was committed in perpetration of that felony. Further, there was no allegation or evidence that defendant intended for a death to occur in Monroe County. Venue was also not proper in Monroe County under MCL 762.5. Given the dictionary definitions of the terms "wound," "injury," and "poison," there was no evidence that defendant gave the decedent a mortal wound, otherwise inflicted injury on the decedent, or directly administered a poison to the decedent. Rather, defendant sold heroin that was presumably laced with fentanyl to Ingall, who in turn gave it to the decedent. Although the amount of fentanyl that defendant consumed was dangerous to life, the substance is not a per se poison as that term is used in MCL 762.5 because the substance has legitimate medical uses. The only criminal act asserted by the prosecution was defendant's alleged delivery of the controlled substances, which occurred only in Wayne County, and defendant was not charged with any crimes related to poisoning anyone. Given that defendant had no direct contact with the decedent, the drug supply chain linking defendant's act in Wayne County to the decedent's death in Monroe County did not provide a basis for establishing venue in Monroe County under MCL 762.5. Accordingly, the trial court erred by concluding that venue was proper in Monroe County, and it abused its discretion by denying defendant's motion to dismiss.

Reversed and remanded.

1. CONTROLLED SUBSTANCES — DELIVERY OF CONTROLLED SUBSTANCES RESULTING IN DEATH — ELEMENTS OF OFFENSE.

MCL 750.317a provides a penalty enhancement when a defendant's criminal act—the delivery of a controlled substance in violation of MCL 333.7401—has the result or effect of causing a death to any other individual; to establish a violation of MCL 750.317a, the prosecution must prove (1) the defendant's act of delivering a controlled substance in violation of MCL 333.7401 and (2) the effect that a person died as a result of consuming the controlled substance; the defendant's criminal act is complete when the controlled substance is delivered; the statute punishes an individual's role in placing the controlled substance in the stream of commerce, even when the individual is not directly linked to the resultant death.

2. VENUE — CRIMINAL LAW — ACTS DONE IN PERPETRATION OF A FELONY — EFFECTS OF FELONY DO NOT ESTABLISH VENUE.

MCL 762.8—an exception to the general rule that defendants should be tried by a jury of the county where the offense was committed—provides that when a felony consists of two or more acts, venue for prosecution of the felony is proper in any county in which any one of the acts was committed; MCL 762.8 does not allow venue for prosecution in places where the effects of the criminal act are felt; it is the act that constitutes the felony, not the effects of the act, that gives rise to venue.

3. VENUE — CRIMINAL LAW — DIRECT ACTION BY DEFENDANT NECESSARY.

MCL 762.5—an exception to the rule that defendants should generally be tried by a jury of the county where the offense was committed—provides that an offense may be prosecuted in either county if any mortal wound is given or other violence or injury is inflicted or any poison is administered in one county by means of which death shall occur in another county; the mortal wound, injury, or poison must be inflicted on or administered to the victim directly by the defendant for venue to be proper under MCL 762.5 when the death subsequently occurs in a different county; venue is not automatically established under MCL 762.5 for the prosecution of an MCL 333.7401 charge even when the controlled substance could be considered a poison in a particular case; rather, the focus is on where the act of administering the poison occurred when determining venue under MCL 762.5.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *William P. Nichols*, Prosecut-

ing Attorney, and *Michael C. Brown*, Assistant Prosecuting Attorney, for the people.

Rockind Law (by *Neil Rockind* and *Noel Erinjeri*) for defendant.

Before: TALBOT, C.J., and BORRELLO and RIORDAN, JJ.

BORRELLO, J. In this interlocutory appeal, defendant appeals by leave granted[1] the trial court's order denying his motion to dismiss. Defendant is charged with one count of delivery of a controlled substance causing death (fentanyl), MCL 750.317a. Defendant argued in the trial court as well as on appeal that the trial court lacks "jurisdiction."[2] For the reasons set forth in this opinion, we reverse and remand the matter to the trial court for further proceedings consistent with this opinion.

I. BACKGROUND

This case arises out of the drug-related death of Nicholas Abraham. On December 12, 2016, Nicholas called William Ingall to tell Ingall that he was coming over because he wanted to get some heroin. Later that night, they traveled together in Nicholas's pickup truck to a house in Detroit to purchase heroin from defendant. Once they arrived in the area, Ingall called defendant's cell phone and informed defendant that he wanted to "get some heroin." Nicholas gave Ingall $100, and he waited in his pickup truck while Ingall left and purchased heroin from defendant inside a

[1] *People v McBurrows*, unpublished order of the Court of Appeals, entered July 13, 2017 (Docket No. 338552).

[2] As discussed in this opinion, defendant's argument is actually predicated on the claim that *venue* was improper in Monroe County.

nearby house. Ingall gave defendant $100, and defendant gave Ingall heroin that was wrapped up in paper.

Subsequently, Ingall returned to Nicholas's truck with the heroin, and they went to a nearby laundromat where they used the heroin. Ingall used approximately $20 worth of the heroin, and Nicholas used approximately $10 worth of the heroin. According to Ingall, the heroin "was really strong," and it "wasn't real bitter like the heroin would be." After Ingall noticed the strength of the heroin, he told Nicholas "to be careful with it."

Nicholas dropped Ingall off at Ingall's house and then went home. Nicholas lived in Monroe County with his wife, Michelle Abraham. After getting home at approximately 10:00 p.m. that evening, Nicholas put down two lines of heroin on a table and told Michelle to snort the heroin. Michelle passed out after she used the heroin. When she regained consciousness, she discovered that Nicholas was not breathing and tried unsuccessfully to resuscitate him. Nicholas was pronounced dead during the early morning hours of December 13, 2016. An autopsy was subsequently performed by Dr. Leigh Hlavaty of the Wayne County Medical Examiner's Office, who opined that Nicholas's death was caused by fentanyl toxicity. According to Detective Michael McClain of the Monroe County Sheriff's Office Vice Unit, fentanyl is sometimes used by heroin dealers as "a cutting agent to make the heroin more potent."

Defendant was charged with one count of delivery of fentanyl causing death, and he was bound over to the Monroe Circuit Court following his preliminary examination. Defendant subsequently moved to dismiss the prosecution's case on the ground that the trial court lacked "jurisdiction." Defendant contended that the

trial court lacked jurisdiction over him because the only "act" that he allegedly committed—the delivery of fentanyl—occurred in Wayne County and he did not commit any act in Monroe County given that Nicholas's death was not an "act" committed by defendant.

A hearing was held on defendant's motion, and the trial court denied the motion. The trial court ruled that defendant could be tried in either Wayne County or Monroe County because elements of the charged offense occurred in both of those counties. The trial court further reasoned that venue was authorized in Monroe County because a "mortal wound" was inflicted by means of the drug transaction, which resulted in a death in Monroe County.

We granted defendant's application for leave to appeal, as well as his motion to stay the proceedings pending resolution of this appeal.[3]

As a threshold matter, we note that although defendant has characterized his challenge as one involving the trial court's "jurisdiction," the question presented in this appeal is actually whether *venue* was properly laid in Monroe County. "Jurisdiction is the power [of a court] to act." *People v Johnson*, 427 Mich 98, 106 n 7; 398 NW2d 219 (1986) (opinion by BOYLE, J.) (quotation marks and citations omitted; alteration in original). "Michigan circuit courts are courts of general jurisdiction and unquestionably have jurisdiction over felony cases." *People v Lown*, 488 Mich 242, 268; 794 NW2d 9 (2011), citing Const 1963, art 6, §§ 1 and 13, MCL 600.151, MCL 600.601, and MCL 767.1. However, venue refers to the location, or forum, in which the trial is to be held. See *Gross v Gen Motors Corp*, 448 Mich 147, 156; 528 NW2d 707 (1995); *People v Webbs*, 263

[3] *McBurrows*, unpub order.

Mich App 531, 533; 689 NW2d 163 (2004). Therefore, defendant's appellate argument that the trial court erred because Monroe County is not a proper county in which to try this case is clearly a venue challenge.[4]

II. STANDARD OF REVIEW

"A trial court's determination regarding the existence of venue in a criminal prosecution is reviewed de novo." *People v Houthoofd*, 487 Mich 568, 579; 790 NW2d 315 (2010). "Venue is a part of every criminal prosecution and must be proved by the prosecutor beyond a reasonable doubt." *Webbs*, 263 Mich App at 533. "A trial court's ruling addressing a motion to dismiss is reviewed for an abuse of discretion." *People v Lewis*, 302 Mich App 338, 341; 839 NW2d 37 (2013). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Id*. (quotation marks and citation omitted).

Issues involving statutory interpretation are reviewed de novo. *Houthoofd*, 487 Mich at 579. "The primary purpose of a court when construing a statute is to discern and give effect to the Legislature's intent." *People v Rivera*, 301 Mich App 188, 192; 835 NW2d 464 (2013). "We begin by examining the plain language of the statute; where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006) (quotation marks and citation omitted). The words in a statute are inter-

[4] The trial court properly recognized that defendant's motion actually presented a venue challenge.

preted "in light of their ordinary meaning and their context within the statute . . . ." *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011).

III. ANALYSIS

"The general venue rule is that defendants should be tried in the county where the crime was committed." *Houthoofd*, 487 Mich at 579. "[E]xcept as the legislature for the furtherance of justice has otherwise provided reasonably and within the requirements of due process, the trial should be by a jury of the county or city where the offense was committed." *Id*. (quotation marks and citation omitted; alteration in original).

Accordingly, to determine the county in which venue is proper, it is necessary to determine the county where the offense was committed. This determination in turn requires an examination of the statute that defendant was charged with violating.

The crime of delivery of a controlled substance causing death is defined in MCL 750.317a, which provides as follows:

> A person who delivers a schedule 1 or 2 controlled substance, other than marihuana, to another person in violation of section 7401 of the public health code, 1978 PA 368, MCL 333.7401, that is consumed by that person or any other person and that causes the death of that person or other person is guilty of a felony punishable by imprisonment for life or any term of years.

In *People v Plunkett*, 485 Mich 50, 60; 780 NW2d 280 (2010), our Supreme Court explained that

> [i]t is clear from the plain language of the statute that MCL 750.317a provides *an additional punishment* for persons who "deliver[]" a controlled substance in violation of MCL 333.7401 when that substance is subsequently consumed by "any . . . person" and it causes that person's

> death. It punishes an individual's role in placing the controlled substance in the stream of commerce, even when that individual is not directly linked to the resultant death.
>
> Consequently, MCL 750.317a is a general intent crime, and as such does not require the intent that death occur from the controlled substance first delivered in violation of MCL 333.7401. Rather, the general intent required to violate MCL 750.317a is identical to the general intent required to violate MCL 333.7401(2)(a): the *delivery* of a schedule 1 or 2 controlled substance. [First emphasis added; other alterations in original.]

Thus, MCL 750.317a is properly understood as providing a penalty enhancement when a defendant's criminal *act*—the delivery of a controlled substance in violation of MCL 333.7401—has the *result* or *effect* of causing a death to any other individual. It is also clear, however, that a defendant's criminal act is complete upon the delivery of the controlled substance. Criminal liability has attached at that point. The effects of that completed action merely determine the degree of the penalty that a defendant will face despite the fact that a defendant need not commit any further acts causing the occurrence of any specific result (such as a death by drug overdose). In light of the plain language of the statute, establishing a defendant's violation of MCL 750.317a requires the prosecution to prove (1) the defendant's *act* of delivering a controlled substance in violation of MCL 333.7401 and (2) the *effect* that a person died as a result of consuming the controlled substance.

Establishing an act in violation of MCL 333.7401 with respect to a Schedule 1 or Schedule 2 controlled substance requires the prosecution to prove that the defendant delivered an amount of the controlled substance with knowledge that he was delivering a con-

trolled substance. *People v Collins*, 298 Mich App 458, 462; 828 NW2d 392 (2012). " 'Deliver' or 'delivery' means the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there is an agency relationship." MCL 333.7105(1). Fentanyl is classified as a Schedule 2 substance. MCL 333.7214(b).

In this case, the prosecution does not dispute that the alleged drug transaction between Ingall and defendant occurred in Detroit, within Wayne County. Ingall testified at the preliminary examination that while he was in Detroit, he gave defendant $100 in exchange for heroin. Presumably, this heroin was mixed with fentanyl. At that point, defendant's alleged criminal act—delivery of a controlled substance in violation of MCL 333.7401—was complete. *Plunkett*, 485 Mich at 60. The fact that Nicholas subsequently died may make defendant subject to prosecution under MCL 750.317a rather than MCL 333.7401, but that is not due to any further act on defendant's part. *Plunkett*, 485 Mich at 60. Because the alleged criminal offense was committed in Wayne County, venue is proper there. *Houthoofd*, 487 Mich at 579. Defendant did not commit any act in Monroe County. Accordingly, venue could only be proper in Monroe County if it was authorized by an applicable exception to the general rule that venue lies in the county where the crime was committed. *Id*.

The prosecution argues on appeal that two statutes that provide exceptions to the general rule regarding venue authorize venue in Monroe County, where the death occurred.

First, the prosecution argues that venue is proper in Monroe County under MCL 762.8, which provides that

> [w]henever a felony consists or is the culmination of 2 or more acts done in the perpetration of that felony, the

> felony may be prosecuted in any county where any of those acts were committed or in any county that the defendant intended the felony or acts done in perpetration of the felony to have an effect.

In *Houthoofd*, 487 Mich at 580, our Supreme Court construed the former version of MCL 762.8,[5] which provided as follows:

> Whenever a felony consists or is the culmination of 2 or more acts done in the perpetration thereof, said felony may be prosecuted in any county in which any 1 of said acts was committed.

The *Houthoofd* Court held that the statute unambiguously stated that "when a felony consists of two or more acts, venue for prosecution of the felony is proper in any county in which any one of the *acts* was committed" and that the "statute *does not* contemplate venue for prosecution in places where the *effects of the act are felt* . . . ." *Houthoofd*, 487 Mich at 583-584 (emphasis added). The Court emphasized that "it is the *act* that constitutes the felony—rather than its effects—that gives rise to venue." *Id*. at 585. The Legislature subsequently amended MCL 762.8 to also authorize venue "in any county that the defendant *intended* the felony or acts done in perpetration of the felony to have an effect." MCL 762.8, as amended by 2013 PA 128 (emphasis added).

In this case, defendant's alleged criminal *act* of delivering a controlled substance was complete upon concluding the transaction with Ingall, and this act took place entirely within Wayne County. There is no allegation that defendant committed any act in Monroe County. Because the alleged crime—with the exception of the sentencing enhancement for the death of

[5] 1948 CL 762.8.

Nicholas—was complete at the point of the sale, *Plunkett*, 485 Mich at 60, there was no further act to be committed "in the perpetration of that felony," MCL 762.8. It was only the *effect* of Nicholas's death that made defendant subject to potential additional punishment under MCL 750.317a. See *Plunkett*, 485 Mich at 60. In a prosecution under MCL 750.317a, it is not necessary for the prosecution to prove that the defendant intended for a death to occur, *Plunkett*, 485 Mich at 60, and there is no contention in this case that defendant harbored such an intent. Most importantly, there is no allegation or evidence that defendant *intended* such an effect to occur in Monroe County. MCL 762.8. Although MCL 762.8 was amended to authorize venue in a county where a defendant intended an act to have an effect, there still is no provision authorizing venue in a county where a defendant's act merely happens to have an effect. Therefore, MCL 762.8 does not authorize venue in Monroe County in this case. *Houthoofd*, 487 Mich at 583-585.

Next, the prosecution argues that venue is proper in Monroe County under MCL 762.5, which provides that "[i]f any mortal wound shall be given or other violence or injury shall be inflicted, or any poison shall be administered in 1 county by means whereof death shall ensue in another county, the offense may be prosecuted and punished in either county." In support of this theory of venue, the prosecution relies on our Supreme Court's decision in *People v Southwick*, 272 Mich 258; 261 NW 320 (1935). In *Southwick*, our Supreme Court held that venue was proper in Oakland County for the defendant's manslaughter by abortion charge when the defendant performed an illegal abortion in Jackson County and the victim subsequently died in Oakland County. *Id*. at 259-260, 262. Specifically, the amended information in that case stated that the defendant

> willfully and unlawfully administer[ed] to Aletha Hopps, certain medicines, drugs and substances and . . . use[d] certain instruments in and upon the body of the said Aletha Hopps, with intent to procure the miscarriage of the said Aletha Hopps, she the said Aletha Hopps being then and there a pregnant woman, and that the administering of said medicines, drugs and substances and by the use of certain instruments by the said Dr. Charles Southwick as aforesaid not being then and there necessary to preserve the life of said Aletha Hopps. [*Id*. at 260 (quotation marks omitted).]

In reaching its conclusion that venue was proper in Oakland County, the *Southwick* Court relied on 1929 CL 17123, a statute substantively identical to the current version of MCL 762.5. *Id*. at 262. The Court reasoned that the statute authorized venue in Oakland County because the "willful injuries were inflicted in Jackson county and death occurred in Oakland county." *Id*.

In this case, the prosecution asks this Court to find that for purposes of MCL 762.5, the alleged delivery constituted a mortal wound or injury such that the delivery of heroin containing fentanyl corresponds with the acts undertaken by the defendant in *Southwick*. We begin our analysis of this request by noting that neither MCL 762.5 nor our Supreme Court in *Southwick* defined the terms "wound" or "injury." We typically examine dictionary definitions for terms that are not defined in the statute. *People v Perkins*, 473 Mich 626, 639; 703 NW2d 448 (2005). There we find that the term "wound" means "an injury to the body (as from violence, accident, or surgery) that typically involves laceration or breaking of a membrane (as the skin) and usu. damage to underlying tissues." *Merriam-Webster's Collegiate Dictionary* (11th ed). The term "injury" is defined as "hurt, damage, or loss

sustained." *Id*. Although controlled substances can certainly have dangerous effects, there is no evidence in the instant case that defendant had any contact with Nicholas or directly transferred a controlled substance to Nicholas. Quite unlike the facts in *Southwick*, in which the defendant was charged with having administered medicines to the decedent and also having used "certain instruments" upon the decedent that caused her death, the record here establishes that the fentanyl entered Nicholas's body and caused his death as a result of his own actions related to using heroin; there is no evidence that defendant put any drug into Nicholas. Rather, defendant provided Ingall with a controlled substance that ultimately made its way to Nicholas. Therefore, unlike the circumstances in *Southwick*, there is no factual support here for this Court to conclude that defendant gave Nicholas a mortal wound or otherwise inflicted any injury *on him*.

The prosecution also asks this Court to find that heroin and fentanyl are poisons for purposes of MCL 762.5. The term "poison" is not defined within the statute, nor was this term defined by the *Southwick* Court. The term is also not defined in the Public Health Code, MCL 333.1101 *et seq*.; the Michigan Penal Code, MCL 750.1 *et seq*.; or the Code of Criminal Procedure, MCL 760.1 *et seq*. Turning to a dictionary, a "poison" is "[a]ny substance, either taken internally or applied externally, that is injurious to health or dangerous to life." *Stedman's Medical Dictionary* (26th ed).

Although the amount of fentanyl consumed by Nicholas was "dangerous to life" in this case, that does not mean that fentanyl is a per se poison in all cases. Fentanyl is classified as a Schedule 2 controlled substance, MCL 333.7214(b), in part because it has legiti-

mate medical uses. See MCL 333.7213 (stating that a substance shall be placed in Schedule 2 if it is found, among other things, that the "substance has currently accepted medical use in treatment in the United States, or currently accepted medical use with severe restrictions"). In contrast, heroin is not used for medical treatment and is accordingly classified as a Schedule 1 controlled substance. See MCL 333.7212(1)(b) (classifying heroin as a Schedule 1 controlled substance); MCL 333.7211 ("The administrator shall place a substance in schedule 1 if it finds that the substance has high potential for abuse and has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision."). Although heroin may be injurious to a person's health, the evidence in this case showed that Nicholas's death was caused by fentanyl toxicity rather than by heroin.

Nonetheless, even accepting the argument that a given controlled substance could be considered a poison in a particular case, that does not mean that MCL 762.5 is automatically satisfied such that this statute may be relied on to establish venue when the crime at issue is delivery of a controlled substance causing death. Examining the term "poison" in context, *Peltola*, 489 Mich at 181, we note that this venue statute refers to "*any poison . . . administered in 1 county . . . .*" MCL 762.5 (emphasis added). This implies an *action* related to the poisoning. Considering the term "poison" when used as a verb rather than as a noun, we find that "poison" or "poisoning" means "to injure or kill with poison." *Merriam-Webster's Collegiate Dictionary* (11th ed). "Poisoning" has also been defined as "[t]he administering of poison." *Stedman's Medical Dictionary* (26th ed).

Focusing on the use of the word "poison" as a verb is in accordance with the general proposition that for purposes of determining venue, the focus is on the "*act* that constitutes the felony." *Houthoofd*, 487 Mich at 585. In this case, the only criminal act put forth by the prosecution was defendant's alleged *delivery* of the controlled substance. As previously discussed, defendant's alleged criminal act was complete once the delivery occurred, and that delivery occurred entirely within Wayne County. Defendant has not been charged with any crime related to *poisoning* anyone. For example, he is not charged with first-degree murder by poisoning, see MCL 750.316(1)(a),[6] or mingling a poison or harmful substance with food, drink, nonprescription medicine, or a pharmaceutical product, see MCL 750.436(1)(a).[7] Moreover, for purposes of establishing venue, the lesson from *Southwick* is that the mortal wound, injury, or poison must be inflicted on or administered to the victim *directly* in order for venue to be proper under MCL 762.5 when the death subsequently occurs in a different county. It is not enough to depend on a drug supply chain to link a defendant's act in one county to the death in another county of a victim who had no contact with the defendant in order to rely on MCL 762.5 for establishing venue. In this case,

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[6] MCL 750.316(1)(a) provides that a person who commits "[m]urder by means of poison, lying in wait, or any other willful, deliberate, and premediated killing" is guilty of first-degree murder.

[7] MCL 750.436(1)(a) provides that a person shall not

> [w]illfully mingle a poison or harmful substance with a food, drink, nonprescription medicine, or pharmaceutical product, or willfully place a poison or harmful substance in a spring, well, reservoir, or public water supply, knowing or having reason to know that the food, drink, nonprescription medicine, pharmaceutical product, or water may be ingested or used by a person to his or her injury.

there is no support for the contention that defendant administered anything *to* Nicholas.

In sum, without any evidence that defendant either administered a poison or inflicted a mortal wound to or other violence or injury on Nicholas, MCL 762.5 is inapplicable to this case and does not provide a basis for establishing venue in Monroe County. Therefore, the trial court erred by ruling that venue was proper in Monroe County, and the court abused its discretion by denying defendant's motion to dismiss.

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

TALBOT, C.J., and RIORDAN, J., concurred with BORRELLO, J.

BATTON-JAJUGA v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN

Docket No. 334130. Submitted December 12, 2017, at Lansing. Decided December 21, 2017, at 9:00 a.m. Leave to appeal denied 502 Mich 938.

Debra Batton-Jajuga brought an action in the Livingston Circuit Court against Farm Bureau General Insurance Company of Michigan, alleging breach of contract and seeking damages when Farm Bureau, the insurer of Batton-Jajuga's real property in Monroe, Michigan, refused to pay any replacement costs after the Monroe property was destroyed in a fire and Batton-Jajuga attempted to replace the destroyed property with different property purchased with a land contract. Farm Bureau insured Batton-Jajuga's Monroe property up to $289,000. The parties' agreement included two types of property coverage: (1) indemnification up to the depreciated value of the property (i.e., the actual cash value), and (2) replacement-cost coverage (i.e., the full cost of repair or replacement above the actual cash value). Under the replacement-cost coverage provision, payment of replacement cost was subject to the condition that "actual repair or replacement" be "complete." Additionally, the replacement-cost coverage provision limited the replacement-cost payment to the lesser of (a) the agreement's overall coverage cap ($289,000), (b) the replacement-cost value of the loss, or (c) the necessary amount actually spent to repair or replace the damaged building. The parties agreed that the replacement-cost value of the loss was $179,811.23, and Farm Bureau promptly paid Batton-Jajuga $93,000 (the actual cash value of the destroyed property minus a $1,000 deductible). After adjusting for an additional $1,085.33 in nonrecoverable depreciation, Farm Bureau held back the remaining $83,725.90 while Batton-Jajuga attempted to identify a replacement property. Batton-Jajuga eventually located replacement property in Pinckney, Michigan. She purchased the property by land contract for $200,000, with $40,000 paid immediately as a down payment and the remaining balance to be paid with monthly installments over 15 years. Several days after she purchased the Pinckney property, Batton-Jajuga submitted a claim with Farm Bureau for the remaining $83,725.90. Farm Bureau denied the claim, asserting that Batton-Jajuga had spent

nothing to repair or replace the damaged building and that acquisition of another property under a land contract did not constitute "replacement" of the damaged building within the meaning of the replacement-cost coverage provision. Batton-Jajuga brought the instant suit for breach of contract and sought damages of $83,725.90 as well as additional consequential and incidental damages. Both parties moved for summary disposition. The court, Michael P. Hatty, J., granted Batton-Jajuga summary disposition and awarded her the replacement-cost amount as well as statutory interest and fees, but the court denied her any additional damages or contractual attorney fees. Farm Bureau appealed.

The Court of Appeals *held*:

1. Under MCL 500.2826, an insurer may reimburse and indemnify the insured for the amount above the property's actual cash value that is actually expended to repair, rebuild, or replace the damaged property, not to exceed the coverage cap. MCL 500.2826 further states that a fire policy issued pursuant to this section may provide that there shall be no liability by the insurer to pay the amount specified in the policy unless the property damaged is actually repaired, rebuilt, or replaced at the same or another site. Neither MCL 500.2826 nor the parties' agreement defined the terms "replace," "replacement," "actual," or "complete," and a review of the statute and agreement provided little contextual insight into the meaning of the terms; therefore, dictionary definitions were consulted, and the replacement-cost condition was construed to mean: *In fact, as opposed to potentially or possibly, the insured has acquired a full, entire substitute—i.e., a complete replacement—for the damaged property*. Therefore, the question was whether Batton-Jajuga's acquisition of the Pinckney property was a full, entire—i.e., complete—substitute for her destroyed Monroe property. Farm Bureau argued that the Pinckney property was not a complete replacement because Batton-Jajuga did not obtain a fee simple in the property upon sale but instead only received equitable title under the land contract. However, when a vendee purchases property under a land contract, the vendee becomes, in a real sense, the owner of that property. While the vendee may not immediately acquire full title in the property, the vendee does acquire equitable title and the remaining legal title is simply held in trust by the vendor. In this case, the land contract was binding and unconditional upon execution, as opposed to a mere option to buy upon the satisfaction of a future condition. Batton-Jajuga gave real consideration to the vendor, both in the form of a $40,000 down payment and an

unconditional promise to pay the remaining balance in future monthly installments. Under state law, she obtained equitable title to the property and, thus, she could sell, devise, or encumber the property as she saw fit. Accordingly, Batton-Jajuga made a complete replacement of her destroyed Monroe property when she acquired the Pinckney property by land contract.

2. Under Michigan law, the sale of real property under a land contract operates as an equitable conversion. Under the doctrine of equitable conversion, equity treats the sale as actually taking place when the land contract becomes effective. Accordingly, in equity a contract for the sale of land is treated, for most purposes, precisely as if it had been specifically performed. In this case, Farm Bureau's replacement-cost coverage provision limited the replacement-cost payment to "the necessary amount actually spent to repair or replace the damaged building." Farm Bureau argued that Batton-Jajuga had actually spent only $46,629.58 (the down payment and several monthly installments) at the time she made her claim for replacement costs, which was less than the amount that Farm Bureau had already paid to her as the actual cash value of the destroyed property. However, when the land contract became effective, Batton-Jajuga became the equitable owner of the Pinckney property, and the vendor became the equitable owner of the purchase money ($200,000). Under the doctrine of equitable conversion, because the land contract was unconditional and effective, Batton-Jajuga had "actually spent" the $200,000 in purchase money before she made her claim with Farm Bureau. This amount exceeded the replacement-cost value of the loss ($179,811.23), and, thus, Batton-Jajuga was entitled to the lesser replacement-cost value minus the actual-cash-value payment she had already received (i.e., $179,811.23 - $94,000 (actual cash value) - $1,000 (deductible) - $1,085.33 (nonrecoverable depreciation) = $83,725.90). Accordingly, the trial court did not err when it held that there was no genuine issue of material fact that Farm Bureau was liable for the unpaid replacement costs as well as applicable statutory fees and interest.

Affirmed.

CONTRACTS — PROPERTY — SALE OF REAL PROPERTY — EQUITABLE CONVERSION.

When a vendee purchases real property under a land contract, the vendee becomes, in a real sense, the owner of that property; while the vendee may not immediately acquire full title in the property, the vendee does acquire equitable title and the remaining legal title is simply held in trust by the vendor.

Donald M. Fulkerson and *Fabian, Sklar & King, PC* (by *Jason L. Liss*) for Debra Batton-Jajuga.

Law Offices of John Honeyman, PLLC (by *John D. Honeyman*) and *Willingham & Coté, PC* (by *Kimberlee A. Hillock*) for Farm Bureau General Insurance Company of Michigan.

Before: MURPHY, P.J., and M. J. KELLY and SWARTZLE, JJ.

SWARTZLE, J. Defendant Farm Bureau General Insurance Company of Michigan (Farm Bureau) insured real property owned by plaintiff Debra Batton-Jajuga, and the property was destroyed in a fire. Batton-Jajuga had indemnification coverage as well as replacement-cost coverage. When she attempted to replace her destroyed property with different property purchased with a land contract, Farm Bureau refused to pay any replacement costs. Farm Bureau claimed that Batton-Jajuga's interest in the new property was less than a fee simple and therefore was not a "complete" replacement.

Farm Bureau breached the insurance agreement by refusing to pay. While a vendee to a land contract does not immediately acquire a full fee simple in the real property, the vendee does become the equitable owner of the property when the contract becomes effective, and this was sufficient under the law and the parties' agreement. Accordingly, we affirm the trial court's grant of summary disposition to plaintiff.

I. BACKGROUND

The relevant facts are not in dispute. Farm Bureau insured Batton-Jajuga's real property located in Mon-

roe, Michigan up to $289,000. The parties' agreement included two types of property coverage: (1) indemnification up to the depreciated value of the property (i.e., the actual cash value); and (2) replacement-cost coverage (i.e., the full cost of repair or replacement above the actual cash value). With respect to replacement-cost coverage, the parties' agreement provided in pertinent part:

> 5. **Loss Settlement.** Covered property losses are settled as follows:
>
> b. Buildings under Coverage A or Coverage B at replacement cost . . . subject to the following:
>
> (1) If, at the time of loss, the amount of insurance in this policy on the damaged building is 80% or more of the full replacement cost of the building immediately before the loss, we will pay the cost to repair or replace, after application of deductible and without deduction for depreciation, but not more than the least of the following amounts:
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> (a) the limit of liability under this policy that applies to the building;
>
> (b) the replacement cost of that part of the building damaged for like construction and use on the same premises; or
>
> (c) the necessary amount actually spent to repair or replace the damaged building.
>
> * * *
>
> (4) We will pay no more than the actual cash value of the damage, unless:
>
> (a) actual repair or replacement is complete; . . . .

A fire destroyed Batton-Jajuga's property in October 2014. The parties agreed that the replacement-cost value of the loss was $179,811.23, and Farm Bureau promptly paid Batton-Jajuga $93,000 (the actual cash

value of the destroyed property minus a $1,000 deductible). After adjusting for an additional $1,085.33 in nonrecoverable depreciation, Farm Bureau held back the remaining $83,725.90 while Batton-Jajuga attempted to identify a replacement property.

In April 2015, Batton-Jajuga located replacement property in Pinckney, Michigan. She purchased the property by land contract for $200,000, with $40,000 paid immediately as a down payment and the remaining balance to be paid with monthly installments over 15 years. While an initial version of the land contract made the sale contingent on Farm Bureau paying replacement costs to Batton-Jajuga, that provision was removed from the final version. The version executed in June 2015 made the sale unconditional and provided that, in the event of default, the vendor had the right to declare a forfeiture of the property and take immediate possession as well as seek payment of any unpaid balance due under the contract. The contract further stated, "The Land Contract can be paid off in full at anytime with no pre-payment penalty."

Several days after she purchased the Pinckney property, Batton-Jajuga submitted a claim with Farm Bureau for the remaining $83,725.90. Given the lack of any prepayment penalty, she suggested that Farm Bureau could pay the remaining amount directly to the vendor to reduce the balance owed on the land contract. Farm Bureau refused, asserting that Batton-Jajuga had "spent nothing to repair or replace the damaged building" and that "[a]cquisition of another property under a land contract does not constitute 'replacement' of the damaged building within the meaning" of the replacement-cost coverage provision. Farm Bureau subsequently clarified that "the documents supplied [by Batton-Jajuga] suggest an expen-

diture by [her] of $40,000 under the land contract," but otherwise the company maintained that its position remained unchanged.

Batton-Jajuga sued Farm Bureau for breach of contract and sought damages of $83,725.90 as well as additional consequential and incidental damages. She later moved for summary disposition under MCR 2.116(C)(10) and in its response, Farm Bureau likewise sought summary disposition under MCR 2.116(I)(2). The trial court granted Batton-Jajuga summary disposition and awarded her the replacement-cost amount as well as statutory interest and fees, but the trial court denied her any additional damages or contractual attorney fees.

Farm Bureau appealed as of right.

II. ANALYSIS

A. STANDARD OF REVIEW

On appeal, this Court reviews de novo a trial court's ruling on summary disposition. Summary disposition is appropriate under MCR 2.116(C)(10) when, except as to damages, "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." We construe the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to Farm Bureau as the nonmovant. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). This Court also reviews de novo questions of law, including the meaning of statutes and contracts. *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998); *Reed v Reed*, 265 Mich App 131, 141; 693 NW2d 825 (2005).

Our duty in interpreting a statute or a contract is to give effect to the intent of the drafter. *Van Buren Co Ed Ass'n v Decatur Pub Sch*, 309 Mich App 630, 643; 872 NW2d 710 (2015); *In re Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007). In both the statutory and contractual contexts, the drafter is presumed to intend the meaning clearly expressed, and this Court gives effect to the plain, ordinary, or generally accepted meaning of the drafter's words. *Terrien v Zwit*, 467 Mich 56, 76-77; 648 NW2d 602 (2002); *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992). Only when ambiguity exists does the Court turn to common canons of construction for aid in construing a text's meaning. *People v Borchard-Ruhland*, 460 Mich 278, 284-285; 597 NW2d 1 (1999); *People v Stone Transp, Inc*, 241 Mich App 49, 50-51; 613 NW2d 737 (2000). Finally, in the absence of a statutory or contractual definition, the Court "may turn to dictionaries in common usage for guidance." *In re Detmer*, 321 Mich App 49, 62; 910 NW2d 318 (2017).

B. FARM BUREAU BREACHED THE INSURANCE AGREEMENT

Farm Bureau makes two arguments on appeal. First, Farm Bureau argues that the property interest conveyed by land contract is not a complete replacement for Batton-Jajuga's fee simple in the destroyed property, and, therefore, she has failed to satisfy the precondition for any replacement-cost recovery under ¶ 5.b(4)(a) of the agreement. Second, Farm Bureau claims that, regardless of the type of property interest conveyed, Batton-Jajuga only spent $46,629.58 (the down payment and several monthly installments) when she made her claim for replacement costs, and because this amount was less than the $93,000 she had

already received, she is not entitled to anything more under the replacement-cost measure of ¶ 5.b(1)(c). Both arguments fail.

1. BATTON-JAJUGA ACQUIRED A "COMPLETE" REPLACEMENT

Michigan law expressly permits an insurer to offer replacement-cost coverage for property damaged by fire. Specifically, under MCL 500.2826, an insurer may "reimburse and indemnify the insured" for the amount above the property's actual cash value that is "actually expended to repair, rebuild, or replace" the damaged property, not to exceed the coverage cap. The statute further states, "A fire policy issued pursuant to this section may provide that there shall be no liability by the insurer to pay the amount specified in the policy unless the property damaged is actually repaired, rebuilt, or replaced at the same or another site."

Pursuant to state law, Farm Bureau offered replacement-cost coverage in Michigan in a form consistent with coverage offered in other states. See, e.g., *Pierce v Farm Bureau Mut Ins Co*, 548 NW2d 551, 554 (Iowa, 1996) (construing a replacement-loss coverage provision identical in all material respects to the one in this case); Parker, *Replacement Cost Coverage: A Legal Primer*, 34 Wake Forest L Rev 295, 301-302 (1999) (analyzing a form provision of replacement-cost coverage that is identical in all material respects to the one in this case). Batton-Jajuga purchased replacement-cost coverage from Farm Bureau, and payment of replacement cost was subject to the condition that "actual repair or replacement" be "complete." Neither the statute nor the agreement defined the terms "replace," "replacement," "actual," or "complete," and a review of the statute and agreement provides little contextual insight into the meaning of the terms.

Given this, we turn to a dictionary in common usage, here the *Oxford English Dictionary* (2d). "Replace" is defined in relevant terms as: "To restore to a previous place or position" or "To take the place of, become a substitute for (a person or thing)." "Replacement" is defined as "Something which or someone who replaces another." "Actual" is defined as "Existing in act or fact; really acted or acting; carried out; real;—opposed to *potential*, *possible*, *virtual*, *theoretical*, *ideal*." And "complete" is defined as "Having all of its parts or members; . . . embracing all the requisite items, details, topics, etc.; entire, full" and "Of an action, state, or quality: Realized in its full extent; entire, thorough." With these dictionary definitions in hand, the replacement-cost condition can be understood to mean: *In fact, as opposed to potentially or possibly, the insured has acquired a full, entire substitute for the damaged property*.

Farm Bureau does not dispute that, in terms of any physical or geographical attribute, the Pinckney property is a full, entire substitute—i.e., a complete replacement—for the damaged Monroe property. Indeed, MCL 500.2827 expressly contemplates that replacement can be made at a location different from that of the insured property. Rather, Farm Bureau argues that the Pinckney property is not a complete replacement because Batton-Jajuga did not obtain a fee simple in the property upon sale, but instead only received equitable title under the land contract. Batton-Jajuga had a fee simple in the Monroe property, but with the Pinckney property, she acquired only equitable title in fee, with legal title remaining with the vendor until the balance is paid. In Farm Bureau's view, ownership under a land contract is a lesser form of ownership, something akin to a lease-with-an-option-to-buy arrangement.

If the relevant question was whether an equitable title is identical in all material respects to a fee simple, then Farm Bureau's position would be unassailable. This is not, however, the relevant question, as it would conflate the term actually used in the contractual provision—*complete*—with a different term not used in the provision—*identical*. Instead, we must consider whether Batton-Jajuga's acquisition of the Pinckney property is a full, entire—i.e., *complete*—substitute for her destroyed Monroe property. And on that question, Batton-Jajuga is on much firmer ground.

As noted, there is no dispute that the Pinckney property is physically and geographically a complete replacement. As to the legal interests in the Pinckney property, as our Supreme Court has explained, upon signing the land contract, "the vendee has, in a real sense, purchased the relevant property." *Graves v American Acceptance Mtg Corp (On Rehearing)*, 469 Mich 608, 616; 677 NW2d 829 (2004). More specifically, the vendee acquires " 'seisin' and a present interest in the property that may be sold, devised, or encumbered." *Id*. The vendee has obtained, in other words, full equitable title to the property, while legal title remains with the vendor until satisfaction of the conditions of the land contract. As the Supreme Court expressly cautioned in *Graves*, "That the vendee may ultimately default on the contract does not negate the fact that the vendee has, in a real sense, purchased the relevant property." *Id*. Thus, under Michigan law, Batton-Jajuga is the owner of the Pinckney property, holding equitable title to it, while the vendor holds legal title in trust for her until the conditions of the land contract are fulfilled. *Id*.; *Pittsfield Charter Twp v City of Saline*, 103 Mich App 99, 103; 302 NW2d 608 (1981).

The argument advanced here by Farm Bureau was earlier analyzed by the Supreme Court of Iowa in *Pierce*. In that case involving a sister Farm Bureau entity, the parties had entered into an insurance agreement with a replacement-cost coverage provision materially indistinguishable from the one here. The insured had purchased replacement property under a land contract, but the insurer refused to pay, claiming that the land contract had not been executed in time. Before determining whether the timing was even relevant, the Iowa court examined whether the legal interests obtained by the insured constituted a "bona fide replacement" under the insurance agreement. Or, as it framed the question, "[D]id the [insureds] fully or entirely supplant their damaged dwelling with a substitute or equivalent dwelling when they executed the real estate contract with the [vendors]?" *Pierce*, 548 NW2d at 555.

The answer was *yes*, according to the Iowa court. It recognized that, under the common law, "when the vendee contracts to buy and the vendor to sell, though legal title has not yet passed, in equity the vendee becomes the owner of the land, [and] the vendor of the purchase money." *Id*. (citation and quotation marks omitted). The court concluded that "such contracts satisfy the 'actual and complete' replacement requirement of the replacement cost provision." *Id*. at 556. The court further noted that the Farm Bureau entity in that case had "no quarrel" with this legal conclusion. *Id*.

On the question of whether replacement was complete, Farm Bureau in the present case does not distinguish *Pierce* other than to point out that it is not binding on Michigan courts and that its sister company essentially agreed with the Iowa court. Based on the latter point, Farm Bureau asserts that the Iowa court

"engaged in no discussion or analysis of the issue." This assertion is belied by a number of reasons when performing a plain-language reading of the court's decision, not least of which is the fact that the court's analysis takes up several single-spaced pages in the reporter. Although we agree with Farm Bureau that *Pierce* is not binding, we do find the Iowa court's analysis to be thoughtful and in line with relevant Michigan law.

Moreover, although we do not find the pertinent language ambiguous, even if we did,[1] we note that Farm Bureau drafted the agreement and any ambiguity must be read in favor of Batton-Jajuga as the nondrafter. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 62; 664 NW2d 776 (2003). The replacement-cost coverage provision is boilerplate language. Nowhere in the agreement did Farm Bureau discuss fee simple, equitable title, legal title, seisin, bundles of property interests, or the like. It did, though, broadly contrast "owner" with "tenant" in another provision of the agreement, confirming that Farm Bureau could distinguish between different types of interests in property when it deemed the matter of sufficient import.

Nor is this a novel legal issue, one that could not be reasonably anticipated by the drafter. The *Pierce* decision was issued in 1996 and involved a sister Farm Bureau company, and the Michigan Supreme Court's decision in *Graves* was issued in 2004. And as for the interests impacted by the sale of real property by land

[1] The construction of an ambiguous contract is generally a question of fact reserved for the fact-finder. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003). Because we do not find the contractual provision ambiguous, we need not remand to the trial court. Moreover, the contract language is drawn from and mirrors the statutory language, and construction of a statute is a question of law. *Mayor of Cadillac v Blackburn*, 306 Mich App 512, 516; 857 NW2d 529 (2014).

contract, as well as the distinction between legal and equitable titles more generally, it is fair to say that these topics have been the bane of first-year law students for decades. Thus, had Farm Bureau intended that, for a replacement to be complete under its insurance agreement, the insured must obtain both equitable and legal titles at the time of purchase, the insurer could have explicitly said so—and that it did not must be given effect.

Accordingly, informed by *Pierce* and following *Graves* and other Michigan precedent, we conclude that Batton-Jajuga made a complete replacement of her destroyed property when she acquired the Pinckney property by land contract. The land contract was binding and unconditional upon execution, as opposed to a mere option to buy upon the satisfaction of a future condition. Batton-Jajuga gave real consideration to the vendor, both in the form of a $40,000 down payment and an unconditional promise to pay the remaining balance in future monthly installments. Under state law, she obtained equitable title to the property and, thus, she may sell, devise, or encumber the property as she sees fit. She did, "in a real sense, purchase[]" the Pinckney property, *Graves*, 469 Mich at 616, and thus she made a complete replacement under the parties' agreement.

2. BATTON-JAJUGA "ACTUALLY SPENT" THE PURCHASE MONEY BEFORE MAKING A CLAIM FOR REPLACEMENT COSTS

Farm Bureau also argues on appeal that, regardless of whether or not the Pinckney property was a complete replacement, Batton-Jajuga had "actually spent" only $46,629.58 at the time she made her claim, which was less than the amount that Farm Bureau had already paid to her as the actual cash value of the

destroyed property. In support, Farm Bureau points to ¶ 5.b(1) of the agreement, which limits any replacement-cost payment to the *lesser* of (a) the agreement's overall coverage cap ($289,000); (b) the replacement-cost value of the loss ($179,811.23); or (c) "the necessary amount actually spent to repair or replace the damaged building." Under Farm Bureau's reading of provision (c), to be entitled to receive any payment for replacement costs, Batton-Jajuga would have had to have paid out-of-pocket something more than the actual cash value payment she had already received. In essence, according to Farm Bureau, Batton-Jajuga had no compensable replacement costs because her out-of-pocket payment for the Pinckney property was less than what she received as the actual cash value of her destroyed Monroe property. Batton-Jajuga responds that she actually spent $200,000 before she submitted her claim, as that amount was the agreed-upon purchase price for the replacement property.

Under Michigan law, the sale of real property under a land contract "operates as an equitable conversion[.]" *Pittsfield Charter Twp*, 103 Mich App at 103 (quotation marks and citation omitted). Under the doctrine of equitable conversion, equity treats the sale as actually taking place when the land contract becomes effective. This view "is based on the maxim that 'equity regards and treats as done what, in good conscience, ought to be done.' " *Id*. (quotation marks and citation omitted). "Accordingly, in equity a contract for the sale of land is treated, for most purposes, precisely as if it had been specifically performed." *Id*. (quotation marks and citation omitted); see also *Mich Trust Co v Baker*, 226 Mich 72, 77; 196 NW 976 (1924) ("Whether this has been accomplished in fact or not is of no moment for, if not done, it is to be done, and the doctrine of equitable

conversion governs and considers it as actually performed."); *Wood v Donohue*, 136 Ohio App 3d 336, 339; 736 NE2d 556 (1999) (holding that, in the context of a land contract sale, "the seller, in equity, becomes the owner of the purchase money, and the purchaser becomes the owner of the property").

In its reply brief, Farm Bureau suggests that "it is unclear whether equitable conversion has survived the passage of the land contract mortgage act, MCL 565.356, *et seq*." Other than briefly alluding to the issue, Farm Bureau has failed to develop it with any rigor and therefore has waived it. *Bruley Trust v City of Birmingham*, 259 Mich App 619, 631 n 28; 675 NW2d 910 (2003). In any event, under Article 3, § 7, of Michigan's 1963 Constitution, common-law doctrines remain in force until they are "changed, amended or repealed" by statute. This Court does not lightly infer that our Legislature intended to abrogate or modify the common law. Rather, this Court presumes that the common law remains intact, even when the Legislature enacts a statute on the same or a similar subject. See *Butler v Grand Rapids*, 273 Mich 674, 679; 263 NW 767 (1935). Having reviewed the act, we find no clear indication that the Legislature intended to abrogate or modify the doctrine of equitable conversion as applied to land contracts.

Therefore, when the land contract became effective, Batton-Jajuga became the equitable owner of the Pinckney property, and the vendor became the equitable owner of the purchase money, $200,000. Under the doctrine of equitable conversion, because the land contract was unconditional and effective, Batton-Jajuga had "actually spent" the $200,000 in purchase money before she made her claim with Farm Bureau. This amount exceeded the replacement-cost value of

the loss ($179,811.23), and, thus, Batton-Jajuga was entitled to the lesser replacement-cost value minus the actual-cash-value payment she had already received (i.e., $179,811.23 - $94,000 (actual cash value) - $1,000 (deductible) - $1,085.33 (nonrecoverable depreciation) = $83,725.90).

III. CONCLUSION

When a vendee purchases property under a land contract, the vendee becomes, in a real sense, the owner of that property. While the vendee may not immediately acquire full title in the property, the vendee does acquire equitable title and the remaining legal title is simply held in trust by the vendor. Under the parties' replacement-cost coverage, which required that the insured obtain a complete replacement for the destroyed property, Batton-Jajuga satisfied the requirement when she became the owner of real property under a land contract. Moreover, in equity, she had actually spent the purchase money when the land contract became effective. Accordingly, there is no genuine issue of material fact that Farm Bureau is liable for the unpaid replacement costs as well as applicable statutory fees and interest.

Affirmed. As the prevailing party, plaintiff may tax costs under MCR 7.219.

MURPHY, P.J., and M. J. KELLY, J., concurred with SWARTZLE, J.

SCHUBERT v DEPARTMENT OF TREASURY

Docket No. 337121. Submitted December 12, 2017, at Lansing. Decided December 21, 2017, at 9:05 a.m. Leave to appeal denied 503 Mich 858.

Dale J. Schubert filed a property-tax appeal petition in the Tax Tribunal, alleging that the Department of Treasury erred when it determined that the estate of Marguerite Schubert was not entitled to a principal-residence exemption (PRE) under MCL 211.7cc(1) for the 2010 through 2013 tax years. Marguerite, who passed away in 2014, purchased a home in Ludington in 1977 with her husband, and Marguerite claimed a PRE for the Ludington property from 1994 through 2013. In 2013, the department retroactively denied Marguerite the PRE for the 2010, 2011, and 2012 tax years and also denied the PRE for the 2013 tax year, concluding that Marguerite had not owned and occupied the Ludington property as her principal residence during those years. The tribunal ultimately affirmed the department's denial of the PRE for the 2010 through 2013 tax years. The tribunal reasoned that while Marguerite had a presence at the Ludington property from 2010 through 2012, evidence established that an apartment in Midland was her principal residence during those years. Moreover, because Marguerite had not occupied the Ludington property as her principal residence before moving into a nursing home in 2013, she did not qualify under MCL 211.7cc(5) for a PRE in that year either. Dale appealed.

The Court of Appeals *held*:

1. A property owner must file an affidavit with the department to receive a PRE. MCL 211.7cc(2) provides that the affidavit must state that the property is owned and occupied as a principal residence by that owner of the property on the date that the affidavit is signed. The statute plainly requires that a person claiming a PRE establish that he or she owned *and* occupied the property as a principal residence for each year that the exemption is claimed, not just on the date the affidavit is filed. The phrase "principal residence" means 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; generally, a principal residence includes only that portion of a dwelling that is owned and occupied by an owner of the dwelling. To "occupy" a property for purposes of MCL 211.7cc(2), a person must dwell either permanently or continuously at the property. An owner claiming a PRE has a continuing requirement to use the property as his or her principal residence. Accordingly, even though MCL 211.7dd(c) provides that an owner's principal residence will continue until a new principal residence is established, under MCL 211.7cc(5), an owner must rescind the PRE when the owner stops using the property as his or her principal residence. However—regardless of whether the owner rescinds his or her exemption claim—the department may review the validity of an owner's PRE claim to determine whether the property is the owner's principal residence.

2. In this case, the tribunal did not commit an error of law when it reviewed Marguerite's PRE claim to determine whether the Ludington property was Marguerite's principal residence for the relevant tax years, whether she owned and occupied the property during those years, and whether she had stopped using it as her principal residence during that period. The tribunal was entitled to rely on and give greater weight to the challenged documents submitted by the department rather than on those submitted by Dale. Given the evidence on the record, the tribunal's determination that Marguerite used her Midland apartment as her principal residence during the tax years in question was supported by competent, material, and substantial evidence on the whole record.

Affirmed.

1. TAXATION — GENERAL PROPERTY TAX ACT — PRINCIPAL-RESIDENCE EXEMPTION — OWNED AND OCCUPIED.

To receive a principal-residence exemption (PRE) under MCL 211.7cc(1), a property owner must file an affidavit with the Department of Treasury that states the property is owned and occupied as a principal residence by that owner of the property on the date that the affidavit is signed; MCL 211.7cc(2) requires that a person claiming a PRE establish that he or she owned *and* occupied the property as a principal residence for each year that the exemption is claimed; to "occupy" a property for purposes of MCL 211.7cc(2), a person must dwell either permanently or continuously at the property.

2. TAXATION — GENERAL PROPERTY TAX ACT — PRINCIPAL-RESIDENCE EXEMPTION — WORDS AND PHRASES — "PRINCIPAL RESIDENCE."

For purposes of the MCL 211.7cc(1) principal-residence exemption,

the phrase "principal residence" means 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; generally, a principal residence includes only that portion of a dwelling that is owned and occupied by an owner of the dwelling.

3. TAXATION — GENERAL PROPERTY TAX ACT — PRINCIPAL-RESIDENCE EXEMPTION — NO RESCISSION OF CLAIM — REVIEW BY DEPARTMENT OF TREASURY ALLOWED.

An owner claiming a principal-residence exemption (PRE) under MCL 211.7cc(1) has a continuing requirement to use the property as his or her principal residence; even though MCL 211.7dd(c) provides that an owner's principal residence will continue until a new principal residence is established, MCL 211.7cc(5) requires an owner to rescind the PRE when the owner stops using the property as his or her principal residence; regardless of whether the owner rescinds his or her exemption claim, the Department of Treasury may review the validity of an owner's PRE claim to determine whether the property is the owner's principal residence.

Dale J. Schubert *in propria persona*.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *James A. Ziehmer*, Assistant Attorney General, for respondent.

Before: MURPHY, P.J., and M. J. KELLY and SWARTZLE, JJ.

PER CURIAM. Petitioner, Dale Schubert, as personal representative of the Estate of Marguerite Schubert,[1] appeals as of right the Tax Tribunal order determining that the Estate was not entitled to a principal-residence exemption (PRE), MCL 211.7cc(1), for the

[1] References in this opinion to "Schubert" are to the decedent, Marguerite Schubert.

2010, 2011, 2012, and 2013 tax years. For the reasons stated in this opinion, we affirm.

I. BASIC FACTS

The subject property is a residential property located in Ludington, Michigan. Schubert and her husband purchased the property in 1977. According to petitioner, Schubert first filed an affidavit claiming a PRE for the property in 1994, and it was granted at that time.[2] It appears that from 1994 until 2013, Schubert continued to claim and receive a PRE on the Ludington property. However, around August 2013, the Department began an audit of the property. And on November 14, 2013, the PRE was denied for the 2010, 2011, 2012, and 2013 tax years after the Department determined that the Ludington property was not owned and occupied as Schubert's principal residence.

Schubert, through her personal representative, sought an informal conference before the Department's PRE unit. The hearing was held on September 22, 2014.[3] Petitioner asserted that before her retirement, Schubert was a public school teacher in Midland, Michigan. After her retirement, she continued to use a Midland apartment as her mailing address until her son took over responsibility for her bills. Additionally, her extended family remained in Midland, and she continued to see doctors in Midland. Petitioner represented to the conference referee that Schubert had intended to live at the Ludington property during her retirement. Schubert's son explained at the conference that Schubert had seasonally resided in Florida, Ari-

[2] A copy of the 1994 affidavit is not available in the lower court record; however, this fact is not disputed by respondent, the Department of Treasury.

[3] Schubert died on May 22, 2014.

zona, Midland, and Ludington but that she had spent most of the year at the Ludington property.[4] He maintained that Schubert had only kept the apartment in Midland for convenience. In the summer of 2012, Schubert moved into a rehabilitation center, where she stayed until September or October 2012. She then returned to the Ludington property. In the fall of 2013, she entered a different rehabilitation facility, where she remained until her death in 2014.

Despite the facts presented by petitioner, the Department maintained that its denial of the PRE was proper for a number of reasons. First, it questioned whether Schubert was an "owner" as defined by MCL 211.7dd(a). Second, it contended that there was no evidence that Schubert had occupied the Ludington property as her principal residence during the 2010 through 2013 tax years. Third, the Department asserted that in 2012 and 2013, when Schubert was at the rehabilitation facilities, she did not maintain an intent to return to the Ludington property and she did not meet the requirements to retain the exemption under MCL 211.7cc(5)(a), (b), or (c).

The informal conference referee found that Schubert was an owner of the Ludington property because she was a grantor who had placed her property in a revocable trust. See MCL 211.7dd(a)(*vi*). The referee, however, determined that petitioner had failed to present any documentation showing that the Ludington property was Schubert's principal residence, whereas the Department had presented a number of documents

[4] In a March 2016 submission of evidence, petitioner clarified that Schubert had spent about eight months of the year at the Ludington property, typically from mid-March to mid-November, and that she spent the other months in Florida; Arizona; Texas; or Midland, Michigan.

to show that Schubert's principal residence was her Midland apartment. The referee further stated that because there was no evidence that the Ludington property was Schubert's principal residence during the 2010 through 2013 tax years, petitioner could not establish that Schubert was entitled to retain the exemption under MCL 211.7cc(5).[5]

On February 13, 2015, the informal conference recommendation was adopted as the Department's final decision under MCL 211.7cc(8). Petitioner appealed the decision to the Tax Tribunal, asserting that Schubert had established a PRE for the Ludington property in 1994 and had thereafter continuously maintained the property as her primary residence until her death in 2014. In response, the Department conceded that Schubert owned the Ludington property, but contended that she had not occupied it as her principal residence for the tax years at issue. It presented documentary evidence showing that Schubert's driver's license listed her Midland address until September 2013, that her 2009 through 2012 Michigan income tax

[5] In relevant part, MCL 211.7cc(5) provides:

> An owner of property who previously occupied that property as his or her principal residence but now resides in a nursing home or assisted living facility may retain an exemption on that property if the owner manifests an intent to return to that property by satisfying all of the following conditions:
>
> (a) The owner continues to own that property while residing in the nursing home or assisted living facility.
>
> (b) The owner has not established a new principal residence.
>
> (c) The owner maintains or provides for the maintenance of that property while residing in the nursing home or assisted living facility.
>
> (d) That property is not occupied, is not leased, and is not used for any business or commercial purpose.

returns listed her Midland address, that her voter registration history listed her Midland address and indicated that she was registered to vote in Midland, and that her vehicle registration address was her Midland address. In addition, the Department submitted a copy of a PRE Questionnaire completed by petitioner during the August 2013 audit, which indicated that the Ludington property was occupied "seasonally," and a letter from Schubert's son admitting that the Midland address was Schubert's permanent mailing address.

Petitioner responded by submitting a number of documents to establish that Schubert owned and occupied the property as her principal residence for the tax years in question. In particular, he submitted copies of envelopes sent to Schubert at her Ludington address in 2013 and 2014; a tax refund check from 2014 that reflected Schubert's Ludington address; a copy of the certificate of title for Schubert's vehicle that listed her Ludington address; a copy of Schubert's Michigan identification card—apparently issued in September 2013—that proclaimed Schubert's address was in Ludington; a copy of Schubert's voter identification card stating that as of 2014, she was registered to vote in Ludington; a copy of Schubert's voter details stating that she had voted absentee in 2008, 2010, and 2012;[6] a copy of her obituary published in a Ludington-area newspaper; an affidavit indicating that a letter to Schubert's creditors was published in a Ludington-area newspaper; a document purporting to show that Schubert's will was probated in the county that Ludington is located within; and progress notes from

[6] This document showed that Schubert was registered to vote using her Midland address in December 2007, but changed the address where she was registered to vote from Midland to Ludington in October 2013.

Schubert's rehabilitation home, noting that shortly before her death Schubert requested to be taken back to Ludington.[7]

On June 17, 2016, the Tribunal issued a final opinion and judgment, affirming the Department's denial of the PRE for tax years 2010, 2011, and 2012, but reversing its denial for the 2013 tax year.[8] Petitioner moved for reconsideration, arguing, in part, that petitioner had not been allowed sufficient time to rebut the Department's evidence. On July 15, 2016, the Tribunal granted the motion, finding that rebuttal evidence may have been improperly excluded. The Tribunal ordered that the rehearing be limited to one hour, and it subsequently denied petitioner's motion to extend the time for the hearing to two hours. At the rehearing, petitioner submitted additional evidence, including copies of unredacted individual income tax returns for 2009 through 2012, a copy of the first page of Schubert's 2010 through 2012 Michigan Homestead Property Tax Credit claim, and a copy of a letter from Consumers Energy stating that the Ludington property had not received external electrical services since June 2008.

On February 1, 2017, the Tribunal affirmed the Department's denial of the PRE for the 2010, 2011, 2012, and 2013 tax years. The Tribunal determined that in order to qualify for a PRE, a person must both own and occupy a property as his or her principal residence on or before the relevant date of the tax years

[7] Additional exhibits were submitted; however, they are not pertinent to the issues raised on appeal.

[8] The Tribunal concluded in the June 2016 order that petitioner was entitled to a PRE for 2013 because of the exemption provision in MCL 211.7cc(5) applying to an owner in a nursing home or other rehabilitation facility.

involved. The Tribunal held that although there was no question that Schubert owned the property during the relevant tax years, there was a question as to whether she occupied it as her principal residence. The Tribunal found that in light of the evidence presented, it was clear that Schubert "had a presence" at the property; however, it found that her Midland address was her principal residence. The Tribunal explained that Schubert had used her Midland address for her 2009 through 2012 income tax returns; that she had been registered to vote in Midland until October 3, 2013; that her Michigan Identification Card had listed her Midland address until September 13, 2013; and that her vehicle had been registered in Midland in 2010. The Tribunal further found that virtually all of petitioner's documentary evidence was developed *after* Schubert was audited in August 2013. Finally, the Tribunal found that because Schubert did not occupy the property as her principal residence before moving into a nursing home, petitioner did not qualify under MCL 211.7cc(5) for a PRE for the 2013 tax year.

II. PRINCIPAL-RESIDENCE EXEMPTION

A. STANDARD OF REVIEW

Petitioner argues that the Tribunal erred by affirming the Department's denial of a PRE for the property for the 2010 through 2013 tax years. In the absence of fraud, this Court reviews decisions by the Tax Tribunal for misapplication of the law or adoption of a wrong principle. *Power v Dep't of Treasury*, 301 Mich App 226, 229-230; 835 NW2d 622 (2013). When the Tribunal's findings of fact are supported by competent, material, and substantial evidence on the whole record, those findings are conclusive. *EldenBrady v Albion*, 294 Mich App 251, 254; 816 NW2d 449 (2011). "[S]tatutes

exempting persons or property from taxation must be narrowly construed in favor of the taxing authority." *Power*, 301 Mich App at 230 (quotation marks and citation omitted). The burden of proving entitlement to a tax exemption rests with the person claiming the exemption. *Stege v Dep't of Treasury*, 252 Mich App 183, 189; 651 NW2d 164 (2002).

Issues regarding the proper interpretation and application of a statute are reviewed de novo. *Manske v Dep't of Treasury*, 282 Mich App 464, 468; 766 NW2d 300 (2009). When interpreting a statute, our main goal is to determine the Legislature's intent. *EldenBrady*, 294 Mich App at 254. The most reliable indicator of the Legislature's intent is the words used in the statute. *Id*. Therefore, we first examine the statutory language, giving the words used their plain and ordinary meaning. *Id*. at 254-255. If a statute defines a word or phrase, that definition is controlling. *Orthopaedic Assoc of Grand Rapids, PC v Dep't of Treasury*, 300 Mich App 447, 451; 833 NW2d 395 (2013).

B. ANALYSIS

"Michigan's principal residence exemption, also known as the 'homestead exemption,' is governed by §§ 7cc and 7dd of the General Property Tax Act, MCL 211.7cc and MCL 211.7dd." *EldenBrady*, 294 Mich App at 256. Under MCL 211.7cc(1), "[a] principal residence is exempt from the tax levied by a local school district for school operating purposes . . . if an owner of that principal residence claims an exemption as provided in this section." In order to receive the exemption, a taxpayer must file an affidavit claiming the exemption. *Power*, 301 Mich App at 231. MCL 211.7cc(2) sets forth the requirements for the affidavit:

> Except as otherwise provided in subsection (5), an owner of property may claim 1 exemption under this section by filing an affidavit . . . . *The affidavit shall state that the property is owned and occupied as a principal residence by that owner of the property on the date that the affidavit is signed* and shall state that the owner has not claimed a substantially similar exemption, deduction, or credit on property in another state. . . . If an owner of property filed an affidavit for an exemption under this section before January 1, 2004, that affidavit shall be considered the affidavit required under this subsection for a principal residence exemption and that exemption shall remain in effect until rescinded as provided in this section. [Emphasis added.]

In pertinent part, the Legislature has defined the term "principal residence" to mean "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."[9] MCL 211.7dd(c).

In the proceedings before the Tribunal, the Department contended that, read together, MCL 211.7cc and MCL 211.7dd(c) require a person claiming a PRE to occupy the property as his or her principal residence during every tax year the exemption is claimed. The term "occupied" is not defined by the statute. If a word or phrase is undefined by the statute, we may consult a dictionary. *EldenBrady*, 294 Mich App at 255. *Merriam-Webster's Collegiate Dictionary* (11th ed) de-

[9] The definition of "principal residence" additionally sets forth a number of situations in which property is considered to be part of the principal residence, even if it does not strictly meet the cited definition. See MCL 211.7dd(c). For example, the statute explains that under some circumstances, unoccupied property can be included in the definition of principal residence, as can portions of a property that are rented or leased to another person. See *id*.

fines "occupy," in relevant part, as "to reside in as an owner or tenant." In turn, "reside" is defined as "to dwell permanently or continuously : occupy a place as one's legal domicile." *Id*.; see also *EldenBrady*, 294 Mich App at 259 (defining "unoccupied" as used in MCL 211.7dd(c) as meaning without a human tenant or resident). Accordingly, it is clear that a person must dwell either permanently or continuously at a property to "occupy" the property.

On appeal, however, petitioner asserts that Schubert only had to occupy the property on the date that she filed the affidavit claiming the PRE under MCL 211.7cc(2). MCL 211.7cc(2) requires an owner to aver that the property "*is owned and occupied as a principal residence by that owner of the property on the date that the affidavit is signed* . . . ."[10] (Emphasis added.) Petitioner further contends that the MCL 211.7dd(c) definition of "principal residence" includes only an ownership, not an occupancy requirement. We agree that the *first* sentence of the definition in MCL 211.7dd(c) does not contain an occupancy requirement. However, the second sentence of the definition provides that "[e]xcept as otherwise provided in this subdivision, *principal residence includes only that portion of a dwelling* or unit in a multiple-unit dwelling that is subject to ad valorem taxes and *that is owned and occupied by an owner of the dwelling or unit*." *Id*. (emphasis added).[11]

[10] This requirement likely reflects the fact that an affiant cannot generally aver to events that may occur in the future. In that regard, it is axiomatic that a person claiming a PRE on his or her property could not properly aver that he or she currently owns and occupies the property as his or her principal residence and will continue to do so for the next 50 years.

[11] We recognize that this portion of the definition expressly applies to multiple-unit dwellings, see *Rentschler v Melrose Twp*, 322 Mich App 113, 118; 910 NW2d 711 (2017). However, because we must read a

Further, the definition goes on to provide in later sentences that under certain circumstances, portions of *unoccupied* property may be included in the definition of principal residence. MCL 211.7dd(c). See also *EldenBrady*, 294 Mich App at 259 (concluding that an unoccupied 10-acre parcel that adjoined or was contiguous to the petitioners' dwelling satisfied the MCL 211.7dd(c) definition of "principal residence"). It would make little sense to distinguish between those circumstances in which unoccupied property qualifies as a principal residence and those in which it does not if there were not an underlying requirement that the property must be both owned and occupied as a principal residence. In addition, MCL 211.7cc(5) expressly provides that a person who is not occupying his or her property because the person is residing in a nursing home or assisted living facility must satisfy a number of requirements to retain the exemption. If a property did not have to be occupied other than on the date set forth in the affidavit, then the language providing this exception from the occupancy requirement would be nothing more than surplusage. See *Robinson v City of Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010) (stating that we should avoid a construction of a statute that would render any part of it surplusage or nugatory). Accordingly, we conclude that under the plain language of the statute, a person claiming a PRE on a property must establish that he or she owned and occupied the property as a principal residence for each year that the exemption is claimed.

Petitioner next argues that the Tribunal erred by finding that Schubert used her Midland apartment as

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statute in context to produce a harmonious whole, it is nevertheless relevant to our analysis. See generally *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010).

her principal residence and by concluding therefore that she could not claim her Ludington property as her principal residence. MCL 211.7dd(c) provides that "principal residence" means "the 1 place where *an owner of the property* has his or her true, fixed, and permanent home to which, whenever absent, he or she intends to return and that *shall continue as a principal residence until another principal residence is established*." (Emphasis added.) Petitioner directs us to consider the phrase "shall continue as a principal residence until another principal residence is established." This language suggests that once a property is established as an owner's principal residence, the sole way for it to lose its status as a principal residence is if the owner establishes a new principal residence. Petitioner then contends that in order to establish a new principal residence the owner must, in fact, *own* the new property.

However, MCL 211.7dd(c) only defines the phrase "principal residence." It does not provide that if a property is, at one time or another, an owner's principal residence, then the owner is entitled to the MCL 211.7cc(1) PRE until such time as he or she establishes a new principal residence. Instead, MCL 211.7cc(5) provides that "after exempted property *is no longer used as a principal residence* by the owner claiming an exemption, that owner shall rescind the claim of exemption by filing with the local tax collecting unit a rescission form prescribed by the department of treasury." (Emphasis added.) Accordingly, to be entitled to the PRE, an owner claiming the exemption has a continuing requirement to *use* the property as his or her principal residence. In order to use a property as his or her principal residence, it must be "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 . . . ." MCL 211.7dd(c). And as already explained, it must also be a property that he or she occupies. Because the definition of "principal residence" clearly provides that a person can only have one place that he or she holds out as his or her "true, fixed, and permanent home to which, whenever absent, he or she intends to return," *id*., if a person stops using the exempted property in that fashion and starts using a rented apartment as his or her true, fixed, and permanent home, then that person, by definition, is no longer using the exempted property as his or her principal residence and must rescind the PRE under MCL 211.7cc(5). Therefore, even though MCL 211.7dd(c) provides that a person's principal residence will continue until a new principal residence is established, a person cannot continue to claim a PRE on a property that he or she no longer uses as a principal residence.[12]

Schubert never rescinded the PRE on her Ludington property. The Department, however, was not required to wait to review the PRE until Schubert filed a rescission under MCL 211.7cc(5). MCL 211.7cc(8) provides, in pertinent part, as follows:

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[12] Petitioner's interpretation of the statute would lead to absurd results. Assume, for example, that a person has a principal residence as defined in the first part of MCL 211.7dd(c). Assume further that the principal residence is wholly destroyed in a fire. Under petitioner's interpretation, unless the (former) owner of the residence (1) owns a new residence and (2) otherwise satisfies the definition in MCL 211.7dd(c), his or her principal residence will necessarily continue to be the wholly destroyed residence despite the fact that there is literally no residence left for the owner to claim as his or her true, fixed, and permanent home to which, whenever absent, he or she intends to return. Because we must construe MCL 211.7dd(c) to avoid absurd results, see *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 142-143; 662 NW2d 758 (2003), we reject petitioner's interpretation.

> The department of treasury shall determine if the property is the principal residence of the owner claiming the exemption. Except as otherwise provided in subsection (21), the department of treasury may review the validity of exemptions for the current calendar year and for the 3 immediately preceding calendar years. Except as otherwise provided in subsections (5) and (32), if the department of treasury determines that the property is not the principal residence of the owner claiming the exemption, the department shall send a notice of that determination to the local tax collecting unit and to the owner of the property claiming the exemption, indicating that the claim for exemption is denied, stating the reason for the denial, and advising the owner claiming the exemption of the right to appeal . . . .

Consequently, the Department was entitled to review the PRE claim to determine if the Ludington property was Schubert's principal residence. Further, in accordance with that review power, the Department was free to determine whether Schubert owned and occupied the property and whether she had stopped using it as her principal residence.

Having determined that the Tribunal did not commit an error of law by requiring petitioner to establish occupancy, we next turn to whether there was competent, material, and substantial evidence on the whole record to support the Tribunal's findings.

Because a principal residence is defined as one's "true, fixed, and permanent home," MCL 211.7dd(c), and because the burden of proving a tax exemption falls to the person claiming the exemption, *Stege*, 252 Mich App at 189, petitioner had to present evidence linking Schubert to the Ludington address. A person can present that evidence in the form of testimony or documentary evidence. Generally, documentary evidence relevant to whether a person occupies the property as his or her principal residence can include utility

bills, driver's licenses, tax documents, other documents showing the petitioner's address, and voter registration cards. See generally *Drew v Cass Co*, 299 Mich App 495, 500-501; 830 NW2d 832 (2013). No single document is conclusive. *Id*.

In this case, Schubert's son testified at the hearing regarding Schubert's intent. Petitioner also presented a number of documents purporting to show that Schubert owned and occupied the Ludington property as her principal residence during the tax years in question. The Department responded by submitting a number of documents purporting to show that Schubert was occupying her Midland apartment as her principal residence. Weighing the competing evidence, the Tribunal found that Schubert occupied the Midland apartment as her principal residence, not her Ludington property.

On appeal, petitioner attacks the credibility of the documentary evidence submitted by the Department. We briefly address each challenge in turn.

First, petitioner argues that the "drivers license search result" document submitted by the Department did not conclusively show that Schubert lived in Midland during the tax years at issue. Instead, petitioner contends that the document shows that Schubert resided, at various times, in Texas, in Midland, in Ludington, and at a post office box. He correctly points out that although the document is dated March 2015, it does not contain any dates indicating when she lived at any of the listed places. Instead, the document states that the "current" address on Schubert's identification card is her Ludington address, whereas Schubert's Midland address is listed as a "historical" address. A copy of Schubert's most recent identification card was also submitted. It proclaimed Schubert's address as

her Ludington address; however, it was issued on September 13, 2013, which was after the Department began its audit of the Ludington property. Given this evidence, the Tribunal could reasonably conclude that Schubert's identification card was changed from Midland (one of her historical addresses listed on the driver's-license-search document) to Ludington in 2013, which would make Ludington her current address. Accordingly, the Tribunal's reliance on this document was not improper, despite the fact that it could arguably be interpreted in petitioner's favor.

Next, petitioner asserts that the 2009 through 2012 Michigan Income Tax Returns do not provide proof that Schubert's principal residence was her Midland apartment. He acknowledges that the tax returns proclaim in line 1 that Schubert's "home address" was her Midland apartment. However, petitioner asserts that because Schubert lived in Ludington from about mid-March until about mid-November, and because the tax returns were completed while she was not living on the property, Schubert was required to list her address as her Midland apartment. His argument, however, goes to the weight of the documents. And "[t]he weight to be accorded to the evidence is within the Tax Tribunal's discretion." *Drew*, 299 Mich App at 501 (quotation marks and citation omitted). "[T]his Court may not second-guess the [Tribunal's] discretionary decisions regarding the weight to assign to the evidence." *Id*.

Similarly, we find no error with the weight the Tribunal accorded to Schubert's Homestead Property Tax Credit Claim forms for 2010 through 2012. Petitioner argues that Schubert listed her Midland address because that was where she was living on December 31 of the relevant years, not because her Midland address

was her principal residence. In support, petitioner points out that line 36 of the Homestead Property Tax Credit Claim forms asks the taxpayer to identify the "Address where you lived on December 31, [of the tax year], if different than reported on line 1."[13] The fact that the Tribunal did not credit this explanation for the address listed in line 1 goes to the weight of the evidence, which we may not second-guess on appeal. See *id*.[14]

Petitioner also challenges the weight given to the voter-registration records. The information indicated that Schubert registered to vote using her Midland address on October 30, 2007. It also indicated that on October 3, 2013, she registered to vote using her Ludington address. According to the document, Schubert last voted in November 2012, at which time she was registered to vote in Midland, not Ludington. Therefore, this document supports the Tribunal's findings of fact, despite the fact that it does not conclusively tie Schubert to her Midland apartment for the tax years at issue.

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[13] Furthermore, we fail to see how this establishes that the address in line 1 was not Schubert's principal residence. It appears that there is no date requirement listed for line 1, which would allow Schubert to list her Ludington address on line 1 and her Midland address (the place she was living on December 31 of the relevant tax years) on line 36.

[14] Petitioner also takes issue with the Department's decision to white out certain information on the Homestead Property Tax Credit Claim form. However, we have carefully reviewed the redacted and unredacted versions of the form and do not see any attempt to mislead the Tribunal by whiting out the information. Moreover, the Tribunal did not rely on the whited-out information in any form when reaching its decision.

In addition, petitioner contends that because the 2012 Homestead Property Tax Credit form lists the Ludington address in line 1, using the Tribunal's logic, Schubert is entitled to a PRE for 2012 on the subject property. However, the 2012 tax return appears to have been prepared after the audit was conducted; moreover, no one document is dispositive. See *Drew*, 299 Mich App at 501.

The challenge to the weight of the submitted vehicle-registration information fails for the same reason. According to the document submitted, Schubert's vehicle was registered using the Midland address on October 13, 2006, and again on September 12, 2010. On September 9, 2013, a title was issued for the vehicle that listed Schubert's Ludington address. Petitioner contends that this document only reflects registration of the vehicle in Schubert's name so that her son could try to sell the vehicle for her. Petitioner also asserts that Schubert's son testified at the hearing that Schubert no longer drove the vehicle (or others) during the tax years in question. The Tribunal, however, heard the testimony and decided to give some weight to the address and date listed on the vehicle-registration document. We find nothing improper in that exercise of discretion.

Finally, petitioner contends that the notation "seasonally" on the PRE Questionnaire submitted as part of the August 2013 audit does not prove that Schubert only used the property seasonally. In Part 2 of the questionnaire, the notation "seasonally" is handwritten in response to the question "Do you currently live at the property listed in Part 1?" The property listed in Part 1 is Schubert's Ludington property. Although we agree that this notation is not conclusive, we do not agree that it was improper for the Tribunal to rely on it in reaching its decision. The Tribunal was not required to credit petitioner's explanation for the notation.

Having carefully and thoroughly reviewed each exhibit submitted to the Tribunal, we conclude that although petitioner challenged the evidentiary value of the Department's evidence, the Tribunal was still entitled to rely on those documents when reaching its decision. And on this record, we conclude that the

Tribunal's finding that Schubert was using her Midland apartment as her principal residence, not her Ludington property, was supported by competent, material, and substantial evidence on the whole record. See *EldenBrady*, 294 Mich App at 254.

Affirmed.

MURPHY, P.J., and M. J. KELLY and SWARTZLE, JJ., concurred.

In re BUTLER

Docket No. 334687. Submitted December 12, 2017, at Lansing. Decided December 21, 2017, at 9:10 a.m.

The Michigan Department of Licensing and Regulatory Affairs (LARA) filed an administrative complaint against Karen L. Butler, M.D., after a final adverse administrative action was taken against her in Wisconsin that was not reported to LARA within 30 days. Butler had been employed as the Regional Medical Director for Advanced Correctional Healthcare in Wisconsin and was reprimanded by the state of Wisconsin for prescribing medicine for hypothyroidism to an inmate whose lab results were consistent with hyperthyroidism. The Michigan hearings examiner, Shawn Downey, concluded that LARA had established by a preponderance of the evidence that Butler violated MCL 333.16221(b)(*x*) and (f). Butler filed exceptions to the examiner's proposal for decision. The Michigan Board of Medicine Disciplinary Subcommittee accepted and adopted the examiner's findings of fact and conclusions of law and ordered Butler to pay a $500 fine. Butler appealed.

The Court of Appeals *held*:

Rulings by disciplinary subcommittees of regulated professions are reviewed on appeal solely under Const 1963, art 6, § 28, which provides that the final decisions of administrative agencies that are judicial or quasi-judicial and affect private rights or licenses are subject to direct review by the courts. At a minimum, the review must determine whether the final decisions were authorized by law and, when a hearing was required, whether the final decision was supported by competent, material, and substantial evidence on the whole record. In this case, the complaint alleged that Butler violated MCL 333.16221(b)(*x*) and (f) and MCL 333.16222(4) because a final adverse administrative action had been taken against her in another state and because she failed to give timely notice to LARA that she had received a reprimand in another state. The disciplinary subcommittee found that a preponderance of the evidence supported the examiner's recommendations, and it adopted the examiner's findings of fact and conclusions of law. Under the plain language of

MCL 333.16226(1), the subcommittee was required to impose a sanction on Butler when it found a violation of MCL 333.16221. MCL 333.16226(1) sets forth the possible sanctions for violations of MCL 333.16221. The subcommittee imposed a $500 fine on Butler and no other sanction. Mich Admin Code, R 338.7005 (Rule 5) mandates consideration of four factors when a fine is assessed. The Rule 5 factors are: (1) the extent to which the licensee obtained financial benefit from any conduct comprising part of the violation, (2) the willfulness of that conduct, (3) the actual or potential harm to the public caused by the violation, and (4) the cost incurred in investigating and proceeding against the licensee. Rule 5 did not permit the subcommittee to entirely forgo a fine, as Butler suggested, because forgoing a fine in this case would have violated the mandatory sanction language in MCL 333.16226(1). Nonetheless, because there was no evidence that the subcommittee examined the Rule 5 factors, the fine prejudiced Butler's substantial rights. The fine, therefore, was contrary to law and had to be vacated and the case remanded for further proceedings.

Determination that Butler violated MCL 333.16221(b)(*x*) and (f) affirmed, fine vacated, and case remanded.

LICENSES — DISCIPLINARY SUBCOMMITTEES — VIOLATIONS OF THE PUBLIC HEALTH CODE — SANCTIONS — FINES.

When a disciplinary subcommittee for a regulated profession decides to impose a fine as a sanction for a violation of MCL 333.16221 to MCL 333.16226, the subcommittee, in the course of assessing the fine, must take into consideration the four factors listed in Mich Admin Code, R 338.7005: (1) the extent to which the licensee obtained financial benefit from any conduct comprising part of the violation, (2) the willfulness of that conduct, (3) the actual or potential harm to the public caused by the violation, and (4) the cost incurred in investigating and proceeding against the licensee.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Bruce Charles Johnson*, Assistant Attorney General, for petitioner.

Wilson Elser Moskowitz Edelman & Dicker LLP (by *Jeffrey C. Hart* and *William S. Cook*) for respondent.

Before: MURPHY, P.J., and M. J. KELLY and SWARTZLE, JJ.

MURPHY, P.J. Respondent, Karen Lind Butler, M.D., appeals as of right an order issued by the Michigan Board of Medicine Disciplinary Subcommittee, which accepted and adopted the recommended findings of fact and conclusions of law set forth in a proposal for decision issued by a hearings examiner following an evidentiary hearing. Butler was previously reprimanded by the Wisconsin Medical Examining Board and failed to timely notify Michigan authorities of the reprimand. The examiner and the subcommittee concluded that Butler violated the Public Health Code, MCL 333.1101 *et seq*., under MCL 333.16221(b)(*x*) ("[f]inal adverse administrative action by a licensure, registration, disciplinary, or certification board involving the holder of . . . a license . . . regulated by another state") and MCL 333.16221(f) (failure to notify department[1] of disciplinary action taken by another state against licensee within 30 days of action).[2] The subcommittee fined Butler $500 for the violations. We affirm the determination that Butler violated MCL 333.16221(b)(*x*) and (f) but vacate the fine and remand for further proceedings under Mich Admin Code, R 338.7005 (Rule 5).

Butler is a doctor licensed to practice medicine in nine states, including Michigan and Wisconsin. In 2012, Butler was employed as the Regional Medical Director for Advanced Correctional Healthcare and was responsible for providing medical services for

[1] The Department of Licensing and Regulatory Affairs (LARA). MCL 333.16104(3).

[2] MCL 333.16221(f) refers to a notification failure under either MCL 333.16222(3) or (4). MCL 333.16222(4) addresses licensing actions taken in another state and was implicated in this case.

persons jailed in Wisconsin. Pursuant to a stipulation agreed to by Butler in February 2015, the Wisconsin Medical Examining Board formally reprimanded her for a 2012 incident wherein an inmate was prescribed medicine for hypothyroidism when his lab results were consistent with hyperthyroidism. The error was initially the result of a miscommunication regarding the lab results by a nurse during a phone call to Butler, but the error continued even after Butler was later provided with the actual lab results. As reflected in the stipulated final decision and order, Butler "acknowledged that the written lab report support[ed] a diagnosis of hyperthyroidism and that she erred." More than 30 days later, by letter dated April 22, 2015, the Director of Human Resources for Advanced Correctional Healthcare informed the Michigan Board of Medicine of Butler's Wisconsin reprimand and apologized for the delay, which was blamed on a miscommunication between the corporate office and Butler's Wisconsin counsel and not on any fault or failure on Butler's part.

In May 2015, LARA, through the acting director of the Bureau of Health Care Services, filed an administrative complaint against Butler based on a final adverse administrative action taken against Butler in Wisconsin, MCL 333.16221(b)(*x*), and the fact that the action had not been reported to LARA within 30 days, MCL 333.16221(f) and MCL 333.16222(4). The crux of Butler's defense was that the Wisconsin reprimand was not based on any willful misconduct, that the prisoner-patient suffered no adverse reaction to the prescribed medicine, that Butler implemented changes in jail protocols regarding the reporting of lab tests to help prevent future errors, and that, as to the 30-day notice failure, there was no willful wrongdoing on her part, given that she was led to reasonably believe that

her employer or its counsel would provide the requisite notice in timely fashion. Following the evidentiary hearing, the examiner concluded that the violations had been established by LARA by a preponderance of the evidence, concluding that there was no willful-intent element to the provisions in MCL 333.16221(b)(*x*) and (f). The examiner issued a proposal for decision, recommending adoption of his findings of fact and conclusions of law. The recommendation was subsequently accepted by the subcommittee after Butler had filed exceptions to the proposal for decision. In the subcommittee's final order, it fined Butler $500 for the violations of MCL 333.16221(b)(*x*) and (f). She now appeals as of right.

Rulings by disciplinary subcommittees of regulated professions are reviewed on appeal solely under Const 1963, art 6, § 28. *Dep't of Community Health v Anderson*, 299 Mich App 591, 597; 830 NW2d 814 (2013); *Dep't of Community Health v Risch*, 274 Mich App 365, 371; 733 NW2d 403 (2007). Const 1963, art 6, § 28, provides, in relevant part:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.

A court must review the entire record, not just the portions that support an agency's findings, when assessing "whether an agency's decision was supported by competent, material, and substantial evidence on the whole record[.]" *Risch*, 274 Mich App at 372.

"Substantial evidence" means "evidence that a reasonable person would accept as sufficient to support a conclusion." *Id*. This may be substantially less than a preponderance of evidence, but does require more than a scintilla of evidence. *Id*. For purposes of Const 1963, art 6, § 28, a decision is not "authorized by law" when it is in violation of a statute or a constitutional provision, in excess of an agency's statutory authority or jurisdiction, made upon unlawful procedure that results in material prejudice, or arbitrary and capricious. *Northwestern Nat'l Cas Co v Comm'r of Ins*, 231 Mich App 483, 488; 586 NW2d 563 (1998).

MCL 333.16231 authorizes the issuance of a complaint against a licensee for an alleged violation of MCL 333.16221; Butler was alleged to have violated MCL 333.16221(b)(*x*) and (f). And MCL 333.16231a provides for a hearing on the complaint before an examiner. At the hearing, the licensee "may be represented . . . by legal counsel," and LARA "shall be represented . . . by an assistant attorney general[.]" MCL 333.16231a(4). The examiner "shall determine if there are grounds for disciplinary action under section 16221 . . . ." MCL 333.16231a(2). The examiner must "prepare recommended findings of fact and conclusions of law for transmittal to the appropriate disciplinary subcommittee." *Id*. "In imposing a penalty . . . , a disciplinary subcommittee shall review the recommended findings of fact and conclusions of law of the hearings examiner." MCL 333.16237(1). "In reviewing the recommended findings of fact and conclusions of law of the hearings examiner and the record of the hearing, a disciplinary subcommittee may request the hearings examiner to take additional testimony or evidence on a specific issue or may revise the recommended findings of fact and conclusions of law as determined necessary by the disciplinary subcommittee, or both."

MCL 333.16237(3). A disciplinary subcommittee is not permitted to conduct its own investigation or to take its own additional testimony or evidence. *Id*. MCL 333.16237(4) provides:

> If a disciplinary subcommittee finds that a preponderance of the evidence supports the recommended findings of fact and conclusions of law of the hearings examiner indicating that grounds exist for disciplinary action, the disciplinary subcommittee *shall impose* an appropriate sanction . . . . If the disciplinary subcommittee finds that a preponderance of the evidence does not support the findings of fact and conclusions of law of the hearings examiner indicating that grounds exist for disciplinary action, the disciplinary subcommittee shall dismiss the complaint. A disciplinary subcommittee shall report final action taken by it in writing to the appropriate board or task force. [Emphasis added.]

When a disciplinary subcommittee finds the existence of one or more of the grounds set forth in MCL 333.16221, the subcommittee "*shall* impose" a sanction. MCL 333.16226(1) (emphasis added). And for a violation of MCL 333.16221(b)(*x*), the available sanctions include "[p]robation, limitation, denial, suspension, revocation, permanent revocation, restitution, or fine." MCL 333.16226(1). For a violation of MCL 333.16221(f), the available sanctions are "[r]eprimand, denial, limitation, probation, or fine." MCL 333.16226(1). Finally, MCL 333.16226(2) provides:

> Determination of sanctions for violations under this section shall be made by a disciplinary subcommittee. If, during judicial review, the court of appeals determines that a final decision or order of a disciplinary subcommittee prejudices substantial rights of the petitioner for 1 or more of the grounds listed in section 106 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.306, and holds that the final decision or order is unlawful and is to be set aside, the court shall state on the record the

> reasons for the holding and may remand the case to the disciplinary subcommittee for further consideration.

Here, Butler does not present a challenge to the findings that she violated MCL 333.16221(b)(*x*) and (f). Indeed, there can be no real dispute that the Wisconsin reprimand constituted a final adverse administrative action taken by another state against Butler's license, MCL 333.16221(b)(*x*), and that Butler failed to notify LARA of the reprimand within 30 days, MCL 333.16221(f) and MCL 333.16222(4). Instead, Butler, on the strength of Rule 5, challenges the fine imposed by the subcommittee. Rule 5 provides in full:

> When a fine is designated as an available sanction for a violation of section 16221 to 16226 of the code, MCL 333.16221 to 333.16226, in the course of assessing a fine, the disciplinary subcommittee *shall take into consideration* the following factors without limitation:
>
> (a) The extent to which the licensee obtained financial benefit from any conduct comprising part of the violation found by the disciplinary subcommittee.
>
> (b) The willfulness of the conduct found to be part of the violation determined by the disciplinary subcommittee.
>
> (c) The public harm, actual or potential, caused by the violation found by the disciplinary subcommittee.
>
> (d) The cost incurred in investigating and proceeding against the licensee. [Rule 338.7005 (emphasis added).]

Butler argues that the subcommittee failed to apply Rule 5 in assessing the $500 fine, thereby acting unlawfully, beyond the scope of its powers, without any supporting evidence, and in violation of Butler's due-process rights. Butler posits that if the Rule 5 factors are weighed, there is no basis for any fine. LARA argues that it must be presumed that the subcommittee weighed the factors in Rule 5 in the course of assessing the fine and that, in light of the factors, the

$500 fine was justified under the facts of the case. LARA accurately points out that the subcommittee was generally authorized to impose a fine of up to $250,000 for the violation of MCL 333.16221(b)(*x*). See MCL 333.16226(3).

First, as indicated, MCL 333.16226(1) and MCL 333.16237(4) mandate a sanction for a violation of MCL 333.16221, so the subcommittee had no choice but to impose a sanction on Butler, and it chose to fine her, which was an available sanction under MCL 333.16226(1) for the two particular violations at issue. Accordingly, given the subcommittee's election to impose a fine and no other sanction, Rule 5, an administrative rule, did not allow the subcommittee to entirely forgo a fine, as Butler suggests, because this would offend the mandatory-sanction language in the statutes. Therefore, the factors in Rule 5 must be weighed for purposes of determining the amount of the fine and not whether the fine should have been imposed in the first place. Even outside the circumstances of this case in which the $500 fine was the only sanction that was imposed, the plain language of Rule 5 reveals that it is meant to be analyzed merely in regard to setting the *amount* of a fine and that the fine must be more than $0. Specifically, Rule 5 directs a subcommittee to consider the Rule 5 factors "in the course of assessing a fine" when "a fine is designated as an available sanction."[3] The language "in the course of assessing a fine" indicates or reflects that an underlying decision to impose a fine in some amount has already been made

[3] The rules of statutory interpretation apply equally to the construction of administrative rules, and thus the interpretation of a rule is "governed by its plain language." *Danse Corp v City of Madison Hts*, 466 Mich 175, 184; 644 NW2d 721 (2002).

by the relevant subcommittee, leaving only a determination regarding the amount of the fine.

In the instant case, the final order issued by the subcommittee contained no indication that the subcommittee examined and weighed the factors in Rule 5 in settling on the fine of $500, and we are in no position to presume that the subcommittee engaged in the required analysis. Moreover, we, as an appellate court, cannot act in place of the subcommittee and do our own independent examination and analysis in the first instance. Because the subcommittee apparently did not take into consideration the factors in Rule 5 in the course of assessing the fine, as the rule requires, the imposition of the $500 fine prejudiced Butler's substantial rights because the ruling was made on the basis of unlawful procedure and was contrary to law. Const 1963, art 6, § 28; MCL 333.16226(2). Accordingly, while we affirm the subcommittee's ruling that Butler violated MCL 333.16221(b)(*x*) and (f) as alleged, we vacate the $500 fine imposed by the subcommittee and remand for proceedings under Rule 5 consistent with our interpretation of the rule.

Affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. We decline to award taxable costs under MCR 7.219.

M. J. KELLY and SWARTZLE, JJ., concurred with MURPHY, P.J.

ZORAN v COTTRELLVILLE TOWNSHIP

Docket No. 334886. Submitted November 8, 2017, at Detroit. Decided December 28, 2017, at 9:00 a.m. Leave to appeal denied 503 Mich ___.

Michael Zoran, Kyle Sunday, and Austin Adams (plaintiffs) brought an action in the St. Clair Circuit Court against Cottrellville Township and Kelly Ann Lisco, alleging violations of the Open Meetings Act (OMA), MCL 15.261 *et seq*. Counts I to III of plaintiffs' complaint asserted violations of MCL 15.263(5) against the township, and Count IV alleged that Lisco intentionally violated the OMA in contravention of MCL 15.273. Plaintiffs moved for summary disposition, and the court, Michael J. West, J., granted the motion with regard to Counts I to III, determining that the township violated the OMA. The court then held a bench trial for the remaining OMA claim against Lisco and concluded that Lisco intentionally violated the OMA in contravention of MCL 15.273(1). Plaintiffs filed a motion pursuant to MCL 15.273(1), requesting that the court order Lisco to pay their attorney fees. Plaintiffs requested reimbursement at an hourly rate of $250, the rate charged by counsel per their attorney-client agreement, and asserted that MCL 15.273(1) mandated that a public official who intentionally violates the OMA pay the actual attorney fees of those persons bringing the action. Lisco argued that the hourly rate of $250 was clearly excessive in violation of MRPC 1.5(a). Following a hearing on the motion, the court examined the factors in *Speicher v Columbia Twp Bd of Election Comm'rs*, 299 Mich App 86 (2012), to evaluate a request for attorney fees and concluded that plaintiffs' requested hourly rate of $250 was clearly excessive in violation of MRPC 1.5(a). The court awarded plaintiffs attorney fees at a reduced hourly rate of $200. Plaintiffs appealed.

The Court of Appeals *held*:

1. MCL 15.273(1) provides that a public official who intentionally violates the OMA shall be personally liable in a civil action for actual and exemplary damages of not more than $500 total, plus court costs and actual attorney fees to a person or group of persons bringing the action. MRPC 1.5(a) provides that a lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee and further provides that a fee

is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Plaintiffs argued that the plain terms of MCL 15.273(1) require the payment of actual attorney fees; however, *Speicher* held that MRPC 1.5(a) is applicable to actions for actual attorney fees under the OMA. Accordingly, a court has the discretion to award attorney fees at a reduced rate if it finds the actual attorney fees to be clearly excessive, and plaintiffs were incorrect that "actual" attorney fees must always be awarded because of the plain language of MCL 15.273(1).

2. Plaintiffs' argument that Lisco should have been required to plead MRPC 1.5(a) as an affirmative defense to the requested attorney fees lacked merit because *Speicher* allowed a challenge to a request for attorney fees under the OMA made in response to the motion for attorney fees, rather than as an affirmative defense. Further, *Speicher* specifically reasoned that the plaintiff bore the burden of proving that the requested fees were not clearly excessive. Therefore, the same burden of proof applied to plaintiffs' request for attorney fees in this case.

3. The trial court erred in its application of the "clearly excessive" standard contained within MRPC 1.5(a). When deciding whether the $250 hourly rate satisfied the standard, the trial court concluded that "an hourly rate of $200 per hour is reflective of the fee customarily charged in this locality for similar legal services or those with similar difficulty." However, the test is not whether the fee is reflective of the locality's customary charge, but rather whether the fee was clearly excessive, meaning that after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Because of the high standard contained within MRPC 1.5(a), which is essentially an articulation of the clear-and-convincing-evidence burden of proof, a fee that is slightly—or even moderately—above a reasonable fee cannot be "clearly excessive." In this case, while it was proper for the trial court to evaluate what constituted a reasonable fee (and by necessity the reasonable hourly rate) through application of the factors set forth in MRPC 1.5(a), the trial court should not have stopped there; it should have then determined whether the $250 hourly rate was clearly excessive by considering whether a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee was in excess of a reasonable fee. Because the trial court failed to make that determination, the order had to be vacated and the case remanded for determination of that question by the trial court.

Vacated and remanded.

1. ATTORNEY FEES — REASONABLENESS OF ATTORNEY FEES — CLEARLY EXCESSIVE FEES.

Michigan Rule of Professional Conduct (MRPC) 1.5(a) provides that a lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee; MRPC 1.5(a) further provides that a fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee; because of the high standard contained within MRPC 1.5(a), which is essentially an articulation of the clear-and-convincing-evidence burden of proof, a fee that is slightly—or even moderately—above a reasonable fee cannot be "clearly excessive."

2. ACTIONS — OPEN MEETINGS ACT — ATTORNEY FEES — APPLICATION OF THE MICHIGAN RULES OF PROFESSIONAL CONDUCT.

Under MCL 15.273(1) of the Open Meetings Act (OMA), MCL 15.261 *et seq*., a public official who intentionally violates the OMA shall be personally liable in a civil action for actual and exemplary damages of not more than $500 total, plus court costs and actual attorney fees to a person or group of persons bringing the action; Michigan Rule of Professional Conduct (MRPC) 1.5(a) provides that a lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee and further provides that a fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee; MRPC 1.5(a) is applicable to actions for actual attorney fees under the OMA; accordingly, a court has the discretion to award attorney fees at a reduced rate if it finds the actual attorney fees to be clearly excessive.

Outside Legal Counsel PLC (by *Philip L. Ellison*) for plaintiffs.

Davis Burket Savage Listman (by *Robert C. Davis*) for Kelly Ann Lisco.

Before: MURRAY, P.J., and FORT HOOD and GLEICHER, JJ.

PER CURIAM. Plaintiffs appeal as of right the final judgment entered by the trial court in this Open Meetings Act (OMA), MCL 15.261 *et seq*., action. Specifically, plaintiffs challenge the trial court's award of attorney fees. For the reasons stated herein, we vacate the trial court's order and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs filed this OMA suit against defendants, the Township of Cottrellville[1] and Kelly Ann Lisco,[2] as a result of actions taken at the township's May 8, 2013 board meeting. At the time of the meeting, Lisco was the township supervisor. Counts I to III of the complaint[3] asserted violations of MCL 15.263(5) against the township, and Count IV alleged that Lisco intentionally violated the OMA in contravention of MCL 15.273.

The trial court granted plaintiffs' motion for summary disposition with regard to Counts I to III, determining that the township violated the OMA.[4] It then held a bench trial for the remaining OMA claim

[1] The Township of Cottrellville is not a party to this appeal.

[2] Lisco is also known as Kelly Ann Fiscelli-Lisco and Kelly Ann Fiscelli.

[3] Plaintiff Michael Zoran filed a second amended complaint adding a quo warranto claim against Lisco, but the trial court dismissed the claim as moot.

[4] Although not at issue on appeal, we note that following the court's decision, plaintiffs filed a motion against the township pursuant to MCL 15.271(4), requesting payment of their attorney fees at an hourly rate of $250. The trial court ultimately awarded plaintiffs attorney fees, but at a reduced hourly rate of $200, concluding that the $250-per-hour rate agreed to between plaintiffs and their counsel was clearly excessive under Michigan Rule of Professional Conduct (MRPC) 1.5(a). This Court denied plaintiffs' application for leave to appeal the trial court's decision. *Zoran v Cottrellville Twp*, unpublished order of the Court of Appeals, entered May 16, 2014 (Docket No. 321256).

against Lisco and concluded that Lisco intentionally violated the OMA in contravention of MCL 15.273(1).

Following the trial court's decision, plaintiffs filed a motion pursuant to MCL 15.273(1), requesting that the court order Lisco to pay their attorney fees. Specifically, they requested reimbursement at an hourly rate of $250, the rate charged by counsel per their attorney-client agreement, and asserted that MCL 15.273(1) mandates that a public official who intentionally violates the OMA pay the actual attorney fees of those persons bringing the action. In response, Lisco argued that the hourly rate of $250 requested by plaintiffs was clearly excessive in violation of MRPC 1.5(a).

At the motion hearing, the parties made arguments consistent with those made in their briefs. But ultimately, the trial court agreed with Lisco, finding plaintiffs' requested hourly rate of $250 to be clearly excessive in violation of MRPC 1.5(a). In so doing, it examined the factors this Court used in *Speicher v Columbia Twp Bd of Election Comm'rs*, 299 Mich App 86, 94-95; 832 NW2d 392 (2012), to evaluate a request for attorney fees under MCL 15.271(4), a provision which, like MCL 15.273(1), requires the payment of actual attorney fees for noncompliance with the OMA, and awarded plaintiffs attorney fees at a reduced hourly rate of $200. The court's final judgment reflected these findings and conclusions, and ordered that Lisco pay plaintiffs' attorney fees in the amount of $12,392.

II. ANALYSIS

Plaintiffs argue that the trial court erred by awarding attorney fees at a reduced hourly rate of $200. In so doing, they assert that: (1) MCL 15.273(1) requires the payment of *actual* attorney fees for intentional viola-

tions of the OMA, (2) a party opposing a request for attorney fees must raise MRPC 1.5(a) as an affirmative defense, and (3) they presented unrebutted evidence that the requested hourly fee of $250 was not clearly excessive.

"We review a trial court's determination of the reasonableness of requested attorney fees for an abuse of discretion." *Speicher*, 299 Mich App at 94.[5] " 'If the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion.' " *Id*., quoting *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007). A trial court's factual findings are reviewed for clear error. *Speicher*, 299 Mich App at 94. "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made." *Id*. (citation and quotation marks omitted).

The trial court ordered Lisco to pay plaintiffs' attorney fees pursuant to MCL 15.273(1), which states, "A public official who intentionally violates this act *shall* be personally liable in a civil action for actual and exemplary damages of not more than $500.00 total, plus court costs and actual attorney fees to a person or group of persons bringing the action." (Emphasis added.) Despite the requirement that "actual attorney fees" be awarded, the court awarded fees at a reduced

[5] Plaintiffs assert that because MCL 15.273(1) requires the payment of actual attorney fees, the abuse-of-discretion standard cannot apply to the trial court's decision. But this Court applied the abuse-of-discretion standard in *Speicher*, 299 Mich App at 94, to analyze a trial court's award of attorney fees pursuant to MCL 15.271(4), which—like MCL 15.273(1)—requires the payment of actual attorney fees for noncompliance with the OMA. MCL 15.271(4). We are bound to follow prior published decisions of this Court under the rule of stare decisis. MCR 7.215(C)(2).

hourly rate of $200, rather than the actual hourly rate of $250 requested by plaintiffs.

Plaintiffs first argue that the trial court erred by awarding attorney fees at a reduced hourly rate of $200 because the plain terms of MCL 15.273(1) require the payment of actual attorney fees. In *Speicher*, 299 Mich App at 93, this Court held that MRPC 1.5(a) and "the public policy restraint on illegal or clearly excessive attorney fees is applicable to actions for actual attorney fees under the OMA." Thus, plaintiffs are incorrect that "actual" attorney fees must *always* be awarded because of the plain language of MCL 15.273(1), as a court has the discretion to award attorney fees at a reduced rate if it finds the actual attorney fees to be clearly excessive.

Plaintiffs attempt to distinguish *Speicher*, arguing that there, the trial court reduced the requested attorney fees sua sponte, whereas here, "an *opposing party* (i.e. Defendant [Lisco]) seeks to use the ethics rules to challenge a contracted-for fee amount as being in violation of MRPC 1.5(a)." Therefore, they assert, Lisco should have been required to plead MRPC 1.5(a) as an affirmative defense to the requested attorney fees and bear the burden of proving that the attorney fees requested were clearly excessive.

Initially, we note that the trial court in *Speicher* did not sua sponte reduce the requested attorney fees, as plaintiffs maintain. Instead, as in this case, the plaintiff filed a motion for attorney fees in response to which the defendant argued that the requested fees were clearly excessive. *Speicher*, 299 Mich App at 89. Thus, we see no meaningful distinction.[6] Further, plaintiffs'

[6] We do note that, in *Speicher*, 299 Mich App at 101, this Court remanded to the trial court "for an evidentiary hearing to determine the appropriate amount of attorney fees and to allow [the] plaintiff to

argument that Lisco should have been required to plead MRPC 1.5(a) as an affirmative defense, and prove that the fees plaintiffs requested were clearly excessive, lacks merit. As stated above, the *Speicher* Court allowed a challenge to a request for attorney fees under the OMA made in response to the motion for attorney fees, rather than as an affirmative defense. *Speicher*, 299 Mich App at 89. And it also specifically reasoned that the plaintiff bore the burden of proving that the requested fees were not clearly excessive because " '[t]he burden of proving the fees rests upon the claimant of those fees.' " *Id*. at 101 (citation omitted; alteration in original). There is no reason that this same burden of proof should not have applied to plaintiffs' request for attorney fees.

Although we disagree with plaintiffs that MCL 15.273(1) is a statutory guarantee without exception, we do agree that the trial court erred in its application of the "clearly excessive" standard contained within MRPC 1.5(a).[7] Specifically, when deciding whether the $250 hourly rate satisfied that standard, the court

present evidence in support of his claim that the requested attorney fees are not excessive." Plaintiffs do not argue here that the trial court should have held an evidentiary hearing before awarding attorney fees.

[7] MRPC 1.5(a) provides:

> (a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

concluded that "an hourly rate of $200 per hour is reflective of the fee customarily charged in this locality for similar legal services or those with similar difficulty." But the test is not whether the fee is reflective of the locality's customary charge, but rather whether the fee was "clearly excessive," meaning that "after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." MRPC 1.5(a). Presumably, the trial court's conclusion that a $200 hourly rate is customary in St. Clair County is a determination that a $200 rate is a reasonable one; but the next question to answer is whether a lawyer of ordinary prudence would have a *firm conviction* that a $250 hourly rate is *in excess* of that reasonable rate.

Because of the high standard contained within MRPC 1.5(a), which is essentially an articulation of the clear-and-convincing-evidence burden of proof, a fee that is slightly—or even moderately—above a reasonable fee cannot be "*clearly* excessive." Indeed, the Supreme Court has recognized that an unreasonable fee is not necessarily a clearly excessive one:

> We note that a trial court's determination under [MCL 213.66(3)] that the owner's attorney fees are unreasonable

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(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

> does not necessarily mean that the owner's fees are "clearly excessive" in violation of MRPC 1.5(a). This is because the ethics rule provides that a fee is "clearly excessive" only when "a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." [*Dep't of Transp v Randolph*, 461 Mich 757, 766 n 12; 610 NW2d 893 (2000).]

Consequently, it was proper for the trial court to evaluate what is a reasonable fee (and by necessity the reasonable hourly rate) through application of the factors set forth in MRPC 1.5(a), as what is reasonable must first be determined before it can be decided that something is in excess of what is reasonable. But the trial court should not have stopped there, as it should have then determined whether the $250 hourly rate was "clearly excessive" by considering whether "a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." Its failure to do so requires that we vacate the order so that the trial court can make that determination in the first instance.

The trial court's order is vacated, and this matter is remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

No costs to either side.

MURRAY, P.J., and FORT HOOD and GLEICHER, JJ., concurred.

In re APPLICATION OF CONSUMERS ENERGY COMPANY TO INCREASE RATES

Docket Nos. 330675, 330745, and 330797. Submitted July 12, 2017, at Lansing. Decided October 10, 2017. Approved for publication December 28, 2017, at 9:05 a.m. Leave to appeal sought in Docket Nos. 330675 and 330745.

In December 2014, Consumers Energy Company filed an application with the Michigan Public Service Commission (PSC), requesting a rate increase to cover the costs associated with, among other things, technology investments in its Advanced Metering Infrastructure (AMI) system (smart-meter program) and increased operating and maintenance costs. Consumers requested $166 million in rate increases to produce a return on common equity (ROE) of 10.7%. In June 2015, as authorized by MCL 460.6a(2), Consumers self-implemented a rate increase and eliminated certain customer credits to raise its rates by the requested amount. In November 2015, the PSC authorized a rate increase, continued the smart-meter program, and continued the then-current ROE of 10.3%. The Association of Businesses Advocating Tariff Equity (ABATE) (Docket No. 330675), Residential Customer Group (RCG) and Michelle Rison (Docket No. 330745), and the Attorney General (Docket No. 330797) appealed. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. Whether a utility rate is reasonable depends on a comprehensive examination of all factors involved. The PSC has discretion to set a utility rate at the rate it chooses as long as the commission chooses a rate that is neither so low as to be confiscatory nor so high as to be oppressive. When setting a utility rate, MCL 460.557(2) provides that the PSC must consider and give due weight to all lawful elements properly to be considered, but the PSC is not bound by any single formula or method when setting rates. MCL 462.26(8) provides that a party challenging an order of the PSC has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. An order is unlawful if the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. An

order is unreasonable if it is not supported by the evidence, but one commissioner's disagreement with the majority's findings does not make that order unreasonable. In this case, the PSC examined the evidence, and the order approving the 10.3% ROE was lawful and reasonable. The PSC properly relied on evidence presented by Consumers' expert witness and a PSC staff witness to set the rate, even though contradictory evidence was presented by other witnesses. Moreover, the order was not unreasonable simply because one commissioner concluded that the ROE should be 10%, not 10.3%. Accordingly, the PSC acted within its statutory authority and acted within its discretion when it set the ROE.

2. The PSC has broad authority to regulate rates for public utilities, but that authority does not include the power to make management decisions for utilities. Determining the types of equipment a public utility should deploy as an upgrade to infrastructure are management decisions over which the PSC does not have control. In this case, the PSC had authority to approve implementation of the smart-meter program and to approve the customer fees associated with those customers who choose to opt out of the program. The PSC properly exercised its ratemaking authority when it approved the opt-out fees in light of the fact that the opt-out fees covered the additional costs of providing services to those customers.

3. The installation of a smart meter on a customer's home did not violate the Fourth Amendment of the United States Constitution because the constitutional protection applies only to governmental action and Consumers is not a state actor.

4. Issues fully decided in earlier PSC proceedings need not be completely relitigated in later proceedings unless the party wishing to do so establishes by new evidence or a showing of changed circumstances that the earlier result was unreasonable. In other recent cases decided by the PSC, the commission approved the opt-out fees charged by Consumers to those customers who had requested a nontransmitting meter and found that the expenses were related to the cost of services provided and were properly accounted for in Consumers' base rates. RCG failed to establish by new evidence or a showing of changed circumstances that the earlier PSC decisions regarding opt-out fees were unreasonable, and RCG was therefore precluded from challenging those fees again on appeal.

Affirmed.

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

Public Law Resource Center PLLC (by *Don L. Keskey* and *Brian W. Coyer*) for the Residential Customer Group and Michelle Rison.

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

H. Richard Chambers, *Bret A. Totoraitis*, and *Kelly M. Hall* for Consumers Energy Company.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *John A. Janiszewski*, Assistant Attorney General, for the Attorney General.

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

PER CURIAM. In these consolidated appeals, appellants the Association of Businesses Advocating Tariff Equity (ABATE) (Docket No. 330675), Residential Customer Group (RCG) and Michelle Rison (Docket No. 330745), and the Attorney General (Docket No. 330797) appeal a November 19, 2015 order of the Michigan Public Service Commission (PSC) approving a return on equity of 10.3% for appellee Consumers Energy Company and authorizing Consumers to continue its smart-meter program. For the reasons stated in this opinion, we affirm.

I. FACTS

On December 5, 2014, Consumers filed an application to increase its rates for the sale of electricity. Consumers used a projected test year ending May 31, 2016, and stated that without rate relief, it would experience an annual revenue deficiency of approximately $166 million. Consumers stated that its need for additional revenue was based on the following factors: (1) the purchase of a 450-megawatt natural gas plant to partially offset the projected capacity shortfall resulting from the retirement of seven coal plants in April 2016, (2) continuing investments in electric generation and distribution assets to comply with legal and environmental requirements, (3) continuing investments in electric generation and distribution assets to provide safe and reliable service, (4) ongoing investments in technology improvements, and (5) increased operating and maintenance expenses to improve reliability of service. Consumers sought approximately $166 million in rate increases and the authorization to produce a return on common equity (ROE) of 10.7%.

On June 4, 2015, Consumers self-implemented[1] a rate increase of $110 million above its current rates. Consumers also eliminated a customer credit. The rate increase and the elimination of the credit raised Consumers' retail rates by $166 million.

The administrative law judge (ALJ) issued a proposal for decision (PFD), recommending that Consum-

[1] If the PSC does not issue an order within 180 days after the filing of an application for a rate increase, a utility may self-implement a rate increase up to the amount requested. If the utility does so and the PSC issues an order approving a rate increase lower than that requested, the utility must refund the excess amount collected to its customers. MCL 460.6a(2).

ers' overall rate of return be set at 6.09%, including an ROE of 10.00%. The ALJ noted that Consumers had requested a rate increase for various purposes, including continuing technology investments in its Advanced Metering Infrastructure (AMI) system,[2] and concluded that recovery of the costs of the projected test year AMI investment should be allowed.

On November 19, 2015, the PSC, in a 2-1 decision, issued an order authorizing Consumers to raise its rates. The PSC rejected requests by the Attorney General and RCG to terminate the AMI program, reasoning as follows:

> The Commission adopts the findings and recommendations of the ALJ. As the ALJ relates, the Commission has thoroughly vetted the underlying cost/benefit analyses and the AMI program itself and will not revisit those issues. *See*, November 2, 2009 and October 7, 2014 orders in Case No. U-15645; November 4, 2010 order in Case No. U-16191; June 7, 2012 order in Case No. U-16794; and June 28, 2013 order in Case No. U-17087. The AMI program is correctly characterized as a grid modernization program that cannot be replaced by renewable energy or energy efficiency measures. The Commission finds that no party provided evidence showing that conditions have changed such that the current rate base and depreciation

[2] An AMI meter measures and records real-time data on power consumption and reports that consumption to the utility on a regular basis. An AMI meter is also known as a "smart meter." See *In re Applications of Detroit Edison Co*, 296 Mich App 101, 114; 817 NW2d 630 (2012). The PSC has issued a series of orders approving Consumers' pilot AMI program, *In re Application of Consumers Energy Co*, order of the Public Service Commission, entered November 4, 2010 (Case No. U-16191); authorizing Consumers to proceed with Phase 2 of its AMI deployment program, *In re Application of Consumers Energy Co*, order of the Public Service Commission, entered June 7, 2012 (Case No. U-16794); and granting rate relief for and authorizing continuation of the program, *In re Application of Consumers Energy Co*, order of the Public Service Commission, entered July 12, 2017 (Case No. U-17087).

> treatment of these expenses should be changed. Consumers shall continue to provide cost/benefit analyses as long as the program is still in the implementation phase. The Commission approves Consumers' proposed test year expenditure, minus the contingency expenditure identified by the Staff.

The PSC reviewed the evidence and the parties' recommendations regarding Consumers' request for an ROE of 10.7%, noting that Consumers took the position that if the PSC did not approve an ROE of 10.7%, it should not set the rate lower than the current 10.3%. The PSC concluded:

> The Commission agrees with the utility and finds that the current 10.3% ROE should be continued. While the ALJ provided an excellent analysis of this issue, the Commission finds that the current ROE will best achieve the goals of providing appropriate compensation for risk, ensuring the financial soundness of the business, and maintaining a strong ability to attract capital.
>
> Consumers has planned an ambitious capital investment program, much of which is related to environmental and generation expenditures that are unavoidable and are saddled with time requirements. The Commission observes that 10.3% is at the upper point of the Staff's recommended ROE range, and Consumers showed, using the Staff's exhibit, that the average ROE resulting from recently decided cases in Michigan, Indiana, Ohio, Pennsylvania, and Wisconsin was 10.26%. The Commission acknowledges that ROEs, nationally, have shown a steady decline (as they have in Michigan), and agrees with the Attorney General that Michigan's economy has stabilized; but finds that, under present circumstances, it is reasonable to assume that investor expectations may be rising. Consumers' recently-improved credit ratings will help the utility secure the financing required to carry out its goals. Thus, the Commission favors adopting an ROE of 10.30%.

The dissenting Commissioner concluded that approving an ROE of 10% was more reasonable given the record.

ABATE, RCG and Rison, and the Attorney General appealed the PSC's order. This Court consolidated the appeals for purposes of hearing and decision.

II. STANDARD OF REVIEW

In *In re Application of Consumers Energy Co to Increase Electric Rates (On Remand)*, 316 Mich App 231, 236-237; 891 NW2d 871 (2016), we explained that

> [t]he standard of review for PSC orders is narrow and well defined. Pursuant to MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. *Mich Consol Gas Co v Pub Serv Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). An order is unreasonable if it is not supported by the evidence. *Associated Truck Lines, Inc v Pub Serv Comm*, 377 Mich 259, 279; 140 NW2d 515 (1966) [O'HARA, J., dissenting].
>
> A final order of the PSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Attorney General v Pub Serv Comm*, 165 Mich App 230, 235; 418 NW2d 660 (1987).
>
> We give due deference to the PSC's administrative expertise and will not substitute our judgment for that of the PSC. *Attorney General v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999). We give respectful consideration to the PSC's construction of a statute that the

> PSC is empowered to execute, and this Court will not overrule that construction absent cogent reasons. *In re Complaint of Rovas against SBC Mich*, 482 Mich 90, 103, 108; 754 NW2d 259 (2008). If the language of a statute is vague or obscure, the PSC's construction serves as an aid in determining the legislative intent and will be given weight if it does not conflict with the language of the statute or the purpose of the Legislature. *Id*. at 103-104. However, the construction given to a statute by the PSC is not binding on us. *Id*. at 103. Whether the PSC exceeded the scope of its authority is a question of law that is reviewed de novo. *In re Complaint of Pelland Against Ameritech Mich*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

III. ANALYSIS

Appellants ABATE and the Attorney General argue that the PSC erred by approving an ROE of 10.3% for Consumers. They assert that the 10.3% ROE approved by the PSC does not have support in the record, that none of the parties advocated for that particular ROE, that the PSC's choice appears to have been a compromise among the ROEs recommended by the parties, and that the PSC provided no rationale for choosing the ROE that it did.

We hold that the PSC's order approving an ROE of 10.3% was lawful and reasonable and that the PSC's decision was not arbitrary or capricious.

The establishment of a reasonable utility rate is not subject to precise computation. What is reasonable "depends upon a comprehensive examination of all factors involved, having in mind the objective sought to be attained in its use." *Meridian Twp v East Lansing*, 342 Mich 734, 749; 71 NW2d 234 (1955). See also *id*. at 753 (holding that the township failed to meet its burden of showing that the rate charged for water was unreasonable). As long as the PSC chooses a rate that

is neither "so low as to be confiscatory" nor "so high as to be oppressive," the PSC has discretion to set the rate at the level it chooses. *Mich Bell Tel Co v Pub Serv Comm*, 332 Mich 7, 26; 50 NW2d 826 (1952) (citation omitted). See also *id*. at 42-43 (holding that the PSC's establishment of reduced telephone rates was neither confiscatory nor oppressive).

Testimony from witnesses for Consumers and the PSC staff supports the approval of an ROE of 10.3%. Consumers' witness Venkat Dhenuvakonda Rao recommended an ROE range of 10.50% to 10.90% after adjusting for economic conditions; however, his quantitative models produced a range from 8.94% to 10.69%. PSC staff witness Kirk D. Megginson testified that an ROE in the range of 8.3% to 10.3% would be reasonable. Megginson recommended the adoption of an ROE of 10.0%, but he did not suggest that the adoption of a different rate would be unreasonable. The PSC was entitled to rely on the evidence from these experts, even if other witnesses presented contradictory testimony. *In re Application of Consumers Energy to Increase Electric Rates (On Remand)*, 316 Mich App at 240, citing *Great Lakes Steel Div of Nat'l Steel Corp v Mich Pub Serv Comm*, 130 Mich App 470, 481; 344 NW2d 321 (1983). Furthermore, the fact that one Commissioner dissented and would have established Consumers' ROE at 10% does not mandate a conclusion that the PSC's decision was unreasonable. See *ABATE v Pub Serv Comm*, 208 Mich App 248, 265; 527 NW2d 533 (1994) (explaining that one commissioner's disagreement with the PSC's findings does not require this Court to conclude that the PSC's decision was not supported by the requisite evidence).

The PSC noted that the rate of 10.3% was within the PSC staff's recommended range and that it was con-

sistent with ROEs approved in other Midwestern states. The PSC acknowledged that ROEs were trending downward nationally, but it noted that Consumers' credit rating had improved and reasoned that lowering the company's ROE would impede the company's ability to secure financing for future investments. The PSC is required to "consider and give due weight to all lawful elements necessary" to determine an appropriate rate. MCL 460.557(2). In determining rates, the "PSC is not bound by any single formula or method and may make pragmatic adjustments when warranted by the circumstances." *Detroit Edison Co v Pub Serv Comm*, 221 Mich App 370, 375; 562 NW2d 224 (1997).

The PSC examined the evidence and determined that an ROE of 10.3% was appropriate. The PSC acted consistently with its statutory authority, MCL 460.557(2), and acted within its discretion to determine an appropriate ROE, *Detroit Edison*, 221 Mich App at 375. Neither ABATE nor the Attorney General has shown that the PSC's order was unlawful or unreasonable. MCL 462.26(8).

Next, appellants RCG and Rison argue that the PSC lacked the authority, absent specific statutory guidance, to mandate the installation of smart meters in customers' homes by approving Consumers' smart-meter program and its attendant tariffs on an "opt-out" basis. RCG and Rison specifically argue that in prior uncontested cases, the PSC foreclosed the presentation of evidence concerning health questions and privacy matters related to smart meters and that this defective process prevented the introduction of evidence regarding an alternative "opt-in" approach that would have respected customer choices and concerns.

We hold that the PSC did not lack the authority to approve implementation of the smart-meter program and the attendant fees on customers.

The PSC has only the authority granted to it by statute. The PSC has broad authority to regulate rates for public utilities, but that authority does not include the power to make management decisions for utilities. *Consumers Power Co v Pub Serv Comm*, 460 Mich 148, 158; 596 NW2d 126 (1999) (holding that the PSC lacked the authority to order local utilities to transmit "electricity from a third-party provider's system to an end-user who is not connected to that system"); *Union Carbide Corp v Pub Serv Comm*, 431 Mich 135, 148-150; 428 NW2d 322 (1998) (holding that the PSC lacked the authority to make management decisions for the utility regarding the operation of its facilities).

RCG and Rison correctly point out that the PSC has no statutory authority to enable Consumers to require all its customers to participate in the AMI program and accept a smart meter or to pay fees if they choose to opt out of the AMI program. However, no such statute exists because the decision regarding the type of equipment to deploy as an upgrade to infrastructure can only be described as a management prerogative. Consumers applied for approval of its AMI program; but that fact does not mandate a conclusion that Consumers' decision regarding the type of meters to use is not a management decision. RCG and Rison's suggestion that the PSC could order Consumers to develop an opt-in program is clearly the type of action found invalid in *Union Carbide*, 431 Mich at 148-150.

RCG and Rison's reliance on *Attorney General v Pub Serv Comm*, 269 Mich App 473; 713 NW2d 290 (2006), is misplaced. In that case, this Court held that the PSC lacked the statutory authority to authorize Consumers

to impose an extra charge on all customers—including those who had not agreed to pay premium rates to receive green power—to finance renewable-energy programs. *Id*. at 481-482. In the instant case, Consumers proposed opt-out fees, calculated on the basis of cost-of-service principles, that would be imposed only on those customers who chose not to participate in the AMI program. The fees were designed to cover the additional costs of providing service to those customers. Accordingly, approval of the opt-out fees was a proper exercise of the PSC's ratemaking authority. MCL 460.6a(1); *Detroit Edison*, 221 Mich App at 385.

Next, RCG and Rison argue that the PSC's disregard of Consumers' customers' concerns about privacy, data collection, and the transmittal of data violates due-process and Fourth Amendment principles.

We hold that the installation of a smart meter on a customer's home does not violate the customer's rights under the Fourth Amendment of the United States Constitution because Consumers is not a state actor.

We review de novo a question of constitutional law, including whether an individual's Fourth Amendment right to be free from unreasonable searches has been violated. *Detroit Edison Co v Stenman*, 311 Mich App 367, 387; 875 NW2d 767 (2015).

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment applies only to governmental actions, and it is not applicable to a search performed by a private actor who is not acting as an agent of the government. *People v McKendrick*, 188 Mich App 128, 141; 468 NW2d 903 (1991). Appellants have not established that the installation of either a transmitting or a nontransmitting AMI meter constitutes a search or, even if it did, that Consumers was acting as an agent of the government.

The argument that the installation of a smart meter constituted state action and violated a customer's Fourth Amendment protections was raised and rejected in *Stenman*, 311 Mich App 367. In that case, Detroit Edison filed suit in circuit court against the defendants, who had removed a smart meter installed on their property. *Id*. at 370-371. The defendants filed a counterclaim alleging, among other things, that the smart meter was a surveillance device, the installation of which violated the Fourth Amendment. *Id*. at 372. The trial court granted partial summary disposition in favor of the plaintiff. *Id*. at 373-374. On appeal, the defendants argued that the installation of a smart meter on their home constituted a warrantless search and therefore violated the Fourth Amendment. This Court disagreed, stating:

> The United States and Michigan Constitutions guarantee every person's right to be free from unreasonable searches. US Const, Am IV; Const 1963, art 1, § 11. However, in order for Fourth Amendment protections to apply, *the government* must perform a search. *Lavigne v Forshee*, 307 Mich App 530, 537; 861 NW2d 635 (2014); see also *People v Taylor*, 253 Mich App 399, 404; 655 NW2d 291 (2002), citing *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967). "[T]he Fourth Amendment proscribes only government action and is not applicable to a search or seizure, even an unreasonable one, conducted

> by a private person not acting as an agent of the government or with the participation or knowledge of any government official." *People v McKendrick*, 188 Mich App 128, 141; 468 NW2d 903 (1991); see also *id*. at 142-143 (identifying two factors that must be shown in order to conclude that a search is proscribed by the Fourth Amendment).
>
> First, defendants have not shown, or even argued, that an illegal search has already been performed through the smart meter that was installed on their property. Instead, their arguments in the lower court and on appeal focus on the *potential* for smart meters to collect information from the homes of Americans in the future. Further, defendants have failed to establish that plaintiff's installation of smart meters constitutes governmental action for Fourth Amendment purposes. Even if the state and federal governments have advocated or incentivized, as a matter of public policy, the use of smart meters, there is no indication that the government controls the operations of plaintiff, an investor-owned electric utility, or that plaintiff acts as an agent of the state or federal governments. Accordingly, we reject defendants' claim that plaintiff's installation of a smart meter violated their Fourth Amendment rights. [*Stenman*, 311 Mich App at 387-388 (alteration in original).]

RCG and Rison have made no attempt to distinguish *Stenman*; in fact, RCG and Rison make no reference to the case. This Court's decision in *Stenman* controls on this issue, MCR 7.215(C)(2), and mandates rejection of RCG and Rison's argument.

Finally, RCG and Rison argue that the PSC's order unlawfully and unreasonably continues surcharges on customers who opt out of the AMI program.

Ratemaking is a legislative, rather than a judicial, function. For that reason, the doctrines of res judicata and collateral estoppel do not apply in a strict sense. Nevertheless, factual "issues fully decided in earlier PSC proceedings need not be 'completely relitigated' in

later proceedings unless the party wishing to do so establishes by new evidence or a showing of changed circumstances that the earlier result is unreasonable." *In re Application of Consumers Energy Co for Rate Increase*, 291 Mich App 106, 122; 804 NW2d 574 (2010), quoting *Pennwalt Corp v Pub Serv Comm*, 166 Mich App 1, 9; 420 NW2d 156 (1988).

RCG and Rison contend that surcharges, including a one-time charge paid by a customer who declines to have a smart meter installed or who requests that a smart meter be removed, as well as a monthly surcharge, are not supported by the requisite evidence and should have been eliminated by the PSC.

This issue was recently decided by the PSC in another case on remand from this Court. In *In re Application of Consumers Energy Co*, order of the Public Service Commission, entered July 12, 2017 (Case No. U-17087), another matter involving Consumers Energy Company, the PSC entered an order on June 28, 2013, approving opt-out fees for customers who requested a nontransmitting meter. The Attorney General and individual appellant Rison, among others, appealed the PSC's order and challenged the imposition and the amount of the opt-out fees. In *Attorney General v Pub Serv Comm*, unpublished per curiam opinion of the Court of Appeals, issued April 30, 2015 (Docket Nos. 317434 and 317456), this Court, in Docket No. 317456,[3] remanded the matter to the PSC to conduct a contested-case hearing to examine the opt-out tariff.

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[3] In *In re Application of Consumers Energy to Increase Electric Rates*, 498 Mich 967 (2016), our Supreme Court reversed the portion of this Court's decision that addressed the Attorney General's claim of appeal in Docket No. 317434 and remanded the case for consideration of the merits of that appeal. This Court thereafter issued a published decision in Docket No. 317434. *In re Application of Consumers Energy to Increase*

In an order entered March 29, 2016, in Case No. U-17087, the PSC indicated that on remand it would address the purpose of the opt-out fees, whether the fees constituted reimbursement for the cost of services related to nontransmitting meters, and whether any of the costs were already accounted for in Consumers' base rates.

On January 19, 2017, the ALJ issued a PFD, finding that the opt-out fees represented reimbursement for the costs of service and that no expenses related to Consumers' opt-out program were accounted for in Consumers' base rates. The ALJ recommended that the PSC reaffirm its June 28, 2013 decision.

On July 12, 2017, the PSC issued an order on remand in Case No. U-17087, adopting the findings and recommendations in the PFD. The PSC found that the opt-out tariffs were cost-based and that Consumers provided an explanation of the cost-of-service principles used to determine those tariffs. Specifically, the PSC stated that

> [o]pt-out fees represent incremental costs that are incurred solely in order to be able to offer the opt-out program; opt-out customers are protected by the credits from the costs of AMI, and customers who use standard equipment are protected from subsidizing customers who choose non-standard equipment. The amounts collected from opt-out customers are credited to base rate calculations to ensure that there is no double recovery. The Court of Appeals has found that smart meters are standard utility equipment, and that the choice of metering technology is a utility management prerogative. The opt-out tariff collects costs associated with the development and

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Electric Rates (On Remand), 316 Mich App 231. However, this Court's initial decision in Docket No. 317456 was not affected by the Supreme Court's remand order or this Court's decision on remand. See *id*. at 234 n 1.

> operation of a non-standard metering option. The Commission has previously rejected the RCG's argument regarding the use of self-reads as an alternative to the opt-out program. The Commission has made it a priority to limit estimated and customer self-reading of meters in order to increase the accuracy of meter reading and billing. Commission rules require utilities to read a certain percentage of electric meters. [*In re Application of Consumers Energy Co to Increase Rates*, order of the Public Service Commission, entered July 12, 2017 (Case No. U-17087), p 12 (citations omitted).]

The PSC ultimately affirmed the opt-out tariffs and credits related to the tariffs originally approved in the June 28, 2013 order in Case No. U-17087. *Id*. at 16.

In the instant case, RCG and Rison are requesting that this Court examine the opt-out fees in a manner similar to that undertaken by the PSC in Case No. U-17087. We decline to do so and defer to the decision on remand issued by the PSC in Case No. U-17087. That decision is based on previous decisions of the PSC and this Court. Appellants seek to reargue the matter yet again but have put forth nothing that would require this Court to conclude that the previous decision as reflected most recently in the order in Case No. U-17087 is unreasonable and should not be followed. See *In re Application of Consumers Energy Co*, 291 Mich App at 122.

Affirmed.

MARKEY, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ., concurred.

In re MILLER

Docket No. 338871. Submitted December 5, 2017, at Lansing. Decided January 9, 2018, at 9:00 a.m.

In September 2016, Adoption Associates, a child-placing agency, filed petitions in the Jackson Circuit Court, Family Division, to terminate parental rights to two minor siblings whose mother surrendered them to a hospital in August 2016 under the Safe Delivery of Newborns Law, MCL 712.1 *et seq*. At the time she surrendered the children, she gave no indication of her marital status and declined to identify the children's father. Adoption Associates took custody of the children from the hospital and placed them with prospective adoptive parents. Adoption Associates was unable to obtain the children's birth certificates until December 2016 because of an "unresolved paternity issue"; it was later discovered that the mother was married. Once received, the birth certificates listed the mother's husband as the children's father. Adoption Associates asserted that the termination of the rights of the surrendering parent and the nonsurrendering parent could move forward and that it had no duty to notify the husband of the adoption process. The court, Diane M. Rappleye, J., refused to terminate the nonsurrendering father's parental rights. According to the court, the Safe Delivery of Newborns Law only applied to the mother in this case and not to the mother's husband. The Court of Appeals granted Adoption Associates' application for leave to appeal.

The Court of Appeals *held*:

The Safe Delivery of Newborns Law permits a parent of an unwanted newborn child to surrender the newborn to an emergency service provider within 72 hours of the newborn's birth. MCL 712.3(1)(c) permits a parent to file a petition for custody of the infant within 28 days of surrender or within 28 days of notice of surrender. If no person files a petition for custody within 28 days of notice or surrender, the child-placing agency must immediately petition the court pursuant to MCL 712.17(2) and (3) to terminate the parental rights of both the nonsurrendering parent and the surrendering parent. Termination of parental rights requires the child-placing agency, under MCL 712.17(4) and (5),

to prove by a preponderance of the evidence that the surrendering parent released the newborn and that reasonable efforts were made by the agency to identify, locate, and provide notice to the nonsurrendering parent. In this case, the newborns' mother surrendered her infant twins and did not identify the children's father. No one claimed paternity, and there was no response to the published notice intended to alert the father of the newborns' birth pursuant to MCL 712.7(f). A nonsurrendering father who does not file a petition for custody will have his parental rights terminated under MCL 712.17(3). In this case, it eventually became known that the newborns' mother was married. The mother's husband was the presumptive father of the infants under MCL 722.1433(e) because a child born during a marriage is presumed to be the issue of that marriage, and the husband is the legal father of a child conceived or born during the marriage. Therefore, the mother's husband was named as the father on the twins' birth certificates. Adoption Associates claimed it had no duty to specifically notify the man listed on the newborns' birth certificates. The trial court disagreed, holding that the Safe Delivery of Newborns Law did not apply to the child's legal father. The trial court was concerned that an order terminating the parental rights of the mother and the nonsurrendering parent would only terminate the parental rights of a biological father and would not terminate the rights of the mother's husband. But the trial court was operating under the fallacy that a child of a married mother could have two legal fathers and that the husband of the surrendering mother could seek to assert his parental rights to the surrendered child after the child had been adopted. However, a child may have only one legal father, and any man claiming paternity of the child under the Safe Delivery of Newborns Law would be subject to DNA testing under MCL 712.11(1). If DNA testing did not identify the person asserting paternity as the children's biological father, MCL 712.11(5) would require the trial court to dismiss his petition for custody. On the other hand, if the person asserting paternity *was* the biological father of the child, MCL 712.14 would require the trial court to conduct a best-interest hearing to determine custody. Thus, the parental rights at issue in a surrender proceeding are the biological father's parental rights. If the husband of a surrendering mother later challenged an adoption, either he would be precluded from asserting paternity because he was the biological father whose rights were terminated, or he would have to demonstrate that he was not the biological father whose parental rights were terminated, effectively defeating the presumption of legitimacy. As a result, under the procedure set forth in the Safe

Delivery of Newborns Law, there are no circumstances in which a party claiming to be the father of the newborns would later be able to interfere with an adoption by claiming paternity and asserting his parental rights. In this case, no one claimed paternity in the 28 days following surrender and notice of surrender. If the trial court terminates the rights of the nonsurrendering father and the husband later seeks to assert parental rights, he would have to demonstrate that he was not the biological father, but by doing so would defeat the presumption of paternity and be without parental rights to assert. Accordingly, termination proceedings under the Safe Delivery of Newborns Law apply to the children's legal father.

Reversed and remanded.

PARENT AND CHILD — SAFE DELIVERY OF NEWBORNS LAW — APPLICATION TO THE HUSBAND OF A SURRENDERING MOTHER.

The Safe Delivery of Newborns Law, MCL 712.1 *et seq*., permits a parent of an unwanted newborn child to surrender the newborn to an emergency service provider within 72 hours of the newborn's birth; MCL 712.3(1)(c) permits a parent to file a petition for custody of the infant within 28 days of surrender or within 28 days of notice of surrender; if no person files a petition for custody within 28 days of notice or surrender, the child-placing agency must immediately petition the court pursuant to MCL 712.17(2) and (3) to terminate the parental rights of both the nonsurrendering parent and the surrendering parent; the parental rights at issue in a surrender proceeding when the mother surrendered the newborn are the biological father's parental rights, but termination proceedings under the Safe Delivery of Newborns Law apply to the husband of a surrendering mother in that the husband may not later assert parental rights.

Speaker Law Firm, PLLC (by *Liisa R. Speaker* and *Jennifer M. Alberts*) for Adoption Associates.

Brown, Raduazo & Hilderley, PLLC (by *Christopher M. Hurlburt*) for the nonsurrendering parent.

Before: O'CONNELL, P.J., and BECKERING and STEPHENS, JJ.

O'CONNELL, P.J. Petitioner, Adoption Associates, a child-placing agency, appeals by leave granted the trial

court's order denying petitions to terminate parental rights to two children surrendered under the Safe Delivery of Newborns Law, MCL 712.1 *et seq*. The trial court concluded that the Safe Delivery of Newborns Law only applied to the mother of the surrendered children and not to the legal father. We granted Adoption Associates' application for leave to appeal, and "the nonsurrendering parent" appeared and requested that we affirm the decision of the trial court. We conclude that the existence of a legal father does not affect application of the Safe Delivery of Newborns Law and that the Safe Delivery of Newborns Law applies to the husband of a surrendering mother in that the husband may not later assert parental rights. Accordingly, we reverse.

I. BACKGROUND

In August 2016, a woman gave birth to twins. Under the Safe Delivery of Newborns Law, she surrendered the twins to the hospital the day after they were born. The surrendering mother did not provide her address or marital status, she gave no indication that she was married, and she declined to identify the father. Adoption Associates took custody of the children and placed them with prospective adoptive parents. In September 2016, the adoption agency filed petitions to terminate the parental rights of the surrendering parent and the nonsurrendering parent.

Also in September 2016, Adoption Associates requested the children's birth certificates for purposes of the adoption. In October 2016, the Vital Records Office notified the agency that it could not provide the birth certificates because of an "unresolved paternity issue." In December 2016, after the Vital Records Office

learned that the mother was married, it produced birth certificates listing the mother's husband as the father.[1]

This development raised the issue whether the adoption agency had a duty to notify the man listed as the father on the birth certificates about the surrender of the children. The adoption agency protested that it did not. In a written order, the trial court concluded that the Safe Delivery of Newborns Law only applied to the mother in this case and not to the legal father identified on the birth certificates.

II. ANALYSIS

This case concerns the intersection of the Safe Delivery of Newborns Law with the presumption of legitimacy. We review de novo questions of statutory interpretation. *Parks v Parks*, 304 Mich App 232, 237; 850 NW2d 595 (2014). The primary goal of statutory interpretation is to effectuate the Legislature's intent. *Sinicropi v Mazurek*, 273 Mich App 149, 156; 729 NW2d 256 (2006). We do so by applying the statute as written if it is unambiguous. *Parks*, 304 Mich App at 238.

This Court reads the statute as a whole and generally reads statutes covering the same subject matter together. *Sinicropi*, 273 Mich App at 157. However, the Safe Delivery of Newborns Law provides that neither "a provision in another chapter of [the Probate Code, MCL 710.21 *et seq*.,]" nor the Child Custody Act, MCL 722.21 *et seq*., applies to the Safe Delivery of Newborns Law unless specifically stated otherwise. MCL 712.2(3).

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[1] Effective January 28, 2018, a birth certificate for a newborn surrendered under the Safe Delivery of Newborns Law must list the parents as " 'unknown' and the newborn . . . as 'Baby Doe'." 2017 PA 142.

A. SAFE DELIVERY OF NEWBORNS LAW

The Safe Delivery of Newborns Law "encourage[s] parents of unwanted newborns to deliver them to emergency service providers instead of abandoning them[.]" *People v Schaub*, 254 Mich App 110, 115 n 1; 656 NW2d 824 (2002). The statute permits a parent to surrender a child to an emergency service provider within 72 hours of the child's birth. MCL 712.1(2)(k); MCL 712.3(1). When the emergency service provider takes temporary custody of the child, the emergency service provider must reasonably try to inform the parent that surrendering the child begins the adoption process and that the parent has 28 days to petition for custody of the child. MCL 712.3(1)(b) and (c). The emergency service provider must furnish the parent with written notice about the process of surrender and the termination of parental rights. MCL 712.3(1)(d). The emergency service provider should also try to inform the parent that, before the child can be adopted, "the state is required to make a reasonable attempt to identify the other parent, and then ask the parent to identify the other parent." MCL 712.3(2)(e). Finally, the emergency service provider must take the newborn to a hospital, if the emergency service provider is not a hospital, and the hospital must take temporary protective custody of the child. MCL 712.5(1). The hospital must notify a child-placing agency about the surrender, and the child-placing agency has various obligations, including making "reasonable efforts to identify, locate, and provide notice of the surrender of the newborn to the nonsurrendering parent" within 28 days, which may require "publication in a newspaper of general circulation in the county where the newborn was surrendered." MCL 712.7(f).

Either the surrendering parent, within 28 days of surrender, or the nonsurrendering parent, within 28 days of published notice of surrender, may file a petition to gain custody of the child. MCL 712.10(1). If neither the surrendering parent nor the nonsurrendering parent files a petition for custody within 28 days of surrender or notice of surrender, the child-placing agency must immediately file a petition with the court to terminate the rights of the surrendering parent and the nonsurrendering parent. MCL 712.17(2) and (3). The agency "shall present evidence that demonstrates that the surrendering parent released the newborn and that demonstrates the efforts made by the child placing agency to identify, locate, and provide notice to the nonsurrendering parent." MCL 712.17(4). If the agency meets its burden of proof by a preponderance of the evidence and a custody action has not been filed by the nonsurrendering parent, the trial "court shall enter an order terminating parental rights of the surrendering parent and the nonsurrendering parent under this chapter." MCL 712.17(5). The Safe Delivery of Newborns Law does not define "parent," "surrendering parent," or "nonsurrendering parent." See MCL 712.1(2) (definitions).

B. PRESUMPTION OF LEGITIMACY

When a child is born during a marriage, the child is presumed to be the issue of that marriage. *Barnes v Jeudevine*, 475 Mich 696, 703; 718 NW2d 311 (2006). The Revocation of Paternity Act (RPA), MCL 722.1431 *et seq*., defines a "presumed father" as "a man who is presumed to be the child's father by virtue of his marriage to the child's mother at the time of the child's conception or birth." MCL 722.1433(e). The RPA gov-

erns actions to determine whether a presumed father is actually a child's father. MCL 722.1435(4); MCL 722.1441.

A biological father has no standing to seek a declaration of paternity under the Paternity Act, MCL 722.711 *et seq*., when the child's mother is married to another man unless a court has previously determined that the child was born out of wedlock. *Pecoraro v Rostagno-Wallat*, 291 Mich App 303, 311-313; 805 NW2d 226 (2011). The Paternity Act defines a child born out of wedlock as "a child begotten and born to a woman who was not married from the conception to the date of birth of the child, or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage." MCL 722.711(a). Until the biological father of a child obtains a declaration of paternity, he has no lawful rights to a child who has a presumed father because "a child may have only one legal father." *Helton v Beaman*, 304 Mich App 97, 106; 850 NW2d 515 (2014), aff'd 497 Mich 1001 (2015).

C. SYNTHESIS

We conclude that the Safe Delivery of Newborns Law does apply to the husband of a surrendering mother. The trial court's decision and the nonsurrendering parent's argument rely on the fallacy that the child of a married mother could have two legal fathers. The trial court and the nonsurrendering parent are concerned about a situation in which an order terminating the parental rights of the mother and the nonsurrendering parent would only terminate the rights of a biological father but not the husband of the surrendering mother. In this scenario, the husband of

the surrendering mother could seek to assert his parental rights to the surrendered child after the child has been adopted.

However, "a child may have only one legal father," *Helton*, 304 Mich App at 106, so the legal father of a child born or conceived during a marriage is presumed to be the mother's husband until that presumption is defeated, *Barnes*, 475 Mich at 703. The Safe Delivery of Newborns Law tests this presumption through DNA testing of "each party claiming paternity" and attempting to gain custody of the child, leaving only one as the true legal father. See MCL 712.11(1).

If the nonsurrendering parent has not filed a petition for custody, the Safe Delivery of Newborns Law provides for termination of the parental rights of the nonsurrendering parent. MCL 712.17(3). The Safe Delivery of Newborns Law refers to the "nonsurrendering parent" in the singular, MCL 712.7(f), MCL 712.10(1), and MCL 712.17, and requires a party claiming paternity to submit to DNA testing, MCL 712.11(1). Therefore, the parental rights at issue in a surrender proceeding concern the biological father. If a presumed father later appeared to challenge the children's adoption, either he would be precluded from asserting paternity because he was the biological father whose parental rights were terminated, or he would have to demonstrate that he was not the biological father whose parental rights were terminated, effectively defeating the presumption of legitimacy. Accordingly, there are no circumstances in which a party would later be able to challenge the adoption by claiming paternity and asserting his parental rights.

Applying this discussion to the present case, the husband of the surrendering mother was presumed to be the legal father of the children by virtue of the

marriage. See MCL 722.1433(e). If the husband had filed a petition for custody of the children within 28 days of published notice of the surrender, see MCL 712.10(1), he would have been required to submit to a DNA test to determine paternity, see MCL 712.11(1). If the testing established that he was not the children's biological father, the trial court would have dismissed his petition for custody. See MCL 712.11(5). This dismissal would be consistent with the rules governing the presumption of legitimacy. The DNA test would have demonstrated that the children were not the issue of the marriage, thereby defeating the presumption of legitimacy. See 722.711(a); *Barnes*, 475 Mich at 703. On the other hand, if the husband of the surrendering mother was the biological father, the trial court would have held a best-interest hearing to determine the children's custody. See MCL 712.14. If the children's biological father never claimed paternity or petitioned for custody, the child-placing agency would have had to "immediately file a petition with the court to determine whether the court shall enter an order terminating the rights of the nonsurrendering parent." MCL 712.17(3).

In this case, no one claimed paternity. If the trial court terminates the parental rights of the nonsurrendering parent and the husband of the surrendering mother later seeks to assert his parental rights, he would have to demonstrate that he was not the biological father to show that the order terminating parental rights did not apply to him. However, in doing so, he would be defeating the presumption of paternity, and he would be without parental rights to assert to disrupt an adoption. Accordingly, the termination proceedings under the Safe Delivery of Newborns Law apply to the legal father of the children.

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

BECKERING and STEPHENS, JJ., concurred with O'CONNELL, P.J.

SIMCOR CONSTRUCTION, INC v TRUPP

Docket No. 333383. Submitted January 4, 2018, at Detroit. Decided January 9, 2018, at 9:05 a.m.

Simcor Construction, Inc., brought a breach-of-contract action in the 52-1 District Court against Carl J. Trupp III and Jennifer Trupp. Pursuant to a contractual provision, the district court, Robert M. Bondy, J., ordered the parties to arbitration. Defendants made an offer of judgment in favor of plaintiff for $2,200. Plaintiff rejected the offer and made a counteroffer of judgment for $9,338.39. The parties did not reach a settlement, the case went to arbitration, and the arbitrator dismissed plaintiff's claim with prejudice and without costs. Plaintiff moved to vacate the arbitration award. The district court denied the motion, confirmed the arbitration award in favor of defendants, and entered a judgment of no cause of action. Plaintiff appealed the district court's denial of the motion to vacate the arbitration award in the Oakland Circuit Court, and the circuit court, Michael D. Warren Jr., J., affirmed the district court's denial. Defendants then sought offer-of-judgment costs and attorney fees under MCR 2.405 in the district court, which the district court denied. Defendants appealed the denial of their motion for offer-of-judgment costs in the circuit court, and the circuit court, Nanci J. Grant, J., remanded the case to the district court to allow it the opportunity to more thoroughly explain its reasoning under MCR 2.405(D) regarding the interest-of-judgment exception set forth in MCR 2.405(D)(3). On remand, the district court granted costs to defendants under MCR 2.405(D). Plaintiff moved for reconsideration. The district court held a hearing on the motion and entered an order concluding that MCR 2.405(D) did not apply, relying on *Kequam ex rel Macklam v Lakes States Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued April 11, 1997 (Docket No. 189433), which held that the confirmation of an arbitration award did not constitute a "verdict" under MCR 2.405(A)(4). Defendants appealed in the circuit court, and the circuit court affirmed, concluding that the confirmation of an arbitration award does not constitute a "verdict" within the meaning of MCR 2.405(A)(4) because a court that confirms the arbitration award is essentially acting in an appellate capacity and does

not render a "verdict." Defendants sought leave to appeal in the Court of Appeals, which the Court of Appeals granted.

The Court of Appeals *held*:

1. MCR 2.405(D)(1) provides, in relevant part, that if an offer to stipulate the entry of a judgment is rejected, and if the adjusted verdict is more favorable to the offeror than the average offer, then the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action. MCR 2.405(A)(4)(c) provides that "verdict" includes a judgment entered as a result of a ruling on a motion after rejection of the offer of judgment. Whether MCR 2.405 applies to the district court's confirmation of the arbitration award is a two-step analysis: (1) determining whether the district court's judgment confirming the arbitration award is a "judgment" under MCR 2.405, and (2) if it is, determining whether the judgment was entered as a result of a ruling on a motion after rejection of the offer of judgment.

2. MCL 691.1702 of the Uniform Arbitration Act, MCL 691.1681 *et seq*., provides that after a party to an arbitration proceeding receives notice of an award, the party may move the court for an order confirming the award, at which time the court shall issue a confirming order unless the award is modified or corrected under MCL 691.1700 or is vacated under MCL 691.1703. MCR 3.602(L) provides that the court shall render judgment giving effect to the award as corrected, confirmed, or modified and that the judgment has the same force and effect, and may be enforced in the same manner, as other judgments. Under MCR 2.405(A)(4)(c), a verdict is a judgment entered as a result of a ruling on a motion after rejection of the offer of judgment. There is nothing that excludes judgments confirming arbitration awards from the provisions of MCR 2.405. The only exclusion in MCR 2.405 is MCR 2.405(E), which does not allow the court to award costs in a case that has been submitted to case evaluation under MCR 2.403 unless the case evaluation award was not unanimous; therefore, only unanimous case evaluations are outside of the scope of MCR 2.405. Accordingly, the district court's judgment confirming the arbitration award is a "judgment" under MCR 2.405.

3. In *Acorn Investment Co v Mich Basic Prop Ins Ass'n*, 495 Mich 338 (2014), the Supreme Court held that a motion for entry of judgment of an appraisal panel's award satisfied the definition of verdict under MCR 2.403(O)(2)(c) (defining "verdict" as "a judgment entered as a result of a ruling on a motion after rejection of the case evaluation") because it was the court, not the appraisal panel, that made the final determination of the parties' rights and obligations. In this case, it was the district court—not

the arbitrator—that made the final determination whether to confirm, correct, modify, or vacate the arbitration award. Because the court had the final determination as to the arbitration award, the judgment constitutes a final verdict. Accordingly, if a party rejects an offer of judgment, an arbitrator enters an arbitration award, and a judgment is entered as a result of a ruling on a motion to vacate the arbitration award, then the rejecting party must pay the opposing party's actual costs unless the judgment affecting the arbitration award is more favorable to the rejecting party than the offer of judgment. In this case, plaintiff rejected defendants' offer of judgment in the amount of $2,200. At the arbitration, the arbitrator dismissed the case, finding no cause of action. The district court confirmed the arbitrator's decision, which was an outcome less favorable to the rejecting party. Therefore, the district court's judgment falls within the plain meaning of "verdict," as defined by MCR 2.405(A)(4)(c), and the circumstances in this case mandated the award of offer-of-judgment costs to defendants.

4. The district court denied defendants' motion for offer-of-judgment costs because the "arbitrator specifically did not grant any costs or attorney fees to either party." However, until the arbitration award was confirmed by the district court, there was no "verdict," and the issue of offer-of-judgment costs was not before the arbitrator. The offer of judgment is not part of the arbitration proceedings, and any costs involving the offer of judgment are outside the scope of the arbitrator's power to impose costs. Accordingly, the district court erred to the extent that it concluded that the arbitration award barred defendants' motion for offer-of-judgment costs.

5. The district court erred when it relied on *Kequam*. Not only was *Kequam* nonbinding authority under MCR 7.215(C)(1), but its holding pertained to a former version of MCR 2.405(A)(4) and therefore was entirely irrelevant to the current version of MCR 2.405(A)(4). The prior version did not contain MCR 2.405(A)(4)(c), which was the controlling provision at issue in this case.

6. MCR 2.405(D)(3) provides that if an offer is rejected, the court shall determine the actual costs incurred and may, in the interest of justice, refuse to award an attorney fee. The interest-of-justice exception should be applied only in unusual circumstances, which may occur when a legal issue of first impression is presented, when the law is unsettled and substantial damages are at issue, when a party is indigent and an issue merits decision by a trier of fact, or when the effect on third persons may be significant. The district court's order did not address whether the interest-of-justice exception applied; therefore, the case had to be

remanded to the district court for a determination of the applicability of the exception. If the exception does not apply, then the district court must impose offer-of-judgment costs.

Reversed and remanded.

ARBITRATION — COSTS — REJECTION OF OFFER OF JUDGMENT AND ENTRY OF AN ARBITRATION AWARD — JUDGMENT ENTERED AS A RESULT OF A RULING ON A MOTION TO VACATE AN ARBITRATION AWARD.

MCR 2.405(D)(1) provides, in relevant part, that if an offer to stipulate the entry of a judgment is rejected, and if the adjusted verdict is more favorable to the offeror than the average offer, then the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action; MCR 2.405(A)(4)(c) provides that "verdict" includes a judgment entered as a result of a ruling on a motion after rejection of the offer of judgment; the district court's judgment confirming an arbitration award is a "judgment" under MCR 2.405; accordingly, if a party rejects an offer of judgment, an arbitrator enters an arbitration award, and a judgment is entered as a result of a ruling on a motion to vacate the arbitration award, then the rejecting party must pay the opposing party's actual costs unless the judgment affecting the arbitration award is more favorable to the rejecting party than the offer of judgment.

Daniel P. Marcus for plaintiff.

John W. Henke, III, for defendants.

Before: CAMERON, P.J., and SERVITTO and GLEICHER, JJ.

CAMERON, P.J. Defendants, Carl J. Trupp III and Jennifer M. Trupp, appeal by leave granted the circuit court's May 26, 2016 order affirming the district court's January 22, 2016 order denying their motion for offer-of-judgment sanctions against plaintiff, Simcor Construction, Inc. We reverse and remand.

I. BACKGROUND

This case arises out of plaintiff's breach-of-contract claim against defendants, which originated in district

court. Pursuant to a contractual provision, the district court ordered the parties to arbitration on September 18, 2014. Defendants made an offer of judgment in favor of plaintiff for $2,200 on November 6, 2014. Plaintiff rejected the offer and made a counteroffer of judgment for $9,338.39. The parties did not reach a settlement, the case went to arbitration, and the arbitrator dismissed plaintiff's claim "with prejudice and without costs."

On February 17, 2015, the district court denied plaintiff's motion to vacate the arbitration award, confirmed the arbitration award in favor of defendants, and entered "a Judgment of No Cause of Action" that was "in favor of Defendants and against Plaintiff." On March 9, 2015, the district court denied defendants' motion for offer-of-judgment costs and attorney fees under MCR 2.405. On June 8, 2015, the circuit court affirmed the district court's denial of plaintiff's motion to vacate the arbitration award.[1] On October 7, 2015, the circuit court held a hearing on defendants' appeal of the district court's denial of their motion for offer-of-judgment costs. The circuit court remanded the case to the district court to allow it the opportunity to more thoroughly explain its reasoning under MCR 2.405(D) regarding the "interest of justice" exception.

On remand, the district court granted costs to defendants under MCR 2.405(D). On January 22, 2016, the district court held a hearing on plaintiff's motion for reconsideration. After some confusion as to the

[1] On August 10, 2015, plaintiff sought leave to appeal the circuit court's affirmance of the district court's denial of plaintiff's motion to vacate the arbitration award. This Court denied plaintiff's application for leave to appeal on February 4, 2016. *Simcor Constr, Inc v Trupp*, unpublished order of the Court of Appeals, entered February 4, 2016 (Docket No. 328731).

scope of the remand from the circuit court,[2] the district court changed course and entered an order concluding that MCR 2.405(D) did not apply, relying heavily on *Kequam ex rel Macklam v Lakes States Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued April 11, 1997 (Docket No. 189433), p 1, and held that the confirmation of the arbitration award did not constitute a "verdict" under MCR 2.405(A)(4). The circuit court affirmed the district court's order, concluding that the confirmation of an arbitration award does not constitute a "verdict" within the meaning of MCR 2.405(A)(4) because a court that confirms the arbitration award is essentially acting in an appellate capacity and not rendering a "verdict." Defendants sought leave to appeal the circuit court's order affirming the district court's order. On appeal, defendants argue that the circuit court erred when it affirmed the district court's order denying defendants' motion for offer-of-judgment sanctions. First, defendants claim that they are entitled to offer-of-judgment costs because the district court's judgment confirming the arbitration award constitutes a "verdict" under MCR 2.405(A)(4)(c). Second, defendants claim that if offer-of-judgment costs apply, plaintiff cannot prove an "interest of justice" exception that would nonetheless prevent the imposition of costs.

II. STANDARD OF REVIEW

Generally, this Court reviews de novo "[t]he interpretation of statutes and court rules." *Estes v Titus*,

[2] There was confusion at the district court's hearing on the motion for reconsideration as to whether the district court was to address the applicability of MCR 2.405, or if the circuit court had already ruled on that and the only question was whether an "interest of justice" exception applied under MCR 2.405(D)(3).

481 Mich 573, 578-579; 751 NW2d 493 (2008). Additionally, this Court reviews "de novo the interpretation and application of the offer of judgment rule." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 297; 769 NW2d 234 (2009). We review "for an abuse of discretion the trial court's decision regarding whether to refuse to award attorney fees under the interest-of-justice exception." *AFP Specialties, Inc v Vereyken*, 303 Mich App 497, 516; 844 NW2d 470 (2014) (citation omitted). "An abuse of discretion occurs 'when the trial court's decision is outside the range of reasonable and principled outcomes.' " *Id*. at 517, quoting *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

III. ANALYSIS

Defendants first claim that MCR 2.405 applies to the district court's confirmation of the arbitration award, and therefore, offer-of-judgment costs are merited. We agree.

"Generally, the rules governing statutory interpretation apply equally to the interpretation of court rules. If the plain meaning of the language of the court rule is clear, then judicial construction is neither necessary nor permitted, and unless explicitly defined, every word or phrase should be accorded its plain and ordinary meaning, considering the context in which the words are used." *Castillo v Exclusive Builders, Inc*, 273 Mich App 489, 492; 733 NW2d 62 (2007) (citations and quotation marks omitted).

"MCR 2.405(D) provides for the imposition of costs following the rejection of an offer to stipulate the entry of a judgment . . . ." *Castillo*, 273 Mich App at 491. This is known as "the offer of judgment rule." *Froling Trust*, 283 Mich App at 297. "The purpose of MCR 2.405 is 'to

encourage settlement and to deter protracted litigation.' " *Luidens v 63rd Dist Court*, 219 Mich App 24, 31; 555 NW2d 709 (1996), quoting *Hamilton v Becker Orthopedic Appliance Co*, 214 Mich App 593, 596; 543 NW2d 60 (1995). MCR 2.405(D)(1) provides, in relevant part:

> (D) Imposition of Costs Following Rejection of Offer. If an offer is rejected, costs are payable as follows:
>
> (1) If the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action.

As stated by this Court, MCR 2.405(A)(4) previously provided that "the term 'verdict' " was "defined as 'the award rendered by a jury or by the court sitting without a jury, excluding all costs and interest.' " *Parkhurst Homes, Inc v McLaughlin*, 187 Mich App 357, 362; 466 NW2d 404 (1991), citing former MCR 2.405(A)(4), effective March 1, 1985. MCR 2.405(A)(4)[3] has since been amended and currently states:

> (4) "Verdict" includes,
>
> (a) a jury verdict,
>
> (b) a judgment by the court after a nonjury trial,
>
> (c) a judgment entered as a result of a ruling on a motion after rejection of the offer of judgment.

Plaintiff argues that MCR 2.405 does not apply to arbitration disputes, such as this case, because the district court's judgment confirming the arbitration award is not a "verdict" under MCR 2.405(A)(4)(c). Determining whether MCR 2.405 applies to the district court's confirmation of the arbitration award is a

[3] The current version of MCR 2.405(A)(4) came into effect on October 1, 1997. See 454 Mich cxxii, cxxxiv (1997).

two-step analysis. First, we must address whether the district court's judgment confirming the arbitration award is a "judgment" under MCR 2.405, and if it is, then we must address whether the judgment was "entered as a result of a ruling on a motion after rejection of the offer of judgment." MCR 2.405(A)(4)(c). We conclude that defendants have met both requirements.

To first determine whether the judgment confirming the arbitration award falls within the provisions of MCR 2.405(A)(4), we examine the relevant arbitration provisions. MCL 691.1702 of the Uniform Arbitration Act, MCL 691.1681 *et seq*., states:

> After a party to an arbitration proceeding receives notice of an award, the party may move the court for an order confirming the award at which time the court shall issue a confirming order unless the award is modified or corrected under [MCL 691.1700] or [MCL 691.1704] or is vacated under [MCL 691.1703].

MCR 3.602(J)(5) provides, "If the motion to vacate is denied and there is no motion to modify or correct the award pending, the court shall confirm the award." As to judgments relating to arbitration, MCR 3.602(L) states:

> Judgment. The court shall render judgment giving effect to the award as corrected, confirmed, or modified. The judgment has the same force and effect, and may be enforced in the same manner, as other judgments.

Plaintiff contends that the district court's ruling was correct because both MCR 3.602 and MCL 691.1702 do not expressly refer to MCR 2.405, and therefore, MCR 2.405 is inapplicable to judgments confirming arbitration awards. This argument lacks merit. Under MCR 3.602(L), judgments confirming arbitration awards carry "the same force and effect . . . as other judg-

ments" and "may be enforced in the same manner." MCR 3.602(L). Under MCR 2.405(A)(4)(c), a verdict is "a *judgment* entered as a result of a ruling on a motion after rejection of the offer of judgment." (Emphasis added.) There is nothing that excludes judgments confirming arbitration awards from the provisions of MCR 2.405, and we see no reason to do so in light of MCR 3.602(L).[4] The only restriction under MCR 2.405 is stated in Subrule (E): "Costs may not be awarded under this rule in a case that has been submitted to case evaluation under MCR 2.403 unless the case evaluation award was not unanimous." Thus, only unanimous case evaluations are outside the scope of MCR 2.405 because MCR 2.403 governs such cases. The drafters could have excluded from MCR 2.405 judgments confirming arbitration awards, yet no such provision exists. The plain language in MCR 3.602, MCL 691.1702, and MCR 2.405 is clear, and we need not look further to reach this result.

Because we conclude that the district court's judgment confirming the arbitration award constitutes a "judgment" under MCR 2.405(A)(4)(c), the next question is whether the judgment was "entered as a result of a ruling on a motion after rejection of the offer of judgment." MCR 2.405(A)(4)(c). There is no dispute on appeal that plaintiff rejected defendants' offer of judgment or that the district court denied plaintiff's motion to vacate the arbitration award, confirmed the arbitration award in favor of defendants, and entered a judg-

[4] The circuit court erred when it held that the district court's confirmation of the arbitration award was not a "verdict" because it was acting as an appellate court in the arbitration proceedings and not entering a "judgment" as that term is used in MCR 2.405. MCR 3.602(L) expressly states that a judgment confirming an arbitration award has the same force and effect as any other judgment, and we conclude that a judgment, as described in MCR 3.602(L), falls within the provisions of MCR 2.405.

ment "in favor of Defendants and against Plaintiff." After plaintiff rejected defendants' offer of judgment, the district court entered a judgment in favor of defendants "as a result of" its ruling on plaintiff's motion to vacate the arbitration award, thereby satisfying the second requirement under MCR 2.405(A)(4)(c), i.e., that the judgment be entered as a result of a ruling on a motion after rejection of the offer of judgment.

We find instructive the Michigan Supreme Court's holding in *Acorn Investment Co v Mich Basic Prop Ins Ass'n*, 495 Mich 338, 342; 852 NW2d 22 (2014). In *Acorn*, the Court analyzed the availability of case evaluation sanctions under MCR 2.403(O)(1) and (O)(2), stating that MCR 2.403(O)(2)(c) defines "verdict" as "a judgment entered as a result of a ruling on a motion after rejection of the case evaluation." *Acorn*, 495 Mich at 350 (quotation marks omitted). The definition of "verdict" provided by MCR 2.403(O)(2)(c) is nearly identical to the definition of verdict provided by MCR 2.405(A)(4)(c), with the exception of the last portion of each rule referring respectively to a case evaluation or an offer of judgment. In *Acorn*, the Michigan Supreme Court first inserted the definition of the term "verdict" as defined by MCR 2.403(O)(2)(c) into the language of MCR 2.403(O)(1), which resulted in the following rule:

> If a party has rejected an evaluation and the action proceeds to *a judgment entered as a result of a ruling on a motion after rejection of the case evaluation*, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. [*Acorn*, 495 Mich at 350.]

While *Acorn* concerned case evaluations and the interpretation of MCR 2.403(O)(2)(c), we find its analysis persuasive, considering that the definitions of "verdict"

found in MCR 2.403(O)(2)(c) and MCR 2.405(A)(4)(c) are virtually identical. In *Acorn*, the Court held that a motion for entry of judgment of an appraisal panel's award satisfied the definition of verdict under MCR 2.403(O)(2)(c) because it was "the court, not the appraisal panel, that made the final determination of the parties' rights and obligations." *Acorn*, 495 Mich at 351. The Court explained that the trial court "would still have had matters to attend to, including awarding interest under MCL 500.2006 for [the] defendant's failure to pay in a timely fashion." *Id*. at 351-352.

In this case, it was the district court, not the arbitrator, that made the final determination of whether to confirm, correct, modify, or vacate the arbitration award. See MCL 691.1702. The district court still had to determine whether it should modify or correct the award under MCL 691.1700 and MCL 691.1704, or to vacate the award entirely under MCL 691.1703. Because the court had the final determination as to the arbitration award, the judgment constitutes a verdict. Thus, we hold that if a party rejects an offer of judgment, an arbitrator enters an arbitration award, and a judgment is entered as a result of a ruling on a motion to vacate the arbitration award, then the rejecting party must pay the opposing party's actual costs unless the judgment affecting the arbitration award is more favorable to the rejecting party than the offer of judgment. Plaintiff rejected defendants' offer of judgment in the amount of $2,200. At the arbitration, the arbitrator dismissed the case, finding no cause of action. The district court confirmed the arbitrator's decision, which was an outcome less favorable to the rejecting party. Therefore, the district court's judgment falls within the plain meaning of "verdict," as defined by MCR 2.405(A)(4)(c), and the circumstances in this case mandate the award of offer-of-judgment costs to defendants.

We note that the district court denied defendants' motion for offer-of-judgment costs because "[t]he arbitrator specifically did not grant any costs or attorney fees to either party." Additionally, plaintiff argues that the arbitrator ruled that "[a]ll claims not expressly granted herein are hereby denied," and therefore, allowing the district court to impose costs contravenes the arbitrator's award. Under MCR 2.405(D)(1), "costs are payable" if "the adjusted verdict is more favorable to the offeror than the average offer . . . ." Until the arbitration award was confirmed by the district court, there was no "verdict," and the issue of offer-of-judgment costs was not before the arbitrator. Plaintiff also fails to acknowledge that the arbitrator ruled that "[t]his Award is in full settlement of all claims submitted *to this Arbitration*." (Emphasis added.) The claim for offer-of-judgment costs was not submitted to arbitration, and no such claim existed at that time because there was no verdict. To that point, plaintiff concedes on appeal that the arbitrator did not consider the issue of offer-of-judgment costs.

Further, MCR 3.602 defines an arbitrator's power to impose costs. MCR 3.602(M) states, "The costs of the proceedings may be taxed as in civil actions, and, if provision for the fees and expenses of the arbitrator has not been made in the award, the court may allow compensation for the arbitrator's services as it deems just." The use of the term "proceedings" refers to the arbitration proceedings over which the arbitrator presides. The offer of judgment is not part of the arbitration proceedings, and any costs involving the offer of judgment are outside the scope of the arbitrator's power to impose costs. Therefore, plaintiff's argument fails, and the district court erred to the extent that it concluded that the arbitration award barred defendants' motion for offer-of-judgment costs.

The district court also expressly found *Kequam* persuasive in its order denying defendants' motion for offer-of-judgment costs because, in that case, an arbitration award did not satisfy the definition of "verdict" in MCR 2.405(A)(4). *Kequam*, unpub op at 2. Not only is *Kequam* nonbinding authority under MCR 7.215(C)(1), its holding pertained to the former version of MCR 2.405(A)(4) and therefore was entirely irrelevant to the current version of MCR 2.405(A)(4). The prior version did not contain MCR 2.405(A)(4)(c), which is the controlling provision at issue here. Therefore, the district court erred when it relied on *Kequam*.

Finally, defendants contend that the "interest of justice" exception under MCR 2.405(D)(3) does not apply here. MCR 2.405(D)(3) states as follows:

> (D) Imposition of Costs Following Rejection of Offer. If an offer is rejected, costs are payable as follows:
>
> * * *
>
> (3) The court shall determine the actual costs incurred. The court may, in the interest of justice, refuse to award an attorney fee under this rule.

This Court has held that "the interest of justice exception should be applied only in unusual circumstances." *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 472; 624 NW2d 427 (2000) (citation and quotation marks omitted). "[T]he unusual circumstances necessary to invoke the 'interest of justice' exception may occur where a legal issue of first impression is presented, or 'where the law is unsettled and substantial damages are at issue, where a party is indigent and an issue merits decision by a trier of fact, or where the effect on third persons may be significant . . . .' " *Haliw v City of Sterling Hts (On Remand)*,

266 Mich App 444, 448; 702 NW2d 637 (2005) (quotation marks and citations omitted).

The district court's order does not address this exception. " '[A] court speaks through its written orders and judgments, not through its oral pronouncements.' " *City of Sterling Hts v Chrysler Group, LLC*, 309 Mich App 676, 682; 873 NW2d 342 (2015), quoting *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009) (alteration in original). Because the district court did not reach the issue of whether the "interest of justice" exception applies in its order, we cannot determine whether the exception in MCR 2.405(D)(3) applies to the facts of this case. For that reason, we must remand the case to the district court for a determination of the applicability of the exception and to articulate the basis for its decision. If the exception does not apply, the district court must impose offer-of-judgment costs.

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

SERVITTO and GLEICHER, JJ., concurred with CAMERON, P.J.

PEOPLE v CARPENTER

Docket No. 335383. Submitted January 3, 2018, at Grand Rapids. Decided January 9, 2018, at 9:10 a.m. Leave to appeal denied 503 Mich 883.

Chad M. Carpenter pleaded guilty in the Iosco Circuit Court to armed robbery, MCL 750.529, breaking and entering a building with intent to commit a felony or larceny therein, MCL 750.110, and attempted possession of a firearm by a felon, MCL 750.224f. The court, William F. Myles, J., sentenced defendant to concurrent prison terms of 225 to 480 months for the armed-robbery conviction, 60 to 120 months for the breaking-and-entering conviction, and 18 to 30 months for the attempted-felon-in-possession conviction. As part of defendant's plea bargain, defendant and the prosecution agreed that Offense Variable (OV) 19 (interference with the administration of justice), MCL 777.49, would be assessed zero points for the armed-robbery and breaking-and-entering convictions. However, after the plea hearing but before sentencing, defendant attempted to smuggle controlled substances into jail, and when discovered, defendant allegedly struck and injured another inmate who defendant believed had informed jail authorities of his smuggling scheme. At sentencing, the court assessed 25 points for OV 19 and sentenced defendant to 225 months to 480 months' imprisonment, with credit for 334 days served. After sentencing, defendant moved to correct his OV 19 score and for resentencing, claiming that the trial court had improperly assessed 25 points for OV 19 when it should have assessed zero points. The court denied defendant's motion, concluding that because defendant's conduct of smuggling drugs and allegedly assaulting an individual in jail threatened the security of the penal institution while defendant was in jail awaiting trial, defendant's conduct was connected to his sentencing offense of armed robbery. The court further noted that because defendant's sentencing occurred after *People v Lockridge*, 498 Mich 358 (2015), the advisory guidelines only had to be taken into account, and given defendant's prior record and the seriousness of this offense, even if OV 19 were to be assessed at zero points, the sentence imposed was reasonable and resentencing would not be required. Defendant moved for delayed leave to appeal in the Court of Appeals with

respect to his sentence for the armed-robbery conviction only, and the Court granted leave to appeal.

The Court of Appeals *held*:

1. Offense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise. The sentencing offense is defined as the crime of which the defendant has been convicted and for which he or she is being sentenced. MCL 777.49(a) directs a court to assess 25 points for OV 19 when the offender, by his or her conduct, threatened the security of a penal institution or court. The aggravating factors considered in OV 19 contemplate events that almost always occur after the charged offense has been completed; by the time a defendant encounters either a courthouse or a penal institution, the sentencing offense has long been completed. Therefore, the express consideration of these events contemplated in OV 19 indicates that postoffense conduct may be considered when scoring OV 19. In this case, defendant argued that his smuggling of controlled substances and assault of an inmate did not sufficiently relate to the underlying sentencing offense of armed robbery to justify the trial court's consideration of those events when calculating defendant's OV 19 score. However, the sentencing offense need not itself involve a threat to the security of a penal institution or court; rather, our Legislature has specifically commanded that OV 19 be scored for every category of felony. Because defendant was in the administration-of-justice phase of the sentencing offense while awaiting sentencing when he threatened the security of a penal institution, the trial court did not err by determining that defendant's conduct at the jail should be considered in calculating his OV 19 score. Furthermore, the trial court did not err by assessing 25 points for OV 19 because the smuggling of controlled substances into a jail constituted a threat to the security of a penal institution given the dangers of controlled substances to the users and those around them. The trial court also did not err by assessing 25 points for OV 19 because defendant's retaliatory attack on an inmate who defendant believed had informed on him threatened the security of a penal institution given the disruption it caused within the jail and given its potential deterrent effect on inmates' willingness to come forward about security breaches they might witness.

2. A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness. However, if the defendant's sentence is within the recommended guidelines range, resentencing is not required unless there is a

scoring error that changes the guidelines range or the trial court relied on inaccurate information in sentencing the defendant. In this case, the trial court properly assessed 25 points for OV 19, and defendant did not challenge any other offense variables or otherwise present evidence that the trial court relied on inaccurate information in sentencing him. Accordingly, because defendant's sentence was within the recommended minimum sentencing guidelines range, defendant did not establish his right to be resentenced.

Affirmed.

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLE 19 — SCORING OFFENSE VARIABLES.

MCL 777.49 directs the assessment of points for Offense Variable (OV) 19, which pertains to interference with the administration of justice; the aggravating factors considered in OV 19 contemplate events that almost always occur after the charged offense has been completed; accordingly, points may be assessed under OV 19 for conduct that occurred after the sentencing offense was completed.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, *Gary Rapp*, Prosecuting Attorney, and *Linus Banghart-Linn* and *Anica Letica*, Assistant Attorneys General, for the people.

William F. Branch for defendant.

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

BOONSTRA, J. Defendant pleaded guilty to armed robbery, MCL 750.529, breaking and entering a building with intent to commit a felony or larceny therein, MCL 750.110, and attempted possession of a firearm by a felon, MCL 750.224f. The trial court sentenced defendant to concurrent prison terms of 225 to 480 months for the armed-robbery conviction, 60 to 120 months for the breaking-and-entering conviction, and 18 to 30 months for the attempted-felon-in-possession

conviction. Defendant filed a delayed application for leave to appeal with respect to his sentence for the armed-robbery conviction only, which we granted.[1] We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant provided a factual basis for his pleas at his plea hearing, admitting that on December 16, 2014, he and his accomplice entered a Rite Aid store located in the city of Oscoda with the intent to rob the store, that he brandished and pointed a knife at the clerk and demanded money from the cash register, and that the clerk handed him money. Defendant then fled the premises with the money. Defendant further testified that later that day, after the robbery at the Rite Aid, he broke into the Mai Tiki Resort with the intent to steal, taking various hand tools and an air compressor from a storage unit, placing them in his vehicle, and leaving the premises. Finally, defendant testified that on September 17, 2015, he attempted through text messages to buy a handgun from an undercover police officer. Defendant admitted that he knew that he was a felon and could not legally possess a handgun. Defendant went to the designated sale location with $200 in order to complete the sale but was arrested by police officers for his attempted purchase of the handgun.

As part of defendant's plea bargain, defendant and the prosecution agreed that Offense Variable (OV) 19 (interference with the administration of justice), MCL 777.49, would be assessed zero points for the armed-robbery and breaking-and-entering convictions. However, after the plea hearing but before sentencing,

[1] *People v Carpenter*, unpublished order of the Court of Appeals, entered December 16, 2016 (Docket No. 335383).

defendant attempted to smuggle controlled substances into jail, and when discovered, defendant allegedly struck and injured another inmate who defendant believed had informed jail authorities of his smuggling scheme. At sentencing, defendant recognized that the trial court could no longer assess zero points for OV 19, but defendant argued that OV 19 should be assessed at 15 points because "the incident that was alleged to have occurred at the jail allegedly required medical attention, and did allegedly disrupt the criminal justice system or the pursuance of criminal justice." See MCL 777.49(b). The prosecution argued that OV 19 should be assessed at 25 points because the conduct "threatened the security of a penal institution or court." See MCL 777.49(a). The trial court assessed 25 points for OV 19.

Based on the OV 19 score and the other OV and prior record variable (PRV) scores that are not being challenged on appeal, defendant was subject to a guidelines minimum sentence range of 135 to 225 months. The trial court sentenced defendant to 225 months to 480 months' imprisonment, with credit for 334 days served.

After sentencing, defendant moved to correct his OV 19 score and for resentencing, claiming that the trial court had improperly assessed 25 points for OV 19 when it should have assessed zero points. Defendant argued that because OV 19 "only applies to the sentencing offense," and because the charge of assault of an inmate had been dismissed and the controlled-substance smuggling was not connected to the sentencing offense, OV 19 should have been assessed at zero points. With an OV 19 score of zero points, defendant's guidelines minimum sentence range would have changed to 126 months to 210 months. The prosecution

argued that defendant's interference with the administration of justice was connected to the sentencing offense because "the reason . . . he was in jail in the first place was because of the underlying armed robbery charge . . . ." The trial court denied defendant's motion, concluding that because defendant's conduct of smuggling drugs and allegedly assaulting an individual in jail "threatened the security of the penal institution . . . while he was in there awaiting [sentencing]," it was "connected enough." Further, the court noted that defendant's sentencing occurred after *People v Lockridge*, 498 Mich 358, 391-392; 870 NW2d 502 (2015), that the advisory guidelines therefore only had to be taken into account, and that, given defendant's prior record and the seriousness of this offense, even if OV 19 were to be assessed at zero points, the sentence imposed was reasonable and resentencing would not be required.

This appeal followed. On appeal, defendant challenges the scoring of OV 19 at 25 points as well as the reasonableness of his armed-robbery sentence.

II. OV 19

Defendant argues that the trial court erred by scoring 25 points for OV 19 because the alleged subsequent actions in jail were not connected to the sentencing offense. We disagree. Defendant preserved this issue by moving the trial court for resentencing. See *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). With regard to sentencing guidelines, we review for clear error a trial court's factual determinations; those factual determinations must be supported by a preponderance of the evidence. See *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). However, "[w]hether the facts, as found, are adequate

to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id*.

"Offense Variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise." *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009). The sentencing offense is defined as "the crime of which the defendant has been convicted and for which he or she is being sentenced." *Id*. at 122 n 3. The calculation of an OV 19 score is governed by MCL 777.49, which provides:

> Offense variable 19 is threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services. Score offense variable 19 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) The offender by his or her conduct threatened the security of a penal institution or court ..... 25 points
>
> (b) The offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services ..... 15 points
>
> (c) The offender otherwise interfered with or attempted to interfere with the administration of justice .... 10 points
>
> (d) The offender did not threaten the security of a penal institution or court or interfere with or attempt to interfere with the administration of justice or the rendering of emergency services by force or threat of force .... 0 points

"The aggravating factors considered in OV 19 contemplate events that almost always occur *after* the charged

offense has been completed." *People v Smith*, 488 Mich 193, 200; 793 NW2d 666 (2010). As stated in *Smith*,

> It is axiomatic that every defendant charged with a felony must, at a minimum, enter a court in order to have his criminal charges resolved. And while not every criminal defendant is required to confront a penal institution in consequence of his felonious activity, by the time a defendant encounters *either* a courthouse or a penal institution, the sentencing offense has *long* been completed. The express consideration of these events explicitly indicates that postoffense conduct may be considered when scoring OV 19. [*Id*. (citation omitted).]

We disagree with defendant's argument that his smuggling of controlled substances and assault of an inmate do not sufficiently relate to the underlying sentencing offense of armed robbery to justify the trial court's reference of those events when calculating defendant's OV 19 score. OV 19 explicitly contemplates postoffense conduct. *Id*. The underlying offense need not itself involve a court, jail, or correctional facility; in other words, the sentencing offense need not itself involve a threat to the security of a penal institution or court. *Id*. Rather, our Legislature has "specifically commanded that OV 19 be scored for *every* category of felony." *Id*. Defendant, by virtue of his plea to the sentencing offenses, was in custody awaiting sentencing for those offenses when he threatened the security of the jail facility by attempting to bring controlled substances into it and by attacking another inmate. Defendant was thus in the "administration of justice" phase of the sentencing offense when his conduct threatened the security of a penal institution. See *id*. at 202 (noting that the administration-of-justice process "is not commenced until an underlying crime has occurred, which invokes the process"). The trial court did not err by

determining that defendant's conduct at the jail should be considered in calculating his OV 19 score.

Further, defendant's conduct in attempting to smuggle drugs into the jail and assaulting another inmate who defendant believed had informed the authorities of his conduct clearly threatened the security of a penal institution. The smuggling of controlled substances into a jail is certainly a threat to the security of a penal institution because of the dangers of controlled substances to the users and those around them. *People v Ward*, 483 Mich 1071, 1072 (2009) (YOUNG, J., concurring) ("It is hard to believe that anyone could sincerely dispute that the presence of illicit drugs 'threaten[s] the security of a penal institution.' "), quoting MCL 777.49(a) (alteration in *Ward*). And even if a fight between inmates might be found insufficiently related to the security of the penal institution at large, defendant's *retaliatory* attack on an inmate who he believed had informed on him definitely threatened the security of the jail by causing disruption within the jail and by potentially discouraging other inmates from coming forward about security breaches they might witness.

Finally, defendant's *Lockridge* argument is meritless because defendant was sentenced after *Lockridge* was issued and the trial court was fully aware of the advisory nature of the guidelines. See *Lockridge*, 498 Mich at 388-389, 392 n 28.

The trial court did not err by assessing 25 points for OV 19.

III. REASONABLENESS OF SENTENCE

Defendant also argues that his sentence at the top of the recommended guidelines range for armed robbery

was unreasonable. Because we conclude that defendant's sentence was not a departure, we disagree.

If the "defendant's sentence is calculated using a guidelines minimum sentence range in which OVs have been scored on the basis of facts not admitted by the defendant or found beyond a reasonable doubt by the jury, the sentencing court may exercise its discretion to depart from that guidelines range . . . ." *Lockridge*, 498 Mich at 391-392. "A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness." *Id*. at 392. However, if the defendant's sentence is within the recommended guidelines range, resentencing is not required unless there is a scoring error that changes the guidelines range or the trial court relied on inaccurate information in sentencing the defendant. See *People v Francisco*, 474 Mich 82, 89; 711 NW2d 44 (2006); *People v Sours*, 315 Mich App 346, 350-351; 890 NW2d 401 (2016).

As discussed, we hold that the trial court properly assessed 25 points for OV 19. Defendant has not challenged any other offense variables or otherwise presented evidence that the trial court relied on inaccurate information in sentencing him; rather, he merely argues that if fewer than 25 points were assessed for OV 19, his sentence then would be a departure from the guidelines, one that should be held to be unreasonable. Because defendant's sentence was within the recommended minimum sentencing guidelines range, he has not established his right to resentencing. See *Francisco*, 474 Mich at 89; *Sours*, 315 Mich App at 350-351.

Affirmed.

METER, P.J., and BORRELLO, J., concurred with BOONSTRA, J.

PEOPLE v STRICKLIN

Docket No. 335616. Submitted January 3, 2018, at Grand Rapids. Decided January 9, 2018, at 9:15 a.m.

Ricky T. Stricklin was convicted following a bench trial in the Muskegon Circuit Court of third-offense domestic violence, MCL 750.81(4), and witness intimidation, MCL 750.122(7)(b). Stricklin's convictions arose after an incident in which Stricklin repeatedly punched his girlfriend in the face and then, while he was in jail awaiting trial, he phoned the victim and told her not to come to court for the trial. William C. Marietti, J., sentenced Stricklin as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of 2 to 12 years for each offense. It was undisputed that Stricklin had two previous domestic-violence convictions and that he had sufficient previous convictions to support the fourth-offense habitual offender charge. Stricklin filed a delayed application for leave to appeal his sentences, which the Court of Appeals granted.

The Court of Appeals *held*:

1. Stricklin was convicted of third-offense domestic violence under MCL 750.81(4) because he had two previous domestic-violence convictions. Third-offense domestic violence is punishable by imprisonment for not more than five years, a fine of not more than $5,000, or both. MCL 769.12 provides that a fourth or subsequent felony conviction is punishable by imprisonment for life or for a lesser term when the fourth or subsequent felony is punishable upon a first conviction by imprisonment for a maximum term of five years or more or for life. Stricklin argued that the sentence enhancement provided by MCL 769.12 should not be based on his first conviction of MCL 750.81(4); rather, Stricklin claimed that the sentence enhancement should be based on a first conviction of domestic violence under MCL 750.81(2), which is a misdemeanor punishable by not more than 93 days of imprisonment. Stricklin also argued that because the domestic-violence statute contains a method for enhancing punishment based on recidivism, his sentence should not also be enhanced by the habitual-offender provision in MCL 769.12. However, the domestic-violence conviction for which Stricklin was sentenced

was a separate offense in a statutory scheme designed to elevate the severity of a repeat offense. When the legislative scheme governing an underlying offense elevates the offense on the basis of prior convictions, rather than simply enhances the punishment for the offense, both the elevation of the offense and enhancement of the penalty under the habitual-offender provisions are permitted. The domestic-violence statutory scheme—like the statutory schemes concerning operation of a motor vehicle while under the influence of intoxicating liquor (OUIL) and violation of the sex offenders registration act (SORA)—does not merely enhance punishment based on recidivism but instead creates separate substantive crimes. Therefore, the trial court correctly applied MCL 769.12 to defendant's felony conviction of third-offense domestic violence, and the trial court correctly determined that it was authorized to sentence defendant to life in prison.

2. Under MCL 750.122(7)(b) of the witness-intimidation statute, if the violation is committed in a criminal case for which the maximum term of imprisonment is more than 10 years or the violation is punishable by imprisonment for life or any term of years, the person is guilty of a felony punishable by imprisonment for not more than 10 years. The trial court properly determined that the underlying offense for the witness-intimidation charge was third-offense domestic violence as enhanced by MCL 769.12. Therefore, under MCL 750.122(7)(b), Stricklin's act of witness intimidation was committed in a criminal case for which the maximum term of imprisonment was more than 10 years or imprisonment for life.

Affirmed.

1. CRIMINAL LAW — SENTENCING — SUBSEQUENT DOMESTIC VIOLENCE CONVICTIONS — HABITUAL OFFENDER ENHANCEMENT.

When the statutory scheme governing an underlying offense elevates the offense on the basis of prior convictions, rather than simply enhances the punishment for the subsequent offense, both elevation of the offense and enhancement of the penalty under the habitual-offender provisions are permitted; the statutory scheme governing domestic-violence offenses elevates the offense on the basis of prior domestic-violence convictions; therefore, the habitual-offender sentence enhancement under MCL 769.12, indicated for a repeat offender with three or more prior convictions, is calculated on the basis of the penalty applicable to the elevated domestic-violence offense, not on the basis of the penalty applicable to first-offense domestic violence.

2. CRIMINAL LAW — SENTENCING — WITNESS-INTIMIDATION CONVICTIONS — ELEVATED SEVERITY OF REPEAT OFFENSES — PENALTY DETERMINED BY SENTENCE FOR ELEVATED SUBSTANTIVE OFFENSE.

When the statutory scheme governing an offense elevates the severity of repeat offenses, as does MCL 750.81 for domestic-violence offenses, the scheme creates a separate substantive offense for a subsequent conviction and the penalty for the underlying elevated offense serves as the basis for determining the penalty for a witness-intimidation conviction under MCL 750.122(7)(b).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *D. J. Hilson*, Prosecuting Attorney, and *Heather R. Halub*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Brett DeGroff*) for defendant.

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

BOONSTRA, J. Following a bench trial, defendant appeals by delayed leave granted[1] his sentences for convictions of third-offense domestic violence, MCL 750.81(4),[2] and witness intimidation, MCL 750.122(7)(b).[3] The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of 2 to 12 years for each offense. We affirm.

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[1] *People v Stricklin*, unpublished order of the Court of Appeals, entered March 20, 2017 (Docket No. 335616).

[2] At the time of defendant's sentencing on May 9, 2016, the applicable subsection of the statute was MCL 750.81(4). See 2012 PA 366, effective April 1, 2013. However, as of July 25, 2016, the statute was amended, and the third-offense domestic violence provision now falls under MCL 750.81(5). See 2016 PA 87, effective July 25, 2016.

[3] The trial court acquitted defendant of interfering with an electronic communication, MCL 750.540(5)(a).

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On appeal, defendant challenges only his sentence, not his convictions. Defendant's domestic-violence conviction arose from an incident in which he repeatedly punched his girlfriend in the face. His witness-intimidation conviction arose after he placed a call to the victim from jail, while he was awaiting trial, during which he told the victim not to come to court for his trial. This call was recorded and admitted into evidence. It was undisputed that defendant had two previous domestic-violence convictions and that he had committed a sufficient number of prior felonies to be charged as a fourth-offense habitual offender. Defendant does not contest these facts on appeal.

At sentencing, defendant argued that his sentences should only be enhanced to maximum terms of 15 years as a result of his habitual-offender status. Defendant further argued that his witness-intimidation sentence should be based on the underlying offense of domestic violence without any habitual-offender enhancements. The trial court rejected both arguments, holding that defendant's habitual-offender status warranted an enhancement of his maximum sentence for domestic violence to life imprisonment and indicating that it would proceed on that basis.[4] And the trial court based its sentence for witness intimidation on the underlying crime of third-offense domestic violence as enhanced by defendant's habitual-offender status.[5]

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[4] The trial court did not actually sentence defendant to a maximum sentence of life imprisonment; indeed, the maximum sentence imposed was less than the 15-year maximum sentence advocated by defendant.

[5] The trial court concluded that a sentence imposed under the witness-intimidation statute must reflect the severity of the underlying offense.

The trial court sentenced defendant as described. This appeal followed.

II. DOMESTIC-VIOLENCE SENTENCE

Defendant argues that he is entitled to resentencing because his sentence for domestic violence was erroneously enhanced under both the domestic-violence statute and the fourth-offense habitual-offender statute. We disagree. Defendant's argument presents a question of statutory interpretation, which we review de novo. *People v Flick*, 487 Mich 1, 8-9; 790 NW2d 295 (2010).

At the time defendant was sentenced, MCL 750.81 provided, in pertinent part:

> (2) Except as provided in subsection (3) or (4), an individual who assaults or assaults and batters his or her spouse or former spouse, an individual with whom he or she has or has had a dating relationship, an individual with whom he or she has had a child in common, or a resident or former resident of his or her household, is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both.
>
> * * *
>
> (4) An individual who commits an assault or an assault and battery in violation of subsection (2), and who has 2 or more previous convictions for assaulting or assaulting and battering his or her spouse or former spouse, an individual with whom he or she has or has had a dating relationship, an individual with whom he or she has had a child in common, or a resident or former resident of his or her household, under any of the following, is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than $5,000.00, or both:

> (a) This section or an ordinance of a political subdivision of this state substantially corresponding to this section.
>
> (b) Section 81a, 82, 83, 84, or 86.
>
> (c) A law of another state or an ordinance of a political subdivision of another state substantially corresponding to this section or section 81a, 82, 83, 84, or 86.[6]

MCL 750.81b(b) requires that a defendant's prior domestic-violence convictions be established at sentencing. As stated, it was undisputed that defendant had two prior convictions for domestic violence, and he does not challenge his conviction of third-offense domestic violence. Rather, defendant argues that the domestic-violence statute contains a method for enhancing his punishment based on recidivism and that his sentence should therefore not also be enhanced by the habitual-offender statute, MCL 769.12, which provides in pertinent part:

> (1) If a person has been convicted of any combination of 3 or more felonies or attempts to commit felonies, whether the convictions occurred in this state or would have been for felonies or attempts to commit felonies in this state if obtained in this state, and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows:
>
> * * *
>
> (b) If the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term of 5 years or more or for life, the court, except as otherwise provided in this section or section 1 of chapter XI, may sentence the person to imprisonment for life or for a lesser term.

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[6] As amended by 2012 PA 366.

> (c) If the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term that is less than 5 years, the court, except as otherwise provided in this section or section 1 of chapter XI, may sentence the person to imprisonment for a maximum term of not more than 15 years.

In other words, defendant argues that the "first conviction" for the purposes of his habitual-offender enhancement should be taken to mean a conviction for a first offense of domestic violence, which is a misdemeanor. MCL 750.81(2). Misdemeanors are not subject to enhancement under the habitual-offender statute, which enhances a defendant's sentence based on prior and subsequent *felonies*. MCL 769.12.

The primary goal in construing a statute is "to ascertain and give effect to the intent of the Legislature." *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002); *People v Morey*, 461 Mich 325, 329-330; 603 NW2d 250 (1999). In doing so, this Court must begin by examining the plain language of the statute itself. *Pasha*, 466 Mich at 382. If the language of the statute is clear and unambiguous, it is assumed that the Legislature intended its plain meaning, and the statute is enforced as written. *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001). We avoid "literal constructions that produce unreasonable and unjust results that are inconsistent with the purpose of the act" in question. *People v Fetterley*, 229 Mich App 511, 526; 583 NW2d 199 (1998).

The Legislature has demonstrated its ability to exclude certain categories of felonies from the sentence-enhancement provisions of the habitual-offender statutes when it intends to do so. *People v Bewersdorf*, 438 Mich 55, 72; 475 NW2d 231 (1991). In this case, however, nothing in the habitual-offender statute or the domestic-violence statute indicates an

intent by the Legislature to exclude third-offense domestic violence from the enhancement provisions of MCL 769.12. The plain language of the relevant statutes thus does not aid defendant's argument.

Further, "[w]here the legislative scheme pertaining to the underlying offenses elevates the offense, rather than enhances the punishment, on the basis of prior convictions, both the elevation of the offense and the enhancement of the penalty under the habitual offender provisions is permitted." *Fetterley*, 229 Mich App at 540-541. In *Fetterley*, the Court examined the reasoning in *People v Brown*, 186 Mich App 350, 354-357; 463 NW2d 491 (1990), and approved the *Brown* Court's analysis and its decision to uphold the defendant's convictions because the retail-fraud statutory scheme does not "provide for gradations of punishment. Rather, it punishes the commission of a second-degree retail-fraud offense by a person with a prior conviction for a subsection 2 offense as a separate substantive offense." *Fetterley*, 229 Mich App at 536 (quotation marks and citation omitted). Our Supreme Court has held similarly with regard to statutory schemes in place regarding the operation of a motor vehicle while under the influence of intoxicating liquor (OUIL) offenses, *Bewersdorf*, 438 Mich at 68-72, and failure to comply with the sex offenders registration act (SORA) offenses, *People v Allen*, 499 Mich 307, 310-311; 884 NW2d 548 (2016). In all three of those cases, the reviewing Court concluded that a statutory scheme similar to the domestic-violence statutory scheme did not merely enhance punishment based on recidivism but instead created separate substantive crimes and that the habitual-offender sentence enhancements applied to those offenses. In fact, the Supreme Court in *Allen* stated, albeit in dictum, that "[t]his is likewise true of other statutory schemes of

commonly charged offenses, such as domestic violence, MCL 750.81(2) to (4)." *Allen*, 499 Mich at 325.

Our caselaw is clear. There is no qualitative difference in the domestic-violence statutory scheme, which elevates an offense from a misdemeanor to a felony and increases the penalty for repeat offenses, that compels a different outcome than those reached in *Allen*, *Bewersdorf*, and *Fetterley*. Cases cited by defendant are distinguishable. In *People v Honeycutt*, 163 Mich App 757, 760-763; 415 NW2d 12 (1987), this Court held that a conviction for possession of a firearm during the commission of a felony (felony-firearm) was not subject to habitual-offender enhancement because the felony-firearm statute imposes mandatory determinate sentences for its violation. The Supreme Court agreed with *Honeycutt*. *Allen*, 499 Mich at 325 n 51. *Fetterley* involved the interplay of the public health code and the habitual-offender act. The *Fetterley* Court merely interpreted the plain meaning of MCL 769.12(1)(d) ("[i]f the subsequent felony is a major controlled substance offense, the person shall be punished as provided by part 74 of the public health code") and concluded that subsequent major controlled substance offenses must be enhanced as directed by the public health code, not by the habitual-offender statutes. *Fetterley*, 229 Mich at 540-541. Finally, defendant is of course not aided by his reference to *People v Allen*, 310 Mich App 328, 348-351; 872 NW2d 21 (2015), inasmuch as the case was reversed by *Allen*, 499 Mich at 311, 327.

The domestic-violence statute does not impose mandatory determinate sentences for its violation, nor is it explicitly excepted from the habitual-offender act. Rather, the domestic-violence statute contains the type of "statutory scheme[] of commonly charged offenses," *Allen*, 499 Mich at 325, that courts have repeatedly

found to be subject to habitual-offender enhancement. The trial court therefore did not err by enhancing defendant's sentence for third-offense domestic violence under the habitual-offender statute. Defendant further argues, however, that even if the trial court was permitted to enhance his sentence, it erred by determining that the maximum sentence it could impose was life imprisonment, rather than a prison term of 15 years. Defendant thus argues that he is entitled to resentencing based on the trial court's misunderstanding of the law. We disagree.

Defendant contends that the trial court should have based its enhancement of his sentence on the maximum penalty for a first-offense conviction for domestic violence (93 days in jail). Had the trial court done so, it would have concluded that the offense being enhanced by defendant's habitual-offender status was "punishable upon a first conviction by imprisonment for a maximum term that is less than 5 years" and thus could only be enhanced to a maximum of 15 years. MCL 769.12(1)(c). We disagree. Defendant was convicted of violating MCL 750.81(4), not MCL 750.81 generally. Third-offense domestic violence is, as discussed earlier in this opinion, a separate offense arising after two previous convictions; third-offense domestic violence is punishable by a maximum of 5 years' imprisonment. Therefore, the trial court's application of MCL 769.12(1)(b) was appropriate, because the subsequent felony (that constituted third-offense domestic violence) was "punishable upon a first conviction by imprisonment for a maximum term of 5 years or more or for life . . . ." *Allen*, 499 Mich at 322 (applying the same rationale to second-offense failures to comply with SORA). The trial court did not err by recognizing that it was authorized to enhance defendant's sentence to a maximum of life imprisonment.

III. WITNESS-INTIMIDATION SENTENCE

Defendant also argued that the trial court erred by basing his sentence for witness intimidation on an underlying conviction of third-offense domestic violence as enhanced by the habitual-offender statute. We disagree. Defendant's argument involves a question of statutory interpretation, which we review de novo. *Flick*, 487 Mich at 8-9.

The witness intimidation statute, MCL 750.122, provides, in pertinent part:

> (7) A person who violates this section is guilty of a crime as follows:
>
> (a) Except as provided in subdivisions (b) and (c), the person is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $5,000.00, or both.
>
> (b) If the violation is committed in a criminal case for which the maximum term of imprisonment for the violation is more than 10 years, or the violation is punishable by imprisonment for life or any term of years, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $20,000.00, or both.
>
> (c) If the violation involves committing or attempting to commit a crime or a threat to kill or injure any person or to cause property damage, the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $25,000.00, or both.

Defendant argues that the underlying "violation" in the instant case is a first-offense violation of MCL 750.81, i.e., a 93-day misdemeanor. For the reasons stated earlier in this opinion, however, the trial court correctly determined that the underlying offense was third-offense domestic violence, MCL 750.81(4), as enhanced by the habitual-offender statute. The act of

witness intimidation was thus "committed in a criminal case for which the maximum term of imprisonment is more than 10 years, or . . . imprisonment for life." MCL 750.122(7)(b). Although defendant argues that this reading will produce absurd results, we see nothing absurd about the Legislature's determination to structure the level of punishment for witness intimidation according to the severity of the underlying offense.

Affirmed.

METER, P.J., and BORRELLO, J., concurred with BOONSTRA, J.

D'AGOSTINI LAND COMPANY, LLC v
DEPARTMENT OF TREASURY

Docket No. 336599. Submitted January 4, 2018, at Lansing. Decided January 9, 2018, at 9:20 a.m.

D'Agostini Land Company, LLC, as the representative member of a unitary business group, brought an action in the Tax Tribunal against the Department of Treasury, claiming that the group should be treated as a unified taxpayer for purposes of the small business alternative credit under the Michigan Business Tax Act (MBT), MCL 208.1101 *et seq*. The group filed returns under the MBT in 2009, 2010, and 2011, and the group claimed a small business alternative credit under the MBT in 2009 and 2010. In neither year did the group's gross receipts exceed $20 million, nor did the group's adjusted net income exceed $1.3 million in contravention of MCL 208.1417(1). However, one of its members, a Subchapter S corporation, did receive more than $180,000 as a distributive share of the adjusted net business income. The department disallowed the small business alternative credit because, in its view, no member of a unitary business group could violate the disqualifying provisions in MCL 208.1417(1)(a) and (b) and claim the credit, even though the term "unitary business group" is not itself listed in MCL 208.1417(1)(a) and (b) as a type of taxpayer that may be disqualified from taking the credit. The department subsequently adjusted the group's 2009 and 2010 returns, which resulted in an adjustment to the 2011 return as well; the adjustments added taxes due by the group as well as late penalties and interest. On behalf of the group, D'Agostini appealed the department's decision in the Tax Tribunal. Both D'Agostini and the department moved for summary disposition, and the Tax Tribunal granted summary disposition in favor of the department, affirming the department's decision with respect to the adjustments, late penalties, and interest. D'Agostini moved for reconsideration, and the Tax Tribunal denied the motion. D'Agostini appealed.

The Court of Appeals *held*:

1. MCL 208.1117(5) of the MBT provides that a taxpayer is defined as a person or a unitary business group liable for a tax, interest, or a penalty under the MBT. MCL 208.1417(1) provides

that the small business alternative credit can be claimed by any taxpayer that has gross receipts not exceeding $20 million and adjusted income not exceeding $1.3 million. MCL 208.1417(1) then makes the credit expressly subject to several disqualifying conditions: (a) an individual, a partnership, a limited liability company, or a Subchapter S corporation is disqualified if the individual, any one partner of the partnership, any one member of the limited liability company, or any one shareholder of the Subchapter S corporation receives more than $180,000 as a distributive share of the adjusted business income minus the loss adjustment of the individual, the partnership, the limited liability company, or the Subchapter S corporation; and (b) a corporation other than a Subchapter S corporation is disqualified if either of the following occurs for the respective tax year: compensation and directors' fees of a shareholder or officer exceed $180,000, or the sum of the amounts for various adjustments exceeds $180,000. A plain reading of MCL 208.1417(1) establishes that if a particular type of taxpayer is not listed in the disqualifying provisions—Subdivisions (a) and (b)—then that type of taxpayer is not subject to disqualification on the basis of the compensation of an owner or officer. In this case, the department argued that the disqualifying provisions also applied to a unitary business group made up of one or more of the listed entities (e.g., individuals, partnerships, limited liability companies, or corporations). However, nothing on the face of MCL 208.1417(1) supported the department's reading of the statute; a plain reading of MCL 208.1417(1) would lead a person to reasonably conclude that the entities listed in Subdivisions (a) and (b) are those taxpayers—and only those taxpayers—that may be disqualified from claiming the credit, and a unitary business group is not one of the types of taxpayers listed in those credit-disqualifying subdivisions. Accordingly, because MCL 208.1417(1) is not ambiguous, an extension that is not supported by the statute's text could not be inferred. The Tax Tribunal erred by granting summary disposition to the department with respect to its holding that D'Agostini's unitary business group was disqualified under MCL 208.1417(1) from claiming the MBT's small business alternative credit.

2. Even if MCL 208.1417(1) were ambiguous, the Legislature's decision to explicitly add the term "unitary business group" to the list of taxpayers that may be disqualified from claiming the small business alternative credit when it amended the tax scheme in January 2012 demonstrates that the Legislature did not intend to include unitary business groups in the MBT's disqualifying provisions. It is axiomatic that when the Legislature effects a change in the provisions of a statute, a presumption

arises that the Legislature intends a substantive change in the law. This is especially the case when the statutory language and history confirm that the change is a substantive one, and not merely a recodification of existing law. In 2012 PA 38, the Legislature replaced the MBT with the corporate income tax (CIT), which was a significant change in Michigan tax law. Under MCL 206.611(5) of the CIT, the definition of taxpayer was circumscribed to just three entities and one group: corporation, insurance company, financial institution, and unitary business group. Similarly, MCL 206.611(6) limited membership in a unitary business group to corporations, insurance companies, and financial institutions. However, even with these and other substantive changes, the CIT retained the small business alternative credit in much the same form and substance as the credit found in the MBT—but with a crucial difference: the term "unitary business group," which was not listed in the MBT's credit-disqualifying provisions, was added in the CIT's credit-disqualifying provision. Had the department's reading of the MBT been the correct reading, there would have been no need for the Legislature to add "unitary business group" to the CIT's credit-disqualifying provision; by adding the term to the CIT, the Legislature undercut any reasonable support for the argument that the MBT's credit-disqualifying provision should be read to include that missing taxpayer.

Reversed and remanded.

Plunkett Cooney (by *Karen E. Beach*) for D'Agostini Land Company, LLC.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *Scott L. Damich* and *David W. Thompson*, Assistant Attorneys General, for the Department of Treasury.

Before: O'CONNELL, P.J., and HOEKSTRA and SWARTZLE, JJ.

SWARTZLE, J. This Court is asked again to determine the character of a rather protean actor under Michigan tax law, the "unitary business group." The group has no independent existence outside of tax law, unlike, for example, a partnership or corporation. It is a recent

creation of tax law, and its definition has changed markedly since inception.

In this appeal, petitioner D'Agostini Land Company, LLC, as the representative member of a unitary business group, claims that it should be treated as a unified taxpayer for purposes of the Michigan Business Tax Act's small business alternative credit. Because "unitary business group" is not listed as a type of taxpayer subject to certain disqualifications, the group should be able to claim the credit notwithstanding the fact that one of its members would otherwise trigger one of the disqualifications. Respondent Department of Treasury disagrees and points to its published guidance that explains that each member of the unitary business group is subject to the disqualifying provisions. To grasp how to apply the credit and its disqualifying provisions to a unitary business group, the plain, ordinary meaning of the statutory text is sufficient, although our conclusion is strengthened by applying a common canon of statutory construction. As explained here, we agree with petitioner and reverse.

I. BACKGROUND

Central to this appeal is how the Michigan Business Tax Act's (MBT) small business alternative credit applies to a specific type of taxpayer—unitary business group. It will be helpful, therefore, to review the credit's history under Michigan tax law, as well as the state's relatively recent adoption and modification of the unitary-business-group concept.

A. THE SMALL BUSINESS ALTERNATIVE CREDIT UNDER MICHIGAN TAX LAW

Given the importance of small businesses to the state's economy, Michigan has historically provided tax

credits for qualifying small businesses. Beginning in the late 1970s, Michigan offered a form of the following credit under the state's Single Business Tax Act (SBT):

> (2) The credit provided in this section shall be taken before any other credit under this act, and is available to any person whose gross receipts do not exceed . . . $10,000,000.00 for tax years commencing after 1991, and whose adjusted business income minus the loss adjustment does not exceed $475,000.00 for tax years commencing on or after January 1, 1985, subject to the following:
>
> (a) *An individual, a partnership, or a subchapter S corporation is disqualified* if the individual, any 1 partner of the partnership, or any 1 shareholder of the subchapter S corporation receives more than . . . $115,000.00 for tax years commencing after December 31, 1997 as a distributive share of the adjusted business income minus the loss adjustment of the individual, the partnership, or the subchapter S corporation.
>
> (b) *A corporation other than a subchapter S corporation is disqualified* if either of the following occur for the respective tax year: [various adjustments not relevant here]. [MCL 208.36, repealed by 2006 PA 325 (emphasis added).]

Effective January 2008, Michigan repealed the SBT and replaced it with the MBT. The MBT also included a small business alternative credit in substantially the same form as the prior one, though it was updated, among other ways, to include limited liability companies among those taxpayers that may be disqualified from taking the credit:

> (1) The credit provided in this section shall be taken after the credits under sections 403 and 405 and before any other credit under this act and is available to any taxpayer with gross receipts that do not exceed $20,000,000.00 and with adjusted business income minus the loss adjustment that does not exceed $1,300,000.00 as

adjusted annually for inflation using the Detroit consumer price index and subject to the following:

(a) *An individual, a partnership, a limited liability company, or a subchapter S corporation is disqualified* if the individual, any 1 partner of the partnership, any 1 member of the limited liability company, or any 1 shareholder of the subchapter S corporation receives more than $180,000.00 as a distributive share of the adjusted business income minus the loss adjustment of the individual, the partnership, the limited liability company, or the subchapter S corporation.

(b) *A corporation other than a subchapter S corporation is disqualified* if either of the following occur for the respective tax year:

(*i*) Compensation and directors' fees of a shareholder or officer exceed $180,000.00.

(*ii*) The sum of the following amounts exceeds $180,000.00: [various adjustments not relevant here]. [MCL 208.1417 (emphasis added).]

The MBT was not long for the tax world, and the state replaced it just four years later with the Corporate Income Tax (CIT). 2011 PA 38, effective January 1, 2012.[1] As with prior tax acts, the current CIT includes a credit for qualifying small businesses:

(1) The credit provided in this section shall be taken before any other credit under this part and is available to any taxpayer, other than those taxpayers subject to the tax imposed under chapter 12 or 13, with gross receipts that do not exceed $20,000,000.00 and with adjusted business income minus the loss adjustment that does not exceed $1,300,000.00 as adjusted annually for inflation using the Detroit consumer price index, and subject to the following:

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[1] Although the MBT no longer applies to most businesses, the MBT will not be fully repealed until the last certificated MBT credit or the carryforward from that credit has been claimed. 2011 PA 39, enacting § 1.

> (a) *A corporation or unitary business group is disqualified* if either of the following occurs for the respective tax year:
>
> (*i*) Compensation and directors' fees of a shareholder or officer exceed $180,000.00.
>
> (*ii*) The sum of the following amounts exceeds $180,000.00: [various adjustments not relevant here]. [MCL 206.671 (emphasis added).]

B. UNITARY BUSINESS GROUP AS A "TAXPAYER" UNDER MICHIGAN TAX LAW

One key difference between the CIT's small business alternative credit and those in the SBT and MBT is the CIT's inclusion of the term "unitary business group" among the taxpayers that may be disqualified from taking the credit. A unitary business group is not a separate and distinct legal entity, like a corporation, limited liability company, or partnership; rather, the group is purely a creation of tax law. In general, a unitary business group is a group of related U.S. persons whose business activities are sufficiently interdependent. MCL 206.611(6) (CIT); MCL 208.1117(6) (MBT). To qualify as a unitary business group, one member of the proposed group must own or control more than 50% of the other members and there must be a sufficient connection between the members to meet one of two relationship tests. MCL 206.611(6) (CIT); MCL 208.1117(6) (MBT). If a group of businesses qualifies as a unitary business group in a particular tax year, then the group must file a unitary tax return for that year. MCL 206.691(1) (CIT); MCL 208.1511 (MBT). Michigan, like several other states, has adopted the unitary-business-group concept in an effort to measure more accurately the related group's taxable activities in the state.

Unitary business groups were not taxed as such under the SBT. When it enacted the MBT, the Legislature added "unitary business group" to the list of persons who qualify as a "taxpayer" under state law. MCL 208.1117(5). Membership in a unitary business group was open to individuals as well as a wide range of legal entities, including corporations, limited liability companies, and partnerships. MCL 208.1117(6) and (7). With the CIT, the Legislature retained the concept of a "unitary business group" in the definition of a "taxpayer," but it restricted membership in such a group to corporations, insurance companies, and financial institutions. MCL 206.611(6).

C. TREASURY DISALLOWS CREDIT CLAIMED BY UNITARY BUSINESS GROUP

In this tax dispute, the unitary-business-group taxpayer (represented by petitioner D'Agostini Land Company, LLC (D'Agostini)) and the Department of Treasury (Treasury) disagree on whether a unitary business group is subject to the disqualifying provision of the MBT's small business alternative credit. The following facts are not in dispute: D'Agostini is the designated representative of a unitary business group that filed returns under the MBT in 2009, 2010, and 2011. The group claimed a small business alternative credit under the MBT in 2009 and 2010. In neither year did the group's gross receipts exceed $20,000,000, nor did the group's adjusted net income exceed $1,300,000. One of its members, a Subchapter S corporation, did receive more than $180,000 as a distributive share of the adjusted net business income. Consistent with its then-published guidance, Treasury disallowed the credit because, in its view, no member of a unitary business group could violate the disqualifying provision in MCL 208.1417(1)(a) and (b) and claim

the credit, even though the term "unitary business group" is not itself listed as a type of taxpayer that may be disqualified from taking the credit. See Treasury's MBT FAQs, at C41.[2] Treasury adjusted the group's 2009 and 2010 returns, which resulted in an adjustment to the 2011 return as well; the adjustments added taxes due by the group as well as late penalties and interest.

On behalf of the group, D'Agostini appealed Treasury's decision to the Tax Tribunal (the Tribunal). On cross-motions for summary disposition, the Tribunal affirmed Treasury's decision with respect to the adjustments as well as to the late penalties and interest. D'Agostini moved for reconsideration, arguing that the group should have been reevaluated under this Court's decision in *LaBelle Mgt, Inc v Dep't of Treasury*, 315 Mich App 23; 888 NW2d 260 (2016). The Tribunal denied the motion, concluding that the status of the unitary business group had never been at issue and that both parties had earlier acknowledged the status of the group.

D'Agostini appealed.

II. ANALYSIS

D'Agostini claims on appeal that the Tribunal erred in three separate ways. First, the Tribunal misread the plain language of the disqualifying provisions of the MBT's small business alternative credit. The provisions list five types of taxpayers that are subject to disqualification, and "unitary business group" is not one of them. Second, even if a unitary business group is

[2] Michigan Department of Treasury, *Michigan Business Tax Frequently Asked Questions*, at C41, available at <http://www.michigan.gov/documents/taxes/MBT_FAQs_505615_7.pdf> (accessed April 10, 2018) [https://perma.cc/6XVZ-CYKP].

subject to disqualification, the Tribunal should have allowed the group to take certain loss adjustments. Finally, according to D'Agostini, the Tribunal should have determined whether the group was even properly considered a unitary business group under this Court's recent decision in *LaBelle Mgt*.

A. STANDARD OF REVIEW

On appellate review, this Court defers to the Tribunal's factual findings supported by competent, material, and substantial evidence, but reviews de novo the Tribunal's legal conclusions, including its decision to grant summary disposition under MCR 2.116(C)(10) as well as its interpretation of a statute. *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 75; 780 NW2d 753 (2010). Summary disposition is appropriate under MCR 2.116(C)(10) when, except as to damages, "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

With respect to statutory interpretation, this Court is required to give effect to the Legislature's intent. *Van Buren Co Ed Ass'n v Decatur Pub Sch*, 309 Mich App 630, 643; 872 NW2d 710 (2015). The Legislature is presumed to intend the meaning clearly expressed, and this Court must give effect to the plain, ordinary, or generally accepted meaning of the Legislature's terms. *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992). "A statutory provision is ambiguous only if it irreconcilably conflicts with another provision, or when it is equally susceptible to more than a single meaning." *People v Fawaz*, 299 Mich App 55, 63; 829 NW2d 259 (2012) (quotation marks and citation omitted). Only when ambiguity exists does the Court turn to common canons of construction for aid in

construing a statute's meaning. *People v Borchard-Ruhland*, 460 Mich 278, 284-285; 597 NW2d 1 (1999).

B. SOME, BUT NOT ALL, "TAXPAYERS" ARE DISQUALIFIED FROM TAKING THE MBT'S SMALL BUSINESS ALTERNATIVE CREDIT

Although D'Agostini raises three claims of error, we begin and end our analysis with the first one. Under the MBT, a "taxpayer" is defined as "a person or a unitary business group liable for a tax, interest, or penalty under this act." MCL 208.1117(5). The act also includes a definition of a "unitary business group"—a group of related entities that satisfy specific control and relationship conditions. MCL 208.1117(6). The act goes on to define a "person" as "an individual, firm, bank, financial institution, insurance company, limited partnership, limited liability partnership, copartnership, partnership, joint venture, association, corporation, subchapter S corporation, limited liability company, receiver, estate, trust, or any other group or combination of groups acting as a unit." MCL 208.1113(3). Thus, individuals, partnerships, limited liability companies, corporations, and unitary business groups are all specifically identified as entities that, among others, may qualify as a taxpayer under the MBT.

With respect to the small business alternative credit, the MBT provides that the credit can be claimed by "any taxpayer" that has gross receipts not exceeding $20,000,000 and adjusted net income not exceeding $1,300,000. MCL 208.1417(1). The statute then makes the credit expressly "subject to" several disqualifying conditions:

> (a) *An individual, a partnership, a limited liability company, or a subchapter S corporation is disqualified* if the individual, any 1 partner of the partnership, any 1

> member of the limited liability company, or any 1 shareholder of the subchapter S corporation receives more than $180,000.00 as a distributive share of the adjusted business income minus the loss adjustment of the individual, the partnership, the limited liability company, or the subchapter S corporation.
>
> (b) *A corporation other than a subchapter S corporation is disqualified* if either of the following occur for the respective tax year:
>
> (*i*) Compensation and directors' fees of a shareholder or officer exceed $180,000.00.
>
> (*ii*) The sum of the following amounts exceeds $180,000.00: [various adjustments not relevant here]. [MCL 208.1417(1) (emphasis added).]

Thus, in terms of structure, the credit's language consists of a broad grant of the credit to "any taxpayer" that meets certain financial thresholds, followed by two limited exceptions or disqualifications related to entities that exceed other financial thresholds. The plain, logical way to read the statute is that the main provision applies at the "any taxpayer" level, and the disqualifying provisions that follow similarly (and consistently) apply at the taxpayer level—i.e., the entities listed in the disqualifying provisions are the types of taxpayers that may be disqualified from claiming the credit. Thus, it follows that if a particular type of taxpayer is not listed in the disqualifying provisions, then that type of taxpayer is not subject to disqualification based on the compensation of an owner or officer.

This reading is consistent with how Treasury treats most types of taxpayers in this situation. For example, in Letter Ruling 2013-3, Treasury was asked whether an irrevocable trust, a type of taxpayer, was subject to the credit's disqualifying provisions. Treasury explained that it was not: "An irrevocable trust is not

listed as being subject to the disqualifiers or reduction percentages; therefore, irrevocable trusts are not subject to the disqualifiers or reduction percentages listed under MCL 208.1417(a) and (c). See *Alliance Obstetrics & Gynecology, PLC v Michigan Dep't of Treasury*, 285 Mich App 284[; 776 NW2d 160] (2009)." Michigan Department of Treasury, Letter Ruling 2013-3 (June 26, 2013), available at <http://www.michigan.gov/documents/treasury/LR2013-3_425734_7.pdf> [https://perma.cc/GX35-HQJE].

Treasury agrees with this reading as far as it goes, but then it asks this Court to go farther and infer that the disqualifying provisions also apply to a unitary business group made up of one or more of the listed entities (e.g., individuals, partnerships, limited liability companies, or corporations). We decline the invitation for several reasons. First, there is nothing on the face of the statute to suggest such a reading. Subsection (1) refers broadly to "any taxpayer," followed immediately by Subdivisions (a) and (b), which list several entities defined elsewhere as types of taxpayers. A person who reads MCL 208.1417(1) and (a) and (b) would reasonably conclude that the entities listed in the two subdivisions were those taxpayers—and only those taxpayers—that may be disqualified from claiming the credit. Nowhere does the plain language of the statute imply that a taxpayer that is not itself listed under Subdivision (a) or (b) should somehow be unpacked like a matryoshka doll until a disqualifying member of the group is discovered. The Legislature expressed itself with sufficient clarity in MCL 208.1417(1), and we will not infer an extension that is not supported by the statute's text. *LaBelle Mgt*, 315 Mich App at 29 ("Tax laws generally will not be extended in scope by implication or forced construc-

tion, and when there is doubt, tax laws are to be construed against the government.").

To support its contrary reading, Treasury relies on its interpretive guidance provided to taxpayers as well as several Tribunal decisions interpreting and applying similar provisions in the SBT. Courts do give "respectful consideration" to a state agency's interpretation of a statute and do not generally overrule such an interpretation absent "cogent reasons." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 108; 754 NW2d 259 (2008). Moreover, legislative silence in the face of agency decisions may, under certain circumstances, suggest legislative acquiescence. See, e.g., *Nat'l Labor Relations Bd v Bell Aerospace Co Div of Textron Inc*, 416 US 267, 275; 94 S Ct 1757; 40 L Ed 2d 134 (1974) (adopting the board's interpretation of "employee" that had been consistently used before the act's amendment repeating the language). Yet, the taxation of unitary business groups as such was first introduced in the MBT, and decisions involving how the credit was applied to affiliated groups under the SBT are of limited interpretive value. More fundamentally, these are interpretive principles or canons employed only when a statute is ambiguous. See *Borchard-Ruhland*, 460 Mich at 284-285. Treasury has not identified another provision of the MBT with which our reading of MCL 208.1417(1) would irreconcilably conflict, and as shown above, on its face MCL 208.1417(1) is not equally susceptible to more than a single meaning. Concluding that the statute is not ambiguous, we need not resort to these or other canons of construction.

With that said, even assuming for the sake of argument that MCL 208.1417(1) is ambiguous, a different canon of construction conclusively demonstrates that the Legislature did not intend to include

unitary business groups in the MBT's disqualifying provisions. Recall that with the CIT, the Legislature explicitly added "unitary business group" to the list of taxpayers that may be disqualified from claiming the CIT's small business alternative credit. The form and substance of the CIT's credit mirrors that of the MBT's credit, but with a crucial difference relevant here—"unitary business group" is not listed in the MBT's disqualifying provisions, but it is listed in the CIT's disqualifying provision. Courts have long understood that "a change in the language of a prior statute presumably connotes a change in meaning." *Ray v Swager*, 501 Mich 52, 80 n 68; 903 NW2d 366 (2017) (citation and quotation marks omitted); see also *People v Wright*, 432 Mich 84, 92; 437 NW2d 603 (1989) ("It is axiomatic that when the Legislature effects a change in the provisions of a statute, a presumption arises that the Legislature intends a substantive change in the law."). This is especially the case when the statutory language and history confirm that the change is a substantive one, and not merely a recodification of existing law. Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 257.

The CIT was a significant change in Michigan tax law. Among other things, the definition of a "taxpayer" was circumscribed to just three entities and one group: corporation, insurance company, financial institution, and unitary business group. MCL 206.611(5). Similarly, membership in a "unitary business group" was limited to just corporations, insurance companies, and financial institutions. MCL 206.611(6). Yet, even with these and other substantive changes, the CIT retained a small business alternative credit in much the same form and substance as the ones found in the SBT and MBT, though with

several important changes. If Treasury's reading of the MBT were the correct one, then there would have been no need for the Legislature to add "unitary business group" to the CIT's credit-disqualifying provision, as merely listing "corporation" should have been sufficient. By adding "unitary business group" to the CIT's credit-disqualifying provision, the Legislature undercut any reasonable support for the argument that the MBT's credit-disqualifying provision should be read to include that missing taxpayer.

Finally, Treasury asserts that our reading would be "illogical" because one "cannot seriously believe that the Legislature intended to place more restrictions on single-entity taxpayers than unitary business groups in a credit designed for small businesses." This is an argument from policy implication, rather than an argument from law. It is undeniable that the Legislature chose not to apply the disqualifying provision to a number of taxpayers regardless of financial size or owner/officer compensation, including banks, associations, receivers, and trusts, as even Treasury has recognized. See, e.g., Letter Ruling 2013-3. It is not our place to divine *why* the Legislature did or did not subject unitary business groups to the disqualifying provisions of the MBT's small business alternative credit. Rather, it is our place only to determine *whether* the Legislature did or did not do so—and, as we have explained, the Legislature did not. *Wismer & Becker Contracting Engineers v Dep't of Treasury*, 146 Mich App 690, 700-701; 382 NW2d 505 (1985). Accordingly, we reverse the Tribunal's grant of summary disposition to Treasury with respect to whether D'Agostini's unitary business group was disqualified under Subdivisions (a) or (b) from claiming the MBT's small business alternative credit under MCL 208.1417(1).

C. REMAINING CLAIMS

Because we reverse the Tribunal's grant of summary disposition, we need not reach D'Agostini's second claim of error. As for the third claim of error, we agree with Treasury that the claim was not preserved because it was first raised in a motion for reconsideration. *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009). We decline to take up the unpreserved claim on appeal.

III. CONCLUSION

A "unitary business group" is not one of the types of taxpayer listed in the disqualifying provisions of the MBT's small business alternative credit. Under separation-of-power principles, we do not have the authority to add it, only the Legislature does—which it in fact did in the disqualifying provisions of the CIT's small business alternative credit. Accordingly, we reverse the Tribunal's grant of summary disposition to Treasury and remand for entry of judgment consistent with this opinion.

As the prevailing party, D'Agostini may tax costs. We do not retain jurisdiction.

O'CONNELL, P.J., and HOEKSTRA, J., concurred with SWARTZLE, J.

EPPEL v EPPEL

Docket Nos. 335653 and 335775. Submitted December 6, 2017, at Grand Rapids. Decided January 9, 2018, at 9:25 a.m.

Plaintiff, Janet L. Eppel, and defendant, Christopher J. Eppel, were divorced in 2012. The judgment of divorce included a uniform child support order and a uniform spousal support order. The spousal support order included an attachment requiring defendant to pay plaintiff additional support of 19.5% of defendant's "gross bonuses and/or deferred compensation" and "any and all restricted and performance shares when they vest." In contrast, the child support order included an attachment requiring defendant to pay additional child support for a certain percentage of his "gross bonuses, deferred compensation, vesting restricted shares and performance shares [and] the net value of vested options received." In August 2014, the parties agreed to arbitrate six outstanding motions that had been filed by the parties and authorized the arbitrator to "arbitrate all of the remaining, post judgment issues in the case, except for any determinations of contempt and applicable sanctions, which [were] specifically reserved for the Court's consideration." In 2015, defendant was terminated from his position with Allied Specialty Vehicles (ASV) but was retained as a consultant for a 12-month period following the termination. Under the consulting agreement, defendant, who already owned 1,150 common shares of ASV stock that he had purchased with his own money, had stock options to purchase an additional 3,000 shares of ASV common stock under a particular vesting schedule; the agreement allowed ASV to repurchase defendant's shares and vested options for $1,284,489.50. Plaintiff asserted that under the spousal support order, she was entitled to a portion of the proceeds that defendant had received from the ASV stock repurchase. Plaintiff also asserted that she was entitled to attorney fees under MCR 3.206(C)(2)(b) because of defendant's alleged lack of compliance with prior orders. The arbitrator concluded that, given the language in the spousal support attachment, any subsequent compensation or stock received by defendant was income for purposes of calculating spousal support. The arbitrator determined that the ASV stock repurchase constituted compensation for purposes of spousal

support but subtracted 500 of the ASV shares from the calculation because they would never vest. Given that conclusion, the arbitrator awarded plaintiff $236,160 as her share of the proceeds from ASV's repurchase of the remaining 2,500 shares of stock. The arbitrator denied plaintiff's request for attorney fees, noting, in part, that both parties' fees were the result of acrimony between the parties. Plaintiff moved in the Allegan Circuit Court to affirm the arbitrator's award, and defendant moved to vacate or modify portions of the award. The court, Kevin W. Cronin, J., concluded, in part, that the arbitrator had exceeded his authority when he improperly modified the spousal support order by granting plaintiff 19.5% of the net profits ($117,073.20) from the ASV stock repurchase and by awarding plaintiff 19.5% of the capital gains ($35,971.94) from the sale of the ASV common stock defendant had purchased. The court remanded to the arbitrator plaintiff's request for attorney fees. In Docket No. 335653, plaintiff appealed by leave granted the court's order vacating portions of the arbitrator's award. In Docket No. 335775, defendant appealed by leave granted the court's order remanding the issue of attorney fees to the arbitrator. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. Arbitrators exceed their powers when they act beyond the material terms of the contract from which they draw their authority or in contravention of controlling law. In this case, the arbitrator had authority to arbitrate certain outstanding motions as well as all the remaining postjudgment issues in the case. The arbitrator did not exceed his authority when he addressed whether the 2,500 shares of ASV stock constituted either deferred compensation or performance shares for purposes of spousal support. Even though the child support order included "options" as additional support for which defendant was liable and the spousal support order did not include that term, both orders included "restricted and performance shares" upon vesting. The ASV shares of stock constituted deferred compensation because the shares were conferred on defendant as part of his compensation, the liquid value of which he received after his termination from the company. Accordingly, the arbitrator did not exceed his powers by awarding plaintiff 19.5% of the value of those 2,500 shares of stock, and the circuit court erred by vacating that portion of the arbitration award. However, the arbitrator's decision to award plaintiff 19.5% of the profits from the sale of the 1,150 shares of ASV common stock that defendant had purchased with his own money was a substantial error, resulting in a

substantially different outcome, and the error was apparent on the face of the award. Specifically, the arbitrator exceeded his authority because defendant had purchased those shares with his own money and the shares were not part of a compensation package or a performance-based award. Accordingly, the circuit court properly vacated that portion of the arbitration award.

2. MCL 552.13 grants courts authority in a divorce action to require either party to pay any sums necessary to enable the adverse party to carry on or defend the action during its pendency. In addition, under MCR 3.206(C)(1), a party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action, including a postjudgment proceeding. MCR 3.206(C)(2)(a) provides that a party who requests attorney fees and expenses must allege facts sufficient to show that the party is unable to bear the expense of the action and that the other party is able to pay, while MCR 3.206(C)(2)(b) provides that the requesting party allege sufficient facts to show that the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply. To preserve the issue of attorney fees under MCR 3.206(C), a party must specify on which basis the fees are being requested; in other words, a request for attorney fees under MCR 3.206(C)(2)(a) does not place attorney fees under MCR 3.206(C)(2)(b) in issue. In this case, plaintiff failed to request need-based attorney fees during arbitration, and the arbitrator rejected the request she had made for fees on the basis of defendant's alleged failure to comply with previous orders. Because plaintiff never requested attorney fees on the basis of need during arbitration, the circuit court erred by remanding this new issue to the arbitrator that the parties had not agreed to arbitrate. To the extent that *Stoudemire v Stoudemire*, 248 Mich App 325 (2001), held that a request for attorney fees based on need was impliedly placed in issue when attorney fees in general were requested, that holding is no longer good law; the court rule under which attorney fees were requested in that case, MCR 3.206(C), as adopted January 28, 1993, 441 Mich cxiii, cxxi (1993), has subsequently been amended. The former court rule only provided for the award of attorney fees based on need, while current MCR 3.206(C), as adopted April 1, 2003, 468 Mich lxxxv (2003), includes an additional provision for granting attorney fees only on the basis of a party's refusal to comply with a previous court order.

Affirmed in part, reversed in part, and remanded.

DIVORCE — ATTORNEY FEES — SPECIFICITY OF BASIS REQUIRED.

Under MCR 3.206(C)(1), a party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action, including a postjudgment proceeding; to preserve the issue of attorney fees under MCR 3.206(C), a party must specify on which basis the fees are being requested; in other words, a request for attorney fees under MCR 3.206(C)(2)(a) does not place attorney fees under MCR 3.206(C)(2)(b) in issue.

Cunningham Dalman, PC (by *David M. Zessin*) for plaintiff.

Scholten Fant (by *Mary M. Mims* and *Douglas J. Rooks*) for defendant.

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

PER CURIAM. In these consolidated appeals, the parties appeal by leave granted different portions of an order entered by the trial court vacating part of an arbitration award and remanding the matter to the arbitrator. This case arises out of a divorce proceeding commenced in early 2011 that resulted in the entry of a judgment of divorce in 2012, followed by extensive disputes over implementation details. The parties eventually stipulated to binding arbitration, which, after further contentiousness before the arbitrator, resulted in an award that plaintiff found acceptable but defendant did not. The trial court vacated part of the award and remanded for the arbitrator to consider awarding plaintiff attorney fees "based on need." We affirm in part, reverse in part, and remand.

The parties, Janet L. Eppel and Christopher J. Eppel, were married in 1992, and they had three children, the youngest of whom was born in May 2000. The divorce was contested, but apparently the parties

were able to cooperate effectively regarding parenting time, custody, their children's various issues, and payment of expenses. The trial court ultimately entered a judgment of divorce, along with a uniform child support order and a uniform spousal support order. Both orders had attachments describing additional obligations. Relevant to the instant appeal, the spousal support attachment stated, in pertinent part:

> As and for additional spousal support, the Defendant shall pay 19.5% of Defendant's gross bonuses and/or deferred compensation within 15 days of payment. He shall provide proof as to the gross amounts. This provision applies to bonuses and/or deferred compensation beginning in 2012. Additionally, the Defendant shall pay 19.5% of any and all restricted and performance shares when they vest based upon the market value of the gross vested shares at the vesting date or the first available date after lock-out ends. This additional spousal support obligation shall cease after 84 months, or shall terminate earlier upon the event of Plaintiff's death within 36 months of the entry of the Judgment of Divorce, or Plaintiff's death, remarriage or cohabitation after 36 months from the entry of the Judgment of Divorce. Mr. Eppel is to provide proof of receipt of all bonuses, deferred compensation, restricted and performance shares within 15 days of receipt. The term "lock-out" referenced above refers to the blackout period in which a shareholder is prohibited from purchase or sale of securities under SEC regulations.

Defendant draws a distinction between the language used in the spousal support attachment and the attachment to the uniform child support order, which provides, in relevant part, that

> for additional child support, for 3 children the Defendant shall pay 16.7% of his gross bonuses, deferred compensation, vesting restricted shares and performance shares, the net value of vested options received after 12/31/11 as if they were exercised on the date of vesting or the first

> available date after lock-out ends, 13.3% for two children of all above-stated categories, and 8.7% for one child.

As will be discussed, defendant believes that the child support attachment therefore includes a requirement to pay support based on stock options but that the spousal support attachment does not.

The parties engaged in a significant amount of postjudgment conflict over numerous matters, most of which are no longer at issue. Relevant to this appeal, the trial court entered a qualified domestic relations order granting plaintiff half of defendant's interest, as of December 31, 2011, in the "Perrigo Profit Sharing and Investment Plan." Simultaneously, the trial court entered a domestic relations order granting plaintiff half of defendant's interest, also as of December 31, 2011, in the "Perrigo 2005 Nonqualified Deferred Compensation Plan (As Amended and Restated Effective January 1, 2007)." Perrigo was defendant's employer until some time around September 2013, after which he eventually obtained employment with Allied Specialty Vehicles (ASV). Defendant was terminated from ASV effective September 25, 2015, but remained with that company in a consulting role for another twelve months. Relevant to the instant appeal, a letter[1] so stating set forth, among other things, the following "consulting benefits":

> You hold 1,150 shares of common stock of the Company (the "Shares"); and pursuant to the provisions of the Company's 2010 Long-Term Incentive Plan, as amended

[1] We could find no copy of this letter in the lower court record, but it appears that it was introduced into evidence before the arbitrator, and we perceive no dispute that the copy provided on appeal is accurate and real. We remind the parties that it is unwise to fail to ensure that evidence about which they might care on appeal is properly included in the lower court's record.

(the "Plan") and the Nonqualified Stock Option Agreements between you and the Company dated as of January 20, 2014 (the "Option Agreements"), you own stock options to purchase 3,000 shares of common stock of the Company (the "Options") at a strike price of $354.74 which had the following vesting schedule:

- Optioned Shares (the "Performance Based Options") shall vest 25% per annum over 4 years. Records indicate 500 Optioned Shares have previously vested.
- 1,000 Optioned Shares (the "Performance Based Options") shall vest upon the Company achieving annual earnings before interest, taxes, depreciation and amortization (EBITDA) on a Last Twelve Months (LTM) basis of at least $80 million. These Optioned Shares have previously vested.
- 1,000 Optioned Shares (the "Performance Based Options") shall vest upon the Company achieving annual earnings before interest, taxes, depreciation and amortization (EBITDA) on a Last Twelve Months (LTM) basis of at least $90 million. These Optioned Shares have previously vested.

Current fair market value of all common stock and Optioned Shares is $594.89. Pursuant to the Shareholders Agreement, ASV may exercise its right to repurchase your shares and vested options. Per mutual agreement, ASV will complete this repurchase no sooner than January 01, 2016 and no later than January 31, 2016. The purchase price for all of your common stock and 2,500 vested Optioned Shares (net of the strike price) is equal to $1,284,489.50, which ASV will pay in cash upon your surrender of the stock and option certificates or instruments, if any.

Broadly, the central dispute remaining in this matter is whether plaintiff is entitled to any portion of the ASV stock repurchase pursuant to the spousal support attachment.

Without engaging in unnecessary detail, the record discloses a relationship between the parties postdi-

vorce that can best be described as mutually distrustful and antagonistic, with both parties engaging in voluminous motion practice. Relevant to the instant appeal, the parties agreed and entered a stipulation to arbitrate. In pertinent part, the stipulation specifically enumerated six motions that were outstanding as of the date of the stipulation, and it further provided that the arbitrator "shall arbitrate all of the remaining, post judgment issues in the case, except for any determinations of contempt and applicable sanctions, which are specifically reserved for the Court's consideration," although the arbitrator was empowered to make recommendations. The parties continued to file motions on issues ranging from parenting time, to allegations of noncompliance with interim orders from the arbitrator, to efforts to disqualify the judge. One of the motions was styled as an amended version of a motion that had already been submitted to arbitration pursuant to the stipulation. The arbitrator issued his first opinion on May 5, 2016, almost two years after the parties entered the stipulation.

The arbitrator's opinion[2] is not a model of clarity, although it is readily apparent that the arbitrator had a great deal with which to contend. The introductory portion enumerated the outstanding motions from the original stipulation, but noted that "the Order also required any other issues excepting those related to contempt and sanctions to be resolved by the Arbitrator as they are brought." It observed that "[p]roofs had to be reopened in 2015 to access information relative to the Defendant's job change and new income numbers for calculation purposes." In relevant part, the arbitrator determined that defendant owed plaintiff a pay-

[2] We cannot find an original copy of the arbitrator's opinion in the lower court record.

ment of $236,160.00 on the basis of the ASV stock repurchase. Both parties apparently requested that the arbitrator correct certain alleged errors or omissions.[3] The arbitrator issued a response, noting that modification of spousal support was not an arbitrable issue under the stipulation but that the types of income that should be considered compensation to defendant for purposes of calculating that support was a subject of arbitration. Relevant to the instant appeal, the arbitrator conceded that 500 of the repurchased ASV stocks would never vest and that they should be subtracted from the calculations. The arbitrator determined that the only reasonable interpretation of the spousal support attachment was that any subsequent compensation or stock was to be considered income for support purposes and that the ASV stock purchase necessarily had to be considered compensation, although limited only to gains realized from the stock rather than the entire buy-back price.

Plaintiff moved in the trial court to confirm the ultimate award, and defendant moved to vacate or modify portions of it. In relevant part, defendant argued that the value of the 2,500 shares of repurchased ASV stock options was properly used to calculate additional child support because the child support attachment explicitly included a percentage "of the net value of vested options," whereas the spousal support attachment did *not* include stock options for purposes of calculating the support payment. Consequently, according to defendant, including 19.5% of the ASV stock repurchase was an impermissible modification of the uniform spousal support order and the arbitrator exceeded his authority by making the modification because doing so was not required to resolve any of the

[3] Neither request is in the lower court record.

outstanding motions submitted to arbitration. Defendant also argued that the other 1,150 shares of ASV stock were personal purchases, not even arguably compensation, and the arbitrator erred by requiring him to pay 19.5% of the capital gains from his sale thereof. It appears that the arbitrator's opinion did not clearly distinguish between the two categories of ASV stock.

For the most part, the trial court confirmed the arbitration award, and to the extent it did so, those matters are not before this Court on appeal. The trial court also concluded, after holding a hearing, that

> the Arbitrator exceeded his authority by improperly modifying the Uniform Spousal Support Orders by granting Plaintiff 19.5% of the net profits from the sale of the ASV stock options and, therefore, the Arbitrator's opinion granting plaintiff $117,073.20 is vacated. Further, and for the same reasons, the Arbitrator's Opinion that Defendant should pay Plaintiff as additional spousal support 19.5% of the capital gains from the sale of the ASV common stock in the amount of $35,971.94 should be vacated.

The trial court denied the remainder of defendant's request. However, it also remanded to the arbitrator "the issue of attorney fees requested by Plaintiff" limited "to the need of Plaintiff to be reimbursed for attorney fees pursuant to MCR 3.206(C)(2) related to the enforcement proceedings initiated by Plaintiff." Both parties attempted to claim an appeal by right, and we subsequently granted their applications for leave.

"This Court reviews de novo a circuit court's decision to enforce, vacate, or modify an arbitration award." *Cipriano v Cipriano*, 289 Mich App 361, 375; 808 NW2d 230 (2010). Under the domestic relations arbitration act, MCL 600.5070 *et seq*., "parties to a domestic-relations proceeding may stipulate to submit their disputed issues to binding arbitration," *Cipriano*,

289 Mich App at 367, pursuant to a written contract that defines, dictates, and limits the powers of the arbitrator, *id*. at 376. By default, the trial court is required to enforce the arbitrator's award. MCL 600.5079(1). However, the trial court is required to vacate the award under MCL 600.5080(1) if the trial court finds the award adverse to the best interests of the child or, relevant to the instant matter, under MCL 600.5081(2)(c), if "[t]he arbitrator exceeded his powers." "An arbitrator exceeds his or her powers if the arbitrator acts in contravention of controlling law," *Cipriano*, 289 Mich App at 373, or "exceed[s] the powers that the parties' agreement granted to him," *id*. at 377. The phrase "exceed his powers" is essentially longstanding shorthand for deviating from the contract or controlling law. *Washington v Washington*, 283 Mich App 667, 672; 770 NW2d 908 (2009). "In order for a court to vacate an arbitration award because of an error of law, the error must have been so substantial that, but for the error, the award would have been substantially different." *Cipriano*, 289 Mich App at 368. Any such error must be readily apparent on the face of the award without second-guessing the arbitrator's thought processes, and the arbitrator's findings of fact are immune from review altogether. *Washington*, 283 Mich App at 672.

The gravamen of the parties' dispute appears to be whether the arbitrator effectively modified the parties' uniform spousal support order by awarding plaintiff 19.5% of the profits from the sale of defendant's ASV stock, although defendant presumably also would argue[4] that the arbitrator exceeded his authority by addressing a matter not strictly contained within the

[4] Defendant's counsel apparently encountered technical difficulties in submitting a brief to this Court.

six motions pending when the parties agreed to arbitrate. The latter is obviously meritless. "Arbitrators exceed their powers whenever they act beyond the material terms of the contract from which they draw their authority or in contravention of controlling law." *Miller v Miller*, 474 Mich 27, 30; 707 NW2d 341 (2005). The arbitration stipulation states that the parties agreed to arbitrate the outstanding motions, and *in a separate section*, directed the arbitrator to "arbitrate all of the remaining, post judgment issues in the case, except for any determinations of contempt and applicable sanctions . . . ." Clearly, this was intended to be relatively open-ended and to bring the entire matter to a conclusion; considering the *two years* the parties nevertheless contrived to stretch the arbitration proceedings, it defies reason to conclude that the arbitrator was prohibited from addressing later spousal support and income issues as they arose.

The former argument is apparently based on the fact that the child support attachment includes the word "options," whereas the spousal support attachment does not. While accurate, both attachments *do* encompass "restricted and performance shares" upon vesting. The letter from ASV describes 3000 shares (of which 500 will not vest) as "Optioned Shares (the 'Performance Based Options')." We do not understand why those would not be considered "performance shares," nor can we find any coherent argument presented anywhere in the record explaining otherwise. Furthermore, given that the shares were apparently conferred upon defendant as part of his compensation, and he only received liquid value for them upon his termination from ASV, they at least plausibly constitute some form of "deferred compensation," which is also encompassed by the spousal support attachment.

Given that review of an arbitrator's decisions is highly deferential, that determining whether the 2,500 shares of ASV stock constitute either deferred compensation or performance shares is clearly within the arbitrator's authority, and that the determination itself is at least partly factual, we find it impossible to reasonably conclude that the arbitrator's decision to award plaintiff 19.5% thereof exceeded his powers.

In contrast, the other 1,150 shares were *purchased* by defendant. Plaintiff's argument is that these shares constitute "gross bonuses and/or deferred compensation" because defendant was only permitted to make those purchases because of his employment. We agree with defendant's argument made in the trial court that it does not constitute either a bonus or compensation merely because defendant's employment afforded him an opportunity to make a personal investment that would have otherwise been unavailable. Defendant bought the stock with his own money; it was not granted to him as either part of a compensation package or as a consequence of meeting a performance goal. In light of the poor comprehensibility of the arbitrator's opinion, we cannot deem the arbitrator's inclusion of the profit from the 1,150 ASV shares to be an unreviewable factual finding. We therefore conclude that the arbitrator *completely* deviated from the plain language of the spousal support attachment by including the profit from the 1,150 ASV shares. This departure is of such magnitude to constitute a "substantial" error that resulted in a "substantially different" outcome, *Cipriano*, 289 Mich App at 368, and the error is readily apparent on the face of the award, *Washington*, 283 Mich App at 672.

Defendant argues that the trial court also erred by remanding the matter to the arbitrator to address

plaintiff's request for attorney fees based on her financial need. We agree. As discussed, the arbitrator was authorized to consider all postjudgment issues. However, the arbitrator had already done so and had, in fact, expressly rejected plaintiff's request for attorney fees, noting, among other things, that there was some argument that both parties' acrimony was responsible for the accumulation of attorney fees by both parties. Plaintiff apparently did not object to that rejection. It appears that the only arguments plaintiff made regarding attorney fees *to the arbitrator* were based on MCR 3.206(C)(2)(b)—that defendant's noncompliance entitled her to the fees. Indeed, our review of the record indicates that plaintiff made that request at least a half-dozen times; it seems that plaintiff routinely added to her numerous motions a request that defendant be required to pay attorney fees associated with the motion, but none of those requests "allege[d] facts sufficient to show that . . . the party is unable to bear the expense of the action . . . ." MCR 3.206(C)(2)(a).

Clearly, attorney fees were placed before the arbitrator. Equally clearly, at least on the basis of the available record, attorney fees *based on need* were not, or at least not specifically, argued. Plaintiff claims that she submitted an arbitration summary on July 31, 2015, that cited MCR 3.206(2)(a), but that document is not actually found anywhere in the lower court record. Defendant does provide what purports to be a copy of that document, and if accurate, it simply recites MCR 3.206(2) in its entirety and then proceeds to argue solely that plaintiff incurred expenses because of defendant's violations and misconduct and lack of good faith, clearly constituting an argument under MCR 3.206(2)(b). As a consequence, the record establishes that defendant is correct in asserting that attorney fees *based on plaintiff's need* were only expressly

raised for the first time after the trial court read from the bench its decision to reverse part of the arbitrator's award.

Plaintiff argues that attorney fees are only permitted in a divorce action when necessary to permit a party to pursue or defend the action, thus placing attorney fees based on need before the arbitrator by necessary implication. The case cited by plaintiff does say as much. *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001). However, at the time *Stoudemire* was decided, MCR 3.206(C) *only* provided for attorney fees based on need. See MCR 3.206(C), as adopted January 28, 1993, 441 Mich cxiii, cxxi (1993). The court rule was amended in 2003, specifically to add a provision for granting attorney fees solely on the basis of a litigant's improper behavior. See MCR 3.206, as adopted April 1, 2003, 468 Mich lxxxv (2003).[5] The statement in *Stoudemire*—and any cases it cited or that have cited it—is no longer based on an accurate understanding of the relevant court rule. Furthermore, presuming the arbitration summary supposedly filed by plaintiff is accurate, plaintiff was actually aware of the current provisions of the court rule and cannot claim surprise. Because plaintiff only argued that attorney fees were appropriate because of defendant's allegedly improper behavior, attorney fees based on need were, by necessary implication, *not* argued.

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[5] Prior to the amendment, former MCR 3.206(C) provided:

> (C) Attorney Fees and Expenses.
>
> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action.
>
> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that the party is unable to bear the expense of the action, and that the other party is able to pay.

Plaintiff also accurately notes that MCL 552.13 provides, "In every action brought, . . . the court may require either party to . . . pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency." Nevertheless, as discussed, we find no indication in the record that at the time the parties agreed to arbitrate, or thereafter, any outstanding request existed from plaintiff for sums necessary to enable her to carry on the action.

Although the arbitrator's opinion was rambling, the arbitrator did explicitly consider attorney fees, and he decided against awarding them. There is no indication that the arbitrator considered plaintiff's need in doing so, but there is also no indication in the arbitrator's response to both parties' requests to correct errors and omissions that plaintiff's need was ever placed at issue. Consequently, need was raised for the first time after the trial court read its decision to vacate part of the award. The trial court's remand to the arbitrator was apparently based on the logic that the arbitrator might have reached a different conclusion about attorney fees if the "big picture" of the award as a whole was altered by the reduction of $153,045.14. While understandable, this decision suffers from the fatal flaw that attorney fees based on need were never before the arbitrator in the first place, so no decision thereon existed to be reconsidered. The trial court's remand was therefore an improper ad hoc submission of an entirely new issue that the parties had not agreed to arbitrate.

Consequently, the trial court's order vacating the arbitrator's award granting plaintiff 19.5% of the 1,150 shares of ASV stock is affirmed; the trial court's decision to vacate the portion of the arbitrator's award granting plaintiff 19.5% of the 2,500 shares of ASV

stock is reversed; and the trial court's remand to the arbitrator to address the issue of attorney fees based on need is reversed. The matter is remanded to the trial court for entry of an order consistent with this opinion. We retain jurisdiction. In Docket No. 335653, the parties shall bear their own costs, neither having prevailed in full; in Docket No. 335775, defendant, being the prevailing party, may tax costs. MCR 7.219(A).

MARKEY, P.J., and HOEKSTRA and RONAYNE KRAUSE, JJ., concurred.

PEOPLE v WILLIS

Docket No. 334398. Submitted January 9, 2018, at Detroit. Decided January 11, 2018, at 9:00 a.m. Leave to appeal sought.

Kelvin Willis was convicted in the Wayne Circuit Court, Lawrence S. Talon, J., of child sexually abusive activity, MCL 750.145c(2), possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(*v*), and disseminating sexually explicit material, MCL 722.675. Defendant's convictions arose from his interaction with his neighbor, a 16-year-old male, in defendant's apartment. The prosecution presented evidence that defendant spoke to the victim outside, asked the victim his age, and then invited the victim into his apartment. While inside defendant's apartment, the victim sat on the couch, defendant put his arm around the victim, and defendant used his cell phone to show the victim a video of two men engaging in sexual intercourse. Defendant offered the victim $25 if he would allow defendant to insert his fingers in the victim's anus and masturbate on the victim, and defendant later offered the victim $100 to engage in sexual intercourse. The victim declined both offers, fled from the apartment, and reported the incident to a neighbor, who contacted police. Officers arrested defendant and found cocaine in the pocket of defendant's pants during an inventory search. The court sentenced defendant as a third-offense habitual offender, MCL 769.11, to 15 to 40 years' imprisonment for the child-sexually-abusive-activity conviction, two to eight years for the possession-of-cocaine conviction, and 2½ to 4 years for the dissemination-of-sexually-explicit-material conviction. Defendant appealed.

The Court of Appeals *held*:

1. MCL 750.145c(2) provides that a person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material, or a person who arranges for, produces, makes, copies, reproduces, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make, copy, reproduce, or finance any child sexually abusive activity or child sexually abusive material for personal, distributional, or other purposes is guilty of a felony, punishable

by imprisonment for not more than 20 years, or a fine of not more than $100,000, or both, if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child. MCL 750.145c is not limited to criminalizing conduct involving the production of child sexually abusive material; among the types of conduct expressly proscribed by MCL 750.145c(2) is "arrang[ing] for . . . or . . . attempt[ing] or prepar[ing] or conspir[ing] to arrange for . . . any child sexually abusive activity or child sexually abusive material . . . ." The use of the disjunctive "or" unambiguously indicates that persons who arrange for or attempt or prepare to arrange for child sexually abusive activity face criminal liability. Accordingly, defendant's argument that MCL 750.145c is limited to conduct involving the production of sexually abusive material was rejected, and the allegations against defendant squarely placed him within the group of persons on whom MCL 750.145c(2) imposes criminal liability.

2. When ascertaining whether sufficient evidence was presented at trial to support a conviction, a reviewing court must view the evidence 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. In this case, the evidence showed that the 52-year-old defendant invited the 16-year-old victim into his apartment, showed the victim a pornographic video of two men engaging in sexual intercourse, offered the victim $25 to allow defendant to insert his fingers into the victim's anus while he masturbated, and later offered the victim $100 to engage in sexual intercourse. This was sufficient for a rational trier of fact to find that the essential elements of child sexually abusive activity were proved beyond a reasonable doubt.

3. A defendant must overcome a heavy presumption of judicial impartiality when claiming judicial bias. In determining whether a trial judge's conduct deprives a defendant of a fair trial, a reviewing court considers whether the trial judge's conduct pierces the veil of judicial impartiality. A judge's conduct pierces this veil and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party. In evaluating the totality of the circumstances, a

reviewing court should consider a variety of factors, including the nature of the judicial conduct, the tone and demeanor of the trial judge, the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, the extent to which the judge's conduct was directed at one side more than the other, and the presence of any curative instructions. In this case, defendant argued that he was denied a fair trial because the trial court limited defense counsel's cross-examination of a police sergeant about the sergeant's incorrect assumption that defendant was prohibited from being around schools pursuant to the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., and purportedly belittled defense counsel by reading out loud the substance of MRE 611 when issuing its ruling. However, the trial court record showed that the trial court appropriately exercised its discretion to control the trial to prevent improper questioning of the sergeant and avoid wasting time. The parties agreed that a portion of a videorecording from the sergeant's squad car depicting a conversation between the sergeant and the victim could be played. The sergeant's testimony was limited to what transpired on the recording; however, defense counsel sought to ask the sergeant whether his assumption that defendant could not be around schools was incorrect. Similar testimony had been previously placed before the jury at trial when a detective testified that it was not correct that defendant could not be around schools. Thus, the trial court evidently prevented further exploration on this matter because it was outside the scope of the trial court's ruling regarding the sergeant's testimony, irrelevant to the proceedings inasmuch as defendant was not charged with violating SORA, and repetitive. Additionally, the trial court's specific mention of MRE 611 occurred after the trial court had already cautioned defendant about the limitations on cross-examination. Considering the totality of the circumstances, the trial court's reading of MRE 611 was not calculated to cause the jury to believe that the court had any opinion regarding the case and was not likely to unduly influence the jury to defendant's detriment; rather, the trial court was merely explaining its interruptions and was not intending to belittle defense counsel. Moreover, the trial court instructed the jury that the case must be decided only on the evidence, that its comments and rulings were not evidence, that it was not trying to influence the vote or express a personal opinion about the case when it made a comment or a ruling, and that if the jury believed that the court had an opinion, that opinion must be disregarded. Accordingly, to the extent that the trial court's conduct could be deemed improper, its instructions were sufficient to cure any error.

4. Defendant's assertion that the trial court imposed an unreasonable departure sentence was incorrect because the court did not depart from the appropriate guidelines range. Defendant received a total offense variable score of 10 points, which, combined with his 80 prior record variable points, placed him in the F-II cell of the applicable sentencing grid in MCL 777.63, for which the minimum sentence range is 78 to 130 months. But because defendant was sentenced as a third-offense habitual offender under MCL 769.11, the upper limit of the guidelines range was increased by 50% under MCL 777.21(3)(b), resulting in an enhanced range of 78 to 195 months. Therefore, in sentencing defendant to a minimum sentence of 180 months, the trial court imposed a sentence that was within the appropriate guidelines range. Defendant was not entitled to be resentenced.

Affirmed.

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

Ronald D. Ambrose for defendant.

Before: TALBOT, C.J., and MURRAY and O'BRIEN, JJ.

PER CURIAM. A jury convicted defendant of child sexually abusive activity, MCL 750.145c(2), possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(*v*), and disseminating sexually explicit material, MCL 722.675. The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to 15 to 40 years' imprisonment for the child-sexually-abusive-activity conviction, two to eight years for the possession-of-cocaine conviction, and 2½ to 4 years for the dissemination-of-sexually-explicit-material conviction. Defendant appeals as of right. We affirm.

The 52-year-old defendant's convictions arise from his interaction with his neighbor, a 16-year-old male, in defendant's Dearborn apartment on August 12, 2015. The prosecution presented evidence that defendant spoke to the victim outside, asked the victim his age, and then invited the victim into his apartment. While inside defendant's apartment, the victim sat on the couch, defendant put his arm around the victim, and defendant used his cell phone to show the victim a video of two men engaging in sexual intercourse. Defendant offered the victim $25 if he would allow defendant to insert his fingers in the victim's anus and masturbate on the victim, and defendant later offered the victim $100 to engage in sexual intercourse. The victim declined both offers, and thereafter, when defendant briefly left the apartment, the victim fled and reported the incident to a neighbor. The neighbor contacted police, and officers arrested defendant. During an inventory search, officers found cocaine in the pocket of defendant's pants. At trial, defendant denied any wrongdoing and asserted that the testimony of the victim and the police was inconsistent and not credible.

On appeal, defendant first argues that there was insufficient evidence to support his conviction for child sexually abusive activity. We disagree. We review de novo a challenge to the sufficiency of the evidence. *People v Bailey*, 310 Mich App 703, 713; 873 NW2d 855 (2015). When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence 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). "[A] reviewing court is required to draw all reasonable

inferences and make credibility choices in support of the jury's verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Initially, we reject defendant's claim that MCL 750.145c is limited to criminalizing conduct involving the production of child sexually abusive material. Whether conduct falls within the scope of a criminal statute, in this case MCL 750.145c(2), is a question of statutory interpretation that we review de novo. *People v Hill*, 486 Mich 658, 667-668; 786 NW2d 601 (2010). When construing a statute, our primary goal is to ascertain and give effect to the intent of the Legislature. *People v Perry*, 317 Mich App 589, 604; 895 NW2d 216 (2016). To that end, we begin by examining the plain language of the statute, and "where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed and enforce that statute as written." *People v Holder*, 483 Mich 168, 172; 767 NW2d 423 (2009). "[O]nly where the statutory language is ambiguous may we look outside the statute to ascertain legislative intent." *Id*.

The statute proscribing child sexually abusive activity provides:

> A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material, *or a person who arranges for, produces, makes, copies, reproduces, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make, copy, reproduce, or finance any child sexually abusive activity* or child sexually abusive material for personal, distributional, or other purposes is guilty of a felony, punishable by imprisonment for not more than 20 years, or a fine of not more than $100,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or

> that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child. [MCL 750.145c(2) (emphasis added).]

Thus, among the types of conduct expressly proscribed by MCL 750.145c(2) is "arrang[ing] for . . . or . . . attempt[ing] or prepar[ing] or conspir[ing] to arrange for . . . any child sexually abusive *activity or* child sexually abusive *material* . . . ." (Emphasis added.) MCL 750.145c(1)(n) defines "child sexually abusive activity" as "a child engaging in a listed sexual act." "Child" means "a person who is less than 18 years of age." MCL 750.145c(1)(b) and MCL 750.145c(6). A listed sexual act is defined to include "sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity." MCL 750.145c(1)(i). The statute provides a separate definition for "child sexually abusive material." See MCL 750.145c(1)(o).

This Court has recognized that MCL 750.145c(2) applies to three distinct groups of persons. *People v Adkins*, 272 Mich App 37, 40; 724 NW2d 710 (2006). The first category includes a person "who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material . . . ." MCL 750.145c(2); *Adkins*, 272 Mich App at 40. This category refers to those who are engaged in the production of pornography. It is undisputed that defendant does not fall within this group. The second category includes a person who "arranges for, produces, makes, copies, reproduces, or finances . . . any child sexually abusive activity or child sexually abusive material . . . ." MCL 750.145c(2); *Adkins*, 272 Mich App at 41. The last category is defined to include a

person "who attempts or prepares or conspires to arrange for, produce, make, copy, reproduce, or finance any child sexually abusive activity or child sexually abusive material . . . ." MCL 750.145c(2); *Adkins*, 272 Mich App at 41. The use of the disjunctive "or" in the second and third categories clearly and unambiguously indicates that persons who arrange for or attempt or prepare to arrange for child sexually abusive activity face criminal liability. See *Adkins*, 272 Mich App at 41. "The Legislature thus omitted from the second and third groups subject to criminal liability any requirement that the individuals therein must have acted for the ultimate purpose of creating any child sexually abusive material, a specific requirement applicable to the first group of criminals." *Id*. at 42. Accordingly, we reject defendant's argument that MCL 750.145c is limited to conduct involving the production of sexually abusive material. The allegations against defendant squarely place him within the group of persons on whom MCL 750.145c(2) imposes criminal liability.

Turning to the sufficiency of the evidence to support defendant's conviction, we conclude that, viewed in a light most favorable to the prosecution, the evidence was factually sufficient to show that defendant arranged for, or attempted to arrange or prepare for, child sexually abusive activity with the 16-year-old victim. The evidence showed that the 52-year-old defendant invited the 16-year-old victim into his apartment, showed the victim a pornographic video of two men engaging in sexual intercourse, offered the victim $25 to allow defendant to insert his fingers into the victim's anus while he masturbated, and later offered the victim $100 to engage in sexual intercourse. This was sufficient for a rational trier of fact to find that the essential elements of child sexually abusive activity were proved beyond a reasonable doubt. As discussed

earlier, the prosecution was not required to prove that defendant's conduct involved the production of child sexually abusive material.

Our conclusion is supported by *People v Aspy*, 292 Mich App 36; 808 NW2d 569 (2011). In that case, the defendant, who was from Indiana, communicated in a website chatroom with a woman pretending to be a 14-year-old girl. *Id*. at 38. Eventually, the defendant and the woman pretending to be the 14-year-old girl made plans to meet in person, and when the defendant arrived at the address provided, the police arrested him. *Id*. at 39-40. The defendant was subsequently charged and convicted under MCL 750.145c(2). *Id*. at 38. Defendant in this case correctly points out that *Aspy* dealt with whether a Michigan court had jurisdiction over the *Aspy* defendant, but, as part of that determination, the parties in *Aspy* disputed, and the *Aspy* Court had to determine, whether the prosecution presented sufficient record evidence to support a criminal prosecution. *Id*. at 42. This Court concluded that "the prosecution presented more than sufficient evidence to allow a rational jury to conclude that [the] defendant prepared and attempted to commit child sexually abusive activity . . . ." *Id*. at 42-43. Relying on *Adkins*, the *Aspy* Court concluded that MCL 750.145c(2) only requires that a defendant prepare to arrange for child sexually abusive activity and " 'does not require that those preparations actually proceed to the point of involving a child.' " *Id*. at 43, quoting *Adkins*, 272 Mich App at 46. The *Aspy* Court held that there was sufficient evidence that the "defendant acted consistently with the preparations he had made to commit child sexually abusive activity" by driving "into Michigan to a location where he intended to meet a child whom he believed to be under the age of 18" and

"engage in behavior wrongful under MCL 750.145c(2)." *Aspy*, 292 Mich App at 43-44.

Next, defendant argues that a new trial is required because the trial court's conduct pierced the veil of judicial impartiality and denied him a fair trial. We disagree. "The question whether judicial misconduct denied defendant a fair trial is a question of constitutional law that this Court reviews de novo." *People v Stevens*, 498 Mich 162, 168; 869 NW2d 233 (2015).

A defendant must overcome a heavy presumption of judicial impartiality when claiming judicial bias. *People v Jackson*, 292 Mich App 583, 598; 808 NW2d 541 (2011). In determining whether a trial judge's conduct deprives a defendant of a fair trial, this Court considers whether the "trial judge's conduct pierces the veil of judicial impartiality." *Stevens*, 498 Mich at 164, 170. "A judge's conduct pierces this veil and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party." *Id*. at 171. This is a fact-specific inquiry, and this Court considers the "cumulative effect" of any errors. *Id*. at 171-172. A single instance of misconduct generally does not create an appearance that the trial judge is biased, unless the instance is "so egregious that it pierces the veil of impartiality." *Id*. at 171. In evaluating the totality of the circumstances, this Court should consider a "variety of factors," including

> the nature of the judicial conduct, the tone and demeanor of the trial judge, the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, the extent to which the judge's conduct was directed at one side more than the other, and the presence of any curative instructions. [*Id*. at 172.]

In this case, defendant takes exception to the trial court limiting defense counsel's cross-examination of Dearborn Police Sergeant Brian Kapanowski about the sergeant's incorrect assumption that defendant was prohibited from being around schools pursuant to the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., and purportedly belittling defense counsel by reading out loud the substance of MRE 611 when issuing its ruling.

The following is the exchange from trial that defendant takes issue with on appeal:

> [*Defense Counsel*]: And one of the things you were concerned about is if he could be alone with a minor, correct?
>
> [*Sergeant Kapanowski*]: I believe it was a CSC [criminal sexual conduct] under thirteen year old [sic], so, yes, I was concerned whether or not he could have children in the residence as well as be close to schools and difference [sic] stipulations.
>
> [*Defense Counsel*]: In the video you didn't say anything about being close to schools, correct, that we heard?
>
> [*Sergeant Kapanowski*]: No, but that's part of the sexual offender registry. That's what I was assuming, too. I was thinking, I should say.
>
> [*Defense Counsel*]: Thank you. And when you made that assumption were you saying—
>
> *The Court*: What assumption?
>
> [*Defense Counsel*]: What he just said, the assumption about him not being able to be near minors or be around schools.
>
> [*Defense Counsel*]: Whatever assumptions you made, okay, did you later come to find out after you arrested Mr. Willis that you were wrong?
>
> *The Court*: That's beyond that, [defense counsel].
>
> [*Defense counsel*]: Okay.

> *The Court*: Hold on, one second. Okay. I just want to say that Michigan Rule Evidence 6.11 [sic] says, that the Court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence.
>
> So as to, one, make the interrogation and presentation effective for the ascertainment of the truth; two, avoid needless consumption of time as applies here. So that was the reason for my limiting this to what was on the video and that's my reason for stopping that last question.

One form of judicial bias is biased commentary in front of the jury. *Stevens*, 498 Mich at 173. Reversal is proper "when the trial judge's . . . comments were such as to place his great influence on one side or the other in relation to issues which our law leaves to jury verdict." *Id*. at 177 (citation and quotation marks omitted). In general, however, a trial judge's comment that is critical of or hostile to a party or his or her counsel is not sufficient to pierce the veil of judicial impartiality. *Jackson*, 292 Mich App at 598. A trial judge's rulings or opinions do not pierce the veil of judicial impartiality "unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible." *Id*. (citation and quotation marks omitted).

In this case, the general nature of the judicial intervention—controlling the proceedings—was not inappropriate. MRE 611(a); *Stevens*, 498 Mich at 173. It is well established that the trial court has a duty to control trial proceedings in the courtroom and has wide discretion and power in fulfilling that duty. *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006). While a defendant's constitutional right to confront his accusers is secured by the right of cross-examination guaranteed by the Confrontation

Clause, US Const, Am VI; Const 1963, art 1, § 20, a court has latitude to impose reasonable limits on cross-examination, *People v Sexton*, 250 Mich App 211, 221; 646 NW2d 875 (2002). Further, the trial court must "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." MRE 611(a).

The trial court's remarks were not of such a nature as to unduly influence the jury. The record shows that the trial court appropriately exercised its discretion to control the trial to prevent improper questioning of the sergeant and avoid wasting time. Before the sergeant took the stand, the parameters of his testimony were discussed. On the basis of the parties' agreement, the trial court allowed a portion of a videorecording from the sergeant's squad car that depicted a conversation between the sergeant and the victim. The sergeant's testimony was limited to what transpired on the recording. Defense counsel, however, sought to ask the sergeant whether his assumption that defendant could not be around schools was incorrect. Similar testimony was previously placed before the jury at trial when a detective testified that it was not correct that defendant could not be around schools. Thus, the trial court evidently prevented further exploration on this matter because it was outside the scope of the trial court's ruling regarding the sergeant's testimony, irrelevant to the proceedings inasmuch as defendant was not charged with violating SORA, and repetitive. Defendant has provided no explanation, argument, or authority indicating how the evidentiary objection was improper and

not in accordance with MRE 611(a). Instead, defendant focuses on the trial court "reading from a court rule" and the "tone and demeanor" in which the trial court recited the court rule, but defendant fails to also observe that defense counsel's behavior of ignoring the court's ruling very likely necessitated the court's reference to MRE 611.

Before defense counsel's question that prompted the trial judge's reference to MRE 611, the trial court had interrupted defense counsel, noting that her questions about the sergeant's training were "beyond the redirect." In an apparent effort to continue, defense counsel stated, "Well, no, Judge, I understand that, but they never produced this witness." The trial court explained that defendant may call the sergeant as a defense witness but that her question was "beyond what we've gone into and what I said you should do or could cover on recross." Thus, the trial court's specific mention of MRE 611 occurred after the trial court had already cautioned defendant about the limitations on cross-examination. Yet defense counsel chose to question the sergeant on a matter that was outside the trial court's ruling. Considering the totality of the circumstances, the trial court's reading of MRE 611 was not calculated to cause the jury to believe that the court had any opinion regarding the case and was not likely to unduly influence the jury to defendant's detriment. Rather, it appears that the trial court was merely explaining its interruptions and was not intending to belittle defense counsel. Moreover, the trial court instructed the jury that the case must be decided only on the evidence, that its comments and rulings were not evidence, that it was not trying to influence the vote or express a personal opinion about the case when it made a comment or a ruling, and that if the jury believed that the court had

an opinion, that opinion must be disregarded. Accordingly, to the extent that the trial court's conduct could be deemed improper, its instructions were sufficient to cure any error. *Stevens*, 498 Mich at 190.[1]

Lastly, defendant argues that he is entitled to be resentenced because the trial court imposed an unreasonable departure sentence. However, defendant incorrectly asserts that the trial court imposed a departure sentence. The trial court scored the sentencing guidelines for defendant's conviction of child sexually abusive activity, which is a Class B offense. MCL 777.16g. Defendant received a total offense variable (OV) score of 10 points, which, combined with his 80 prior record variable (PRV) points, placed him in the F-II cell of the applicable sentencing grid, for which the minimum sentence range is 78 to 130 months. MCL 777.63. But because defendant was sentenced as a third-offense habitual offender, MCL 769.11, the upper limit of the guidelines range was increased by 50%, MCL 777.21(3)(b), resulting in an enhanced range of 78 to 195 months. Therefore, in sentencing defendant to a minimum sentence of 180 months, the trial court imposed a sentence within the appropriate guidelines range. Defendant does not allege a scoring error or argue that the court relied on inaccurate information when imposing his sentence. Accordingly, we affirm defendant's sentence.

[1] Defendant also directs our attention to instances when the trial court issued unfavorable rulings on evidentiary matters and a request for an adjournment, which he alleges demonstrate bias. However, defendant has provided no explanation, argument, or authority indicating how the trial court's rulings were improper and not in accordance with the applicable rules. Judicial rulings on their own, even those unfavorable to a litigant, are not sufficient to demonstrate bias. *Jackson*, 292 Mich App at 598. Defendant has not shown that the trial court's conduct was improper.

MCL 769.34(10); *People v Schrauben*, 314 Mich App 181, 196 n 1; 886 NW2d 173 (2016).

Affirmed.

TALBOT, C.J., and MURRAY and O'BRIEN, JJ., concurred.

PATRICK v TURKELSON

Docket No. 336061. Submitted January 4, 2018, at Grand Rapids. Decided January 16, 2018, at 9:00 a.m. Leave to appeal denied 503 Mich ___.

Lindsey Patrick and Christian Patrick filed a negligence action in the Kent Circuit Court against Virginia B. Turkelson, Auto-Owners Insurance Company, Citizens Insurance Company of the Midwest, and Home-Owners Insurance Company, seeking to recover damages for the injuries Lindsey sustained as the result of a motor vehicle accident caused by Turkelson. In 2013, Turkelson drove her vehicle into the driver's side of Lindsey's vehicle, causing multiple air bags in Lindsey's car to deploy; the side curtain air bag hit Lindsey on the side of her face, her left ear, and the top of her head. After the accident, Lindsey's hearing was muffled and she had ringing in her left ear. Lindsey reported hearing loss and tinnitus to both an audiologist and an otology and neurotology specialist who later examined her. An audiogram performed by the audiologist showed a dip in hearing at high frequencies. The specialist diagnosed Lindsey with mild high frequency sensorineural hearing loss in both ears. The specialist opined that Lindsey's hearing problems were related to the air bag explosion but acknowledged that there were no preaccident hearing test results for comparison. Lindsey and Christian both testified that Lindsey experienced various symptoms related to the hearing loss and tinnitus in everyday life. Lindsey testified that the hearing loss and tinnitus negatively affected her work, leisure, and family activities. Turkelson moved for summary disposition, arguing that Lindsey did not suffer a serious impairment of body function and that any injury was not caused by the accident; Auto-Owners Insurance Company and Home-Owners Insurance Company concurred in the motion. The court, Paul J. Sullivan, J., granted the motion and dismissed the action with respect to all defendants. The court reasoned that Lindsey had failed to show an objective manifestation of her subjective complaints of tinnitus, that her hearing loss was mild and not a manifestation of or physical basis for tinnitus, and that there was no evidence that Lindsey's general ability to live her normal life had been affected by the mild hearing loss. Plaintiffs appealed.

The Court of Appeals *held*:

1. MCL 500.3135(1) provides that a person is subject to tort liability for noneconomic loss caused by the person's ownership, maintenance, or use of a motor vehicle if the injured person has suffered, among other things, serious impairment of body function. Under MCL 500.3135(5), the phrase "serious impairment of body function" is defined as an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life. An objectively manifested impairment is one that is evidenced by actual symptoms or conditions that someone other than the injured person would observe or perceive as impairing a body function. Although mere subjective complaints of pain and suffering are insufficient to show impairment, evidence of a physical basis for that pain and suffering may be introduced to show that the impairment is objectively manifested. An important body function is one that has great value, significance, or consequence in relation to the injured person's life; the test is inherently subjective. The impairment to an important body function affects a person's general ability to lead a normal life if it has an influence on some of the person's capacity to live in his or her normal manner of living. In other words, the impairment must affect the person's ability to live in his or her normal manner of living, and there is no quantitative minimum as to the percentage of a person's normal manner of living that must be affected. Under MCL 500.3135(2)(a), the issue of whether the injured person has suffered serious impairment of body function is a question of law for the court if the court decides that (1) there is no factual dispute concerning the nature and extent of the person's injuries or (2) there is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination whether the person has suffered a serious impairment of body function. When there is a genuine issue of material fact regarding the nature and extent of a person's injuries, the threshold question of whether there was a serious impairment of body function is for the jury and may not be decided as a matter of law.

2. In this case, a question of fact existed as to the nature and extent of Lindsey's alleged hearing impairment. Lindsey testified about her hearing loss and tinnitus since the accident, and the impairment was observable by others who testified on her behalf. Specifically, the hearing loss was documented by the audiologist and the specialist, and the manifestations of the hearing loss were reported by Christian. The fact that there was a subjective

component to the hearing tests conducted by the audiologist and the specialist did not negate a finding that Lindsey's hearing loss constituted an objectively manifested impairment. Accordingly, the trial court erred by evaluating the persuasiveness of the medical evidence and by concluding that Lindsey's hearing loss did not constitute an objectively manifested impairment. The parties did not dispute that Lindsey's hearing constituted an important body function. However, there was conflicting evidence related to whether Lindsey's claimed hearing loss and tinnitus influenced her ability to live in her normal manner. Given the conflicting evidence, questions of fact existed as to whether Lindsey's hearing loss affected her general ability to lead her normal life. Accordingly, the trial court erred by deciding as a matter of law that a serious impairment had not occurred and by granting summary disposition in favor of defendants.

3. Proximate causation is a required element of a negligence claim. The issue of causation is generally reserved for the trier of fact unless there is no dispute of material fact. To establish proximate cause, the plaintiff must prove the existence of both cause in fact and legal cause. To establish cause in fact, a plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. To create a question of fact for the jury and withstand a motion for summary disposition, a plaintiff must establish a logical sequence of cause and effect, notwithstanding the existence of other plausible theories, although other plausible theories may also have evidentiary support. To establish legal cause, a plaintiff must show that it was foreseeable that the defendant's conduct might create a risk of harm to the victim and that the result of that conduct and intervening causes was foreseeable. If a person's conduct is a substantial factor in bringing about harm to another, the fact that the person neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent the person from being liable; in other words, negligent conduct may result in unforeseeable harm to another person for which liability may attach. Given the evidence in this case, a jury could have reasonably concluded that, more likely than not, Lindsey's hearing loss would not have occurred but for the car accident. Although it was possible that Lindsey's hearing loss was due to aging, plaintiffs presented evidence that demonstrated a logical sequence of cause and effect sufficient to create a genuine issue of material fact regarding cause in fact. With regard to legal cause, it was foreseeable that Turkelson's act of hitting Lindsey's car would create a risk of harm to Lindsey and that the result of

Turkelson's conduct—air bags exploding with high force and loud sound, hitting Lindsey in the head—was foreseeable. Therefore, even though Turkelson might not have anticipated that her actions would result in Lindsey's hearing loss, causing a car accident could have been the legal cause of Lindsey's injuries. Accordingly, although the causation issue was not addressed by the trial court, summary disposition on the issue would have been improper because there was a genuine issue of material fact regarding the cause in fact and the legal cause of Lindsey's hearing loss.

Reversed and remanded.

Sam Bernstein Law Firm (by *Edmund O. Battersby*) and *Bendure & Thomas, PLC* (by *Mark. R. Bendure*) for Lindsey Patrick and Christian Patrick.

Bosch Killman VenderWal, PC (by *Peter D. Bosch*) for Auto-Owners Insurance Company.

Garan Lucow Miller, PC (by *Caryn A. Ford*) for Virginia B. Turkelson.

The Hanover Law Group (by *Thomas P. Murray, Jr.*) for Citizens Insurance Company of the Midwest.

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

BORRELLO, J. In this automobile-negligence action, plaintiffs, Lindsey Patrick and Christian Patrick,[1] appeal as of right the trial court's order granting defendant Virginia Turkelson's motion for summary disposition pursuant to MCR 2.116(C)(10) and dismissing the action with respect to all defendants.[2] For the reasons set forth in this opinion, we reverse the trial

[1] Christian is Lindsey's husband. He was not involved in the automobile accident that is the subject of this case, and his only claim is for loss of consortium.

[2] Defendant Home-Owners Insurance Company is not a party to this appeal.

court's order and remand this matter for further proceedings consistent with this opinion.

I. BACKGROUND

This case arises out of a car accident that occurred on February 12, 2013.[3] Lindsey was driving on a service road as she was leaving a Spectrum Health parking lot when a vehicle driven by Turkelson turned onto the road and struck the driver's side of Lindsey's vehicle. Multiple air bags deployed inside Lindsey's vehicle, and the side curtain air bag above the driver's side door hit Lindsey on the side of her face, her left ear, and the top of her head. Lindsey referred to the deployment of the air bags as an "explosion." After the accident, Spectrum Security arrived at the scene, and Lindsey reported that the sound in both of her ears was "very muffled" and that her left ear was "ringing."

Following the accident, Lindsey was examined in the emergency room where she reported experiencing sharp pain in her left ear, ringing in both ears, and a headache. She also reported pain in her left shoulder, lower back, left hip, and left rib cage.

Lindsey was subsequently referred to an audiologist, Pam Keenan at McDonald Audiology & Hearing Health Care on February 21, 2013. Keenan noted in her report that Lindsey's primary concern was sudden decrease in hearing and bilateral tinnitus. An audiogram test "revealed hearing to be within normal limits at 250-4000Hz with a slight dip at 6 and 8000Hz." Lindsey's word recognition was "[e]xcellent bilaterally," and her speech recognition was in accordance

[3] Defendant Auto-Owners Insurance Company insured the vehicle that Lindsey was driving at the time of the accident, and defendant Citizens Insurance Company of the Midwest insured Lindsey.

with her other testing. The record reflects that Lindsey was administered various hearing tests that measured her ability to hear pure tones and speech. Keenan also noted that there was no previous audiogram to provide a comparison. Further testing at a March 19, 2013 visit to McDonald Audiology & Hearing Health Care yielded similar results. According to Lindsey, she was told by the audiologist that the air bag explosion caused the ringing in her ears.

On November 11, 2013, Lindsey visited the University of Michigan Health System and was seen by Dr. Katherine Heidenreich, a specialist in otology and neurotology who treats patients with ear disorders and hearing loss. According to Dr. Heidenreich's deposition testimony, Lindsey reported experiencing symptoms of hearing loss and tinnitus. Dr. Heidenreich explained tinnitus as being a "phantom sound that somebody perceives," which is "something that is inside your head that you hear, not from the environment." Dr. Heidenreich further explained that people experiencing tinnitus symptoms may describe the sound as ringing, a tone, or the sound of the ocean.

As part of Lindsey's examination that day, Dr. Heidenreich conducted a physical examination, which typically includes examining the patient's ears, nose, oral cavity, oral pharynx, and the cranial nerve function. The exam was "normal." Lindsey was also given an audiogram to test her hearing, and Dr. Heidenreich reviewed these results during the examination as well. Dr. Heidenreich testified that components of an audiogram require a patient to acknowledge whether or not the patient heard a sound that was presented to the patient, and Dr. Heidenreich acknowledged that this kind of testing relied on the patient "subjectively reporting what they heard." However, she testified that

the testing also included "more objective components as well such as the movement of the eardrum and the acoustic reflexes." On the basis of the results of the audiogram administered to Lindsey that day, Dr. Heidenreich determined that Lindsey had "a mild high frequency sensorineural hearing loss in both ears but with excellent word recognition scores." Dr. Heidenreich testified that sensorineural hearing loss suggests problems with the inner ear or nerve. With respect to tinnitus, Dr. Heidenreich explained that this is a symptom that is often reported by people experiencing hearing loss and that there typically are not objective measures that can verify the existence of this symptom. Dr. Heidenreich also determined that Lindsey had "an acoustic reflex abnormality." The acoustic reflex "measures the contraction of the stapedius muscle," and abnormalities can be associated with middle-ear bone problems or tumors. According to Dr. Heidenreich, an acoustic reflex abnormality might not cause any symptoms, and this particular finding might not have had any bearing on Lindsey's condition.

Dr. Heidenreich testified that peer-reviewed scientific literature includes reports of hearing loss and tinnitus following air bag deployment due to the sound generated. According to Dr. Heidenreich, it is possible for exposure to loud noises to cause hearing loss and tinnitus, even if an individual does not suffer physical trauma. Dr. Heidenreich opined that Lindsey's hearing issues were related to the car accident in light of Lindsey's audiogram results and her history, which included her reports of experiencing an immediate decline in hearing, muffled hearing, and tinnitus right after the car accident in which the air bags deployed. Dr. Heidenreich opined that this history suggested that Lindsey had experienced a negative change in her hearing as compared to her preaccident hearing capa-

bilities and that Lindsey's exposure to the loud sound from the air bags could have caused her symptoms. However, Dr. Heidenreich acknowledged that there was no audiogram for Lindsey from before the accident for comparison and that hearing can deteriorate due to age. Additionally, Dr. Heidenreich indicated that she did not know the cause of the acoustic reflex abnormality.

Lindsey testified at her deposition that the pain and muffling in her ears started immediately after the automobile accident and that she did not have any of these symptoms before the automobile accident. At the time of her deposition, she no longer suffered from muffled hearing, but she did still have ringing or tingling in both of her ears. Lindsey indicated that her hearing loss was in her left ear. Lindsey testified that she generally did not have trouble hearing people speaking during normal conversation unless there was a lot of background noise, but she had trouble hearing whispering. Lindsey was told by both the audiologist and Dr. Heidenreich that the sound from the explosion of the air bag deploying near her ear caused her hearing problems.

According to Lindsey, her ear issues had a negative impact on her work because she was required to spend a significant amount of time in the car for work and the road noise made the ringing in her ears worse. She also testified that the ringing affected her ability to do her job because it was "distracting" and made her "very irritable." Places with large groups of people or loud sounds also made the ringing worse. Before the accident, Lindsey worked approximately 30 hours a week over the course of three days each week. At the time of her deposition, Lindsey was working one day a week for approximately eight hours because it was "harder to do the driving" and because she had small children.

Lindsey also testified during her deposition that before the accident, she had enjoyed outdoor activities such as kayaking, hiking, and bike riding. She also had a busy social life, enjoyed going to concerts, and liked to travel. Since the accident, Lindsey had been to two concerts, and they made the ringing in her ears worse. Lindsey also had not continued hiking or kayaking since the accident because she had tried these activities multiple times and found that it was "too quiet in the woods," which made the ringing more noticeable. Lindsey further testified that her ear problems had affected her ability to take care of her children because she was less patient, more irritable, and more anxious.

Lindsey's husband, Christian, testified at his deposition that he and Lindsey had experienced difficulties communicating since the accident because Lindsey would speak either too softly or too loudly. Lindsey would also occasionally tell Christian that she was having trouble hearing him. According to Christian, he sometimes had to ask Lindsey to repeat herself because he had a hard time understanding or hearing her, and she would get frustrated during these interactions because she was having a hard time knowing how loud she was talking. Christian further testified that there were times when Lindsey did not hear questions that their children asked her or misheard a question and responded with an answer that was unresponsive to the actual question. Christian also indicated that Lindsey was "more irritable" than before the car accident. Christian testified that Lindsey had indicated that she could not go on road trips or go to concerts with him because of her hearing issues. He also had to keep music at a quieter volume inside the house. Lindsey could watch television without a problem but going to movies gave her trouble.

Lindsey filed this action on July 10, 2015. Lindsey specified in her deposition that her claim of injury resulting from the automobile accident involved her hearing loss and ringing in her ears. Turkelson moved for summary disposition under MCR 2.116(C)(10), arguing that Lindsey did not suffer a serious impairment of body function and that any injury was not caused by the car accident. Auto-Owners Insurance Company and Home-Owners Insurance Company concurred in Turkelson's motion.

The trial court granted Turkelson's motion for summary disposition and dismissed the action in its entirety with respect to all defendants, ruling that there was no genuine issue of material fact regarding whether Lindsey suffered a serious impairment of body function. Specifically, the trial court concluded that Lindsey had "not shown any objective manifestation of her subjective complaints of tinnitus or otherwise demonstrated any physical basis for those complaints," that her hearing loss was "mild" and was "not a manifestation of or physical basis for tinnitus," and that there was "no indication that plaintiff's general ability to live her normal life is affected by that mild hearing loss." As a result of its determination on the threshold injury issue, the trial court specifically declined to make a ruling regarding Turkelson's causation argument. The trial court also stated that it would not address plaintiffs' countermotion for summary disposition regarding the issue of fault "because summary disposition is proper regardless of fault for the underlying accident."

On appeal, plaintiffs argue that the trial court erred by concluding that Lindsey's impairment was not objectively manifested and granting summary disposition on the ground that a serious impairment of body function had not been established.

II. STANDARD OF REVIEW

"This Court reviews de novo a trial court's decision on a summary disposition motion to determine if the moving party was entitled to judgment as a matter of law." *Bergmann v Cotanche*, 319 Mich App 10, 15; 899 NW2d 754 (2017). "In making this determination, the Court reviews the entire record to determine whether defendant was entitled to summary disposition." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "Courts are liberal in finding a factual dispute sufficient to withstand summary disposition." *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009).

"A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim." *Id*. at 474-475. "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A motion pursuant to MCR 2.116(C)(10) is reviewed "by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. "[I]t is well settled that the circuit court may not weigh the evidence or make determinations of credibility when deciding a motion for summary disposition." *Innovative Adult Foster Care*, 285 Mich App at 480. Moreover, a court may not "make findings of fact; *if the evidence before it is conflicting*, summary disposition is im-

proper." *Lysogorski v Bridgeport Charter Twp*, 256 Mich App 297, 299; 662 NW2d 108 (2003) (quotation marks and citation omitted).

III. ANALYSIS

Tort liability is limited under the Michigan no-fault insurance act. *McCormick v Carrier*, 487 Mich 180, 189; 795 NW2d 517 (2010). However, a "person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, *serious impairment of body function*, or permanent serious disfigurement." MCL 500.3135(1) (emphasis added). The issue in the instant case is whether there is a genuine issue of material fact regarding whether Lindsey suffered a serious impairment of body function. The other two types of threshold injuries are not implicated here.

The phrase "serious impairment of body function" is defined by statute as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(5). Under *McCormick*, the test for establishing a serious impairment of body function requires showing "(1) an objectively manifested impairment (2) of an important body function that (3) affects the person's general ability to lead his or her normal life." *McCormick*, 487 Mich at 195.

First, an objectively manifested impairment is one "that is evidenced by actual symptoms or conditions that someone other than the injured person would observe or perceive as impairing a body function." *Id*. at 196. The inquiry focuses on "whether the *impairment* is objectively manifested, not the *injury* or its symptoms." *Id*. at 197. The term "impairment" means

"the state of being impaired." *Id*. (quotation marks and citation omitted). In turn, "impaired" means the state of (1) "being weakened, diminished, or damaged" or (2) "functioning poorly or inadequately." *Id*. (quotation marks and citation omitted). Although mere subjective complaints of pain and suffering are insufficient to show impairment, evidence of a physical basis for that pain and suffering may be introduced to show that the impairment is objectively manifested. *Id*. at 198. Medical testimony is generally, but not always, required to make this showing. *Id*.

Second, the important-body-function inquiry is "an inherently subjective" one. *Id*. at 199. The focus is on whether the body function "has great value, significance, or consequence," and the relationship of that function to the individual's life must be considered. *Id*. (quotation marks omitted).

Third, the impairment to an important body function affects a person's general ability to lead a normal life if it has "an influence on some of the person's capacity to live in his or her normal manner of living." *Id*. at 202. This is also a subjective inquiry. *Id*. The statute does not require the person's ability to lead a normal life to have been destroyed or for the impairment to last a certain period of time. *Id*. at 202-203. Instead, the statute only requires that the impairment *affect* the person's *ability* to live in his or her normal manner of living. *Id*. at 202. The focus is not on whether a person's normal manner of living itself has been affected, and "there is no quantitative minimum as to the percentage of a person's normal manner of living that must be affected." *Id*. at 202-203.

However, the issue of whether a serious impairment of body function has been incurred is a question of law to be decided by the court only if (1) "[t]here is no

factual dispute concerning the nature and extent of the person's injuries" or (2) "[t]here is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination whether the person has suffered a serious impairment of body function . . . ." MCL 500.3135(2)(a). Accordingly, in *McCormick*, 487 Mich at 215, our Supreme Court instructed courts applying MCL 500.3135 to begin by determining "whether there is a factual dispute regarding the nature and the extent of the person's injuries and, if so, whether the dispute is material to determining whether the serious impairment of body function threshold is met." When there is a genuine issue of material fact regarding the nature and extent of a person's injuries, the threshold question of whether there was a serious impairment of body function is for the jury and may not be decided as a matter of law. *Chouman v Home Owners Ins Co*, 293 Mich App 434, 444; 810 NW2d 88 (2011).

A. LINDSEY'S HEARING LOSS CONSTITUTES AN OBJECTIVELY MANIFESTED IMPAIRMENT

In their motions for summary disposition, defendants argued that Lindsey's hearing loss does not constitute an objectively manifested impairment. The trial court agreed. We disagree.

Review of the record evidence submitted in this matter reveals that Lindsey complained of problems related to hearing loss and ringing in her ears immediately following the car accident and that Dr. Heidenreich determined that Lindsey had mild high frequency sensorineural hearing loss in both ears and an acoustic reflex abnormality. Lindsey's hearing loss was documented in the results of audiological evaluations by Keenan and Dr. Heidenreich. Defendants argue,

and the trial court seemingly agreed, that because there exists a subjective component to the hearing tests, namely that Lindsey had to indicate when she heard a particular sound, Dr. Heidenreich's conclusions were not evidence of an objectively manifested impairment. Rather, defendants contend, the testing that revealed hearing loss was dependent on the subjective verifications of Lindsey and for that reason, her hearing loss does not constitute an objectively manifested impairment. However, the fact that there was a subjective component to the hearing tests does not negate a finding that Lindsey's hearing loss is an objectively manifested impairment. Furthermore, the record also reveals that in addition to Keenan's and Dr. Heidenreich's findings, Lindsey's husband, Christian, testified that Lindsey had difficulties after the accident with speaking too softly or too loudly, which made it hard for him to understand her. Christian observed Lindsey experiencing frustration over her own lack of awareness about the volume of her voice. Christian also testified that Lindsey sometimes did not hear questions that were asked of her and that Lindsey sometimes responded to questions in a way that showed that she did not accurately hear the question. On the basis of his observations of his wife's actions, Christian testified that Lindsey had difficulty hearing adequately in everyday situations. The evidence of Lindsey's medical evaluations and Christian's testimony supports finding that a question of fact exists as to whether Lindsey's hearing was impaired. This impairment to her hearing was observable by others, which would satisfy the standard for showing an "objectively manifested impairment." *McCormick*, 487 Mich at 196-198. "In other words, an 'objectively manifested' impairment is commonly understood as one observable or perceivable from actual symptoms or conditions." *Id*. at 196.

Keenan, Dr. Heidenreich, and Christian testified as to *their* observations. All three testified that Lindsey suffered a hearing loss. Additionally, Lindsey testified that her hearing was muffled after the accident and that she suffered from tinnitus. Dr. Heidenreich testified that while it is not possible to test for tinnitus, both symptoms Lindsey complained of are consistent with air-bag explosions. Hence, examination of the entirety of the record in the light most favorable to plaintiff plainly reveals that Lindsey's complained-of symptoms and conditions were observed and perceived by Keenan and Dr. Heidenreich's testing and that Christian also observed and perceived Lindsey's hearing loss in everyday situations. Consequently, plaintiff has demonstrated, in accordance with *McCormick*, that there is a physical basis for her complaints. See *id*. at 198.

Moreover, contrary to its role in deciding a motion under MCR 2.116(C)(10), the trial court weighed the evidence. While testing a person's hearing necessarily involves self-reporting by the person being tested, the record reflects that this testing also includes objective components (such as examining the movement of the eardrum and acoustic reflexes) and that the test is relied on by medical professionals. Both Keenan and Dr. Heidenreich examined Lindsey and considered her audiogram results, and they drew conclusions about the condition of her hearing based on their medical findings. The fact that Dr. Heidenreich used the word "subjective" in describing this self-reporting process does not completely negate the significance of her determinations. Nor does Dr. Heidenreich's description of ringing in the ears as the hearing of a "phantom" sound dispositively affect the analysis: her description illustrates the entire problem that a person with this symptom experiences—hearing a sound that is not heard by anybody else because it is not generated in

the external environment. According to Dr. Heidenreich, tinnitus is a symptom commonly experienced by people with hearing loss. The words used by Dr. Heidenreich in her explanations cannot be used out of context to render Lindsey's claimed hearing impairment nonexistent as a matter of law. Yet the trial court essentially focused on these two words, to the exclusion of all the other evidence in the record, as providing dispositive proof that Lindsey's hearing problems were somehow a figment of her imagination. As previously discussed, Lindsey's hearing issues manifested themselves in ways that were observable by Christian and documented by medical professionals, and the record contains evidence of these medical findings. Lindsey clearly was not making unverifiable, subjective complaints of mere pain and suffering. Rather, she provided evidence that, if believed, would establish a physical basis for her complaints. See *id*. at 198. In sum, an injury is an "objectively manifested impairment" if it is "commonly understood as one observable or perceivable from actual symptoms or conditions." *Id*. at 196. In this case, Lindsey produced evidence from medical professionals and others that creates questions of fact as to the nature and extent of the impairment she alleges arose from the car accident. The fact that some subjective testing methods are incorporated into these medical findings does not negate a conclusion that her impairment is objectively manifested. Rather, the trial court erred by failing to follow the factors set forth in *McCormick* when deciding whether Lindsey's impairment is objectively manifested. Additionally, the trial court erred by making its own evaluations regarding the persuasiveness of the medical evidence related to Lindsey's hearing. *Innovative Adult Foster Care*, 285 Mich App at 480. Accordingly, reversal of the trial court's ruling on this issue is warranted.

B. HEARING IS AN IMPORTANT BODY FUNCTION

"If there is an objectively manifested impairment of body function, the next question is whether the impaired body function is 'important.' " *McCormick*, 487 Mich at 198. As stated in *McCormick*:

> The relevant definition of the adjective "important" is "[m]arked by or having great value, significance, or consequence." *The American Heritage Dictionary, Second College Edition* (1982). See also *Random House Webster's Unabridged Dictionary* (1998), defining "important" in relevant part as "of much or great significance or consequence," "mattering much," or "prominent or large." Whether a body function has great "value," "significance," or "consequence" will vary depending on the person. Therefore, this prong is an inherently subjective inquiry that must be decided on a case-by-case basis, because what may seem to be a trivial body function for most people may be subjectively important to some, depending on the relationship of that function to the person's life. [*McCormick*, 487 Mich at 199.]

On appeal, neither party disputes that hearing is a body function that has "great value," especially to someone who enjoys going to concerts like Lindsey did. Neither party raised an issue relative to whether hearing constitutes an important body function, nor did the trial court address this issue. We therefore turn to the third prong in the *McCormick* factors to determine if a question of fact exists relative to whether Lindsey's hearing loss affects her general ability to lead a normal life.

C. QUESTIONS OF FACT EXIST AS TO WHETHER LINDSEY'S HEARING LOSS AFFECTS HER GENERAL ABILITY TO LEAD HER NORMAL LIFE

As stated in *McCormick*, *id*. at 200-201,[4] the test used to determine whether the impairment affects the

[4] Some alterations in original.

person's general ability to lead their normal life is as follows:

> [I]f the injured person has suffered an objectively manifested impairment of body function, and that body function is important to that person, then the court must determine whether the impairment "affects the person's general ability to lead his or her normal life." The common meaning of this phrase is expressed by the unambiguous statutory language, and its interpretation is aided by reference to a dictionary, reading the phrase within its statutory context, and limited reference to *Cassidy* [*v McGovern*, 415 Mich 483; 330 NW2d 22 (1982).]
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> To begin with, the verb "affect" is defined as "[t]o have an influence on; bring about a change in." *The American Heritage Dictionary, Second College Edition* (1982). An "ability" is "[t]he quality of being able to do something," *id*., and "able" is defined as "having sufficient power, skill, or resources to accomplish an object," *Merriam-Webster Online Dictionary*, <http://www.merriam-webster.com> (accessed May 27, 2010). The adjective "general" means:
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> > 1. Relating to, concerned with, or applicable to the whole or every member of a class or category. 2. Affecting or characteristic of the majority of those involved; prevalent: *a general discontent*. 3. Being usually the case; true or applicable in most instances but not all. 4. a. Not limited in scope, area, or application: *as a general rule*. b. Not limited to one class of things: *general studies*. 5. Involving only the main features of something rather than details or particulars. 6. Highest or superior in rank." [*The American Heritage Dictionary, Second College Edition* (1982).]

MCL 500.3135(5) defines the phrase "serious impairment of body function" as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." The Legislature also expressly provided that whether a serious impairment of body function has

occurred is a "question[] of law" for the court to decide unless there is a factual dispute regarding the nature and extent of injury and the dispute is relevant to deciding whether the standard is met. MCL 500.3135(2)(a). See also *McCormick*, 487 Mich at 190-191. In this case, the trial court erred by deciding whether a serious impairment has occurred because a factual dispute exists regarding the nature and extent of the injury.

Our Supreme Court stated in *McCormick*, 487 Mich at 202, that "the plain text of the statute . . . demonstrate[s] that the common understanding of to 'affect the person's ability to lead his or her normal life' is to have an influence on some of the person's capacity to live in his or her normal manner of living . . . [, which] requires a subjective, person- and fact-specific inquiry that must be decided on a case-by-case basis." In order to make such a determination, we compare the plaintiff's life before and after the incident.[5]

There was record evidence to support a finding that Lindsey's symptoms of hearing loss influenced her ability to live in her normal manner of living: she had trouble communicating with her family, and her tinnitus made it difficult to drive for long periods as required by her work, to attend concerts, and to engage in the outdoor activities that she enjoyed before the accident. We also note that the record reveals Lindsey could still hear normal conversation and that some of her hearing issues, such as her complaints of muffled hearing, may have been resolved. Dr. Heidenreich testified that Lind-

[5] This method of analysis purposefully differs from that employed by the trial court. The trial court seemed to quantify the impairment, calling it "mild" and "only in one ear," despite the specific instruction in *McCormick*, *id*. at 203, that "there is no quantitative minimum as to the percentage of a person's normal manner of living that must be affected."

sey reported that her tinnitus was less intrusive when she was concentrating on caring for her young baby. Additionally, although Dr. Heidenreich testified that Lindsey had hearing loss in both ears, Lindsey testified that she noticed the loss of hearing in her left ear. There was also testimony that Lindsey still participated in many of the activities that she enjoyed before the accident, even though she sometimes experienced heightened ringing in her ears afterward.

In light of this record evidence, we conclude that there was conflicting evidence directly related to whether Lindsey's claimed injury qualified as a serious impairment of body function. Given this conflicting evidence, there was a genuine issue of fact regarding the nature and extent of the impairment to Lindsey's hearing that was material to the threshold injury determination. The trial court erred by ruling on this question as a matter of law and granting summary disposition in favor of defendants. *McCormick*, 487 Mich at 215; *Chouman*, 293 Mich App at 444; *Lysogorski*, 256 Mich App at 299. Accordingly, reversal is warranted on this issue.

D. CAUSATION

Although the trial court did not rule on defendants' causation arguments, defendants argue on appeal (1) that a plaintiff must still show under *McCormick* that the alleged impairment was caused by the motor vehicle accident and (2) that plaintiffs failed to establish that Lindsey suffered an objectively manifested impairment related to her ears that was caused by the car accident. To the extent that defendants' argument implicates the issue of causation, we find it necessary to address this issue because of the possibility that defendants could be entitled to have the trial court's

ruling affirmed on alternate grounds if defendants are correct. See *Adell Broadcasting Corp v Apex Media Sales, Inc*, 269 Mich App 6, 12; 708 NW2d 778 (2005) (stating that a trial court's ruling granting summary disposition may be affirmed on an alternate ground that was not decided by the trial court if the issue was presented to the trial court).

Proximate causation is a required element of a negligence claim. See *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). Causation is an issue that is typically reserved for the trier of fact unless there is no dispute of material fact. *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 326; 661 NW2d 248 (2003).

"To establish proximate cause, the plaintiff must prove the existence of both cause in fact and legal cause." *Weymers v Khera*, 454 Mich 639, 647; 563 NW2d 647 (1997). While the term "proximate cause" is also a term of art for the concept of legal causation, Michigan courts have historically used the term proximate cause "both as a broader term referring to factual causation and legal causation together and as a narrower term referring only to legal causation." *Ray v Swager*, 501 Mich 52, 63; 903 NW2d 366 (2017). However, in *Ray*, the Michigan Supreme Court explained that "[a]ll this broader characterization recognizes . . . is that a court must find that the defendant's negligence was a cause in fact of the plaintiff's injuries before it can hold that the defendant's negligence was the proximate or legal cause of those injuries." *Id*. at 63-64 (quotation marks and citation omitted). The *Ray* Court also reiterated that " '[p]roximate cause' has for a hundred years in this state, and elsewhere, been a legal term of art; one's actions cannot be *a* or *the*

'proximate cause' without being both a factual and a legal cause of the plaintiff's injuries." *Id*. at 83.

Establishing cause in fact requires the plaintiff to "present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Weymers*, 454 Mich at 647-648 (quotation marks and citation omitted). Although causation cannot be established by mere speculation, see *id*. at 648, a plaintiff's evidence of causation is sufficient at the summary disposition stage to create a question of fact for the jury "if it establishes a logical sequence of cause and effect, notwithstanding the existence of other plausible theories, although other plausible theories may also have evidentiary support," *Wilson v Alpena Co Rd Comm*, 263 Mich App 141, 150; 687 NW2d 380 (2004) (quotation marks and citation omitted).

"To establish legal cause, the plaintiff must show that it was foreseeable that the defendant's conduct may create a risk of harm to the victim, and . . . [that] the result of that conduct and intervening causes were foreseeable." *Weymers*, 454 Mich at 648 (quotation marks and citation omitted; alteration in original). Our inquiry "normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences." *Campbell v Kovich*, 273 Mich App 227, 232; 731 NW2d 112 (2006) (quotation marks and citation omitted). "The general rule, expressed in terms of damages, and long followed in this State, is that in a tort action, the tort-feasor is liable for all injuries resulting directly from his wrongful act, whether foreseeable or not, provided the damages are the legal and natural consequences of the wrongful act, and are such as, according to common experience and the usual course of events,

might reasonably have been anticipated." *Sutter v Biggs*, 377 Mich 80, 86; 139 NW2d 684 (1966). When judging the foreseeability of a risk of harm, "[i]t is not necessary that the manner in which a person might suffer injury should be foreseen or anticipated in specific detail." *Clumfoot v St Clair Tunnel Co*, 221 Mich 113, 117; 190 NW 759 (1922).[6] In other words, "[w]here an act is negligent, to render it the proximate cause, it is not necessary that the one committing it might have foreseen the particular consequence or injury, or the particular manner in which it occurred, if by the exercise of reasonable care it might have been anticipated that some injury might occur." *Baker v Mich Central R Co*, 169 Mich 609, 618-619; 135 NW 937 (1912) (opinion by MCALVAY, J.).

Similarly, 2 Restatement Torts, 2d, § 435, p 449 states:[7]

> (1) If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.
>
> (2) The actor's conduct may be held not to be a legal cause of harm to another where after the event and

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[6] Although the *Clumfoot* Court was discussing the concept of foreseeability in the context of examining the duty element of a negligence claim, *id*. at 116-117, this Court has recognized that "[t]he question of proximate cause, like duty, depends in part on foreseeability," *Ross v Glaser*, 220 Mich App 183, 192; 559 NW2d 331 (1996).

[7] We note that the Restatement, while not binding, is persuasive authority. See *Rowe v Montgomery Ward & Co, Inc*, 437 Mich 627, 652; 473 NW2d 268 (1991) (opinion by RILEY, J.); *id*. at 662 (opinion by BOYLE, J., concurring). Although we have located no Michigan cases expressly adopting or rejecting this section of the Restatement, it is in accordance with the jurisprudence of this state as expressed in the rules cited from *Sutter*, *Clumfoot*, and *Baker*. Therefore, we find this principle expressed in the Restatement and accompanying comments to be persuasive.

> looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.

Comment *a* of 2 Restatement Torts, 2d, § 435, pp 449-450, further explains, in pertinent part, as follows:

> The fact that the actor, at the time of his negligent conduct, neither realized nor should have realized that it might cause harm to another of the particular kind or in the particular manner in which the harm has in fact occurred, is not of itself sufficient to prevent him from being liable for the other's harm if his conduct was negligent toward the other and was a substantial factor in bringing about the harm.
>
> Negligent conduct may result in unforeseeable harm to another, (1) because the actor neither knows nor should know of the situation upon which his negligence operates, or (2) because a second force the operation of which he had no reason to anticipate has been a contributing cause in bringing about the harm. In neither case does the unforeseeable nature of the event necessarily prevent the actor's liability.

In this case, the record reflects that there was no audiogram from before the accident to show Lindsey's preaccident hearing capabilities, and Dr. Heidenreich testified that hearing loss can occur as part of the aging process. However, Lindsey testified that she began experiencing hearing problems and ringing in her ears immediately following the accident, and Lindsey further testified that she did not have these issues before the accident. Additionally, Dr. Heidenreich testified that there were studies in peer-reviewed literature showing a connection between the loud sounds of air bag deployment and hearing loss and that exposure to loud sounds could cause hearing loss and tinnitus, even if there has been no physical trauma. Dr. Heidenreich also opined that based on Lindsey's audiogram

results and her history of experiencing an immediate negative change in her hearing following the accident, Lindsey's hearing loss and tinnitus were caused by her exposure to the loud sound of the air bags deploying. On the basis of this evidence, a jury could reasonably conclude that, more likely than not, Lindsey's hearing loss would not have occurred but for the car accident given that Lindsey did not have any problems with her hearing before the accident, she was exposed to the loud sound of the air bags deploying in the accident, and she then experienced sudden and persistent hearing loss immediately following the accident. Therefore, although it is possible that Lindsey's hearing loss was due to aging, plaintiffs presented evidence demonstrating a logical sequence of cause and effect sufficient to create a genuine issue of material fact regarding cause in fact. *Weymers*, 454 Mich at 647-648; *Wilson*, 263 Mich App at 150.

Additionally, injuries of various kinds, including injuries involving the head, are obviously a foreseeable result of negligently causing a motor vehicle accident. Although hearing damage may not be the first injury that might be expected to occur in a car accident, it is foreseeable that air bags may deploy during a crash and that a great deal of force and sound will be involved given the velocity at which air bags deploy. Therefore, negligently causing a car accident may be considered a legal cause of hearing damage from the sound of the air bags deploying, even if this particular type of injury was not actually anticipated by Turkelson in the instant case. See *Sutter*, 377 Mich at 86-87; *Baker*, 169 Mich at 618-619; Restatement, p 449.

Therefore, summary disposition also could not have been properly granted on causation grounds because there was a genuine issue of material fact on the

current record regarding both the cause in fact and the legal cause of Lindsey's hearing loss. *West*, 469 Mich at 183; *Weymers*, 454 Mich at 647.

Reversed and remanded for further proceedings consistent with this opinion. Plaintiff, having prevailed, may tax costs. MCR 7.219(A). We do not retain jurisdiction.

METER, P.J., and BOONSTRA, J., concurred with BORRELLO, J.

PEOPLE v ANDERSON

Docket No. 334219. Submitted January 9, 2018, at Detroit. Decided January 16, 2018, at 9:05 a.m. Leave to appeal denied 502 Mich 939.

Henry Anderson was convicted after a jury trial in the Oakland Circuit Court of two counts of assault with intent to commit murder (AWIM), MCL 750.83, and two counts of carrying a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The court, Leo Bowman, J., sentenced Anderson to 11½ to 60 years of imprisonment for each AWIM conviction and to a consecutive term of 2 years of imprisonment for each felony-firearm conviction. At approximately 5:30 a.m. on July 30, 2015, Victor Stinson and Joshua Harris were executing a repossession order for Anderson's car. While the two men worked to lift Anderson's vehicle onto a tow truck, Anderson came out of his house. The two men did not see that Anderson was carrying a handgun. Stinson told Anderson that they had a valid repossession order for Anderson's car and headed to the tow truck to retrieve paperwork containing the contact information Anderson would need to inquire about the repossession. Anderson repeatedly told the men to "drop the car," and when Anderson ultimately brandished the weapon, Harris yelled "gun." As Stinson and Harris ran to hide behind the tow truck, Anderson fired the gun, and a bullet struck Stinson's leg. Anderson discharged his handgun a second time before he walked behind his house and eventually emerged at the top of his driveway. Anderson shot at Stinson and Harris once more before going back inside his home. The entire incident was recorded on Anderson's home security system. Anderson was convicted as charged. He appealed.

The Court of Appeals *held*:

1. Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise. Establishing ineffective assistance of counsel requires a defendant to show that his or her attorney's performance fell below an objective standard of reasonableness under prevailing professional norms. A defendant must further show that there was a reasonable probability that, but for the attorney's deficient performance, the result of the proceedings would have been different. Anderson

claimed that his counsel was ineffective for (1) failing to request M Crim JI 7.22, the jury instruction on the use of nondeadly force in self-defense, (2) failing to argue that the two men preparing to tow his car breached the peace in violation of MCL 440.9609, and (3) failing to investigate what his neighbors may have seen and failing to contact the credit union to verify that his car loan was current. All of Anderson's assertions in support of his claim of ineffective assistance of counsel were meritless. First, the jury instruction on the use of nondeadly force in self-defense was not warranted; force used to defend oneself is not nondeadly simply because no one died as a result of the use of force. A gun is a deadly weapon, and firing a deadly weapon at another person constitutes the use of deadly force because the natural, probable, and foreseeable consequence of firing a gun at a person is death. Second, Anderson failed to establish the factual predicate for his claim that Stinson and Harris breached the peace. Stinson and Harris had a valid order of repossession and had worked swiftly, quietly, and under cover of darkness to lessen the chances of encountering Anderson. Any breach of the peace was caused by Anderson when he fired his handgun, not by Stinson and Harris, who were simply doing their jobs. Third, Anderson's counsel was not ineffective for failing to determine what Anderson's neighbors may have seen that morning or for failing to determine whether the credit union's records would have shown that Anderson was current on his car loan. Although the failure to reasonably investigate a case could constitute ineffective assistance of counsel if the failure undermined confidence in the trial's outcome, Anderson failed to establish the factual predicate for this claim. The record evidence indicated that it was just as likely that Anderson's counsel did investigate and did not find any useful information. In addition, an attorney's failure to call witnesses constitutes ineffective assistance of counsel only when it deprives a defendant of a substantial defense. There was no evidence showing that defense counsel had failed to subject the prosecution's case to meaningful adversarial testing. Instead, the record showed that defense counsel had extensively cross-examined the witnesses at trial and had moved for a directed verdict. The video footage that had been recorded by Anderson's home security system also supported Stinson's and Harris's accounts of the incident. Finally, the fact that the police had allowed Harris to tow Anderson's vehicle after the incident provided support for the validity of the repossession order.

2. A verdict is against the great weight of the evidence when the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. It

is the province of the jury to determine questions of fact, to assess the credibility of witnesses, and to draw inferences from the evidence presented. A court must defer to a jury's determination unless testimony directly contradicting a defendant's innocence was so far impeached that it lost all probative value or the jury could not have believed it, or the testimony contradicted indisputable physical facts or defied physical realities. A conviction of AWIM requires proof of an assault with an actual intent to kill, which, if successful, would make the killing murder. Anderson argued that the great weight of the evidence demonstrated that he had not had the intent to kill and that he had reasonably acted in self-defense when confronted by unknown individuals in the dark who possessed tools that Anderson claimed looked like weapons. Minimal circumstantial evidence is sufficient to prove a defendant's state of mind. In this case, sufficient evidence was produced to show that Anderson had acted with the requisite intent to kill, and the great weight of the evidence did not support his claim of self-defense. Anderson fired three shots at close range in the direction of Stinson and Harris. After the first two shots, Anderson walked around his house and then fired one more shot from the top of the driveway. The balance of the evidence negated Anderson's contention that he had feared imminent harm. Video footage of the incident supported Stinson's and Harris's versions of the events and showed that neither man had been armed or had taken any sort of hostile action toward Anderson. Anderson admitted to the police after the incident that he had understood Stinson and Harris were "repo guys," but Anderson had not mentioned that either man had a weapon or that he had been in fear for his life. The great weight of the evidence did not controvert the jury's verdict, and the jury's verdict indicated that it did not find credible Anderson's self-defense claim.

3. Offense Variable (OV) 6 of the sentencing guidelines, set forth in MCL 777.36, concerns the defendant's intent to kill or injure another individual. An OV 6 score must be consistent with the jury's verdict unless the court has information that was not presented to the jury. Anderson agreed that his OV 6 score of 25 points was consistent with the jury's verdict but argued that he was entitled to be resentenced because his sentences were unreasonable and because the trial court had had information that had not been presented to the jury. Specifically, Anderson claimed that the trial court should have considered its knowledge that Anderson was 70 years old, had no prior record, had been living a productive and law-abiding life, and that the offense committed had been completely out of character. Although the plain language of MCL 777.36(2)(a) permits the sentencing court to

consider information that was not presented to the jury, nothing in the statutory language suggests that the court should take into account information that is not relevant to the variable in question. Anderson also contended that he should be resentenced because the sentences imposed on him were unreasonably excessive given that he was 70 years old, married with four children, dealing with health issues, and caring for a dependent wife. However, the sentencing court sentenced Anderson to a minimum term of imprisonment within the guidelines minimum sentence range, and appellate review of a sentence for reasonableness is required only for those sentences that depart from the range recommended by the statutory sentencing guidelines. Anderson's sentences must be affirmed because his sentences were within the guidelines range and because there was no evidence that there was an error in scoring or that the trial court relied on inaccurate information.

Affirmed.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Joshua J. Miller*, Assistant Prosecuting Attorney, for the people.

Ronald D. Ambrose for defendant.

Before: TALBOT, C.J., and MURRAY and O'BRIEN, JJ.

PER CURIAM. Defendant, Henry Anderson, appeals as of right his jury trial convictions of two counts of assault with intent to murder[1] and two counts of carrying a firearm during the commission of a felony (felony-firearm).[2] The trial court sentenced Anderson to 11½ to 60 years' imprisonment for each assault-with-intent-to-murder conviction and to a consecutive term of two years' imprisonment for each felony-firearm conviction. We affirm.

[1] MCL 750.83.

[2] MCL 750.227b.

I. BACKGROUND

This case arises out of an incident that occurred on July 30, 2015, at approximately 5:30 a.m., in front of Anderson's home. Victor Stinson and Joshua Harris were working for Signature Recovery Service repossessing cars and had a repossession order for the Chrysler 300 parked in Anderson's driveway. After Stinson and Harris confirmed that the car was the correct vehicle, they backed their tow truck up to the rear end of the Chrysler 300 and got to work quickly, using the wheel lift equipment on the tow truck to grab the back end of the Chrysler 300 so they could tow it away. While the men worked in darkness using flashlights, Anderson heard a noise that woke him up. He looked out the window and saw Stinson and Harris preparing to tow his car away. Anderson asked his wife to call 911 and, armed with a loaded handgun, went outside to confront the men.

Harris noticed Anderson standing on the porch wearing only his underwear and alerted Stinson. Stinson approached Anderson, introduced himself, and explained that he had a valid repossession order for the Chrysler 300. Stinson told Anderson that he would give him the contact information for the finance company that ordered the repossession and started to walk toward the tow truck to get the paperwork. Harris continued securing the Chrysler 300 onto the tow truck. Instead of waiting for Stinson to return with the information, Anderson repeatedly told the men to "drop the car" and then brandished his weapon. Harris saw the weapon and yelled "gun" as Stinson was leaning into the cab of the tow truck to get the documentation off of a clipboard.

Harris immediately ran to the front of the tow truck to take cover. When Stinson turned around, he saw

Anderson raise the weapon and then felt a bullet hit his leg and saw blood gushing out. Anderson fired his gun again, and the bullet hit the pavement not far from Stinson and Harris, who both saw it ricochet off Anderson's driveway. Leaning on the tow truck, Stinson limped to the far side of the truck and collapsed on the grass. Harris was able to get their cell phones from the truck and attempted to call 911. Anderson walked to the back of his house, then around the side of his house, and emerged approximately 30 to 45 seconds later at the top of his driveway where he fired another shot at Stinson and Harris before retreating into his house. The entire incident was recorded on Anderson's home security system.

When the police arrived, Anderson told an officer that the men were trying to steal his car, that they had no right to take his car, and that he had a right to protect his property. Anderson acknowledged to police that Stinson and Harris were "repo guys." By contrast, Anderson testified at trial that he heard a metallic sound, believed that Stinson had a metal rod or pipe in the cab of the truck, and feared for his life when he decided to fire his weapon. Anderson admitted to firing three shots during the incident. He also maintained that the repossession was unlawful because he was up to date on his payments and insurance. Anderson was convicted as charged.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Anderson first argues that he was denied his constitutional right to the effective assistance of counsel and should be granted a new trial or an evidentiary hearing. "Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact

and constitutional law."[3] "Generally, a trial court's findings of fact, if any, are reviewed for clear error, and questions of law are reviewed de novo."[4] "When no *Ginther*[5] hearing has been conducted, our review of the defendant's claim of ineffective assistance of counsel is limited to mistakes that are apparent on the record."[6]

To establish that his or her lawyer provided ineffective assistance, a defendant must show that (1) the lawyer's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for the lawyer's deficient performance, the result of the proceedings would have been different.[7] "A reasonable probability is a probability sufficient to undermine confidence in the outcome."[8] In addition, "[e]ffective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise."[9] The "[d]efendant also bears the burden of establishing the factual predicate for his claim."[10]

Anderson first argues that defense counsel was ineffective for failing to request a jury instruction on the use of nondeadly force in self-defense,[11] rather than the use of deadly force in self-defense.[12] In support,

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[3] *People v Solloway*, 316 Mich App 174, 187; 891 NW2d 255 (2016).

[4] *Id*. at 188.

[5] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

[6] *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

[7] *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012).

[8] *Strickland*, 466 US at 694.

[9] *People v Putman*, 309 Mich App 240, 248; 870 NW2d 593 (2015).

[10] *Id*. (quotation marks and citation omitted).

[11] M Crim JI 7.22.

[12] M Crim JI 7.15.

Anderson maintains that the evidence clearly showed that he used nondeadly force when he fired his weapon because no one died as a result of the incident. We disagree. At trial, Anderson admitted to firing three shots at Stinson and Harris, who were unarmed, nonconfrontational, and simply performing the duties of their repossession jobs. Record evidence, including video footage of the incident, confirms that Anderson fired three shots in the direction of Stinson and Harris during the course of the incident. One of Anderson's hollow-point rounds actually hit Stinson in the leg, causing him to collapse to the ground bleeding. While Stinson and Harris took cover behind the tow truck, Anderson had the opportunity to walk away, and he did so, but he then returned and chose to fire the third shot at Stinson and Harris. A gun is a deadly weapon, and firing a deadly weapon at another person—once or several times—undoubtedly involves the use of deadly force, because it is an act for which "the natural, probable, and foreseeable consequence . . . is death."[13] We agree with the prosecution's contention that the fact that Anderson did not kill Stinson and Harris does not absolve him of using deadly force or show that he used nondeadly force. Because there was no basis for a nondeadly-force instruction, trial counsel was not ineffective for failing to request that instruction.[14]

Next, Anderson argues that trial counsel was ineffective for failing to argue that Stinson and Harris had

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[13] *People v Pace*, 102 Mich App 522, 534; 302 NW2d 216 (1980) (rejecting the notion that deadly force requires a resulting death and holding that "deadly force has been used where the defendant's acts are such that the natural, probable, and foreseeable consequence of said acts is death").

[14] *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) ("Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.").

breached the peace. Anderson contends that the self-help repossession statute, MCL 440.9609, provides that a secured party may take possession of collateral without judicial process if it proceeds without breach of the peace. Anderson's argument fails because he has not met his burden of establishing the factual predicate for his claim.[15] The record evidence shows that Stinson and Harris had a valid repossession order for Anderson's vehicle, and in executing the directives of that order, Stinson and Harris worked swiftly, quietly, and under cover of darkness specifically to lessen the chances of confrontation with Anderson. To the extent that a breach of the peace occurred, it was a result of Anderson's decision to shoot at the victims, rather than a result of any conduct on the part of Stinson or Harris. Therefore, Anderson's argument fails. Once again, trial counsel was not ineffective for failing to raise a meritless argument.[16]

Anderson next argues that trial counsel failed to investigate Anderson's neighbors to determine whether they saw anything and/or his credit union to verify that the repossession was unlawful. The failure to reasonably investigate a case can constitute ineffective assistance of counsel.[17] However, Anderson's argument fails because, once again, he has not established the factual predicate for his claim.[18] Anderson provides no evidence in support of his assertions. On the record before the Court, it is just as likely that defense counsel did investigate these potential witnesses but found that their testimony would not be useful. With regard to the neighbors' observations, Anderson ignores the video evidence of the incident captured by his

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[15] *Putman*, 309 Mich App at 248.

[16] *Ericksen*, 288 Mich App at 201.

[17] *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005).

[18] *Putman*, 309 Mich App at 248.

own home security system, which supported the victims' version of the events. With regard to the validity of the repossession order, Harris testified that the police allowed him to tow the vehicle away after the incident. This evidence clearly supports the conclusion that the repossession order was valid. Because no available record evidence establishes that trial counsel failed to interview or investigate potentially helpful witnesses, Anderson's claim necessarily fails.

Furthermore, "[t]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense. Similarly, [t]he failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome."[19] Anderson fails to explain how counsel's alleged failure to interview neighbors and credit union employees deprived him of either a substantial defense or evidence that could have been helpful to his defense. There is no basis for concluding that defense counsel failed to subject the prosecution's case to meaningful adversarial testing. Even assuming that Anderson's counsel did not investigate and interview witnesses, the record discloses that counsel extensively cross-examined the witnesses at trial and moved for a directed verdict, arguing that the prosecutor failed to offer sufficient evidence to present certain charges to the jury. Anderson's argument therefore fails.

III. GREAT WEIGHT OF THE EVIDENCE

Anderson next contends that his convictions must be overturned because the jury's verdict was against the

[19] *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012) (quotation marks and citation omitted) (second alteration in original).

great weight of the evidence. "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand."[20] When a defendant claims on appeal that his convictions were against the great weight of the evidence,

> [c]onflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial. [U]nless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it, or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination.[21]

Additionally, "[i]t is the province of the jury to determine questions of fact and assess the credibility of witnesses."[22]

To prove assault with intent to murder, the prosecution must show "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder."[23] Anderson argues that his convictions for assault with intent to murder were contrary to the great weight of the evidence, which clearly reflected that he did not have the intent to murder. According to Anderson, the evidence demonstrated that he reasonably acted in self-defense when confronted with unknown individuals in the dark who were in possession of tools he perceived to be weapons. In essence, Anderson urges this Court to conclude that his version of

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[20] *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003).

[21] *Id*. at 219 (quotation marks and citations omitted) (second alteration in original).

[22] *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998).

[23] *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993).

events was more credible than the evidence offered by the prosecution. We decline to do so.

"This Court has consistently observed that 'because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient.' "[24] Additionally, the weight and credibility of evidence, and the inferences to be drawn from the evidence, are matters for the jury to resolve.[25] In this case, there was sufficient evidence that Anderson acted with the requisite intent to kill, and the great weight of the evidence did not support Anderson's claim of self-defense. Anderson fired a total of three shots at close range in the direction of Stinson and Harris. Anderson used hollow-point bullets, which are designed to cause additional damage after striking a target. Further, after firing the first two shots, Anderson walked around his house and then emerged at the top of the driveway, aimed, and fired a third shot toward Stinson and Harris while they were both hiding behind the tow truck. Stinson had already been struck by the first bullet and was lying on the ground, bleeding, and unable to walk. While Anderson's own testimony suggested he was in fear of imminent harm from Stinson and Harris, the balance of the evidence negated his assertion. Anderson's home security system captured the entire incident on video and supported the victims' version of the incident. Neither Stinson nor Harris was armed, and neither victim engaged in any sort of hostile action toward Anderson. Furthermore, when Anderson first spoke to the police after the incident, he acknowledged that he understood Stinson and Harris were "repo guys" and made no mention of seeing either victim with a weapon or being in fear for his life. It is clear from its verdict that the jury did not find Anderson's testimony or

[24] *Ericksen*, 288 Mich App at 196-197 (citation omitted).

[25] *People v Unger*, 278 Mich App 210, 228-229; 749 NW2d 272 (2008).

self-defense claim credible and, having reviewed the record, the jury's verdict was not contrary to the great weight of the evidence.

IV. SENTENCING

Finally, Anderson argues that he is entitled to resentencing because Offense Variable (OV) 6 was erroneously scored and because the sentences he received were unreasonable. "To preserve a sentencing issue for appeal, a defendant must raise the issue 'at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.' "[26] Anderson raised a challenge to the scoring of OV 6 at sentencing, but he did not object to his sentences on the basis that they were unreasonably excessive. Therefore, Anderson's challenge to the scoring of OV 6 is preserved, but his challenge to the reasonableness of his sentences is unpreserved.

In reviewing a trial court's calculation of a defendant's sentencing guidelines score, this Court reviews factual determinations for clear error, and factual determinations must be supported by a preponderance of the evidence.[27] "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo."[28] To the extent that this issue is unpreserved, our review is limited to plain error affecting substantial rights.[29] "To establish entitlement to relief under plain-error review, the defen-

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[26] *People v Clark*, 315 Mich App 219, 223; 888 NW2d 309 (2016), quoting MCR 6.429(C).

[27] *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016).

[28] *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

[29] *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015).

dant must establish that an error occurred, that the error was plain, i.e., clear or obvious, and that the plain error affected substantial rights."[30]

Anderson argues that the trial court erred by assessing 25 points for OV 6 (intent to kill or injure). Pursuant to MCL 777.36(1)(b), 25 points should be assessed for OV 6 if "[t]he offender had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result." A sentencing judge is directed to "score this variable consistent with a jury verdict unless the judge has information that was not presented to the jury."[31]

Anderson admits in his brief on appeal that the trial court's assessment of 25 points was consistent with the jury's verdict in this case. Nonetheless, he argues that OV 6 should not have been scored at 25 points because the trial court had information that was not presented to the jury. Specifically, Anderson asserts that the trial court was aware that Anderson was 70 years old, had no prior record, and was living a productive and law-abiding life. Anderson further asserts that the trial court had broad discretion and should have considered these factors as well as the fact that the offense was completely out of character. We disagree. The directive set forth in MCL 777.36(2)(a) dictates how the sentencing guidelines should be scored and is unambiguous. "If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written."[32] The plain language of MCL 777.36(2)(a)

[30] *Id*. at 392-393.

[31] MCL 777.36(2)(a).

[32] *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004).

permits the sentencing court to consider information that was not presented to the jury, but nothing in the statutory language suggests that the court should take into account information that is not relevant to the variable in question. The information Anderson points to in this case is irrelevant to the scoring of OV 6, because Anderson's age, health, family status, and lack of a criminal record have no bearing whatsoever on Anderson's intent at the time he decided to open fire on Stinson and Harris. For these reasons, the trial court did not err with respect to OV 6.

Finally, Anderson argues that the sentences he received were unreasonably excessive. Anderson contends that the trial court should have taken into account the fact that, at the time of sentencing, he was 70 years old, married with four children, dealing with health issues, and caring for a dependent wife. The guidelines range for Anderson's assault with intent to murder convictions was 126 to 210 months in prison. The trial court sentenced Anderson at the low end of this range, imposing minimum sentences of 138 months' imprisonment for Anderson's assault with intent to murder convictions.

According to *People v Lockridge*,[33] this Court is required to review for reasonableness only those sentences that depart from the range recommended by the statutory guidelines. Because the trial court sentenced Anderson within the applicable sentencing guidelines range, this Court need not evaluate Anderson's sentences for reasonableness and must affirm his sentences unless there was an error in the scoring or the trial court relied on inaccurate information.[34] For the

[33] *Lockridge*, 498 Mich at 365.

[34] See *Schrauben*, 314 Mich App at 196 ("When a trial court does not depart from the recommended minimum sentencing range, the mini-

reasons already explained, Anderson has not demonstrated any error in the calculation of his sentencing guidelines range. Likewise, there is no indication that the trial court sentenced Anderson on the basis of inaccurate information. Indeed, each of the factors Anderson points to as justifying a reduced minimum sentence was known to the trial court because it was identified in Anderson's presentence investigation report or otherwise discussed at sentencing. Accordingly, Anderson is not entitled to resentencing.

Affirmed.

TALBOT, C.J., and MURRAY and O'BRIEN, JJ., concurred.

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mum sentence must be affirmed unless there was an error in scoring or the trial court relied on inaccurate information."), citing MCL 769.34(10).

BENNETT v RUSSELL

Docket No. 334859. Submitted January 10, 2018, at Detroit. Decided January 16, 2018, at 9:10 a.m.

Deborah Bennett and Marsha C. Wilson filed a negligence action in the Wayne Circuit Court against Carrie Russell, Liberty Mutual Insurance Company, Enterprise Leasing Company of Detroit (Enterprise), and Dennis Hogge, seeking to recover damages for the injuries they had received in an automobile accident. In November 2013, Hogge loaned an automobile he had just rented from Enterprise to nonparty Latasha Phillips, who crashed the rental car into the automobile that Wilson was driving and in which Bennett was a passenger. Plaintiffs asserted that Enterprise and Hogge were liable for plaintiffs' injuries under the owner's liability statute, MCL 257.401. Hogge moved for summary disposition, arguing that because he was not the "owner" of the rental—as that term is defined in MCL 257.37 of the Michigan Vehicle Code, MCL 257.1 *et seq*.—he was not liable under MCL 257.401 for plaintiffs' injuries. Plaintiffs' counsel argued that, even though the theory was not asserted in the complaint, Hogge was liable for negligently entrusting the rented vehicle to Phillips and that the complaint should be conformed to fit the proofs in the case. Plaintiffs also asserted that Hogge's lack of ownership was irrelevant because his insurance policy provided liability coverage for the rented vehicle. The court, John A. Murphy, J., granted summary disposition in favor of Hogge, concluding that because Hogge was not the owner of the rented vehicle, he was not liable under MCL 257.401 or under a theory of negligent entrustment. Plaintiffs appealed.

The Court of Appeals *held*:

1. The tort of negligent entrustment imposes liability on one who supplies a chattel for the use of another whom the supplier knows or has reason to know is—because of youth, inexperience, or otherwise—likely to use it in a manner involving unreasonable risk of physical harm. Generally, a negligent-entrustment claim can arise from the use of a motor vehicle; the plaintiff must establish that the motor vehicle was driven with the permission and authority of the owner, that the entrustee was an incompe-

tent driver, and that the owner knew at the time of the entrustment that the entrustee was incompetent or unqualified to operate the vehicle, or had knowledge of such facts and circumstances as would imply knowledge on the part of the owner of such incompetency. While an owner of a chattel may be liable under a theory of negligent entrustment, the tort imposes liability on the basis of a defendant's negligence in allowing the use of a chattel by a person who is likely to handle it in a manner that will cause harm to others. For that reason, liability can attach regardless of whether the entrusting person is the owner of the chattel; that is, it is a defendant's identity as the supplier of the chattel, rather than as its owner, that is relevant to liability under a negligent-entrustment theory. In this case, it was undisputed that Hogge leased the automobile from Enterprise and that Hogge allowed Phillips to drive the car. Evidence was presented that Phillips did not have a valid driver's license and that Phillips may have been intoxicated at the time of the accident, which occurred one hour after Hogge rented the automobile. Viewing the evidence in a light most favorable to plaintiffs, reasonable minds could have differed regarding whether Hogge knew or should have known that Phillips was not licensed or fit to drive. Accordingly, the trial court erred by granting summary disposition in favor of Hogge because he was not entitled to judgment as a matter of law under MCR 2.116(C)(10).

2. In their complaint, plaintiffs asserted a claim of negligence against Hogge that was premised on the statutory liability of an owner under MCL 247.401. Plaintiffs' assertion of liability against Hogge under a theory of negligent entrustment at oral argument was not a proper motion to amend the complaint as required by MCR 2.118. On remand, it was in the trial court's discretion whether to allow plaintiffs to amend their complaint.

Reversed and remanded for further proceedings.

TORTS — NEGLIGENT ENTRUSTMENT — MOTOR VEHICLES — LIABILITY OF LENDERS.

The tort of negligent entrustment imposes liability on one who supplies a chattel for the use of another whom the supplier knows or has reason to know is—because of youth, inexperience, or otherwise—likely to use it in a manner involving unreasonable risk of physical harm; while an owner of a chattel, like a motor vehicle, may be liable under a theory of negligent entrustment, the tort imposes liability on the basis of a defendant's negligence in allowing the use of the chattel by a person who is likely to handle it in a manner that will cause harm to others; liability can attach regardless of whether the entrusting person is the owner of

> the chattel; that is, it is a defendant's identity as the supplier of the chattel, rather than as its owner, that is relevant to liability under a negligent-entrustment theory.

Ravid & Associates, PC (by *Keith M. Banka*) for Deborah Bennett and Marsha C. Wilson.

Law Offices of Paul R. Knight (by *Richard G. Lewandowski* and *Danny C. Allen*) for Dennis Hogge.

Before: TALBOT, C.J., and MURRAY and O'BRIEN, JJ.

TALBOT, C.J. Plaintiffs, Deborah Bennett and Marsha Christine Wilson, initiated this action following a motor vehicle accident that occurred on November 16, 2013. The trial court granted summary disposition in favor of defendant Dennis Hogge under MCR 2.116(C)(10). Plaintiffs appeal by right. We conclude that the trial court erred by dismissing plaintiffs' claim against Hogge because liability under a negligent-entrustment theory is not limited to the owner of the vehicle negligently operated. We therefore reverse the trial court's order granting Hogge's motion for summary disposition and remand this matter to the trial court for further proceedings.

I. BACKGROUND

At 8:30 a.m. on November 16, 2013, plaintiffs were stopped at a traffic light at the intersection of Chalmers and East Vernor in the city of Detroit when their vehicle was struck by a white Chrysler 300 attempting to turn onto Chalmers. According to the traffic crash report, the Chrysler 300 was driven by defendant Carrie Russell. During the course of discovery, plaintiffs learned that Russell was not involved in the accident and that the actual driver, nonparty Latasha Phillips, had falsely identified herself as Russell when

she spoke with the police. Moreover, the Chrysler 300 was owned by defendant Enterprise Leasing Company of Detroit (Enterprise) and leased to Hogge at the time of the accident. Shortly after acquiring the vehicle from Enterprise, Hogge turned it over to Latasha.[1] Plaintiffs amended their complaint to add Enterprise and Hogge as defendants to their negligence claim, averring that they were liable for injuries plaintiffs sustained in the accident under the owner's liability statute, MCL 257.401.

Hogge moved for summary disposition, arguing that he could not be held liable for Latasha's negligence because he was not an "owner" of the rental vehicle as that term is defined in the Michigan Vehicle Code, MCL 257.1 *et seq*. In pertinent part, plaintiffs asserted that questions of fact remained as to whether Hogge negligently entrusted the vehicle to Latasha. During oral argument, plaintiffs' counsel essentially conceded that plaintiffs' complaint did not allege a negligent-entrustment cause of action against Hogge, but counsel maintained that there was ample evidence to support that theory and asserted that "the pleadings should conform to the proofs . . . ." The trial court found that Hogge did not meet the statutory definition of an "owner" set forth in MCL 257.37 and granted summary disposition in Hogge's favor, reasoning that his lack of ownership was fatal to plaintiffs' claim under the owner's liability statute and under a negligent-entrustment theory.

On appeal, plaintiffs argue that the trial court erred by granting Hogge's motion for summary disposition

[1] Hogge knew Latasha as "Latasha Dawson." However, Russell recognized the surname Dawson as belonging to the father of Latasha's children and stated that "Latasha Dawson" was actually Latasha Phillips.

because the common-law tort of negligent entrustment imposes liability on one who negligently *supplies* a chattel to another and, therefore, whether Hogge met the statutory definition of an owner was not dispositive.

II. STANDARD OF REVIEW

This Court generally reviews de novo a trial court's rulings on summary disposition motions.[2] A trial court deciding a motion for summary disposition under MCR 2.116(C)(10) considers "the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . ."[3] "Summary disposition is appropriate . . . if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ."[4]

However, when a party presses a claim of error that was not raised in, and addressed and decided by, the trial court, it is not properly preserved for appellate review.[5] Although plaintiffs asserted before the trial court that Hogge's lack of ownership was irrelevant, the basis of their argument was that Hogge's insurance policy provided liability coverage for the rented vehicle. Accordingly, this issue is unpreserved, and this

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[2] *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 115; 839 NW2d 223 (2013).

[3] *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012).

[4] *Gorman*, 302 Mich App at 116, quoting *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

[5] *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005).

Court's review is limited to plain error affecting substantial rights.[6] "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights."[7]

III. ANALYSIS

The common-law tort of negligent entrustment "imposes liability on one who supplies a chattel for the use of another whom the supplier knows or has reason to know is, because of youth, inexperience, or otherwise, likely to use it in a manner involving unreasonable risk of physical harm."[8] A negligent-entrustment claim can arise from the use of a motor vehicle, as long as the action falls within the scope of the residual liability allowed by the no-fault statutory scheme.[9] In this context, courts have sometimes referred to the liability of an "owner" of the vehicle. For instance, in *Perin v Peuler (On Rehearing)*, the Supreme Court explained that the plaintiff in a negligent-entrustment action has the burden of proving

> that the motor vehicle was driven with the permission and authority of the *owner*; that the entrustee was in fact an incompetent driver; and that the *owner* knew at the time of the entrustment that the entrustee was incompetent or

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[6] *In re Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007), aff'd 480 Mich 19 (2008).

[7] *Id*. at 285-286 (quotation marks and citations omitted).

[8] *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261, 265; 532 NW2d 882 (1995).

[9] *Travelers Ins v U-Haul of Mich, Inc*, 235 Mich App 273, 288-289; 597 NW2d 235 (1999). See also *Roberts v Vaughn*, 214 Mich App 625, 631; 543 NW2d 79 (1996) ("A claim for negligent entrustment may be based on the use of a motor vehicle."), rev'd on other grounds 459 Mich 282 (1998).

> unqualified to operate the vehicle, or had knowledge of such facts and circumstances as would imply knowledge on the part of the *owner* of such incompetency.[10]

This passage from *Perin* has since been quoted in other cases,[11] and indeed, plaintiffs themselves relied on the quotation in opposing Hogge's motion for summary disposition in the lower court.

However, a full reading of *Perin* makes it clear that the tort of negligent entrustment imposes liability on the basis of a defendant's negligence in permitting the use of a chattel by a person who is likely to handle it in a manner that will cause harm to others.[12] Therefore, as noted in *Perin*, liability can arise regardless of "whether the entrusting person is [the] 'owner' of the entrusted chattel or not."[13] In other words, it is a defendant's identity as the supplier of the chattel, rather than as its owner, that is central to a negligent-entrustment theory. Accordingly, while we are reluctant to fault the trial court for relying on plaintiffs' misleading statement of law, we must conclude that the trial court's decision to summarily dismiss plaintiffs' claim solely on the basis of Hogge's lack of ownership constituted plain error.

Hogge testified that he rented the Chrysler 300 from Enterprise's Lucas Street location near the airport on November 16, 2013. The rental agreement indicated that the transaction took place at 7:24 a.m., and Hogge

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[10] *Perin v Peuler (On Rehearing)*, 373 Mich 531, 538-539; 130 NW2d 4 (1964) (emphasis added) (quotation marks and citation omitted; emphasis added), overruled on other grounds by *McDougall v Schanz*, 461 Mich 15 (1999).

[11] See, e.g., *Hendershott v Rhein*, 61 Mich App 83, 89; 232 NW2d 312 (1975).

[12] *Perin (On Rehearing)*, 373 Mich at 536-537.

[13] *Id*.

agreed that the time sounded accurate. Hogge drove to his Taylor home, where he gave the keys to Latasha. Hogge stated that he believed Latasha was going to return the vehicle to Enterprise by the end of the following day. Thus, it is evident and undisputed that Hogge supplied the Chrysler 300 to Latasha. However, the parties disagree on appeal as to whether the evidence demonstrated that Hogge knew or should have known that Latasha would be likely to operate the rented vehicle in an unsafe manner. Plaintiffs argue that it can be inferred from the timeline of events that Hogge rented the Chrysler 300 specifically for Latasha's use. Plaintiffs further contend that Hogge's failure to include Latasha as an additional driver in the rental agreement under these circumstances suggests that he knew she was an unfit driver.

Plaintiffs presented evidence suggesting that Latasha did not have a valid driver's license and may have been intoxicated at the time of the accident. The accident occurred approximately one hour after Hogge rented the vehicle from Enterprise, which supports plaintiffs' contention that Hogge entrusted the vehicle to Latasha almost immediately after he rented it and before he could make any significant use of it himself. Hogge understood that he was the only person who was supposed to drive the vehicle under the terms of the rental agreement, and he testified that he only allowed Latasha to drive it because she needed to get home and he was not feeling well. However, Hogge's assertions were contradicted by other evidence. Hogge had known Latasha for several months before the accident and, according to Russell, Latasha bragged that Hogge rented the vehicle for her. Russell also recalled that when Latasha informed Hogge about the accident and assured him that the vehicle was not totaled, he said, "[W]ell, drive it, baby." Hogge's response suggests that

he was neither surprised nor concerned that Latasha did not use the vehicle solely to return home. Viewing the evidence in the light most favorable to plaintiffs, the circumstances were such that reasonable minds could differ as to whether Hogge knew or should have known that Latasha was not licensed or fit to drive. Moreover, given the brief time frame in which the relevant events occurred and Russell's observation that Latasha was visibly intoxicated by 8:00 a.m.—almost immediately after Latasha acquired the vehicle from Hogge—a fact-finder could also infer that Hogge knew Latasha had been drinking and that she was therefore unfit to safely operate a vehicle at the time. Accordingly, Hogge was not entitled to judgment as a matter of law with respect to a negligent-entrustment cause of action.

That being said, we recognize that plaintiffs' first amended complaint alleges a single count of negligence against Hogge, which is unambiguously premised on the statutory liability of an owner under MCL 257.401. During oral argument, plaintiffs' counsel seemingly acknowledged the deficiency in plaintiffs' pleadings before saying: "[T]he pleadings should conform to the proofs . . . and the negligent entrustment theory does not prejudice Mr. Hogge . . . in any way. The, the [sic] facts have been discovered." To the extent that this statement is construed as a request for leave to amend plaintiffs' complaint, the trial court implicitly denied the request when it concluded that Hogge's lack of ownership was fatal to plaintiffs' claim as pleaded in their complaint and under a negligent-entrustment theory.

When a summary disposition motion is brought under MCR 2.116(C)(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."[14] The court rules further provide that leave to amend should be "freely given when justice so requires,"[15] and this Court has explained that leave to amend is "generally a matter of right rather than of grace."[16] Therefore, leave to amend "should ordinarily be denied only for particularized reasons such as undue delay, bad faith or dilatory motive, repeated failures to cure by amendments previously allowed, or futility."[17] In this case, because the trial court's decision to grant Hogge's motion was based on a mistake of law, it is unclear whether the court would have otherwise granted plaintiffs leave to further amend their complaint. Moreover, because plaintiffs' oral request to amend their complaint was not a proper motion to amend, filed in compliance with MCR 2.118, Hogge did not have a full opportunity to present his arguments in opposition to the proposed amendment. Accordingly, whether plaintiffs should be allowed to further amend their complaint is a matter best left to the discretion of the trial court on remand.

IV. CONCLUSION

For the reasons stated, we reverse the trial court's order granting summary disposition in Hogge's favor and remand this matter to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

MURRAY and O'BRIEN, JJ. concurred with TALBOT, C.J.

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[14] MCR 2.116(I)(5).

[15] MCR 2.118(A)(2).

[16] *In re Kostin Estate*, 278 Mich App 47, 52; 748 NW2d 583 (2008).

[17] *Id*.

CHARTER TOWNSHIP OF YORK v MILLER

Docket No. 335344. Submitted January 9, 2018, at Lansing. Decided January 18, 2018, at 9:00 a.m. Leave to appeal granted 503 Mich ___.

The Charter Township of York sought a declaratory judgment in the Washtenaw Circuit Court regarding the validity of its zoning and construction regulations and its right to enforce them as they apply to the cultivation of medical marijuana in areas zoned residential. Defendants, Donald Miller, Katherine Null, and David Miller, were qualified medical marijuana patients. Null served as David's registered caregiver. The Millers lived together in Donald's home, and Null rented a bedroom in the home but did not reside there. In 2014, Null told David to build a structure in Donald's backyard for Null's cultivation of marijuana. Null rented space on Donald's property for that purpose. Defendants did not obtain permits for construction or for the installation of electrical and watering systems, and they never obtained a certificate of occupancy. The parties stipulated to the essential facts, and both parties moved for summary disposition. Plaintiff contended that the Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq*., authorized it to limit the places where medical marijuana could be grown by individuals permitted by law to grow it. Defendants argued that plaintiff's prohibition against growing marijuana outdoors conflicted with the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., and that the MMMA preempted plaintiff's zoning ordinance. The court, Carol A. Kuhnke, J., held that the MMMA preempted plaintiff's prohibition against growing medical marijuana outdoors but that defendants were required to comply with construction regulations and to seek the necessary permits to building an enclosed, locked facility for growing marijuana outdoors. The court denied plaintiff's motion for reconsideration, and plaintiff appealed.

The Court of Appeals *held*:

1. Under Const 1963, art 7, § 22, a municipality's power to adopt ordinances related to municipal concerns is subject to the Constitution and the law. Therefore, a township may exercise reasonable control in regulating matters of local concern as long as the regulations do not conflict with state law. The MZEA

authorizes townships to adopt zoning ordinance regulations for land development and use for the public health, safety, and welfare of the local community. Use of property by a medical marijuana caregiver is permitted only under Charter Township of York Zoning Ordinance (Zoning Ordinance) § 40.204 as a "Home Occupation," which is defined elsewhere in the Zoning Ordinance as an occupation or profession customarily conducted entirely within a dwelling by the people who reside there and not more than one other person who does not reside there when such use is clearly incidental to the principal use of the dwelling as a residence. Subparts 40.204(A)(13)(e) and (f) of the Zoning Ordinance regulate the cultivation of marijuana in areas zoned residential and require that all medical marijuana must be contained inside a home in an enclosed, locked facility; caregivers are prohibited from growing any medical marijuana outside a house in residential areas. A local ordinance that purports to prohibit what a state statute permits is void. MCL 333.26424(b)(2) permits a registered caregiver to cultivate in an enclosed, locked facility 12 marijuana plants for each qualifying patient, and MCL 333.26423(d) specifies that marijuana plants grown outdoors are considered to be in an enclosed, locked facility in certain circumstances. Read together, MCL 333.26424(b)(2) and MCL 333.26423(d) permit growing medical marijuana outdoors by registered caregivers as long as the growing occurs within an enclosed, locked facility as specified. Plaintiff's prohibition effectively denied registered caregivers the right and privilege that MCL 333.26424(b) permits in conjunction with MCL 333.26423(d). Accordingly, plaintiff's prohibition against outdoor growing of medical marijuana by a registered caregiver directly conflicted with the MMMA. Further, enforcement of plaintiff's Zoning Ordinance would result in the imposition of penalties against persons like defendants that the MMMA does not permit. Contrary to plaintiff's contention, local zoning regulations enacted pursuant to the MZEA do not save the regulation from preemption. Therefore, the Zoning Ordinance prohibited registered caregivers from outdoor medical marijuana growing, which directly conflicted with the MMMA by prohibiting what the MMMA permitted. Consequently, the ordinance was void and preempted by the MMMA. Contrary to plaintiff's argument, the Legislature's silence regarding authorizing the specific location of a caregiver's right and privilege to cultivate medical marijuana may not be relied upon for the conclusion that plaintiff may prohibit caregivers from outdoor cultivation. The MMMA does not grant municipalities authority to adopt ordinances that restrict registered caregivers' rights and privileges under the MMMA.

The MMMA permits growing medical marijuana outdoors by registered caregivers as long as the growing occurs within an enclosed, locked facility as specified by the MMMA. The trial court did not err by applying the plain language of the MMMA to resolve the case.

2. The trial court correctly held that defendants' enclosed, locked facility must comply with MCL 333.26423(d), construction regulations, and plaintiff's construction permit requirements. Contrary to plaintiff's contention, the trial court's ruling did not grant defendants immunity and exemption from all zoning and construction regulations. The trial court narrowly tailored its ruling to resolve the issues presented in this case and yet upheld plaintiff's power to regulate the public health and safety respecting construction of structures. Accordingly, the trial court did not err.

Affirmed.

TOWNSHIPS — ZONING ORDINANCES — PROHIBITION AGAINST CULTIVATING MEDICAL MARIJUANA OUTDOORS.

A township zoning ordinance prohibiting the outdoor cultivation of medical marijuana directly conflicts with the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., which permits the outdoor cultivation of medical marijuana under MCL 333.26424(b)(2) and MCL 333.26423(d) when the marijuana is contained in an enclosed, locked facility.

Victor L. Lillich for the Charter Township of York.

Dennis M. Hayes for Donald Miller, Katherine Null, and David Miller.

Before: MURPHY, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM. Plaintiff appeals as of right from the trial court judgment that declared that plaintiff could not enforce its zoning ordinance's prohibition against growing medical marijuana outdoors because the ordinance conflicted with the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., and therefore, the ordinance was preempted. We affirm.

Defendants David Miller and Donald Miller are brothers who resided together at Donald's home in Milan, Michigan, in York Township. Both were qualified medical marijuana patients. Defendant Katherine Null, formerly in a long-term relationship with David, also was a qualified medical marijuana patient, and she served as David's registered medical marijuana primary caregiver. Null rented a bedroom from Donald, but she did not reside with the Millers. During 2014, Null directed David to construct a medical marijuana structure in Donald's backyard for containing the medical marijuana she cultivated for patients connected to her through registration under the MMMA. Starting in July 2015, Null rented space on Donald's property for that purpose. Defendants failed to obtain a construction permit for the medical marijuana outdoor-growing facility, never got permits before installing electrical and watering systems, and never obtained a certificate of occupancy.

Under the Michigan Zoning Enabling Act, MCL 125.3101 *et seq*. (MZEA), plaintiff adopted its zoning ordinance regulations for land development and use for the public health, safety, and welfare of the local community. Use of property by a medical marijuana caregiver is permitted only under Charter Township of York Zoning Ordinance (Zoning Ordinance) § 40.204 as a "Home Occupation," which is defined as

> [a]n occupation or profession customarily conducted entirely within a dwelling by the persons residing within the dwelling and not more than one person who does not reside within the dwelling, and where such use is clearly incidental to the principal use of the dwelling as a residence. [Zoning Ordinance § 2.03(112).]

Medical marijuana caregivers were required to comply with Zoning Ordinance § 40.204(A)(13)(e) and (f) for marijuana use and cultivation:

> (e) All medical marihuana shall be contained within the main building in an enclosed, locked facility inaccessible on all sides and equipped with locks or other security devices that permit access only by the registered primary caregiver or qualifying patient, as reviewed and approved by the Building Official;
>
> (f) All necessary building, electrical, plumbing, and mechanical permits shall be obtained for any portion of the residential structure in which electrical wiring, lighting and/or watering devices that support the cultivation, growing, or harvesting of marihuana are located[.]

Plaintiff learned that the medical marijuana facility that defendants had built outdoors failed to comply with zoning and construction regulations. Instead of enforcing its zoning ordinance regulations, plaintiff sought a declaratory judgment from the trial court regarding the validity of its zoning and construction regulations and its right to enforce them as they applied to the cultivation and use of medical marijuana in zoned residential locations and subdivisions.

Before filing their respective motions for summary disposition, the parties stipulated to the essential facts. They agreed that defendants' medical marijuana outdoor growing facility failed to comply with plaintiff's home-occupation zoning ordinance because Null did not reside at Donald's property, and defendants grew medical marijuana outside and not entirely within Donald's house. The parties agreed that, except for defendants' zoning and construction code violations, defendants' medical marijuana use and their outdoor growing facility complied with the MMMA. The parties stipulated that defendants' violations of plaintiff's zoning ordinance and construction code regulations constituted nuisances per se subject to penalties including injunctive relief and abatement.

Plaintiff argued in its motion for summary disposition that under the MZEA, it had broad authority to prohibit growing medical marijuana outdoors. Defendants countered that the MMMA preempted plaintiff's home-occupation zoning ordinance because it directly conflicted with the MMMA. The trial court ruled that direct conflicts existed between the MMMA and plaintiff's ordinance. The trial court noted that the Legislature amended the MMMA during 2012 specifically to permit outdoor cultivation. Consequently, the trial court held that plaintiff's ordinance conflicted by allowing medical marijuana growing only as an indoor home occupation. Further, the trial court held that plaintiff's ordinance also conflicted with the MMMA because the MMMA did not require Null to live on the premises where the marijuana was grown. The trial court ruled that plaintiff could not exclude outdoor cultivation because the MMMA permitted it. In addition, the trial court ruled that defendants' structure was subject to construction regulations and zoning so long as the zoning did not forbid outdoor cultivation of medical marijuana. The trial court ordered defendants to seek the required permits and ordered plaintiff to review and grant the permits if defendants' structure complied with the building code. Plaintiff now appeals.

Plaintiff first argues that its authority under the MZEA to adopt ordinances permitted it to regulate medical marijuana and to restrict registered caregivers to growing marijuana indoors in areas zoned residential. We disagree.

"Whether a state statute preempts a local ordinance is a question of statutory interpretation and, therefore, a question of law that we review de novo." *Ter Beek v City of Wyoming*, 297 Mich App 446, 452; 823 NW2d 864 (2012) (*Ter Beek I*), aff'd *Ter Beek v City of Wyo-*

ming, 495 Mich 1; 846 NW2d 531 (2014) (*Ter Beek II*). "We also review de novo a decision to grant or deny a declaratory judgment; however, the trial court's factual findings will not be overturned unless they are clearly erroneous." *Ter Beek I*, 297 Mich App at 452. Findings of fact are clearly erroneous when no evidentiary support exists or when this Court is left with a definite and firm conviction that a mistake has been made. *Trahey v Inkster*, 311 Mich App 582, 593; 876 NW2d 582 (2015).

"Under Const 1963, art 7, § 22, a Michigan municipality's power to adopt resolutions and ordinances relating to municipal concerns is 'subject to the constitution and law'." *People v Llewellyn*, 401 Mich 314, 321; 257 NW2d 902 (1977). "Michigan is strongly committed to the concept of home rule, and constitutional and statutory provisions which grant power to municipalities are to be liberally construed." *Bivens v Grand Rapids*, 443 Mich 391, 400; 505 NW2d 239 (1993). Local governments, however, may "exercise 'reasonable control' to regulate matters of local concern only in a manner and to the degree that the regulation does not conflict with state law." *City of Taylor v Detroit Edison Co*, 475 Mich 109, 117-118; 715 NW2d 28 (2006).

The MZEA provides, in relevant part, that

> [a] local unit of government may provide by zoning ordinance for the regulation of land development . . . which regulate[s] the use of land and structures . . . to ensure that use of the land is situated in appropriate locations and . . . to promote public health, safety, and welfare. [MCL 125.3201(1).]

The dispositive issues in this case are whether the MMMA permits outdoor medical marijuana growing and, if so, whether the MMMA preempts plaintiff's

zoning regulation prohibiting outdoor growing in residential areas. A panel of this Court explained in *Ter Beek I*, 297 Mich App at 453, that

> [a] city ordinance that purports to prohibit what a state statute permits is void. A state statute preempts regulation by an inferior government when the local regulation directly conflicts with the statute or when the statute completely occupies the regulatory field. A direct conflict exists between a local regulation and state statute when the local regulation prohibits what the statute permits. [Quotation marks and citations omitted.]

In this case, Zoning Ordinance § 40.204 regulates home occupations and home-based businesses. Within the context of a home occupation, plaintiff specifically regulates registered primary medical marijuana caregivers. Section 40.204(13) permits such caregivers to operate as a "home occupation" if they comply with the MMMA and certain specified restrictions, some of which are not relevant to the issues on appeal. Pertinent to this case, § 40.204(13)(e) requires that all medical marijuana be contained inside the house in areas zoned residential; caregivers are prohibited from having or growing any medical marijuana outside the house on properties zoned residential. Section 40.204(13)(f) requires permits to modify any portion of a house for cultivation, growing, or harvesting of marijuana. Read together, Subparts (e) and (f) of § 40.204(13) only permit medical marijuana to be grown indoors.

Zoning Ordinance § 3.13 permits plaintiff to penalize property owners for nonconforming uses. Plaintiff can declare a nonconforming use a nuisance and require any structure to be vacated, torn down, removed from the property, modified, or abated with the cost of abatement attaching as a lien on the property. Defen-

dants' violation of plaintiff's home-occupation zoning ordinance, therefore, was subject to serious penalties.

The MMMA governs medical marijuana use. Under MCL 333.26427(a), the "medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions of this act." MCL 333.26423(f)[1] defined the term "medical use" to include:

> the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition.

The MMMA does not define the term "cultivation."

The MMMA provides immunity from arrest, prosecution, or penalties in any manner and prohibits the denial of any rights or privileges to qualifying medical marijuana patients and registered primary caregivers. MCL 333.26424(a) and (b); *People v Hartwick*, 498 Mich 192, 210-221; 870 NW2d 37 (2015). MCL 333.26424(b)(2) permits registered caregivers to cultivate in an enclosed, locked facility 12 marijuana plants for each qualifying patient. MCL 333.26423(d) permits medical marijuana growing only in an "enclosed, locked facility," including outdoor growing if done as specified.

Before 2012, MCL 333.26423 did not mention or regulate outdoor growing but defined the term "en-

[1] Effective December 20, 2016, the Legislature amended the definition of the term "medical use" in MCL 333.26423(f). Now the definition of the phrase "medical use of marihuana" appears in MCL 333.26423(h) and is substantially similar to the definition in former Subdivision (f) with the addition of the terms "extraction" and "marihuana-infused products" to MCL 333.26423(h). See 2016 PA 283.

closed, locked facility" in Subdivision (c) only as "a closet, room, or other enclosed area equipped with locks or other security devices that permit access only by a registered primary caregiver or registered qualifying patient." The Legislature changed Subdivision (c) to Subdivision (d) and amended it by adding requirements for growing medical marijuana outdoors. See 2012 PA 512, effective April 1, 2013. Since the amendment, MCL 333.26423(d) provides in relevant part as follows:

> "Enclosed, locked facility" means a closet, room, or other comparable, stationary, and fully enclosed area equipped with secured locks or other functioning security devices that permit access only by a registered primary caregiver or registered qualifying patient. Marihuana plants grown outdoors are considered to be in an enclosed, locked facility if they are not visible to the unaided eye from an adjacent property when viewed by an individual at ground level or from a permanent structure and are grown within a stationary structure that is enclosed on all sides, except for the base, by chain-link fencing, wooden slats, or a similar material that prevents access by the general public and that is anchored, attached, or affixed to the ground; located on land that is owned, leased, or rented by either the registered qualifying patient or a person designated through the departmental registration process as the primary caregiver for the registered qualifying patient or patients for whom the marihuana plants are grown; and equipped with functioning locks or other security devices that restrict access to only the registered qualifying patient or the registered primary caregiver who owns, leases, or rents the property on which the structure is located.[2]

MCL 333.26424(b)(2) and MCL 333.26423(d) are *in pari materia* and must be read together as one law

[2] MCL 333.26423(d) was unchanged by 2016 PA 283, effective December 20, 2016.

because they are different provisions of statutes that relate to the same subject matter. *Ter Beek I*, 297 Mich App at 462. Read together, MCL 333.26424(b)(2) and MCL 333.26423(d) permit growing medical marijuana outdoors by registered caregivers as long as the growing occurs within an enclosed, locked facility as specified. The MMMA also provides that other state law inconsistent with the MMMA may not interfere with the rights established under the MMMA. Under MCL 333.26427(e), "All other acts and parts of acts inconsistent with this act do not apply to the medical use of marihuana as provided for by this act."

In this case, plaintiff's home-occupation regulations, Zoning Ordinance § 40.204(13)(e) and (f), plainly purport to prohibit the outdoor growing of medical marijuana that the MMMA otherwise permits. Plaintiff's prohibition effectively denies registered caregivers the right and privilege that MCL 333.26424(b)(2) permits in conjunction with MCL 333.26423(d). Accordingly, under *Ter Beek I*, 297 Mich App at 453, plaintiff's prohibition against growing medical marijuana outdoors by a registered caregiver directly conflicts with the MMMA and is void. Further, enforcement of plaintiff's home-occupation ordinance would result in the imposition of penalties against persons like defendants that the MMMA does not permit. See MCL 333.26424(b); *Ter Beek I*, 297 Mich App at 454-457. Contrary to plaintiff's contention, "a local zoning regulation enacted pursuant to the MZEA does not save it from preemption." *Ter Beek II*, 495 Mich at 21-22. Plaintiff's zoning ordinance prohibits registered caregivers from outdoor medical marijuana growing, which directly conflicts with the MMMA by prohibiting what the MMMA permits. Consequently, the ordinance is void and preempted by the MMMA. *Ter Beek I*, 297 Mich App at 457.

Plaintiff next essentially contends that the trial court's interpretation of MCL 333.26423(d) broadly immunizes registered caregivers from zoning and construction regulations. Plaintiff's argument disregards the principles of statutory construction and disregards the trial court's ruling that defendants' enclosed, locked facility must comply with construction regulations and plaintiff's zoning ordinance's building-permit requirements.

In *People v Bylsma*, 315 Mich App 363, 377-378; 889 NW2d 729 (2016), this Court recognized that the MMMA was a voter-initiated statute, and we applied the rule of statutory construction directing that the words of an initiative law are to be given their ordinary and customary meanings as would have been understood by the voters. We instructed that if the MMMA's "statutory language is unambiguous, . . . [n]o further judicial construction is required or permitted because we must conclude that the electors intended the meaning clearly expressed." *Id*. at 378 (quotation marks and citation omitted; alteration in original). "Judicial construction of a statute is only permitted when statutory language is ambiguous," and ambiguity exists "only if it creates an irreconcilable conflict with another provision or it is equally susceptible to more than one meaning." *Noll v Ritzer*, 317 Mich App 506, 511; 895 NW2d 192 (2016).

Similarly, when courts interpret statutes created by the Legislature, they must first look to the specific statutory language to determine the legislative intent. *Universal Underwriters Ins Group v Auto Club Ins Ass'n*, 256 Mich App 541, 544; 666 NW2d 294 (2003). "If the language is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." *Id*. (quota-

tion marks and citation omitted). In *Detroit Pub Sch v Conn*, 308 Mich App 234, 247-248; 863 NW2d 373 (2014), we recited the framework for statutory construction:

> When interpreting a statute, our goal is to give effect to the intent of the Legislature. The language of the statute itself is the primary indication of the Legislature's intent. If the language of the statute is unambiguous, we must enforce the statute as written. This Court reads the provisions of statutes reasonably and in context, and reads subsections of cohesive statutory provisions together.
>
> . . . [N]othing may be read into a statute that is not within the intent of the Legislature apparent from the language of the statute itself. Courts may not speculate regarding legislative intent beyond the words expressed in a statute. Hence, nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself. [Quotation marks and citations omitted.]

As noted earlier in this opinion, when amending the definition of the term "enclosed, locked facility," the Legislature added language regulating how the term applies to marijuana plants grown outdoors. MCL 333.26423(d). Because nothing in the plain language of MCL 333.26423(d) is ambiguous, judicial construction is not necessary. Moreover, when MCL 333.26423(d) is read together with MCL 333.26424(b)(2), no irreconcilable conflict results that makes either statutory provision susceptible to more than one meaning. Accordingly, we conclude that the MMMA permits growing medical marijuana outdoors by registered caregivers as long as the growing occurs within the specified enclosed, locked facility.

The record in this case reflects that the trial court essentially read the plain language of the MMMA and

held that the MMMA permitted growing medical marijuana outdoors. The trial court recognized that the Legislature amended MCL 333.26423(d) to redefine the meaning of "enclosed, locked facility" to include specific requirements for structures enclosing medical marijuana being grown outdoors. The trial court did not clearly err by finding that the Legislature amended the MMMA to permit outdoor cultivation. The trial court reasonably inferred that the Legislature changed the MMMA to permit and regulate outdoor-growing facilities. Therefore, the MMMA authorizes growing medical marijuana outdoors under specific requirements.

The trial court read the plain language of MCL 333.26423(d) and simply concluded that the MMMA permitted what plaintiff's home-occupation zoning ordinance expressly prohibited. The trial court did not find ambiguity and did not judicially construe MCL 333.26423(d) in search of its meaning. We also do not find any inherent ambiguity necessitating judicial construction. Therefore, the trial court did not err by applying the plain language of the MMMA to resolve the case.

The trial court also correctly held that defendants' enclosed, locked facility must comply with MCL 333.26423(d), plaintiff's construction regulations, and plaintiff's construction-permit requirements. Contrary to plaintiff's contention, the trial court's ruling did not grant defendants immunity and exemption from all zoning and construction regulations. We believe that the trial court narrowly tailored its ruling to resolve the issues presented in this case and yet upheld plaintiff's power to regulate the public health and safety respecting new construction. Accordingly, the trial court did not err.

Plaintiff next argues that the silence in the MMMA's "medical use" and "enclosed, locked facility" definitions regarding the specific manner and location of cultivating medical marijuana permitted plaintiff to prohibit cultivation through zoning ordinance regulations. We disagree.

This Court emphasized in *Detroit Pub Sch*, 308 Mich App at 247, that statutory construction requires giving effect to the intent of the Legislature based on the language of the statute itself. Courts must enforce statutes as written by reading the related parts of statutory provisions together without reading into a statute anything that is not within the manifest intent of the Legislature. *Id*. at 248. Further, as explained in *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009), correct interpretation of a statutory scheme like the MMMA requires (1) reading the statute as a whole, (2) reading the statute's words and phrases in the context of the entire legislative scheme, (3) considering both the plain meanings of the critical words and phrases along with their placement and purpose within the statutory scheme, and (4) interpreting the statutory provisions "in harmony with the entire statutory scheme." Courts should not intuit legislative intent from the absence of action by the Legislature but should interpret statutes based on what the Legislature actually enacted. *McCahan v Brennan*, 492 Mich 730, 749; 822 NW2d 747 (2012). As the Michigan Supreme Court has explained, the "legislature legislates by legislating, not by doing nothing, not by keeping silent." *Id*. (quotation marks and citation omitted).

In this case, we read and interpret the MMMA as a whole. We conclude, as the trial court did, that the MMMA permits and thereby authorizes registered

caregivers to grow medical marijuana for their patients both indoors and outdoors without fear of penalty by a local government. Contrary to plaintiff's argument, the Legislature's failure to articulate a caregiver's right and privilege to cultivate medical marijuana in a specific location may not be relied on to conclude that plaintiff may prohibit caregivers from outdoor cultivation. See *id*.

MCL 333.26423(d) provides that caregivers may elect to grow medical marijuana outdoors so long as they comply with the enclosed, locked facility requirements. MCL 333.26424(b)(2) and MCL 333.26423(d), when read together, grant registered caregivers the right and privilege to grow medical marijuana outdoors without fear of a local government's imposition of penalties. As explained in *Ter Beek II*, 495 Mich at 20, an ordinance "directly conflicts with the MMMA by permitting what the MMMA expressly prohibits—the imposition of a 'penalty in any manner' on a registered" caregiver whose medical marijuana use, i.e., cultivation, falls within the scope of the immunity in MCL 333.26424(b).

Notably, the MMMA does not grant municipalities authority to adopt ordinances that restrict registered caregivers' rights and privileges under the MMMA. By comparison, the Legislature recently enacted the Medical Marihuana Facilities Licensing Act, MCL 333.27101 *et seq*., and specifically granted municipalities authority to adopt local ordinances including zoning regulations that restrict the location, number, and type of facilities within their boundaries. MCL 333.27205. Obviously, had the Legislature intended to authorize municipalities to adopt zoning ordinances restricting the activities of registered medical marijuana caregivers, it could have done so in the MMMA.

Despite amending the MMMA twice, the Legislature refrained from incorporating such provisions into the MMMA. Plaintiff's insistence on reading into the MMMA what the statutory scheme plainly fails to provide lacks merit. Accordingly, the trial court did not err by reading the MMMA as a whole and concluding that plaintiff could not infringe upon registered medical marijuana caregivers' rights and privileges under the MMMA.

Lastly, plaintiff argues a number of angles for reversing the trial court's decision that the MMMA preempted its home-occupation zoning ordinance. All of them lack merit.

As explained above, the trial court read the MMMA as a whole, analyzed its plain language, and interpreted MCL 333.26424(b)(2) and MCL 333.26423(d) and other MMMA provisions in a reasonable and harmonious manner to conclude that plaintiff's home-occupation ordinance prohibited what the MMMA permitted. Therefore, the trial court correctly ruled that a direct conflict existed resulting in the MMMA's preemption of plaintiff's ordinance.

Plaintiff asserts that the trial court erred because the MMMA does not preempt its ordinance by occupying the field of zoning and construction-code regulations. The trial court, however, never held that the MMMA preempted zoning and construction-code regulations. In fact, the trial court specifically held that construction-code regulations and plaintiff's building-permit regulations applied to defendants' outdoor structure. Consequently, it ordered defendants to obtain all requisite permits for their enclosed, locked facility for growing medical marijuana outdoors. Accordingly, plaintiff's argument lacks merit.

Plaintiff also argues that its home-occupation ordinance did not directly conflict with the MMMA. As explained above, plaintiff's ordinance directly conflicts with the MMMA because it prohibits what the MMMA clearly permits, and therefore, the ordinance is void and preempted. We also believe that the trial court could have held that the MMMA preempted plaintiff's ordinance because plaintiff's enforcement of its home-occupation zoning ordinance would have resulted in the imposition of penalties upon qualified patients and registered caregivers in direct conflict with the immunity that MCL 333.26424(a) and (b) grants them.

Plaintiff argues further that its ordinance was not preempted by the MMMA because plaintiff merely adopted additional requirements for medical marijuana cultivation that were not unreasonable and only served to prevent possible nuisances in residential neighborhoods. Plaintiff again relies on the MZEA for its authority to regulate medical marijuana cultivation and prohibit outdoor growing in areas zoned residential. As we explained above, the MZEA does not save plaintiff's ordinance from preemption. See *Ter Beek II*, 495 Mich at 21-22.

Plaintiff contends that, read alone, MCL 333.26423(d) does not authorize outdoor growing, so plaintiff could limit such conduct as it saw fit. Proper statutory construction, however, requires reading MCL 333.26423(d) within the overall statutory scheme to prevent reducing a registered caregiver's right and privilege to grow medical marijuana outdoors into conduct subject to local government prohibition with potentially severe penalties for violations. Plaintiff's reading improperly turns a blind eye to the rights, privileges, and immunity afforded registered medical marijuana caregivers by MCL 333.26424(b) and quali-

fying medical marijuana patients under MCL 333.26424(a). Accordingly, plaintiff's argument fails.

Affirmed.

MURPHY, P.J., and SAWYER and BECKERING, JJ., concurred.

HONIGMAN MILLER SCHWARTZ AND COHN LLP v
CITY OF DETROIT

Docket No. 336175. Submitted January 10, 2018, at Lansing. Decided January 18, 2018, at 9:05 a.m. Leave to appeal granted 503 Mich ___.

Honigman Miller Schwartz and Cohn LLP filed a petition in the Tax Tribunal, challenging the income tax assessments issued by the city of Detroit for the tax years 2010 through 2014. Petitioner argued that under MCL 141.623 of the City Income Tax Act, MCL 141.501 *et seq*., services performed by attorneys working in the city on behalf of clients located outside the city constituted out-of-city income for purposes of calculating income taxes, not in-city income as asserted by respondent. In other words, petitioner argued that MCL 141.623 should have been calculated on the basis of where its clients received the provided services, and respondent argued that the figure should have been calculated on the basis of where petitioner's attorneys performed the work. The tribunal granted partial summary disposition in favor of respondent, reasoning that the relevant consideration for calculating income tax under MCL 141.623 was where the work was performed, not where the client received the services. Petitioner appealed.

The Court of Appeals *held*:

1. MCL 141.618 requires a business to determine the percentage of its income that is derived from business activities within the city. Under MCL 141.624, a business must calculate the income that is derived from business activity within a city—the business allocation percentage—by calculating the property factor under MCL 141.621, the payroll factor under MCL 141.622, and the sales factor under MCL 141.623, after which the figures must be added together and divided by three. MCL 141.622 requires a business to ascertain the percentage of its total compensation that is "for work done or for services *performed* within the city," while MCL 141.623 requires a business to ascertain the percentage of gross revenue "derived from sales made and services *rendered* in the city." Because it used the phrase "services performed" in MCL 141.622, but used the different phrase "services rendered" in MCL 141.623, the Legis-

lature intended the phrases to have different meanings. While the phrase "services rendered" is not defined in the statute, guidance from MCL 141.623(1) regarding the meaning of the defined phrase "sales made in the city" establishes that the Legislature used a destination test for the sales factor; in other words, the destination of the service provided to a client is the relevant inquiry for purposes of calculating the business allocation percentage under MCL 141.623, not the location of the provider when the service was performed. Moreover, while they are different from tangible items, services provided by an attorney may be delivered to a client in a location that is different from where the attorney performed the service. Accordingly, for purposes of calculating business allocation percentage under MCL 141.623, a service provided by a business working within a city to a client located outside the city is an out-of-city service that is not included in the sales-factor calculation, while a service provided to a client located in the city is included. In this case, because the relevant clients were located outside Detroit, the services provided by petitioner's attorneys working in Detroit for those clients were not "services rendered in the city" for purposes of calculating business allocation percentage under MCL 141.623. Accordingly, the tribunal erred by holding otherwise and by granting respondent's motion for partial summary disposition.

Reversed and remanded.

TAXATION — CITY INCOME TAX ACT — SALES FACTOR — CALCULATION OF SALES FACTOR — SERVICES PROVIDED TO CLIENTS LOCATED OUTSIDE CITY.

Under MCL 141.624 of the City Income Tax Act, MCL 141.501 *et seq*., a business must calculate the income that is derived from business activity within a city—the business allocation percentage—by calculating the property factor under MCL 141.621, the payroll factor under MCL 141.622, and the sales factor under MCL 141.623, after which the figures must be added together and divided by three; for purposes of MCL 141.623, a service provided by a business working within a city to a client located outside the city is an out-of-city service that is not included in the sales-factor calculation, while a service provided to a client located in the city is included.

Honigman Miller Schwartz and Cohn LLP (by *John D. Pirich* and *Lynn A. Gandhi*) for petitioner.

Charles N. Raimi, *Robert E. Forrest*, and *Sheri Whyte* for respondent.

Before: MURPHY, P.J., and SAWYER and BECKERING, JJ.

SAWYER, J. We are asked in this case to determine whether services performed by an attorney in Detroit on behalf of a client located outside the city—while that attorney is physically located in his or her office in the city—is to be considered in-city or out-of-city income for purpose of § 23 of the City Income Tax Act (CITA).[1] Petitioner maintains that the relevant consideration is where the client receives the services, while respondent and the Tax Tribunal maintain that the relevant consideration is where the work is performed. We agree with petitioner, and we reverse the Tax Tribunal and remand.

Petitioner is a law firm with a primary office in the city of Detroit but with additional offices located elsewhere. Petitioner represents clients both within Detroit and outside Detroit. Under § 18 of CITA,[2] petitioner must determine the percentage of its business income that is derived from its business activities in Detroit. Petitioner uses §§ 20 through 24,[3] the business allocation percentage method, in making this determination. This method requires the taxpayer to calculate the business allocation percentage under three different methods and then average the three to arrive at the business allocation percentage.[4] The three factors are: (1) the property factor under § 21, which considers the percentage of the business's tangible personal and real property that is located within the city,[5]

[1] MCL 141.623.

[2] MCL 141.618.

[3] MCL 141.620 through MCL 141.624.

[4] MCL 141.624.

[5] MCL 141.621.

(2) the payroll factor under § 22, which considers the percentage of total compensation that is "for work done or for services performed within the city,"[6] and (3) the sales factor under § 23, which considers the gross revenue "derived from sales made and services rendered in the city"[7] compared to all gross revenue.

This case involves tax years 2010–2014 (the subject years). The parties agree on the computation of the first two factors (the property factor and the payroll factor), but disagree as to the computation of the sales factor. As noted, the dispute involves whether to interpret the § 23 phrase "services rendered" as referring to where the client receives the services (petitioner's interpretation) or where the work is performed (respondent's interpretation). Specifically, petitioner states that it calculated its in-city gross revenue by summing the gross revenue collected from clients located within the city of Detroit. According to petitioner, it had used this methodology in the past, but it was not until the subject years that the city objected and calculated the sales factor on the basis of the billable hours recorded for work performed within the city, regardless of the location of the client. The difference is not insignificant.[8] For the subject years, under the city's methodology, slightly over 51% of petitioner's gross revenue would be considered in-city, while under petitioner's methodology, it would be slightly less than 11%.[9]

In the Tax Tribunal, the parties filed cross-motions for summary disposition. The administrative law judge

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[6] MCL 141.622.

[7] MCL 141.623.

[8] For the subject years, the back taxes, plus interest and penalty, exceed $1 million.

[9] Of course, this only accounts for one-third of the final business allocation percentage.

(ALJ) determined that § 23 was ambiguous and unclear. The ALJ concluded that because services are intangible, they cannot be delivered in the same manner as tangible property and that there was no reason to overrule the city's construction of the statute. Initially, we note that both parties agree that the tribunal erred by determining that § 23 is ambiguous.[10] Of course, they offer differing interpretations of the statute. But, as an initial matter, we agree that the statute is unambiguous. Accordingly, we must interpret the plainly expressed meaning of the statute as contained in the words used by the Legislature.[11] And we conclude that the plainly expressed meaning does not support respondent's position or the conclusion of the Tribunal.

We begin by observing that the Legislature used two different terms in drafting the payroll factor under § 22 and the sales factor under § 23. The payroll factor refers to "services performed," and § 23 refers to "services rendered." We agree with petitioner that these phrases must be given two different meanings because when

> the Legislature uses different words, the words are generally intended to connote different meanings. Simply put, 'the use of different terms within similar statutes generally implies that different meanings were intended.' 2A Singer & Singer, Sutherland Statutory Construction (7th ed), § 46:6, p 252. If the Legislature had intended the same meaning in both statutory provisions, it would have used the same word.[12]

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[10] This would seem to be a necessity for respondent because otherwise it would have to deal with a principle of law that the tribunal overlooked. Namely, "ambiguities in the language of a tax statute are to be resolved in favor of the taxpayer." *Mich Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 477; 518 NW2d 808 (1994).

[11] *Whitman v City of Burton*, 493 Mich 303, 311-312; 831 NW2d 223 (2013).

[12] *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 14; 795 NW2d 101 (2009).

Therefore, because § 22 refers to where the work is done or performed, the Legislature likely intended that the § 23 phrase "services rendered" have a different meaning.

The tribunal deals with this issue by also noting the directive of the Supreme Court in *G C Timmis & Co v Guardian Alarm Co*[13] that statutory

> language does not stand alone, and thus it cannot be read in a vacuum. Instead, "[i]t exists and must be read in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute . . . ." *Arrowhead Dev Co v Livingston Co Rd Comm*, 413 Mich 505, 516; 322 NW2d 702 (1982). "[W]ords in a statute should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the act as a whole." *Gen Motors Corp v Erves (On Rehearing)*, 399 Mich 241, 255; 249 NW2d 41 (1976) (opinion by COLEMAN, J.). Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context. *McCarthy v Bronson*, 500 US 136, 139; 111 S Ct 1737; 114 L Ed 2d 194 (1991); *Hagen v Dep't of Ed*, 431 Mich 118, 130-131; 427 NW2d 879 (1988). "In seeking meaning, words and clauses will not be divorced from those which precede and those which follow." *People v Vasquez*, 465 Mich 83, 89; 631 NW2d 711 (2001), quoting *Sanchick v State Bd of Optometry*, 342 Mich 555, 559; 70 NW2d 757 (1955). "It is a familiar principle of statutory construction that words grouped in a list should be given related meaning." *Third Nat'l Bank in Nashville v Impac Ltd, Inc*, 432 US 312, 322; 97 S Ct 2307; 53 L Ed 2d 368 (1977); see also *Beecham v United States*, 511 US 368, 371; 114 S Ct 1669; 128 L Ed 2d 383 (1994). [Alterations in original.]

In our view, however, this strengthens, rather than weakens, petitioner's interpretation. While the Legis-

[13] 468 Mich 416, 421-422; 662 NW2d 710 (2003).

lature does not give much direct guidance in § 23 to the meaning of "services rendered," it does give explicit guidance to "sales made in the city." MCL 141.623(1) provides, in part, as follows:

> For the purposes of this section, "sales made in the city" means all sales where the goods, merchandise or property is received in the city by the purchaser, or a person or firm designated by him. In the case of delivery of goods in the city to a common or private carrier or by other means of transportation, the place at which the delivery has been completed is considered as the place at which the goods are received by the purchaser.
>
> The following examples are not all inclusive but may serve as a guide for determining sales made in the city:
>
> (a) Sales to a customer in the city with shipments to a destination within the city from a location in the city or an out-of-city location are considered sales made in the city.
>
> (b) Sales to a customer in the city with shipments to a destination within the city directly from the taxpayer's in-city supplier or out-of-city supplier are considered sales made in the city.
>
> (c) Sales to a customer in the city with shipments directly to the customer at his regularly maintained and established out-of-city location are considered out-of-city sales.
>
> (d) Sales to an out-of-city customer with shipments or deliveries to the customer's location within the city are considered sales made in the city.
>
> (e) Sales to an out-of-city customer with shipments to an out-of-city destination are considered out-of-city sales.

There is a very obvious common thread here: what is relevant is not the location of the taxpayer (or even the customer), but the destination of the goods. If the destination is within the city, then it is a sale made in the city. If the destination is outside the city, then it is

not a sale within the city. This employs a "destination test" for the sales factor.[14]

Returning to the meaning of the word "render," petitioner supplies a contemporary definition of the word from the 1969 edition of *Webster's Seventh New Collegiate Dictionary*,[15] wherein the relevant definition of "render" is "to transmit to another: DELIVER." This is in contrast to the Tribunal's opinion, which looked to an online definition of "render": " 'to do (a service) for another.' " The opinion then equated "do" with "perform" to reach the conclusion that "render" is "synonymous with perform." We find this conclusion to be dubious and unnecessarily convoluted.[16] Why would the Legislature use the word "render" to mean "perform" by way of the verb "to do," when it would have been much simpler and clearer to simply reuse the § 22 word "perform"? This neatly illustrates the principle that the Legislature employs different words when it intends different meanings.

The tribunal finds a need for its strained conclusion because it observes that services "cannot be 'delivered' in the same manner as tangible items." It then invokes an irrelevant quotation, typically attributed to Abraham Lincoln, that " 'A lawyer's time and advice [are] his stock in trade.' " It is true that services are different

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[14] See Hellerstein & Hellerstein, *State and Local Taxation* (Thomson West, 8th ed), pp 658, 659 (2005).

[15] Section 23 was enacted by 1964 PA 284.

[16] Respondent pursues the same reasoning by citing a number of sources to suggest an equivalency between "render" and "perform." But only two examples come close to equating the two: Thesaurus.com gives "performed" as a synonym of "rendered," and *Black's Law Dictionary* (rev 4th ed) gives a definition of "render" to mean "perform . . . services," though respondent leaves out a semicolon and intervening words to reach that definition in *Black's*. The other examples involve some variation of doing or providing a service.

than tangible items. But that does not mean that services cannot be delivered. And, with all due respect to President Lincoln, a lawyer's time and advice can result in a tangible item. For example, a lawyer's time and advice may well result in the drafting of a will, a complaint, a contract, a brief, etc. And those items may well be delivered to the client in a different location than where the lawyer performed the drafting. Moreover, even the advice itself may be delivered to a different location. For example, a lawyer in Detroit may have a telephone conversation with a client located in Ann Arbor. The lawyer's advice during that conversation is delivered to the client in Ann Arbor.

In sum, after considering the Legislature's use of the word "rendered" in § 23—rather than reusing the § 22 word "performed" in relation to services—and considering that term in the context of how it treats the sale of tangible goods, we conclude that the relevant consideration in § 23 is where the service is delivered to the client, not where the attorney performs the service. Therefore, for purposes of § 23, when a service is provided to a client outside the city of Detroit, it is to be considered an "out-of-city" service, while a service provided to a client in the city of Detroit is to be considered an "in-city" service.

The Tax Tribunal's grant of partial summary disposition in favor of respondent is reversed, and the matter is remanded to the Tax Tribunal for further proceedings consistent with this opinion. We do not retain jurisdiction. Petitioner may tax costs.

MURPHY, P.J., and BECKERING, J., concurred with SAWYER, J.

PEOPLE v GREEN

Docket No. 334880. Submitted January 9, 2018, at Detroit. Decided January 23, 2018, at 9:00 a.m. Leave to appeal sought.

After a jury trial in the Wayne Circuit Court, Robert M. Green was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; armed robbery, MCL 750.529; carrying a concealed weapon, MCL 750.227; and possession of a firearm during the commission of a felony, MCL 750.227b. Green met James Winbush at Winbush's house in December 2015 in order to purchase two video game systems from Winbush. Arrangements through the Internet had been made for the meeting, and the buyer had identified himself as Darius King. When a man arrived at Winbush's house at the appointed time, Winbush recognized the man as someone he knew as TSN Monya (later identified as Green), an individual Winbush had spent time with in a juvenile detention facility. Green approached the porch where Winbush and his adoptive brother, Dion Strange, waited. Green pulled a gun and informed Winbush that he was being robbed. Winbush and Green struggled, and Green shot Winbush several times before fleeing the scene. Winbush identified the shooter as TSN Monya when he spoke to his aunt before being taken to the hospital and again when he later spoke to Strange at the hospital. Strange located two Facebook photographs of Green, Winbush identified the pictures as depicting Green, and Strange took the photographs to a detective who later showed Winbush a photographic lineup during which Winbush identified Green as the shooter. A one-person grand jury indicted Green, and after a trial, Megan Maher Brennan, J., a jury found him guilty of the charges earlier noted. Green appealed.

The Court of Appeals *held*:

1. An accused's right to counsel attaches at or after the initiation of adversarial judicial proceedings against the accused by way of formal charge, preliminary hearing, indictment, information, or arraignment. A grand jury proceeding is not an adversary proceeding at which the guilt or innocence of the accused is adjudicated; rather, a grand jury proceeding is an ex parte investigation to determine whether a crime has been

committed and whether criminal proceedings should be instituted against any person. MCL 767.3 and MCL 767.4 authorize the use of a one-person grand jury. In this case, Green's constitutional right to the assistance of counsel under US Const, Am VI, was not violated because the right to counsel had not yet attached—adversarial judicial proceedings against Green were not initiated until after the one-person grand jury reached its decision. Therefore, Green had no right to counsel at the time of the one-person grand jury proceeding. In addition, Green had no right to have counsel present at the one-person grand jury proceeding because he was not called to testify at the proceeding. Had he been called to testify, MCL 767.19e would have given him a statutory right to consult with counsel and have counsel present at the proceeding.

2. The central concern of the Confrontation Clause in US Const, Am VI is to ensure the reliability of evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversarial proceeding before the trier of fact. Because there was no indictment against Green at the time of the one-person grand jury, Green's right to confront witnesses was not implicated because he was not yet a criminal defendant who had been formally charged and the proceeding was not an adversarial hearing.

3. The Legislature acted within its province when it created the one-person grand jury procedure as an alternative charging procedure. Further, a criminal defendant does not have a constitutional right to a preliminary examination, and a prosecutor acts within his or her discretion when invoking the one-person grand jury procedure rather than proceeding with a preliminary examination. Both the one-person grand jury and the preliminary examination serve the same function: to determine whether there is probable cause to believe that a person committed a crime. And, in both procedures, the same individual decides whether there is probable cause to charge the accused with a crime: a judge. Therefore, the one-person grand jury did not impinge on Green's constitutional rights.

4. A criminal defendant has a constitutional right to the effective assistance of trial counsel according to US Const, Am VI. For a defendant to show that he or she was denied the effective assistance of counsel, the defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's deficient performance, there was a reasonable probability that the outcome would have been different. In this case, Green contends that his trial counsel was ineffective

for failing to object to the use of the statutory one-person grand jury procedure because the one-person grand jury procedure impinged on his Sixth Amendment right to counsel and his right to confront the witnesses against him. Because there was no basis for concluding that the one-person grand jury proceeding violated Green's constitutional rights, Green's trial counsel was not ineffective for failing to advance these meritless arguments.

5. A criminal defendant must show that prejudice resulted from his or her deprivation of effective assistance of counsel in order to obtain a new trial on this basis. In this case, Green failed to challenge in the trial court the propriety of the one-person grand jury, and so review of the issue was for plain error affecting Green's substantial rights. Green argued that if a preliminary examination had been conducted instead of the one-person grand jury proceeding, no probable cause would have been found because the witnesses' uncertain identifications of Green as the shooter would have been exposed on cross-examination. Green's argument ignored the jury verdict, which was based on proof beyond a reasonable doubt rather than the lesser standard of probable cause that would have been used at a preliminary examination. In addition, Green failed to establish that the one-person grand jury proceeding affected the fairness of the trial or the reliability of the verdict because his trial counsel had the opportunity to cross-examine the witnesses at trial. Therefore, even if the one-person grand jury proceeding was unconstitutional, the error was harmless given that Green was ultimately convicted beyond a reasonable doubt and cannot show prejudice from the use of the one-person grand jury.

Affirmed.

1. CRIMINAL LAW — CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL — ONE-PERSON GRAND JURY PROCEEDING.

An individual's Sixth Amendment right to the effective assistance of counsel does not attach until adversarial judicial proceedings are initiated against him or her; a one-person grand jury proceeding under MCL 767.3 and MCL 767.4 is not an adversarial proceeding and, therefore, an accused has no right to be represented by counsel at a one-person grand jury proceeding (US Const, Am VI).

2. CRIMINAL LAW — CONSTITUTIONAL RIGHT OF CONFRONTATION — ONE-PERSON GRAND JURY PROCEEDING.

An accused's Sixth Amendment right to confront the witnesses against him or her does not attach until adversarial proceedings have been initiated against him or her; a one-person grand jury

proceeding authorized by MCL 767.3 and MCL 767.4 is not an adversarial proceeding and, therefore, an accused has no right to confront the witnesses against him or her that appear before the one-person grand jury (US Const, Am VI).

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

Kristina Larson Dunne for defendant.

Before: TALBOT, C.J., and MURRAY and O'BRIEN, JJ.

MURRAY, J. This case arises from defendant's robbery and shooting of James Winbush on December 15, 2015, during the course of what was supposed to be a sale of Winbush's video game equipment to defendant. Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84, armed robbery, MCL 750.529, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant does not argue that anything occurring during trial warrants a reversal of his convictions. Nor does he challenge his sentences. Instead, defendant argues that the use of a one-person grand jury, see MCL 767.3 and MCL 767.4, violated his right to counsel and his right to confront the witnesses against him. And, because his counsel did not lodge these objections to the proceedings, defendant argues that he received the ineffective assistance of counsel. We affirm.

I. PERTINENT BACKGROUND

On December 14, 2015, Winbush made arrangements through the Internet to sell two video game

systems and some accompanying video games to a buyer named Darius King. The transaction was to be completed at Winbush's house on the morning of December 15, 2015. Winbush had never met King and did not otherwise know who King was. That morning, Winbush informed his adoptive brother, Dion Strange, that a buyer was coming to their house to purchase the video game systems and accompanying video games. Not long after the discussion between Winbush and Strange, a man arrived at the house and called to let Winbush know. Winbush and Strange went to the porch to complete the sale. The man then exited a parked Ford Taurus and came to the porch. Winbush, however, recognized the man not as King, but as defendant, because Winbush had spent time with defendant at a juvenile detention facility. Winbush attempted to proceed with the sale. However, not long after arriving at the porch, defendant pulled out a gun and indicated that he was robbing Winbush. In response, Winbush reached out to grab the gun, a struggle ensued, and defendant subsequently shot Winbush several times before fleeing the scene. Strange, who was in the doorway leading into the house during the incident, was not hit by any bullets. Before being taken to the hospital, Winbush indicated to his aunt that he was shot by someone named TSN Monya.

While at the hospital, Strange asked Winbush who shot him. Winbush responded, "TSN Monya." Strange recognized the name because, at some point in the past, Strange had seen defendant rapping in a music video. Once Strange heard Winbush's response, he searched for defendant on Facebook, an Internet website, and was able to find a corresponding Facebook account entitled "TSN Big Homie Monya" that featured photographs of defendant. Strange then showed

Winbush two photographs from the account, and Winbush recognized the photographed individual as the shooter. Strange later showed the photographs to a detective. In turn, the detective spoke to Winbush, obtained a statement, and showed Winbush a photographic lineup. Winbush selected defendant from the photographic lineup. The lineup was eventually introduced at trial.

Defendant was indicted by a one-person grand jury at which Winbush and Strange were the only witnesses who testified. At trial, both Winbush and Strange made in-court identifications of defendant as the shooter. Defendant was subsequently convicted by the jury.

II. STANDARD OF REVIEW

"The question whether [defendant's trial attorney] performed ineffectively is a mixed question of law and fact[.]" *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). To the extent that defendant's arguments rely on constitutional provisions, this Court reviews these issues de novo. *People v Fonville*, 291 Mich App 363, 376; 804 NW2d 878 (2011). Likewise, to the extent defendant's arguments involve the interpretation and application of statutes, this Court's review is also de novo. *People v Waclawski*, 286 Mich App 634, 645; 780 NW2d 321 (2009).

Constitutional challenges must be raised in the trial court; otherwise, those challenges are "not properly preserved for appellate review." *People v Hogan*, 225 Mich App 431, 438; 571 NW2d 737 (1997). Because defendant failed to challenge the use of the one-person grand jury procedure in the trial court, defendant's arguments are unpreserved and are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To satisfy

the plain error test, defendant must show that an obvious or clear error occurred and that the error affected the outcome of the trial court proceedings. *Id*. at 763. However, reversal is only warranted when the plain error results in the conviction of an "actually innocent defendant or when an error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. (quotation marks, apostrophe, and citation omitted).

III. ANALYSIS

Defendant contends that his trial attorney was ineffective for failing to object to the use of the statutory one-person grand jury procedure because its use to indict defendant was unconstitutional given that it unduly impinged on defendant's constitutional right to counsel and his right to confront the witnesses against him.

The first part of the one-person grand jury procedure is set forth in MCL 767.3, and it provides, in pertinent part:

> Whenever by reason of the filing of any complaint, which may be upon information and belief, or upon the application of the prosecuting attorney or attorney general, any judge of a court of law and of record shall have probable cause to suspect that any crime, offense or misdemeanor has been committed within his jurisdiction, and that any persons may be able to give any material evidence respecting such suspected crime, offense or misdemeanor, such judge in his discretion may make an order directing that an inquiry be made into the matters relating to such complaint, which order, or any amendment thereof, shall be specific to common intent of the scope of the inquiry to be conducted, and thereupon conduct such inquiry. In any court having more than 1 judge such order

> and the designation of the judge to conduct the inquiry shall be made in accordance with the rules of such court. Thereupon such judge shall require such persons to attend before him as witnesses and answer such questions as the judge may require concerning any violation of law about which they may be questioned within the scope of the order.

The second part of the procedure is contained within MCL 767.4, which provides, in pertinent part:

> If upon such inquiry the judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person to be guilty thereof, he may cause the apprehension of such person by proper process and, upon the return of such process served or executed, the judge having jurisdiction shall proceed with the case, matter or proceeding in like manner as upon formal complaint.

Defendant contends this procedure unduly impinges on his Sixth Amendment right to counsel and right to confrontation.[1] Defendant also asserts that because his trial attorney failed to object to the improper use of the procedure, defendant was denied the effective assistance of trial counsel. Defendant's arguments are unavailing.

Arguments that a defendant received the ineffective assistance of trial counsel are evaluated under the standard set forth in *Strickland v Washington*, 466 US

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[1] The Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999). "In order to obtain a new trial, a defendant must show that (1) [trial] counsel's performance fell below an objective standard of reasonableness and (2) but for [trial] counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *Trakhtenberg*, 493 Mich at 51.

Under the deficient-performance prong, a reviewing court evaluates whether the trial attorney's "acts or omissions were outside the wide range of professionally competent assistance." *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012) (quotation marks and citation omitted). In conducting this review, it is strongly presumed that defendant's trial attorney "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id*. (quotation marks and citation omitted). Stated differently, "defendant must overcome the strong presumption that [trial] counsel's performance was born from a sound trial strategy." *Trakhtenberg*, 493 Mich at 52. And, unless defendant's assertion falls under one of the narrow circumstances where prejudice is presumed, defendant must "affirmatively prove prejudice" by showing "a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *Vaughn*, 491 Mich at 671 (quotation marks and citation omitted).

Defendant's arguments cannot overcome the high legal hurdles placed in their way. And there are many. First, "[t]he right to counsel attaches . . . only at or after the initiation of adversary judicial proceedings against the accused by way of a formal charge, preliminary hearing, indictment, information, or arraign-

ment." *People v Buie (On Remand)*, 298 Mich App 50, 61; 825 NW2d 361 (2012) (quotation marks and citation omitted). " 'A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated. Rather, it is an *ex parte* investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person.' " *People v Morris*, 228 Mich App 380, 385; 579 NW2d 109 (1998), quoting *United States v Calandra*, 414 US 338, 343-344; 94 S Ct 613; 38 L Ed 2d 561 (1974). Consequently, because the one-person grand jury procedure is used to determine whether criminal proceedings should be instituted against an individual by way of an indictment, there is not yet a formal charge, preliminary hearing, indictment, information, or arraignment that indicates adversarial judicial proceedings have begun; thus, defendant's right to counsel had not yet attached. See *People v Glass (After Remand)*, 464 Mich 266, 276; 627 NW2d 261 (2001) ("[C]riminal prosecutions may be initiated . . . by either indictment or information."); MCR 6.112(B) ("A prosecution must be based on an information or an indictment. . . . An indictment is returned and filed without a preliminary examination. When this occurs, the indictment shall commence judicial proceedings."); MCL 767.4 (providing that the trial court "shall proceed with the case" after the one-person grand jury returns an indictment).

Moreover, defendant did not have a statutory right to the presence of counsel at the one-person grand jury proceeding because defendant was not called before the one-person grand jury. See MCL 767.19e (providing that witnesses called before a grand jury are statutorily entitled to consult and have legal counsel present during the inquiry). Thus, defendant's right to counsel was not impinged on by the one-person grand jury

procedure because defendant's right to counsel had not yet attached at the time of the challenged procedure.

Second, " '[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.' " *People v Pesquera*, 244 Mich App 305, 309; 625 NW2d 407 (2001), quoting *Maryland v Craig*, 497 US 836, 845; 110 S Ct 3157; 111 L Ed 2d 666 (1990). However, because there was no indictment against defendant at the time of the one-person grand jury, defendant's right to confront witnesses was not implicated because he was not yet a "criminal defendant" who had been formally charged. This holds true because " '[a] grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated. Rather, it is an *ex parte* investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person.' " *Morris*, 228 Mich App at 385, quoting *Calandra*, 414 US at 343-344. Hence, defendant's argument is misguided because the protections afforded by the Confrontation Clause have not yet come to fruition at the time of the one-person grand jury.[2]

Third, defendant's argument that the one-person grand jury procedure is, as a matter of policy, improper, is neither an issue this Court (or any court) can decide, nor is it otherwise compelling because the Legislature acted within its province when it created an "alternative charging procedure." *People v Farquharson*, 274 Mich App 268, 273-274; 731 NW2d 797 (2007). Having

[2] Defendant's argument lacks particular force because the witnesses that testified at the grand jury, Winbush and Strange, later testified at trial and defendant could, and did, confront them there.

been created, the procedure may be invoked at a prosecutor's discretion. Additionally, because it is an alternative charging procedure, it does not "replace[] the preliminary examination" as defendant asserts. Rather, both serve the same function: to determine whether there is probable cause to believe that a person committed a crime. *People v Yost*, 468 Mich 122, 125-126; 659 NW2d 604 (2003) (discussing a preliminary examination's function); *Farquharson*, 274 Mich App at 274 (noting that a one-person grand jury may be convened to determine whether probable cause exists). Further, just like "[t]here is no state constitutional right to indictment by grand jury," *Farquharson*, 274 Mich App at 273, there is no state constitutional right to a preliminary examination, *Yost*, 468 Mich at 125 (noting that the right to preliminary examination is a purely statutory right). Moreover, in both a one-person grand jury and a preliminary examination, the individual who decides whether there is probable cause is the same: a judge. MCL 767.3 (one-person grand jury); MCL 766.13 (preliminary examination). At bottom, the one-person grand jury does not impinge on defendant's asserted constitutional rights.

Fourth, because there is no basis for concluding that the use of the one-person grand jury violated defendant's asserted constitutional rights, defendant did not receive ineffective assistance of trial counsel. That is, "[f]ailing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Because there is no basis on which to conclude that the one-person grand jury violated defendant's constitutional rights, defendant's trial attorney was not ineffective for failing to advance these arguments.

The fifth and final hurdle that defendant cannot overcome is a showing of any prejudice. Defendant's argument that his trial attorney was ineffective rests on the theory that if a preliminary examination would have been held, no probable cause would have been found because the "far from certain" identification of defendant would have been exposed on cross-examination.[3] However, defendant's argument ignores the jury verdict. In other words, because "defendant's conviction was based on proof beyond a reasonable doubt, [this Court] can surmise that had a preliminary examination been conducted," as defendant argued for here, "defendant would have been bound over to circuit court for trial since the lesser standard of probable cause is used at preliminary examination." *People v McGee*, 258 Mich App 683, 698; 672 NW2d 191 (2003). Further, because defendant had the opportunity to cross-examine the grand jury witnesses at trial, defendant failed to establish that the use of the one-person grand jury procedure "otherwise affected the fairness of the trial or the reliability of the verdict . . . ." *Id*. at 698-699. Thus, even if use of the one-person grand jury procedure was unconstitutional, it "was harmless error relating to pleading or procedure that did not result in

[3] The core of Winbush's and Strange's grand jury testimony about the shooting largely mirrored their testimony at trial: shortly after defendant came to the porch to buy the merchandise that Winbush was selling, defendant pulled out a gun, aimed it towards Winbush, indicated that Winbush was being robbed, and subsequently shot Winbush before fleeing the scene. Likewise, the core of Winbush's identification of defendant was largely the same: Winbush recognized defendant from the time the two spent together at a juvenile detention facility. Similarly, the core of Strange's identification of defendant was largely the same: Strange asked Winbush who the shooter was, and defendant responded, "TSN Monya." Strange then used that information to find pictures of defendant taken from defendant's Facebook account, Strange showed the pictures to Winbush, and Winbush indicated that the pictures depicted his shooter.

a miscarriage of justice." *Id*. at 699 (quotation marks, alteration, and citation omitted). As a result, defendant cannot show prejudice from the use of the one-person grand jury given that he was ultimately convicted by proof beyond a reasonable doubt.

Affirmed.

TALBOT, C.J., and O'BRIEN, J., concurred with MURRAY, J.

PEOPLE v CARLL

Docket No. 336272. Submitted January 10, 2018, at Grand Rapids. Decided January 23, 2018, at 9:05 a.m.

Dalton D. Carll was convicted following a jury trial in the Delta Circuit Court of one count of reckless driving causing death, MCL 257.626(4), and three counts of reckless driving causing serious impairment of a body function, MCL 257.626(3). Defendant was driving a pickup truck on a gravel road with six additional people in the vehicle, including two people riding in the truck bed, when he drove through a stop sign at about 30 to 40 miles per hour (mph) and struck a car that was entering the intersection with the right of way. The driver of the car was killed, and a passenger in that car sustained serious injuries. The two people riding in the truck bed were also seriously injured. Defendant admitted at trial that he failed to stop at the stop sign, but he asserted that he had not been traveling at an excessive speed and that his truck's brakes did not respond when he tried to stop at the stop sign. The court, Stephen T. Davis, J., sentenced defendant to serve concurrent terms of 4 to 15 years' imprisonment for his conviction of reckless driving causing death and 23 months to 5 years' imprisonment for each of his convictions for reckless driving causing serious impairment. Defendant appealed, arguing that (1) the prosecution failed to present sufficient evidence to prove beyond a reasonable doubt that he was operating a motor vehicle with willful and wanton disregard for the safety of persons or property, (2) his trial counsel was ineffective, (3) the trial court abused its discretion by allowing the testimony of an expert witness, and (4) the trial court improperly scored offense variable (OV) 13 at 25 points.

The Court of Appeals *held*:

1. MCL 257.626 provides, in pertinent part, that a person who operates a vehicle with willful or wanton disregard for the safety of persons or property and causes death or serious impairment of a body function to another person is guilty of a felony. When willful and wanton behavior is an element of a criminal offense, it is not enough to show carelessness; rather, a defendant must have a culpable state of mind. "Willful or wanton disregard" does not

require proof of intent to cause harm; it means knowingly disregarding the possible risks to the safety of people or property. An appellate court evaluates a defendant's sufficiency-of-the-evidence claim by asking whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror in finding guilt beyond a reasonable doubt. In this case, extensive evidence was presented to show that defendant drove in a manner that willfully and wantonly disregarded a high risk of serious injury to the people in his vehicle and other vehicles. Passengers in defendant's truck, some of whom were riding in the truck bed, testified that defendant was driving on the gravel road at about 30 to 40 mph, which was too fast for the conditions, did not slow down in response to a passenger's request, and did not attempt to stop or slow down for the stop sign. They described defendant's driving as "weird," "kind of terrifying," "way too fast for . . . people in the back [of the truck]" and stated that defendant's driving got worse as the ride continued. An accident reconstructionist also testified that there was no indication of braking on the gravel road and that the speed of defendant's truck at the moment of impact with the other vehicle was in the range of 30 to 43 mph. The accident reconstructionist further described the stop sign as visible, stated that there was a "stop ahead" sign 180 feet before the stop sign itself, and also stated that he believed that defendant accelerated as he approached the stop sign. Because a jury could fairly conclude on the basis of this evidence that defendant's actions were willful or done with wanton disregard for the safety of others, defendant's sufficiency-of-the-evidence claim failed.

2. MRE 702 provides that a witness qualified as an expert by knowledge, skill, experience, training, or education may testify at trial if the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. MRE 702 also obligates the trial court to ensure that any expert testimony admitted at trial is reliable. In this case, Greg Bittner, an owner of a local automobile repair shop, testified as an expert on automobile mechanics. Bittner inspected defendant's truck and concluded that a broken brake line had been pulled apart during the course of the accident, not before the accident. The lawyers had conducted an extensive inquiry into Bittner's qualifications, which included a college certification in automotive technology, a state certification in brakes, and 15 years' experience inspecting and repairing brakes. While defendant argued that Bittner's methodology was unreliable, Bittner personally examined defendant's truck and gathered sufficient data to form an opinion, Bittner based his testimony on reliable principles and methods, and Bittner applied those meth-

ods reliably to the facts. Therefore, the trial court did not abuse its discretion by qualifying Bittner as an expert and allowing him to offer his opinion.

3. To prove that defense counsel is ineffective, a defendant must show that defense counsel's performance fell below an objective standard of reasonableness. The defendant must also show that there is a reasonable probability that counsel's deficient performance prejudiced the defendant. In this case, defense counsel was not ineffective for failing to hire a mechanical expert to challenge Bittner's testimony. Defense counsel conducted an extensive cross-examination of Bittner regarding his process and conclusions, established that Bittner did not know whether there had been brake fluid in the truck's brake-fluid container that could have affected the brakes, and established that Bittner could have, but did not, videotape the inspection of defendant's truck. Defendant also failed to establish that any error prejudiced him because defendant provided no indication that any expert witness would have been able to offer favorable testimony. Accordingly, defendant's claim of ineffective assistance of counsel failed.

4. Under MCL 777.43, a trial court properly assigns points for OV 13 if there was a continuing pattern of criminal behavior. Under MCL 777.43(1)(c), the trial court is instructed to score OV 13 at 25 points when the offense was part of a pattern of felonious criminal activity involving three or more crimes against a person. Under MCL 777.43(1)(g), the trial court must score OV 13 at zero points if no pattern of criminal activity existed. MCL 777.43 does not define the term "continuing pattern of behavior." Dictionary definitions of "continuing" as "to keep going or add to" and "pattern" as "a reliable sample of trait, acts, tendencies, or other observable characteristics" indicated that MCL 777.43 contemplates the existence of more than one felonious event. In this case, defendant's reckless driving constituted a single act, and although there were multiple victims, nothing was presented to show that defendant committed separate acts against each individual victim in the course of the reckless driving. Accordingly, the trial court improperly scored OV 13 at 25 points when OV 13 should have been scored at zero points.

Affirmed, but remanded for resentencing.

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLE 13 — CONTINUING PATTERN OF CRIMINAL BEHAVIOR — A SINGLE FELONIOUS ACT DOES NOT CONSTITUTE A PATTERN OF CRIMINAL BEHAVIOR DESPITE THE EXISTENCE OF MULTIPLE VICTIMS.

Under MCL 777.43, a trial court properly assigns points for offense variable (OV) 13 if there was a continuing pattern of criminal

behavior; MCL 777.43 contemplates the existence of more than one felonious act; while a defendant's commission of separate acts against each individual victim may merit a score under OV 13, a single felonious act cannot constitute a pattern of criminal behavior despite the existence of multiple victims.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *Bruce H. Edwards*, Assistant Attorney General, for the people.

State Appellate Defender (by *F. Mark Hugger*) for defendant.

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

SHAPIRO, J. Defendant appeals his convictions, following a jury trial, of one count of reckless driving causing death, MCL 257.626(4), and three counts of reckless driving causing serious impairment of a body function, MCL 257.626(3). The trial court sentenced defendant to serve concurrent terms of 4 to 15 years' imprisonment for his reckless driving causing death conviction and 23 months to 5 years' imprisonment for each of his reckless driving causing serious impairment convictions. For the reasons discussed in this opinion, we affirm defendant's convictions but remand for resentencing.

The crash giving rise to this case occurred on June 17, 2015. Defendant, then 17 years old and a licensed driver for only one month, was driving a pickup truck with six other young people in the vehicle. They were traveling on a gravel road. Alyson Anderson was seated in the front passenger seat of the truck; Daniel Garza, Danielle Baxter, and Edward Kwarciany were seated in the interior rear of the truck; and Brad Hemes and Gage Caswell were riding in the bed of the truck. Testimony at trial established that defendant drove the truck

through a stop sign at 30 to 40 miles per hour (mph) and struck a car that was entering the intersection with the right of way. The driver of that car was killed, and his passenger sustained serious injuries. Hemes and Caswell, the two young men riding in the bed of the pickup, were also seriously injured. Defendant testified at trial and admitted that he failed to stop at the stop sign. He asserted, however, that he had not been traveling at an excessive speed and that he had tried to stop but the truck's brakes did not respond.

I. SUFFICIENCY OF EVIDENCE

On appeal, defendant first argues that the prosecution failed to present sufficient evidence to prove beyond a reasonable doubt that he was operating a motor vehicle with willful and wanton disregard for the safety of persons or property. We disagree.[1]

MCL 257.626 provides that a person who drives recklessly and causes death or serious injury is guilty of a felony:

> (1) A person who violates this section is guilty of reckless driving punishable as provided in this section.
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> (2) Except as otherwise provided in this section, a person who operates a vehicle upon a highway or a frozen public lake, stream, or pond or other place open to the general public, including, but not limited to, an area designated for the parking of motor vehicles, in willful or

[1] A claim that the evidence was insufficient to convict a defendant concerns the defendant's constitutional right to due process of law. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970). This Court reviews de novo a defendant's challenge to the sufficiency of the evidence supporting his or her conviction following a jury trial. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011).

> wanton disregard for the safety of persons or property is guilty of a misdemeanor . . . .
>
> (3) Beginning October 31, 2010, a person who operates a vehicle in violation of subsection (2) and by the operation of that vehicle causes serious impairment of a body function to another person is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not less than $1,000.00 or more than $5,000.00, or both. . . .
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> (4) Beginning October 31, 2010, a person who operates a vehicle in violation of subsection (2) and by the operation of that vehicle causes the death of another person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not less than $2,500.00 or more than $10,000.00, or both. . . .

The conduct proscribed by Subsection (2) of this statute is the operation of a vehicle in "willful or wanton disregard for the safety of persons or property." It is well settled that "[t]o show that a defendant acted in wilful and wanton disregard of safety, something more than ordinary negligence must be proved." *People v Crawford*, 187 Mich App 344, 350; 467 NW2d 818 (1991). When willful and wanton behavior is an element of a criminal offense, it is not enough to show carelessness. Rather, "a defendant must have a culpable state of mind . . . ." *Id*.

The trial court instructed the jury that in order to convict defendant, it must find that defendant drove the motor vehicle with willful or wanton disregard for the safety of persons or property. "Willful or wanton disregard" means more than simple carelessness but does not require proof of an intent to cause harm. It means knowingly disregarding the possible risks to the safety of people or property.[2]

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[2] Defendant did not object to this instruction and does not argue on appeal that it was incorrect. In a related argument, defendant asserts that the prosecutor's closing argument "watered down" the standard for

This Court evaluates a defendant's sufficiency-of-the-evidence claim by asking whether "the evidence, viewed in a light most favorable to the [prosecution], would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Id*. at 400. "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Id*. (quotation marks and citation omitted). Questions regarding the weight of the evidence and credibility of witnesses are for the jury, and this Court must not interfere with that role even when reviewing the sufficiency of the evidence. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Finally, on appellate review, conflicts in the evidence are "resolved in favor of the prosecution." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

Extensive evidence was presented to show that defendant drove in a manner that willfully or wantonly disregarded a high risk of serious injury to the people

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recklessness, which requires a willful or wanton disregard for the safety of persons or property. During closing arguments, the prosecutor argued, in pertinent part:

> We're asking for accountability to the defendant for killing and seriously injuring innocent individuals. We're asking for a reminder of our moral and legal duty to drive responsibly, and we're asking you to find that the defendant, beyond a reasonable doubt, knowingly disregarded the possible risks to the safety of other people due to his driving conduct on June 17, 2015.

Defendant did not object to this statement at trial, and while it might have been somewhat incomplete, we do not find that the statement was misleading. In any event, any misunderstanding was corrected by the court's instruction on the elements.

in his vehicle and other vehicles.[3] There was testimony and forensic evidence that defendant was driving too fast for the conditions. Anderson testified that defendant was going 30 or 40 mph on the gravel road and that she told defendant to slow down because he was traveling faster than he normally did. Kwarciany testified that defendant was traveling 30 or 40 mph when approaching the stop sign. Garza testified that he believed defendant was going 40 to 45 mph and that he did not slow down before the stop sign. He described defendant's driving as "getting kind of reckless." Hemes testified that defendant was driving very fast—as fast as 50 to 60 mph—and that he was "going way too fast . . . for people in the back [of the truck]," on high speed, which got worse as the ride continued. Caswell described defendant's driving as "weird" and "kind of terrifying" and testified that he estimated defendant's speed at 50 mph at the time of the crash.

The prosecution also presented testimony from a Michigan State Police officer who is an accident reconstructionist. The officer testified that there was no indication of braking on the gravel road, which would normally be evidenced by some of the gravel being dug out or dragged along the road surface. He also testified that the speed of defendant's truck at the moment of impact with the other vehicle was in the range of 30 to 43 mph. He and other witnesses described the stop sign as visible and noted that there was a "stop ahead" sign 180 feet before the stop sign itself. Kwarciany

[3] Defendant asks this Court to reevaluate the weight of the evidence and determine that the testimony that his driving was reasonable outweighed the testimony that it was not. When reviewing the sufficiency of the evidence, this Court will not interfere with the trier of fact's role to determine the weight of the evidence or the credibility of the witnesses. *Wolfe*, 440 Mich at 514-515.

testified that he felt that defendant was trying to "gun through" the stop sign and believed that defendant accelerated as he approached the sign.

In sum, there was evidence that defendant purposefully drove through a stop sign at high speed without any attempt to brake and that he might have even accelerated into the intersection. A jury could fairly conclude that defendant's actions were willful or that they were done with wanton disregard of the potential consequences, i.e., death and serious injury.

II. EXPERT TESTIMONY

Defendant testified that he was driving between 20 and 30 mph and that he did try to brake for the stop sign but the brakes failed. He testified that during the drive the brakes had been feeling "spongy" but that until he tried to stop for the stop sign he had been able to stop without difficulty. After the crash, the vehicles were inspected and a broken rear brake line was found.

The prosecution presented Greg Bittner, the owner/operator of a local automobile repair shop, as an expert on automobile mechanics. He testified that he inspected defendant's truck after the accident and that the brake line that was broken had been pulled apart in the course of the accident, not before. He was able to determine this because the line was cleanly cut and the cut was at the point where the frame and cab had bent into the line. He testified that it was not a brake-line defect that might develop over time from age or corrosion and that the front and rear brakes operated from different lines so that even if the rear brakes failed prior to the crash, the front brakes still would have been working. He also testified that he found nothing wrong with the rotors, calipers, or pads. He concluded

by offering his opinion that "the brakes should have worked prior to the accident."

Defendant argues that the trial court abused its discretion by allowing Bittner to testify as an expert and to offer an opinion regarding the cause of the broken brake line. We disagree.[4]

An expert witness may offer an opinion only if he or she has specialized knowledge that will assist the trier of fact to understand the evidence. *People v Petri*, 279 Mich App 407, 416; 760 NW2d 882 (2008). MRE 702 provides that a person may have specialized knowledge on the basis of skill, training, experience, or education:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise . . . .

"The determinative inquiry in qualifying an expert is the nature and extent of knowledge and actual experience . . . ." *People v Christel*, 449 Mich 578, 592 n 25; 537 NW2d 194 (1995) (quotation marks and citation omitted).

The lawyers conducted an extensive inquiry into Bittner's qualifications. He described his training and extensive experience in brake analysis and repair. He had a college certification in automotive technology, a state certification in brakes, and 15 years' experience

[4] This Court reviews for an abuse of discretion the trial court's determination regarding whether an expert witness was qualified. *People v Christel*, 449 Mich 578, 592 n 25; 537 NW2d 194 (1995). The trial court abuses its discretion "when its decision falls outside the range of reasonable and principled outcomes." *People v Duncan*, 494 Mich 713, 722-723; 835 NW2d 399 (2013).

inspecting and repairing brakes. Bittner stated that he works on brakes on "[a] weekly basis" and had repaired "[h]undreds" of brakes.[5] We find no error in the trial court's decision to permit Bittner to testify as an expert.

Defendant also argues that Bittner's testimony should have been excluded because his methodology was unreliable and therefore did not meet the standard of reliability set forth in MRE 702:

> [A] witness qualified as an expert . . . may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MRE 702 obligates the trial court to "ensure that any expert testimony admitted at trial is reliable." *People v Dobek*, 274 Mich App 58, 94; 732 NW2d 546 (2007) (quotation marks and citation omitted). "Expert testimony may be excluded when it is based on assumptions that do not comport with the established facts or when it is derived from unreliable and untrustworthy scientific data." *Id*. The inquiry into reliability is a flexible one that is tied to the facts of the particular case, and a reliability determination may differ on the

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[5] We also reject defendant's assertion that Bittner should not have been qualified as an expert because he had never before been qualified to provide expert testimony. Defendant provides no support for this assertion. While Bittner testified that it was his first time offering expert testimony before the trial court, logic dictates that every expert witness must have been qualified for the first time at some point. See *United States v Parra*, 402 F3d 752, 758 (CA 7, 2005) (holding that "there is a first time in court for every expert"). Moreover, MRE 702 provides that a witness's qualification as an expert is to be determined by the witness's "knowledge, skill, experience, training, or education"; there is no requirement that the witness must have previously been recognized as an expert in a prior proceeding.

basis of the type of expert testimony offered. *Kumho Tire Co, Ltd v Carmichael*, 526 US 137, 150; 119 S Ct 1167; 143 L Ed 2d 238 (1999).

We begin by noting that defendant does not criticize any specific aspect of Bittner's analysis. His criticisms of Bittner's testimony are general and not well defined. In any event, it is clear that Bittner's testimony rested on a reasonable analysis. He testified that he personally examined defendant's truck, and he set forth the data necessary to form opinions about the condition of the brake lines on defendant's truck. He explained the mechanism of hydraulic brakes and the fact that defendant's truck had separate lines for front and rear brakes, thereby ruling out the possibility that a single brake line failure would affect both front and rear brakes. He also testified that he was familiar with rusting brakes and brake lines that corrode over time and that he has seen such phenomena many times. From this, he explained that the brake line had not broken because of corrosion or other natural cause; he described the most likely mechanism for the damage to the brake line as being the crash itself.

Accordingly, Bittner's testimony was based on well-established principles rather than on an experimental science. Bittner had sufficient data to form an opinion, based his testimony on reliable principles and methods, and applied those methods reliably to the facts of the case. Therefore, the trial court did not abuse its discretion by qualifying Bittner as an expert and allowing him to offer his opinions.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that his trial counsel was ineffective. We disagree.

Generally, a defendant's ineffective-assistance-of-counsel claim "is a mixed question of fact and constitutional law." *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012) (quotation marks and citation omitted). When, as in this case, a defendant does not move for a new trial or evidentiary hearing, our review is limited to mistakes apparent from the record. *Id*.

A criminal defendant has the fundamental right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984). To prove that his defense counsel was not effective, the defendant must show that defense counsel's performance fell below an objective standard of reasonableness. *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defendant must also show that there is a reasonable probability that counsel's deficient performance prejudiced the defendant. *Id*. at 694.

Defendant first argues that defense counsel was ineffective for failing to hire a mechanical expert to challenge Bittner's testimony. Defense counsel's failure to investigate and attempt to secure a suitable expert witness to assist in preparing the defense may constitute ineffective assistance. *People v Ackley*, 497 Mich 381, 393; 870 NW2d 858 (2015). However, effective counsel need not always provide "an equal and opposite expert." *Harrington v Richter*, 562 US 86, 111; 131 S Ct 770; 178 L Ed 2d 624 (2011).

Defense counsel conducted an extensive cross-examination of Bittner regarding his process and conclusions. "In many instances cross-examination will be sufficient to expose defects in an expert's presentation." *Id*. "A particular strategy does not constitute ineffective assistance of counsel simply because it does not work." *People v Matuszak*, 263 Mich App 42, 61;

687 NW2d 342 (2004). Defense counsel established that Bittner did not know whether there had been brake fluid in defendant's brake-fluid container at the time of the accident and that if the container had been empty, defendant would not have had brakes. He also established that Bittner could have, but did not, videotape the inspection to show that defendant's brakes were otherwise in working order.

Defendant has also failed to establish that any error prejudiced him. A defendant is prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994). Without some indication that a witness would have testified favorably, a defendant cannot establish that counsel's failure to call the witness would have affected the outcome of his or her trial. See *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). In this case, defendant has provided no indication that any expert witness would have been able to offer favorable testimony. Defendant has thus failed to establish that any error on defense counsel's part prejudiced him, and he did not move for a remand for purposes of making such a record.

Next, defendant argues that counsel was ineffective for failing to challenge Bittner's expert opinion. As earlier discussed, there is no indication that Bittner's opinion was not appropriate expert opinion testimony or was not reliable. Counsel need not make futile challenges. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Because a challenge to the basis of Bittner's testimony would have been futile, counsel did not provide ineffective assistance by failing to make such a challenge.

Accordingly, defendant's claim of ineffective assistance of counsel fails.

IV. OFFENSE VARIABLE (OV) 13

Defendant argues that the trial court improperly scored OV 13 at 25 points for a pattern of continuing criminal conduct when he had no prior record and all four convictions arose from a single act. We find no published case directly on point and conclude that this is an issue of first impression.

A trial court properly scores OV 13 if there was a "continuing pattern of criminal behavior." MCL 777.43. Specifically, the trial court is instructed to score OV 13 at 25 points when the "offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). The statute then further provides that "[f]or determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). If no pattern of felonious criminal activity existed, the trial court must score OV 13 at zero points. MCL 777.43(1)(g).

We agree with defendant that a single felonious act cannot constitute a pattern and that the trial court erred by concluding otherwise.[6] Although the statute provides guidance to the courts on how to score OV 13, MCL 777.43(2), it does not define the term "continuing pattern of criminal behavior." The word "continuing" clearly refers to an event or process that takes place

[6] Whether a sentencing court has properly interpreted and applied a sentencing statute is a question of statutory interpretation that this Court reviews de novo. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). When interpreting a statute, if statutory language is unambiguous, this Court must enforce the statute as written. *Id*. at 439. The language of the statute itself is the primary indication of the Legislature's intent. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006).

over time. *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "continuing" as "to keep going or add to." It defines "pattern" as "a reliable sample of traits, acts, tendencies, or other observable characteristics of a person . . . ." *Id*. Accordingly, the statute contemplates that there must be more than one felonious event.

The prosecution directs our attention to two cases; however, both are readily distinguishable. In *People v Gibbs*, 299 Mich App 473, 487; 830 NW2d 821 (2013), the defendant argued that assessing points under OV 13 was improper because his convictions arose out of one incident. The defendant robbed a jewelry store, during which he took property that belonged to the store and demanded that the two individuals present in the store turn over their personal possessions to him. *Id*. at 478. We approved the OV 13 scoring because "while the robberies arose out of a single criminal episode, Gibbs committed three separate acts against each of the three victims and these three distinct crimes constituted a pattern of criminal activity." *Id*. at 488.

Similarly, in *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001), we rejected the defendant's argument that OV 13 was improperly scored at 25 points. The defendant was convicted of four counts of making child sexually abusive material on the basis that he took four photographs of two underage victims on a single day. *Id*. at 524. Evidence presented at trial established that the defendant took the photographs of the minors on "*two separate occasions*." *Id*. (emphasis added). Therefore, the trial court could properly score OV 13 in that case because the defendant committed separate acts in a single criminal episode.

The instant case presents a very different circumstance. Defendant's reckless driving constitutes a

single act, and although there were multiple victims, nothing was presented to show that he committed separate acts against each individual victim in the course of the reckless driving.[7] Accordingly, we conclude that the trial court improperly scored OV 13 at 25 points. It should have been scored at zero.[8]

Affirmed, but remanded for resentencing. We do not retain jurisdiction.

MARKEY, P.J., and GADOLA, J., concurred with SHAPIRO, J.

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[7] The only case that appears to address this issue under the same circumstances is *People v Smith*, unpublished per curiam opinion of the Court of Appeals, issued February 25, 2003 (Docket No. 229137). In that case, the defendant was convicted of operating a vehicle while his license was revoked, causing death; operating a motor vehicle while under the influence of intoxicating liquor, causing death; manslaughter; and failure to stop at the scene of a serious personal injury incident. *Id*. at 1. The defendant's convictions arose from one motor vehicle accident, and we held that the defendant's four concurrent convictions did not support a 25-point score under OV 13 because they arose from a single act. *Id*. at 9. In construing the meaning of the word "pattern," as used in the statute, we noted that "[t]he use of the term 'pattern' and the fact that the Legislature permitted consideration of all crimes within a five-year period evinces an intention that it is repeated felonious conduct that should be considered in scoring this offense variable." *Id*.

[8] Defendant did receive other sentencing-guidelines points on the basis of the number of victims. Prior record variable (PRV) 7 was scored for two concurrent convictions, i.e., two additional victims of the reckless driving, and OV 9 was scored at 10 points for two to nine victims.

VHS HURON VALLEY-SINAI HOSPITAL, INC v
SENTINEL INSURANCE COMPANY (ON REMAND)

Docket No. 328005. Submitted October 5, 2017, at Lansing. Decided January 23, 2018, at 9:10 a.m. Leave to appeal sought.

VHS Huron Valley-Sinai Hospital, Inc., filed an action in the Wayne Circuit Court against Sentinel Insurance Company, seeking to recover no-fault personal protection insurance (PIP) benefits for medical services it provided to defendant's insured, Charles Hendon, Jr., following an accident in which Hendon was injured. In a separate action, Hendon brought a claim against defendant, seeking uninsured motorist benefits under his insurance policy; Hendon did not seek PIP benefits in the separate action. In 2014, Hendon settled the separate action with defendant and those parties stipulated to the dismissal of that action with prejudice. Defendant thereafter moved for summary disposition in this case, asserting that the plaintiff's claim for PIP benefits was barred by res judicata because of the earlier, separate action between Hendon and defendant. The court, John A. Murphy, J., denied the motion, concluding that plaintiff's claim was not barred by res judicata because the claim could not have been resolved in Hendon's earlier action. The trial court entered a stipulated order for dismissal and consent judgment, which dismissed the case with prejudice but allowed defendant to appeal by right the court's denial of its motion for summary disposition. The stipulation provided that if defendant's res judicata argument was rejected by the Court of Appeals or the Michigan Supreme Court, plaintiff would be entitled to a sum certain of money plus costs and interest. In an unpublished per curiam opinion issued October 13, 2016, the Court of Appeals, FORT HOOD, P.J., and GLEICHER and O'BRIEN, JJ., affirmed the trial court's order denying defendant's motion for summary disposition, reasoning that res judicata did not bar the instant action. In lieu of granting leave to appeal, the Supreme Court vacated the Court of Appeals' decision and remanded to the Court of Appeals for reconsideration in light of *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191 (2017). Defendant moved in the Court of Appeals for peremptory reversal, arguing that dismissal of plaintiff's claim was compelled by *Covenant*. In contrast, plaintiff argued that *Cov-*

enant was inapplicable because defendant had waived the issue of standing by agreeing to the stipulated order for dismissal and consent judgment, which allowed defendant to appeal the issue of res judicata only. The Court of Appeals denied defendant's motion for peremptory reversal.

On remand, the Court of Appeals *held*:

1. In *Covenant*, the Supreme Court held that healthcare providers do not possess a statutory cause of action against no-fault insurers for the recovery of PIP benefits under the no-fault act, MCL 500.3101 *et seq*. In reaching that conclusion, the Supreme Court rejected the long line of Court of Appeals cases that had held otherwise. Accordingly, post-*Covenant*, a healthcare provider cannot pursue a statutory cause of action for PIP benefits directly from an insurer.

2. A stipulation—which is construed using the same principles applicable to a contract—is an agreement, admission, or concession made by the parties in a legal action with regard to a matter related to the case. Unambiguous contracts are not open to judicial construction and must be enforced as written. Although the use of specific key words is not required to waive a right, the language of a stipulation must show the intent to plainly relinquish that right.

3. In this case, defendant preserved the issue of plaintiff's lack of standing by raising that issue as an affirmative defense and by assuming that plaintiff had standing for purposes of defendant's summary disposition motion. The holding in *Covenant* applied retroactively to this case because defendant preserved the standing issue and the case was pending on direct review when *Covenant* was decided. Defendant did not waive review of the standing issue by entering into the stipulated order. The order did not contain language indicating that defendant intended to clearly and unequivocally waive the standing issue, and the Court could not read into the contract terms to which the parties did not agree. The lack-of-waiver conclusion was supported by the record and the procedural posture of the case. Specifically, given the caselaw in place before *Covenant* was decided, defendant may have reasonably concluded that any standing argument would have been rejected by the trial court and the appellate courts and therefore excluded such language from the stipulated order. Moreover, in its motion for summary disposition, defendant questioned whether plaintiff had standing to seek PIP benefits on behalf of its insured, and defendant filed supplemental authority challenging plaintiff's standing after *Covenant* was decided. Accordingly, defendant did not relinquish

its right to challenge plaintiff's standing by entering into the stipulated order, and the trial court erred by denying defendant's motion for summary disposition.

Stipulated order for dismissal and consent judgment vacated, order denying defendant's motion for summary disposition reversed, and case remanded for entry of judgment in favor of defendant.

GLEICHER, J., dissenting, disagreed with the majority's analysis of the waiver-of-standing issue. The stipulated order plainly and unambiguously provided that the only issue to be addressed on appeal was that of res judicata; the stipulation did not refer to plaintiff's alleged standing or a healthcare provider's statutory right to sue. In the original appeal in this case, this Court only addressed the issue of res judicata because—in accordance with the terms of the stipulated order—that was the only issue that the parties had agreed to present for review. Although *Covenant* applied retroactively, the decision did not apply to this case because defendant waived its potential standing argument when it signed a release that reserved only the issue of res judicata for appeal. The majority's interpretation of the stipulated order rewrote the terms of the release and violated principles of contract law because the issue of standing was not mentioned in the document. Judge GLEICHER would have held that *Covenant* did not apply to this case because defendant waived review of the standing issue by entering into the stipulated order.

Miller & Tischler, PC (by *Milea M. Vislosky*) for plaintiff.

Secrest Wardle (by *Mark F. Masters* and *Drew W. Broaddus*) for defendant.

ON REMAND

Before: FORT HOOD, P.J., and GLEICHER and O'BRIEN, JJ.

FORT HOOD, P.J. This case is again before us following remand from the Michigan Supreme Court.[1] In our

[1] *VHS Huron Valley Sinai Hosp v Sentinel Ins Co*, 501 Mich 857 (2017).

earlier opinion, we concluded that the trial court properly determined that res judicata did not operate to bar plaintiff's claims against defendant. However, the Michigan Supreme Court has remanded this case to our Court to reconsider our initial disposition in light of the Michigan Supreme Court's decision in *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017). For the reasons set forth in this opinion, we vacate the trial court's stipulated order for dismissal and consent judgment, reverse the trial court's order denying defendant's motion for summary disposition, and remand for entry of judgment in favor of defendant.[2]

I. FACTS AND PROCEDURAL HISTORY

In our earlier opinion we recited the relevant facts, in pertinent part, as follows:

> On June 25, 2013, Charles Hendon, Jr. was involved in a motor vehicle accident when his vehicle was allegedly rear-ended by an unidentified hit and run driver, causing bodily injury. Defendant Sentinel Insurance Company is Hendon's insurer. From August 1, 2013, through October 7, 2013, plaintiff VHS Huron Valley-Sinai Hospital, doing business as DMC Surgery Hospital, provided medical services to Hendon for his care, recovery, and rehabilitation related to his injuries sustained in the automobile accident, at a cost totaling $68,569.
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> On September 9, 2013, Hendon commenced a cause of action against Sentinel asserting a claim for uninsured motorist benefits under his insurance policy and alleging negligence on the part of the unidentified hit and run driver involved in the accident. Hendon did not assert a claim for no-fault [personal protection insurance (PIP)]

[2] If it were not for our dissenting colleague's insistence on publication pursuant to MCR 7.215(A), this opinion would not be published because it does not meet the standards of MCR 7.215(B).

benefits as part of his lawsuit. Thereafter, on July 15, 2014, DMC, plaintiff in the instant case, commenced a cause of action against Sentinel asserting a claim for no-fault PIP benefits for the medical services DMC provided to Hendon for injuries arising out of the accident. On October 21, 2014, Hendon and Sentinel settled Hendon's lawsuit seeking uninsured motorist benefits for $1,500 and, on October 29, 2014, that suit was dismissed, with prejudice, per stipulation of the parties.

After settling Hendon's case, Sentinel sought summary disposition of DMC's action for PIP benefits under MCR 2.116(C)(7), asserting that it was barred by res judicata. The trial court denied Sentinel's motion, concluding that res judicata did not bar DMC's claim because it could not have been resolved in Hendon's earlier action for uninsured motorist benefits given the dissimilarity in the two claims. The court then entered a stipulated order for dismissal and consent agreement, which closed the case but allowed Sentinel to appeal as of right the court's denial of its motion for summary disposition. Sentinel appeals. [*VHS Huron Valley Sinai Hosp v Sentinel Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued October 13, 2016 (Docket No. 328005), pp 1-2, vacated and remanded 501 Mich 857 (2017).]

This Court concluded that the trial court properly determined that res judicata did not bar plaintiff's claim for PIP benefits and that the trial court did not err by denying defendant's motion for summary disposition under MCR 2.116(C)(7). *VHS Huron Valley Sinai Hosp*, unpub op at 2. With regard to the second element of res judicata, this Court determined that the actions did not involve the same parties or their privies because Hendon and plaintiff were not in privity with one another. *Id*. at 3-4. This Court reasoned that because Hendon asserted only a claim for uninsured motorist benefits and plaintiff had no interest or right to those benefits, Hendon and plaintiff "did not share a substantial identity of interest" in those benefits, nor did

plaintiff have "a mutual or successive relationship in those benefits." *Id*. at 4. According to this Court, plaintiff's interest in or right to the recovery of PIP benefits was not represented or protected in the earlier litigation, and Hendon had no motivation in the earlier litigation to protect plaintiff's interest in or right to recover PIP benefits. *Id*. Therefore, this Court affirmed the trial court's decision. *Id*. at 5.

On November 9, 2016, this Court denied defendant's motion for reconsideration. *VHS Huron Valley Sinai Hosp v Sentinel Ins Co*, unpublished order of the Court of Appeals, entered November 9, 2016 (Docket No. 328005). On December 20, 2016, defendant filed an application for leave to appeal in the Michigan Supreme Court. On September 12, 2017, the Michigan Supreme Court vacated this Court's judgment and remanded to this Court for reconsideration in light of *Covenant*. *VHS Huron Valley Sinai Hosp*, 501 Mich 857. On remand to this Court, defendant moved for peremptory reversal, arguing that *Covenant* compels the dismissal of plaintiff's claims. In its answer to the motion, plaintiff argued that *Covenant* is inapplicable because defendant waived the issue of standing by agreeing to the stipulated order for dismissal and consent judgment, which permitted defendant to appeal the issue of res judicata only. On October 26, 2017, this Court denied defendant's motion for peremptory reversal "for failure to persuade the Court of the existence of manifest error requiring reversal and warranting peremptory relief without argument or formal submission." *VHS Huron Valley Sinai Hosp v Sentinel Ins Co*, unpublished order of the Court of Appeals, entered October 26, 2017 (Docket No. 328005). After receiving leave from this Court to do so, defendant filed a supplemental brief, and plaintiff filed a brief in response.

II. ANALYSIS

On remand, the pivotal question is whether the Michigan Supreme Court's decision in *Covenant* affects this Court's prior decision concluding that summary disposition in favor of defendant was not warranted.

As an initial matter, in *Covenant*, the Michigan 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." *Covenant*, 500 Mich at 196. In so ruling, the *Covenant* Court declined to "follow the long line of cases from the Court of Appeals recognizing that a healthcare provider may sue a no-fault insurer to recover PIP benefits under the no-fault act." *Id*. at 200. Instead, it relied "on the language of the no-fault act to conclude that a healthcare provider possesses no statutory cause of action against a no-fault insurer for recovery of PIP benefits." *Id*. at 200.[3]

Post-*Covenant*, this Court has recognized that a healthcare provider "cannot pursue a statutory cause of action for PIP benefits directly from an insurer." *W A Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159, 172; 909 NW2d 38 (2017). In *W A Foote Mem Hosp*, *id*. at 173, this Court considered whether *Covenant* should apply retroactively to cases pending on appeal when it was decided or apply prospectively only. This Court concluded that it was required to apply the Michigan Supreme Court's decision in *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503; 821 NW2d 117 (2012)—which "essen-

[3] This Court is bound to follow precedent of the Michigan Supreme Court. *State Treasurer v Sprague*, 284 Mich App 235, 242; 772 NW2d 452 (2009).

tially adopted the rationale" of the United States Supreme Court's decision in *Harper v Virginia Dep't of Taxation*, 509 US 86, 97; 113 S Ct 2510; 125 L Ed 2d 74 (1993)—holding that judicial decisions concerning statutory interpretation apply retroactively to all cases pending on direct review when the rule is announced. *W A Foote Mem Hosp*, 321 Mich App at 190-191.

In *W A Foote Mem Hosp*, *id*. at 167-168, 173-174, 183, 196, this Court applied *Covenant* retroactively because the issue whether the plaintiff possessed a statutory cause of action was preserved and the case was pending on direct review when *Covenant* was issued. Because the issue whether the plaintiff possessed a statutory cause of action was preserved, this Court stated that it was not necessary to decide whether full or limited retroactivity should apply. *Id*. at 174 n 9. As this Court explained, "[A] judicial decision with full retroactivity would apply to all cases then pending, whereas with limited retroactivity it would apply in pending cases in which the issue had been raised and preserved." *Id*. at 175 n 9 (citation omitted). Finally, this Court concluded that, even if it were to consider the "threshold question" and the "three-factor test" that are often stated in Michigan caselaw, it would not "find a level of exigency that would justify contravening the general rule of full retroactivity." *Id*. at 191, 195.

As in *W A Foote Mem Hosp*, the question of whether *Covenant* should be given full or limited retroactive effect is not determinative in this case, given that defendant raised plaintiff's lack of standing as an affirmative defense. Additionally, in its motion for summary disposition, defendant stated that it was "[a]ssuming for purposes of this Motion that Plaintiff has standing at all[.]" Moreover, given that it is a

question of law and all the facts necessary for its resolution are present, the issue of standing is preserved and *Covenant* would apply to this case even if it were given only limited retroactivity. See *id*. at 174.

In their briefs following remand, the parties disagree on a key issue relevant to the interplay between *Covenant* and the facts of this case, that being whether defendant waived the issue of standing[4] by entering into a stipulated order for dismissal and consent judgment in the trial court.

This Court reviews de novo issues pertaining to the interpretation of contractual language and interprets contractual terms in accordance with their ordinary meaning when the terms are not expressly defined in the contract. *Barton-Spencer v Farm Bureau Life Ins Co of Mich*, 500 Mich 32, 39; 892 NW2d 794 (2017). The Michigan Supreme Court has also recently instructed that we are to "construe contracts 'so as to give effect to every word or phrase as far as practicable.' " *Id*. at 40, quoting *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003).

> This Court's main goal in the interpretation of contracts is to honor the intent of the parties. The words used in the contract are the best evidence [of] the parties' intent. When contract language is clear, unambiguous, and has a definite meaning, courts do not have the ability to write a different contract for the parties, or to consider extrinsic testimony to determine the parties' intent. [*Auto-Owners Ins Co v Campbell-Durocher Group Painting & Gen Contracting, LLC*, 322 Mich App 218, 225; 911 NW2d 493 (2017), quoting *Kyocera Corp v Hemlock Semiconductor, LLC*, 313 Mich App 437, 446; 886 NW2d 445 (2015) (quotation marks omitted).]

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[4] "Whether a party has standing is a question of law that is reviewed de novo by this Court." *Coldsprings Twp v Kalkaska Co Zoning Bd of Appeals*, 279 Mich App 25, 28; 755 NW2d 553 (2008) (citation omitted).

"A stipulation is an agreement, admission, or concession made by the parties in a legal action with regard to a matter related to the case." *In re Koch Estate*, 322 Mich App 383, 402; 912 NW2d 205 (2017) (quotation marks and citation omitted). This Court will construe a stipulation using the same principles applicable to a contract. *Id*. See also *In re Nestorovski Estate*, 283 Mich App 177, 183; 769 NW2d 720 (2009) (recognizing that stipulated orders that the trial court accepts and enters are interpreted using the same legal principles applicable to contracts). Moreover, we are aware of the well-settled legal principle emphasized by our dissenting colleague and discussed in the Michigan Supreme Court's decision in *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005), that it is a "fundamental tenet" of contract jurisprudence that "unambiguous contracts are not open to judicial construction and must be *enforced as written*." This legal principle is grounded in the rationale that the judiciary ought not interfere with the right of individuals to "arrange their affairs via contract." *Id*.

With regard to the issue of waiver, in *Nexteer Auto Corp v Mando America Corp*, 314 Mich App 391, 395-396; 886 NW2d 906 (2016), this Court stated, in pertinent part:

> A waiver is an intentional relinquishment or abandonment of a known right. An affirmative expression of assent constitutes a waiver. In contrast, a failure to timely assert a right constitutes a forfeiture.
>
> A stipulation is an agreement, admission or concession made by the parties in a legal action with regard to a matter related to the case. *To waive a right, the language of a stipulation must show an intent to plainly relinquish that right*. However, the use of specific key words is not required to waive a right. [Quotation marks and citations omitted; emphasis added.]

Returning to the facts of the present case, the stipulated order for dismissal and consent judgment provides, in pertinent part:

> WHEREFORE, upon hearing and argument of April 24, 2015, this Court entered an Order dated May 21, 2015 denying the Motion for Summary Disposition brought by Sentinel Insurance Company ("Sentinel").
>
> WHEREFORE, Sentinel argued that it was entitled to summary disposition on the grounds that this provider suit is barred by *res judicata*, the injured party (Charles Hendon) having filed his own suit against Sentinel, based upon the same accident that gave rise to this suit, which was dismissed with prejudice pursuant to a release.
>
> WHEREFORE, Sentinel wishes to enter a final Order in this cause for the purpose of filing an appeal as of right from the court's May 21, 2015 decision, which denied Sentinel's Motion for Summary Disposition.
>
> WHEREFORE, Sentinel and Plaintiff VHS Huron-Valley Sinai Hospital, d/b/a DMC Surgery Hospital ("DMC") have agreed to the amount that DMC would be entitled to, if Sentinel's position regarding *res judcata*/release [sic] is ultimately rejected by the Michigan Court of Appeals or Supreme Court.
>
> WHEREFORE, the parties hereby agree to the entry of a judgment (subject to Sentinel's right to appeal as set forth above) against Sentinel and in favor of DMC in the amount of $61,712.18, plus taxable costs [and interest calculated under MCL 600.6013 of the Revised Judicature Act (RJA)] consistent with *Bonkowski v Allstate* [*Ins Co*], 281 Mich App 154[; 761 NW2d 784] (2008).
>
> WHEREFORE, the parties further agree that, if Sentinel's position regarding *res judcata*/release [sic] is ultimately rejected by the Michigan Court of Appeals or Supreme Court, DMC will also be entitled to an award of interest pursuant to MCL 500.3142, to be calculated at the time the aforementioned judgment is paid to DMC based upon the following dates:
>
> * * *

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that judgment is entered in favor of DMC and against Sentinel in the amount of $61,712.18, plus taxable costs and RJA interest consistent with *Bonkowski v Allstate*, 281 Mich App 154 (2008), plus interest pursuant to MCL 500.3142 to be calculated as indicated above at the time said judgment is satisfied.

IT IS FURTHER ORDERED that, notwithstanding anything set [forth] above, Sentinel hereby reserves its appellate rights with respect to the May 21, 2015 denial of its Motion for Summary Disposition, as it is Sentinel's intention to use this order as a final order allowing it to appeal by right from that decision.

IT IS FURTHER ORDERED that the aforementioned judgment amount shall not be recoverable until Sentinel has exhausted its appellate remedies, relative to the denial of its Motion for Summary Disposition.

IT IS FURTHER ORDERED that if, for any reason, Sentinel chooses not to further pursue its appellate remedies, this judgment shall remain in effect and shall be recoverable upon expiration of any applicable appeal period(s) relative to the denial of Sentinel's Motion for Summary Disposition.

IT IS FURTHER ORDERED that if, for any reason, an appellate court determines that this Consent Judgment is not a final order that is appealable by right, this agreement is null and void.

IT IS FURTHER ORDERED that the above-entitled cause of action be, and hereby is, dismissed with prejudice and without costs to any of the parties hereto, pursuant to the terms herein.

This is a final order that resolves the last pending claim and closes the case at the trial court level.

The Michigan Supreme Court has made it abundantly clear, following a comprehensive review of the no-fault act, MCL 500.3101 *et seq*., that healthcare

providers do not have standing to pursue a claim against a no-fault insurer for PIP benefits for the allowable expenses incurred by an insured. *Covenant*, 500 Mich App at 195. While plaintiff asserts that defendant waived its opportunity to challenge plaintiff's standing to bring this cause of action by entering into the stipulated order for dismissal and consent judgment, we disagree with this contention. We recognize that the language of the stipulated order for dismissal and consent judgment established defendant's intent to appeal this case on the issue of "*res judicata*/release," the issue that was decided following defendant's motion for summary disposition. However, we are not persuaded that a review of the plain language of the stipulated order for dismissal and consent judgment leads to the inexorable conclusion that defendant intended to waive any and all issues related to plaintiff's standing. Our conclusion is buttressed by the fact that there is no language in the stipulated order for dismissal and consent judgment indicating that defendant intended to clearly and unequivocally waive its legal position with respect to plaintiff's standing. *Nexteer Auto Corp*, 314 Mich App at 395-396. This Court may not "read into the contract terms not agreed upon by the parties." *Trimble v Metro Life Ins Co*, 305 Mich 172, 175; 9 NW2d 49 (1943) (quotation marks and citation omitted).

While we properly base our conclusion on the plain language of the stipulated order for dismissal and consent judgment, our determination is supported by a review of the record and the procedural posture of this case as a whole. For example, as a matter of background, given the state of the law before *Covenant* was decided, defendant may have reasonably surmised that any challenges to plaintiff's standing would have been rejected by the trial court and the appellate

courts. See *W A Foote Mem Hosp*, 321 Mich App at 174 (recognizing, in the context of rejecting the assertion that standing was waived, that "it is clear that counsel was aware that then-applicable Court of Appeals precedent likely would have rendered any [argument regarding standing] futile"). Put another way, defendant may have concluded, very reasonably on the basis of the then-existing pertinent jurisprudence, that disputing plaintiff's standing in the trial court, as on appeal, would not have been the most successful avenue to pursue. Additionally, as already noted, defendant aptly questioned in its motion for summary disposition whether plaintiff even had standing in this case. Moreover, while its application for leave was pending in the Michigan Supreme Court, and the day after *Covenant* was decided, defendant filed supplemental authority in the Michigan Supreme Court challenging plaintiff's standing to pursue this cause of action. These circumstances support our conclusion that the plain language of the stipulated order for dismissal and consent judgment in this case does not manifest defendant's intention to "plainly relinquish" its right to challenge plaintiff's standing. *Nexteer*, 314 Mich App at 395-396.

III. CONCLUSION

Accordingly, in light of the Michigan Supreme Court's pronouncement in *Covenant*, plaintiff does not have a cause of action against defendant.[5] We vacate the trial court's stipulated order for dismissal and consent judgment, reverse the trial court's order denying defendant's motion for summary disposition, and remand for entry of judgment in favor of defendant. We do not retain jurisdiction.

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[5] There is no indication in the record that Hendon assigned his rights to "past or presently due benefits" to plaintiff. *Covenant*, 500 Mich at 217 n 40.

O'BRIEN, J., concurred with FORT HOOD, P.J.

GLEICHER, J. (*dissenting*). A release is a contract. We interpret contracts according to their plain and unambiguous terms. We do not add or ignore words. We disdain interpretative methodologies premised on "reasonableness." "A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written*." *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005).

Given these well-settled rules, the majority's conclusion that the plain words of the parties' release do not mean what they say, and instead must be viewed against the backdrop of "the record and the procedural posture of this case as a whole," is nothing short of remarkable. Contrary to *Rory* and every rule of contract interpretation, the majority has rewritten the parties' release.

This is not a hard case, and its resolution should be as simple as the rule set out in *Rory*. Charles Hendon, Jr., sustained personal injuries in an accident with an uninsured vehicle. Plaintiff, VHS Huron Valley-Sinai Hospital, Inc., provided Hendon with healthcare services related to the accident. Hendon filed a first-party lawsuit against defendant, Sentinel Insurance Company, seeking uninsured motorist (UIM) benefits, but failed to include in his lawsuit a claim for no-fault personal protection insurance (PIP) benefits. Hendon and Sentinel settled Hendon's UIM claim. Huron Valley then sued Sentinel for payment of Hendon's medical expenses. Sentinel contended that its liability for Hendon's medical expenses should have been litigated in Hendon's UIM case and that res judicata barred the suit. The circuit court denied Sentinel's summary

disposition motion on this ground. Sentinel and Huron Valley settled their dispute by entering into a release. The parties agreed that Sentinel would pay Huron Valley $61,712.18, plus costs and interest, "if Sentinel's position regarding *res judcata*/release [sic] is ultimately rejected by the Michigan Court of Appeals or Supreme Court."

At least two other paragraphs of the release addressed (and repeated) that the sole issue to be presented on appeal was "regarding *res judcata*/release." The 2015 release made no mention of Huron Valley's standing (or alleged lack thereof). Nor did the release reference a healthcare provider's statutory right to sue.

We decided Sentinel's appeal in Huron Valley's favor in October 2016. Not surprisingly, our decision focused exclusively on the doctrine of res judicata; after all, that was the only issue that the parties had agreed to present to us. We held that because Huron Valley and Hendon were not in privity, res judicata did not apply. We did not consider Huron Valley's standing to sue because the issue was never raised. We did not evaluate whether healthcare providers possess a statutory cause of action against insurers because, consistent with the release it signed, Sentinel argued only that Huron Valley's claim for PIP benefits could have been resolved in Hendon's UIM action, implicating res judicata principles. Displeased with our rejection of this argument, Sentinel applied for leave to appeal in the Supreme Court.

In May 2017, the Supreme Court decided *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017), holding that healthcare providers lack standing to maintain direct causes of action against insurers to recover PIP benefits. Senti-

nel now contends that despite the plain and unambiguous language of the release, it is not liable to Huron Valley because the hospital had no cause of action in the first place.

Sentinel's argument would be compelling if it had made it in the trial court or settled the underlying case with a release reserving that issue for appeal. Instead, Sentinel elected to sign a release that carved out for appeal only a single, specific and narrow question: whether the doctrine of res judicata barred Huron Valley's claim. In other words, Sentinel waived any argument that Huron Valley lacked standing. It deliberately elected to forgo this appellate claim. If Sentinel suspected that a standing argument had legal legs, it should have identified "standing" in the release as an issue to be presented to an appellate court.

Perhaps the release did not preserve a standing claim because the parties' bargain *required* Sentinel to waive the issue. Perhaps Sentinel's counsel calculated incorrectly that the Supreme Court would decide *Covenant* differently. We need not speculate because our Supreme Court has forcefully and effectively instructed that if a contract's words are unambiguous, we look no further to ascertain the parties' intent. The words lend themselves to but one interpretation in this case: Sentinel agreed to appeal on res judicata grounds and waived its potential standing argument.

The majority makes much of the fact that Sentinel raised the issue of standing in the trial court by including it as an affirmative defense. This proves my point: Sentinel knew an important legal issue existed that might entirely preclude Huron Valley's claim. Yet Sentinel deliberately decided to forgo asserting a standing challenge when it signed a release plainly limiting its appeal to "res judicata." This is called a waiver.

The majority's reliance on the *absence* of language in the release "indicating that defendant intended to clearly and unequivocally waive its legal position with respect to plaintiff's standing" turns the law of contracts—and waiver—upside down. "[A]n unambiguous contract reflects the parties' intent as a matter of law." *In re Egbert R Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). In other words, the parties to a contract are bound by what they say, not by what they do not say. We do not rewrite unambiguous contracts by intuiting what a party really meant to say or speculating about subjective intent. We do not bail out parties who forget to include a provision or who make a bad prediction and elect to go in one direction rather than another. "Courts have long held parties to agreements they make, regardless of the harshness of the results." *Nexteer Auto Corp v Mando America Corp*, 314 Mich App 391, 396; 886 NW2d 906 (2016).[1]

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[1] The majority cites *Nexteer* as authority for its holding that a waiver of a right requires language reflecting a specific intent to waive the right. In *Nexteer*, 314 Mich App at 393, however, this Court upheld the validity of a stipulation that stated that " '[a]n agreement to arbitrate this controversy . . . exists [but] is not applicable.' " (Alterations in original.) One party, Mando, changed its mind about arbitration, and sought to reassert the arbitration agreement. This Court held that the stipulation's language "that the arbitration provision 'was not applicable' " constituted an express and binding waiver. *Id*. at 395. We pointed out that

> Mando was aware of the arbitration clause in the nondisclosure agreement, and it was aware of Nexteer's general allegations in its complaint. It had the ability to apply the language of the arbitration clause to the complaint in order to decide whether it should pursue arbitration. After stipulating that the arbitration provision did not apply, Mando may not now argue that the arbitration provision does in fact apply. [*Id*. at 397.]

Nexteer assuredly does not stand for the proposition that a waiver may be enlarged by reference to legal arguments not mentioned in the waiver. The majority's groundbreaking proposition that stipulated

The majority ignores the law and repudiates the plain language of the release. Instead of holding Sentinel to the bargain it made, the majority tosses a lifeline, excusing Sentinel's waiver by hypothesizing that before the Supreme Court decided *Covenant*, Sentinel "may have reasonably surmised that any challenges to plaintiff's standing would have been rejected by the trial court and the appellate courts." This breathtaking and contrived exemption from the words of the contract suggests that because Sentinel reasonably expected that a standing argument would go nowhere, it could nevertheless preserve the claim without including it in the release. *Rory* forcefully condemns such reasoning: "When a court abrogates unambiguous contractual provisions based on its own independent assessment of 'reasonableness,' the court undermines the parties' freedom of contract." *Rory*, 473 Mich at 468-469. And although this Court has held that *Covenant* applies retroactively to cases awaiting review in which the issue was raised, this Court has never extended the retroactivity rule to embrace cases that have been *settled*.

Sentinel made a choice. It settled the claims brought by Huron Valley. As part and parcel of that settlement, Sentinel agreed in writing to limit its appeal to an argument regarding res judicata, thereby forgoing any and all other legal claims. Having made its bed, Sentinel must lie in it. Any other result violates bedrock principles of contract law and flies in the face of decades of contract jurisprudence. I would hold that based on the clear and unambiguous language of the release, Sentinel's *Covenant* argument comes too late, and respectfully dissent.

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waiver language may be interpreted to mean more than it says contravenes *Nexteer*, *Rory*, and countless other cases. That is why publication is required under MCR 7.215(B)(3) ("A court opinion must be published if it . . . alters, modifies, or reverses an existing rule of law[.]").

PEOPLE v ROSA

Docket No. 336445. Submitted January 10, 2018, at Grand Rapids. Decided January 23, 2018, at 9:15 a.m. Leave to appeal denied 502 Mich 904.

Robert L. Rosa was convicted after a jury trial in the Barry Circuit Court of assault with intent to commit murder, MCL 750.83; assault by strangulation, MCL 750.84(1)(b); and domestic violence, MCL 750.81(2). The court, Amy L. McDowell, J., sentenced Rosa as a second-offense habitual offender, MCL 769.10, to 25 to 50 years' imprisonment for his conviction of assault with intent to commit murder, 10 to 15 years' imprisonment for his conviction of assault by strangulation, and 93 days' imprisonment for his conviction of domestic violence. The victim of defendant's assaultive conduct was his ex-wife, KR. Defendant had become verbally and physically abusive to KR during their marriage, and the two were divorced but still living together at the time of the assault. On March 6, 2016, KR was asleep in a bedroom with her youngest child. Defendant placed a pillow over KR's face, took off his belt, and announced that he was going to rape KR. He placed the belt around KR's neck and tightened it, but KR managed to get a hand between the belt and her neck and was able to continue breathing. Defendant removed the belt and then placed it around KR's neck a second time and cut off her ability to breathe. Physical evidence of the assault included bruising on KR's neck and broken blood vessels around her eyes. Defendant was convicted of the charged offenses and sentenced as indicated. He appealed.

The Court of Appeals *held*:

1. MCL 768.27b allows evidence of a defendant's prior acts of domestic violence to be admitted at trial when the defendant is charged with an offense involving domestic violence. The evidence may be admitted to show a defendant's propensity for domestic violence as long as (1) admission of the evidence would not violate MRE 403 (relevant evidence is admissible only if its probative value is not substantially outweighed by the danger of unfair prejudice) and (2) the prior acts took place no more than 10 years before the charged offense. There is one exception to the 10-year rule: evidence of an act that occurred more than 10 years

before the charged offense may be admissible if admission is in the interest of justice. In this case, the prosecution introduced 16-year-old evidence under the interest-of-justice exception, arguing that the evidence did not violate MRE 403 and that it was probative of defendant's pattern of behavior. But *all* evidence admitted under MCL 768.27b must be probative and must not violate MRE 403. If the interest-of-justice exception could be satisfied merely because evidence was probative of a defendant's propensity and because it survived MRE 403 review, then the 10-year limitation would essentially be rendered nugatory. Any construction rendering any part of a statute surplusage or nugatory must be avoided, so the interest-of-justice exception must be narrowly construed; evidence of prior acts that occurred more than 10 years before the charged offense is admissible under MCL 768.27b only if that evidence is uniquely probative or if the jury is likely to be misled without admission of the evidence. Evidence that defendant was an abusive and violent man during his first marriage—at least 16 years before the instant offenses—was neither uniquely probative nor necessary to ensure that the jury would not be misled. The evidence was merely consistent with and cumulative to the evidence properly admitted in this case, and it was error to admit the testimony under MCL 768.27b.

2. Evidence that is not admissible under MCL 768.27b may be admissible under MRE 404 if it is not offered to show a defendant's propensity. MRE 404 contains no time limitation on prior acts—the remoteness of a prior act affects the weight, not the admissibility, of the evidence. However, under MRE 404(b), prior acts are not admissible to show a defendant's character or trait of character or for the purpose of showing that a defendant's alleged conduct in the charged offense constituted action in conformity with a prior act. In this case, the evidence was not admissible under MRE 404(b) because the purpose of the evidence was to show that defendant acted in conformity with the character shown by his prior acts, i.e., that he was threatening, abusive, and violent. Defendant's first wife's testimony demonstrated that defendant was a dangerous man and an incorrigible spouse abuser, but her testimony did not offer probative evidence on a material issue. Even if defendant's former wife's testimony was at all probative, it should not have been admitted under MRE 403 because the danger of unfair prejudice substantially outweighed the testimony's probative value.

3. The mere presence of some corroborating evidence of guilt does not automatically render harmless the erroneous admission of evidence. A reviewing court must assess the effect of the error

in light of the weight and strength of the untainted evidence. In this case, the properly admitted evidence of guilt was so overwhelming that exclusion of the infirm evidence would not have resulted in a different outcome. KR's testimony was compelling and wholly unshaken by cross-examination. Her injuries were documented, visible, unquestionably caused by strangulation, inflicted when defendant and KR were alone—except for the presence of a sleeping child—and occurred at a time when defendant was very angry. In addition, KR's testimony about defendant's prior acts over the course of 10 years, which was properly admitted under MCL 768.27b, strongly supported the notion that defendant had a strong propensity for violence against KR. Therefore, the exclusion of defendant's first wife's testimony would not have spared defendant from the devastating propensity evidence that had been properly admitted.

4. A criminal defendant is entitled to a properly instructed jury. Jury instructions must include all elements of the crime charged and must not exclude from the jury's consideration material issues, defenses, or theories if there is evidence to support them. MCR 2.512(D)(2) requires that courts use the Michigan Model Criminal Jury Instructions if they are applicable, accurately state the relevant law, and are requested by a party. Defendant argued that the trial court should have delivered M Crim JI 17.4, the instruction on the existence of mitigating factors. A mitigating factor for purposes of this case would be something that caused the defendant an emotional excitement that disturbed the defendant's thinking to the point that an ordinary person might have acted rashly or on impulse, without thinking twice, from passion rather than judgment. The trial court properly declined to give the mitigating-circumstances instruction because (1) defendant did not offer evidence that his emotional excitement was caused by something that would cause an ordinary person to act rashly, (2) defendant was calm when he entered the bedroom, and (3) the assault happened over the course of time and was not a sudden impulsive act.

5. To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) the performance of counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability existed that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. The record did not support defendant's claim that his counsel was ineffective when, during cross-examination, he asked for a police officer's opinion on whether defendant had the intent to murder KR. In fact, the

record reflected that defendant's counsel specifically told the officer-witness that counsel did not ask the officer what the officer *believed*, but that he asked the officer what the officer *knew*. Defendant was not deprived of the effective assistance of counsel.

6. The trial court properly scored Offense Variables 3, 4, and 7, and therefore, the advisory sentencing guidelines range was correctly identified. Points are assessed under MCL 777.37 (OV 7) for aggravated physical abuse, and 50 points are properly assessed when a victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense. In this case, defendant attempted to strangle KR three times during the assault and threatened to rape her. Defendant told the five-year-old child present in the same room to say goodbye to her mother. A preponderance of the evidence supported the trial court's score of 50 points for OV 7 because defendant's conduct was excessively brutal, went beyond what was required to commit the offense, and was designed to substantially increase KR's fear and anxiety. MCL 777.34 (OV 4) addresses serious psychological injury occurring to a victim. Ten points were appropriately assessed for OV 4 in this case because KR was terrified during the lengthy assault and feared for her children's safety. Whether a victim has sought counseling for the psychological injury resulting from a crime is not dispositive, but KR and her children had sought, and were participating in, counseling. Points are assessed under MCL 777.33 (OV 3) for bodily injury, and the trial court properly assigned 25 points to OV 3 for life-threatening or permanent incapacitating injury because defendant strangled KR until she was near death. KR was deprived of oxygen to the point that there were petechiae around her eyes, she suffered extensive external and internal bruising to her throat from the strangulation, and the severity of KR's injury caused her to lose control of her bowels. Strangulation may not always be enough to merit 25 points for OV 3, but when the evidence shows that the strangulation was severe enough and continued long enough that the victim lost consciousness or control over bodily functions, the injury was severe enough to be life-threatening for purposes of scoring OV 3 at 25 points.

7. A trial court may impose a reasonable sentence departure on a defendant when the court has determined that the recommended minimum guidelines range is disproportionate, in either direction, to the seriousness of the crime. A departure must be based on circumstances not adequately embodied within the variables used to score the guidelines. In this case, defendant's

guidelines score resulted in a recommended minimum sentence of 135 to 281 months in prison, and the trial court sentenced defendant to 300 to 600 months of imprisonment, a departure of 19 months over the recommended maximum-minimum sentence under the guidelines. The trial court did not abuse its discretion in departing from the guidelines. In support of the departure, the trial court noted defendant's history of abusing KR throughout their marriage, the fact that the assault occurred while a young child lay sleeping next to KR on the bed, the damage done to a family of four children, and the fact that defendant tried three times to strangle KR. These factors were not fully accounted for by the guidelines. The extent of the departure was also proportionate to the seriousness of the circumstances surrounding the offense and the offender.

Affirmed.

EVIDENCE — PRIOR DOMESTIC VIOLENCE ACTS ADMISSIBLE TO SHOW PROPENSITY — LIMITATIONS ON ADMISSIBILITY — INTEREST-OF-JUSTICE EXCEPTION.

At trial for an offense involving domestic violence, evidence of a defendant's prior acts of domestic violence may be admitted under MCL 768.27b to show the defendant's propensity for domestic violence as long as (1) admission of the evidence would not violate MRE 403 and (2) the prior acts took place no more than 10 years before the charged offense; evidence of a prior act of domestic violence that occurred more than 10 years before the charged offense may also be admitted under the statute if admission of the evidence would serve the interest of justice; evidence of prior acts occurring more than 10 years before the charged offense may be admitted under the MCL 768.27b interest-of-justice exception only if that evidence is uniquely probative or if the jury is likely to be misled without admission of the evidence.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Laura Moody*, Chief Legal Counsel, *Julie A. Nakfoor Pratt*, Prosecuting Attorney, and *Scott R. Shimkus*, Assistant Attorney General, for the people.

Michael A. Faraone PC (by *Michael A. Faraone*) for defendant.

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

PER CURIAM. Defendant was convicted of assault with intent to commit murder, MCL 750.83; assault by strangulation, MCL 750.84(1)(b); and domestic violence, MCL 750.81(2). The convictions arose out of an assault against his ex-wife, KR, on March 6, 2016.[1] He was sentenced as a second-offense habitual offender, MCL 769.10. The sentencing guidelines provided a recommended minimum term of imprisonment of between 135 months and 281 months, but the trial court departed from the guidelines and imposed a sentence of 300 to 600 months' imprisonment for the assault-with-intent-to-commit-murder conviction. Defendant was also sentenced to 120 to 180 months' imprisonment for the assault-by-strangulation conviction and to 93 days' imprisonment for the domestic-violence conviction.

According to KR's testimony and other evidence, defendant entered KR's bedroom while she was asleep with their youngest child asleep beside her. Defendant placed a pillow over KR's face. He then put a belt around her neck and tightened it; however, KR was able to get her hand between the belt and her neck so she could still breathe. Defendant removed the belt and put it around KR's neck a second time and tightened it, cutting off KR's ability to breathe. There was physical evidence of the strangling, including bruising on KR's neck and broken blood vessels around her eyes.

Defendant raises five claims of error in this appeal—three that challenge his convictions and two that challenge his sentences. For the reasons discussed in this opinion, we affirm.

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[1] At the time of the assault in this case, defendant and KR were divorced but still living together.

I. OTHER-ACTS EVIDENCE

Defendant argues that the trial court erred by admitting evidence of prior acts of domestic violence against his first wife.[2] The trial court ruled that the evidence was admissible under MCL 768.27b and MRE 404(b).[3] We agree with defendant that this evidence was improperly admitted, but after a review of the entire record, we are confident that this error was harmless. It is highly unlikely that the evidence affected the outcome of the trial, and its admission did not undermine the reliability of that outcome. See *People v Young*, 472 Mich 130, 141-142; 693 NW2d 801 (2005); *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). We will first review the question of admissibility in relation to the statute, MCL 768.27b, and then in relation to the rule, MRE 404(b).

A. MCL 768.27b

MCL 768.27b provides that in domestic violence cases, evidence of other acts of domestic violence is admissible, even to show propensity, so long as admission of the evidence does not violate MRE 403 and the acts took place no more than 10 years before the charged offense. The statute reads in pertinent part:

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[2] Defendant also argued before the trial court that KR should not be allowed to testify about defendant's prior bad acts against her; however, he does not raise this on appeal.

[3] "The decision whether to admit evidence is within the trial court's discretion and will not be disturbed absent an abuse of that discretion." *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). A trial court abuses its discretion when it "chooses an outcome that falls outside the range of principled outcomes." *People v Douglas*, 496 Mich 557, 565; 852 NW2d 587 (2014) (quotation marks and citation omitted). However, when "the decision involves a preliminary question of law, [such as] whether a rule of evidence precludes admissibility, the question is reviewed de novo." *McDaniel*, 469 Mich at 412.

> (1) Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.
>
> * * *
>
> (4) Evidence of an act occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that admitting this evidence is in the interest of justice.

The prior acts testified to by defendant's first wife occurred at least 16 years before the events for which defendant was charged in this case. Per the language of the statute, those acts that occurred more than 10 years before the charged offense are inadmissible unless their admission "is in the interest of justice." The statute does not define "interest of justice."

The prosecution argues that the evidence of prior acts occurring outside the 10-year period was admissible under the interest-of-justice exception because the evidence was probative of defendant's pattern of behavior and it did not violate MRE 403. The difficulty with this standard is that if we read the interest-of-justice exception to apply merely because the evidence is probative of defendant's propensities and it survives MRE 403 review, the 10-year limitation would have no meaning. *All* evidence admitted under MCL 768.27b, including evidence of acts falling within the 10-year window, must be probative and must not violate MRE 403. Thus, to define "interest of justice" by such a standard would mean that evidence of prior acts that occurred more than 10 years before the charged offense would be admissible simply by showing that the evidence would be admissible if it had occurred within the

10-year window. This would render the 10-year limit essentially nugatory, and it is well settled that we must "avoid a construction that would render any part of the statute surplusage or nugatory." *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011) (quotation marks and citation omitted).

For this reason, we conclude that the trial court applied the wrong standard in determining whether the testimony of defendant's first wife fell within the interest-of-justice exception. To avoid rendering the 10-year limit nugatory, the exception should be narrowly construed. Accordingly, we conclude that evidence of prior acts that occurred more than 10 years before the charged offense is admissible under MCL 768.27b only if that evidence is uniquely probative or if the jury is likely to be misled without admission of the evidence.

In this case, the testimony of defendant's first wife concerning events that occurred at least 16 years before the charged crimes was not uniquely probative. KR's testimony laid out a detailed and compelling picture of defendant as an abusive and violent husband. She described repeated verbal abuse, multiple beatings, and a rape. The older son described threatening and violent behavior as well. The prior bad acts described by defendant's first wife were neither uniquely probative nor were they needed to ensure that the jury was not misled; instead, the acts were consistent with and cumulative to KR's testimony regarding defendant's character and propensity for violence.

B. MRE 404

We next consider whether the testimony of defendant's first wife, though not admissible under MCL

768.27b, was nevertheless admissible under MRE 404. MRE 404 differs from MCL 768.27b in several ways that are relevant here. First, there is no temporal limitation in MRE 404. "The remoteness of the other act affects the weight of the evidence rather than its admissibility." *People v Brown*, 294 Mich App 377, 387; 811 NW2d 531 (2011). Unlike the statute, MRE 404 contains no bright-line cutoff based on when the other acts took place. Second, while the statute permits evidence to be admitted to show a defendant's propensity or character, MRE 404 does not. The text of the rule begins, "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ." MRE 404(a). However, MRE 404(b)(1) sets forth a nonexhaustive list of several grounds, other than propensity, for which evidence of other acts may serve as proof "when the same is material."

We conclude that the testimony of defendant's prior wife was not admissible under MRE 404(b) because the purpose of the evidence was to show that in this case, defendant acted in conformity with the character shown by the prior acts, i.e., that defendant was threatening, abusive, and violent. The testimony of defendant's first wife demonstrated that defendant was a dangerous man and an incorrigible spouse abuser, but her testimony did not offer probative evidence on a material issue. Putting aside the fact that identity was not at issue, there was no particular pattern or scheme described by his first wife that would have served to identify defendant except to show that abusing and attacking his wives was in the nature of defendant's character. Nor did the evidence have significant, if any, probative value as to intent. Testimony about defendant's abusive treatment of his first wife many years ago tells us little, if anything, about whether defendant

had an intent to kill when he strangled KR. By contrast, there is substantial evidence of defendant's intent in KR's testimony describing the actual assault at issue, i.e. that he attempted to smother her with a pillow and twice placed a belt around her neck and tightened it so that she could not breathe. Further, the photographs of KR's bruises and discoloration around her eyes from ocular petechiae[4] were very relevant to intent because they showed that the belt was tightened around her neck for a significant period of time. Finally, defendant's 16-year-old son testified that the day after the assault against his mother, defendant was in a state of anger and repeatedly attacked him. Compared to this sort of evidence, 16-year-old assaults against a different person are barely probative of intent, if at all. And to the degree the prior acts are at all probative, under the facts of this case, they would not survive review under MRE 403 due to the danger of unfair prejudice.

C. HARMLESS ERROR

As noted, the testimony of defendant's first wife did carry significant potential for unfair prejudice because the jury could conclude that even if defendant was not guilty of the instant charge, he was a bad and dangerous man who should be incarcerated. As the Supreme Court stated in *People v Denson*, 500 Mich 385, 410; 902 NW2d 306 (2017):

> [O]ther-acts evidence carries with it a high risk of confusion and misuse. When a defendant's subjective character [is used] as proof of conduct on a particular occasion, there

[4] Testimony at trial established that petechiae are "little red dots" on the face that represent broken capillaries and blood vessels that hemorrhaged as a result of oxygen and blood flow to the head being cut off.

> is a substantial danger that the jury will overestimate the probative value of the evidence. The risk is severe that the jury will use the evidence precisely for the purpose that it may not be considered, that is, as suggesting that the defendant is a bad person, a convicted criminal, and that if he did it before he probably did it again. [Quotation marks and citations omitted; second alteration in original.][5]

Given these dangers, the Supreme Court in *Denson* instructed that harmless-error analysis should be applied with care and that "the mere presence of some corroborating evidence [of guilt] does not automatically render an error harmless." *Id*. at 413. Rather, the Court explained that we are "to assess the effect of the error in light of the weight and strength of the untainted evidence." *Id*. (quotation marks and citation omitted). Having done so in this case, we conclude that the properly admitted evidence of guilt was so overwhelming that exclusion of the infirm evidence could not have resulted in a different outcome. KR's testimony was compelling and wholly unshaken by cross-examination. Her injuries were documented, visible, and unquestionably caused by strangulation. They were inflicted when defendant and KR were alone except for the presence of a sleeping child, and

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[5] See also *People v Allen*, 429 Mich 558, 569; 420 NW2d 499 (1988), in which the Supreme Court described three ways in which prior-acts evidence may prove prejudicial:

> First, . . . jurors may determine that although defendant's guilt in the case before them is in doubt, he is a bad man and should therefore be punished. Second, the character evidence may lead the jury to lower the burden of proof against the defendant, since, even if the guilty verdict is incorrect, no "innocent" man will be forced to endure punishment. Third, the jury may determine that on the basis of his prior actions, the defendant has a propensity to commit crimes, and therefore he probably is guilty of the crime with which he is charged.

there is evidence that the assault occurred at a time when defendant was very angry. Moreover, KR's testimony about defendant's prior bad acts over the course of 10 years, which was properly admitted under MCL 768.27b, strongly supported the notion that defendant had a strong propensity toward violence and specifically violence toward KR. Thus, exclusion of the testimony of defendant's first wife would not have spared defendant from the devastating propensity evidence that was properly admitted. Finally, defendant's claim that KR had inflicted these injuries on herself was wholly incredible and would not have been less incredible had the testimony of his first wife been excluded.

II. JURY INSTRUCTION ON MITIGATING CIRCUMSTANCES

Defendant contends that the trial court's refusal to instruct the jury on mitigating circumstances denied him his right to a fair trial and the right to present a defense. We disagree.[6]

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[6] "This Court reviews de novo claims of instructional error." *People v Martin*, 271 Mich App 280, 337; 721 NW2d 815 (2006). In reviewing instructional-error claims, "this Court examines the instructions as a whole, and even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried." *Id*. at 337-338 (quotation marks and citation omitted). Further, we review de novo whether defendant suffered a deprivation of his constitutional right to present a defense. *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009). Because defendant failed to argue in the trial court that he was denied his constitutional right to present a defense, our review is for plain error affecting substantial rights. See *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). Plain error requires that: "1) [an] error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id*. at 763. "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*.

"A criminal defendant is entitled to have a properly instructed jury consider the evidence against him." *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). "The jury instructions must include all elements of the crime charged, and must not exclude from jury consideration material issues, defenses or theories if there is evidence to support them." *People v Armstrong*, 305 Mich App 230, 240; 851 NW2d 856 (2014) (quotation marks and citation omitted). Further, MCR 2.512(D)(2) requires that the jury be instructed using the Michigan Model Criminal Jury Instructions if "(a) they are applicable, (b) they accurately state the applicable law, and (c) they are requested by a party."

Defendant argues that the trial court should have instructed the jury on the existence of mitigating factors pursuant to M Crim JI 17.4.[7] Defendant testi-

[7] M Crim JI 17.4 provides:

> (1) The defendant can only be guilty of the crime of assault with intent to commit murder if [he / she] would have been guilty of murder had the person [he / she] assaulted actually died. If the assault took place under circumstances that would have reduced the charge to manslaughter if the person had died, the defendant is not guilty of assault with intent to commit murder.
>
> (2) Voluntary manslaughter is different from murder in that for manslaughter, the following things must be true:
>
> (3) First, when the defendant acted, [his / her] thinking must have been disturbed by emotional excitement to the point that an ordinary person might have acted on impulse, without thinking twice, from passion instead of judgment. This emotional excitement must have been caused by something that would cause an ordinary person to act rashly or on impulse. The law does not say what things are enough to do this. That is for you to decide. . . .
>
> (4) Second, the killing itself must have resulted from this emotional excitement. The defendant must have acted before a reasonable time had passed to calm down and before reason took over again. The law does not say how much time is needed. That is for you to decide. The test is whether a reasonable time passed under the circumstances of this case.

fied that he was suicidal, if not psychotic, on the night of the assault, that he was highly emotional, and that he was under the influence of nonprescribed medication. Accordingly, he argues that had the court given the requested instruction, the jury would have concluded that he was acting out of passion.

The trial court properly declined to give the mitigating-circumstances instruction because defendant did not offer evidence that his "emotional excitement" was "caused by something that would cause an ordinary person to act rashly" and because, as the trial court pointed out, this assault "happened over the course of time," not in a sudden impulsive act. Indeed, the testimony showed that defendant was calm when he went into the bedroom. In sum, there was no evidence that defendant acted in the heat of passion, which was caused by something that would create such a state in an ordinary person. See *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991). Accordingly, there was no error.

Related to his argument of instructional error, defendant claims that the lack of a mitigation instruction denied him his right to present a defense. We disagree. First, defendant testified that he never assaulted the victim. He acknowledged that he put the belt over the victim's head, but he contended that he never tightened it around her neck. He did not testify that he assaulted the victim because of the stress of the events leading up to the incident. As a result, he has failed to show how the trial court's refusal to include the mitigating-circumstances instruction denied him his constitutional right to present a defense.

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(5) If you find that the crime would have been manslaughter had the person died, then you must find the defendant not guilty of assault with intent to murder . . . . [Bracketed material in original.]

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues that he was denied the effective assistance of counsel. We disagree.[8]

To prevail on a claim of ineffective assistance of counsel, a defendant must establish that "(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). "A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and he must show that, but for counsel's error, the outcome of the trial would have been different." *Id*.

Defendant claims that counsel was ineffective when he asked for a police officer's opinion, during cross-examination, on whether defendant had an intent to murder the victim. Defendant's assertion is based on the following exchange between defense counsel and the police officer involved in the investigation of the case:

> *Q*. Okay. And on the night in question, between him and [KR], you don't know what his intent is that night, correct?

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[8] "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's "factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). However, because defendant failed to move for a new trial or an evidentiary hearing, this Court's review of his ineffective assistance of counsel claim is limited to errors apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

A. I absolutely believe that his intent was to—

Q. I didn't ask what you believe. I asked what you know.

A. I—based on the evidence and the total—totality of the circumstances, it would show that his intent was to murder [KR] that night.

Q. All right. Thank you.

Defendant's claim that defense counsel asked for the police officer's opinion is not supported by the record. In fact, defense counsel specifically stated, "I didn't ask you what you believe. I asked what you know." In context, the question was to show that the officer did not have any knowledge of defendant's intent during the assault, which was a legitimate strategy based on the charges and the testimony. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008) (holding that "[d]ecisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy"). This Court "will not second-guess counsel on matters of trial strategy, nor [will it] assess counsel's competence with the benefit of hindsight." *Id*. Defendant has not shown that he was denied effective assistance of counsel.

IV. SENTENCING

Defendant argues that he is entitled to resentencing because the trial court's improper scoring of Offense Variables (OVs) 3, 4, and 7 altered the advisory sentencing range. We disagree.[9]

[9] "Issues involving the proper interpretation and application of the legislative sentencing guidelines . . . are legal questions that this Court reviews de novo." *People v Ambrose*, 317 Mich App 556, 560; 895 NW2d 198 (2016) (quotation marks and citation omitted). The trial court's

First, defendant argues that the trial court improperly scored OV 7 at 50 points. MCL 777.37 provides in pertinent part:

> (1) Offense variable 7 is aggravated physical abuse. Score offense variable 7 by determining which of the following apply and by assigning the number of points attributable to the 1 that has the highest number of points:
>
> (a) A victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense ..... 50 points
>
> (b) No victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense ..... 0 points

"OV 7 is designed to respond to particularly heinous instances in which the criminal acted to increase [a victim's] fear by a substantial or considerable amount." *People v Glenn*, 295 Mich App 529, 536; 814 NW2d 686 (2012), rev'd on other grounds by *People v Hardy*, 494 Mich 430, 434; 835 NW2d 340 (2013). For purposes of OV 7, "excessive brutality means savagery or cruelty beyond even the 'usual' brutality of a crime." *Glenn*, 295 Mich App at 533. Although "all crimes against a person involve the infliction of a certain amount of fear and anxiety," the trial court "may consider conduct inherent in a crime" when scoring OV 7. *Hardy*, 494 Mich at 442 (quotation marks and citation omitted).

"[A] defendant's conduct does not have to be similarly egregious to sadism, torture, or excessive brutality for OV 7 to be scored at 50 points, and . . . absent an express statutory prohibition, courts may consider

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"factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *Id*.

circumstances inherently present in the crime when scoring OV 7." *Hardy*, 494 Mich at 443 (quotation marks omitted). Rather, "[t]he relevant inquiries are (1) whether the defendant engaged in conduct beyond the minimum required to commit the offense; and, if so, (2) whether the conduct was intended to make a victim's fear or anxiety greater by a considerable amount." *Id*. at 443-444.

The record supports the trial court's determination that OV 7 should be assigned 50 points. Defendant attempted to strangle or suffocate KR three times over the course of the assault. Further, at the outset of the assault, KR's five-year-old child was asleep next to her. When the child awoke in the middle of the assault, defendant told the child to say goodbye to her mother and that her grandmother would take good care of her. Finally, it appears that defendant intended to rape KR while he was strangling her. Based on this evidence, the trial court properly found, by a preponderance of the evidence, that defendant's conduct was excessively brutal, that it went beyond what was required to complete an assault with the intent to kill KR, and that it was designed to substantially increase KR's fear and anxiety.

Defendant also contends that the trial court improperly scored OV 4 at 10 points. "Offense Variable 4 concerns psychological injury to a victim and directs a sentencing court to assess 10 points if '[s]erious psychological injury requiring professional treatment occurred to a victim[.]' " *People v McChester*, 310 Mich App 354, 356; 873 NW2d 646 (2015), quoting MCL 777.34(1)(a) (alterations in original). MCL 777.34(2) requires a court to "[s]core 10 points if the serious psychological injury may require professional treat-

ment" but states that "[i]n making this determination, the fact that treatment has not been sought is not conclusive."

Here, KR testified in detail about the terror she experienced during the lengthy assault and her fear for the fate of her children, which defendant exploited to increase her suffering. KR testified that she did not call anyone for help that night because she was too afraid to do so. A social worker and police officer both testified that KR appeared too frightened to speak to them when they visited the family home. A second police officer interviewed KR at the police station and testified that KR looked directly at the ground and would not make eye contact. Further, during defendant's sentencing, KR stated that she was in counseling and was working through the situation together with her children. Defendant's Presentence Investigation Report also stated that KR reported that she and her children were in counseling.

Because the evidence showed that KR experienced a terrifying ordeal, and actually sought professional counseling after the assault, defendant's claim of error regarding OV 4 fails.

Defendant also argues that the trial court improperly scored OV 3 at 25 points. "Offense variable 3 is physical injury to a victim." MCL 777.33(1). OV 3 should be scored at 25 points when "[l]ife threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c). OV 3 should be scored at 10 points when "[b]odily injury requiring medical treatment occurred to a victim." MCL 777.33(1)(d). OV 3 should be scored at 5 points when "[b]odily injury not requiring medical treatment occurred to a victim." MCL 777.33(1)(e).

At the sentencing hearing, defendant objected to the scoring of OV 3, arguing that KR only suffered bruising to her neck and that there was no testimony that the injuries KR suffered were life-threatening. The defense also pointed out that KR did not seek any medical treatment that night or in the following days and that she was able to go to work the next day and was not incapacitated. Therefore, defendant contended that OV 3 should be scored at 5 points, rather than 25. The trial court disagreed, stating that KR's injuries and the cause of those injuries were life-threatening because strangulation can cause death.

The trial court was correct that the assault could have ended in KR's death had defendant been able to complete his intended murderous assault. However, OV 3 does not assess whether a *defendant's actions* were life-threatening; rather, OV 3 assesses whether a *victim's injuries* were life-threatening. See *Peltola*, 489 Mich at 181 (holding that the words in a statute are interpreted "in light of their ordinary meaning and their context within the statute"). The issue may be more easily considered in the context of a shooting for which a defendant is charged with assault with intent to murder. If the gunshot resulted in the victim's nearly bleeding to death, the victim suffered a life-threatening injury, and OV 3 should be scored accordingly. Conversely, if the defendant was a poor shot and the victim received only a minor wound that did not place his or her life in danger or permanently incapacitate him or her, OV 3 should not be scored at 25 points.

Applying that standard to this case, we conclude that OV 3 was properly scored. The evidence demonstrated that the strangulation continued until KR was near death. She had petechiae around her eyes, a phenomenon that results from an extended period of

strangulation and is the result of increasing venous pressure in the head and anoxic injury to the vessels. In addition, KR suffered extensive external and internal bruising to her throat demonstrating an extended period during which her airway was shut down, depriving her brain of oxygen. Finally, the severity of the injury caused KR to lose control of her bowels.

This is not to say that the act of strangulation is always enough to score OV 3 at 25 points. However, when the evidence shows that the strangulation was severe enough and continued long enough such that the victim lost consciousness or control over bodily functions—albeit temporarily—it demonstrates that the anoxic injury was severe enough to be life-threatening.

Finally, defendant claims that his minimum sentence of 300 months (25 years) was an unreasonable and disproportionate upward departure from his recommended guidelines range. We disagree.[10]

"[A] departure sentence may be imposed when the trial court determines that 'the recommended range under the guidelines is disproportionate, in either direction to the seriousness of the crime.' " *People v Steanhouse (On Remand)*, 322 Mich App 233, 238; 911 NW2d 253 (2017) (citation omitted). "An appellate court must evaluate whether reasons exist to depart from the sentencing guidelines and whether the *extent* of the departure can satisfy the principle of proportionality." *Id*. at 239. "The first inquiry in our reasonableness review is whether there were 'circumstances that are not adequately embodied within the variables used

[10] "We review a trial court's upward departure from a defendant's calculated guidelines range for reasonableness." *People v Walden*, 319 Mich App 344, 351; 901 NW2d 142 (2017). "[T]he reasonableness of a sentence [is reviewed] for an abuse of the trial court's discretion." *Id*.

to score the guidelines.' " *Id*., quoting *People v Milbourn*, 435 Mich 630, 659-660; 461 NW2d 1 (1990).

Defendant's sentencing guidelines score resulted in a recommended minimum sentence range of 135 to 281 months of imprisonment for his assault with intent to commit murder conviction. However, the trial court sentenced defendant, as a second-offense habitual offender, to 300 to 600 months' imprisonment, a departure of 19 months over the maximum minimum sentence. In support of the upward departure, the trial court cited defendant's history of abusing KR throughout the marriage, which ultimately culminated in the charged offenses that occurred while KR's young child was in the bed next to her. Further, the trial court noted that defendant intended to rape the victim while he was strangling her and that there were three incidents of attempted strangulation during the assault. Finally, the trial court stated that given defendant's lengthy history of domestic violence, it believed that defendant was dangerous, that his abusive conduct was likely to continue, and that he was not a good candidate for rehabilitation.

Considering the record and the trial court's statements in support of the sentence, the trial court did not abuse its discretion in departing from the guidelines when sentencing defendant. Defendant's long history of abusing KR, the presence of a child during the assault, and the damage done to a family of four children were not fully accounted for by the guidelines. We also conclude that the extent of the departure was not disproportionate. The departure was 19 months from a guidelines maximum of 281 months, a proportional increase given the nonguidelines considerations and which, in percentage terms, was an increase of approximately 7%. As a result, the sentencing depar-

ture was "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Milbourn*, 435 Mich at 636.

Affirmed.

MARKEY, P.J., and SHAPIRO and GADOLA, JJ., concurred.

RETTIG v RETTIG

Docket No. 338614. Submitted December 6, 2018, at Grand Rapids. Decided January 23, 2018, at 9:20 a.m.

Jamie K. Rettig filed an action in the Kent Circuit Court, seeking a divorce from Jeffrey Rettig. The parties mediated all issues related to the divorce, including custody and parenting time related to their minor child and the distribution of personal property and real property. Following mediation, the parties signed a memorandum, which provided that the mediation agreement resolved all disputes between the parties and that the parties agreed to be bound by the agreement. Plaintiff moved for entry of judgment on the memorandum, but defendant moved to set aside the memorandum. The court, Daniel V. Zemaitis, J., entered the judgment of divorce in accordance with the terms of the memorandum, reasoning that defendant had signed the document in the presence of counsel and that defendant's signature was expected to "mean something." Defendant appealed.

The Court of Appeals *held*:

When a settlement agreement is reached following domestic-relations mediation, a hearing must be held and proofs taken in the circuit court before the court may enter judgment on the agreement. The terms of the agreement must be placed on the record, and the parties must acknowledge on the record that the agreement contains the terms of the settlement and the parties' signatures. The acknowledgment of the agreement's terms and the parties' signatures allows the court to exercise its discretion in an informed manner. In a divorce action, a trial court may accept the parties' stipulations or agreements regarding child custody and parenting time and include them in the judgment. A court does not have to articulate each of the MCL 722.23 best-interest factors when it accepts the parties' settlement agreement regarding custody and parenting time because implicit in the court's acceptance of the agreement is the court's determination that the arrangement is in the child's best interests. In other words, while a court must make an independent conclusion that the parties' agreement is in the child's best interests, the court may accept the parties' stipulations or agreements and presume that the parties meant

what they signed. Before entering judgment on a mediated settlement agreement that resolves the parties' custody and parenting-time issues, a circuit court is not required to make an express determination regarding the minor child's established custodial environment or determine if entry of judgment on the agreement would change that environment; a trial court must make a finding regarding a child's established custodial environment when custody is in issue, not when the parties have signed a settlement agreement regarding that issue. In this case, the trial court correctly conducted a hearing and took proofs regarding the memorandum before entering the judgment. The trial court found that both parties had signed the memorandum and that defendant was aware of the terms of the agreement that settled the parenting-time and custody issues. In light of those findings, the trial court did not err by concluding that the parties had reached a binding settlement agreement. Given that the trial court concluded that the agreement appeared to be in the child's best interests, the court properly understood that it was not bound by the parties' agreement regarding custody and parenting time. The trial court was not required to make findings regarding the child's established custodial environment because the parties had agreed on the terms of custody.

Affirmed.

DIVORCE — SETTLEMENT AGREEMENTS — CUSTODY AND PARENTING TIME — ENTRY OF JUDGMENT — ESTABLISHED-CUSTODIAL-ENVIRONMENT DETERMINATION NOT REQUIRED BEFORE JUDGMENT ENTERED.

Before entering judgment on a mediated settlement agreement that resolves the parties' custody and parenting-time issues, a circuit court is not required to make an express determination regarding the minor child's established custodial environment or determine if entry of judgment on the agreement would change that environment; a trial court must make a finding regarding a child's established custodial environment when custody is in issue, not when the parties have signed a settlement agreement regarding that issue.

RizzoBryan, PC (by *Devin R. Day*) for plaintiff.

Mark F. Haslem, PC (by *Mark F. Haslem*) for defendant.

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

RONAYNE KRAUSE, J. Defendant appeals by right the trial court's order denying his motion for reconsideration, rehearing, and relief from judgment; substantively, he appeals the parties' judgment of divorce, which was entered pursuant to a memorandum signed by the parties following a mediation meeting. The memorandum outlined and resolved all the disputes for the divorce, and it was adopted by the trial court. We affirm.

We note initially that defendant complains that plaintiff allegedly failed to disclose an interest in certain real estate during the mediation meeting. However, it appears that the trial court addressed that issue, and in any event, defendant makes no argument pertaining to it and no request for relief for it. We deem it to be a "red herring" that is not properly before this Court or relevant to the issue before us, and even if defendant *had* made a relevant request for relief, his failure to present any argument on point would have waived any basis for such relief. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

The parties married in 2015 and had one minor child together. The marriage did not last long, and plaintiff filed for divorce approximately five months later. In a motion for custody, parenting time, and child support, plaintiff expressed a number of concerns, including an alleged lack of caretaking interest or ability by defendant, an alleged abuse of drugs and alcohol by defendant, and a variety of violent threats or outbursts by defendant. Plaintiff sought full physical custody of the parties' child with some weekly supervised parenting time for defendant; defendant denied the allegations and sought joint legal and physical custody. The trial court entered a temporary order granting joint legal custody, granting plaintiff sole physical custody, grant-

ing defendant parenting time 3 times a week, and ordering defendant to pay $700 a month in child support.

Following the temporary order, the parties participated in facilitated mediation. Both parties had retained counsel. The parties reached an agreement on all issues in the divorce. Among other agreements, defendant's child support was reduced to $300 a month, his parenting time was extended, and the parties agreed to review parenting time and custody when the child reached certain ages. The memorandum signed by the parties reflecting their agreement concluded with the following provision:

> This memorandum of understanding spells out the agreement that we have reached in mediation. This resolves all disputes between the parties and the parties agree to be bound by this agreement.

The memorandum also seemed to resolve disputes over personal property, and it enumerated the parties' specified real estate. As noted, defendant contends that plaintiff did not fully disclose her interest in certain real estate, but that issue has either been addressed by the trial court or waived, and it is not before us.

The parties held a settlement conference before the trial court. Plaintiff subsequently moved for entry of judgment, while defendant moved to set aside the settlement memorandum. The trial court held a hearing on the parties' respective motions and entered the judgment of divorce. The trial court observed that defendant had signed the memorandum in the presence of counsel and that defendant's signature was expected to "mean something." The trial court also asked that this Court provide express guidance regarding "whether or not the parties have the right to make

decisions for their own children." We do so, and we agree with the trial court's assessment of the situation.

> Unlike virtually all other civil litigation between competent individuals, a divorce, even when settled, requires a hearing in the circuit court and the taking of proofs before a judgment can be entered. MCR 3.210(B)(2). As we pointed out in *Koron v Melendy*, 207 Mich App 188, 191; 523 NW2d 870 (1994), this requirement allows for an exercise of judicial discretion. In contemplation of this judicial activity, when the terms of the parties' agreement are placed on the record there must at least be an admission, i.e., acknowledgment, by the parties that the agreement contains the terms of the settlement and the parties' signatures. This acknowledgment of the settlement's terms and the parties' signatures allows the court to exercise the anticipated discretion in an informed manner. [*Wyskowski v Wyskowski*, 211 Mich App 699, 702; 536 NW2d 603 (1995).]

"A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law." *Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d 11 (1998). "The finding of the trial court concerning the validity of the parties' consent to a settlement agreement will not be overturned absent a finding of an abuse of discretion." *Vittiglio v Vittiglio*, 297 Mich App 391, 397; 824 NW2d 591 (2012) (quotation marks and citation omitted). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010). "This Court will defer to the trial court's credibility determinations, and the trial court has discretion to accord differing weight to the best-interest factors." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

In this case, the parties came to an agreement, which was embodied in the memorandum. Notwith-

standing his protestations that he felt pressured, defendant does not seriously dispute that the memorandum reflected the agreement and bore his signature. Even if he attempted to seriously engage in that dispute, the trial court clearly found that defendant had in fact agreed to the memorandum, which, in light of the deference given to the trial court's findings, would be conclusive at this stage. Instead, it appears that defendant simply regretted making the agreement. He now attempts to raise essentially procedural challenges, in particular noting that the memorandum was not read into the record in open court and that it was not signed by the parties' mediator or attorneys. In support, defendant likens the agreement to a mediation settlement, for which MCR 3.216(H)(7) and MCR 2.507(G) require certain procedures to be followed during mediation. However, there was a hearing held, and the agreement was scrutinized before it was entered into the proposed judgment. Therefore, the trial court did not err by finding that the parties had reached a binding settlement agreement that was valid.

This Court has ruled that "in cases where the parties are in agreement regarding custody and visitation and present the court with such an agreement, the trial court need not expressly articulate each of the best interest factors. Implicit in the court's acceptance of the parties' agreement is its determination that the arrangement is in the child's best interest." *Koron*, 207 Mich App at 192-193. "Implicit in the trial court's acceptance of the parties' custody and visitation arrangement is the court's determination that the arrangement struck by the parties is in the child's best interest." *Id*. at 191. Although the trial court is not necessarily constrained to accept the parties' stipulations or agreements verbatim, the trial court is entirely

permitted to accept them and presume at face value that the parties actually meant what they signed. See *id*. There is no coherent reason presented why the trial court could not do so in this case.

Defendant cites *Rivette v Rose-Molina*, 278 Mich App 327, 332-333; 750 NW2d 603 (2008), and *Harvey v Harvey*, 470 Mich 186, 187-188; 680 NW2d 835 (2004), to support his argument that the trial court was required to make an independent factual determination of the statutory best-interest factors even in the face of a mediated agreement between the parents. Neither case is applicable because in both the issue was the extent to which a trial court may "rubber-stamp" a decision made by a referee to resolve a dispute between parents who could not agree. In other words, those cases involved the exact opposite of an agreement reached by the parties. In fact, our Supreme Court explicitly held that its "holding should not be interpreted, where the parties have agreed to a custody arrangement, to require the court to conduct a hearing or otherwise engage in intensive fact-finding." *Harvey*, 470 Mich at 192. Defendant is correct in stating that the court remains obligated to come to an independent conclusion that the parties' agreement is in the child's best interests, but again, the court is absolutely permitted to accept that agreement when the dispute was resolved by the parents instead of a stranger. See *Koron*, 207 Mich App at 191-192.

We note that it is inherently an abuse of discretion if a trial court fails to exercise discretion on the incorrect belief that no discretion exists to exercise. *People v Merritt*, 396 Mich 67, 80; 238 NW2d 31 (1976). However, the trial court did not indicate a belief that it was bound by the parties' agreement. Rather, the trial court correctly expressed the belief that it was empowered to accept it.

Finally, defendant argues that the trial court was required to make a finding regarding the minor child's established custodial environment, so as to determine if the entry of judgment would change that environment. "The established custodial environment is the environment in which 'over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort.' " *Pierron v Pierron*, 486 Mich 81, 85-86; 782 NW2d 480 (2010), quoting MCL 722.27(1)(c). Defendant's argument is nonsensical in the context of an agreement between the parties. As defendant himself points out, the purpose of making a determination of an established custodial environment is to determine whether the trial court may award custody "simply by determining the child's best interests" or whether the trial court must more stringently find by clear and convincing evidence that changing any established custodial environment is in the child's best interest. *Baker v Baker*, 411 Mich 567, 577-579; 309 NW2d 532 (1981). Critically, the context is one in which *the trial court* is making a custody determination *for the parties*. The requirement of making an express determination of whether there is an established custodial environment is as inapposite to effectuating an agreement reached by the parties as is the requirement of conducting intensive fact-finding.

The agreement between the two parties was signed by both parties and therefore valid. The trial court concluded that the agreement appeared to be in the best interests of the child and included that finding in the court's order. In context, the trial court was not required to make a finding of an established custodial environment, although of note, defendant actually received increased parenting time from the prior arrangement as well as reduced support payments. The

evidence shows that there was no clear legal error or abuse of discretion falling outside the range of principled outcomes. Defendant was aware of the provisions in the agreement that settled the disputes over parenting time and custody, as shown by his signature. The trial court did not err by entering the order effectuating the parties' agreement, and the court did not abuse its discretion by declining to grant defendant's motion for reconsideration, rehearing, and relief from judgment.

Affirmed.

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